

## **GRAND CHAMBER CASE OF HASSAN v. THE UNITED KINGDOM (Application no. 29750/09) JUDGMENT STRASBOURG 16 September 2014**

**N.B. As per the disclaimer <sup>[1]</sup>, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: *Hassan v. the United Kingdom*, European Court of Human Rights, Grand Chamber, Application no. 29750/09, Judgment, Strasbourg, 16 September 2014; references partially omitted. Available on <http://hudoc.echr.coe.int/sites/eng> <sup>[2]</sup>]

[...]

## **PROCEDURE**

[...]

3. The applicant alleged that his brother was arrested and detained by British forces in Iraq and was subsequently found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards [...].

## **THE FACTS**

### **I. THE CIRCUMSTANCES OF THE CASE**

[...]

#### **A. The invasion of Iraq**

9. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq from their assembly point across the border with Kuwait. By 5 April 2003 British forces had captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003.

#### **B. The capture of the applicant's brother by British forces**

10. Prior to the invasion, the applicant was a general manager in the national secretariat of

the Ba'ath Party and a general in the Al-Quds Army, the army of the Ba'ath Party. He lived in Umm Qasr, a port city in the region of Basrah, near the border with Kuwait and about 50 kilometres from Al-Basrah (Basrah City). After the British army entered into occupation of Basrah, they started arresting high ranking members of the Ba'ath Party. Other Ba'ath Party members were killed by Iraqi militia. The applicant and his family therefore went into hiding, leaving the applicant's brother, Tarek Resaan Hassan (henceforth, "Tarek Hassan"), and his cousin to protect the family home.

11. According to information given by the Government, members of a British army unit, the 1st Battalion The Black Watch, went to the applicant's house early in the morning of 23 April 2003, hoping to arrest him. The applicant was not there, but the British forces encountered Tarek Hassan, who was described in the contemporaneous report drawn up by the arresting unit ("the battalion record") as a "gunman", found on the roof of the house with an AK-47 machine gun. The battalion record indicated that the "gunman" identified himself as the brother of the applicant and that he was arrested at approximately 6.30 a.m. It further indicated that the house was found by the arresting soldiers to contain other firearms and a number of documents of intelligence value, related to local membership of the Ba'ath Party and the Al-Quds Army.

12. According to a statement made by the applicant and dated 30 November 2006, Tarek Hassan was arrested by British troops on 22 April 2003, in the applicant's absence. [...] In a later statement, dated 12 September 2008, the applicant [...] stated that he asked his friend, Saeed Teryag, and his neighbour Haj Salem, to ask British forces for information about Tarek Hassan. [...] According to the applicant, "[W]hen they approached the British military authorities the British told them I had to surrender myself to them before they would release my brother".

[...]

### **C. Detention at Camp Bucca**

14. Both parties agreed that Tarek Hassan was taken by British forces to Camp Bucca [...] a United Kingdom detention facility. However, it officially became a United States facility, known as “Camp Bucca”, on 14 April 2003. [...]

15. For reasons of operational convenience, the United Kingdom continued to detain individuals they had captured at Camp Bucca. [...] In addition, the United Kingdom operated a separate compound at the Camp for its Joint Forward Interrogation Team (JFIT). This compound had been build by British forces and continued to be administered by them. [...]

20. The Government submitted a witness statement by Mr Timothy Lester, who was charged with running the United Kingdom Prisoner of War Information Bureau (UKPWIB) in respect of Iraq from the start of military operations there in March 2003. He stated that the UKPWIB operated in Iraq as the “National Information Bureau” required by Article 122 of the Third Geneva Convention and monitored details of prisoners of war internees and criminal detainees in order to facilitate contact with their next-of-kin. The Third Geneva Convention also required the establishment of a “Central Prisoners of War Information Agency”. This role was subsumed by the Central Tracing Agency of the International Committee of the Red Cross (ICRC). The ICRC collected information about the capture of individuals and, subject to the consent of the prisoner, transmitted it to the prisoner’s country of origin or the power on which he depended. In practice, details of all prisoners taken into custody by British forces were entered by staff at the detention facility in Iraq and sent to Mr Lester in London, who then transferred the data to a spread-sheet and downloaded it to the ICRC’s secure website. He stated that during the active combat phase he typically passed data to the ICRC on a weekly basis, and monthly thereafter. However, Tarek Hassan’s details were not notified to the ICRC until 25 July 2003, because of a delay caused by the updating of UKPWIB computer system. In any event, it was noted on Tarek

Hassan's record that he did not consent to the Iraqi authorities being notified of his capture (see paragraph 18 above). In the absence of consent, Mr Lester considered it unlikely that the ICRC would have informed the Iraqi authorities and that those authorities would, in turn, have informed the Hassan family.

#### **D. The screening process**

21. According to the Government, where the status of a prisoner was uncertain at the time of his arrival at Camp Bucca, he would be registered as a prisoner of war by the United Kingdom authorities. Any detainee, such as Tarek Hassan, captured in a deliberate operation was taken immediately to the JFIT compound for a two-stage interview. [...] The aim of the interview process was to identify military or paramilitary personnel who might have information pertinent to the military campaign and, where it was established that the detainee was a non-combatant, whether there were grounds to suspect that he was a security risk or a criminal. If no such reasonable grounds existed, the individual was classified as a civilian not posing a threat to security and ordered to be released immediately.

