Towards a More Restrictive Interpretation of the Right to Liberty in Article 5(1) ECHR?

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Abstract

The contribution concerns the interpretation by the European Court of Human Rights (ECtHR) of the right to liberty in Article 5 (1) of the European Convention on Human Rights (ECHR). It argues that the Court has interpreted the right to liberty restrictively by way of public security grounds, with the result that more room is given to interference by state authorities at the expense of individual protection, compared to earlier interpretations. This assertion is supported by the analyses of four Grand Chamber cases the author believes stands for a restrictive interpretation of Article 5 (1), either through a narrow interpretation of its scope, or a wide interpretation of its exceptions. The use of present-day conditions in the Court's reasoning is examined to identify their role in the development towards a restrictive inter-

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pretation of the right to liberty, and it is argued that the restrictive approach is a variation of the method of 'evolutive interpretation'. On the basis of the analyses, it is finally argued that the list of permissible detention grounds in Article 5 (1) is no longer exhaustive.

Keywords: European Court of Human Rights, ECtHR, European Convention on Human Rights, ECHR, the right to liberty, deprivation of liberty, detention, restrictive interpretation, present day conditions, Article 5 ECHR

A. Introduction

In a dissenting opinion in the case *S., V., and A. v. Denmark* before the European Court of Human Rights[1] in 2018, Judge De Gaetano expressed that:

> It is entirely unclear why in some cases the Court adopts an evolutive interpretation departing from the original intent of the parties and from the text of the treaty, whereas in other cases, like this one, it adopts the opposite approach. The result is that the Court has neither presented a coherent theory of treaty interpretation serving as a basis for its judgments nor explained its choices concerning the interpretative rules it applies.[2]

The case *S., V., and A* is one of four judgments that will be analysed in this paper, where the ECtHR adopted – to paraphrase Judge De Gaetano – an approach "opposite of an evolutive" one to the right to liberty in Article 5 (1) of the European Convention on Human Rights.[3] Such an approach will in the following be referred to as a "restrictive" one and will include scenarios where the right to liberty could have been widened but was not, and scenarios where the right was interpreted narrowly compared to how it has previously been understood. By a narrow interpretation is meant that the interpretative result includes *less* than what an ordinary reading of the wording would suggest, so that it is given a smaller scope than what the text could have encompassed. A wide interpretation, on the other hand, leads to an interpretative result that includes *more* than what the text would suggest.[4] Thus, because of the implication they have for the overall protection under Article 5 (1), both a narrow interpretation of the provision's scope of protection and a wide interpretation of its exceptions will be regarded as a restrictive interpretation of the provision.

This article will examine how various factors may have an impact on the Court's method of interpretation of Article 5 (1) ECHR, whose first sentence reads that "[e]veryone has the right to liberty and security of person", a right described by the Grand Chamber as being "[…] of the highest importance "in a democratic society"

1 Hereinafter referred to as "European Court of Human Rights", "ECtHR" or "the Court".
2 ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, dissenting opinion para. 2, last indent.
3 Hereinafter referred to as "ECHR or "the Convention".
4 *Nygaard*, p. 227.

within the meaning of the Convention".[5] The latter phrase proves the fundamentality of the right. The right to liberty is, however, merely a starting point. It is clear from the subsequent sentence that the right is not absolute: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", followed by a list of six exceptions. Any lawful detention is an exploitation of this access to limit the right to liberty. The Court has held that "[t]he list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one […] and only a narrow interpretation of those exceptions is consistent with the aim of that provision" which is to protect from arbitrary interference with the right to liberty.[6] The exhaustiveness of the list of exceptions and its narrow interpretation have been regarded as clearly established principles.[7] This, however, is arguably no longer the case.

After having presented some factors that may affect the Court's interpretation, the aim of this article is to shine a light on the Court's interpretation when it establishes whether there has been a "deprivation of liberty" and whether such deprivation of liberty was "lawful". This will be done through the analyses of four selected cases that concerned various aspects of Article 5 (1). Ultimately, this article will present the hypothesis that the Court has interpreted the right to liberty restrictively by way of public security arguments – with the result that more room is given to interference by state authorities at the expense of individual protection, compared to earlier interpretations.

B. Specifics of the conception of Article 5 (1) ECHR: their advantages and drawbacks

By virtue of the nature of the provision, the use of public security arguments to justify a restrictive interpretation is particularly interesting in relation to Article 5 (1). Whereas the right to liberty can indeed be limited, thus not being absolute, it does not contain a mechanism that allows it to be balanced against general interests subjected to proportionality, as is the case for the qualified rights enshrined in Articles 8 to 11 ECHR whose paragraph 2 allows such balancing.[8] The absence of a general public order exception in Article 5 (1) has been done deliberately. The provision is constructed to, by default, allow only for certain expressly stated exceptions that at the time of their drafting were considered to adequately take account to public in-

5 ECtHR, *Medvedyev and others v. France* [GC], App. no. 3394/03, 29 March 2010, para. 76.
6 Ibid., para. 78.
7 See for instance, *Rainey/Wicks/Ovey*, p. 211; ECtHR, *Engel and Others v. The Netherlands* [P], App. nos. 5100/71 etc., 8 June 1976, para. 54; ECtHR, *Ireland v. The United Kingdom*, App. no. 5310/71, 18 January 1978, para. 194; ECtHR, *Al-Jedda v. the United Kingdom* [GC], App. no. 27021/08, 7 July 2011, para. 99.
8 *Oreb*, MLR 2013/4, pp. 736–737.

