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A Human Rights Perspective to Global Battlefield Detention: Time to Reconsider Indefinite Detention

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I. INTRODUCTION

The security detention policies applied by military forces of the United States, United Kingdom and other Western countries associated with what the George W. Bush Administration initially dubbed the "Global War on

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Terrorism" (GWOT)[1] are finding themselves subject to increasing judicial scrutiny. As a result, some of the legal assumptions that accompanied early applications of such policies are being reconsidered. For example, the judgment of the U.S. Supreme Court in *Hamdan v. Rumsfeld*[2] essentially debunked the argument that the GWOT (as pursued against the Taliban, Al Qaeda and associated forces) and the exercise of detention powers in connection with its execution are regulated by neither international humanitarian law (IHL) rules governing international armed conflict (IAC) nor IHL rules governing non-international armed conflicts (NIAC).[3] Likewise, the

1. *The Global War on Terrorism: The First 100 Days,* U.S. DEPARTMENT OF STATE, https://2001-2009.state.gov/s/ct/rls/wh/6947.htm (last visited Mar. 21, 2017). The term "Global War on Terrorism" (GWOT) is used throughout the article to describe the set of loosely-connected military operations launched by the United States and some of its allies, after the September 11, 2001 (9/11) attacks, against terrorist groups affiliated with Al Qaeda, whose members were located in several predominantly Muslim states, including Afghanistan, Pakistan, Iraq, Syria, Libya, Yemen and Somalia.

2. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

3. A full doctrinal analysis of the many classification issues and geographical nuances of the GWOT exceeds the scope of the present article. It is safe to state, however, that it appears that many detainees involved in recent conflicts would not qualify as prisoners of war (POWs) under IAC, since they do not qualify as either "Members of the Armed Forces of a party" or members of other militias "belonging to a Party to the conflict"—typically understood as a belligerent State. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 54–55 (3d ed. 2016). Many detainees also fail to meet the substantive criteria for POW status enumerated in the Third Geneva Convention, including the use of a fixed distinctive sign and a respect for the laws and customs of war in the conduct of their operations. Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. Nor would such individuals qualify as protected persons under the Fourth Geneva Convention, entitled to Section IV safeguards, since this status depends on inter-State belligerency (and, in any event, many of the detention-related protections associated with this status are only relevant to situations of belligerent occupation). Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 4, 79–141, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

Furthermore, while the proposition that the GWOT is fought on a global battlefield is highly controversial, it is safe to assert that there is broad support in the literature for classifying certain inter-parties interactions comprising the GWOT, such as post-transition armed conflicts in Afghanistan and Iraq, as NIACs in line with the holding of the U.S. Supreme Court in *Hamdan.* Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 186, 196 (2011); Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, *in* RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW: *JUS AD BELLUM*, *JUS IN BELLO*, AND *JUS POST BELLUM* 256, 307–08 (Nigel D. White & Christian Henderson eds.,

2015 judgment of the UK Court of Appeal in *Serdar Mohammed and Others v. Secretary of State for Defence*[4] rejected the position that IHL rules governing NIAC can serve as the basis for prolonged detention without trial of suspected international terrorists. Although some aspects of the judgment were reversed on appeal by the UK Supreme Court in 2017, the position of the Court of Appeal on detention under NIAC remains intact.[5] Arguably, the combined effect of the *Hamdan* and *Serdar Mohammad* judgments presents a challenge to a "hardline" legal position, in which IHL can serve as an independent basis for the prolonged detention of "enemy combatants" until the end of hostilities, outside the four corners of the prisoner of war (POW) regime applicable in IACs.

The growing acceptance of international human rights law (IHRL) doctrines on the co-applicability of rules of IHL and IHRL in times of armed conflict and on the extra-territorial application of certain IHRL norms serves as yet another impetus for re-examining existing policies on security detention. If IHL cannot serve anymore as an exclusive basis for the detention of international terrorists, then other bodies of law (e.g., national legislation, United Nations Security Council resolutions), may provide the necessary legal basis for such detention. Still, such alternative legal bases may need to be interpreted in an IHRL-friendly manner, or be read subject to relevant IHRL provisions. Furthermore, even if IHL continues to govern certain security detentions, in a world of co-application and extra-territorial application, IHRL arguably should influence the interpretation and application of IHL, including its provisions on security detentions.

The present article discusses one principal IHRL challenge to detention without trial of suspected international terrorists—the need to introduce an upper limit on the duration of security detention in order to render it not indefinite in length. Although even open-ended security detentions may

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2013); Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INTERNATIONAL LAW STUDIES 696, 705–06 (2013). *But see* DINSTEIN, *supra*, at 66. Note that the classification of a specific conflict between a State and a non-State party comprising part of the GWOT as a NIAC for the purpose of regulating the detention of enemy combatants does not exclude the possibility of the parallel applicability of IAC rules governing protection of civilians to cross-border operations not consented to by the relevant territorial State. For a discussion, see Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 77 (Elizabeth Wilmshurst ed., 2013).

4. Serdar Mohammed and Others v. Secretary of State for Defence [2015] EWCA (Civ) 843.

5. Al-Waheed v. Ministry of Defence [2017] UKSC 2.

come to an end at some point in time, upon the occurrence of an interruptive event (e.g., the end of active hostilities or a change in risk assessment), there are three critical elements which justify classifying these security detentions as indefinite in nature. They are: (1) the acute lack of certainty that the detainee experiences about the overall length of detention; (2) the lack of control by the detainee over the conditions which would bring the detention to an end; and (3) the practical feasibility of the detention period being extended indefinitely—perhaps for the entire duration of the detainee's life.

Following these introductory comments, Part II describes the "hardline" position on GWOT-related detention adopted by the United States in the immediate aftermath of the 9/11 terror attacks and followed, with certain variations, by other countries, including the United Kingdom and the State of Israel. According to this "hardline" position, international terrorism suspects can be deprived of their liberty without trial for the duration of the armed conflict in which the organizations they are affiliated with participate, in the same way in which "enemy combatants" can be detained without trial as POWs for the duration of an IAC. Part III describes judicial and quasi-judicial challenges to the "hardline" position: the *Hamdan* and *Serdar Mohammad* judgments in the United States and the UK, the *A v. Secretary of Defence* judgment of the Israeli Supreme Court, the *Al-Jedda* and *Hassan* judgments of the European Court of Human Rights (ECtHR), and the non-binding recommendations of the Human Rights Committee (HRC) codified in its General Comment 35. Part IV addresses recent developments in IHRL relating to the co-application of the IHL and IHRL and the extra-territoriality of certain IHRL norms. It specifically discusses developments relating to the application of IHRL norms governing security detentions. Finally, Part V concludes by offering an IHRL-based perspective to the GWOT-related detention policy and, in particular, to aspects of the policy leading to the de facto placement of international terrorism suspects under a regime of indefinite detention.