22. A print-out from the JFIT computer database indicated that in Camp Bucca Tarek Hassan was assigned JFIT no. 494 and registration no. UK107276. His arrival was recorded as 23 April 2003 at 16.40 and his departure was recorded as 25 April 2003 at 17.00, with his "final destination" recorded as "Registration (Civ Cage)." Under the entry "Release/Keep" the letter "R" was entered. [...]

23. The Government provided the Court with a copy of a record of an interview between Tarek Hassan and United States agents, dated 23 April 2003 [...], which stated as follows:

"EPW [Enemy Prisoner of War] was born in BASRA on August 3, 1981. [...] EPW knows that he was brought in because of his brother, Qazm. Qazm is a Othoo Sherba in the Ba'ath

party and he fled his home four days ago to an unknown destination. Qazm joined the Ba'ath party in 1990 and is involved in regular meetings and emergency action planning [...].

EPW seems to be a good kid who was probably so involved with soccer that he didn't follow his brother's whereabouts all that much. But it seems they have a close knit family and EPW could know more about his brother's activities in the Ba'ath party, and some of his friends involved in the party, too. Using any type of harsh approach is not going to be effective. EPW loves his family and soccer. EPW will cooperate, but he needs someone he can trust if he's going to tell information about his brother that is going to harm him. EPW seems to be innocent of anything himself, but may help with information about others around him.”

24. A record of the second questioning was provided by the Government in the form of a Tactical Questioning Report. [...] The report stated:

[...] **JFIT COMMENT: EPW** appears to be telling the truth and has been arrested as a result of mistaken identity. He is of no intelligence value and it is recommended that he is released to the civilian pen. **JFIT COMMENT ENDS.**”

### **E. Evidence relating to Tarek Hassan's presence in the civilian holding area at Camp Bucca and his possible release**

26. [...] [T]he decision to release United Kingdom captured detainees held at Camp Bucca, other than those facing criminal charges, was taken by a tribunal convened by United Kingdom military legal officers. [...] [T]he United Kingdom forces were responsible for returning prisoners to areas within their field of operation, namely South East Iraq, regardless of which force had captured the prisoners. [...]

28. [...] [Records] showed that an entry was made [...] on 4 May 2003 at 1.45 p.m. recording the release of “Tarek Resaan Hashmyh Ali” at 00.01 on 2 May 2003. The releasing authority was stated to be “United Kingdom (ARMD) DIV SIG REGT”; the place of release was stated to be “Umm Qasr”; the method of release was “By Coach” and the ground of release was recorded as “End of Hostilities”. [...]

#### **F. The discovery of Tarek Hassan’s body**

29. According to the applicant, Tarek Hassan did not contact his family during the period following his purported release. On 1 September 2003 one of the applicant’s cousins received a telephone call from a man unknown to them, from Samara, a town north of Baghdad. This man informed them that a dead man had been found in the nearby countryside, with a plastic ID tag and piece of paper with the cousin’s telephone number written on it in the pocket of the sport’s top he was wearing. According to the applicant, Tarek Hassan was wearing sportswear when he was captured by British forces. The applicant’s cousin called him and, together with another brother, the applicant went to the forensic medical station of the Tekrit General Hospital in Samara. There they saw the body of Tarek Hassan with eight bullet wounds from an AK-47 machine gun in his chest. According to the applicant, Tarek Hassan’s hands were tied with plastic wire. The identity tag found in his pocket was that issued to him by the United States authorities at Camp Bucca. A death certificate was issued by the Iraqi authorities on 2 September 2003, giving the date of death as 1 September 2003, but the sections reserved for the cause of death were not completed. A police report identified the body as “Tariq Hassan” but gave no information about the cause of death.

[...]

## II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

### **A. Relevant provisions of the Third and Fourth Geneva Conventions**

33. The following Articles of the Third Geneva Convention of 12 August 1949, Relative to the Treatment of Prisoners of War (“the third Geneva Convention”) and the Fourth Geneva Convention of 12 August 1949, Relative to the Protection of Civilian Persons in Time of War (“the Fourth Geneva Convention”), are of particular relevance to the issues in the present case[:] Article 2, common to all four Geneva Conventions [...], Article 4(A) of the Third Geneva Convention [...], Article 5 of the Third Geneva Convention [...], Article 12 of the Third Geneva Convention [...], Article 21 of the Third Geneva Convention [...], Article 118 of the Third Geneva Convention [...], Article 42 of the Fourth Geneva Convention [...], Article 43 of the Fourth Geneva Convention [...], Article 78 of the Fourth Geneva Convention [...], Article 133(1) of the Fourth Geneva Convention [...], Article 132(2) of the Fourth Geneva Convention.

### **B. The Vienna Convention on the Law of Treaties, 1969, Article 31**

34. Article 31 of the Vienna Convention on the Law of Treaties 1969 (“the Vienna Convention”) provides as follows:

#### Article 31, General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

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

4. A special meaning shall be given to a term if it is established that the parties so intended.

### **C. Case-law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human rights law**

35. In its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), the International Court of Justice stated as follows [See **Case: ICJ, Nuclear Weapons Advisory Opinion** <sup>[3]</sup>, para. 25 <sup>[3]</sup>].