terests, therefore being the only circumstances justifying detention.[9] This distinguishes the right to liberty enshrined in the ECHR from comparable provisions in other international human rights instruments such as Article 9 of the Universal Declaration of Human Rights, which simply states that "[n]o one shall be subjected to arbitrary arrest, detention or exile", and Article 9 (1) second sentence of the International Covenant on Civil and Political Rights, according to which "[n]o one shall be subjected to arbitrary arrest or detention". Because of their wording, these provisions necessitate a balancing exercise where legitimate grounds can render detention non-arbitrary. Conversely, in the case of the ECHR, the Grand Chamber expressly held in *Baisuev* that "[…] Article 5 § 1 does not permit a balance to be struck between the individual's right to liberty and the State's interest in addressing security threats"[10] if the deprivation of liberty does not fall within the said exceptions. The advantage of this construction is a high level of individual protection and foreseeability as to when individuals can be deprived of their liberty. The disadvantage, on the other hand, is that the use of justifiable state power is less flexible compared to other derogable rights whose limitations are not exhaustively listed. With an exhaustive list of exceptions, the access to detain someone is reliant on the wording of the provision's scope and exceptions, and the judiciary's interpretation thereof.

As the same case would more easily prove to fall under the protection of a wide-scoped notion of "deprivation of liberty", a wide interpretation of the scope is beneficial for individual protection. A narrow interpretation of the scope, on the other hand, could result in the circumvention of the safeguard inherent in having a limited number of detention grounds in the first place. To this comes that the procedural safeguards under paragraphs 2 to 5, which come into force once detention is in place, are avoided. For these reasons, the Court has been criticised for finding that Article 5 did not apply in the case *Austin*, where the police had fenced a crowd of protestors and passers-by within a restricted area on the street for six to seven hours.[11] The Court held that, because the measure was deployed with the purpose of maintaining public order, it was not a deprivation of liberty,[12] with the implication that safeguards otherwise applicable to detainees did not apply to the applicants.

While a wide interpretation of the scope of a Convention right is beneficial for individual protection, a wide interpretation of its exceptions serves to restrict it. It has therefore been a general conception that exceptions to the Convention must be given a strict interpretation.[13] In the case *Klass and others*, the Court simply held

9 *Council of Europe*, "Preparatory Work on Article 5", 1956, CDH (67), p. 8 ff., available at: https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART5-DH(56)10-EN1674958.pdf (4/1/2022).

10 ECtHR, *Baisuev and Anzorov v. Georgia* [C], App. no. 39804/04, 18 December 2012, para. 60.

11 See for example, *Edwards*, LLR 2020, p. 332; *Rainey/Wicks/Ovey,* p. 246; *Aall*, p. 326.

12 ECtHR, *Austin and Others v. the United Kingdom* [GC], App. nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, para. 67.

13 *Rainey/Wicks/Ovey,* p. 211.

that exceptions to a right guaranteed by the Convention were to be interpreted narrowly.[14] A combination of interpreting rights widely and their exceptions narrowly creates a *prima facie* protection during the first stage of the interpretation, to which limitations may be made if they are justified. This is because the approach shifts the larger burden of proof from the individual, who must prove that there has been an interference, to the respondent government, who must prove that the deprivation of liberty fell within the limitation grounds in Article 5 (1) litera (a) to (f) and thus was justified.[15]

C. Principles for the interpretation of the ECHR

I. The rejection of state sovereignty-preservation

Despite being an international instrument concluded by states, the ECHR does not have the character of a contract that regulates reciprocal obligations between the parties to it. Rather, it is categorised as a "law-making treaty", meaning that the norms within it have a statutory nature.[16] Because the Convention is different from conventional contract treaties, a special interpretative approach to it can be justified. While contract treaties are interpreted in light of the *in dubio mitius principle,* meaning that in case of ambiguity, the interpretative result that is less intrusive on the state's sovereignty should be chosen,[17] this principle has been rejected by ECtHR as applicable to the ECHR. In *Wemhoff*, the Court famously held that: "Given that it is a law-making treaty, it is […] necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties".[18] Indeed, applying the *in dubio mitius* principle fully on human rights treaties, i.e. choosing the interpretative result that is less intrusive on the state's sovereignty, would seriously undermine the purpose of protecting individuals against government abuse. As a result, the ECHR is often interpreted following a teleological approach – i.e., that the interpretative result that best contributes to realising the aim and achieving the object of the treaty, is chosen.[19]

14 ECtHR, *Klass and others v. Germany* [P], App. no. 5029/71, 6 September 1978, para. 42.
15 *Lavrysen*, in: Brems/Gerards (eds.), p. 182; *Van der Schyff*, in: Brems/Gerards (eds.), p. 83.
16 ECtHR, *Loizidou v. Turkey* (preliminary objections) [GC], App. no. 15318/89, 23 March 1995, para. 84; *Brölmann*, NJIL 2005, p. 383.
17 *Lo,* p. 27.
18 ECtHR, *Wemhoff v. Germany* [C], App. no. 2122/64, 27 June 1968 section "As to the Law", para. 8.
19 *Dothan*, Fordham Int'l LJ 2019/3, p. 790.

II. Evolutive interpretation and its flipside

The objective of further realisation of human rights in a progressing society necessitates a dynamic interpretation of the Convention. In *Tyrer,* the Court held that the Convention is a living instrument that must be interpreted in light of present-day conditions,[20] meaning that the level of protection must evolve congruently with societal circumstances and expectations. Thus, an evolutive interpretation often corresponds to a teleological one and serves to widen the protection under the Convention.[21] The changes in society that justify the revisitation of earlier interpretations, however, sometimes call for a narrow interpretation of the rights. In *S., V., and A. v. Denmark*, the dissenting judges agreed with the premise relied on by the majority that "[…] the letter of the Convention may justify the Court revisiting an over-extensive interpretation of a particular provision",[22] and in the *McVeigh* case,[23] the Commission noted that organised terrorism is an issue that has grown since the drafting and enaction of the Convention that "cannot be ignored" and that may justify the protection under the Convention to be lowered by some extent.[24] The arguments reveal that the difference between an evolutive interpretation on the one hand and a restrictive interpretation on the other lies more in the interpretative result than in the methodology. In both cases, present-day conditions were used to justify a rebalancing of priorities leading to a change in the scope of protection. Article 32 ECHR mandates the ECtHR to interpret and apply the Convention and the Court may rightly adjust the scope of a provision through interpretation. A legitimate interpretation, however, requires a careful balance so that it does not cross the line towards a *de facto* amendment; amending the Convention, is a prerogative vested exclusively in the Contracting States.[25]