II. THE "HARDLINE" POSITION

In the aftermath of 9/11, the United States assumed custody of thousands of individuals suspected of participating in hostilities against the United States as members or accomplices of the Taliban, Al Qaeda and associated

forces.[6] Some of them were detained in Guantanamo Bay; others were kept in overseas military facilities, such as Bagram prison in Afghanistan; and yet others were detained in transitory places of custody, including military brigs on the U.S. mainland and on board naval vessels, and "black prison" sites in a number of locations around the world.[7] Under U.S. domestic law, the authority to detain suspected terrorists implicated in the GWOT without criminal charges originally emanated from the 2001 Authorization for Use of Military Force (AUMF),[8] as well as from President George W. Bush's Military Order of November 13, 2001, authorizing the detention of individuals who are or have been members of Al Qaeda, or were involved in other international terrorism attacks against the United States, its citizens and national interests, as well as individuals harboring such terrorists.[9]

The legal position underlying the power to detain individuals without criminal charges was confirmed by the U.S. Supreme Court in the 2004 *Hamdi* judgment, in which the Court accepted the claim that suspected international terrorists qualifying as "enemy combatants"[10]—including U.S. citizens—may be detained without trial for the duration of the conflict. Writing for a plurality of the Court, Justice O'Connor opined that:

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the

6. According to the Costs of War Project, hosted by the Watson Institute for International and Foreign Affairs at Brown University, "The United States government detained well over 100,000 people for various periods in conjunction with the War on Terror in the years since 9/11." *Detention,* COSTS OF WAR, http://watson.brown.edu/costsofwar/costs/social/rights/detention (last visited Mar. 21, 2017).

7. *See, e.g.*, Council of Eur., Comm. on Legal Affairs and Human Rights, Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, Eur. Parl. Doc. 11302 rev. (June 11, 2007) (by Dick Marty).

8. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also* 50 U.S.C § 1541 (2017).

9. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

10. An enemy combatant was narrowly defined by the U.S. government for the purpose of the *Hamdi* litigation as an individual who was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict against the United States" there. Hamdi v. Rumsfeld*,* 542 U.S. 507, 526 (2004) (citing Brief for the Respondents 3).

> al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.[11]

The United States continues to detain individuals on the Guantanamo Bay Naval Base and in Afghanistan for the duration of "the particular conflict in which they were captured" on the basis of the AUMF, whose authorization to detain "enemy combatants" for the duration of the conflict was considered by Justice O'Connor to be "based on longstanding law-of-war principles."[12]

A comparable legal framework was introduced in Israel through the enactment of the 2002 Incarceration of Unlawful Combatants Law, which authorized the detention without trial of "unlawful combatants," defined as individuals taking part directly or indirectly in armed hostilities against the State of Israel or belonging to an armed force engaged in hostilities against the State of Israel, who do not qualify for POW status under the Third Geneva Convention.[13] Although the 2002 Law provides that the detention of "unlawful combatants" would be reviewed by Israeli courts every six months, so as to ascertain whether or not their release would harm the security of the State or is justified for other reasons,[14] Section 7 of the 2002 Law provides that membership in a hostile organization or participation in the organization's hostile activities creates a rebuttable presumption of harm to State security upon release for as long as hostilities continue. The upshot of this legal construction is that Israeli lawmakers attempted to create a legal framework that would meet relevant local constitutional and international law sensitivities, while facilitating the prolonged (in fact, indefinite) detention of "unlawful combatants" (who, by definition, do not quali-

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11. *Id.* at 518.

12. *Id.* at 521. *See also* THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 28 (2016) ("The United States bases its authority to detain these individuals on the 2001 AUMF as informed by the law of armed conflict.").

13. Incarceration of Unlawful Combatants Law, 5762-2002, SH No. 1834 § 2 (Isr.), *reprinted in* 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 389 (2003) (translation available at http://www.hamoked.org/files/2011/240_eng.pdf).

14. *Id.* § 5.

fy for POW status), for the duration of the armed conflict in which the terrorist organizations with which they are affiliated are involved.[15]

In the UK, two frameworks for prolonged detention developed in specific legal contexts that are broadly consistent with the "hardline" position. The first framework is based on domestic immigration law. Between 2001 and 2004, domestic immigration law was employed to indefinitely detain (without criminal charges) suspected foreign terrorists, who could not be deported from the UK by virtue of legal or practical considerations (such as a concern that they would be exposed to torture in the receiving State, or because of their statelessness). Such detention was authorized by the Anti-terrorism, Crime and Security Act 2001, which contained a process for certification of suspected foreign terrorists whose presence in the UK constituted a risk to national security.[16] A terrorist was defined under section 21(2) of the 2001 Act as an individual who is "concerned in the commission, preparation or instigation of acts of international terrorism," "a member of or belongs to an international terrorist group," or an individual who "has links with an international terrorist group." Although it was accompanied by a derogation from IHRL treaties, the 2001 Act did not purport to rely on IHL as a basis for detention, but rather on immigration law, and on the need to protect national security in times of emergency.[17]

A second legal framework to justify prolonged detention without trial of suspected terrorists was employed by UK armed forces overseas, based on relevant Security Council resolutions relating to Iraq and Afghanistan. In Iraq, the UK, like other members of the Multi-National Force, relied on

15. See, in particular, *id.* § 1 ("This Law is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law."). *See also* Draft Bill for Incarceration of Unlawful Combatants (O.R. Draft), 5760-2000, HH No. 2883, p. 416, (Isr.)("The Bill is intended to anchor the authority, which is consistent with IHL, to detain members of hostile forces not qualifying as POW for the duration of the conflict."). It should be noted that one impetus for the passage of the 2002 law is a 2000 Supreme Court judgment indicating that Israel's existing security detention legislation—the Emergency Powers (Detention) Law 1979—did not authorize group-based detention, but rather required the State to establish the personal risk emanating from each detained individual. CrimA 7048/97 Anonymous Persons v. Minister of Defense 54(1) PD 721 (2000) (Isr.), http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf.

16. Anti-terrorism, Crime and Security Act 2001, c. 24, § 21.

17. Unlimited immigration detention is also practiced in Australia pursuant to section 189 of the Migration Act 1958 with regard to aliens who are non-deportable, yet non-releasable (by reason of the security threat they pose to Australia).

Security Council Resolutions 1511 (2003) and 1546 (2004), authorizing "all necessary measures to contribute to the maintenance of security and stability in Iraq,"[18] to justify the security detention regime introduced by the Coalition Provisional Authority (CPA) in Memorandum No. 3. This Memorandum invoked, in turn, provisions of the Fourth Geneva Convention on internment (detention without trial for imperative reasons of security, reviewable every six months).[19] Still, according to UK authorities, Security Council Resolution 1546 and its subsequent extensions implied that the end of belligerent occupation in Iraq in 2004 did not terminate the authority of Coalition forces to undertake security detentions for prolonged periods of time.[20] A similar claim was made by the UK with regard to the effect of Security Council resolutions, such as Resolution 1386 (2001), authorizing the International Security Assistance Force (ISAF) in Afghanistan to "take all necessary measures to fulfil its mandate" (i.e., to assist the Afghan authorities in maintaining security).[21]

Finally, it should be noted that domestic security detention laws, available in a number of countries confronting armed violence,[22] also permit, at times, prolonged preventive detention without trial for as long as the relevant security threat remains in place. Such preventive detention measures are, however, subject to periodic reviews in order to ascertain the continued necessity of detention, or to periodic renewal of detention orders. Although not directly related to the post-9/11 GWOT, this type of security detention is also largely compatible with the "hardline" position to security detention of suspected international terrorists, as it may facilitate security detention for an indefinite period of time in conflict situations.

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18. S.C. Res. 1511, ¶ 13 (Oct. 16, 2003); S.C. Res. 1546, ¶ 10 (June 8, 2004).

