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Targeting and Detention in Non-  
International Armed Conflict: *Serdar  
Mohammed* and the Limits of Human  
Rights Convergence

*Sean Aughey and Aurel Sari*

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# Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence

*Sean Aughey\* and Aurel Sari\*\**

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## I. INTRODUCTION

Since the 1970s, the law of armed conflict and international human rights law have been locked into a gradual process of convergence.<sup>1</sup> One of the earliest outcomes of the rapprochement between these two branches of international law was the revision of the Geneva Conventions of 1949 by

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1. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000). Scholarship on the relationship between the two legal regimes is extensive. For major treatments of the subject, with ample further references to the literature, see RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002); *INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW* (Roberta Arnold & Noëlle N. R. Quéniwet eds., 2008); *INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (Orna Ben-Naftali ed., 2011) and *RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW* (Robert Kolb & Gloria Gaggioli eds., 2013). See also Symposium, *International Humanitarian Law and International Human Rights Law: Exploring Parallel Application*, 40 ISRAEL LAW REVIEW 306 (2007); Guglielmo Verdirame, *Human Rights in Wartime: A Framework for Analysis*, 13 EUROPEAN HUMAN RIGHTS LAW REVIEW 689 (2008); Michael J. Dennis & Andre M. Surena, *Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice*, *id.* at 714; Philip Leach, *The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights*, *id.* at 732; Conor McCarthy, *Human Rights and the Laws of War under the American Convention on Human Rights*, *id.* at 762; Symposium, *The Relationship between International Humanitarian Law and International Human Rights Law*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 441 (2009).

means of their Additional Protocols of 1977.<sup>2</sup> The imprint of human rights law can be detected across both protocols, most obviously in the form of the fundamental guarantees incorporated into Article 75 of Additional Protocol I (AP I) and Article 4 of Additional Protocol II (AP II).<sup>3</sup> In more recent times, international courts and judicial bodies have begun to play a leading role in driving forward the convergence between the two regimes. The International Criminal Tribunal for the Former Yugoslavia, for example, has made a significant contribution to popularizing the notion that the two are complementary in nature by drawing attention to their common principles and objectives.<sup>4</sup> In *Coard*, the Inter-American Commission on Human Rights confirmed that international human rights law applies concurrently with the law of armed conflict during hostilities, declaring that the application of one regime “does not necessarily exclude or displace the other.”<sup>5</sup> In a string of cases, the International Court of Justice (ICJ) likewise affirmed that the protections offered by human rights conventions do not cease in armed conflict.<sup>6</sup> As these examples demonstrate, international

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2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. See Richard R. Baxter, *Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law*, 16 HARVARD INTERNATIONAL LAW JOURNAL 1, 4–9 (1975). Regarding Additional Protocol II, see also Sylvie Junod, *Human Rights and Protocol II*, 23 INTERNATIONAL REVIEW OF THE RED CROSS 246 (1983).

3. In this context, it is also worth noting the preamble to Additional Protocol II, which recalls that “international instruments relating to human rights offer a basic protection to the human person” in what is the first explicit reference to human rights instruments in an agreement on humanitarian law. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1340 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

4. *E.g.*, Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeal Judgment, ¶ 149 (Int’l Crim. Trib. for the former Yugoslavia Feb. 20, 2001), recognizing that “[b]oth human rights and humanitarian law focus on respect for human values and the dignity of the human person.” On the Tribunal’s caselaw on this area, see Robert Cryer, *The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 511 (2009).

5. Bernard Coard et al. v. United States, Case 10.951, Inter-Amer. Comm. H.R., Report No. 109/99, ¶ 39 (1999). For an overview of the relevant jurisprudence under the Inter-American system, see Christina M. Cerna, *The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict*, 2 JOURNAL OF INTERNATIONAL HUMANITARIAN LEGAL STUDIES 3 (2011).

6. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8) [hereinafter *Nuclear Weapons*]; Legal Consequences of the Construction of

courts have become key participants in, and are helping to shape, a global dialogue about the interaction between the law of armed conflict and international human rights law.

So far, the contribution of the European Court of Human Rights to this dialogue has been muted, but has pioneered the extraterritorial application of international human rights law for years.<sup>7</sup> As a result, the Court has received a high number of applications alleging violations of the European Convention on Human Rights (ECHR)<sup>8</sup> in circumstances of armed conflict and generalized violence. However, until recently, the Court has not grasped the opportunity to pronounce on the relationship between the Convention and the law of armed conflict. Other than the odd reference to the Geneva Conventions of 1949,<sup>9</sup> the European Court and now-defunct European Commission on Human Rights did not find it necessary to rely on the law of armed conflict in the numerous cases arising out of the invasion of Northern Cyprus by Turkey in 1974.<sup>10</sup> In *Al-Jedda*, the Court investigated the scope of the obligations imposed by the law of belligerent occupation on an occupying power to protect the inhabitants of the occupied territory against acts of violence, but did so in the light of the ECHR's relationship with Article 103 of the United Nations Charter.<sup>11</sup> It did not con-

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a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 216 (Dec. 19).

7. Scholarship on this subject too is extensive. For major contributions, see EXTRA-TERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004); MARKO MILANOVIĆ, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY (2011) and KAREN DA COSTA, THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES (2013).

8. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

9. See *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. H.R. Rep. 482, ¶ 313 (1982), where the European Commission of Human Rights found it unnecessary to examine the question of a breach of Article 5 of the Convention, which guarantees the freedom of liberty, with regard to persons accorded the status of prisoners of war.

10. *E.g.*, *Loizidou v. Turkey*, App. No. 15318/89, Preliminary Objections, 20 E.H.R.R. 99 (1995). In the case of *Jaloud v. The Netherlands*, App. No. 47708/08 (2014), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148367#{"itemid":\["001-148367"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148367#{), the Court specifically pointed out that it did not have recourse to the concept of “occupying power” within the meaning of the law of armed conflict in *Loizidou* and other cases.

11. Article 103 of the Charter provides as follows: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their

sider whether the law of armed conflict provided a direct legal basis for the respondent State's conduct.<sup>12</sup> However, recently the European Court's jurisprudence has reached a turning point. In *Hassan v. United Kingdom*,<sup>13</sup> it addressed the relationship between the ECHR and the law of armed conflict directly and in express terms for the first time. *Hassan* is a very significant development, as we will discuss in greater detail below.<sup>14</sup> In essence, the Court has inserted a judge-made exception into the text of Article 5 of the Convention to cover the detention of persons in conformity with the Geneva Conventions of 1949.<sup>15</sup> This not only signals a new-found readiness to rely on the law of armed conflict, but also a willingness to give effect to its rules even where they contradict the terms of the European Convention.

Another significant development under the European Convention system has occurred at the domestic level, but points in the opposite direction: the judgment delivered by the English High Court in May 2014 in *Serdar Mohammed v. Ministry of Defence*.<sup>16</sup> This case represents one of the latest chapters in the steady flow of legal challenges under the Human Rights Act 1998<sup>17</sup> arising from the United Kingdom's involvement in the armed conflicts in Afghanistan and Iraq.<sup>18</sup> The judgment in *Mohammed* is of consider-

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obligations under any other international agreement, their obligations under the present Charter shall prevail.”

12. Al-Jedda v. United Kingdom, App. No. 27021/08, 53 E.H.R.R. 23 (2011) [hereinafter *Al-Jedda*, European Court]. See Heike Krieger, *After Al-Jedda: Detention, Derogation, and an Enduring Dilemma*, 50 MILITARY LAW AND THE LAW OF WAR REVIEW 419, 424–32 (2011); Jelena Pejic, *The European Court of Human Rights' Al-Jedda Judgment: The Oversight of International Humanitarian Law*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 837 (2011); Maral Kashgar, *The ECtHR's Judgment in Al-Jedda and its Implications for International Humanitarian Law*, 24 HUMANITÄRES VÖLKERRECHT 229 (2011).

13. *Hassan v. United Kingdom*, App. No. 29750/09, Sept. 16, 2014, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501#{"itemid":\["001-146501"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501#{). For comments, see Lawrence Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v UK*, EJIL: TALK! (Sept. 16, 2014), <http://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/>.

14. See *infra* Section III.C.

15. This is not uncontroversial. *Hassan*, *supra* note 13 (Spano, J., partly dissenting; joined by Nicolaou, J.; Bianku, J.; and Kalaydjieva, J.).

16. *Joined cases of Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence* [2014] EWHC 1369 (QB).

17. Human Rights Act, 1998, c. 42, available at <http://www.legislation.gov.uk/ukpga/1998/42/contents>. The 1998 Act implements the ECHR in the UK.

18. Leading cases include *R. (Al-Skeini and Others) v. Secretary of State for Defence* [2007] UKHL 26, [2008] 1 A.C. 153; *R. (Al-Jedda) v. Secretary of State for Defence* [2007]

able interest in the UK. For years commentators and politicians have expressed concerns that legal constraints, in particular those imposed by human rights law, are undermining the operational effectiveness of the British armed forces.<sup>19</sup> *Mohammed* seems to confirm these fears since it suggests that international human rights law is the sole international legal framework governing the detention of persons, including insurgent fighters, in a non-international armed conflict (NIAC). However, the judgment is of interest not just from a British or purely regional perspective. The interpretation and application of the ECHR, whether before domestic authorities or before the Strasbourg court, has significant ramifications for legal interoperability.<sup>20</sup> State parties to the ECHR frequently deploy their troops alongside United States, Canadian and other forces in the execution of multinational missions. The effectiveness of such operations requires a mutual understanding of the contributing States' varying legal obligations. Moreover, *Mohammed* has major implications for the relationship between international human rights law and the law of armed conflict more generally. In short, the judgment questions the existence of a legal basis under the law of armed conflict for the conduct of status-based operations, that is lethal and non-lethal operations targeting individuals based purely on their battlefield status,<sup>21</sup> in NIACs. The judgment is therefore of broader international significance.

We believe that the restrictive interpretation of the authority to detain in NIACs adopted by the High Court in *Mohammed* is mistaken as a matter of law and undesirable as a matter of policy. It drives the convergence between international human rights law and the law of armed conflict too far.

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UKHL 58, [2008] 1 A.C. 332 [hereinafter *Al-Jedda*, House of Lords]; R (Smith) v. Secretary of State for Defence [2010] UKSC 29, [2011] 1 A.C. 1; and R (Smith) v. Secretary of State for Defence [2013] UKSC 41, [2014] 1 A.C. 52.

19. For an assessment of this debate, see Aurel Sari, *The Juridification of the British Armed Forces and the European Convention on Human Rights: "Because it's Judgment that Defeats Us,"* available at <http://ssrn.com/abstract=2411070>.

20. See Daniel Bethlehem, *The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 2 CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 180, 183–84 (2013). On legal interoperability generally, see Charles Garraway, "England Does not Love Coalitions": Does Anything Change?, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 233 (Anthony M. Helm ed., 2006) (Vol. 82, U.S. Naval War College International Law Studies); Marten Zwanenburg, *International Humanitarian Law Interoperability in Multinational Operations*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 681 (2013).

21. On battlefield status, see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 186–239 (2010).

The conduct of status-based operations lies at the “very core” of the law of armed conflict,<sup>22</sup> both in international and in non-international armed conflicts. According primacy to human rights law principles would not only subvert the law of armed conflict as it currently stands, but it would also frustrate the effective conduct of military operations.<sup>23</sup> That, in turn, would almost certainly undermine respect for law in war.<sup>24</sup> It is therefore imperative to explain why *Mohammed* is unconvincing. Following a brief review of the High Court’s reasoning, we will develop our argument in two steps. Section III.A examines the meaning and legal effect of Security Council resolutions authorizing the use of “all necessary measures” under Chapter VII of the UN Charter. We argue that the judgment construes the meaning of this phrase and the mandate set out in the resolutions relevant to the present case too narrowly. Section IV examines the legal basis for status-based operations under the law of armed conflict applicable in NIACs. We suggest that the reasons for excluding an implicit legal basis for detention in NIACs are not persuasive, that the authority to target certain persons on the basis of their status does in fact imply a corresponding authority to detain them and that this power prevails over any conflicting obligations under the ECHR. Section V contains our conclusions.

## II. *SERDAR MOHAMMED*: BACKGROUND AND KEY ISSUES

Between December 2001 and December 2014, UK armed forces participated in the UN-mandated International Security Assistance Force (ISAF)

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22. Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 INTERNATIONAL HUMANITARIAN LEGAL STUDIES 52, 74 (2010). It is in these “hard cases” that the law of armed conflict clashes most clearly with the more stringent human rights law standards. See Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INTERNATIONAL LAW STUDIES 1, 2 (2014).

23. See Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, in INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 483, 492 (Raul A. “Pete” Pedrozo & Daria P. Wollschlaeger eds., 2011) (Vol. 87, U.S. Naval War College International Law Studies); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795, 837–39 (2011). See also Christopher Greenwood, *Human Rights and Humanitarian Law: Conflict or Convergence*, 43 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 491, 502–3 (2010).

24. Cf. Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EUROPEAN JOURNAL OF INTERNATIONAL LAW 15, 20–21 (2010).



in Afghanistan.<sup>25</sup> During this period, they were engaged in a multinational NIAC pitting the government of Afghanistan and ISAF on one side against various insurgent armed groups on the other side.<sup>26</sup> Pursuant to the applicable Security Council resolutions, ISAF's mandate was to assist the Afghan government in maintaining security.<sup>27</sup> To this end, the contributing States were authorized by the Security Council, acting under Chapter VII of the UN Charter, to "take all necessary measures."<sup>28</sup> However, unlike the relevant Security Council resolutions concerning Iraq,<sup>29</sup> the Afghanistan resolutions did not expressly spell out that contributing States were authorized to intern individuals in Afghanistan for imperative reasons of security. In practice, ISAF forces have detained many suspected insurgents over the

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25. ISAF was established pursuant to S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001). In 2003, came under NATO command. Its mission terminated at the end of 2014 in accordance with S.C. Res. 2120, U.N. Doc. S/RES/2120 (Oct. 10, 2013). Since January 2015, NATO continues to provide assistance to the Afghan security forces and institutions through a follow-on operation called Resolute Support Mission. The new mission was welcomed, but not mandated, by S.C. Res. 2189, U.N. Doc. S/RES/2189 (Dec. 12, 2014). We discuss ISAF's mandate and tasks in greater detail *infra* Section III.B.

26. The classification of the conflict(s) in Afghanistan has changed over time. See Françoise J. Hampson, *Afghanistan*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 242 (Elizabeth Wilmshurst ed., 2012). In 2012, the English Court of Appeal expressed its "provisional view" that a certificate served by the UK Foreign Secretary stating that the conflict constituted a NIAC was conclusive of this fact. *R. v. Gul (Mohammed)*, [2012] EWCA (Crim) 280, [22]; upheld by the Supreme Court in *R. v. Gul (Mohammed)*, [2013] UKSC 64, [2013] 3 W.L.R. 1207, without considering the issue.

27. S.C. Res. 1386, *supra* note 25, ¶ 1, authorized the establishment of "an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment." Since then, the Security Council renewed and expanded ISAF's mandate on several occasions. For an overview, see *Mohammed*, *supra* note 16, ¶¶ 30–33.

28. S.C. Res. 1386, *supra* note 25, ¶ 3. This authorization was repeated in all successive resolutions extending ISAF's authorization. See also Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan art. IV(2), Jan. 4, 2002, *reprinted as* an annex to U.N. Doc. S/2002/117 (Jan. 25, 2002) (which confers upon the ISAF Commander the "authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission").