III. The rule of law as an interpretative principle

In addition to the current societal situation, the nature of the case at hand, including the legal area and the intrusiveness of a measure, may warrant a certain interpretative approach. As stated in the preamble of the ECHR, the rule of law is a common heritage of the governments of Europe, something the ECtHR drew attention to in *Golder* when it held that, because the very background of the ECHR is the Contracting Parties' "profound belief in the rule of law", the principle of good faith enshrined in Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT) required the Court to bear the rule of law in mind when interpreting the Conven-

20 ECtHR, *Tyrer v. the UK* [C], App. no. 5856/72, 25 April 1978, para. 31.
21 *Letsas*, p. 23; *Ulfstein*, IJHR 2020/7, p. 920; *Costa,* EuConst 2011, p. 178.
22 ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, dissenting opinion para. 2, second indent.
23 ECtHR, *McVeigh and Others v. the United Kingdom*, App. nos. 8022/77, 8025/77 and 8027/77, Commission's report, 18 March 1981.
24 Ibid., para. 157; See *Warbrick*, ICLQ, pp. 758-759.
25 *Barak*, p. 66.

tion.[26] The year after, in *Engel,* the Court held that a wide interpretation of an exception to the fundamental right to liberty under Article 5 (1) would "[…] entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration".[27] These sources imply that one of the safeguards required by the rule of law is the use of the rule of law itself as a principle of interpretation.

The impact of the rule of law in interpretation becomes especially visible in the area of criminal law where the protection of fundamental rights is of the essence. Indeed, the principle of legality is a cornerstone of the more general rule of law and requires that state interference in individual rights is done only based on and in accordance with the law.[28] The principle is reflected in the ECHR's notions of "law", "lawful", "in accordance with the law" and, for the case of Article 5 (1), "in accordance with a procedure prescribed by law". The underlying premise of the rule of law as a general principle, accompanied by the narrower and more specific principle of legality in criminal law, seems to be that the weight given to the rule of law as an interpretative principle follows a sliding scale congruent with the intrusiveness of an interference. It is in line with this that – when the state exercises its perhaps most intrusive measure, that of punishment – the interpretation of legal instruments to that end should be done following a strictly objective and just approach that protects individual rights.[29] However, it is not exclusively in criminal law that these considerations become pertinent. As examples of particularly intrusive measures that are not punishment, detention in psychiatric hospitals[30] or measures of forced adoption[31] can be mentioned. These nuances are reflected, for instance, in the Nordic legal method, where the so-called 'area of the legality principle' extends far beyond criminal law and has a significant impact as an interpretative principle in all areas of law where state measures amount to an interference in an "individual's sphere of rights".[32] The closer a measure falls to the core area of the legality principle, the more weight is given to the wording of the provision during the interpretative process. Hence, the more intrusively a measure interferes with an individual's sphere of rights, the stricter interpretation is required.[33]

26 ECtHR, *Golder v. The United Kingdom* [P], App. no. 4451/70, 21 February 1975, para. 34.

27 ECtHR, *Engel and Others v. The Netherlands* [P], App. nos. 5100/71 etc., 8 June 1976, para. 69; As will be shown below, the same phrase has been restated in later judgments, including ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, para. 83, concerning Article 5 (1) (b).

28 *Ramcharan*, p. 75.

29 *Rui,* LoR 2020/6, p. 323.

30 See for example, ECtHR, *Herczegfalvy v. Austria* [C], App. no. 10533/83, 24 September 1992.

31 See for example, ECtHR, *Strand Lobben and Others v. Norway* [GC], App. no. 37283/13, 10 September 2019.

32 My translation. See for example, *Smith,* LoR 2021/2, p. 121; *Rui,* LoR, 2020/6, p. 232; *Kane*, TNB 2018, p. 202.

33 *Kane*, TNB 2018, p. 202.

IV. Facilitating international cooperation through interpretation

The interpretation of a legal instrument is affected, moreover, by its place in a hierarchy of legal instruments. In today's pluralist Europe, most states are part of several legal orders – each with their own legal instruments and internal hierarchies – the most evident ones apart from the CoE being the European Union (EU) and the United Nations (UN). These institutions function independently from each other, yet have many common member states, a feature that makes the relationship between their legal instruments an intricate one. The ECtHR has, for its part, characterised the ECHR as "a constitutional instrument of European public order".[34] Yet, it seeks to interpret the Convention in a way that facilitates international cooperation.

