ROSE GOSS

TAKE NO PRISONERS? WHAT THE DECISIONS IN *HASSAN V UNITED KINGDOM* AND *SERDAR MOHAMMED V MINISTER OF DEFENCE* MEAN FOR THE LEGALITY OF DETENTION IN ARMED CONFLICT.

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Abstract

Detention is a necessary part of armed conflict, and is thus permitted by international humanitarian law in conflicts of an international character. However, detention also raises human rights concerns and is limited by human rights instruments, like the European Convention on Human Rights. The recent case of Hassan v United Kingdom *constitutes the European Court of Human Rights' first substantive discussion of the relationship and conflict between these two areas of law. The Court concluded that, as the United Kingdom was acting in accordance with international humanitarian law, its actions were not a breach of the European Convention, even though the Convention does not permit internment in armed conflict. In* Serdar Mohammed v Minister of Defence *the United Kingdom Court of Appeal continued the discussion of detention in armed conflict and in doing so reached the conclusion that there is no international humanitarian law authority to detain in conflicts of a non-international character. This paper examines the issues raised by those two cases. It highlights problems with the reasoning in* Hassan *and suggests a logical alternative: derogation from the European Convention. The paper also analyses the decision in* Mohammed*, and concludes that while the finding is concerning, it is likely to change in future due to customary law developments.*

Word Count

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Table of Contents

I Introduction 8

II Background 11

A Jurisdiction of the ECHR 11

B *Hassan v United Kingdom* 12

C *Serdar Mohammed v Minister for Defence* 13

D Detention in IHL 15

E Interaction between IHL and IHRL 18

III The Approach in *Hassan* 21

IV Derogation as an Alternative to the Reasoning in *Hassan* 26

A Article 15 26

B A Public Emergency Threatening the Life of the Nation 29

C The ECtHR's Approach to Interpretation 32

D Applicability of art 15 to the Facts of Hassan and Serdar Mohammed 33

1 *Hassan* (Iraq) 34

2 *Serdar Mohammed* (Afghanistan) 36

E Why Derogation is a Preferable Approach 37

F Conclusion on Derogation 38

V The Reasoning and Result in *Serdar Mohammed* 39

VI Authority to Detain in Armed Conflict 41

A Authority to Detain in Domestic Law 41

B Authority to Detain under UNSCRs 43

C Conclusion on Authority to Detain in NIAC 48

VII Future Developments Concerning Authority to Detain in NIAC 48

A Whether Treaty Law Could Provide Authority to Detain in NIAC 48

B Whether Customary International Law Could Provide Authority to Detain in NIAC 53

1 The Copenhagen Principles 54

2 The ICRC Process on Strengthening IHL Protecting Persons Deprived of Their Liberty 57
3 United Nations Principles and Guidelines 60
C Conclusion on Future Developments 62
VIII Conclusion 62
IX Appendix: Relevant Provisions 64
A European Convention on Human Rights 64
B International Covenant on Civil and Political Rights 65
X Bibliography 67
A Cases 67
1 United Kingdom 67
2 European Court of Human Rights 67
3 International Court of Justice and Permanent Court of International Justice 68
B Legislation 69
1 United Kingdom 69
C Treaties 69
D United Nations Materials 70
1 Resolutions 70
2 Reports 70
E International Committee of the Red Cross Documents 70
F Other International Materials 71
G Speeches and Letters 71
H Books and Chapters in Books 71
I Journal Articles 74
J Reports and Other Publications 76
K Internet Resources 77

List of Abbreviations Used

API – Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

APII - Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

CA3 – Common Article 3 to the Geneva Conventions

CIL – Customary international law

Copenhagen Principles – Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations

CPA – Coalition Provisional Authority (Iraq)

ECHR - European Convention on Human Rights

ECtHR – European Court of Human Rights

GCI – Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

GCII - Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea

GCIII - Geneva Convention Relative to the Treatment of Prisoners of War

GCIV - Geneva Convention Relative to the Protection of Civilian Persons in Time of War

IAC – International Armed conflict

IACHR – Inter-American Commission on Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICRC – International Committee of the Red Cross

ICRC Process – International Committee of the Red Cross Process on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty

ICJ – International Court of Justice

IHL – International Humanitarian Law

IHRL – International Human Rights Law

ISAF – International Security Assistance Force

MNF – Multinational Force

NIAC – Non-International Armed Conflict

PKK – Kurdistan Worker's Party

UNSC – United Nations Security Council

UNSCR – United Nations Security Council Resolution

WMDs – Weapons of Mass Destruction

I Introduction

Detention is a necessary reality of armed conflict, despite the negative connotations it has been linked to, particularly in recent years. Internment (detention for reasons of preventive security where no charges are brought against the person detained)[1] is a logical alternative to killing, as a means of ensuring security and removing members of enemy forces from the battlefield.[2] Consequently, detention of this type is something states wish to undertake, and is permitted (to some extent) by international humanitarian law (IHL) in international armed conflict (IAC). However, there is an obvious clash between the need to detain, and the human rights concerns associated with detention – reflected in the fact that many international human rights law (IHRL) instruments protect individuals from deprivation of liberty. The recent cases of *Hassan v United Kingdom (Hassan)*[3] and *Serdar Mohammed & Ors v Ministry of Defence (Mohammed)*[4] have brought the issue of detention in armed conflict to the fore in the context of the European Convention on Human Rights (ECHR), art 5 of which guarantees liberty and security of the person and limits the situations in which a person can be detained.[5]