19. Coalition Provisional Authority Memorandum No. 3 (Revised) § 6(4) (June 27, 2004), http://www.refworld.org/docid/469cd1b32.html.

20. *See* R (on the application of Al-Jedda) v. Secretary of State for Defence [2007] UKHL 58, [32] (Lord Bingham of Cornhill) ("[A]lthough the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it.").

21. S.C. Res. 1386 (Dec. 20, 2001). Security Council Resolution 1386 was extended by numerous Security Council resolutions including S.C. Res. 1510 (Oct. 13, 2003), S.C. Res. 1833 (Sept. 22, 2008), S.C. Res. 1868 (Mar. 23, 2009), S.C. Res. 1890 (Oct. 8, 2009) and S.C. Res. 2120 (Oct. 10, 2013).

22. *See, e.g.*, Internal Security Act, sec. 8, (Singapore); Internal Security Act 1960 (Act 82), sec. 8 (Malaysia); Law No. 162 of 1958 (Emergency Law), 5 June 1967, art. 3 (Egypt); Law No. 7 of 1954 (The Crime Prevention Law), 1 Mar. 1954, art. 3 (Jordan).

III. JUDICIAL CHALLENGES TO THE "HARDLINE" POSITION

A. Authority to Detain under IHL

The "hardline" position, which is consistent with the proposition that IHL rules governing the GWOT allow for detention without trial of terrorists qualifying as "enemy combatants" for the duration of the conflict, has come under increased judicial and quasi-judicial scrutiny. As a result of this scrutiny, a more nuanced legal approach to the exercise of security detention powers has emerged.

One important development was the rejection by the U.S. Supreme Court in the 2006 *Hamdan v. Rumsfeld* judgment of the claim that the fight against international terrorism is regulated neither by Common Article 2 nor by Common Article 3 of the Geneva Conventions.[23] Writing for the majority, Justice Stevens wrote in *Hamdan* that all armed conflicts that do not qualify as international in nature—that is, between two State parties to the Geneva Conventions—are by necessary implication governed by Common Article 3 (notwithstanding their cross-border attributes and global reach):

> [T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities . . . .[24]

Significantly, the Supreme Court did not reject in *Hamdan* its previous decision in *Hamdi,* according to which "enemy combatants" could be detained without criminal charges for the entire duration of the armed conflict. Still, the decision to treat the GWOT as regulated by Common Article 3, an article governing NIACs, does invite, in turn, the question of whether IHL rules governing NIACs can provide States with legal authority to indefinitely detain "enemy combatants," which would allow them to continue

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23. *See* John Yoo, *Terrorists Have No Geneva Rights*, WALL STREET JOURNAL, (May 26, 2004), https://www.wsj.com/articles/SB108552765884721335.

24. Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006).

to maintain that such detention is based on longstanding law-of-war principles.[25] Two recent decisions by the ECtHR and the UK Court of Appeal appear to answer this latter question in the negative.

In *Hassan v. UK* (2014), the ECtHR reviewed, *inter alia*, the authority of the UK to detain without trial an Iraqi individual suspected of participating in armed hostilities in territories occupied by the UK in Iraq, and held that such legal powers were conferred upon the UK forces by relevant provisions governing security detention in the Third and Fourth Geneva Conventions. It also held that these powers of detention allow the UK to deviate from the provisions of the European Convention on Human Rights (ECHR) on the right to liberty *only* in situations of IAC.[26] This implies that no similar powers of detention exist under IHL rules governing NIACs; or that, alternatively, detention based on IHL rules applicable in NIACs must strictly conform to the requirements of the ECHR.

Whereas *Hassan v. UK* only reviewed implicitly the power of detention under IHL rules governing NIACs, this question was at the very heart of the *Serdar Mohammed v. Secretary of State for Defence* judgment issued in 2015 by the UK Court of Appeal. The case dealt, *inter alia*, with the question of whether or not the UK had legal authority to detain without criminal charges a suspected Taliban militant in Afghanistan for a number of months. Since the ISAF, in which the UK participated, was not considered to be an occupying power in Afghanistan in 2010, the UK was barred from relying on the security detention regime found in the Third and Fourth Geneva Conventions. The relevant Security Council resolution authorizing ISAF activities,[27] on which the government relied, was narrowly construed by the Court of Appeal as permitting only very short-term detention (i.e., prior to the transfer of terrorist suspects to the Afghan authorities or immediate release), and so the Court was left with the possibility that only IHL could provide the basis for Serdar Mohammed's security detention. After determining that the armed conflict in which the UK was involved in Afghanistan constituted an "internationalized NIAC"—a NIAC with cross-border features—and following an elaborate analysis of treaty law,

25. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

26. Hassan v. United Kingdom, App. No. 29750/09, ¶ 104 (2014) (Eur. Ct. H.R.), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501 ("It can only be in cases of international armed conflict, where the taking of prisoners 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.").

27. S.C. Res. 1890, ¶ 2 (Oct. 8, 2009).

customary international law and new developments in the positions of States on the issue of security detention (such as the Copenhagen Process),[28] the Court of Appeal reached the conclusion that no basis for prolonged security detention exists under IHL rules governing NIACs (although it acknowledged that a rule authorizing such detention ought to be developed in order to provide an alternative to killing enemy combatants on the battlefield):

> [W]e have concluded that in its present stage of development it is not possible to find authority under international humanitarian law to detain in an internationalised non-international armed conflict by implication from the relevant treaty provisions, Common Article 3 and APII. As to customary international law, despite the interplay of treaty-based sources of international humanitarian law and customary international law sources, the possibility that the requirements for the emergence of a customary rule of international law may be less stringent in the case of the emergence of a customary rule of international humanitarian law, and the position of the ICRC, we do not consider that it is possible to base authority to detain in a non-international armed conflict on customary international law.[29]

It should be noted that the UK Supreme Court reversed on appeal the position of the Court of Appeal on the question of authority to detain pursuant to Security Council resolutions, thus rendering moot the question of whether or not IHL rules governing NIACs constitute an independent legal basis for detention. Still, those judges that expressed a view on the matter in their decisions (writing for the majority *obiter dicta* or dissenting) tended to support the views of the Court of Appeal on the lack of a legal basis under IHL for detention in post-transition Iraq and Afghanistan.[30] The upshot of this analysis is that, according to UK courts, IHL rules governing NIACs do not appear to provide an independent legal basis for security detentions. Thus, as explained in Part IV below, resort must be made to other bodies of law, primarily IHRL, in order to determine the legality under international law of such detentions.

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28. *See infra* note 32 and accompanying text.