To mitigate the dilemma that faces the common member states of the CoE and the EU as a result of being obliged by the two sets of rules, the ECtHR developed the *Bosphorus*-presumption.[35] The presumption entails that the Court will presume that no violation of the ECHR has occurred when a state does nothing more than implementing its obligations stemming from an international organisation considered to offer a level of human rights protection comparable to that of the Convention, provided that the supervisory mechanism for human rights protection in the other legal order has been employed.[36] The presumption is rebuttable: if the implementation of an EU act may result in a manifestly deficient human rights protection, the role of the ECHR as a "constitutional instrument of European legal order" will outweigh the interest of international cooperation.[37]

Similar conflicts of interest arise from the CoE States' parallel participation in the UN. In *Al-Dulimi and Montana Management Inc. v. Switzerland (Al-Dulimi)*, which concerned the relationship between the ECHR and the implementation of a binding UN Security Council Resolution, the Court held that "[…] the State Parties are required, in [the context of the Convention as "a constitutional instrument of European public order"], to ensure a level of Convention compliance which, at the very least, preserves the foundations of that public order".[38] The cited *ratio decidendi* confirms that the scrutiny of Convention-compliance may be lowered. However, international cooperation does not justify that the very fundamental elements of the Convention provisions are compromised. Because Switzerland had not ensured ac-

34 ECtHR, *Loizidou v. Turkey* (preliminary objections) [C], App. no. 15318/89, 23 March 1995, para. 75.

35 *Johansen,* The Bosphorus Presumption Is still Alive and Kicking: the Case of Avotiņš v. Latvia, PluriCourts Blog, 24 May 2016, available at: https://www.jus.uio.no/pluricourts/english/blog/stian-oby-johansen/2016-05-24-avotins-v-latvia.html (4/1/2022).

36 ECtHR, *Michaud v. France* [C], App. no. 12323/11, 6 December 2012, para. 103 and 114.

37 ECtHR, *Bosphorus v. Ireland* [GC], App. no. 45036/98, 30 June 2005, para. 156.

38 ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], App. no. 5809/08, 21 June 2016, para. 145.

cess to judicial review, a safeguard constituting the foundation of Article 6 ECHR, a violation was found.

By showing deference, the ECtHR upholds a minimum level of human rights protection without thwarting international cooperation and the achievement of the undeniably important aims of the EU and the UN. The result is a higher threshold for finding a violation in cases where international cooperation is at stake, compared to "pure CoE-cases". Still, the Court has reserved the right to examine whether human rights protection is manifestly deficient, or, for the case of UN Security Council resolutions, that the foundations of human rights protection have been observed.

D. The interpretation of Article 5 ECHR in selected cases

So far, this article has introduced the specifics of the conception of Article 5 (1) as well as various factors that might impact the Court's interpretation. This section will take a more practical approach by analysing four relatively recent judgments from the Grand Chamber of the ECtHR, with the aim of identifying how these factors have affected the Court's interpretation of Article 5 (1) ECHR. The selected cases concern the interpretation of the scope of the right to liberty in Article 5 (1) or the extent of the exceptions under paragraph 1 second sentence litera (a) to (f). The analyses will follow the structure of a compliance assessment, so that the first analysis will concern the case of *Ilias and Ahmed*, regarding the scope of application of Article 5 (1), i.e., the interpretation of the notion "deprivation of liberty". Thereafter, the case *Hassan,* concerning the exhaustiveness of the list of exceptions in Article 5 (1), will follow. Finally, the cases *S., V., and A.* followed by *Ilnseher*, concerning the interpretation of certain limitations to the right to liberty, will be analysed. In each case, the interpretation of Article 5 (1) was subject for dissent, which makes the cases well suited to illustrate different approaches to treaty interpretation presented in the foregoing parts of this article.

I. *Ilias and Ahmed v. Hungary*: the scope of application of Article 5 (1)

The case of *Ilias and Ahmed* concerned the alleged detention of two asylum seekers from Bangladesh who had entered Röszke transit zone in Hungary via Serbia. The transit zone lays on the Hungarian side of the border between the two countries and allows asylum seekers to lodge applications for asylum in Hungary and wait for them to be processed. In the present case, the applicants' asylum requests had been rejected and, awaiting the appeal of the expulsion orders, the applicants spent 23 days in an enclosed area of the transit zone. The area was surrounded by barbed wire fences, outward and inward movement was strictly regulated, and the applicants were not allowed to leave the enclosed area to enter Hungary but could leave only by exiting towards Serbian territory. However, neither of them had legal access

to Serbia and by leaving Röszke transit zone, their applications for asylum in Hungary would automatically be dismissed.[39]

The Grand Chamber was faced with the question of whether the stay in the enclosed area of the transit zone constituted "deprivation of liberty" of the two applicants so that it had to conform with one of the limitation grounds in Article 5 (1) and offer the safeguards enshrined in paragraphs 2 to 4 of the provision. The Court admitted that this was no easy task, as some borderline cases could be "a matter of pure opinion".[40] As a starting point, it noted that the situation where an individual applies for entry and thus must wait for a short period for the right to enter to be verified, cannot generally be described as a deprivation of liberty,[41] but that the actual restrictions imposed, however, could create an environment of *de facto* detention.[42]

In favour of the threshold not being met, the majority found that the applicants had entered Hungarian territory by their own free will, that the appeal procedure had been diligent and timely, and that the detention-like construction of the facility pursued a legitimate aim to which the measure was connected to and not unnecessary to achieve. It was also taken into account that the aim of the measure had been to hinder unauthorised entry into the country.[43] On these grounds, the majority concluded that the stay at the transit centre was not a "deprivation of liberty" within the meaning of Article 5 ECHR and declared the complaint inadmissible. The minority, on the other hand, composed of Judge Bianku joined by Judge Vučinić, favoured a wider interpretation of the notion "deprivation of liberty", and held that Article 5 was not only applicable but violated. The dissenting judges rejected the significance of the purpose of the measure as decisive for the assessment of whether it fell within the scope of the Convention. Contrariwise, they put more weight on the intrusive nature of the measure, favouring the finding of the restriction as "detention" under the Convention.[44]

A comparable case from the Court of Justice of the European Union (CJEU) is the preliminary ruling in joined cases C-924/19 and C-925/19 PPU, delivered 14 May 2020, some 6 months after *Ilias and Ahmed* by the ECtHR. The PPU cases also concerned asylum seekers who had passed through Serbia and entered the same Röszke transit area. The CJEU concluded that the obligation for an individual to remain permanently in a transit zone, where he or she could not legally leave voluntarily, constituted "detention" and interfered with the right to liberty under Article 6 of the Charter of Fundamental Rights of the EU.[45] Different from the majority in

39 ECtHR, *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15, 21 November 2019, para. 247.
40 Ibid., para. 211.
41 Ibid., para. 225.
42 Ibid., para. 230.
43 Ibid., paras. 223 to 233.
44 ECtHR, *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15, 21 November 2019, separate opinion, p. 77 of the judgment, first, second and third indent.
45 CJEU, Judgment of 14 May 2020, joined cases C-924/19 and C-925/19 PPU, ECLI:EU:C:2020:367, paras. 231 cf. 215.