29. According to a letter from U.S. Secretary of State Colin L. Powell to the President of the Security Council, the functions of the Multinational Force in Iraq included "internment where this is necessary for imperative reasons of security." S.C. Res. 1546, annex, U.N. Doc. S/RES/1546 (June 8, 2004). Resolution 1546 affirmed the mandate of the Multinational Force in Iraq on the basis of this letter.

years.<sup>30</sup> Under ISAF's standard operating procedures, such detainees were to be transferred into the custody of the Afghan authorities, and into the Afghan criminal justice system, within the timeframe of 96 hours.<sup>31</sup> The only exception foreseen to this "96-hour rule" was in cases where detention for a longer period of time was deemed necessary in order to affect the release or transfer of the detainee in safe circumstances.<sup>32</sup> Dissatisfied with the operational difficulties these strict arrangements presented, on November 9, 2009, the UK adopted a "national policy caveat" to the 96-hour rule which permitted, in exceptional circumstances, extended detention for the purposes of obtaining significant new intelligence.<sup>33</sup>

During a military operation in northern Helmand on April 7, 2010, UK armed forces captured Serdar Mohammed, a suspected Taliban commander. In accordance with the national detention principles now applied by British forces, UK ministers approved Mr. Mohammed's continued detention beyond 96 hours, by a further twenty-five days, for the purpose of interrogation. He was then held for an additional eighty-one days—a logistical extension—during which time the Afghan authorities were unable to accept his transfer due to prison overcrowding. In total, Mr. Mohammed was detained by UK armed forces for 110 days at UK bases at Camp Bastion and Kandahar Airfield. On July 25, 2010, he was transferred to the custody of the Afghan authorities. He was subsequently prosecuted, convicted and, following an appeal to the Afghan Supreme Court, sentenced to ten years imprisonment.

Mr. Mohammed then brought a civil damages claim against the UK

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30. ISAF Standard Operating Procedures for Detention of Non-ISAF Personnel identified three specific grounds for detention. Namely where detention is necessary for: (i) ISAF force protection; (ii) self-defense of ISAF or its force; or (iii) accomplishment of the ISAF mission. *See* International Security Assistance Force, SOP 632, Standard Operating Procedures for Detention of Non-ISAF Personnel ¶ 4 (2006), *quoted in Mohammed, supra* note 16, ¶ 35.

31. "The current policy for ISAF is that detention is permitted for a maximum of 96 hours after which time an individual is either to be released or handed into the custody of the [Afghan authorities]." *Id.*, ¶ 5.

32. *Id.*

33. The Secretary of State for Defense stated "in exceptional circumstances, detaining individuals beyond 96 hours can yield vital intelligence that would help protect our forces and the local population—potentially saving lives." Written Ministerial Statement in Parliament (Nov. 9, 2009), *available at* [http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091109/wmstext/91109m0001.htm#column\\_5](http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm091109/wmstext/91109m0001.htm#column_5). The reasons justifying the adoption of this caveat and the operation of the British detention policy are set out in detail in *Mohammed, supra* note 16, ¶¶ 38–53.

Secretary of State for Defence before the High Court of Justice of England and Wales. He argued, *inter alia*, that his detention constituted a violation of his right to liberty and security under Article 5 of the ECHR. In May 2014, over the course of a tightly-argued judgment running well over one hundred pages, Mr Justice Leggatt (hereinafter “Leggatt J”) rejected the respondent’s various preliminary objections and held that Mr. Mohammed’s continued detention after 96 hours amounted to a breach of Afghan law and Article 5 of the Convention. He therefore had an “enforceable right” to compensation under the Human Rights Act 1998. This conclusion was underpinned by four essential findings.

First, as a detainee, the UK exercised effective control and authority over Mr. Mohammed such as to bring him within its jurisdiction within the meaning of Article 1 of the ECHR.<sup>34</sup> The Convention therefore applied to his detention in Afghanistan and the UK was under an obligation to ensure that he enjoyed the benefit of the rights and freedoms set out in the Convention.

Second, Mr. Mohammed’s detention was attributable to the UK and not to the UN, as the government had claimed.<sup>35</sup> While the Security Council exercised effective control over ISAF in general terms, Mr. Mohammed’s detention had been authorized by the UK as a matter of national policy outside the ISAF chain of command. Responsibility for his detention therefore lay with the UK.

Third, Article 5 of the ECHR was not displaced by virtue of the combined effect of the Security Council resolutions authorizing the deployment

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34. *Mohammed*, *supra* note 16, ¶¶ 116–48. Article 1 of the ECHR provides that its Contracting Parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” The establishment of jurisdiction over a person therefore operates as a threshold criterion triggering the applicability of the substantive obligations set out in the Convention. Detention is one of the core examples of the personal model of jurisdiction which were identified by the European Court in *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 E.H.R.R. 18, ¶ 136 (2011).

35. *Mohammed*, *supra* note 16, ¶¶ 158–87. *See also* Lord Astor of Hever (Parliamentary Under-Secretary of State, Ministry of Defence), House of Lords Debates, columns 416–17 (Nov. 7, 2013), available at <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131107-0003.htm>. In making this argument, the government relied on the much criticized judgment of the European Court in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, App. Nos. 71412/01, 78166/01, 45 E.H.R.R. 10 (2007). For a critical comment on the Court’s reasoning in that case, see Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUMAN RIGHTS LAW REVIEW 151 (2008).

of ISAF and Article 103 of the UN Charter.<sup>36</sup> Leggatt J accepted that he was bound by the House of Lords' finding in *Al-Jedda* that Article 103 of the Charter includes authorizations as well as obligations imposed by binding Security Council resolutions.<sup>37</sup> However, in the present case, the applicable Security Council resolutions authorized ISAF to detain individuals only for such time as it was necessary to transfer them into the custody of the Afghan authorities. Since such limited powers of detention were compatible with the ECHR, no conflict arose between the Convention and those resolutions.

Fourth, Leggatt J concluded that the rules of the law of armed conflict applicable in NIACs merely recognize and regulate, but do not authorize, detention.<sup>38</sup> This conclusion was based on three main arguments. First, Leggatt J found that the applicable treaty rules confer no legal authority on States to detain persons in a NIAC either in express terms or by implication.<sup>39</sup> Second, he rejected the government's argument that the authority to kill under the law of armed conflict implies an authority to capture and detain on security grounds.<sup>40</sup> Finally, he found no evidence that a power to detain on security grounds forms part of customary international law.<sup>41</sup> In the absence of any rule authorizing detention in a NIAC either expressly or by implication, Leggatt J concluded that there was no conflict between the law of armed conflict and Article 5 of the ECHR. Therefore, there was no room for the argument that Article 5 was displaced or qualified by the law of armed conflict in the present case.<sup>42</sup> However, he went further, suggesting *obiter* that even if such an obligation did exist; it would not prevail over the requirements of Article 5. In his view, "the only way in which the European Court or a national court required to apply Convention rights can hold that IHL prevails over Article 5 is by applying the provisions for derogation contained in the Convention itself, and not by invoking the principle of *lex specialis*."<sup>43</sup>

Leggatt J must be commended for a careful and meticulous engage-

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36. *Mobammed*, *supra* note 16, ¶¶ 188–227.

37. *Al-Jedda*, House of Lords, *supra* note 18, ¶¶ 26–39. By contrast, the European Court had held, without elaborating, that Article 103 of the Charter is confined to strict obligations. See *Al-Jedda*, European Court, *supra* note 12, ¶ 109.

38. *Mobammed*, *supra* note 16, ¶¶ 228–68.

39. *Id.*, ¶¶ 234–51.

40. *Id.*, ¶ 253.

41. *Id.*, ¶ 254.

42. *Id.*, ¶ 293.

43. *Id.*, ¶ 284.

ment with what is a difficult area of international law. It is important to underline that his reasoning is not confined to the narrow facts of the case. The judgment rejects the existence of a legal basis in the law of armed conflict for security detention in NIACs with general effect. Moreover, the same logic also denies the existence of a legal basis for other status-based operations in a NIAC, including lethal targeting. Ultimately, however, the reasoning is not convincing. The analysis of the meaning and effect of the relevant Security Council resolutions and of the applicable rules of the law of armed conflict is deeply problematic. Moreover, the weight placed on derogations must be reassessed in light of the European Court's judgment in *Hassan*. We will now turn to examine these questions in greater detail.

### III. UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

In the *Al-Jedda* case, the House of Lords and the European Court of Human Rights disagreed over the meaning and effect of Article 103 of the UN Charter. The terms of Article 103 are quite narrow. The provision provides that UN member States' obligations under the UN Charter prevail over their obligations under any other international agreement in the case of a conflict between the two sets of obligations.<sup>44</sup> Since the wording of Article 103 only refers to "obligations," it is not immediately clear whether the provision applies to authorizations to take enforcement measures issued by the Security Council in resolutions adopted under Chapter VII of the Charter.<sup>45</sup> Delivering the majority judgment in the House of Lords, Lord Bingham held that such authorizations were covered by Article 103.<sup>46</sup> The pro-

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44. *See supra* note 11.

45. The scope of Article 103 is a matter of debate in the literature. *See* Robert Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 21 (2004); Rain Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 583 (2008); Johann Ruben Leiaë & Andreas Paulus, *Article 103*, in 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 2110 (Bruno Simma et al. eds., 3d ed. 2012).

46. *Al-Jedda*, House of Lords, *supra* note 18, ¶¶ 26–39. On these points, see Christian Tomuschat, R (On the Application of *Al-Jedda*) v. Secretary of State for Defence: *Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists*, 9 MELBOURNE JOURNAL OF INTERNATIONAL LAW 391, 400–3 (2008); Aurel Sari, *The Al-Jedda Case before the House of Lords*, 13 JOURNAL OF INTERNATIONAL PEACEKEEPING 181, 185–91 (2009); Francesco Messineo, *The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights*, 56 NETHERLANDS INTERNATIONAL LAW REVIEW 35, 47–58 (2009).

vision had to be interpreted broadly: while the Security Council is unable to compel States to participate in military operations authorized under Chapter VII, States which take up such authorizations are bound to carry out the mandate they voluntarily accepted. Since Security Council Resolution 1546 authorized the UK to exercise its powers of detention in Iraq where this was necessary for imperative reasons of security,<sup>47</sup> it followed that this authorization prevailed over any conflicting obligations arising under Article 5 of the European Convention.<sup>48</sup> However, when the *Al-Jedda* case came to Strasbourg, the European Court took a different view and decided that Resolution 1546 did not impose an obligation to detain. According to the Court, in the absence of clear and explicit language to the contrary, a presumption must exist that the Security Council does not intend to place UN member States under an obligation to act contrary to their commitments under international human rights law, including the ECHR.<sup>49</sup> Since in the European Court's view such language was absent from Resolution 1546, the latter did not displace the UK's obligations under the Convention by virtue of Article 103.<sup>50</sup>

In the present case, the government relied on the reasoning of the House of Lords to argue that Security Council Resolution 1890,<sup>51</sup> which provided the legal basis for ISAF at the time, did impose an obligation to detain Serdar Mohammed. In so far as this obligation was incompatible with Article 5 of the ECHR, the government submitted that the doctrine of precedent bound the High Court to follow the House of Lords, rather than the European Court, and declare that Resolution 1890 displaced Article 5. This argument set the High Court at odds with the European Court. Leggatt J resolved this predicament rather elegantly by distinguishing the present case from *Al-Jedda*. As he rightly pointed out, the fact that Resolution 1546 incorporated an express reference to the power to detain was key in persuading the House of Lords in *Al-Jedda* to accept that the Security Council imposed an obligation on the UK to detain individuals for security reasons in Iraq.<sup>52</sup> Since the reasoning hinged on the existence of such a ref-

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47. *See supra* note 29.

48. *Al-Jedda*, House of Lords, *supra* note 18, ¶ 39.

49. *Al-Jedda*, European Court, *supra* note 12, ¶¶ 102, 105. For strong support for this presumption, see Marko Milanović, Al-Skeini and Al-Jedda in Strasbourg, 23 EUROPEAN JOURNAL OF INTERNATIONAL LAW 121, 137–38 (2012).

50. *Al-Jedda*, European Court, *supra* note 12, ¶ 109.

51. S.C. Res. 1890, U.N. Doc. S/RES/1890 (Oct. 8, 2009).

52. *See supra* note 29.

erence, so did its value as a binding precedent. Unlike Resolution 1546, neither Security Council Resolution 1890 nor any of the earlier resolutions on ISAF made an explicit reference to the power to detain. Accordingly, Leggatt J concluded that the High Court was not bound by the interpretation of Resolution 1546 adopted by the House of Lords in *Al-Jedda*, but was free to assess the meaning of Resolution 1890 independently and on its own terms.<sup>53</sup>

In interpreting Resolution 1890, Leggatt J was prepared to accept the government's submission that the power to detain was implicit in its terms, but only subject to the following qualification:

I accept this argument so far as it goes. In particular, I accept that the UNSCRs relating to Afghanistan were plainly intended to authorise the use of lethal force at least for the purposes of self-defence. I also accept that in these circumstances it must be the case that ISAF personnel were authorised to take the lesser step of accepting the surrender of individuals who were believed to pose an imminent threat to them or to the civilian population. I see no necessary implication, however, that this authorisation was intended to give ISAF a power to continue to hold individuals in detention outside the Afghan criminal justice system after they had been arrested and therefore ceased to be an imminent threat.<sup>54</sup>

Accordingly, Leggatt J held that there was no conflict between Resolution 1890 and Article 5 of the Convention. This interpretation is too narrow. It misapprehends the meaning of the phrase "all necessary measures," applies the presumption of human rights-conformity established by the European Court in *Al-Jedda* too rigidly and misreads the scope of ISAF's mandate under the relevant Security Council resolutions.

#### A. *All Necessary Measures*

In construing the meaning of the words "all necessary measures" used in Resolution 1890, Leggatt J proceeded on the basis that in *Al-Jedda* the House of Lords did not decide that this phrase carried an "established or conventional meaning" whenever it was used by the Security Council.<sup>55</sup> This is of course correct, inasmuch as the House of Lords indeed did not define the meaning of the phrase. The High Court therefore was not

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53. *Mohammed*, *supra* note 16, ¶ 217.

54. *Id.*, ¶ 219.

55. *Id.*, ¶ 214.

bound by any precedent on this point. However, this does not mean that the formula “all necessary measures” has not acquired a sufficiently precise meaning within the Security Council’s practice. On the contrary, its meaning is too well-established for domestic courts to overlook.<sup>56</sup>

### 1. The Meaning of the Phrase

Under Chapter VII of the UN Charter, the Security Council enjoys the authority to adopt enforcement measures.<sup>57</sup> The original intention was that such measures were to be carried out by the UN directly, relying on military assets and forces made available to it pursuant to Article 43 of the Charter.<sup>58</sup> However, this scheme was never implemented.<sup>59</sup> Instead, the Security Council has relied on alternative arrangements; in particular coalitions of the willing authorized to act on its behalf.<sup>60</sup> Although this practice

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56. Indeed, the formula has been described as the example “par excellence” of a shared understanding embedded in the Security Council’s interpretative practice. See Efthymios Papastavridis, *Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 83, 101 (2007).

57. See ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004); *THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* (Vaughan Lowe et al. eds., 2008); ALEXANDER ORAKHELASHVILI, *COLLECTIVE SECURITY* 188 (2011).

58. See Nico Krisch, *Article 43*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 45, at 1351. For a comparison of the original intentions of the drafters and the subsequent practice of the Security Council, see Frederic L. Kirgis Jr., *The Security Council’s First Fifty Years*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 506 (1995).