In *Hassan,* the Grand Chamber of the European Court of Human Rights (ECtHR) held that the detention of an Iraqi national by British forces was not a breach of art 5, because the section is to be interpreted in accordance with IHL (namely the Geneva Conventions), which permits detention in IAC. More recently, in *Mohammed,* the United Kingdom Court of Appeal held that the detention of an Afghan national by British forces was a breach of art 5, because IHL does not provide power to detain in non-international armed conflict

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[1] Also referred to as administrative detention; Els Debuf *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing, Oxford, 2013) at 6; and Ashley S Deeks "Administrative Detention in Armed Conflict" (2009) 40 Case W Res J Intl Law 403 at 404.

[2] Debuf, above n 1, at 228; and Bruce 'Ossie' Oswald "Some Controversies of Detention in Multinational Operations and the Contributions of the Copenhagen Principles" (2013) 95 IRRC 707 at 708.

[3] *Hassan v United Kingdom* (29750/09) Grand Chamber, ECHR 16 September 2014.

[4] *Serdar Mohammed v Minister of Defence* [2015] EWCA Civ 843.

[5] See appendix; European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR], art 5.

(NIAC). This paper will examine these cases and the issues they raise, with the aim of evaluating both the current legal position, and likely future developments.

Two main issues arise from these decisions. First, in *Hassan,* the Court reached its conclusion by interpreting art 5 in accordance with IHL pertaining to IAC, which provides authority to detain in armed conflict. However, art 5 provides an exhaustive list of grounds upon which someone can be detained, which does *not* include internment in armed conflict. This result is problematic and has been the subject of much criticism. The seemingly logical alternative is requiring derogation under art 15 of the ECHR, which permits derogation from some ECHR obligations in times of emergency.[6] However, whether this provision is operable in cases of extraterritorial armed conflict has not yet been fully explored by courts or in scholarship. This paper will examine whether a court may find a valid derogation regarding facts like those in *Hassan* and *Mohammed*. While doing so would be a change in ECHR jurisprudence, it would be preferable to the approach in *Hassan.*

The second major issue is that the Court in *Mohammed*, when determining whether the reasoning from *Hassan* could apply, found that IHL does not provide authority to detain in NIAC,[7] leading to its conclusion that the detention in *Mohammed* was illegal. This decision is significant, as it means that authority to detain in armed conflict must come from either domestic law, or United Nations Security Council Resolutions (UNSCRs). There are issues with relying on either source, making it pertinent for this paper to examine the likelihood of a future court reversing this ruling to find that there is authority to detain in NIAC. There is debate over whether treaties could provide this power, but change to the ruling in *Mohammed* is more likely to come from customary international law (CIL), stemming from soft law instruments.

In order to explain and analyse the above issues, this paper will do the following: First, it will outline a number of aspects that form the background to these cases, starting with an

[6] See appendix.

[7] This paper will proceed on the basis that the classifications of conflict in *Hassan* and *Mohammed* were correct.

explanation of the extraterritorial jurisdiction of the ECHR. The paper will then set out the facts and results of the *Hassan* and *Mohammed* cases, and explain the IHL rules of detention. Subsequently, a summary of the previous interaction between IHL and IHRL in the context of the ECHR will be provided. The reasoning from *Hassan* will then be examined in depth, in order to introduce the suggested alternative, derogation. With a view to determining whether derogation could be permissible in situations like *Hassan* and *Mohammed,* the case law around art 15 will be explained and then applied to the facts of both *Hassan* and *Mohammed.* It will be argued that valid derogations could have been entered regarding these cases, and that requiring derogation is preferable to the approach from *Hassan.*

The second half of the paper will address the finding in *Mohammed* that there is no IHL authority to detain in NIAC. The reasoning from *Mohammed* will be explained, and the problems with its ruling outlined: relying on either domestic law or UNSCRs for authority to detain is impractical, and IHL is a preferable source. The final section of the paper will determine whether it is likely that the ruling from *Mohammed* will change. In particular it will scrutinise the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations (Copenhagen Principles) and the International Committee of the Red Cross Process on Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty (ICRC Process), which are likely to impact this area in future.