Ilias and Ahmed, the CJEU did not consider the purpose of the measure when deciding whether it was to be classified as "detention".

The case *Ilias and Ahmed* dates to 2015, a time when European states faced challenges in meeting a massive flow of asylum requests. The situation was described as a crisis,[46] and the following point made by the ECtHR's majority can serve to illustrate the political sensitivity of the case: "[…] in drawing the distinction between a restriction on liberty of movement and deprivation of liberty *in the context of the situation of asylum seekers*, its approach should be practical and realistic, *having regard to the present-day conditions and challenges*".[47] While the regard taken to present-day conditions has traditionally been used as an argument to evolve and widen the scope of Convention rights, the present case is an example of new circumstances being used as an argument for taking a more restrictive approach.

II. *Hassan v. the United Kingdom*: the exhaustiveness of permissible detention grounds

The case *Hassan v. the United Kingdom* (UK) concerned Tarek Hassan, an Iraqi citizen who was arrested by UK soldiers and detained as an Enemy Prisoner of War in Camp Bucca in Iraq during the American led invasion by a multi-state coalition in 2003. Hassan had been arrested and detained for preventive purposes under the Third and Fourth Geneva Conventions as a combatant or civilian posing a threat to security.[48] The case concerned the question of whether the ECHR covered a legal basis for detention in a situation of international armed conflict, or, whether the detention had been unlawful as the UK had not derogated from the provision in accordance with Article 15 (2) ECHR. Thus, the case raised questions of the exhaustiveness of the list of detention grounds in Article 5 (1).

The Court's majority opened their dictum by restating the (then)[49] well-established principle under Article 5, 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 […]".[50] Consequently, since Enemy Prisoners of War enjoy combat privilege under international humanitarian law (IHL), which acquits them from criminal sanctions, the case could not fall within the scope of Article 5 (1) (c) on suspicion of having committed, or risk of committing, an offence. The Court stated that detention carried out under the Third and Fourth Geneva Conventions did not correspond to any of the categories set out in Article 5 (1) litera (a) to (f).[51] Accordingly, the starting point

46 ECtHR, *Ilias and Ahmed v. Hungary* [GC], App. no. 47287/15, 21 November 2019, para. 228.
47 Ibid., para. 213 (emphasis added).
48 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, para. 53.
49 As will be shown below, the Court deviated from this approach in the case *S., V., and A. v. Denmark.*
50 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, para. 97.
51 Ibid.

for the assessment was that detention such as the one in question was not covered by the wording of Article 5 (1). It is also worth noting that the majority did not repeat the general principle about the exhaustiveness of the permissible detention grounds, which is set out as a standard phrase in many preceding cases concerning Article 5 (1).[52]

Turning to the question of whether Article 5 (1), notwithstanding its wording, could encompass detention under the Third and Fourth Geneva Conventions, the majority looked at "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" and the "relevant rules of international law applicable in the relations between the parties", as required by Article 31 (3) (b) and (c) of the VCLT. The Court reiterated that the ECHR should be interpreted consistent with other instruments of international law and noted that the parties' practice had been not to derogate from Article 5 ECHR when detaining persons under the relevant Geneva Conventions.[53] The majority has been criticised for not continuing this legal analysis with an assessment of whether the identified practice was truly an expression of an agreement between the parties regarding the Convention's interpretation or merely a misapplication.[54] It can also be objected that it appears like a contradiction that the state practice, which arose because the state parties did not consider the Convention as relevant under the circumstances, is considered relevant as a practice regarding their interpretation of it. The finding by the ECtHR that the parties were bound by the Convention even in extraterritorial military operations was unexpected from the states' side, and the Court's swift conclusion that derogations were nevertheless not necessary can be seen as an attempt to alleviate the impact of this finding.

Nonetheless, the majority concluded that the detention grounds under the Third and Fourth Geneva Conventions could be accommodated in Article 5 (1) ECHR, with the result that the hitherto exhaustive list of exceptions to the right to liberty enshrined in subsections (a) to (f) did not constitute an obstacle to the arrest of prisoners of war and detention of civilians who pose a security risk.[55] The access to perform this "impossible" harmonisation of two sets of rules which create a genuine norm conflict has been questioned,[56] and the result is, in the minority's words, an attempt to reconcile the irreconcilable.[57] They reasoned that, as long as the exhaus-

52 See *inter alia,* ECtHR, *Engel and Others v. The Netherlands* [P], App. nos. 5100/71 etc., 8 June 1976, para. 54; ECtHR, *Ireland v. The United Kingdom*, App. no. 5310/71, 18 January 1978, para. 194; ECtHR, *Al-Jedda v. the United Kingdom* [GC], App. no. 27021/08, 7 July 2011, para. 99.

53 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, para. 101.

54 Ibid., dissenting opinion paras. 10 to 15; *Hill-Cawthorne,* The Grand Chamber Judgment in Hassan v UK, EJIL:Talk, available at: https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/ (4/1/2022).

55 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, paras. 102 to 104.