59. However, proposals to revive this scheme are made on a regular basis. See, e.g., James E. Rossman, *Article 43: Arming the United Nations Security Council*, 27 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 227 (1994). For an overview of such efforts, see Adam Roberts, *Proposals for UN Standing Forces: A Critical History*, in *THE UNITED NATIONS SECURITY COUNCIL AND WAR*, *supra* note 57, at 99.

60. See Helmut Freudenthuß, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council*, 5 EUROPEAN JOURNAL OF INTERNATIONAL LAW 492 (1994); Nigel D. White & Özlem Ülgen, *The Security Council and the Decentralised Military Option: Constitutionality and Function*, 44 NETHERLANDS INTERNATIONAL LAW REVIEW 378 (1997); DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* (1999); Nils Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing.”* 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 541 (2000).



raises various difficulties,<sup>61</sup> it is now settled and accepted as a matter of law.<sup>62</sup> As part of this practice, the Security Council has employed the phrase “all necessary means” or “all necessary measures” to authorize States to act in the implementation of Chapter VII.<sup>63</sup> Although the phrase is not free from ambiguities,<sup>64</sup> three aspects are nevertheless beyond doubt.

First, by authorizing States to take “all necessary measures,” the Security Council is delegating its own powers under Chapter VII.<sup>65</sup> Chapter VII confers upon the Security Council the authority to adopt measures not involving the use of armed forces under Article 41, and measures that do involve reliance on armed forces under Article 42. As far as enforcement action under Article 42 is concerned,<sup>66</sup> the Security Council is not constrained

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61. One such difficulty concerns the need for sufficient oversight by the Security Council. See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 124 (1999); Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1 (2002). Another difficulty concerns the proper attribution of internationally wrongful conduct carried out by armed forces acting pursuant to a Security Council mandate. In addition to the authorities cited in *supra* note 35, see Paolo Palchetti, *The Allocation of Responsibility for Internationally Wrongful Acts Committed in the Course of Multinational Operations*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 727 (2013).

62. *Cf.* Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 167 (July 20) (“It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.”). See also Nico Krisch, *Article 42, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 45, at 1330, 1337–38.

63. Nico Krisch, *Introduction to Chapter VII: The General Framework, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 45, at 1237, 1264 [hereinafter Krisch, *Introduction to Chapter VII*].

64. Nabil Hajjami, *Que Signifie l'Expression « Prendre Toutes les Mesures Nécessaires » dans la Pratique du Conseil de Sécurité des Nations Unies*, 47 REVUE BELGE DE DROIT INTERNATIONAL 232, 233 (2013).

65. See SAROOSHI, *supra* note 60, at 142–284. This point is sometimes misunderstood. In *Al-Jedda*, for example, the majority in the House of Lords took the view that the Security Council resolutions authorizing the deployment of the Multinational Force in Iraq did not involve a delegation of the Security Council’s powers. See *Al-Jedda*, House of Lords, *supra* note 18, ¶ 23. See also Keir Starmer, *Responsibility for Troops Abroad: UN Mandated Forces and Issues of Human Rights Accountability*, 3 EUROPEAN HUMAN RIGHTS LAW REVIEW 318, 335–36 (2008). But this view is mistaken. See SAROOSHI, *supra* note 60, at 13; Sari, *supra* note 46, at 193–94.

66. On the nature of action taken under Article 42 of the Charter, see *Certain Expenses*, *supra* note 62, at 164–65. See also Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 31, 33 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995).

to act in self-defense as States are under Article 51, but may deploy armed forces for the far broader purpose of maintaining or restoring international peace and security. The point is illustrated by Security Council Resolution 678 adopted in response to the invasion of Kuwait by Iraq in August 1990.<sup>67</sup> Famously, Resolution 678 not only recognized the right of individual and collective self-defense, but also authorized the use of “all necessary means” to restore international peace and security in the area.<sup>68</sup> As this example demonstrates, the phrase “all necessary measures” is capable of covering the entire spectrum of enforcement authority enjoyed by the Security Council under Chapter VII, including the authority to use force in the interests of international peace and security for purposes beyond individual or collective self-defense within the meaning of Article 51.

Second, it is also evident that the Security Council does not authorize the full range of its enforcement powers every time it employs the phrase “all necessary measures.” This follows from the very language used, since it permits only those measures which are *necessary*. What is necessary depends in each particular case on the specific mandate, its general context and any other conditions laid down in the resolution concerned.<sup>69</sup> The level and type of force entailed by the phrase “all necessary measures” is therefore highly contextual. For example, in Security Council Resolution 1973,<sup>70</sup> the Council authorized the use of all necessary measures “to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya,” while at the same time expressly excluding “a foreign occupation force of any form on any part of Libyan territory.”<sup>71</sup>

Third, subject to the foregoing point, the phrase “all necessary measures” is nevertheless meant to permit the use of *some* military force in the implementation of the mandate.<sup>72</sup> Whenever the Security Council limits

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67. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

68. *Id.*, ¶ 2. For a critical assessment of the scope of this authorization, see Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 516, 525–28 (1991).

69. *Cf.* *Nada v. Switzerland*, App. No. 10593/08, 56 E.H.R.R. 18, ¶¶ 175, 177 (2013). See also Hajjami, *supra* note 64, at 250–55.

70. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Feb. 26, 2011).

71. On the scope of the authorization, see Chris De Cock, *Operation Unified Protector and the Protection of Civilians in Libya*, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 213, 217–19 (2011).

72. This is evident from its drafting history. See Christopher Greenwood, *New World Order or Old? The Invasion of Kuwait and the Rule of Law*, 55 MODERN LAW REVIEW 153, 166 (1992). As Professor Dinstein notes, the phrase has become “the common euphemism for

itself to adopting measures under Article 41, it specifically identifies the measures to be taken. By contrast, it routinely uses the generic phrase “all necessary measures” to authorize enforcement action under Article 42. Indeed, the wording of the phrase echoes the language of that provision.<sup>73</sup> In some cases, the mandate may not require the use of lethal force beyond what is permissible for individual self-defense and law enforcement purposes. However, it is notable that even in such cases it is taken for granted that the use of lethal force is authorized to ensure the mission’s freedom of movement in order to accomplish its mandate.<sup>74</sup> Although such a concept of “active” or “extended” self-defense<sup>75</sup> is not necessarily incompatible with the strict requirements governing the use of lethal force under international human rights law,<sup>76</sup> it does stretch the boundaries of those requirements close to their breaking point.<sup>77</sup> In other cases, such as Security Council Resolutions 678 and 1973, the mandate clearly envisages the use of lethal force beyond what would be permissible for the purposes of individual self-defense and domestic law enforcement. Consequently, while it is not inconceivable that a mandate authorizing the use of “all necessary measures” can be carried out strictly within the confines of international

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the use of force.” YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 327 (5th ed. 2011). However, the connection between the phrase and the use of force was employed before the 1990s. See Hajjami, *supra* note 64, at 235–37.

73. Article 42 of the Charter thus permits the Security Council to “take such action by air, sea, or land forces as may be *necessary* to maintain or restore international peace and security” (emphasis added).

74. Rob McLaughlin, *The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising “All Necessary Means,”* 12 *JOURNAL OF CONFLICT AND SECURITY LAW* 389, 410–13 (2007).

75. See Hans F. R. Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-Defence*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 415, 424 (Dieter Fleck & Terry D. Gill eds., 2010).

76. Cf. Nigel D. White, *Security Council Mandates and the Use of Lethal Force by Peacekeepers: What Place for the Laws of War?*, in *CONTEMPORARY CHALLENGES TO THE LAWS OF WAR: ESSAYS IN HONOUR OF PROFESSOR PETER ROWE* 95, 109–10 (Caroline Harvey, James Summers & Nigel D. White eds., 2014).

77. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, Basic Principles on the Use of Force and Fire-arms by Law Enforcement Officials, U.N. Doc. A/CONF.144/28/Rev.1, at 112, ¶ 9 (1990) (“intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life”).

human rights law,<sup>78</sup> frequently this is not the case. In such circumstances, pursuant to Article 103 of the Charter, the Security Council resolutions concerned provide States implementing the mandate with a legal basis to act contrary to their international human rights law obligations.<sup>79</sup>

## 2. The Requirement of Clear and Explicit Language

In line with the foregoing, the European Court in *Al-Jedda* accepted in principle that the Security Council may compel States to act in contravention of their obligations under the ECHR and that in such cases their Charter obligations prevail over their obligations under the Convention.<sup>80</sup> However, the Court also held, correctly, that such an outcome does not arise lightly, since the Security Council must be presumed not to intend to impose obligations on States in breach of fundamental human rights.<sup>81</sup> Yet how does one determine whether the Security Council has acted contrary to that presumption? According to the European Court, the presumption is reversed only where the Council uses “clear and explicit” language to this effect.<sup>82</sup>

As regards the requirement of “explicit” language, we must remember that the European Court is guided in the interpretation of Security Council resolutions by the principles laid down by the ICJ.<sup>83</sup> These principles draw inspiration from the rules of treaty interpretation found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969.<sup>84</sup> A Security Council resolution must be interpreted not only with reference to its terms,

78. Strictly within the confines of international human rights law here means without having recourse to derogations or the principle of *lex specialis* to displace conflicting human rights obligations.

79. Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 361, 370–72 (2000).

80. *Al-Jedda*, European Court, *supra* note 12, ¶ 101. The Court’s substantive analysis of the relevant resolutions would have been utterly pointless if it had not accepted that Article 103 of the Charter could, in principle, have this effect. This is so notwithstanding the fact that the Court’s analysis may have been aimed to avoid the actual application of Article 103. See Antonios Tzanakopoulos, *Collective Security and Human Rights*, in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 43, 61 (Erika De Wet & Jure Vidmar eds., 2012).

81. Krisch, *Introduction to Chapter VII*, *supra* note 63, at 1265–66.

82. *Al-Jedda*, European Court, *supra* note 12, ¶ 102.

83. *Id.*, ¶ 76.

84. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

but also in the light of “all circumstances that might assist in determining the legal consequences of the resolution.”<sup>85</sup> More recently, the ICJ added that the interpretation of resolutions may also require an analysis of “statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.”<sup>86</sup> Bearing in mind this guidance, Security Council resolutions authorizing “all necessary measures” must be interpreted in the light of the role and meaning that this phrase has acquired in the implementation of Chapter VII. Practice shows that the Security Council employs the formula to authorize the use of lethal force in excess of what is permitted as a matter of international human rights law, typically without using more express language to qualify or displace the human rights obligations of the States acting pursuant to such Chapter VII mandates. Under these circumstances, the use of the phrase “all necessary measures” must be understood to satisfy the European Court’s requirement for “explicit” language. To insist on further express language not only contradicts the consistent and well-established practice of the Council and the member States of the UN in the interpretation and implementation of the Charter,<sup>87</sup> but it would also see the European Court or domestic courts seeking to place conditions upon the Security Council which they have no authority to impose. Moreover, such an approach is impractical, as it would require the Security Council to spell out in advance each element of the authorization or amend the enabling resolution in or-

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85. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 114 (June 21). See also Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 73 (1998); Papastavridis, *supra* note 56, 89–111.

86. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 94 (July 22).

87. This practice would appear to qualify without too much difficulty as “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of the Vienna Convention on the Law of Treaty Article 31(3)(b). On the criteria of “subsequent practice” within the meaning of Article 31(3)(b), see WOLFRAM KARL, VERTRAG UND SPÄTERE PRAXIS IM VÖLKERRECHT: ZUM EINFLUSS DER PRAXIS AUF INHALT UND BESTAND VÖLKERRECHTLICHER VERTRÄGE 184–95 (1983); ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES 165–67 (2007); RICHARD K. GARDINER, TREATY INTERPRETATION 225–45 (2010).

der to cater to constantly evolving circumstances.<sup>88</sup>

As regards the requirement for the use of “clear” language, the nature and level of force entailed by an authorization to use “all necessary measures” must be determined with reference to the express terms of the relevant resolution, as interpreted in the light of the factors identified by the ICJ. For example, the nature and level of force authorized by Resolution 678 has to be determined in the light of the preceding decisions of the Security Council on the same subject, including Resolutions 660 and 662.<sup>89</sup> In those instruments, the Security Council condemned Iraq’s invasion of Kuwait as a breach of international peace and security, demanded that Iraq withdraw immediately and unconditionally all its forces, and expressed its determination to bring the occupation of Kuwait to an end and restore the authority of the legitimate government of Kuwait. The language of these resolutions clearly establishes that Resolution 678 was meant to authorize a degree of force which exceeded the limits of law enforcement and thus the confines of international human rights law.<sup>90</sup> Interpreting that authorization subject to, for example, the requirements of Article 2 of the ECHR would have been grossly inadequate and would have failed to give effect to the Security Council’s intention to “secure full compliance with its decisions.”<sup>91</sup> Such a narrow approach would contradict the interpretative principles established by the ICJ, as accepted by the European Court, and defy the “imperative nature” of the Security Council’s responsibility for the maintenance of international peace and security.<sup>92</sup>

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88. It is not the Security Council’s practice to identify the individual elements of the authorization. For an exception, see S.C. Res. 169, ¶ 4, U.N. Doc. S/RES/169 (Nov. 24, 1961).

89. S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990); S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990).

90. See Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 506, 514 (1991), who suggests that the actions contemplated included “whatever attacks against Iraq were reasonably necessary to attain the end: i.e., bombing and other attacks on troops, installations, and military equipment in Iraq as well as Kuwait.”

91. S.C. Res. 678, *supra* note 67, pmb. para. 4. See also ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* (2008) (“[t]he effective interpretation of Security Council resolutions follows from the need to give proper effect to the will of and agreement within the Security Council”).

92. *Behrami*, *supra* note 35, ¶ 148.

### B. ISAF's Mandate

Armed with these considerations, we can now turn to the Security Council resolutions governing the activities of ISAF at the time of Mr. Mohammed's detention. Leggatt J held that these instruments authorized ISAF to exercise powers of detention solely for the purpose of accepting the surrender of individuals believed to constitute an imminent threat and while pending their release or transfer to the Afghan criminal justice system.<sup>93</sup> Leggatt J was led to this conclusion by three considerations.

#### 1. Respect for Sovereignty

First, he declared that ISAF's powers of detention were limited because its mandate was confined to assisting the Afghan government in the maintenance of security.<sup>94</sup> In support of this point, he noted that the applicable Security Council resolutions expressly affirmed the "sovereignty, independence and territorial integrity of Afghanistan" and recognized that "responsibility for providing security and law and order throughout Afghanistan resided with the Afghan authorities."<sup>95</sup>

Care must be taken not to misread these pronouncements. In Resolution 1973, the Security Council employed nearly identical language to affirm its commitment to Libya's sovereignty and reiterate that the responsibility to protect the civilian population lay with the Libyan authorities.<sup>96</sup> Surely, the Council recalled these principles not to detract from the mandate laid down in Resolution 1973, but restated them precisely *because* the mandate authorized measures which otherwise would negate them.<sup>97</sup> For

93. *Mohammed*, *supra* note 16, ¶ 219.

94. *Id.*, ¶ 220.

95. *E.g.*, S.C. Res. 1386, *supra* note 25, pmbl. paras. 4, 9; S.C. Res. 1510, pmbl. paras. 2, 4, U.N. Doc. S/RES/1510 (Oct. 13, 2003).

96. S.C. Res. 1973, *supra* note 70, pmbl. paras. 4, 20.

97. This is consistent with the Security Council's practice in this area. For example, S.C. Res. 1894, pmbl. paras. 5, 6, U.N. Doc. S/RES/1894 (Nov. 11, 2009) on the protection of civilians in time of war notes that

States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law" and reaffirms "that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians."