This paper will demonstrate that, while numerous problems arise from these cases, they are problems which can and should be remedied in future. Resolution of these issues is important due to the integral part that detention plays in armed conflict. Further, this area of IHL is especially important in modern conflict, given the rise in NIAC, and the fact that extraterritorial intervention, and thus detention by foreign forces, is not uncommon. These issues are likely to remain topical; the United Kingdom Minister of Defence has indicated

that leave to appeal *Mohammed* to the Supreme Court will be sought,[8] and the case may eventually reach the ECtHR.[9]

II Background

A Jurisdiction of the ECHR

It has been accepted for some time that jurisdiction of the ECHR is not limited to the territories of contracting parties.[10] Article 1 of the ECHR states that parties to the Convention shall secure the rights and freedoms in the Convention to "…everyone within their jurisdiction".[11] The case law interpreting art 1 has found jurisdiction applies extraterritorially if either spatial or personal control is involved.[12] The strand of jurisdiction relevant to *Hassan* and *Mohammed* is personal jurisdiction, the applicability of which was recently solidified in the ECtHR judgments of *Al-Skeini and Others v United Kingdom* and *Al-Jedda v United Kingdom.*[13] As Christian Tomuschat states, these cases confirm that "…parties to the ECHR remain bound by their contractual commitments wherever they act… provided that they may be deemed to have jurisdiction over a person".[14] The ruling in *Al-Skeini* was adopted by the United Kingdom Supreme Court in *Smith v Ministry of Defence,*[15] making it applicable in United Kingdom law. Personal jurisdiction is especially

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[8] Ministry of Defence (UK) "Breaking News: MOD Response to Court of Appeal Judgment" (30 July 2015) <www.modmedia.blog.gov.uk>; and Owen Bocott "British Forces Illegally Detained Afghan Suspect, Court of Appeal Rules" (30 July 2015) <www.theguardian.com>.

[9] Sean Aughey and Aurel Sari "Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence" (2015) 91 ILS 60 at 118.

[10] See DJ Harris and others *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at 804; and Pieter van Dijk and others (eds) *Theory and Practice of the European Convention on Human Rights* (Intersentia, Antwerp, 2006) at 462.

[11] ECHR, above n 5, art 1.

[12] See *Loizidou v Turkey* (1995) 20 EHRR 99 (1996) 21 EHRR 188 (ECHR) at [62]-[64].

[13] *Al-Skeini and Others v United Kingdom* (2011) 30 BHRC 561 (Grand Chamber, ECHR) at [134]-[137]; and *Al-Jedda v United Kingdom* (2011) 30 BHRC 637 (Grand Chamber, ECHR) at [75].

[14] Christian Tomuschat "The European Court of Human Rights and the United Nations" in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds) *Constituting Europe The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, Cambridge, 2013) 334 at 366.

[15] *Smith and Others v Ministry of Defence* [2014] AC 52 at [46]–[50].

clear when a person is detained,[16] meaning the detainees in *Hassan* and *Mohammed* fell within the jurisdiction of the United Kingdom and could claim under the ECHR.

The following parts will explain the facts of *Hassan* and *Mohammed*, to provide background to the subsequent discussion. Particular segments of the reasoning in each case, and the implications of said reasoning, will be discussed in more depth later in the paper.[17]

B Hassan v United Kingdom

Khadim Resaan Hassan (the applicant) brought a claim regarding the detention of his brother, Tarek Hassan (Hassan), in Iraq in 2003. On 23 April 2003, British forces went to Hassan's home to arrest the applicant, as he was a member and manager of the Ba'ath political party. Khadim was not there, but Hassan was on the roof of the house with an AK-47 machine gun, and was subsequently arrested.[18] Hassan was taken to Camp Bucca, a detention facility. He was questioned twice, but eventually released into the 'civilian pen' when interviewers determined he had been "arrested as a result of mistaken identity",[19] and was "… of no intelligence value...".[20] The records of Hassan's release from the Camp are varied, but he was most likely released in early May 2003.[21] After his release, Hassan did not contact his family. On 1 September 2003, his family was informed that Hassan's body had been found in Samara (North of Baghdad, far from Camp Bucca), with eight bullet wounds from an AK-47 in his chest.[22]

The applicant brought a claim to the United Kingdom High Court, alleging breaches of his brother's rights under arts 5 (the right to liberty and security),[23] 2 (the right to life), and 3

[16] Tomuschat, above n 14, at 366.
[17] See below at Part III and Part V.
[18] *Hassan v United Kingdom,* above n 3, at [10]– 11].
[19] At [24].
[20] At [24].
[21] At [55].
[22] At [29].
[23] See appendix.