56 *Spieker*, ZaöRV 2019, pp. 168-169; *Meier*, Goettingen Journal of International Law 2019/3, pp. 395–424.

57 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, dissenting opinion para. 6 and 19.

tive Article 5 (1) does not provide a legal basis for the detention in question, the provision, *a contrario*, precludes any "accommodation" of the detention ground.

While the finding facilitates international cooperation, it is reasonable to maintain that what the Court did in *Hassan* went beyond mere interpretation and that the Court overstepped its mandate by exceeding the limits of the text of the Convention. Although limited to international armed conflicts, the implication of this Grand Chamber case is that the access to interfere with the right to liberty under Article 5 (1) is expanded to incorporate a ground of detention not included in the list of permissible grounds. The following phrase from the case *Merabishvili v. Georgia* illustrates well the impact *Hassan* has had on the scope of the right to liberty:

> The list of situations in which Article 5 § 1 of the Convention permits deprivation of liberty is likewise exhaustive […], except when it is being applied, in the context of an international armed conflict, to the detention of prisoners of war or of civilians who pose a threat to security (see Hassan v. the United Kingdom […]).[58]

The majority in *Hassan* underscored that the detention, also in cases of international armed conflicts, must be "lawful", meaning that the detention "[…] should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness […]".[59] With this, the Court lowered its scrutiny in an attempt to not impair international cooperation in the field of IHL, an approach similar to the one taken in cases concerning obligations stemming from parallel memberships in international organisations such as the EU and the UN. *Hassan,* however, stands out compared to *Bosphorus* and *Al-Dulimi* because the impugned measure did not stem from a legal obligation imposed by an international organisation but rather from the UK's application of the Geneva Conventions.

III. *S., V., and A. v. Denmark*: the extent of exceptions (b) and (c)

The case *S., V., and A. v. Denmark* concerned the preventive detention of three football hooligans who had been detained to prevent their instigation and participation in brawls on the occasion of a football match between Denmark and Sweden. The three applicants were arrested outside of criminal proceedings without there being any intentions of bringing criminal charges against them. The question before the Court was whether the deprivation of liberty had conformed with any of the exceptions enshrined in Article 5 (1) ECHR. As general principles relating to Article 5 (1), the Court reiterated, as in many cases relating to Article 5 (1),[60] the exhaus-

58 ECtHR, *Merabishvili v. Georgia* [GC], App. no. 72508/13, 28 November 2017, para. 298.

59 ECtHR, *Hassan v. UK* [GC], App. no. 29750/09, 16 September 2014, para. 105; *Hill-Cawthorne,* The Grand Chamber Judgment in Hassan v UK, EJIL:Talk, available at: https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/ (4/1/2022).

60 See *inter alia,* ECtHR, *Engel and Others v. The Netherlands* [Plenary], App. nos. 5100/71 etc., 8 June 1976, para. 54; ECtHR, *Ireland v. The United Kingdom*, App. no. 5310/71, 18

tiveness of the list of exceptions as well as the importance of the adherence to the rule of law and prompt and speedily judicial control of any arrest or detention.[61]

The first detention ground to be examined was Article 5 (1) (b), which allows detention to "secure the fulfilment of any obligation prescribed by law". Here, the Court applied the rule of law as a prevailing interpretative principle when finding that the situation could not intuitively be said to fall within the scope of litera (b) under its ordinary meaning, as the applicants had not been prescribed any obligation to refrain from specific actions that could have warranted the use of the provision. The Court held that "[…] a wide interpretation of sub-paragraph (b) of Article 5 § 1 would entail consequences incompatible with the notion of the rule of law"[62] and unanimously found that the detention of the football hooligans could not be subsumed under the provision.[63]

To the second relevant detention ground, Article 5 (1) (c) allowing "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so", the Court took a somewhat different approach. The Court established, firstly, that the second limb ("when it is reasonably considered necessary to prevent his committing an offence") constituted a distinct ground for detention, independent from the first limb ("on reasonable suspicion of having committed an offence").[64] This widens the scope of application compared to the alterative interpretation of requiring that an offence has been committed. Secondly, considering that the applicants were never brought to criminal proceedings, nor were intended to, the Court had to decide whether the requirement that the detention had to be "effected for the purpose of bringing [the arrested] before the competent legal authority" precluded detention as in the present case, where there had never been any intention to bring the applicants before a judge.[65] Concerning this question, the majority reiterated that the view from the ECtHR's earliest case, *Lawless,* had been that the purpose-requirement applied to all three limbs of litera (c), but argued that the requirement had been applied with a "certain flexibility" by the Court.[66] This justified the finding that an intention of criminal proceedings was not necessary when initiating a short-term preventive detention.[67] As a result, they concluded that the requirement "for the purpose of bringing him before the competent legal authority" did not constitute an obstacle for short-term preventive detention outside of criminal proceedings.

January 1978, para. 194; ECtHR, *Al-Jedda v. the United Kingdom* [GC], App. no. 27021/08, 7 July 2011, para. 99.

61 ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, para. 73 with further references.

62 Ibid., para. 83.

63 Ibid., para. 87.

64 Ibid., paras. 98–99 and 114.

65 Ibid., paras. 96 and 97.

66 Ibid., para. 118.

67 Ibid., paras. 120–121.

By not requiring an intention of criminal proceedings, the access to detain someone is widened considerably compared to the alternative interpretation. With this interpretation, the facts of the present case fell within the scope of the second limb of Article 5 (1) (c) and no violation of the provision was found.[68]

The minority, on the other hand, opted for a stricter and more literal interpretation of the wording of Article 5 (1) (c). In favour of a narrow interpretation of the detention ground, they argued that "the teleological and the linguistic methods of treaty interpretation converge in cases similar to the one at hand".[69] This is interesting because teleological interpretation, i.e., interpretation in light of the object and purpose of the Convention, is often associated with an expansive interpretation of Convention rights, while the strict linguistic methods of treaty interpretation have been associated with the often more restrictive approaches of intentionalism or originalism.[70] An expansive interpretation of *rights* through a teleological approach confers a larger burden on the duty-bearers, the states. When the minority refers to "cases similar to the one at hand", however, they seemingly mean cases where the interpretation of an *exception* to a Convention right is in question. In such cases, an expansive interpretation will result in the opposite of that above, namely conferring a larger burden on the right-holders, the individuals. Accordingly, the teleological approach based on the object and purpose of protecting human rights certainly coincides with the linguistic methods of strict or precise interpretation in cases of exception-interpretation, because the interpretative results of the two approaches ideally are alike.