However, Resolution 1894 goes on to affirm the Security Council's "willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian

the same reason, the references to the sovereignty of Afghanistan and the primary responsibility of the Afghan authorities for providing security should not be read as detracting from ISAF's mandate, but as affirming these principles notwithstanding ISAF's presence and mission in Afghanistan. Accordingly, the nature of ISAF's mandate cannot be derived from these pronouncements, but must be established with reference to the specific tasks assigned to it in the applicable Security Council resolutions.

## 2. Authority to Engage in Hostilities

Second, while Leggatt J accepted that the relevant Security Council resolutions conferred a power to detain on ISAF by implication, he took the view that “there is nothing in the language of UNSCR 1890 which demonstrates—let alone in clear and unambiguous terms—an intention to require or authorise detention contrary to international human rights law.”<sup>98</sup> This position is open to question. As we discussed earlier, the reference to “all necessary measures” in Resolution 1890 and its predecessors constitutes explicit language authorizing, in principle, the use of coercive measures in excess of what is normally permitted under international human rights law. To determine whether or not the implementation of ISAF's mandate did in fact require enforcement action beyond those limits, it is necessary to assess the scope and nature of its tasks in more detail.

ISAF was established by Security Council Resolution 1386 as the force “envisaged in Annex 1 to the Bonn Agreement” in order “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas.”<sup>99</sup> The Bonn Agreement was drawn up in December 2001 to re-establish the power of the Afghan authorities and pave the way for the creation of permanent institutions of government.<sup>100</sup> Annex 1 of the

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assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Security Council's disposal in accordance with the Charter of the United Nations” (¶ 4). This reflects the tension between State sovereignty and collective security action addressed in Article 2(7) of the UN Charter. See Georg Nolte, *Article 2 (7)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 45, at 280, 301–5.

98. *Mohammed*, *supra* note 16, ¶ 221.

99. S.C. Res. 1386, *supra* note 25, ¶ 1.

100. U.N. Secretary-General, Letter dated Dec. 5, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001) (containing Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement)).



Agreement addressed the need for the deployment of an “International Security Force.” It began by underlining that responsibility for providing security and law resided with the Afghans themselves.<sup>101</sup> To this end, the participants in the Bonn talks pledged themselves to do all within their means to ensure security and requested the international community to assist the new Afghan authorities “in the establishment and training of new Afghan security and armed forces.”<sup>102</sup> However, since it was likely to take some time before these new forces were fully constituted and functioning, the participants requested the Security Council “to consider authorizing the early deployment to Afghanistan of a United Nations mandated force” in order to “assist in the maintenance of security for Kabul and its surrounding areas.”<sup>103</sup>

ISAF’s original mandate therefore had two closely connected but distinct aspects. First, ISAF was mandated to assist the Afghan authorities in establishing and training new security forces and in the rehabilitation of Afghanistan’s infrastructure. Second, ISAF was also mandated to assist the Afghan authorities in the maintenance of security in defined geographical areas in the absence of local security forces. Accordingly, ISAF was tasked not only to play a supportive role, but also to carry out executive security functions of its own.<sup>104</sup> Following NATO’s assumption of command over ISAF in August 2003, Security Council Resolution 1510 extended ISAF’s mandate to areas beyond Kabul and expanded it to include providing “security assistance for the performance of other tasks in support of the Bonn Agreement.”<sup>105</sup> While this enlarged the range of tasks ISAF carried out in support of the Afghan authorities, it did not restrict ISAF’s executive functions. On the contrary, their scope and intensity increased. In this respect, it is important to bear in mind the context in which ISAF operated.

All Security Council resolutions concerning ISAF’s mandate prominently recall Resolutions 1368 and 1373 adopted in response to the attacks of September 11, 2001.<sup>106</sup> These resolutions affirm the inherent right of individual and collective self-defense and affirm the need to combat by all

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101. *Id.*, Annex, ¶ 1.

102. *Id.*, Annex, ¶¶ 1, 2.

103. *Id.*, Annex, ¶ 3.

104. This was underlined by the pledge given by the participants in the Bonn talks to “withdraw all military units from Kabul and other urban centers or other areas in which the UN mandated force is deployed.” *Id.*, Annex, ¶ 4.

105. S.C. Res. 1510, *supra* note 95, ¶ 1.

106. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

means, in accordance with the UN Charter, threats to international peace and security caused by terrorist acts.<sup>107</sup> Evidently, the Security Council considered these resolutions relevant to ISAF's mandate. In fact, Resolution 1510 called upon ISAF to work in close consultation with the Operation Enduring Freedom coalition in the implementation of its tasks, while Resolution 1707 welcomed the increased coordination between ISAF and the coalition.<sup>108</sup> Moreover, it must be recognized that ISAF operated in the context of an ongoing NIAC involving itself and the Afghan authorities on one side and insurgents and other opposing forces on the other side.<sup>109</sup> Around the time of Mr. Mohammed's detention, ISAF's strength stood at close to 150,000 personnel, including around 9,500 British troops.<sup>110</sup> Following the adoption of a more robust posture in 2009,<sup>111</sup> ISAF's mission as defined by NATO was to conduct "comprehensive, population-centric counterinsurgency operations" and support the Afghan authorities "in order to neutralize the enemy, safeguard the people, enable establishment of acceptable governance, and provide a secure and stable environment."<sup>112</sup> Accordingly, at the time of Mr. Mohammed's capture, ISAF assisted the Afghan authorities in re-establishing security in their country by, among other things, engaging in the conduct of hostilities in its area of operations.

In the light of the foregoing, it is entirely unconvincing to construe the relevant Security Council resolutions, including Resolution 1890, as restricting the use of force by ISAF to individual or unit-level self-defense and law enforcement only. This ignores the fact that the Security Council evidently considered ISAF to be involved in an armed conflict. Beginning with Reso-

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107. S.C. Res. 1368, *supra* note 106, pmbl. paras. 2, 3; S.C. Res. 1373, *supra* note 106, pmbl. paras. 4, 5.

108. S.C. Res. 1510, *supra* note 95, ¶ 2; S.C. Res. 1707, pmbl. para. 10, ¶ 4, U.N. Doc. S/RES/1707 (Sept. 12, 2006). *See also* S.C. Res. 1833, pmbl. para. 19, ¶ 5, U.N. Doc. S/RES/1833 (Sept. 22, 2008); S.C. Res. 1890, *supra* note 51, pmbl. para. 22, ¶ 5.

109. *See supra* note 26.

110. House of Commons Defence Committee, *Operations in Afghanistan*, Fourth Report of Session 2010–12, at 33–34 (July 6, 2011), available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/554/554.pdf>.

111. *See* Letter from Stanley A. McChrystal, General, U.S. Army, Commander, United States Forces—Afghanistan/International Security Assistance Force, Afghanistan, to Robert M. Gates, Secretary of Defense: COMISAF's Initial Assessment (Aug. 30, 2009), available at [http://media.washingtonpost.com/wp-srv/politics/documents/Assessment\\_Redacted\\_092109.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf).

112. ISAF OPLAN 38302 (Revision 4, Sept. 25, 2009), *quoted in* U.S. Department of Defense, *Report on Progress toward Security and Stability in Afghanistan* 11 (2010), available at [http://www.defense.gov/pubs/November\\_1230\\_Report\\_FINAL.pdf](http://www.defense.gov/pubs/November_1230_Report_FINAL.pdf).

lution 1776, the Security Council started to recall its resolutions on the protection of civilians in armed conflict and to make reference to the need to uphold international humanitarian law.<sup>113</sup> In Resolution 1890, it condemned “in the strongest terms all attacks, including Improvised Explosive Device (IED) attacks, suicide attacks and abductions, targeting civilians and Afghan and international forces” and stressed the need for sustained international efforts, including those of ISAF, to address the threat posed by the Taliban, Al-Qaida and other extremist groups.<sup>114</sup> It also expressed its serious concern with the high number of civilian casualties, recognized the additional efforts taken by ISAF and other international forces to minimize them, and called for compliance with international humanitarian and human rights law.<sup>115</sup> Given the nature of the threat posed by the insurgency, it is unrealistic to suggest that the Security Council did not authorize ISAF to address that threat through the conduct of hostilities against the armed groups involved. If ISAF had exceeded its mandate in doing so, the Security Council would have had ample opportunities to redraw or clarify the boundaries of its authorization. It never did so. Instead, the Council consistently welcomed ISAF’s efforts and expanded and extended its mandate on successive occasions.

### 3. Compliance with International Human Rights Law

Finally, Leggatt J also relied on the fact that Resolution 1890 expressly calls for compliance with international humanitarian and human rights law.<sup>116</sup> Two points are worth noting in this respect. First, in calling for compliance with these two bodies of law, the Security Council stopped short of declaring that they formally applied in the present context. Evidently, the Council must have believed this to be the case; otherwise it would not have invoked them. Nonetheless, the application of either body of law to ISAF operations remained subject to their respective rules governing their applicabil-

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113. S.C. Res. 1776, pmb. paras. 3, 12, U.N. Doc. S/RES/1776 (Sept. 19, 2007).

114. S.C. Res. 1890, *supra* note 51, pmb. paras. 12–14.

115. *Id.*, pmb. paras. 15, 16. On civilian casualties during this period, see United Nations Assistance Mission in Afghanistan & Afghanistan Independent Human Rights Commission, *2010 Annual Report on the Protection of Civilians in Armed Conflict in Afghanistan* (2011), available at [http://www.unama.unmissions.org/Portals/UNAMA/human rights/March PoC Annual Report Final.pdf](http://www.unama.unmissions.org/Portals/UNAMA/human%20rights/March%20PoC%20Annual%20Report%20Final.pdf).

116. *Mohammed*, *supra* note 16, ¶ 222.

ity.<sup>117</sup> Second, the Security Council invoked both humanitarian and human rights law, without addressing their relationship. However, simply by leaving this question open, it cannot be presumed that the Security Council intended to subject the conduct of military operations by ISAF to the more restrictive standards of international human rights law. Indeed, on such a view, it would have been superfluous for the Security Council to refer to international humanitarian law at all. Moreover, as we found earlier, those more restrictive standards would have prevented ISAF from carrying out the mandate to its full effect. Consequently, to the extent that the rules of the law of armed conflict governing the use of lethal force and other coercive measures against individuals displace or qualify the standards of international human rights law during armed conflict, the reference in Resolution 1890 to both bodies of law in fact undermines Leggatt J's reasoning.

Overall, the interpretation of ISAF's mandate adopted by the High Court is too restrictive. It is based on the assumption that ISAF was required to carry out its task in strict conformity with international human rights law and limit itself to using lethal force only for the purposes of individual self-defense and law enforcement. Our analysis of the Security Council's practice under Chapter VII, as well as the terms and context of the resolutions defining ISAF's mandate, demonstrates that this assumption is mistaken. ISAF was authorized and expected to engage actively in armed conflict. This means that it was authorized to operate pursuant to a conduct of hostilities paradigm, subject to the rules of the law of armed conflict, rather than a law enforcement paradigm.<sup>118</sup> Contrary to Leggatt J's conclusions, ISAF's authority to use lethal force was not limited to targeting only individuals who posed an imminent threat. Nor was its authority to detain individuals therefore limited to accepting their surrender and neutralizing the imminent threat they posed, pending their release or transfer to the Afghan authorities.<sup>119</sup> Additionally, in so far as States contributing

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117. For example, nothing suggests that the Security Council intended Resolution 1890 to extend, through its Chapter VII powers, the application of the ECHR either to ISAF as a whole or to the national contingents contributed by the contracting parties of the Convention. Had that been the case, it would have been quite superfluous for the High Court to consider the extraterritorial applicability of the Convention in the present case. See *Mohammed*, *supra* note 16, ¶¶ 116–48.

118. On the notion of these paradigms and the difference between them, see NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 83–90, 243–99 (2008).

119. Leggatt J accepted that the authority to use lethal force implies an authority to capture. *Mohammed*, *supra* note 16, ¶ 219. If ISAF was authorized to use lethal force be-

troops to ISAF acted pursuant to this authorization, it follows from the principles accepted by the European Court in *Al-Jedda* that they carried out obligations which prevailed, in accordance with Article 103 of the UN Charter, over any conflicting commitments they undertook in the ECHR.

#### IV. STATUS-BASED OPERATIONS IN NIACS

As we have just found, Security Council Resolution 1890 had two main legal effects. It authorized ISAF to take all necessary measures in order to implement its mandate, including the use of lethal force and other restrictive measures exceeding the limits of individual self-defense and law enforcement. And, in combination with Article 103, this authorization prevailed over the conflicting obligations imposed on the UK by Article 5 of the ECHR. The government argued that the same two legal effects also flowed from the rules of the law of armed conflict: the law of armed conflict provided a legal authority to detain Mr. Mohammed on security grounds and that authority displaced or qualified the stricter requirements of Article 5 of the Convention. As indicated earlier, Leggatt J dismissed both of these arguments. In this Section, we submit that the government's position is the more persuasive one.

##### A. Treaty Law

Leggatt J relied on a series of arguments to reject the government's submissions.<sup>120</sup> He examined in some detail the treaty rules applicable in NIACs, namely Common Article 3 of the Geneva Conventions (CA3) and AP II of 1977.<sup>121</sup> Neither set of rules confers an express authorization upon belligerent parties to detain individuals. Moreover, Leggatt J found that those rules also do not provide an implicit legal basis for detention. He offered five reasons for this conclusion.

##### 1. Lack of Express Authority

Leggatt J held that it was reasonable to assume that if CA3 and AP II were intended to confer an authority to detain persons in a NIAC, they would

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yond the confines of individual self-defense and law enforcement, it follows that it was authorized to detain individuals beyond those limits as well.

120. *Mohammed*, *supra* note 16, ¶¶ 228–68.

121. *Id.*, ¶¶ 234–51.

have done so in express terms, just as Article 21 of the Third Geneva Convention makes express provision for the power to detain prisoners of war in an international armed conflict.<sup>122</sup> Elsewhere in his judgment, Leggatt J himself supplies the reasons why it is not in fact reasonable to make such an assumption.<sup>123</sup>

As is well known, States have for a long time been reluctant to regulate the conduct of hostilities in civil wars as a matter of international law.<sup>124</sup> Their reluctance was motivated to a large extent by a desire not to grant any legitimacy and legal recognition to rebels, insurgents and other non-State actors taking up arms against them.<sup>125</sup> That attitude has not changed. Consequently, when States eventually agreed to extend the law of armed conflict to NIACs, initially in the form of CA3 and later through AP II, they did so subject to two key restrictions. First, the treaty rules applicable to NIACs were rudimentary compared to the rules applicable in international armed conflicts. Second, their primary aim was to offer legal protections to individuals from the adverse consequences of armed conflict. This humanitarian focus was key to securing the adoption of CA3 and AP II since the grant of minimum protections to rebels does not entail the grant of legitimacy or status.<sup>126</sup> By contrast, the conferral of prisoner of war sta-

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122. *Id.*, ¶ 242. Article 21 of the Third Geneva Convention declares that the “Detaining Power may subject prisoners of war to internment” and goes on to impose various conditions on the exercise of this power. Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. See, similarly, Articles 42–43 and 78 of the Fourth Geneva Convention concerning the internment of civilians where necessary, including on grounds of security. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

123. See *Mohammed*, *supra* note 16, ¶ 245.

124. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 317–18 (2d ed. 2000); LAURA PERNA, *THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS* 49–60, 99–107 (2006); SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 9–53 (2012).

125. Nathaniel Berman, *Privileging Combat: Contemporary Conflict and the Legal Construction of War*, 43 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 1, 19 (2004). See also Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 291, 292–93 (1983); EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 69–74 (2010).

126. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 44 (Jean Pictet ed., 1958); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 4500 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

tus on rebel fighters would have implied some form of legal recognition and therefore remains controversial to this very day.<sup>127</sup> Similarly, any attempt to prescribe the grounds for detention in NIACs would have given rise to the same controversy. Seen from this perspective, it is not at all reasonable to assume that CA3 and AP II would have spelled out the legal basis for detention in express terms. In any event, the fact that they fail to do so does not exclude the possibility, either in logic or in law, that international law may contain alternative legal bases for detention in NIACs.

## 2. No Implied Language

In a closely related argument, Leggatt J held that there is nothing in the language of CA3 and AP II which suggests that they were meant to confer an authority to detain by implication.<sup>128</sup> Both sets of rules take for granted, as a matter of fact, that in times of armed conflict persons are deprived of their liberty. Both therefore accord certain safeguards to such persons without, however, providing a legal basis for their detention. This is a plausible interpretation of the terms of CA3 and AP II if viewed in isolation. However, the existence of an implicit legal authority to detain must be assessed with reference to the context, object and purpose of CA3 and AP II. In any event, even if correct, this interpretation merely posits the absence of an implicit legal basis for detention in CA3 and AP II, but once again does not rule out the existence of such a legal basis under customary law.

## 3. Purely Humanitarian Purpose

Leggatt J declared that the “purely humanitarian purpose” pursued by CA3 and AP II is inconsistent with the idea that they were designed to confer a legal power of detention.<sup>129</sup> There is nothing objectionable about this argument if it was merely meant to repeat the earlier finding that CA3 and AP II grant certain safeguards to detainees without providing a legal basis for their detention. However, it is misconceived if it was meant to suggest that status-based detention is incompatible with the humanitarian nature of

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127. See SIVAKUMARAN, *supra* note 124, at 513–26; ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 451–59 (2013).

128. *Mohammed*, *supra* note 16, ¶ 243. To similar effect, see John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISRAEL LAW REVIEW 396, 404 (2007).

129. *Mohammed*, *supra* note 16, ¶ 244.

CA3 and AP II. Humanitarian considerations are, of course, at the forefront of the law of armed conflict.<sup>130</sup> Indeed, it is popular nowadays to assume that they are its main purpose.<sup>131</sup> Writing in 1952, Hersch Lauterpacht already advised:

We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passions. This, and not the regulation and direction of hostilities, is its essential purpose.<sup>132</sup>

However, contrary to Lauterpacht's suggestion, humanitarian objectives have never been the sole preoccupation of the law of armed conflict. Its other purpose has always been the regulation of hostilities.<sup>133</sup> The detailed rules of AP I concerning targeting attest to the fact that rules designed to protect the victims of war coexist with rules designed to regulate the conduct of hostilities to this very day.<sup>134</sup> Focusing on its humanitarian aspects at the expense of its warfighting dimension ignores the dual character of the law of armed conflict.<sup>135</sup> This approach also overlooks two im-

130. *E.g.*, the famous Martens clause in the preamble of Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403. On the uncertain meaning and effect of the clause, see Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INTERNATIONAL REVIEW OF THE RED CROSS 125 (1997); Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUROPEAN JOURNAL OF INTERNATIONAL LAW 187 (2000); Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 78 (2000).

131. According to the ICJ, at the heart of the principles and rules of the law of armed conflict is the "overriding consideration of humanity." *Nuclear Weapons*, *supra* note 6, ¶ 95. *See also* Prosecutor v. Furundžija, IT-95-17/1, Judgment, ¶ 183 (Int'l Crim. Trib. for the former Yugoslavia Dec. 10, 1998).

132. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 363–64 (1952).

133. *E.g.*, Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AMERICAN UNIVERSITY LAW REVIEW 935, 943 (1982); Charles Garraway, "To Kill or Not to Kill?"—*Dilemmas on the Use of Force*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 499 (2009).

134. *See* IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVES, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I (2009); WILLIAM H. BOOTHBY, THE LAW OF TARGETING 77–116 (2012).

135. The dual character of the law is reflected in the traditional distinction between the rules relating to the protection of the victims of war, known as "Geneva law," and the rules regulating the conduct of hostilities, known as "Hague law." *See* François Bugnion, *Droit de Genève et Droit de La Haye*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 901



portant features that distinguish it from international human rights law.

Not all the rules of the law of armed conflict are humanitarian in their nature or origin.<sup>136</sup> As is well known, at the heart of the law of armed conflict lies a balance between military necessity and humanitarian considerations.<sup>137</sup> Whereas international human rights law confers rights and fundamental freedoms on every person without distinction and discrimination, the level of protection offered by the law of armed conflict to an individual depends on his or her legal status on the battlefield.<sup>138</sup> By stipulating that attacks may only be directed against military objectives, the law of armed conflict gives effect to humanitarian imperatives through shielding civilians and civilian objects from hostilities.<sup>139</sup> However, in the same breath, it also recognizes that the use of combat power against combatants and military objects is permissible on the basis of their status as military objectives.<sup>140</sup> Status-based detention in armed conflict is therefore perfectly compatible with the humanitarian aspirations of the law of armed conflict.

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(2001). With the adoption of AP I, these two strands of the law have become even more closely intertwined. See Richard J. Erickson, *Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict*, 19 VIRGINIA JOURNAL OF INTERNATIONAL LAW 557 (1979); *Nuclear Weapons*, *supra* note 6, ¶ 75. However, this does not mean that “Hague law” has been superseded or abandoned.

136. G.I.A.D. Draper, *Humanitarian Law and Human Rights*, ACTA JURIDICA 193, 199–201 (1979).

137. E.g., G.I.A.D. Draper, *Military Necessity and Humanitarian Imperatives*, 12 MILITARY LAW AND THE LAW OF WAR REVIEW 129 (1973); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 4–6 (2d ed. 2010); Schmitt, *supra* note 23; Mary Ellen O’Connell, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 1, 34–36 (Dieter Fleck ed., 3d ed. 2013). Cf. UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* ¶ 2.4.1 (2004) [hereinafter UK MANUAL OF THE LAW OF ARMED CONFLICT].

138. See Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICHIGAN STATE JOURNAL OF INTERNATIONAL LAW 299 (2011). On the status of individuals on the battlefield, see SOLIS, *supra* note 21, at 186–239. While the law of armed conflict thus discriminates between individuals based on their battlefield status, it does not discriminate between individuals enjoying the same status. See Jelena Pejic, *Non-discrimination and Armed Conflict*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 183 (2001).

139. See David Kretzmer, *Civilian Immunity in War: Legal Aspects*, in *CIVILIAN IMMUNITY IN WAR* 84 (Igor Primoratz ed., 2007).

140. BOOTHBY, *supra* note 134, at 60 (“The law of armed conflict and the customary law of targeting are rooted in the principle that a distinction must be made throughout the conflict between those who may be lawfully attacked and those who must be respected and protected.”).

Unlike human rights law, the law of armed conflict does not merely impose obligations on States. It has occasionally been suggested that this branch of international law is prohibitive, not permissive, in nature. According to this view, the law of armed conflict constitutes an elaborate set of rules crafted for the purpose of prohibiting the excesses of war by establishing a minimum level of humanitarian protection, without, however, providing any affirmative authorization to engage in warfighting.<sup>141</sup> It is difficult to reconcile this position with the permissive language found in various rules of the law of armed conflict, such as Article 22 of the Hague Regulations<sup>142</sup> or Article 21 of the Third Geneva Convention.<sup>143</sup> More fundamentally, such a view fails to appreciate the role that the principle of military necessity plays in the law of armed conflict. As Nils Melzer has explained, the “aim of military necessity as a principle of law has always been to provide a realistic standard of conduct by permitting those measures of warfare that are reasonably required for the effective conduct of hostilities, while at the same time prohibiting the infliction of unnecessary suffering, injury and destruction.”<sup>144</sup> The principle therefore serves both a restrictive and a permissive function at the same time. The permissive function was expressed by the United States Military Tribunal at Nuremberg in the *Hos-tages* case as follows:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war;

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141. Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 656, 666–69 (Andrew Clapham & Paola Gaeta eds., 2014).

142. Regulations Respecting the Laws and Customs of War on Land art. 22, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 (“The *right* of belligerents to adopt means of injuring the enemy is not unlimited.” (emphasis added)).

143. *Supra* note 122. In *Hassan*, the European Court accepted that the Third and Fourth Geneva Conventions confer “powers” upon State parties to an international armed conflict. *Hassan*, *supra* note 13, ¶ 105.

144. MELZER, *supra* note 118, at 279–80.

it allows the capturing of armed enemies and others of peculiar danger.<sup>145</sup>

As a general principle, military necessity it is not sufficiently precise to provide detailed guidance on what are permissible aims, means and methods of warfare, and what are not. Rather, it falls to the positive rules of the law of armed conflict, as laid down in the applicable treaties and embodied in customary international law, to provide that guidance and thereby give military necessity concrete meaning. Military necessity therefore operates as a background principle, woven into the fabric of the law of armed conflict in two main ways. First, it maintains a degree of flexibility in the application of the law by serving as an express exception to specific rules.<sup>146</sup> Second, and more importantly for our purposes, military necessity feeds into the creation of positive rules as a permissive principle.<sup>147</sup> Many, though not necessarily all, prohibitions of the law of armed conflict contain as their flipside varying degrees of permissions.<sup>148</sup> To assume that everything which is not expressly prohibited in the law of armed conflict is permissible does not quite capture the complex interplay between humanitarian considerations and military necessity.<sup>149</sup> However, in some cases, permissions are in fact implied in the law, even though they may not be stated expressly.<sup>150</sup> As we saw, the duty of distinction channels lawful violence, exposing military objectives to attack while shielding civilians.<sup>151</sup> This permissive element of the duty of distinction is confirmed by the longstanding, consistent and general practice of States of exercising their liberty to conduct status-based operations against enemy military objectives within the limits laid down by

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145. *United States v. Wilhelm List and Others (The Hostages Case)*, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 66 (1949). *See also* William Gerald Downey Jr., *The Law of War and Military Necessity*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 251 (1953).

146. *Cf.* AP I, *supra* note 2, art. 51(3). *See* Emily Camins, *The Past as Prologue: The Development of the “Direct Participation” Exception to Civilian Immunity*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 853 (2008). For other examples, see Hillaire McCoubrey, *The Nature of the Modern Doctrine of Military Necessity*, 30 MILITARY LAW AND THE LAW OF WAR REVIEW 215, 229–37 (1991).

147. Nobuo Hayashi, *Military Necessity as Normative Indifference*, 44 GEORGETOWN JOURNAL OF INTERNATIONAL LAW 675, 717–18 (2013).

148. *Id.* at 737–49; Corn, *supra* note 22, at 92.

149. As a principle of law, military necessity is not some form of extra-legal freedom. *Cf.* McCoubrey, *supra* note 146, at 219–21. On different constructions of the term, see Nobuo Hayashi, *Contextualizing Military Necessity*, 27 EMORY INTERNATIONAL LAW REVIEW 190 (2013).

150. *Id.* at 234–35; Hayashi, *Military Necessity as Normative Indifference*, *supra* note 147, at 747–48.

151. Berman, *supra* note 125, at 5.

the law of armed conflict. Once again, these points underline that an implied authorization for detention in NIACs may well exist in rules of the law of armed conflict other than CA3 and AP II.

#### 4. Principle of Equal Application

Leggatt J held that recognizing a legal basis for detention in AP II would have entailed extending that authority to dissident and rebel armed groups as well, which surely could not have been intended.<sup>152</sup> This stretches the principle of the equal application of the law of armed conflict too far.<sup>153</sup> The States negotiating the Geneva Conventions of 1949 and their Additional Protocols resisted creating the impression that they were recognizing any belligerent rights for non-State actors or conferring a belligerent status on them. In fact, CA3 explicitly states that its application “shall not affect the legal status of the Parties to the conflict.” As the commentary on CA3 explains, the inclusion of this clause was essential to secure its adoption by the negotiating States.<sup>154</sup> The language, structure and negotiating history of CA3 and AP II thus demonstrate that States were not prepared to accord the same belligerent status and rights to non-State actors which they themselves enjoyed.

This can mean only one of two things for the principle of equal application. First, if the principle demands that all belligerents must enjoy the same status and rights and CA3 does not confer the full panoply of belligerent status and rights on non-State actors, then the only logical conclusion is that the parties to the Geneva Conventions and AP II gave up their status and rights as States and assumed the same status and rights as non-State actors. This not only contradicts commonsense, but also the plain language of CA3, which declares that it does not affect the legal status of the parties, State and non-State alike, to the conflict. In fact, CA3 thereby conserves any pre-existing inequality between the belligerent status and rights of State and non-State parties to a NIAC. This compels us to adopt a second, nar-

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152. *Mohammed*, *supra* note 16, ¶ 245.

153. On the principle, see Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 931 (2008); Adam Roberts, *The Principle of Equal Application of the Laws of War, in JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS* 226 (David Rodin & Henry Shue eds., 2008).

154. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 126, at 44. *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 126, ¶ 4499.

rower reading of the principle of equality: namely, that CA3 and AP II provide for equality of *protection*, but not equality of *belligerent status and rights*, between the State and non-State parties to a NIAC.<sup>155</sup> Accordingly, the fact that CA3 and AP II do not contain an express legal basis for detention does not prove that States do not enjoy the authority to detain persons in NIACs, nor does the express or implicit existence of such a right for States require them, in logic or in law, to extend the same right to non-State actors.

##### 5. Lack of Procedural Safeguards

Finally, Leggatt J held that in the absence of detailed rules governing “who may be detained, on what grounds, in accordance with what procedures or for how long,” CA3 and AP II could not possibly have been intended to provide for a power to detain.<sup>156</sup> Two points are worth noting in this respect.

First, just because the law of armed conflict does not regulate the exercise of a particular power in great detail does not mean that it does not recognize the existence of that power at all. Consider the rule in Article 51(3) of AP I, whereby civilians enjoy general protection against the dangers arising from military operations and may not be the object of attack “unless and for such time as they take a direct part in hostilities.”<sup>157</sup> AP I does not provide any further guidance as to what direct participation in hostilities entails, when exactly it commences and ceases, or how and through what procedure an act of direct participation should be identified.<sup>158</sup> Yet this lack of guidance does not prevent Article 51(3) from rendering such civilians

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155. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 126, ¶ 4458 (“in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal”); Berman, *supra* note 125, at 20, describes this as the “statist and governmental biases” of the law of armed conflict.

156. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 126, ¶ 246. It should be emphasized that the gap is mainly procedural. The rules governing the treatment of detainees are much more robust. See CRAWFORD, *supra* note 125, at 78–117.

157. See Camins, *supra* note 146.

158. On some of these questions, see Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, *id.* at 697; Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, *id.* at 741.

liable to lethal attack.

Second, such regulatory gaps are often filled by other rules of law or by authoritative guidance.<sup>159</sup> This is not the place to study the rules of international law governing the conditions of deprivation of liberty in a NIAC. It suffices to note that they include other rules of the law of armed conflict,<sup>160</sup> rules of international human rights law<sup>161</sup> and relevant non-binding instruments.<sup>162</sup> Although these additional rules may not resolve all questions with absolutely certainty,<sup>163</sup> they do go a long way towards providing a detailed legal framework for detention in NIACs. In the light of these points, Leggatt J's conclusion that the absence of detailed procedural rules in CA3 and AP II "confirms that it is not the purpose of these provisions to establish a legal basis for detention" is not persuasive. Nor does the absence of such

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159. In the case of Article 51(3) of AP I, see INTERNATIONAL COMMITTEE OF THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2009) [hereinafter INTERPRETIVE GUIDANCE].