(prohibition of torture) of the ECHR.[24] These claims were rejected by the United Kingdom High Court,[25] based on Walker J's conclusion that Hassan was not within the United Kingdom's jurisdiction under art 1 of the ECHR. Hassan was thus unable to proceed with his claim in the domestic system.[26] A case was then brought before the Grand Chamber of the ECtHR. There, the applicant claimed there was a breach of art 5, as the detention and arrest were arbitrary, unlawful, and lacking in procedural safeguards. He also brought claims under arts 2, and 3, alleging that the United Kingdom had failed to carry out an investigation into the circumstances of the detention and death.[27] The claims under arts 2 and 3 were dealt with succinctly by the Court, which concluded there was no evidence that Hassan was ill-treated while detained, or that the United Kingdom had any involvement in his death.[28] The United Kingdom was therefore not obligated to investigate either issue.[29] The Court's discussion of art 5 was considerably more substantial. Following *Al-Skeini,*[30] the Court concluded that because "Tarek Hassan was within the physical power and control of the United Kingdom soldiers…",[31] he fell within United Kingdom jurisdiction from the moment of his arrest, until his release.[32] Regarding art 5, the Court held that the detention of Hassan was not arbitrary or a breach of art 5, as it was consistent with the powers of the United Kingdom under IHL pertaining to IAC, and the requisite procedural safeguards were met.[33] So, while the art 5 claims were admissible, the majority held there was no violation of the ECHR.[34]

C Serdar Mohammed v Minister for Defence

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[24] ECHR, above n 5, arts 2, 3, and 5.

[25] *Hassan v United Kingdom* [2009] EWHC 309 (Admin).

[26] *Hassan v United Kingdom*, above n 3, at [47].

[27] At [3].

[28] At [63].

[29] At [63]-[64].

[30] *Al-Skeini and Others v United Kingdom,* above n 13.

[31] At [76].

[32] At [80].

[33] At [110].

[34] At [111].

In contrast, the more recent case of *Mohammed* held that the United Kingdom, in a situation involving detention in NIAC rather than IAC, had violated art 5. The case concerned the detention of Afghan national Serdar Mohammed, by British forces acting in Afghanistan as part of the International Security Assistance Force (ISAF).[35] Mohammed was arrested on 7 April 2010 by United Kingdom forces targeting a vehicle believed to be carrying a senior Taliban commander.[36] Mohammed claimed to be a farmer, but intelligence was later received "to the effect that he was a senior Taliban Commander …".[37] He was initially detained on the basis that he was a threat to the accomplishment of the ISAF mission.[38] Following a review of the detention on 4 May 2010, the Afghan authorities indicated they wished to accept custody of Mohammed, but did not have the capacity to do so. From this point on he was under "logistical detention" pending transfer to the authorities.[39] Mohammed was detained by United Kingdom forces from 7 April 2010 to 25 July 2010, when he was transferred to the Afghan authorities.[40]

Mohammed brought a claim to the High Court of the United Kingdom under the Human Rights Act 1998, for breach of his rights under the ECHR. He alleged a breach of art 5, claiming his detention was arbitrary after 96 hours and the requisite procedural safeguards were not in place.[41] The High Court found in his favour,[42] and the case was appealed to the United Kingdom Court of Appeal. A claim was also brought in tort law, alleging that the detention was unlawful under Afghan law. That claim will not be discussed in this paper, but the Court of Appeal held that the detention was unlawful under Afghan law, and that a claim in tort could be made.[43]

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[35] *Serdar Mohammed v Minister of Defence,* above n 4, at [1].
[36] At [43].
[37] At [43].
[38] At [43].
[39] At [43].
[40] At [43].
[41] At [5].
[42] *Serdar Mohammed v Minister of Defence* [2014] WEHC 1369 (QB).
[43] At [9].

As in *Hassan*, the Court of Appeal confirmed that the detention was governed by the ECHR, as Mohammed was under the control of United Kingdom forces.[44] However, the Court in *Mohammed* held that there is no IHL authority to detain in NIAC, and that the detention was unlawful after 96 hours (the time allowed under ISAF policy).[45] Further, the procedural safeguards required by art 5 were not met.[46] Thus, although these cases have many similarities, the results differed due to the divergent IHL regimes for detention in IAC and NIAC.

D Detention in IHL

The law regarding detention in IAC is laid out in the Geneva Conventions, and is well accepted.[47] The rules and procedures of detention vary, depending on whether the persons concerned are classified as prisoners of war, medical or religious personnel, or, civilians and others who do not have prisoner of war status.

Prisoner of war status is granted to those classified as lawful combatants, including members of the armed forces of a party to the conflict (who have not forfeited their entitlement to prisoner of war status), and other specific categories of persons who are not members of the armed forces of a party to the conflict but are entitled to prisoner of war status upon capture.[48] Article 21 of the Third Geneva Convention (GCIII) provides that "The Detaining Power may subject prisoners of war to internment".[49] This is based on the principle of military necessity, as "…the purpose of prisoner of war internment is to prevent

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[44] At [99] and [105].
[45] At [9].
[46] At [9].
[47] Debuf, above n 1, at 228; Leslie C Green *The Contemporary Law of Armed Conflict* (3rd ed, Juris Publishing, Manchester, 2008) at 224; and see also Horst Fischer "Protection of Prisoners in War" in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford, 2008) 367 at 371.
[48] Debuf, above n 1, at 188.
[49] Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 972 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention III], art 21.