36. In its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), the International Court of Justice rejected

Israel's argument that the human rights instruments to which it was a party were not applicable to occupied territory [See *Case: ICJ/Israel, Separation Wall/Security Fence, in the Occupied Palestinian Territory* <sup>[4]</sup>, para. 106 <sup>[4]</sup>].

37. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda)*, (19 December 2005) the International Court of Justice held as follows [See *Case: ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* <sup>[5]</sup>, paras 215-216 <sup>[6]</sup>].

#### **D. The Report of the Study Group of the International Law Commission on Fragmentation of International Law**

38. The Report of the Study Group of the International Law Commission on the topic "Fragmentation of international law: difficulties arising from diversification and expansion of international law" was adopted by the International Law Commission at its fifty-eighth session, in 2006. The Analytical Study of the Study Group on the same topic, dated 13 April 2006, (A/CN.4/L.682) stated at § 104:

The example of the laws of war focuses on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an 'armed conflict'. Owing to that condition, the rule appears more 'special' than if no such condition had been identified. To regard this as a situation of *lex specialis* draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether. The [International Court of Justice] was careful to point out that human rights law continued to apply within armed conflict. The exception – humanitarian law – only affected one (albeit important) aspect of it, namely the relative assessment of "arbitrariness". Humanitarian law as *lex specialis* did not suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an

aspect of the pragmatics of the Court's reasoning. However desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances. *Legality of Nuclear Weapons* was a 'hard case' to the extent that a choice had to be made by the [International Court of Justice] between different sets of rules none of which could fully extinguish the others. *Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure 'the survival of a State'."

[...]

## **THE LAW**

### **I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS**

[...]

#### **B. The Court's evaluation of the facts**

[...]

50. It is not in dispute in the present case that the applicant's brother was captured by United Kingdom forces on 23 April 2003, subsequently detained at Camp Bucca and that he died shortly before his body was found in Samara on 1 September 2003. The

disagreement over the facts centres on two issues: first, whether Tarek Hassan was arrested and detained as a means of exerting pressure on the applicant to surrender himself and, secondly, in what circumstances Tarek Hassan left Camp Bucca. In addition, since the applicant alleges that Tarek Hassan's body had marks of ill-treatment on it, the question arises whether he was ill-treated while in detention.

[...]

53. In the Court's view, the capture and questioning records are consistent with the Government's submission that Tarek Hassan was captured as a suspected combatant or a civilian posing a threat to security. This view is supported by other evidence which tends to show that Tarek Hassan may well have been armed with, or at least in the possession of, an AK-47 machine gun at the moment of his capture, namely the applicant's assertion that his younger brother had been left to protect the family home and Tarek Hassan's reported explanation, during his interrogation by British agents, of the presence of the weapon as being for personal protection. The Camp Bucca records further indicate that he was cleared for release as soon as it had been established that he was a civilian who did not pose a threat to security.

54. The Court accepts that Tarek Hassan's capture was linked to his relationship with his brother, but only to the extent that the British forces, having been made aware of the relationship by Tarek Hassan himself and finding Tarek Hassan armed at the moment of capture, may have suspected that he also was involved with the Ba'ath Party and Al-Quds Army. The Court does not find that the evidence supports the claim that Tarek Hassan was taken into custody to be held until the applicant should surrender. If that had been the intention of the United Kingdom forces, he would not have been cleared for release immediately after the second interview and less than 38 hours after his admission to Camp Bucca.

55. [...] The Court considers [...] that [Tarek Hassan] was in all probability released early in May 2003. This view is further supported by the evidence provided by the Government concerning the policy decision taken by United Kingdom forces to release all detainees prior to or immediately following the cessation of hostilities announced on 1 May 2003, save those suspected of criminal offences or of activities posing a risk to security [...].

[...]

57. [...] Assuming the applicant's description of his brother's body to be accurate, the lapse of four months between Tarek Hassan's release and his death does not support the view that his injuries were caused during his time in detention.

58. Having established the facts of the case, the Court must next examine the applicant's complaints under the Convention.

[...]

### III. ALLEGED VIOLATION OF ARTICLE 5 §§ 1, 2, 3 AND 4 OF THE CONVENTION

[...]

#### A. Jurisdiction

[...]

#### 2. The Court's assessment

[...]

75. [...] [T]he Court does not find it necessary to decide whether the United Kingdom was in effective control of the area during the relevant period, because it finds that the United Kingdom exercised jurisdiction over Tarek Hassan on another ground.

76. Following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction [...]. The Government, in their observations, acknowledged that where State agents operating extra-territorially take an individual into custody, this is a ground of extra-territorial jurisdiction which has been recognised by the Court. However, they submitted that this basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be subject to the requirements of international humanitarian law.