29. Serdar Mohammed and Others v. Secretary of State for Defence [2015] EWCA (Civ) 843 [251].

30. Al-Waheed v. Ministry of Defence [2017] UKSC 2, [14] (Lord Sumption SCJ), [274] (Lord Reed SCJ).

Doubts as to whether IHL rules governing NIACs provide a legal basis for the detention without trial of suspected terrorists also manifest themselves in the academic literature.[31] Such doubts have not been put to rest by the inter-State Copenhagen Process Principles and Guidelines, which focused on the treatment of detainees in NIAC, and not on the legal basis for their detention.[32] In any event, there appears to be broad consensus around the proposition that even if an authority to undertake security detentions can be derived from IHL rules governing NIACs—e.g., by way of analogy from the rules governing IACs,[33] or by way of a necessary implication from the authority to kill on the battlefield individuals directly participating in hostilities—such rules are currently under-developed and do not provide exhaustive guidance on critical issues such as the precise grounds for detention, the procedural safeguards available and, arguably, the total length of security detention.[34]

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31. *See, e.g.*, ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 473–77 (2013); Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INTERNATIONAL LAW STUDIES 32, 35 (2015); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 403, 404–5 (2009); Francoise J. Hampson, *Is Human Rights Law of Any Relevance to Military Operations in Afghanistan*?, *in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 485, 502–3 (Michael N. Schmitt ed., 2009) (Vol. 89, U.S. Naval War College International Law Studies). *But see* 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, 377 (2005); Knut Dörmann, *Detention in Non-International Armed Conflicts*, *in* NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 347, 349 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies); David Tuck, *Taking of Hostages*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 297, 310 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015); Chatham House & International Committee of the Red Cross, *Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 859, 862–64 (2009).

32. *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (2012), *reprinted in* 51 INTERNATIONAL LEGAL MATERIALS 1368 (2012) [hereinafter *The Copenhagen Process*] ("During The Copenhagen Process meetings participants—while not seeking to create new legal obligations or authorizations under international law—confirmed the desire to develop principles to guide the implementation of the existing obligations with respect to detention in international military operations.").

33. For a discussion, see Ramin Mahnad, *Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflicts*, 2013 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 33 (Terry D. Gill et al. eds., 2014).

34. *See, e.g.*, Jody M. Prescott, *Direct Participation in Hostilities and Its Significance for Detention Standards in Non-International Armed Conflicts*, *in* DETENTION OF NON-STATE ACTORS ENGAGED IN HOSTILITIES: THE FUTURE LAW 65, 65 (Gregory Rose & Bruce Oswald

B. Authority to Detain under other Legal Sources

To be clear, even if IHL rules governing NIACs cannot serve as an independent basis for security detention, there is nothing in IHL to prevent States from relying on domestic legislation or on international law sources other than IHL to justify the lawfulness of such detentions.[35] Indeed, as indicated above, the United States relied on the AUMF as the legal basis for its security detention policy, Israel on the Unlawful Combatants Law and the UK on its immigration legislation and United Nations Security Council resolutions. However, reliance on domestic legislation invites the application of relevant constitutional and international law standards, most notably IHRL, which includes a detailed body of norms governing deprivation of liberty by State authorities both in times of peace and during times of conflict. Furthermore, as explained below, there is support in the practice of national and international legal institutions for the proposition that IHRL may also govern, or at least influence, the contents of international law norms authorizing detention of terrorist suspects, including Security Council resolutions.

So far, judicial review of U.S. security detention policy has focused on its compatibility with constitutional habeas corpus standards[36] and with Common Article 3 due process standards.[37] While the very power to detain, pronounced in *Hamdi* as derived from the AUMF and deemed consistent with the laws of war, still remains intact, it may still be subject to a future challenge. First, it could be argued that a winding down of U.S. involvement in the armed conflicts in Afghanistan and Iraq—as announced by

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eds., 2016); Chris Jenks, *Detention under the Law of Armed Conflict*, *in* ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 301, 310 (Rain Liivoja & Tim McCormack eds., 2016).

35. The only meaningful restriction found in IHL on the power to detain under other bodies of law appears to derive from customary international law, as reflected in Rule 128 of the ICRC customary law study, which provides that "[p]ersons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist." 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

36. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumedienne v. Bush, 553 U.S. 723 (2008).

37. *Hamdan*, 548 U.S. 557.

President Obama in his 2013 National Defense University speech[38]—will sooner or later invalidate the legality of continued detention under the AUMF[39] (and the related provision on the authority to detain found in the 2012 National Defense Authorization Act),[40] or invite a re-evaluation of the constitutionality of the continued application of security detention legislation.[41] Second, with the passage of time, more and more strain is put on the proposition that the laws of war authorize the detention without trial of suspected international terrorists until the end of hostilities, even when no end to the GWOT appears in sight,[42] or is contemplated.[43] Thus, even if an analogy could be drawn between some aspects of a classic IAC and the fight against international terrorism, the extraordinary length of this conflict, which has no parallel in contemporary IACs to which IHL's rules on detention of enemy combatants have been applied, stretches the analogy to its breaking point.[44] Indeed, the very possibility that the analogy would break down led the drafter of the plurality opinion in *Hamdi,* Justice O'Connor, to qualify the judgment's reliance on an IHL principle allowing detention until the end of the conflict by using the following words:

> If the particular circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel, but this is not the situation we face of this date.[45]

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38. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) (transcript available at https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university).

39. *See, e.g.*, MATTHEW C. WEED, CONG. RESEARCH SERV., 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: ISSUES CONCERNING ITS CONTINUED APPLICATION 12–13 (2015), https://fas.org/sgp/crs/natsec/R43983.pdf; Harold Hongju Koh, *Ending the Forever War: One Year After President Obama's NDU Speech*, JUST SECURITY (May 23, 2014), https://www.justsecurity.org/10768/harold-koh-forever-war-president-obama-ndu-speech/.

40. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

41. *See, e.g.*, Jennifer Daskal & Stephen I. Vladeck, *After AUMF*, 5 HARVARD NATIONAL SECURITY JOURNAL 115, 146 (2014).

42. For a discussion, see ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 255–56 (2007).

43. *See, e.g.*, RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD 291–94 (2005).

44. *See* BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 34 (2008).

45. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

Significantly, in other jurisdictions where prolonged detention without trial of suspected international terrorists was resorted to, domestic and international courts applied constitutional and international law standards, resulting in a restriction of the power to detain, or in the introduction of temporal limits on the duration of detention. For example, in Israel, the Incarceration of Unlawful Combatants Law 2002 came under legal challenge in 2008 in a case involving the security detention of two Gaza-based Hezbollah operatives. With respect to the authority to detain under IHL, the Supreme Court of Israel held that the Israeli-Hezbollah conflict constitutes an IAC, governed by the relevant provisions on security detention of the Fourth Geneva Convention.[46] Under such provisions, the power to detain only extends, according to the Court, to individuals whose contribution to the military effort of the terrorist organization to which they belong, or which they support, is non-negligible or non-marginal in nature, and who pose an individual risk to national security.[47] Furthermore, the Court noted that the State refrained from relying on the legislative presumption that regarded unlawful combatants constituting—by virtue of their group membership or affiliation—a *prima facie* risk to national security upon release for the duration of the conflict. It consequently held that as long as the State bases security detention decisions on a case-by-case analysis of information establishing the individual dangerousness of the detained individuals, there is no need to examine the compatibility of the presumption of dangerousness found in section 7 with IHL and Israeli constitutional law.[48] This dicta can be understood as indicating a certain uneasiness on the part of the Court with the membership-based tilt of the 2002 Law, and doubts as to whether detention on the basis of group affiliation complies with Israel's Basic Law: Human Dignity and Liberty[49] and with the internment provisions of the Geneva Conventions.[50]

Finally, the Supreme Court of Israel held that, as in other security detention contexts, the length of detention under the 2002 Law (which may be for the entire duration of the conflict) potentially creates a serious problem for the application of the principle of proportionality, notwithstanding

46. CrimA 6659/06 Anonymous v. State of Israel 62(4) PD 329, ¶ 17 (2008).

47. *Id.*, ¶ 21.