members of the enemy's armed forces from returning to the battlefield…".[50] Medical and religious personnel may not be interned on the basis of GCIII, as they enjoy special status "…based on the exclusively humanitarian nature of their function…".[51] Instead, they are protected by provisions in the First and Second Geneva Conventions (GCI and GCII), designed to allow them to carry out their functions where necessary. For example, art 37 GCII provides that where medical personnel from a ship fall into the hands of the enemy, "… they may continue to carry out their duties as long as this is necessary for the care of the wounded and sick…", and should be sent back to their ship when practicable.[52]

The remaining category is civilians and other persons who do not have prisoner of war status. Their internment is authorised by the Fourth Geneva Convention (GCIV),[53] and the rules for internment of civilians in situations of IAC and occupation are slightly different. Regarding IAC, art 42 states "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary".[54] Article 78 applies in occupation, and states that internment is possible "If the Occupying Power considers it necessary, for imperative reasons of security…". As well as providing the bases on which detention can occur, the Conventions set out rules for treatment of prisoners during internment,[55] and for their release.[56]

Thus, detention in IAC is authorised and regulated by the Geneva Conventions. The status of detention in NIAC is much less clear. While a number of IHL rules apply to detention

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[50] Debuf, above n 1, at 228.
[51] Debuf, above n 1, at 265.
[52] Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 971 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention II], art 37; see also Debuf, above n 1, at 265-273.
[53] Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 973 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV]; see also Green, above n 47, at 225.
[54] See also art 42(2), regarding voluntary internment.
[55] Art 27.
[56] Art 132(1).

in NIAC, they do not authorise detention or provide comprehensive protections.[57] This difference is due to the fact that, when the Geneva Conventions were drafted, IAC was the focus, and states were unwilling to afford protections to detainees from non-state groups.[58] The relevant law can be found in Common Article 3 of the Geneva Conventions (CA3),[59] Additional Protocol II to the Conventions (APII),[60] and art 75 of Additional Protocol I to the Conventions (API).[61] CA3 applies in NIAC occurring in territory of parties to the Geneva Conventions, and provides a general guarantee against "outrages upon human dignity", including "degrading treatment". The Article also requires that sentences and executions be pronounced by a "…regularly constituted court…". However, CA3 fails to define its own content, such as a regularly constituted court, and, as Jelena Pejic states "…does not provide anywhere near sufficient guidance for the myriad of legal and protection issues that arise in conflicts not of an international character".[62] APII provides slightly more specific protection to detainees, but is of more limited application than CA3, as it only applies in conflicts which take place in territory of a party to the Geneva Conventions, and where:[63]

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[57] See Emily Crawford *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (Oxford, Oxford University Press, 2010) at 48.

[58] Crawford, above n 57, at 69-75.

[59] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention I], art 3(1); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention II], art 3(1); Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (adopted 21 October 1950, opened for signature 12 August 1949) [Geneva Convention III] art 3(1); Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV], art 3(1) [Common Article 3].

[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978).

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 17512 (opened for signature 8 June 1977, entered into force 7 December 1978) [Protocol I], art 75.

[62] Jelena Pejic "The Protective Scope of Common Article 3: More than Meets the Eye" (2011) 93 IRRC 189 at 205.

[63] Art 1.

> …dissident armed forces or other organised armed groups, which, under responsible command, exercise such control over a part of its territory so as to enable them to carry out sustained and concerted military operations…

APII provides similar guarantees of humane treatment to CA3, including a provision to protect those whose liberty has been restricted: Article 5 outlines minimum standards of treatment for persons deprived of liberty in relation to armed conflict, covering things like provision of food and water, working conditions, and medical examinations. Finally, art 75 of API provides, in both IAC and NIAC, protections for persons in "…the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol". Article 75 guarantees humane treatment through prohibitions against acts like torture, and outrages upon personal dignity. It also requires that sentences and penalties must only be given by an "… impartial and regularly constituted court".

While the combination of these provisions provides some measure of protection in NIAC, it does not constitute a thorough regime. Further, and most importantly for the purposes of this paper, there is no IHL treaty rule setting out authority and grounds for detention in NIAC.

E Interaction between IHL and IHRL

There is consensus among a number of international bodies, including the International Court of Justice (ICJ) and Human Rights Committee, that IHRL continues to apply during armed conflict.[64] For example, in the *Nuclear Weapons Advisory Opinion,* the ICJ held that the International Covenant on Civil and Political Rights (ICCPR) applies in armed conflict, unless derogated from under its art 4.[65] The same approach was reaffirmed in the ICJ's

[64] John Cerone "Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict in an Extraterritorial Context" (2007) 40 Israel L Rev 396 at 401.
[65] *Legality of the Threat of Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 at 240.