77. The Court is not persuaded by this argument. *Al-Skeini* [See **Case: ECHR, Al Skeini et al. v. UK**] was also concerned with a period when international humanitarian law was applicable, namely the period when the United Kingdom and its coalition partners were in occupation of Iraq. Nonetheless, in that case the Court found that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives. Moreover, to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently (see paragraphs 35-37 above). As the Court has observed on many occasions, the Convention cannot be

interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part. This applies equally to Article 1 as to the other articles of the Convention.

[...]

79. Finally, the Court notes the Government's argument that once Tarek Hassan had been cleared for release and taken to the civilian holding area, he was no longer a detainee and therefore fell outside United Kingdom jurisdiction. In the Court's view, however, it appears clear that Tarek Hassan remained in the custody of armed military personnel and under the authority and control of the United Kingdom until the moment he was let off the bus that took him from the Camp.

80. In conclusion, therefore, the Court finds that Tarek Hassan fell within the jurisdiction of the United Kingdom from the moment of his capture by United Kingdom troops, at Umm Qasr on 23 April 2003, until his release from the bus that took him from Camp Bucca to the drop-off point, most probably Umm Qasr on 2 May 2003.

## **B. The merits of the complaints under Article 5 §§ 1, 2, 3 and 4**

### 1. The parties' submissions

#### (a) The Applicant

[...]

84. The applicant further contended that, in any event, the Government had not identified anything that United Kingdom forces were required to do by the Geneva Conventions that would have obliged them to act contrary to Article 5. The Iraq war was a non-international

armed conflict following the collapse of Saddam Hussein's forces and the occupation by coalition forces. There was considerably less treaty law applicable to non-international armed conflicts than to international armed conflicts. International humanitarian law stipulated minimum requirements on States in situations of armed conflict but did not provide powers. In reality, the Government's submission that the Convention should be "displaced" was an attempt to re-argue the question of Article 1 jurisdiction which was decided in *Al-Skeini* (cited above). If the Government's position were correct, it would have the effect of wholly depriving victims of a contravention of any effective remedy, since the Third and Fourth Geneva Conventions were not justiciable at the instance of an individual. Such a narrowing of the rights of individuals in respect of their treatment by foreign armed forces would be unprincipled and wrong.

[...]

(b) The Government

[...]

87. [...] Where provisions of the Convention fell to be applied in the context of an international armed conflict, and in particular the active phase of such a conflict, the application had to take account of international humanitarian law, which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention. Thus, in *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Report of the Commission of 10 July 1976, volume 1, the Commission did not consider it necessary to address the question of breach of Article 5 where persons were detained under the Third Geneva Convention in the context of the taking of prisoners of war. Moreover, it had been the consistent approach of the International Court of Justice that international humanitarian law applied as *lex specialis* in the context of an international armed conflict in

circumstances where a given human rights treaty also applied. This view was supported by the Report of the Study Group of the International Law Commission on the “Fragmentation of International Law” and by academic writers [...].

88. [...] It could not be, and it was not so, that a Contracting State, when its armed forces were engaged in active hostilities in an armed conflict outside its own territory, had to afford the procedural safeguards of Article 5 to enemy combatants whom it took as prisoners of war, or suspected enemy combatants whom it detained pending determination of whether they were entitled to such status. [...] In the present case, since Tarek Hassan was captured and initially detained as a suspected combatant, Article 5 was displaced by international humanitarian law as *lex specialis*, or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions, such that there was no breach by the United Kingdom with respect to the capture and detention of Tarek Hassan.

89. In the alternative, if the Court were to find that Article 5 applied and was not displaced or modified in situations of armed conflict, the Government submitted that the list in Article 5 § 1 of permissible purposes of detention had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis*, namely international humanitarian law. [...]

90. The Government recognised that difficult issues might arise as to the applicability of Article 15 in relation to a case such as the present. Consistently with the practice of all other Contracting Parties which had been involved in such operations, the United Kingdom had not derogated; there had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis*, international humanitarian law.

[...]

(c) The third party

91. In the third party submissions filed in the present case, the Human Rights Centre of the University of Essex emphasised that, as the Court had held in its case-law, the Convention should be interpreted in harmony with other rules of public international law, of which it forms part. Such a principle was desirable and necessary, to avoid States being faced with irreconcilable legal obligations and controversial results. This was particularly important with relation to the detention regime applicable in international armed conflicts, since this regime was specifically designed for the situation in question and since the Third and Fourth Geneva Conventions enjoyed universal ratification. There was one sentence in the Court's judgment in *Al-Jedda v. the United Kingdom* [See Case: ECHR, *Al Jedda v. UK* <sup>[7]</sup>, para. 107 <sup>[8]</sup>] which might be read as suggesting that the Court would only take account of international humanitarian law where it imposed an obligation, and not where it authorised a course of conduct, namely where it was stated: "... the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial". However, it was the view of the third party that, in the context of the judgment, it appeared that the Court was not looking at international humanitarian law in its own right but as a source of possible rules which could be read into a Security Council resolution. The United Kingdom Government could have chosen to raise international humanitarian law as an independent basis for detention but chose instead to rely exclusively on the Security Council resolution. The sentence quoted from *Al-Jedda* did not indicate that the Court would take account of international humanitarian law only where it imposed an obligation on States.

[...]