160. *E.g.*, rules defining the temporal scope of application of a NIAC. See SIVAKUMARAN, *supra* note 124, at 252–54. Or rules imported from the law of armed conflict applicable in international armed conflicts by analogy. See, *e.g.*, Knut Dörmann, *Detention in Non-International Armed Conflicts*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 347, 356 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies). See also Jelena Pejic, *Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375 (2005).

161. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 347–52 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). See also U.N. Human Rights Committee, General Comment No. 35: Article 9: Liberty and Security of Person, ¶ 66 (advance unedited version), U.N. Doc. CCPR/C/GC/35, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en); CRAWFORD, *supra* note 125, at 118–52.

162. *E.g.*, *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (2012), reprinted in 51 INTERNATIONAL LEGAL MATERIALS 1368 (2012), available at <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>; International Committee of the Red Cross, *Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict* (Regional Consultations 2012–13 Background Paper), available at <https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf>.

163. See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 201 (2011); John B. Bellinger III, *Legal Issues Related to Armed Conflict with Non-state Groups*, in PRISONERS IN WAR 251 (Sibylle Scheipers ed., 2010).

procedural rules exclude the possibility that there might be an alternative source for such a legal basis.

*B. Lethal Targeting and Detention in NIACs*

In the previous Section we have shown that neither the terms nor the purpose of CA3 and AP II are incompatible with the existence of a legal authority to detain persons in a NIAC based on their battlefield status. Although the language of CA3 and AP II suggests that these rules do not themselves provide an implicit legal basis for detention, in the light of the considerations set out in the previous Section, it is reasonable to read them as being based on an assumption that some implied authority to detain in NIACs does exist. However, at this point some may object that the foregoing considerations, although applicable and well-established in the case of international armed conflicts, do not apply with the same force to NIACs.<sup>164</sup> Of course, the legal framework governing the two types of armed conflicts is different. It is widely acknowledged, for example, that human rights considerations may apply with greater urgency in NIACs.<sup>165</sup> As the Inter-American Commission on Human Rights has observed in the *La Tablada* case, it is “during situations of internal armed conflict” that international human rights law and the law of armed conflict “most converge and reinforce each other.”<sup>166</sup> Notwithstanding these and other differences between international and non-international armed conflicts, the key point for

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164. E.g., Peter Rowe, *Is there a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?*, 61 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 697, 701–2 (2012). Ryan Goodman has argued that “if States have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they *a fortiori* possess the authority to undertake those practices in non-international conflict.” Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 48, 50 (2009). Bearing in mind the different character and trajectories of international and non-international armed conflicts, such a broad analogy goes too far. The authority to undertake particular practices in a NIAC cannot be derived from the corresponding authority available in international armed conflict by simple analogy. Rather, it must be derived from the regulation of the particular practice in question by the law of armed conflict applicable in NIACs, as we do in the present section.

165. E.g., Draper, *supra* note 136, at 205; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 34 (2004); Garraway, *supra* note 133, at 503.

166. *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 ¶ 160 (1997).

our purposes is that the principle of military necessity underlies the law of armed conflict applicable in both types of conflicts. This can be illustrated from two perspectives.

### 1. Military Necessity in NIACs

International human rights law recognizes that the right to life is not absolute, but subject to certain exceptions. Under Article 2(2)(c) of the ECHR the deprivation of life is not unlawful when it results from the use of force which is no more than absolutely necessary “in action lawfully taken for the purpose of quelling a riot or insurrection.” Although the use of lethal force pursuant to this provision remains tied to the law enforcement standard of “absolute necessity,” critically, it implies that quelling a riot or insurrection constitutes a legitimate aim for the use of force by the Contracting Parties.<sup>167</sup> Once the violence reaches the requisite level of intensity and organization,<sup>168</sup> the rules of the law of armed conflict in NIAC become applicable to the situation.<sup>169</sup> There is no reason why the use of lethal force for the

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167. *Stewart v. United Kingdom*, App. No. 10044/82, 39 Eur. Comm’n H.R. Dec. & Rep. 162, ¶ 27 (1984); *Güleç v. Turkey*, App. No. 21593/93, 28 E.H.R.R. 121, ¶ 71 (1998); *Finogenov and Others v. Russia*, App. Nos 18299/03, 27311/03, Eur. Ct. H.R., ¶ 218 (2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231#{"itemid":\["001-108231"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231#{). See LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM 169–71 (2011); DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 232–33 (3d ed. 2014).

168. Concerning this threshold, see SIVAKUMARAN, *supra* note 124, at 164–210; YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW 37–57 (2014). For a human rights-based argument in favor of a higher threshold of application *de lege ferenda*, see David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISRAEL LAW REVIEW 8 (2009).

169. Annyssa Bellal & Louise Doswald-Beck, *Evaluating the Use of Force During the Arab Spring*, 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 32 (2011). The law of armed conflict becomes applicable regardless of which party has caused the escalation in violence. However, as a matter of international human rights law, a State may not take measures which unilaterally escalate the violence to the level of a non-international armed conflict, as this would by definition amount to an unnecessary and disproportionate use of lethal force. In other words, the right to quell a riot or insurrection does not permit States to unilaterally create an armed conflict. See *id.* at 19. Indeed, measures taken to quell a riot must be aimed at “calming the violent behaviour” of the demonstrators. *Solomou v. Turkey*, App. No. 36832/97, Eur. Ct. H.R., ¶ 78 (2008). See also *Isaak v. Turkey*, App. No. 44587/98, Eur. Ct. H.R., ¶ 118 (2008). It has therefore been suggested that international human rights establishes a *jus ad bellum* of sorts for internal armed conflicts. See ELIAV



purposes of quelling the insurrection should suddenly cease to be a legitimate aim.<sup>170</sup> On the contrary, since the applicability of the law of armed conflict is triggered by an escalation of the level of violence, there is every reason to believe that the use of lethal force is now more, rather than less, necessary from the perspective of Article 2(2). If the ECHR admits that the use of lethal force is, in principle, necessary and legitimate in such circumstances, it is difficult to see why the law of armed conflict applicable in NIACs should not do likewise and give effect to this according to its own rules.<sup>171</sup> This point is supported by the fact that the principle of military necessity reflects “the sovereign right of a State to take measures in the defence of its vital interests.”<sup>172</sup> Although there is no single rule codifying a State’s right to use armed force in self-defense in its internal affairs,<sup>173</sup> international law recognizes that States do have a fundamental right to survival.<sup>174</sup> In so far as this right permits the use of force to ensure the State’s survival against internal threats,<sup>175</sup> we should expect to see it reflected in the rules of the law of armed conflict governing the conduct of hostilities in NIACs.

In fact, these rules, in particular the rules governing targeting, confirm that the permissive dimension of the principle of military necessity applies in NIACs. In recent years, the convergence between international human

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LIEBLICH, INTERNATIONAL LAW AND CIVIL WARS: INTERVENTION AND CONSENT 156–57 (2013).

170. Cf. William A. Schabas, *The Right to Life*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT, *supra* note 141, at 365, 385.

171. Accordingly, with the applicability of the law of armed conflict (*see supra* note 169), the State in question now may quell the riot or insurrection pursuant to the conduct of hostilities paradigm. *See* Melzer, *supra* note 118, 243–99.

172. McCoubrey, *supra* note 146, at 217.

173. The inherent right of individual and collective self-defense recognized by Article 51 of the UN Charter is available to States only in their international relations, meaning that the armed attack triggering the right of self-defense must be of an international character. As such, it is not available against purely internal attacks which do not entail the involvement of external actors. *See* TOM RUYTS, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 368–510 (2010).

174. *Nuclear Weapons*, *supra* note 6, ¶ 95. Cf. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 41–44 (1963).

175. It is generally admitted that States enjoy the right to put down a rebellion or insurgency. *See, e.g.*, COMMENTARY TO GENEVA CONVENTION IV, *supra* note 126, at 36; LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 60 (2002); OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 127–29 (2010); DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS, *supra* note 168, at 5.

rights law and the law of armed conflict has been accompanied by a growing convergence between the two branches of the law of armed conflict applicable in international and non-international armed conflicts.<sup>176</sup> The two processes are in fact related.<sup>177</sup> In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia identified the development of human rights doctrines as one of the factors driving the extension of the rules and principles of the law of armed conflict designed for international armed conflicts into the sphere of non-international armed conflicts.<sup>178</sup> According to the Tribunal, customary rules analogous to those applicable in international armed conflict have developed to govern NIACs in such areas as the protection of civilians from hostilities and the prohibition of certain means and methods of warfare.<sup>179</sup> Indeed, convergence extends to targeting.

Neither CA3 nor AP II accord immunity from attack to persons who directly or actively participate in hostilities.<sup>180</sup> Bearing in mind the dual character of the law of armed conflict, the reason for this lack of protection is, quite obviously, that such persons are treated as legitimate objectives of attack. However, as in the case of detention, the difficulty is that neither CA3 nor AP II confers an explicit right on States to attack insurgent fighters and civilians directly participating in hostilities. Nonetheless, their language suggests that such a right was implied by the drafters. First, AP II distinguishes between “persons” who benefit from fundamental guarantees under Article 4 and “civilians” who enjoy general protection against the dangers arising from military operations under Article 13. Since the concept of a “person” is broader than the concept of a “civilian,” the natural meaning of these words suggests that “persons” include civilians and non-civilians, that is, fighters. Second, Article 4(1) affords fundamental guarantees to two groups: “persons who do not take a direct part” in hostilities and persons “who have ceased to take part in hostilities.” The first group can only refer to innocent civilians who have not taken up arms since

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176. See Emily Crawford, *Blurring the Lines between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts*, 15 AUSTRALIAN INTERNATIONAL LAW JOURNAL 29 (2008); DINSTEIN, NON-INTERNATIONAL ARMED CONFLICTS, *supra* note 168, at 211–19.

177. Cf. SIVAKUMARAN, *supra* note 124, at 99.

178. *Prosecutor v. Tadić*, *supra* note 66, ¶ 97.

179. *Id.*, ¶ 127.

180. Only “[p]ersons taking no active part in the hostilities” benefit from the protections afforded by CA3(1), while Article 4(1) of AP II limits the fundamental guarantees set out in that provision to “persons who do not take a direct part or who have ceased to take part in hostilities.”

fighters by definition take a direct part in hostilities. The second group must therefore logically refer to civilians who have ceased to take a direct part in hostilities and to fighters who are *hors de combat*.<sup>181</sup> Two points follow from this. Insurgent fighters are not civilians and do not become civilians upon ceasing to take part in hostilities; otherwise the word “persons” would not have been used in preference of “civilians.” Fighters do not benefit from fundamental guarantees unless they have ceased to take part in hostilities by becoming *hors de combat*. In this respect, AP II mirrors the treatment of combatants in international armed conflict.

Even if this textual interpretation is not considered conclusive, it is hardly conceivable, reading the relevant provisions against their context,<sup>182</sup> that the drafters of CA3 and AP II meant to treat everyone in a NIAC as a civilian and did not foresee the status-based targeting of insurgent fighters.<sup>183</sup> As the commentary on CA3 notes, “it must be recognized that the

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181. Both of these points are confirmed by the negotiating history of AP II. Part II of the draft text prepared by the International Committee of the Red Cross, which served as the basis for the intergovernmental negotiations leading to the adoption of AP II, dealt with the humane treatment of persons in the power of the parties to the conflict. Draft Protocol Additional to Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 1973, in 1 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS pt. III (1978). Article 6 of the draft set out the fundamental guarantees which eventually became Article 4 of AP II. Article 7 of the draft afforded various protections to enemy *hors de combat* “in accordance with Article 6.” The relationship between Articles 6 and 7 and subsequent discussion during the drafting process confirm that the word “persons” used in Article 6 was intended to include enemy fighters. See 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 323–24, 332, 336 (1978). Article 7 of the draft (which during the negotiations became Article 22*bis*) was eventually deleted. However, it was recognized that enemy personnel *hors de combat* were still covered by the fundamental guarantees in Article 6 of the draft. See *id.* at 335; 4 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS ix (1978)).

182. In line with the general rule of interpretation set out in the Vienna Convention on the Law of Treaties Article 31(1)–(2), the terms of CA3 and AP II must be interpreted in their context and in the light of the object and purpose of the Geneva Conventions of 1949 and AP II, respectively.

183. Treating everyone as a civilian in NIACs would render the principle of distinction meaningless and inoperable. Marco Sassöli & Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts*, 90 INTERNATIONAL REVIEW OF THE

conflicts referred to in Article 3 are armed conflicts, with *armed forces on either side* engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.”<sup>184</sup> In fact, the commentary to AP II observes that members of organized armed groups “may be attacked at any time.”<sup>185</sup> Similarly, in the *La Tablada* case, the Inter-American Commission on Human Rights recognized that

when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack *to the same extent as combatants*. . . . When they attacked the La Tablada base, those persons involved clearly assumed the risk of a military response by the State.<sup>186</sup>

Meanwhile, the principal rules of the law of armed conflict governing targeting in international armed conflicts have passed into customary international law so as to now govern targeting in NIACs.<sup>187</sup> Underlying this development is, first, the notion that members of organized armed groups and civilians directly participating in hostilities are fighters and, second, that such persons constitute legitimate military objectives.<sup>188</sup> In line with the principle of distinction, attacks may only be directed against such persons. As the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* issued by the International Committee of the Red Cross (ICRC) illustrates,<sup>189</sup> the interplay between humanity and military necessity channels the use of lethal force in the same way in NIACs as

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RED CROSS 599, 607 (2008). See also Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 313, 329–30 (2011).

184. COMMENTARY TO GENEVA CONVENTION IV, *supra* note 126, at 36 (emphasis added).

185. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 126, ¶ 4789.

186. *Abella v. Argentina*, *supra* note 166, ¶¶ 178–79 (emphasis in original).

187. SIVAKUMARAN, *supra* note 124, at 336–86; BOOTHBY, *supra* note 134, at 440–50. Cf. UK MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 137, ¶¶ 15.6, 15.9.1.

188. Both points are now well-established in State practice, as reflected in authoritative restatements of the law. *E.g.*, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 161, pt. I; MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY rr. 1.1.2, 2.1.1 (2006), available at <http://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf>.

189. INTERPRETIVE GUIDANCE, *supra* note 159.

it does in international armed conflicts: it shelters civilians and those who are *hors de combat* from the adverse effects of war and permits States to conduct attacks against combatants/fighters and civilians directly participating in hostilities.<sup>190</sup> The caselaw of the European Court of Human Rights confirms this conclusion. In *Korbely*, the Court accepted that, from the perspective of CA3, the leader of an armed group of insurgents who has not laid down his arms or otherwise expressed his clear intention to surrender must be considered as taking an active part in hostilities and therefore constitutes a combatant subject to attack.<sup>191</sup>

## 2. An Inherent Right to Detain

So far we have established that the principle of military necessity applies in NIACs and permits States to use lethal force to conduct hostilities. These points are critical in the present context. This is so because, as we have indicated earlier, the government submitted “that the ability to detain insurgents, whilst hostilities are ongoing, is an essential corollary of the authorisation to kill them.”<sup>192</sup> Leggatt J rejected this argument for the following reason:

This argument justifies the capture of a person who may lawfully be killed. But it does not go further than that.<sup>193</sup> It therefore does not begin to justify the detention policy operated by the UK in Afghanistan. In terms of the present case, the argument would justify the arrest of [Serdar Mohammed] on the assumed facts, in circumstances where he was believed to represent an imminent threat. However, as soon as he had been detained and the use of lethal force against him could not be justified, the argument no longer provides a basis for his detention.<sup>194</sup>

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190. Cf. Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS* 307, 308 (Michael N. Schmitt ed., 2009) (Vol. 85, U.S. Naval War College International Law Studies); Corn & Jenks, *supra* note 183, at 325; Dieter Fleck, *The Law of Non-International Armed Conflict*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW*, *supra* note 137, at 581, 595.