Construction of a Wall Advisory Opinion.[66] The parallel application of IHL and IHRL means conflict between these two areas of law is possible, unsurprising considering that, while both areas of law endeavour to protect human rights, military necessity is a fundamental principle of IHL.[67] Many commentators expect incongruity between the two areas of law to be solved by application of the *lex specialis* principle,[68] a principle frequently used to reconcile conflict between competing legal norms.[69] The *lex specialis* principle means the rule more specific to the subject matter will be used: "The reasons for preferring the more specific rule are that it is close to the particular subject matter and takes better account of the uniqueness of the context."[70] Even when the *lex specialis* has been determined, the *lex generalis* remains present and must be taken into account when interpreting the *lex specialis*.[71] This is the most common approach, although as Silvia Borelli points out, it does not strictly correspond to the Latin maxim, which implies the "disapplication or displacement of the general law in favour of the special law".[72] The

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[66] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 178.

[67] See *Serdar Mohammed v Minister of Defence,* above n 4, at [164].

[68] See Marco Sassoli and Laura M Olson "The Relationship between Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in non-International Armed Conflicts" (2008) 90 IRRC 599 at 621; Cedric De Koker "*Hassan v United Kingdom:* The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflict" (2015) 31 Utrecht J Intl & Eur L 90 at 90; and Jean d'Aspremont and Elodie Tranchez "The Quest for a Non-Conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the *Lex Specialis* Principle?" in Robert Kolb and Gloria Gaggioli (eds) *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing, Cheltenham, 2013) 223 at 225.

[69] Noam Lubell "Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate" (2007) 40 Israel L Rev 648 at 655. Contrast with Marko Milanovic "A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law" (2010) 14 JCSL 459.

[70] Sassoli and Olson, above n 68, at 603.

[71] Sassoli and Olson, above n 68, at 605.

[72] Silvia Borelli "The (Mis)-Use of General Principles of Law: *Lex Specialis* and the Relationship between International Human Rights Law and the Laws of Armed Conflict" in Laura Pneschi (ed) *General Principles of Law: The Role of the Judiciary* (Springer, 2015) (forthcoming).

International Law Commission has described *lex specialis* as a "widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts".[73]

Despite consensus about the parallel application of IHL and IHRL in armed conflict, the ECtHR has been reluctant to fully engage with IHL,[74] even when cases before it have involved conflict.[75] In cases concerning the Chechen-Russian conflict, the Court did not expressly discuss IHL, even though this was a "clear situation" in which it could have done so.[76] In *Isayeva v Russia,* the Court examined whether there had been a breach of art 2 of the ECHR (the right to life) but did not clearly address IHL,[77] even though submissions specifically raised the relevant rules of IHL.[78] A similar approach was taken to conflict in Eastern Turkey.[79] In *Özkan and Others v Turkey*, the ECtHR identified that armed conflict had occurred in the South-East of Turkey, between Turkish security forces and members of the Kurdistan Workers' Party (PKK).[80] When determining whether art 2 of the ECHR was violated, the Court did not refer to IHL.[81] Cases like these have led to an expectation that the ECtHR will not substantively engage with IHL,[82] despite evidence of conflict.

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[73] International Law Commission *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission* A/CN.4/L.682 (13 April 2006) at [56]; contrast with Milanovic, above n 69.

[74] Michael Kearney "Extraterritorial Jurisdiction of the European Convention on Human Rights" (2002) 5 TCLR 126 at 147.

[75] Christine Byron "A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies" (2007) 47 VJIL 839 at 849; and see also Silvia Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom*: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad" (2015) 16 QIL 25 at 33-34.

[76] Byron, above n 75, at 854.

[77] *Isayeva v Russia* (2005) 41 EHRR 39 (Former First Section, ECHR) at [200].

[78] At [162]-[167].

[79] Sassoli and Olson, above n 68, at 600-601. "

[80] *Ahmet Özkan and Others v Turkey* (21689/93) Section II ECHR, 6 April 2004 at [85].

[81] At [296]-[330].

[82] Samuel Hartridge "The European Court of Human Rights' Engagement with International Humanitarian Law" in Derek Jinks, Jackson N Maogoto and Solon Solomon (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Online ed, Springer, 2014) 257 at 277-278.

III The Approach in Hassan

Hassan is an important turning point in the ECtHR's jurisprudence. It was the first case in which a state argued that its obligations under art 5 should be disapplied or interpreted in light of IHL,[83] and led to the ECtHR's most direct discussion of the interaction between IHL and IHRL. As it is clear that the ECHR applies extraterritorially in situations of imprisonment,[84] the question to be answered by the court in *Hassan* was *how* the ECHR would apply, in armed conflict.[85] The majority (ten out of fourteen judges)[86] began its discussion of the interaction between art 5 and IHL by stating:[87]

> It has long been established that the list of grounds of permissible detention in Article 5 §1 *does not include internment or preventive detention* when there is no intention to bring criminal charges within a reasonable time.