93. [...] The International Court of Justice had addressed the relationship on three occasions. Certain elements emerged clearly from this case-law. First, that the applicability of international humanitarian law did not displace the jurisdiction of a human rights body. That resulted from the finding that human rights law remained applicable in all circumstances. Secondly, where international humanitarian law was applicable, a human rights body had two choices. Either it had to apply human rights law through the lens of international humanitarian law or it had to blend human rights law and international humanitarian law together. That was the only possible interpretation of certain matters being the province of both bodies of rules, whilst others were regulated by international humanitarian law. The reference to *lex specialis* was unhelpful, which might account for the fact that the International Court of Justice did not refer to it in the *Congo* judgment (see paragraph 37 above). Use of this term had served to obfuscate the debate rather than provide clarification.

94. The International Court of Justice had provided apparently conflicting guidance on the question of the need for derogation before a State could rely on international humanitarian law. If the basis for using international humanitarian law at all was that human rights bodies should take account of other areas of international law, that might be thought to point to its use whether or not a State had derogated and whether or not it invoked international humanitarian law. On the other hand, where the State had done neither, the human rights body might wish to refer to the applicability of international humanitarian law, whilst saying that the State had chosen to be judged by the higher standard of peacetime human rights law, although such an approach might run the risk of appearing disconnected from reality. Where the State had not derogated but had relied on international humanitarian law, it would be open to the human rights body either to take account of international humanitarian law or to insist that the only way of modifying international human rights obligations was by derogation.

95. As regards the interplay between the two regimes, there could be no single applicable rule. Any given situation was likely to require elements of both bodies of law working together, but the balance and interplay would vary. Accordingly, there might be situations, such as the detention of prisoners of war, in which the combination of criteria lead to the conclusion that international humanitarian law would carry more weight, and determination of human rights violations regarding issues such as grounds and review of detention would be based on the relevant rules of international humanitarian law. Even in such contexts, however, human rights law would not be under absolute subjection to international humanitarian law. For example, if there were allegations of ill treatment, human rights law would still assist in determining issues such as the specificities of the acts which constituted a violation. From the perspective of the human rights body, it would be advantageous to use human rights law as the first step to identify the issues that needed to be addressed, for example, periodicity of review of lawfulness of detention, access to information about reasons of detention, legal assistance before the review mechanism. The second step would be to undertake a contextual analysis using both international humanitarian law and human rights law, in the light of the circumstances of the case at hand. On condition that the human rights body presented its analysis with sufficient coherence and clarity, the decisions generated would provide guidance to both States and armed forces ahead of future action. It went without saying that the approaches and the result had to be capable of being applied in practice in situations of armed conflict.

## 2. The Court's assessment

### (a) The general principles to be applied

96. Article 5 § 1 of the Convention sets out the general rule that “[e]veryone has the right to liberty and security of the person” and that “[n]o one shall be deprived of his liberty” except in one of the circumstances set out in sub-paragraphs (a) to (f).

97. It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time. Moreover, the Court considers that there are important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in subparagraphs (a) to (f). Although Article 5 § 1(c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence. As regards combatants detained as prisoners of war, since this category of person enjoys combatant privilege, allowing them to participate in hostilities without incurring criminal sanctions, it would not be appropriate for the Court to hold that this form of detention falls within the scope of Article 5 § 1(c).

98. In addition, Article 5 § 2 requires that every detainee should be informed promptly of the reasons for his arrest and Article 5 § 4 requires that every detainee should be entitled to take proceedings to have the lawfulness of his detention decided speedily by a court. Article 15 of the Convention provides that “[i]n time of war or other public emergency threatening the life of the nation”, a Contracting State may take measures derogating from certain of its obligations under the Convention, including Article 5. In the present case, the United Kingdom did not purport to derogate under Article 15 from any of its obligations under Article 5.

99. This is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. In particular, in *Al-Jedda* [*See Case: ECHR, Al Jedda v. UK*

, para. 107], cited above, the United Kingdom Government did not contend that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions. Instead they argued that the United Kingdom was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of Article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom's obligations under the Convention. It was the Government's case that an obligation to intern the applicant arose from the text of United Nations Security Council Resolution 1546 and annexed letters and also because the Resolution had the effect of maintaining the obligations placed on occupying powers under international humanitarian law, in particular Article 43 of the Hague Regulations. The Court found that no such obligation arose. It was only before the Commission, that a question arose similar to that in the present case, namely whether it was compatible with the obligations under Article 5 of the Convention to detain a person under the Third and Fourth Geneva Conventions in the absence of a valid derogation under Article 15 of the Convention. In its report, the Commission refused to examine possible violations of Article 5 with regard to detainees accorded prisoner of war status, and took account of the fact that both Cyprus and Turkey were parties to the Third Geneva Convention. The Court has not, until now, had the opportunity to review the approach of the Commission and to determine such a question itself.

100. The starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969. Article 31 of the Vienna Convention, which contains the "general rule of interpretation", provides in paragraph 3 that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable

in the relations between the parties.

101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention, the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention. The practice of the High Contracting Parties is not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. [...] [A]lthough there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention, no State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities. The derogations that have been lodged in respect of Article 5 have concerned additional powers of detention claimed by States to have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State. Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention, even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict.

