

HASSAN v. THE UNITED KINGDOM

- **Hassan v. The United Kingdom**, ECtHR (Grand Chamber), App. 29750/09, 16 September 2014
- **Legalities involved:** international human rights law and international humanitarian law
- **Tool to deal with inter-legality:** Article 31(3) (c) of the VCLT

SUMMARY

The case originated in the application against the United Kingdom by Mr. Hassan on the ground that his brother was arrested and detained by British forces and was subsequently found dead in unknown circumstances. Thus, applicant's brother alleged the violation of the right to liberty and security under Article 5 of the ECHR as a result of his brother's detention and the right to life, prohibition of torture and inhuman or degrading treatment under Articles 2, 3 and 4 concerning his death after being released from the detention camp.

After the applicant's claims had been dismissed by the UK High Court on the ground that the detention and death of his brother occurred while he was not under the jurisdiction of the UK, the case came before the ECtHR. As to the Articles 2, 3, and 4 of the ECHR, the Court found no evidence to suggest that Tarek Hassan was ill-treated while in detention or that the United Kingdom authorities were responsible in any way, directly or indirectly, for Tarek Hassan's death since it occurred in a distant part of the country not controlled by the UK forces and four months after he was released from the detention camp. Since there was no evidence to show that the death occurred within the territory controlled by the United Kingdom, the Court dismissed the claims with respect to the right to life, freedom from torture and inhuman or degrading treatment.

As regards the violation of Article 5, there were two different issues to be solved before the Court: a) whether the detention and death of Tarek Hassan can be attributable to the UK, considering that the events took place in Iraq, or in other words, outside its territorial borders; (b) how to resolve the conflict between several international norms stemming from two different international regimes: international human rights law (ECHR) and international humanitarian law (the Third and Fourth Geneva Conventions). Against this background, the UK government argued

that even though it was true that states' extraterritorial operations, such as taking individual into a custody, had been recognized by the Court as the extension of territoriality,

"... 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". (para. 76)

In short, the government was attempting to take advantage of international humanitarian law, in order to circumvent its obligations flowing from the ECHR.

*"It was the Government's primary contention that the relevant events took place outside the jurisdiction of the United Kingdom. In the alternative, if the Court were to find that the United Kingdom had jurisdiction over Tarek Hassan during his detention, the Government contended that Article 5 had to be interpreted and applied in conformity and harmony with international law. 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". (para. 87)*

*"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 Fourth Geneva Conventions, such that there was no breach by the United Kingdom with respect to the capture and detention of Tarek Hassan". (para.88)*

On the other hand, the applicant argued that first, the arrest and detention did not take place in the active combat phase of an international armed conflict, and second, even if it had occurred in the active combat phase, this would not displace the application of the European Convention. This was also the stance the Court had taken so far, as it may be seen from the cases *Ahmet Özkan and Others v. Turkey*, *Varnava and Others v. Turkey*.

The Human Rights Centre of the University of Essex also participated in the case as a third party. In doing so, it pointed out the different rationalities of international human rights law and international humanitarian law and argued that

“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”.(para. 95)

The Court, first drew attention to the fact that

“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, 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”. (para. 99)

The Court subsequently applied Article 31(3)(c) of the VCLT and stated that the responsibilities arising from the Convention and international humanitarian law should be balanced in such a way that in the concrete dispute

“... 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”. (para. 105)

Against this backdrop, the Court found 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”. (para. 110)