The Court then acknowledged the powers to detain in IAC, set out in GCIII and GCIV.[88] Proponents of the *lex specialis* approach would expect the Court, having identified a possible conflict between IHL and IHRL, to determine and apply the most specific regime. Instead, the focus of the Court's reasoning moved to art 31 of the Vienna Convention on the Law of Treaties, para 3 of which states that interpretation of a treaty will take into account:[89]

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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[83] *Hassan v United Kingdom,* above n 3, at [99]. (29750/09) Grand Chamber, ECHR 16 September 2014 at [99].

[84] See above at 11; see also Tomuschat, above n 14, at 366.

[85] Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom",* above n 75, at 26.

[86] De Koker, above n 68, at 92.

[87] At [97] (emphasis added).

[88] At [97]. See above at Part IID.

[89] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3).

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

This approach (referred to as systemic interpretation)[90] led the Court to examine IHL rules and practice of detention in IAC. According to the Court, state practice has been to detain in IAC without derogating from the ECHR.[91] This, and the Court's desire to incorporate IHL in its interpretation of art 5, resulted in the conclusion that IHL (and the authority it provides to detain in IAC) can be taken into account under art 5, if pleaded by a state.[92] So, as the detention of Hassan was in accordance with GCIII and GCIV, the ECtHR concluded there was no breach of art 5.[93]

In *Mohammed,* the United Kingdom Secretary of State submitted that the reasoning from *Hassan* should apply, and that IHL should alter art 5.[94] However, the Court held that the existence of IHL rules authorising detention in IAC was central to the ECtHR's reasoning in *Hassan,* so the same reasoning could only apply if IHL provides a basis for detention in NIAC.[95] The Court concluded there is currently no IHL authority to detain in NIAC,[96] and that detention in NIAC could not be consistent with art 5.[97] The Court did not comment on the validity of the reasoning in *Hassan,* even though that decision has been widely criticised. By stating "the reasoning in *Hassan* can be extended to a situation of non-international armed conflict… if in a non-international armed conflict international humanitarian law provides a legal basis for detention", the Court has left open the possibility that the reasoning from *Hassan* could apply to NIAC. *Hassan* is therefore significant for the future relationship between art 5 and IHL in both IAC and NIAC.

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[90] d'Aspremont and Tranchez, above n 68, at 235.
[91] At [101].
[92] At [107].
[93] At [110].
[94] *Serdar Mohammed v Minister of Defence,* above n 4, at [122].
[95] At [123].
[96] For discussion of other bases of detention see below at Part VI.
[97] At [251].

Hassan is problematic for numerous reasons, most of which were identified by the four dissenting judges,[98] and have been expanded upon by commentators since the decision was released. The major shortfall of the reasoning in *Hassan* is that it does not give adequate weight to the fact that art 5 includes an exhaustive list of grounds for detention, which does not include internment in armed conflict.[99] The way the majority reads in another ground for detention (based on IHL) undermines art 5, resulting in an unprecedented amendment of the EHCR. While other IHRL treaties prohibit 'arbitrary' arrest or detention, the ECHR specifically lists the bases upon which a person can be deprived of their liberty.[100] This has previously been a focal point in ECHR jurisprudence.[101] In the House of Lords *Al-Jedda* decision, Baroness Hale stated:[102]

> The drafters of the Convention had a choice between a general prohibition of "arbitrary" detention, as provided in article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter.

The same point was emphasised in the ECtHR judgment in *Al-Jedda*,[103] and has been reiterated by scholars. In 2014, Samuel Hartridge wrote "… the weight of authority from the Court suggests the power to detain under IHL cannot operate as an additional ground of detention, separate to those found in Article 5".[104] The finding that there is another ground for detention under art 5 is therefore surprising, and the reasoning used to reach that point is questionable.

As noted, the majority relied on state practice to find that art 5 could be interpreted in accordance with IHL. The practice relied on was the fact that no state has derogated from

[98] *Hassan v United Kingdom,* above n 3, per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.
[99] See appendix.
[100] Sassoli and Olson, above n 68, at 618.
[101] Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom*", above n 75, at 39.
[102] *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58 [2008] 1 AC 332 at [122].
[103] *Al-Jedda v United Kingdom,* above n 13, at [99].
[104] Hartridge, above n 82, at 283.

art 5 to detain persons on the basis of GCIII and GCIV.[105] However, the majority did not explore other possible reasons for such practice, and did not acknowledge that there may be political reasons behind states' choices not to derogate.[106] Derogation entails acknowledging the jurisdiction of the ECHR, increasing states' vulnerability to a range of human rights claims which they are unlikely to want to face. The Court also used state practice regarding the ICCPR (art 9 of which is the equivalent of art 5 of the ECHR)[107] to support its conclusion.[108] As the dissenting judges explain, there is a fundamental distinction between art 9 of the ICCPR and art 5 of the ECHR, meaning the ICCPR practice is unhelpful:[109] The ICCPR prohibits 'arbitrary detention' and does not provide an exhaustive list of permitted types of detention. Thus, states which do not derogate under art 9 in situations of conflict may act based on the belief that detention authorised by IHL is not arbitrary. In contrast, the exhaustive list of grounds in art 5 do not leave room for such a belief, and the ECtHR has relied on irrelevant practice to determine that the ECHR has been amended.