102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention, the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part. This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The Court has already held that Article 2 of the Convention should “be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict”, [footnote: See ECHR, *Varnava and Others v. Turkey*, Judgment, 18 September 2009, para. 185] and it considers that these observations apply equally in relation to Article 5. Moreover, the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict. In its judgment *Armed Activities on the Territory of the Congo*, the International Court of Justice observed, with reference to its advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that “[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”. The Court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice.

103. In the light of the above considerations, the Court accepts the Government’s argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking

account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be “lawful” to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness.

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be

interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment “shall be subject to periodical review, if possible every six months, by a competent body”. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent “court” in the sense generally required by Article 5 § 4, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the “competent body” should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. [...]

107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.

(b) Application of these principles to the facts of the case

108. The Court’s starting point is to observe that during the period in question in Iraq, all parties involved were High Contracting Parties to the Four Geneva Conventions, which apply in situations of international armed conflict and partial or total occupation of the territory of a High Contracting Party. It is clear, therefore, that whether the situation in South East Iraq in late April and early May 2003 is characterised as one of occupation or of active international armed conflict, the four Geneva Conventions were applicable.

109. The Court refers to the findings of fact which it made after analysis of all the available evidence. In particular, it held that Tarek Hassan was found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved. The Court considers that, in these circumstances, the United Kingdom authorities had reason to believe that he might be either a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention (see Articles 4A and 21 of the Third Geneva Convention and Articles 42 and 78 of the Fourth Geneva Convention). Almost immediately following his admission to Camp Bucca, Tarek Hassan was subject to a screening process in the form of two interviews by United States and United Kingdom military intelligence officers, which led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security. The Court has also found that the evidence points to his having been physically released from the Camp shortly thereafter.

110. Against this background, it would appear that Tarek Hassan's capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it is unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.

111. It follows from the above analysis that the Court finds no violation of Article 5 §§ 1, 2, 3 or 4 in the circumstances of the present case.

[...]

PARTLY DISSENTING OPINION OF JUDGE SPANO  
JOINED BY JUDGES NICOLAOU, BIANKU AND KALAYDJIEVA

I.

[...]

5. It is imperative to appreciate the scope and consequences of this sweeping statement by the Court.

*Firstly*, the majority finds that it is permissible under the Convention, and without the State having derogated under Article 15, to intern prisoners of war for the duration of hostilities, and also civilians who pose a threat to security, so long as procedural safeguards under international humanitarian law are in place. It is important to understand what this entails under the Geneva Conventions in the light of the majority's finding. Article 4 A of the Third Geneva Convention sets out the categories of protected persons enjoying prisoner of war status. When that status is in doubt at the outset, Article 5 § 2 of the Third Geneva Convention provides that whether a person shall enjoy combatant privilege shall be determined by a "competent tribunal". However, this only applies in principle to the initial determination of prisoner of war status, the recognition of which affords the person in question certain privileges while being interned and excludes, in general, the possibility that his acts can be considered criminal and prosecuted accordingly. However, as prisoner of war status is solely tied to the existence of hostilities, the detainee does not enjoy any right under the Third Geneva Convention to have his detention reviewed further at frequent intervals. Consequently, and most importantly, a person classified as a prisoner of war has

no right under the Geneva Conventions to be released whilst hostilities are on-going. As regards civilians interned for security reasons, they are entitled under Article 43 of the Fourth Geneva Convention to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall “periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit”. Hence, so long as reasons pertaining to the “security of the Detaining Power”, remain, and are considered “imperative” (Articles 42 and 78 of the Fourth Geneva Convention), the civilian detained on such grounds may remain interned indefinitely and not be released.

*Secondly*, as the majority correctly acknowledges, albeit implicitly, the legal principle underlying the existence of this novel understanding of the exhaustive grounds of detention under Article 5 § 1 cannot be limited to acts on the territory of States not parties to the Convention in circumstances where a Contracting State exercises extra-territorial jurisdiction under Article 1. It must, conceptually and in principle, also be applicable within the Convention’s *legal space*; this effectively has the consequence that today’s holding must logically mean that where a Contracting State is engaged in international armed conflict with another Contracting State, it is permitted under the Convention for the belligerents to invoke their powers of internment under the Third and Fourth Geneva Conventions without having to go through the openly transparent and arduous process of lodging a derogation from Article 5 § 1, the scope and legality of which is then subject to review by the domestic courts, and if necessary, by this Court under Article 15.

6. In sum, the majority’s resolution of this case constitutes, as I will explain more fully below, an attempt to reconcile norms of international law that are *irreconcilable* on the facts of this case. As the Court’s judgment does not conform with the text, object or purpose of Article 5 § 1 of the Convention, as this provision has been consistently

interpreted by this Court for decades, and the structural mechanism of derogation in times of war provided by Article 15, I respectfully dissent from the majority's finding that there has been no violation of Tarek Hassan's fundamental right to liberty.

II.

[...]