48. *Id.*, ¶ 24.

49. Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391 (Isr.) https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm.

50. *See, e.g.*, Fourth Geneva Convention, *supra* note 3, arts. 41–46, 79–92.

the fact that security detention is resorted to in a context which the Court viewed to qualify as an IAC.[51] As a result, it introduced a legal requirement that the longer the period of detention without trial is the heavier the burden on the State to justify the extension of detention orders (judicial reviews under the 2002 Law take place every six months).[52]

The upshot of this legal analysis has been the assimilation of the 2002 Incarceration of Unlawful Combatants Law with Israel's State of Emergency legislation (which allows security detention under certain conditions for renewable six-month periods)[53] and with Fourth Geneva Convention standards, requiring the State to detain on the basis of an imperative risk to security posed by the detainee[54] that goes beyond mere membership or affiliation with a terrorist or militant organization.[55] In practical terms, the exercise of periodic judicial review by Israeli courts over security detention cases led to the restriction of the period of detention to less than two years in the vast majority of security detention cases.[56]

In the UK, the immigration law framework allowing for the indefinite detention without trial of non-deportable foreign terrorists was revoked following judgments by the House of Lords and the ECtHR, which found it to be discriminatory and disproportionate and thus incompatible with the ECHR.[57] The ECtHR also held in the *Al-Jedda* case that Security Council Resolution 1546, the legal basis for the UK's detention policy in Iraq, should be read as incorporating relevant IHRL standards, including the prohibition on arbitrary detention.[58] Since nothing in the Resolution explicitly authorized the UK to hold individuals in indefinite detention without criminal charges, the Court held that the UK's detention practices in Iraq

51. CrimA 6659/06 Anonymous v. State of Israel 62(4) PD 329, ¶ 46 (2008).

52. *Id.*

53. Emergency Powers (Detention) Law, 5739–1979, § 33, 89 (1979) (Isr.), http://www.btselem.org/sites/default/files/1979_emergency_powers_law_detention.pdf.

54. Fourth Geneva Convention, *supra* note 3, arts. 42, 78.

55. This outcome is generally compatible with the position of the Israeli Supreme Court in the *Targeted Killing* case, which rejected targeting on the basis of mere group affiliation without consideration of the nature of relevant individual's participation in the hostilities. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507 (2006).

56. *See, e.g.*, *Statistics on Administrative Detention*, B'TSELEM, http://www.btselem.org/administrative_detention/statistics (last visited Mar. 21, 2017).

57. A v. Secretary of State for the Home Department [2004] UKHL 56; A and Others v. United Kingdom, 2009-II Eur. Ct. H.R. 137 (2009).

58. Al-Jedda v. United Kingdom, App. No. 27021/08, ¶ 102 (2011) (Eur. Ct. H.R.), http://hudoc.echr.coe.int/eng?i=001-105612.

violated the ECHR. Although the majority on the UK Supreme Court in the recent *Al-Waheed* case deviated from the position of the ECtHR in *Al-Jedda* and held that Security Council Resolutions 1723 (2007)(re Iraq) and 1890 (2009)(re Afghanistan) implicitly authorized security detentions, the Court nonetheless took the view that safeguards against arbitrary detention found in Article 5 of the ECHR continue to apply *mutatis mutandis* to detentions based on these Security Council resolutions, effectively reading-in IHRL standards into the resolutions.[59]

The upshot of these cases appears to be that whereas States may derive the authority to resort to security detentions from domestic legislation or international instruments (such as Security Council resolutions), this power remains constrained by domestic constitutional principles and IHRL standards, which govern the international legality of domestic norms and inform the interpretation of international instruments granting detention authority.[60] Such IHRL standards include both procedural safeguards (such as access to judicial review) and substantive balancing norms (introducing considerations such as a high threshold of security risk justifying detention and limits on the overall length of detention).

A recent codification of IHRL standards relevant to the judicial scrutiny of security detentions can be found in paragraph 15 of the UN HRC General Comment 35 on the Right to Liberty and Security of Person. This statement codifies the practice of the Committee and reflects the consensus view of members of the Committee on the interpretation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR):

> To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such

59. Al-Waheed v. Ministry of Defence [2017] UKSC 2. Lord Reed, writing for the minority, was, however, of the view that application of the *Al-Jedda* judgment should have led the Supreme Court to narrowly construe the Security Council resolution and to insist upon an explicit authorization for any security detention that goes beyond that recognized under domestic Afghani law.

60. *Cf.* U.N. Human Rights Comm., Communication No. 2136/2012, M.M.M. et al v. Australia*,* Comm. No. 2136/2012, U.N. Doc. CCPR/C/108/D/2136/2012 (2013); U.N. Human Rights Comm., Communication No. 2094/2011, F.K.A.G. et al. v. Australia*,* U.N. Doc. CCPR/C/108/D/2094/2011 (2013). In both cases, the Human Rights Committee found Australia's practice of detaining asylum seekers for lengthy periods of time without criminal charges, on the basis of secret evidence suggesting that their release would jeopardize Australian national security, to be in violation of the International Covenant on Civil and Political Rights.

> detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.[61]

Most significantly for our purpose, the UN HRC took the position that to qualify as non-arbitrary, security detentions must be limited in time. This is because indefinite detention may be regarded as representing a disproportionate response to the security threat posed by the detained individual, which may even be regarded, due to the mental anguish associated with the detainees' lack of certainty about the time and possibility of their release, a form of cruel, inhuman and degrading treatment or punishment.[62] Arguably, as the next Part illustrates, certain standards developed in IHRL to regulate security detentions may be deviated from, but only through an overriding legal instrument. For example, the clear language of *lex specialis* treaty provisions, such as the legal regime on POW detention found in the

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61. U.N. Human Rights Comm., *General Comment No. 35: Article 9 (Liberty and Security of Person)*, ¶ 9, nn.35–37, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) [hereinafter *General Comment No. 35*].

62. *See, e.g.*, U.N. Human Rights Comm., Communication No. 2233/2013, F.J. et al. v. Australia, U.N. Doc. CCPR /C/116/D/2233/2013, ¶ 10.6 (2016); U.N. Comm. against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America*, ¶ 14, U.N. Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014) [hereinafter *Concluding Observations (United States)*] ("the Committee reiterates that indefinite detention constitutes per se a violation of the Convention"); Towards the Closure of Guantanamo, Inter-Am. Comm'n H.R., OAS/Ser.L/V/II. Doc. 20/15, ¶ 93 (June 3, 2015).

Third Geneva Convention, may authorize detention on the basis of group affiliation without the need to establish an individualized security risk.[63]

IV. THE INCREASED RELEVANCE OF IHRL STANDARDS

In the twenty-one years since the 1996 ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,*[64] the position that IHRL applies in times of armed conflict has attained growing acceptance.[65] Even countries like the United States and Israel, who initially resisted this approach, seem to have subsequently accepted it, albeit somewhat grudgingly, in statements before international bodies or other legal instruments produced by official State bodies.[66] Furthermore, the extra-territorial reach of international instruments prohibiting arbitrary detention, such as the ICCPR and ECHR, has been confirmed by international law-applying bodies, such as the ICJ,[67]

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63. Arguably, even the POW regime of the Third Geneva Convention may come under stress were it to apply to prolonged armed conflicts without an end in sight. The discussion of such a contingency exceeds, however, the scope of the present contribution.

64. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

65. For support, see Larissa van den Herrick & Hellen Duffy, *Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches*, *in* TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS 366, 370 (Carla Buckley, Alice Donald & Philip Leach eds., 2017); OREN GROSS & FIONUALLA NI-AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 361–62 (2006).

66. *See* U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Period Report: United States of America*, ¶ 506, U.N. Doc. CCPR /C/USA/4 (May 22, 2012) ("With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or 'IHL'), the United States has not taken the position that the Covenant does not apply 'in time of war.' Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application."); 2 JACOB TURKEL ET AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010: ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW 69 (2013), http://www.turkel-committee.gov.il/files/newDoc3/The%20Turkel%20Report%20for%20website.pdf [hereinafter TURKEL COMMISSION REPORT] ("The Commission is of the view that certain human rights norms apply to supplement international humanitarian law rather than the separate normative regime of human rights law replacing international humanitarian law.").

67. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 111 (July 9) ("In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable

ECtHR[68] and the UN HRC,[69] as well as by a number of domestic courts (who have accepted this approach explicitly or implicitly).[70]

Still, while there is growing acceptance of the relevance of IHRL for all armed conflicts, including conflicts comprising the fight against international terrorism, it is also widely accepted that IHL provisions may sometimes deviate from IHRL norms and displace them by virtue of the *lex specialis derogat legi generali* principle.[71] As recently explained by the UN HRC, this principle applies to the IHRL prohibition against arbitrary detention (Article 9 of the ICCPR):

> While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive. Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.[72]

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in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.").

68. Al-Skeini and Others v. United Kingdom, App. No. 55721/07, ¶ 132 (2011) (Eur. Ct. H.R.), http://hudoc.echr.coe.int/eng?i=001-105606

> To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.

69. U.N. Human Rights Comm., *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004)

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

70. *See, e.g.*, Smith v. Ministry of Defence [2013] UKSC 41, [55] (Lord Hope SCJ) (UK); HCJ 3239/02 Mar'ab v. IDF Commander in the West Bank 57(2) PD 349, ¶ 27 (2003) (Isr.) (applying Article 9 of the ICCPR to administrative detention in the West Bank).

71. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 216 (Dec. 19).

72. *General Comment No. 35*, *supra* note 61, ¶ 64.

Thus, whereas IHL explicitly allows for a prolonged deprivation of liberty, as is the case with regard to the internment of POWs for the duration of an armed conflict,[73] such an authorization may be deemed *lex specialis,* rendering the detention of POWs, in principle, non-arbitrary. Still, it appears that the presumption of conformity with IHRL articulated by the ECtHR in *Al-Jedda*[74] ought to apply here too—namely, that an interpretive attempt should be made to construe the relevant IHL rules on restricting the liberty of POWs (e.g., relating to release on parole or promise, or repatriation of the sick and wounded) in accordance with the parallel norms of IHRL. Furthermore, it is difficult to accept that certain fundamental and non-derogable IHRL norms, such as the prohibition against cruel, inhuman and degrading treatment, could ever be lawfully stipulated upon,[75] implying the continued application of some IHRL norms to all security detentions in all types of armed conflicts.[76]

Where IHL rules do not provide explicitly for a detailed legal regime for deprivation of liberty in times of hostilities—as is arguably the case with respect to IHL rules governing NIACs—the *lex specialis* argument loses much of its force, and there is a greater justification for applying IHRL norms to regulate the terms and duration of such security detentions.[77] This is particularly the case where the IHL arrangements in question do not contain humanitarian protections and institutional safeguards corresponding at some level to those existing under IHRL.

Support for the proposition that rules governing detention under NIAC do not displace the application of IHRL detention safeguards is found in the aforementioned *Serdar Mohammed* case, where the UK Court of Ap-

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73. Third Geneva Convention, *supra* note 3, art. 118.

74. Al-Jedda v. United Kingdom, App. No. 27021/08, ¶ 102 (2011) (Eur. Ct. H.R.), http://hudoc.echr.coe.int/eng?i=001-105612.

75. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2.2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture] ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

76. UK MINISTRY OF DEFENCE, DEVELOPMENT, CONCEPT & DOCTRINE CENTRE, JOINT DOCTRINE PUBLICATION 1–10: CAPTURED PERSONS (CPERS) 1–7 (3rd ed., 2015).

77. Peter Vedel Kessing, *Security Detention in UN Peace Operations*, *in* SEARCHING FOR A 'PRINCIPLE OF HUMANITY' IN INTERNATIONAL HUMANITARIAN LAW 272, 287 (Kjetil Mujezinović Larsen, Camilla G. Guldahl Cooper & Gro Nystuen eds., 2013); Gabor Rona, *Views from Mars, Views from Venus: Minding the Gap between What We Say and What We Do on Terrorism*, *in* THE LONG DECADE: HOW 9/11 CHANGED THE LAW 269, 274 (David Jenkins, Amanda Jacobsen & Anders Henriksen eds., 2014).

peal explicitly rejected the claim that IHL authorizes security detention in NIACs and held that such detentions must be justified under other legal norms and comply with relevant IHRL standards.[78] Although the UK Supreme Court reversed certain aspects of the Court of Appeal's judgment, it still reached the conclusion that the relevant Security Council resolutions conferring authority to detain in Iraq and Afghanistan do not contain sufficient safeguards. Thus, the UK was required to specify in legal instruments governing the conduct of its forces, such as their Standard Operating Instructions, the conditions of detention, and develop adequate institutional safeguards in order to comply with the requirements of Article 5 of the ECHR.[79]

The proposition that security detentions in NIAC must be IHRL-compatible also finds support in the jurisprudence of international courts and committees. In the aforementioned *Hassan* case, the ECtHR accepted that IHL may stipulate upon Article 5 of the ECHR (which prohibits arbitrary detention, but offers a "closed list" of permissible exceptions not including security detention in times of conflict), even without a formal derogation, but *only* in situations constituting an IAC. The Court supported its conclusion by way of allusion to: (1) the practice of ECHR member States not to derogate from the Convention in situations of IAC (as opposed to NIACs, where States have derogated from the Convention in the past)—suggesting that they may have viewed the rigid conditions of Article 5 as not directly applicable to IACs, but potentially applicable to NIACs; and (2) the fact that IHL includes in IACs safeguards comparable, at some level, to those found in IHRL, a fact which facilitates the process of interpre-

78. Serdar Mohammed and Others v. Secretary of State for Defence [2015] EWCA (Civ) 843, [280–81].

79. Al-Waheed v. Ministry of Defence [2017] UKSC 2, [67] (Lord Sumption SCJ)

> Given that the Security Council Resolutions themselves contain no procedural safeguards, it is incumbent on Convention states, if they are to comply with article 5, to specify the conditions on which their armed forces may detain people in the course of an armed conflict and to make adequate means available to detainees to challenge the lawfulness of their detention under their own law. There is no reason why a Convention state should not comply with its Convention obligations by adopting a standard at least equivalent to articles 43 and 78 of the Fourth Geneva Convention, as those participating in armed conflicts under the auspices of the United Nations commonly do. Provided that the standard thus adopted is prescribed by law and not simply a matter of discretion, I cannot think that it matters to which category the armed conflict in question belongs as a matter of international humanitarian law. The essential purpose of article 5, as the court observed at para 105 of Hassan, is to protect the individual from arbitrariness. This may be achieved even in a state of armed conflict if there are regular reviews providing 'sufficient guarantees of impartiality and fair procedure to protect against arbitrariness.'

tive adjustment of Article 5 to situations of IAC.[80] Arguably, the lack of comparable safeguards in NIAC underscored the Court's resistance to deviate from the terms of Article 5 in conflict situations not qualifying as IACs.