191. *Korbely v. Hungary*, App. No. 9174/02, 50 E.H.R.R. 48, ¶¶ 89–94 (2010). Although in this case the Court was concerned with the principle that there can be no punishment without law as recognized by Article 7 of the ECHR, rather than the right to life pursuant to Article 2 of the Convention, this makes no difference with regard to its findings concerning CA3.

192. *Mohammed*, *supra* note 16, ¶ 252.

193. At this point, the judgment refers to DEBUF, *supra* note 127, at 389.

194. *Mohammed*, *supra* note 16, ¶ 253.

The logic of this argument is impeccable. If the authority to detain derives from the authority to kill—on the basis that the right to deprive a person of his life must imply the right to inflict the lesser evil to detain him: *a maiore ad minus*—it follows that detention cannot be permissible in broader circumstances than those governing killing. If killing is not permissible, then neither is detention. Where Leggatt J errs, with respect, is not the logic of the argument, but its opening premise. The law of armed conflict authorizes States to attack two groups of persons: civilians directly participating in hostilities and members of organized armed groups carrying out a continuous combat function. The justification and conditions for attack differ in these two cases, as do the conditions governing their detention.<sup>195</sup>

As regards the first group, CA3 and Article 13(3) of AP II stipulate that civilians lose their immunity from attack for such time as they are directly participating in hostilities. According to the ICRC's *Interpretive Guidance* to qualify as direct participation in hostilities, an act must satisfy three cumulative criteria,<sup>196</sup> known as the threshold of harm,<sup>197</sup> direct causation<sup>198</sup> and belligerent nexus.<sup>199</sup> The details need not detain us here, except that the threshold of harm refers to harm of a "specifically military nature," such as acts of sabotage.<sup>200</sup> In contrast to the human rights standards on which Leggatt J seems to rely in the passage quoted above, CA3 and Article 13(3) therefore permit a person to be lawfully killed even where he or she does

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195. Leggatt J's reasoning closely follows that of DEBUF, *supra* note 127. Debuf denies that there is an inherent right to intern in NIACs. *Id.* at 464–86. She argues that the authority to target civilians directly participating in hostilities does not include an authority to intern them after capture since at that point they will have regained their immunity from attack. *Id.* at 389. Although this is correct, she fails to consider that different considerations apply to persons carrying out a continuous combat function since such persons are not civilians. *See infra* notes 202–8 and accompanying text.

196. INTERPRETIVE GUIDANCE, *supra* note 159, at 46–64.

197. "In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack." *Id.* at 47.

198. "In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part." *Id.* at 51.

199. "In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another." *Id.* at 58.

200. *Id.* at 47.

not present an “imminent threat” to life. Because such persons are civilians, they are subject to attack only for the limited period that they are actively engaged in hostilities.<sup>201</sup> Once they discontinue their direct engagement for whatever reason, their temporary legal exposure to targeting comes to an end and their underlying immunity from attack is fully restored.<sup>202</sup> Consequently, if the direct participation of a civilian in hostilities comes to an effective end with his capture, he may no longer be subject to attack. As Leggatt J correctly recognized, if he may not be killed, he may not be detained on this basis either.

The second group of persons consists of members of organized armed groups who carry out a continuous combat function. As the ICRC’s *Interpretive Guidance* explains, organized armed groups are the armed forces, in a functional sense, of a non-State party to a NIAC.<sup>203</sup> Since membership in insurgent forces has no basis in domestic law, the ICRC’s position is that “membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.”<sup>204</sup> Such a continuous combat function “requires lasting integration into an organized armed group.” For this reason, persons carrying out a continuous combat function cease to be civilians for as long as they remain members in the organized armed group by virtue of their continuous combat function.<sup>205</sup> During this time, they are legitimate military objectives and may be targeted on the basis of their status alone, irrespective of whether they pose an imminent threat or not, just like combatant members of a State’s armed forces. The capture of a person carrying out a continuous combat function does not, in itself, sever his lasting integration into the organized armed group to which he belongs.<sup>206</sup> Accordingly, he does not

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201. *Id.* at 70–71. This leads to a so-called “revolving door” of civilian protection, which has received considerable critical comment. *E.g.*, Boothby, *supra* note 158, at 753–58; Watkin, *supra* note 158, at 686–90.

202. INTERPRETIVE GUIDANCE, *supra* note 159, at 71.

203. *Id.* at 32.

204. *Id.* at 33.

205. *Id.* at 71. *See also id.* at 27–28.

206. According to the *Interpretive Guidance*, membership in an organized armed group on grounds of a continuous combat function ceases when the person disengages from carrying out such a function by means of conclusive behavior to this effect. *See id.* at 72. What constitutes such conclusive behavior is a matter of debate. *See* Boothby, *supra* note 158, at 759–61. However, disengagement clearly requires more than a temporary lapse or inability in carrying out the continuous combat function. Otherwise there would be little

become a civilian merely by virtue of his capture.<sup>207</sup> He remains a fighter subject, in principle, to direct attack for as long as his membership in the organized armed group continues. However, the authority to attack him is merely suspended during his detention, for persons who are *hors de combat* may not be made the subject of attack.<sup>208</sup> The authority revives, however, as soon as he is no longer *hors de combat*, engages in hostile acts against his captors or attempts to escape.<sup>209</sup> Consequently, the authority to kill persists for as long as membership in the organized armed group persists, although that authority is suspended following capture and during detention. Contrary to Leggatt J's finding, the detaining State's continued authority to kill a person carrying out a continuous combat function is therefore capable of serving as a legal basis for its authority to detain him.

We should emphasize that humanitarian and operational considerations equally compel this conclusion. The authority to attack and the authority to detain are functionally linked. As in the case of combatants in an international armed conflict,<sup>210</sup> the internment of members of organized armed groups carrying out a continuous combat function is authorized to prevent them from returning to the battlefield *in lieu* of killing them.<sup>211</sup> Detention thus gives effect to the principle of humanity: it is the lesser evil. However, a decision to detain also reflects military considerations. From an operational perspective, killing every single insurgent may not be necessary and, in fact, may well be counter-productive. Detention is often preferable to attack, since it permits the detaining State to gather intelligence and is more conducive to political reconciliation at the end of the conflict. Denying States engaged in a NIAC the authority to detain persons who carry out a continuous combat function for preventative reasons would frustrate these humanitarian and operational considerations. It would also have meant, for example in Afghanistan, that such persons could not be detained for more than 96 hours, but could be killed, in principle, immediately upon their re-

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to distinguish civilians participating directly in hostilities on a "revolving door" basis from fighters carrying out a continuous combat function and, therefore, between conduct-based and status-based distinction. See Corn & Jenks, *supra* note 183, at 341–44, *passim*. See also BOOTHBY, *supra* note 134, at 162.

207. *Cf.* MOIR, *supra* note 175, at 60.

208. This, of course, is stipulated in express terms in CA3. It also reflects customary international law. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 161, r. 47.

209. *Id.*

210. DEBUF, *supra* note 127, at 228–30.

211. Berman, *supra* note 125, at 9–10.



lease from that short period of detention. This is utterly absurd—and it is not what the law requires.

Moreover, detention is accepted and well-established in NIACs as a matter of State practice. In this respect, Leggatt J seems to have underestimated the significance of the Copenhagen Process Principles and Guidelines.<sup>212</sup> These principles involve a multilateral attempt to formulate standards governing the treatment of individuals detained in NIACs. Importantly, the principles refer to the practice of detention on security grounds. Leggatt J held that this was of no weight, noting that the commentary explicitly states that the principles “cannot constitute a legal basis for detention.”<sup>213</sup> Indeed, the participating States neither intended to create any new authorizations nor purported to recognize any practice as reflective of customary law.<sup>214</sup> This choice is readily understandable, for it reflects the imperative of not bestowing status or legitimacy upon belligerent non-State actors. Crucially, however, the principles do not exclude the possibility that such a legal basis already exists under international law.<sup>215</sup> In fact, the “[p]articipants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.”<sup>216</sup>

The terms, purpose and tone of the principles all suggest that the participating States proceeded on the assumption that an authorization to detain exists in international law. In this respect, it is important to note that the ICRC has recently expressed disagreement with *Mohammed* and endorsed the existence of a legal basis for status-based operations in NIACs:

The fact that Article 3 common to the Geneva Conventions neither expressly mentions internment, nor elaborates on permissible grounds or process, has become a source of different positions on the legal basis for internment by States in an extraterritorial NIAC. One view is that a legal basis for internment would have to be explicit, as it is in the Fourth Geneva Convention; in the absence of such a rule, IHL cannot provide it

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212. *Copenhagen Process: Principles and Guidelines*, *supra* note 162. See Thomas Winkler, *The Copenhagen Process on Detainees: A Necessity*, 78 NORDIC JOURNAL OF INTERNATIONAL LAW 489 (2009); Bruce “Ossie” Oswald & Thomas Winkler, *The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations*, 83 NORDIC JOURNAL OF INTERNATIONAL LAW 128 (2014).

213. *Mohammed*, *supra* note 16, ¶¶ 264–66.

214. *Copenhagen Process: Principles and Guidelines*, *supra* note 162, cmt. ¶ 16.2.

215. *Id.*, princ. 16.

216. *Id.*, ¶ III.

implicitly.<sup>217</sup> Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC. This position is based on the fact that internment is a form of deprivation of liberty which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II—which has been ratified by 167 States—refers explicitly to internment.<sup>218</sup>

Finally, it is useful to recall that, according to information received by the Ministry of Defence, Mr. Mohammed was a senior Taliban commander.<sup>219</sup> If correct, it seems likely that he qualified as an individual carrying out a continuous combat function. According to the *Interpretive Guidance*, “individuals whose continuous function involves the . . . command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.”<sup>220</sup> His detention by UK forces was therefore authorized under the law of armed conflict for such time as his membership in the organized armed group to which he belonged continued.<sup>221</sup> As we have shown, the legal basis for status-based detention is both implicit in the scheme of CA3 and AP II, as a necessary corollary of the implicit authority to kill, and founded in customary law.

### C. Lex Specialis

The final question that remains to be considered is whether the UK’s authority to detain Mr. Mohammed under the law of armed conflict prevails over the conflicting obligation imposed on it by Article 5 of the ECHR. Before turning to Leggatt J’s reasons for denying that any authority to de-

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217. At this point, the Opinion Paper cites *Mohammed*, *supra* note 16.

218. International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges* (Opinion Paper, Nov. 2014), available at <https://www.icrc.org/en/download/file/1980/security-detention-position-paper-icrc-11-2014.pdf>. See also Jelena Pejic & Cordula Droege, *The Legal Regime Governing Treatment and Procedural Guarantees for Persons Detained in the Fight against Terrorism*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 527, 552–53 (Larissa van den Herik & Nico Schrijver eds., 2013).

219. *Mohammed*, *supra* note 16, ¶ 10.

220. INTERPRETIVE GUIDANCE, *supra* note 159, at 34.

221. It should be clear from the foregoing analysis, but is worth underlining that the authority to detain in NIAC is limited: not every individual taking up arms in the so-called “war on terror” may be detained on this basis. See, e.g., Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS LAW REVIEW 1169 (2011). A determination must be made on the facts of each individual case.

tain prevailed, it is useful to make a few more general points.

### 1. Norm Conflict: Real or Apparent?

In the present case, a normative conflict exists between the rules of the law of armed conflict and the European Convention. The law of armed conflict authorized the UK to detain Mr. Mohammed for preventative reasons on the basis of his membership in an organized armed group. However, Article 5(1) of the European Convention stipulates that no one shall be deprived of his liberty save in the five exceptional circumstances listed in subparagraphs (a) to (f).

As the European Court explained in *Hassan*, none of these permissible grounds of detention covers interment and preventative detention where there is no intention to bring criminal charges within a reasonable period of time.<sup>222</sup> In fact, the Court took the firm view that detention of the kind foreseen under the Third and Fourth Geneva Conventions is not congruent with any of the exceptions set out in subparagraphs (a) to (f).<sup>223</sup> Notwithstanding the Court's position, it may be thought that there is no real conflict between these norms at all. The law of armed conflict merely permits internment and preventative detention without actually imposing a duty on States to make use of it. The conflict between the two norms is therefore only an apparent one since it can be resolved quite easily by the States concerned themselves: they merely have to refrain from exercising their authority to intern in favor of the prohibition contained in Article 5 of the Convention. Indeed, this is what the European Court seemed to imply in *Al-Jedda*.<sup>224</sup> However, this is not an attractive approach.

First, it would bring about the complete humanization of the rules governing the conduct of warfare. The law of armed conflict imposes an extensive set of obligations on States, and also grants them certain authorizations. However, these authorizations, for example the right to attack or to intern enemy combatants, are formulated as permissions, not as obligations. No State is bound by the law of armed conflict to engage in status-based operations. Consequently, if we were to deny that a norm conflict may arise between authorizations and obligations, States would have to forego any of the authorizations granted by the law of armed conflict

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222. *Hassan*, *supra* note 13, ¶ 97.

223. *Id.*

224. *Al-Jedda*, European Court, *supra* note 12, ¶ 107. *Cf.* Krieger, *supra* note 12, at 426–27.

where these are inconsistent with their human rights obligations. When faced with a more permissive and a stricter rule of either international human rights law or the law of armed conflict, the same logic would also compel States to comply with the stricter rule. As a result, the conduct of warfare would be governed in its entirety by prohibitions of the most restrictive kind. As we have suggested earlier, this is undesirable as it drives the convergence between the two legal regimes too far.<sup>225</sup> Domestic law is incapable of reversing this outcome. No State may invoke its domestic law as a justification for its failure to perform its treaty obligations.<sup>226</sup> Consequently, States may not rely on any authorizations to conduct hostilities granted under their domestic law where such authorizations conflict with their international human rights obligations.

Second, this restrictive approach is not supported by the law. It is perfectly possible for norm conflicts to arise between authorizations and obligations.<sup>227</sup> A norm may authorize a State to engage in a certain conduct, while a different norm may prohibit it from performing that same conduct. In such cases, a conflict exists if the authorization is a strong one in the sense of a Hohfeldian privilege or liberty.<sup>228</sup> The hallmark of such liberties is that the authorization (a permission to do X) is not restricted by a conflicting obligation (a duty to refrain from doing X). It is clear that the permissive aspect of the principle of military necessity confers such Hohfeldian liberties on States party to an armed conflict *within* the framework of the law of armed conflict.<sup>229</sup>

However, do the authorizations granted by the law of armed conflict also retain their character as Hohfeldian liberties when they meet restrictions imposed by international human rights law? Put differently: do law of armed conflict authorizations prevail over human rights law obligations? To our mind, international practice suggests that the answer is affirmative. It is now well-established that the relationship between the law of armed conflict and international human rights law is governed by the *lex*

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225. See *supra* notes 22–24 and accompanying text.

226. Vienna Convention on the Law of Treaties, *supra* note 84, art. 27. See Kirsten Schmalenbach, *Article 27: Internal Law and Observance of Treaties*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 453 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

227. See Erich Vranes, *The Definition of “Norm Conflict” in International Law and Legal Theory*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 395 (2006).

228. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE LAW JOURNAL 16, 32–44 (1913).