In addition, the minority held that, in light of the first and the third limb, which "clearly refer to criminal proceedings" is it difficult to argue that the second limb does not.[71] In fact, they went as far as to express that the result in the present case could not be reached by interpretation, and, that it was for the High Contracting Parties to amend the treaty – not the Court.[72] The approach taken by the minority to the exception in litera (c) is a narrow one, in line with the one taken by the Court unanimously to litera (b) in the same judgment, finding that a wide interpretation of the exception would be incompatible with the rule of law.

With *S., V., and A. v Denmark,* the Court departed from the comparable *Ostendorf* case decided five years earlier, where it found that Article 5 (1) (c) precluded detention outside of criminal procedures.[73] In doing this it held that it was necessary "[…] to interpret and apply the Convention in a manner taking proper account of the challenges identified, while maintaining the effective protection of human rights […]".[74] The challenges identified were those of football hooliganism and mass

68 Ibid., para. 138-141.
69 ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, dissenting opinion, para. 5.
70 *Letsas,* p. 12.
71 Ibid., para 9.
72 Ibid., para. 10.
73 ECtHR, *Ostendorf v. Germany* [C], App. no. 15598/08, 7 March 2013, para. 89.
74 ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, para. 95.

events "the last few decades" turning violent.[75] It is interesting to note that, even though the Court relied on these present-day conditions, it did not include terminology such as "evolutive interpretation" or "living instrument". A possible explanation for this is that such terminology generally is associated with an expansive interpretation of convention rights,[76] as opposed to interpretation towards a more restrictive interpretative result.

IV. *Ilnseher v. Germany*: the extent of exception (e)

The fourth and last case, *Ilnseher,* concerned preventive detention, but not short-term preventive detention imposed to prevent a concrete and specific offence as was the case in *S., V., and A v. Denmark*. The preventive detention in question in *Ilnseher* is one that, under German law, can be ordered only subsequent to a sentence following a criminal trial. It has the aim of preventing a person of unsound mind from committing another crime, provided that the person is still considered a danger to the public or themself. The Act containing the legal basis for the preventive detention in question was enacted while the applicant served a sentence for a crime he had previously been convicted for, and the preventive detention measure was imposed after his 10-year long prison term was completed. The applicant had then, contrary to what was the case in his criminal trial, been found to suffer from a sexual sadism disorder. The preventive detention was ordered because it was considered a risk that the applicant, if released, again would commit a sexually oriented crime and required him to remain detained for as long as he was considered a "danger". The subsequent detention was carried out at Straubing Preventive Detention Centre, a centre that accommodates persons suffering from mental disorders and other detainees, on the same premises as, but separate from, Straubing Prison.

The question before the Grand Chamber was whether the preventive detention of the applicant conformed with Article 5 (1) (e), that is, whether it was a "lawful" detention of a person of "unsound mind". In addition, because the detention was no longer a detention "after conviction" under litera (a), it was necessary to consider whether it constituted a "penalty" under Article 7 (1), so that the punishment was heavier than the one applicable at the time of the offence. These questions split the Grand Chamber into four fractions, a divergence that indicates a complex legal picture.

The majority introduced their dictum by reiterating general principles relating to Article 5 (1), including that only a narrow interpretation is consistent with the aim of the provision. They held that it is a condition for detaining someone of "unsound mind", that the mental disorder warrants compulsory confinement either for treatment purposes or to prevent the individual from causing harm to themselves or others.[77] The latter alternative is an example of how the purpose of protecting public

75 Ibid., para 94.
76 See Section C.II above.
77 Ibid., paras. 126–129.

interests is incorporated in Article 5 (1), even without the provision having a general public interest exception.[78] The majority further held that it is not a condition for finding that someone is of 'unsound mind', that the mental condition is of a degree that excludes criminal liability under national law.[79] While this might seem like a paradox, the Court-made condition for detaining someone of "unsound mind", i.e., that a true mental disorder of a certain severity is established before a competent authority based on objective medical expertise,[80] does not exclude this solution. After having analysed the facts in light of the relevant principles, the majority found that the applicant qualified as a person of "unsound mind" under the Convention.[81] Concerning the lawfulness of the measure, the majority stated that because detention was necessary to prevent further offences and that the facilities were appropriate to the applicant's condition, the detention was not arbitrary and thus complied with Article 5 (1) (e) of the Convention.[82] The majority further found that, after the applicant was moved to the preventive detention centre, the detention could no longer be regarded as a "penalty" under Article 7 (1) second sentence and did not violate the provision.[83]

In contrast, a dissenting minority consisting of Judges Pinto De Albuquerque and Dedov was of the opinion that a notion of "unsound mind" that also comprised those who are found criminally liable, is too wide. Regarding the "lawfulness" of the detention, they contended that a decisive weight must be put on the special sacrifice made by the applicant in light of the intrusiveness of the measure.[84] While the majority too had tried the necessity of the measure, the proportionality test endorsed by the minority included an additional overall assessment of whether the measure was proportionate or, conversely, whether it imposed an excessive burden on the individual.[85] The minority noted that the detention of the applicant as a person of "unsound mind" – following a prison sentence that he had completed in full, and that could potentially result in the term of imprisonment being longer than for other offenders under the same kind of detention – imposed an excessive burden on the applicant that made the measure disproportionate and thus not lawful.[86] In addition, similarly to the dissenting judges in *S., V., and A. v. Denmark* who criticised the Court's lack of a coherent methodology, the minority expressed regrets about the inconsistent legal interpretation in the Court's case law. The essence of the criti-