A similar position appears to have been adopted by the UN HRC in paragraph 66 of its General Comment No. 35, where the Committee insinuated that the scope of the power to derogate from the right to liberty in situations of emergency is broader in IACs than NIACs.[81] Thus, without determining whether or not IHL rules governing NIACs offer an independent legal basis for detention, the UN HRC opined that detention in such conflicts remains subject to strict legal controls, including limits on its overall duration.[82]

In sum, there appears to be support in the case law of national and international legal bodies for the application of IHRL to security detentions taking place in the context of NIACs. This applies not only to the scope of the power to detain without trial—i.e., who is detainable and for what period of time—but also to the terms of judicial or administrative review of decisions to detain[83] and to conditions of detention and the manner of

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80. Hassan v. United Kingdom, App. No. 29750/09, ¶ 104 (2014) (Eur. Ct. H.R.).

81. *General Comment No. 35*, *supra* note 61, ¶66

> During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention. Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph 15 above, including review by a court within the meaning of paragraph 45 above.

82. *Id.*

83. See, for example, the reference to periodic review of detention in Articles 43 and 78 of the Fourth Geneva Convention, which does not appear in any text governing NIAC.

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and *at least twice yearly*, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Fourth Geneva Convention, *supra* note 3, art. 43 (emphasis added).

> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible *every six months*, by a competent body set up by the said Power.

Id., art. 78 (emphasis added).

treatment of detained individuals, which are specified in IAC but not in NIAC. In the latter case too, the detailed IHL rules governing treatment of detainees under IAC—which sometimes provide detainees with more generous protections than those afforded to them under IHRL[84]—leave only limited room for the residual application of IHRL, whereas the few rules governing detention under NIAC allow considerable space for complementary regulation under IHRL.[85]

The same conclusion—that is, that IHRL standards should govern important aspects of security detentions of international terrorism suspects—would also be warranted even were we to take the position that the *Hamdan* judgment should be read not as classifying the GWOT as a NIAC, but rather as proposing that Common Article 3 provides a "normative floor" applicable to all individuals not protected by other provisions of the Geneva Convention.[86] This is because the limited normative density of the regulatory regime governing security detentions under this alternative construction would still be too sparse in its contents to displace the application of IHRL under the *lex specialis* doctrine and the "comparable safeguards" rationale.

For the sake of completeness, one should also consider whether customary international law pertaining to detentions in NIAC (or to other forms of detention governed by Common Article 3) has developed specific

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84. See, for example, the prohibition in Article 17 of the Third Geneva Convention on exposure to "any unpleasant or disadvantageous treatment of any kind," which affords POWs a higher level of protection against coercive interrogation than that found in the Convention against Torture. Third Geneva Convention, *supra* note 3, art. 17.

85. Common Article 3 provides a right to humane treatment and non-discrimination of detainees, requiring, in particular, protection from violence against their life and person, prohibition against hostage taking and outrages upon personal dignity and certain due process guarantees. Few additional protections for health, safety and religious interests are found in Article 5 of Additional Protocol II. 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.

86. GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 125–26 (2d ed. 2015) (citing, *inter alia,* in support DoD Directive 2310.01E). Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, *in* THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, *supra* note 31, at 343, 346–47. *See also* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), Judgment, 1986 I.C.J. Rep. 14, ¶ 218 (June 27)

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.

rules that deviate from, and which could potentially displace, the relevant IHRL provisions. It is notable in this regard that the ICRC Customary Law Study identified several important developments in State practice which transpose legal standards originally developed in IACs to NIACs, and extend to all NIACs certain standards articulated in the Second Additional Protocol (with respect to a specific sub-category of NIACs involving control of territory by a non-State group).[87] Significantly, unlike some of the International Committee of the Red Cross customary law study rules which have been challenged by States,[88] it does not appear that any of the standards relating to detention in NIAC have been subject to any real controversy; to the contrary, many of these standards have also been endorsed by the non-binding Copenhagen Process Principles and Guidelines, which are likely to result in a further consolidation of the relevant State practice.[89]

Of particular relevance to the present discussion is Rule 128 of the ICRC Customary Law Study, which provides:

> A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC] B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC] C. Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC] The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.[90]

This Rule certainly supports the proposition that detention without trial of suspected terrorists which is not justified by military necessity is unlaw-

87. For a list of the customary IHL rules applicable to persons deprived of their liberty, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS (2005) 175, 198 (including prohibitions on corporal punishment, use of human shields, enforced disappearances, collective punishment and sexual attacks, and requirements for segregation of minors from adults and women from men in places of detention and for contact of detainees with the outside world).

88. *See e.g.*, John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007).

89. *See The Copenhagen Process*, *supra* note 32.

90. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 35, at 451.

ful under customary IHL. It would be difficult, however, to construe this "thin" rule in a manner that would displace all other relevant IHRL standards on arbitrary detention, including the prohibition against indefinite detention without trial.[91] To the contrary, the application of the *Al-Jedda* presumption against the intent of international lawmakers to displace IHRL, the doubts expressed in the *Serdar Mohammed* case as to whether IHL rules governing NIACs provide a proper legal authority to detain and the international criticism directed against indefinite detention arrangements practiced in connection with the GWOT, should lead us to construe Rule 128 narrowly, leaving intact the application of basic IHRL principles, including the principle that no indefinite security detention should be allowed.

Since security detentions undertaken in the context of the GWOT do not, mostly, lend themselves to the application of IHL rules governing IACs, and since no other regulatory framework explicitly authorizing indefinite detention can be found under IHL treaties or customary IHL, there is nothing in IHL which can stipulate upon the relevant and applicable rules of IHRL governing the length of security detentions. Hence, the prohibition against arbitrary detention, which, according to the UN HRC, includes a requirement that "the overall length of possible detention is limited" [92]—i.e., not be indefinite in length—continues to apply to the GWOT, even in emergency situations. Furthermore, there is support in international jurisprudence[93] for the proposition that indefinite detention without trial could constitute a form of cruel, inhuman or degrading treatment or punishment, banned in all circumstances—including in circumstances related to the GWOT—by Article 7 of the ICCPR and Article 16 of the Convention against Torture.[94]

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91. Note, however, the position of the UK Supreme Court, which considered that the "normative density" of a specific detention regime, for the purpose of determining its compatibility with the ECHR, may be constituted cumulatively of national and international norms and regulations. Al-Waheed v. Ministry of Defence [2017] UKSC 2, [67] (Lord Sumption SCJ).

92. *General Comment No. 35*, *supra* note 61, ¶ 15.