8. The Convention applies equally in both peacetime and wartime. That is the whole point of the mechanism of derogation provided by Article 15 of the Convention. There would have been no reason to include this structural feature if, when war rages, the Convention's fundamental guarantees automatically became silent or were displaced in substance, by granting the Member States additional and unwritten grounds for limiting fundamental rights based solely on other applicable norms of international law. Nothing in the wording of that provision, when taking its purpose into account, excludes its application when the Member States engage in armed conflict, either within the Convention's legal space or on the territory of a State not Party to the Convention. The extra-jurisdictional reach of the Convention under Article 1 must necessarily go hand in hand with the scope of Article 15.

9. It follows that if the United Kingdom considered it likely that it would be "required by the exigencies of the situation" during the invasion of Iraq to detain prisoners of war or civilians posing a threat to security under the rules of the Third and Fourth Geneva Conventions, a derogation under Article 15 was the only legally available mechanism for that State to apply the rules on internment under international humanitarian law without the Member State violating Article 5 § 1 of the Convention. It bears reiterating that a derogation under Article 15 will not be considered lawful under the first paragraph of that provision if the measures implemented by the Member State are "inconsistent with its other obligations under international law". In reviewing the legality of a declaration lodged by a Member State to the Convention within the context of an international armed conflict, the

domestic courts, and, if need be, this Court, must thus examine whether the measures in question are in conformity with the State's obligations under international humanitarian law.

### III.

10. The majority's finding that 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", is primarily based on an application of Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 [...].

11. The rationale relating to State practice is flawed for three reasons.

12. *Firstly*, the State practice in question is based on a fundamental premise, invoked by the Government in this case, which relates to the scope of the Convention's extra-territorial reach. The premise is the following: Article 5 does not apply to situations of international armed conflict for the simple reason that Article 1 jurisdiction under the Convention is not extra-territorial in the sense of being applicable in such conflict situations. [...]

13. [...] Furthermore, and most importantly in my view, in assessing whether a State practice fulfils the criteria flowing from Article 31 § 3 (b), and thus plausibly modifies the text of the Convention, there is, on the one hand, a fundamental difference between a State practice clearly manifesting a concordant, common and consistent will of the Member States to collectively modify the fundamental rights enshrined in the Convention, towards a more *expansive or generous understanding of their scope than originally envisaged*, and, on the other, a State practice that *limits or restricts those rights*, as in the present case, in direct contravention of an exhaustive and narrowly tailored limitation clause of the Convention protecting a fundamental right.

14. *Thirdly*, the Court draws further support for its reliance on State practice, in not derogating under Article 15 in respect of detentions under the Third and Fourth Geneva Conventions during international armed conflict, on the practice of States to refrain from derogating under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) with regard to such activities. Such reliance is however clearly inapposite in my view, as there is a fundamental distinction to be made between the wording and scope of Article 5 § 1 of the Convention, on the one hand, and Article 9 of the ICCPR and of Article 9 of the Universal Declaration on Human Rights, on the other. The former is *exhaustive*, as regards permissible grounds of detention, whereas the latter is not, as they are limited to a general prohibition against *arbitrary* forms of detention. [...]

15. In the light of the above, the arguments from State practice, relied upon heavily by the majority, cannot, in my view, sustain its finding in this case.

## Discussion

### I. Classification of the Situation

1. (*Paras 9 and 108*)

a. How would you qualify the situation in Iraq until 1 May 2003? (GC I-IV, Art. 2 <sup>[9]</sup>)

b. How would you qualify the situation in Iraq as from 1 May 2003? What is the law applicable to the conduct of British forces after that date? Does the Court answer the question? Does the fact that the classification of the situation changed after 1 May 2003 have an impact on the status of Tarek Hassan?

### II. Internment

2. (*Paras 53 and 110*) What was the status of Tarek Hassan during his internment at Camp Bucca? Does the Court answer the question? Is it important, considering the very short period of his internment in the present case, to determine his exact status? Why? (GC III, Arts 5 <sup>[10]</sup> and 21 <sup>[11]</sup>; GC IV, Art. 78 <sup>[12]</sup>)

3. a. (*Para. 109 and 110*) According to the Court, what would be the legal basis for Hassan's detention? If he was considered a POW? If he was considered a civilian internee? Under IHL, is an authorization for detaining someone needed, or is it sufficient that such detention does not violate any prohibition and respects the procedures prescribed by IHL? (GC III, Art. 21 <sup>[11]</sup>; GC IV, Art. 78 <sup>[12]</sup>)

b. For civilian internees, the Court mentions both Article 42 and Article 78 of GCIV. Do they both apply in the present case? Why does the Court mention both? (GC III, Art. 21 <sup>[11]</sup>; GC IV, Art. 78 <sup>[12]</sup>)

c. Is the Detaining Power allowed to detain him if no criminal charges are brought against him? Does the term "imperative reasons of security" refer to the security of the detaining power? To the security of the protected person? To the security of civilians? To all of them? (GC IV, Arts 37 <sup>[13]</sup>, 42 <sup>[14]</sup>, 43 <sup>[15]</sup>, 76 <sup>[16]</sup> and 78 <sup>[12]</sup>)

d. Is Article 21 of GCIII a legal basis sufficient under IHRL to intern combatants? Similarly, is Article 78 a sufficient legal basis to intern civilians in occupied territories? According to the Court? Are they self-sufficient? Are the two provisions precise and detailed enough to comply with the principle of legality under IHRL? If not, what steps are required to comply with the principle of legality? (GCIII, Art. 21 <sup>[11]</sup>; GC IV, Art. 78 <sup>[12]</sup>)

4. (*Paras 9 and 55*) When should internment end? For POWs? For civilian internees? Does the fact that major combat operations were declared complete on 1 May 2003 mean that all detainees should have been released?