78 See Section B above.
79 ECtHR, *Ilnseher v. Germany* [GC], App. nos. 10211/12 and 27505/14, 4 December 2018, para. 149.
80 Ibid., para. 127 with further references.
81 Ibid., paras. 144–160.
82 Ibid., paras. 170–171.
83 Ibid., paras. 236–239.
84 Ibid., paras. 122–126.
85 See similarly *Harbo,* p. 76.
86 ECtHR, *Ilnseher v. Germany* [GC], App.nos. 10211/12 and 27505/14, 4 December 2018, dissenting opinion by Judges Pinto De Albuquerque and Dedov, para. 126.

cism is that the weight given to the principle of legality as an interpretative principle is arbitrary and that the principle, in any event, is given a too narrow scope.[87]

Lastly, partly dissenting Judge Sicilianos agreed with the majority as regards Article 5 (1), i.e., that the detention was justified as necessary detention of a person of unsound mind under litera (e) but did not endorse the finding that the improved conditions sufficed to remove the punitive nature of the detention so that it did not constitute a "penalty" under Article 7 (1).[88] The key take from Judge Sicilianos' separate opinion seems to be that the legal area in question and the severity of the interference warrants a stricter interpretation than what was done by the majority.[89]

Ilnseher illustrates several different interpretative approaches in the context of a measure that is non-criminal yet extremely intrusive on the individual's sphere of rights. It is reasonable that a finding that someone has the mental capability to have criminal liability does not preclude detention on grounds of being of unsound mind. This is especially true when the second finding is done years later, as in the present case. However, although the measure was considered suitable and necessary, the majority can be criticised for falling short of an adequate lawfulness-assessment that includes the proportionality of the measure. Although the second detention regime was deemed non-criminal, the overall measures imposed on the applicant were heavier than what was applicable at the time of his offence. A thorough proportionality assessment where factors such as this one was taken into account, would be in place.

E. Conclusions to be drawn and *de lege ferenda* assessments

Reiterating the excerpt by Judge De Gaetano in *S., V., and A* that introduced this contribution,[90] the present article has tried to make it clearer why the Court in some cases adopts an approach "opposite" of an evolutive one – here referred to as a restrictive approach. It has been argued that the restrictive approach has strong similarities to the phenomenon commonly referred to as "evolutive interpretation", as both approaches are justified by changes in the priority of interests that ought to be protected under the Convention. This was illustrated by how present-day conditions were used to justify a restrictive interpretation in several of the cases analysed in section D. While it is true that the Court has not yet presented a "coherent theory of treaty interpretation serving as a basis for its judgments", this paper has ex-

87 Ibid., paras. 90–94.

88 ECtHR, *Ilnseher v. Germany* [GC], App. nos. 10211/12 and 27505/14, 4 December 2018, partly dissenting opinion by Judge Sicilianos, para. 3.

89 Ibid., paras. 15 and 16.

90 "It is entirely unclear why in some cases the Court adopts an evolutive interpretation departing from the original intent of the parties and from the text of the treaty, whereas in other cases, like this one, it adopts the opposite approach. The result is that the Court has neither presented a coherent theory of treaty interpretation serving as a basis for its judgments nor explained its choices concerning the interpretative rules it applies", ECtHR, *S., V. and A. v. Denmark* [GC], App. nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, dissenting opinion, para. 2, last indent.

plained some of the variables that impact the interpretative approach chosen by the Court and its judges. For instance, the overall impression from the four cases analysed, is that the majorities relied less on the rule of law and the principle of legality as interpretative principles, while these were used actively in the reasoning of the minorities by reference to the intrusiveness of the measures. The interpretative approach taken by the minorities in these cases generally favoured a wider scope of protection or narrower exceptions compared to the majorities' rulings.

This article has argued that the exhaustiveness of Article 5 (1) may be compromised for two reasons. The first one is that the purpose and aim of measures restricting someone's liberty are used to determine whether the measure is to be classified as "detention", as was done in *Ilias and Ahmed*. A possible implication of this is that the safeguards inherent in Article 5 (1) are evaded if the scope thus established becomes too narrow.[91] The second reason is that, with the accommodation of IHL introduced in *Hassan,* the list of detention grounds in Article 5 (1) is, by definition, no longer exhaustive. Although the accommodation is limited to detention in international armed conflicts, the interpretative result is a big leap from the wording of Article 5 (1) ECHR.

Finally, it can be noted that the result in the cases analysed tends to grant more room for interference to state authorities at the expense of individual protection. An underlying premise behind the arguments in favour of finding no violation in these cases seems to be the protection of public security: the control of aliens entering the territory of states in *Ilias and Ahmed,* the challenges of mass events turning violent in *S. V., and A.,* the protection of society against sexually oriented crime in *Ilnseher* and the protection of civilians and armed forces in *Hassan.* Surely, the material analysed in this article is not enough to conclude that there is a general trend shifting against public rather than individual protection in cases under Article 5 (1). However, if such a trend does exist, it could mean that Article 5 (1) is converging towards comparable provisions in other international instruments, notably where deprivation of liberty can be done after balancing the individual right to liberty against other legitimate aims. This would be a considerable change in the application of the provision, one that is likely to require an amendment.

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91 Cf. Section B; *Jacobs/White/Ovey*, p. 217.

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