93. *See Concluding Observations (United States)*, *supra* note 62, ¶ 14; U.N. Comm. against Torture, *Concluding Observations on the Fifth Periodic Report of Israel*, ¶ 22, U.N. Doc. CAT/C/ISR/CO/5 (2015); U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: United States of America*, ¶¶ 176.240–176.250, U.N. Doc. A/HRC/30/12 (2015).

94. Convention against Torture, *supra* note 75.

V. CONCLUSION

The starting point for any discussion of the legality of detention without trial of suspected international terrorists for the duration of the GWOT is that such detention constitutes an anathema to basic IHRL principles, which find expression in Article 9 of the ICCPR and Article 5 of the ECHR, prohibiting arbitrary detention. Although the prohibition on arbitrary detention is not absolute, and can be derogated from or stipulated upon in times of armed conflict by principles of IHL, which constitute *lex specialis,* the latter legal move is increasingly viewed as dependent on the notion of "comparable safeguards"—that is, on whether the relevant IHL rules offer certain substantive and procedural protections against excess in the application of detention powers. It appears, in this regard, that there is a general acceptance in legal doctrine of the ability of States to rely on the provisions of the Third Geneva Convention on internment of POWs to deviate from the parallel IHRL norms. This is because the Third Geneva Convention provides a detailed regime of POW internment, regulating the beginning and end of detention, the conditions of detention and presenting certain concrete options for early release (including immediate release upon cessation of active hostilities even in the absence of prisoner exchange agreement,[95] and release due to health reasons).[96] Furthermore, in practical terms, given the short duration of active hostilities in the vast majority of IACs and the availability of prisoner exchange arrangements ("cartels") even during active hostilities,[97] it would be highly unlikely for a POW in an IAC to languish for years upon years in detention without trial. Thus, "indefinite detention" in IAC is almost never truly indefinite.

Almost none of these legal and practical safeguards are available in the fight against international terrorism. The rules governing security detention, either under NIAC or under Common Article 3 applicable as a "normative minimum," are few and far between, and they do not provide a clear roadmap for early release—a point underscored by the difficult "legacy prob-

95. Third Geneva Convention, *supra* note 3, art. 118.

96. *Id.*, arts. 109–10. The Convention also affords some less practical release options (release on parole or promise). *Id.*, art. 21.

97. Robert Frau, *Cartels*, *in* THE LAW OF ARMED CONFLICT AND THE USE OF FORCE: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 173, 174 (Frauke Lachenman & Rüdiger Wolfrum eds., 2017).

lem" of dozens of detainees in Guantanamo.[98] Nor do these rules allow for clear criteria for identifying detainable individuals. It is here that the analogy between IAC and NIAC unravels and, as predicted by Justice O'Connor,[99] where reliance on a general and non-explicit power to detain individuals under the laws of war for the duration of an endless conflict becomes legally non-available.

This insight about the limited pull of the *lex specialis* argument has already caused certain jurisdictions to bring their security detention legislation under constitutional review and led the ECtHR and UN HRC to apply IHRL norms as a limit on the power to hold individuals in indefinite detention without criminal charges in situations not qualifying as IAC.[100] Significantly, the UN HRC held that even in times of emergency, security detentions must meet "requirements of strict necessity and proportionality" that "constrain any derogating measures involving security detention;"[101] there must also be a showing that the "detention does not last longer than absolutely necessary," and that "the overall length of possible detention is limited."[102] In fact, indefinite detention without trial might not only be regarded as arbitrary in nature; it may very well also constitute a form of cruel, inhuman or degrading treatment or punishment—a prohibition that can never be derogated from.[103]

IHL rules governing NIACs, which contain few if any rules regulating detention without trial that offer comparable safeguards to those present under IHRL, cannot displace these fundamental and specific IHRL standards—whether or not one can base on them an independent power to detain. In fact, it looks as if it is the very paucity of safeguards comparable to those found under IACs and under IHRL that explains the reluctance of national and international law-applying institutions to regard IHL rules governing NIACs as an independent basis for the exercise of security detention powers.

In all events, the logic of co-application of IHL and IHRL invites interpretative interaction between the two bodies of law, resulting in the con-

98. *See* Norman Abrams, *Addressing the Guantanamo 'Legacy Problem': Bringing Law-of-War Prolonged Military Detention and Criminal Prosecution into Closer Alignment*, 7 JOURNAL OF NATIONAL SECURITY LAW & POLICY 527, 530 (2014).

99. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

100. *See supra* Part IV.

101. *General Comment No. 35*, *supra* note 61, ¶ 66.

102. *Id.*, ¶ 15.

103. International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture, *supra* note 75, art. 2(2).

struction of the terms of one body of law in light of those of the other, and in reading-in provisions of one body of law into the other (unless such read-ins are excluded explicitly or implicitly, by the very nature of the legal regime in question). Such an approach has led the ECtHR to construe Security Council resolutions as IHRL-compatible[104] and an Israeli Commission of Inquiry to read-in IHRL standards into IHL provisions on investigation of war crime allegations.[105] The application of this latter approach to GWOT-detentions should imply the need to construe the power to engage in security detention as limited by IHRL principles of necessity and proportionality, including limits on the overall duration of detention without trial.[106]

Ultimately, both IHL and IHRL norms applicable to armed conflicts reflect an attempt to strike a balance between security needs and humanitarian interests. Such a balancing act sometimes requires States to assume certain reasonable security risks in order to avoid excessive harm to fundamental human rights of affected individuals. A regime of indefinite detention deviates from this balancing formula because it involves a drastic right-limiting measure applied against individuals who pose a security risk that is, almost inevitably, speculative in nature, and which is often based on information that these individuals had no fair chance to refute.[107] As a result, suspected, yet not convicted, international terrorists may find themselves detained for periods of time as long, if not longer, than those imposed upon criminals convicted for committing serious violent crimes or for aiding and abetting them (note that such criminals are released at the

104. Al-Jedda v. United Kingdom, App. No. 27021/08 (2011) (Eur. Ct. H.R.). Even the *Al-Waheed* judgment of the UK Supreme Court supports the proposition that IHRL safeguards attach to detentions based on a Security Council resolution. Al-Waheed v. Ministry of Defence [2017] UKSC 2, [67] (Lord Sumption SCJ).

105. *See* TURKEL COMMISSION REPORT*, supra* note 66.

106. Arguably, the same should hold true for security detentions under the Fourth Geneva Convention: The power to detain individuals for imperative reasons of security cannot be exercised in a manner which would be disproportionate to the security risk posed by the detainee, or that would amount to exposing him or her to cruel, inhuman or degrading treatment. An upper time limit for the maximum period of detention could minimize the risk of violation of proportionality requirements, and would address some of the harshness associated with the uncertainty of detention without trial for an indefinite period of time.

107. *See, e.g.*, KENT ROACH, *Managing Secrecy and its Migration in a Post-9/11 World*, *in* SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 115, 118 (David Cole, Federico Fabbrini & Arianna Vedaschi eds., 2013).

end of their sentence although they may continue to pose a threat to public safety due to the risk of recidivism).

Finally, as indicated above, the lack of an overall limit on the period of security detention constitutes a particularly harsh measure, turning what may be a proportionate reaction to a security threat into a disproportionate one, possibly constituting a form of cruel, inhuman and degrading treatment. Consequently, transforming indefinite security detentions into time-limited ones, opting for predictable and reasonable time frames for detention, is the morally right and legally correct thing to do.