5. a. (*Para. 98*) Under IHL, is there a right to know the reasons of your internment? Is there a right to have the lawfulness of your detention decided by a court? Who decides if the reasons for internment are sufficient? For POWs? For civilian internees? Does IHL differ from HRL in this respect? (GCIII, Arts 5 <sup>[10]</sup> and 21 <sup>[11]</sup>; GC IV, Art. 78 <sup>[12]</sup>)

b. (*Para. 106*) Under IHL, what are the procedural guarantees afforded to civilian internees? Must the procedure described by Article 78 GC IV be deferred to an independent and impartial tribunal? Respect the judicial guarantees foreseen by human rights law? What shall be the characteristics of the competent body mentioned in Article 78 of GCIV? What does the Court say on this point? Does it need to be a judicial body?

6. a. (*Para 20*) What are the role and mandate of the Central Tracing Agency under the Geneva Conventions?

b. Should the British authorities have allowed Hassan to contact his family directly? What does IHL say in that regard? (GC III Arts 69 <sup>[17]</sup>, 70 <sup>[18]</sup>, 71 <sup>[19]</sup>; GC IV Arts 105 <sup>[20]</sup>, 106 <sup>[21]</sup>, 107 <sup>[22]</sup>)

c. What should have been the reaction of UKPWIB following Hassan's death?

### **III. Relation with the Court's conclusions in Al Jedda**

[See **Case: ECHR, Al Jedda v. UK** <sup>[23]</sup>]

7. (*Paras 91, 99*) What are the differences between the present case and the *Al Jedda* case? Regarding the British Government's arguments? In the Court's conclusion? Does the Court contradict its previous judgment in *Al Jedda*?

8. In *Al Jedda*, why did the Court discuss the question of whether IHL places an "obligation on an Occupying Power to use indefinite internment without trial"? Does Article 21 of GCIII contain an obligation to intern POWs? Do Article 43 Hague Regulations or Article 78 GC IV contain an obligation to intern civilians? Do they contain authorizations? Can they be understood as authorizing internment even if the requirements of International Human Rights Law are not fulfilled?

#### **IV. Interaction between IHL and HRL**

9. (*Paras 93, 95*) Why does the Human Rights Centre of the University of Essex (third party submission) say that the *lex specialis* principle is not a useful one and is even confusing? Do you agree? Is there any other way to regulate the interaction between IHL and HRL? According to the third party submission, how should the two regimes interact? What do you think of their proposition?

10. (*Paras 76-77*) What do you think of the British government's argument that even if the Convention may apply extraterritorially, it should not apply in the active hostilities phase of an international armed conflict? May IHL entirely displace HRL during international armed conflict? May the answer differ based on whether the acts occur during active hostilities or during occupation? In that sense, does the Court, by referring to *Al Skeini*, answer the Government's argument? [See **Case: ECHR, Al Skeini et al. v. UK** <sup>[24]</sup>]

11. (*Paras 94, 101, 103, 107*) What is the Court's position on the necessity to derogate from Article 5 of the Convention? What are the arguments presented in the Dissenting Opinion against the Court's conclusion on this point? Do you agree with the Dissenting Opinion that

the only way for the Court to consider IHL in interpreting the obligations under HRL is for the State to have derogated from such obligations?

12. (*Paras 104-106*) Does the Court accommodate the interpretation of Article 5 of the ECHR to IHL or does it make IHL prevail over Article 5? Does finding an admissible ground for detention which is not listed in Article 5 constitute a mere interpretation of Article 5? Is accepting a procedure for the review of the legality of a detention before a body which is not a court as prescribed by Article 5(4) of the ECHR a mere interpretation of that provision?

13. (*Para. 107*) What does the fact that the court take IHL only into account when it is pleaded by the respondent State mean for armed forces engaged in an armed conflict which have to respect both IHL and the ECHR?

## **V. Internment in non-international armed conflict**

14. (*Para. 104*) The reasoning of the Court seems to indicate that its conclusions are only applicable in international armed conflict. In your opinion, could the same interpretation of the relationship between IHL and HRL be applied to non-international armed conflict? If so, how? If not, what would be the main problem(s)?

15. a. (*Para. 105*) If the conflict had been non-international, which rules would have been applicable to the arrest and detention of Hassan? Is it possible to intern someone for imperative reasons of security in non-international armed conflicts? Do Article 3 common to the Geneva Conventions or Additional Protocol II provide any details on the grounds for detention in such conflicts? (CIHL, Rule 99 <sup>[25]</sup>)

b. In case of NIAC, should, and if so, how, Article 5 of the Convention be interpreted on the basis of IHL? Does international human rights law exclusively govern this issue?

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