229. Hayashi, *Military Necessity as Normative Indifference*, *supra* note 147, at 684.

*specialis* principle.<sup>230</sup> Putting aside for a moment the questions surrounding its meaning and legal effect,<sup>231</sup> the widespread reliance on the principle demonstrates that States and international courts do not take the view that human rights norms simply override the rules of the law of armed conflict. As others have shown, international courts try to resolve conflicts between the two legal regimes through harmonious interpretation and other means, rather than admit that rule prevails over the other.<sup>232</sup>

However, where such conflict avoidance is not possible, in particular in the context of status-based operations,<sup>233</sup> we believe that the consistent and widespread conduct of such operations in contemporary State practice demonstrates that the conflict is to be resolved in favor of the authorizations contained in the law of armed conflict. If the adoption of the Additional Protocols of 1977 is “proof that a separate set of rules for armed conflicts is in fact what States want,”<sup>234</sup> then the passing into customary international law of some of their principal provisions regulating the con-

230. See *Nuclear Weapons*, *supra* note 6, ¶ 25. On the principle generally, see Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW 27 (2005); Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., May 1–June 9, July 3, Aug. 11, 2006, at 34–64, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

231. The application of the principle in the present context has not passed without criticism. See Nancy Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship*, 40 ISRAEL LAW REVIEW 357 (2007); Marko Milanović, *The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed., forthcoming), available at <http://ssrn.com/abstract=2463957>. According to Milanović, “[t]he appeal of *lex specialis* lies in the veneer of antiquity of its Latin formula, in its apparent formality, simplicity and objectivity. But all it really does is disguise a series of policy judgments about what outcomes are the most sensible, realistic and practicable in any given situation.” *Id.* at 30. Milanović may be right about the veneer of antiquity, but ultimately it is of little consequence by what name we call the principle. However, to dismiss it as a mere instrument of policy judgment wrongly denies its value as a tool of *formal legal* reasoning and means for expressing *legal* choices made by States.

232. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 237–74 (2003); Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 69, 73 (2009); Marko Milanović, *A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 459, 468–70 (2009).

233. See *supra* note 22.

234. Dietrich Schindler, *The International Committee of the Red Cross and Human Rights*, 19 INTERNATIONAL REVIEW OF THE RED CROSS 3, 14 (1979).

duct of hostilities for both international and non-international armed conflicts is proof that the States still want the core distinguishing features of this set of rules to prevail.

## 2. Applying the *Lex Specialis* Principle

Leggatt J took a different view. In response to the government's submission that Article 5 of the Convention was displaced or qualified through the operation of the *lex specialis* principle, he distinguished three different understandings of the principle—strong, weaker and modest—based on the varying strength of their intended legal effects.<sup>235</sup> The strong version of *lex specialis* holds that the law of armed conflict displaces international human rights law in its entirety in times of armed conflict.<sup>236</sup> This total displacement thesis does not reflect the prevailing view in international practice<sup>237</sup> and was given short shrift by Leggatt J in the present case.<sup>238</sup>

The modest version suggests that *lex specialis* should be used as a principle of interpretation. Notwithstanding their structural differences, international humanitarian and human rights law are complementary in many respects.<sup>239</sup> The principle of *lex specialis* draws on this natural complementarity in an attempt to interpret and apply the two legal regimes in a manner which renders them mutually reinforcing. In some cases, such an interpretative approach is capable of avoiding norm conflicts. This is how the ICJ used the principle in its advisory opinion in the *Nuclear Weapons* case. Having noted that the right not to be arbitrarily deprived of one's life pursuant to Article 6 of the International Covenant on Civil and Political Rights (ICCPR) continues to apply, in principle, in times of armed conflict, the Court declared that "[t]he test of what is an arbitrary deprivation of life . . . falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."<sup>240</sup> More recently, the UN Human Rights Committee applied the prin-

235. *Mohammed*, *supra* note 16, ¶¶ 269–94. See also Milanović, *supra* note 231, at 24–34.

236. *Mohammed*, *supra* note 16, ¶ 274.

237. DOSWALD-BECK, *supra* note 167, at 8.

238. *Mohammed*, *supra* note 16, ¶ 277.

239. See Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISRAEL LAW REVIEW 310, 340–44 (2007). For a more critical assessment of complementarity, see John Tobin, *Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies*, 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW 356 (2007).

240. *Nuclear Weapons*, *supra* note 6, ¶ 25.

principle in a similar fashion to declare that “[s]ecurity detention authorized and regulated by and complying with the law of armed conflict in principle is not arbitrary” under Article 9 of the Covenant.<sup>241</sup> However, this modest version of the *lex specialis* principle is of no assistance in the present case. In contrast to the more compliant language found in the ICCPR, Article 5 of the ECHR sets out an exhaustive list of permissible grounds for detention and defines them in exact terms. This leaves virtually no scope for applying the principle of harmonious interpretation, as Leggatt J found.

The solution may lie with the weaker understanding of *lex specialis* as a principle designed to resolve conflicts between two opposing norms by giving effect to the specific rule over the more general one.<sup>242</sup> Applying this principle to the present case means that the rules of detention designed specifically for armed conflict would prevail over the generally applicable provisions of Article 5. However, Leggatt J held that the application of this version of the *lex specialis* principle was foreclosed by ECHR Article 15, which provides States with a tailor-made mechanism to resolve potential conflicts between the law of armed conflict and the Convention.<sup>243</sup> In his view, “the only way in which the European Court or a national court required to apply Convention rights can hold that IHL prevails over Article 5 is by applying the provisions for derogation contained in the Convention itself, and not by invoking the principle of *lex specialis*.”<sup>244</sup> In the wake of European Court’s judgment in *Hassan*, this position no longer reflects the law.

In *Hassan*, the Court conceded a number of significant points. First, it

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241. U.N. Human Rights Committee, *supra* note 161, ¶ 64. However, note that the Committee draws a distinction between international and non-international armed conflicts. In the former, the procedural rules of the law of armed conflict help to mitigate the risk of arbitrary detention. In the latter, however, the Committee seems to expect States to take robust additional procedural steps to prevent arbitrary detention. *See id.*

242. *Mohammed*, *supra* note 16, ¶ 282. Marko Milanović has strongly criticized this version of the principle. In his view, it rests on the unstated assumption “that for any given situation at any given point in time there is one, and can *only* be one, expression of State consent or intent as to how that situation is to be regulated,” yet such an assumption is unfounded as States are “perfectly capable of assuming contradictory commitments.” Milanović, *A Norm Conflict Perspective*, *supra* note 232, at 476. This objection carries some force if *lex specialis* were to imply that only one of the competing expressions of State consent is *valid* at any one point in time. But nothing compels *lex specialis* to subscribe to this view. Rather, the principle provides that one of the equally valid expressions of consent should prevail over the other.

243. *Mohammed*, *supra* note 16, ¶ 284.

244. *Id.*

confirmed that the ECHR must be interpreted in harmony with other rules of international law, including those of the law of armed conflict, and took note of the ICJ's caselaw on the subject.<sup>245</sup> Second, it accepted the British government's contention that the absence of derogations made by a respondent State under Article 15 did not prevent the Court from relying on the law of armed conflict for the purposes of such harmonious interpretation. Article 15 enables the Contracting Parties to take measures derogating from their obligations under the Convention in "time of war or other public emergency threatening the life of the nation."<sup>246</sup> Earlier cases seemed to suggest that the Court would not have recourse to the law of armed conflict explicitly and of its own accord unless respondent States made use of Article 15. In *Isayeva*,<sup>247</sup> for example, the Court assessed Russian military operations in the Second Chechen War against what it called the "normal legal background" of peacetime law enforcement.<sup>248</sup> In making this assessment in the context of the exceptional circumstances prevailing in Chechnya, the Court drew inspiration from the relevant rules of the law of armed conflict, in particular those governing precautions in attack.<sup>249</sup> At no point, however, did it rely on these rules expressly, identify their source or address their relationship with the Convention.<sup>250</sup> Third, the Court accepted that

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245. *Hassan*, *supra* note 13, ¶ 102. The Court here recalled its early finding in *Varnava and Others v. Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 50 E.H.R.R. 21, ¶ 185 (2010), that "Article 2 [of the ECHR] must 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."

246. See R. St. J. MacDonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 225 (1997); Aly Mokhtar, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, 8 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 65 (2004).

247. *Isayeva v. Russia*, App. No. 57950/00, 41 E.H.R.R. 38 (2005). See Peter Rowe, *Non-international Armed Conflict and the European Court of Human Rights: Chechnya from 1999*, 4 NEW ZEALAND YEARBOOK OF INTERNATIONAL LAW 205 (2007). Cf. *Al-Jedda*, European Court, *supra* note 12, ¶ 99.

248. *Isayeva*, *supra* note 247, ¶ 191.

249. *Id.*, ¶¶ 172–201.

250. See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741 (2005); Leach, *supra* note 1, 733–34 (2008); Juliet Chevalier-Watts, *Has Human Rights Law become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?*, 14 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 584, 591–94 (2010).



the Third and Fourth Geneva Conventions confer “powers” upon States in an international armed conflict, including in relation to the detention of persons for imperative reasons of security.<sup>251</sup> Finally, it held that the terms of Article 5 of the Convention should be “accommodated,” as far as possible, with the power to intern or detain persons under the Third and Fourth Geneva Conventions.<sup>252</sup>

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 [Article 5 of the ECHR] 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.<sup>253</sup>

These considerations apply with equal force in the present case. First, the UK’s authority to detain Mr. Mohammed derives from its authority to expose him to lethal attack. This engages the prohibition of the intentional deprivation of life under Article 2 of the Convention. As the European Court held in *Varnava*, the duty of harmonious interpretation applies to Article 2 as well.<sup>254</sup> Consequently, if *Hassan* holds that the right to liberty is qualified by the power to detain in armed conflict; this suggests that the right to life must be qualified by the power to attack combatants and civilians directly participating in hostilities. Second, in *Hassan*, the Court carefully limited its judgment to international armed conflicts:

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 (see paragraph 97 above). 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.<sup>255</sup>

As we have shown, the conduct of status-based operations is an accepted and well-established feature not only of international armed con-

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251. *Hassan*, *supra* note 13, ¶ 105.

252. “Accommodation,” no doubt a carefully chosen term, thus goes beyond harmonious interpretation.

253. *Hassan*, *supra* note 13, ¶ 104.

254. *Varnava*, *supra* note 245, ¶ 185.

255. *Hassan*, *supra* note 13, ¶ 104.

flicts, but also of NIACs. Consequently, while the facts and precedential value of *Hassan* are limited to international armed conflicts, the underlying reasoning applies, despite the European Court's hesitation, to NIACs too. In fact, as we pointed out earlier, the permissibility of using lethal force to quell a riot or insurrection is recognized by Article 2(2)(c) of the Convention. Moreover, Article 15(2) of the ECHR specifically permits derogations from the right to life "in respect of deaths resulting from lawful acts of war." Causing the death of a member of an organized armed group carrying out a continuous combat function is a lawful act of war in accordance with the CA3, AP II and customary international law. If causing such a death is a permissible ground for derogation, it must also be a sufficient ground for accommodating the authority to conduct such a lethal attack, as well as the implied power to detain the target, with Articles 2 and 5 of the Convention. Finally, the added benefit of such an approach is that it brings the interpretation of the European Convention in line with the interpretation of the ICCPR in the jurisprudence of the ICJ and the UN Human Rights Committee.<sup>256</sup>

## V. CONCLUSION

In *Mohammed*, the English High Court issued a general challenge to the lawfulness of status-based operations in NIACs under international law. According to the judgment, absent express derogation, the more stringent standards of international human rights law apply as the sole legal framework. By wrongly applying the law of armed conflict and subverting its core principles, this conclusion pushes convergence to the point of legal and operational absurdity. We submit that, contrary to Leggatt J's understanding, a legal basis for the detention of Mr. Mohammed on security grounds may be found in Security Council Resolution 1890 and in both treaty and customary law of armed conflict applicable in NIACs. As regards the latter, the legal authority for status-based detention is implicit in the scheme of CA3 and AP II, as a necessary corollary of the implicit authority to kill, and found in customary law, as reflected by established practice.

As regards the question of Security Council authorization, which we examined in Section III, the High Court erred in finding that Article 103 of the Charter was inapplicable. Its central mistake was to construe ISAF's

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256. *Cf. id.*, ¶ 102.

mandate too narrowly, through the prism of a law enforcement paradigm. On its proper construction, taking into account the well-established meaning of the phrase “all necessary measures” and ISAF’s mandate as spelled out in previous resolutions, Resolution 1890 authorized ISAF to operate pursuant to a conduct of hostilities paradigm. As a result, ISAF was not limited to the use of force against individuals representing an imminent threat. Rather, notwithstanding the absence of specific express authorization, ISAF was permitted to engage in both lethal and non-lethal status-based operations, including targeting. Leggatt J’s demanding understanding of the requirement for “clear and explicit” language fails to apply the interpretative principles set down by the ICJ. It pushes the European Court’s reasoning in *Al-Jedda* too far by inappropriately seeking to impose more exacting conditions upon the Security Council’s authorization of force under Chapter VII.

In Section IV, we demonstrated that permission to conduct status-based operations also exists under the law of armed conflict, both in international and in non-international armed conflicts. Leggatt J, however, overlooked three important principles. First, the insistence on an express basis for detention and/or detailed safeguards in AP II reflects an overly positivist approach which fails to appreciate the true reason for the paucity of treaty law applicable in NIAC, and leaves insufficient room for the possibility of a legal basis either implicit in CA3 and AP II or under customary law. The inability of States to agree on binding rules establishing grounds or safeguards for status-based operations in NIACs reflects their fear of impliedly conferring status or legitimacy upon belligerent non-State actors. However, this does not detract from the fact that the conduct of status-based operations is an accepted and well-established feature of NIACs. The Copenhagen principles provide evidence of the practice of extended detention on security grounds.

Second, by ascribing to CA3 and AP II an exclusively humanitarian purpose, Leggatt J disregarded the equally important counterbalancing structural principle and legitimate aim of military necessity. This principle, which reflects international law’s acknowledgment of the State’s fundamental right to survival, permeates the law of armed conflict and also finds recognition in international human rights law. Practice confirms that the law relating to targeting in international armed conflict, which gives expression to the means of national survival, applies equally in NIACs. Any analysis of the relationship between human rights law and the law of armed conflict which fails to address this aspect of convergence is incomplete.

Third, Leggatt J failed to acknowledge the key distinction between different categories of individuals engaged in hostilities in NIACs on behalf of non-State actors. An exclusive focus on the law enforcement paradigm and the equal protection of individuals under human rights law led him to overlook the significance in the law of armed conflict of the enduring status of members of organized armed groups who carry out a continuous combat function. States engaged in NIACs are permitted to kill or, as a necessary corollary, capture and detain such persons for as long as they remain a member of the group pursuant to either CA3 and AP II or customary international law.

*The Mohammed* judgment provides a crystal ball through which to assess the future relationship between international human rights law and the law of armed conflict according to the total convergence thesis. It paints a bizarre battlefield landscape in which status-based operations in NIACs are prohibited. This highlights the dangers resulting from a failure to fully appreciate the foundational principles of the law of armed conflict and the ways in which this branch of law differs from human rights in its structure, design and objectives. In our view, the authorization to conduct status-based operations under the customary law of armed conflict applicable in NIACs prevails, as the *lex specialis*, over more stringent human rights standards. As the European Court accepted in *Hassan*, albeit with respect to international armed conflicts, this result is precluded neither by the specificity of the ECHR's wording nor by the possibility of derogation. Once it is recognized that detention and targeting are accepted features of NIACs, the same reasoning applies with equal force. *Mohammed* is currently pending before the Court of Appeal and the case is widely expected to reach the Supreme Court and perhaps even the European Court. It is to be hoped that the higher courts will equip themselves with the foundational principles of the law of armed conflict and help move the global convergence debate onto a more conceptually stable and operationally sustainable course.