Further, the Court has gone too far in ensuring that IHRL and IHL coexist. The majority relied on *Varnava and Others v Turkey,* in which the ECtHR stated art 2 of the ECHR should be "… interpreted in so far as possible …" in light of IHL.[110] The Court seems to have overlooked the phrase "in so far as possible"; it will not always be possible to interpret the ECHR in a way that takes IHL into account. IHL and IHRL, while similar, have different objectives. IHRL focuses on protecting individuals' rights, and while IHL does this to some extent, it is also based on the principle of military necessity and designed to allow commanders to achieve military objectives.[111] In this case, the fact that art 5 has

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[105] *Hassan v United Kingdom,* above n 3, at [101].

[106] William Abresch "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" (2005) 16 EJIL 741 at 756.

[107] See appendix.

[108] At [101].

[109] At [14] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.

[110] *Varnava and Others v Turkey* (2010) 50 EHHR 21 (Grand Chamber, ECHR) at [185]; and *Hassan v United Kingdom*, above n 3, at [17] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.

[111] Hartridge, above n 82, at 260.

exhaustive grounds which do not include internment in armed conflict means there is no room for IHL detention in that provision, and that *Hassan* "drives the convergence between international human rights law and the law of armed conflict too far".[112] As the dissenting judges stated, "…the majority's resolution of this case … constitutes an attempt to reconcile norms of international law that are *irreconcilable* on the facts of this case"[113], this is area where IHL and IHRL are not compatible.

Finally, the reasoning in *Hassan* undermines art 15 of the ECHR, which permits derogation from certain rights obligations in times of emergency.[114] In *Hassan,* the ECtHR created a new mode of quasi-derogation:[115]If a state pleads that IHL relevant to IAC should be taken into account, the ECHR can be modified accordingly.[116] This contradicts the existence of art 15, as explained in the dissenting judgment in *Hassan*:[117]

> There would have been no reason to include this structural feature if, when war rages, the Convention's fundamental guarantees automatically became silent or were displaced in substance, by granting the Member States additional and unwritten grounds for limiting fundamental rights based solely on other applicable norms of international law.

The stance taken also contradicts the previous jurisprudence of the ECtHR on this issue, as "The Court has always been strict in requiring that a derogation should be in place before accepting any claim that rights could be limited in light of the existence of an emergency".[118] Furthermore, *Hassan* is contrary to the approach taken by the ICJ toward

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[112] Aughey and Sari, above n 9, at 65.
[113] At [6] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.
[114] See appendix.
[115] Bart van der Sloot "Is All Fair in Love and War? An Analysis of the Case Law on Article 15 ECHR (2015) 53 Mil L & L War Rev 319 at 350-351.
[116] *Hassan v United Kingdom,* above n 3, at [107].
[117] At [8] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.
[118] Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom",* above n 75, at 40.

the ICCPR, which confirmed in the *Nuclear Weapons Opinion* that the ICCPR only ceases to operate in times of war when art 4 (the equivalent of art 15) is in operation.[119]

The majority in *Hassan* disregarded the clear wording of the ECHR in numerous ways in an attempt to reconcile these conflicting branches of law. It went beyond the clear wording of art 5, undermined the status of art 15, and has unsurprisingly been met with a wide range of criticism. Responses have suggested the preferable alternative is to require states to derogate from their ECHR obligations (to a necessary and proportionate extent) under art 15. However, the validity of this suggestion is not clear. Previously, derogations have only occurred in relation to conflicts happening in the territory of the derogating state, so requiring derogation in situations like *Hassan* and *Mohammed* would be another change in ECtHR jurisprudence.

IV Derogation as an Alternative to the Reasoning in Hassan

A Article 15

Article 15 permits derogation from certain ECHR obligations (including art 5) in times of "… war or other public emergency threatening the life of the nation…".[120] Measures taken in response to the emergency must be "strictly required" and not inconsistent with the state's other international law obligations.[121] Requiring derogation under art 15 has been suggested as a logical alternative to the approach in *Hassan.* For example, Borelli's position is that:[122]

> … whenever State Parties act in the context of an armed conflict… it should be for States to derogate from their obligations under the ECHR if they wish to benefit from the greater latitude which the greater rules of IHL can afford them.

[119] See *Legality of the Threat of Use of Nuclear* Weapons, above n 65, at 240.
[120] See appendix; ECHR, above n 5.
[121] Art 15(1).
[122] Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom",* above n 75, at 27.

The dissenting judges in *Hassan* stated that derogation under art 15 was the only way in which the United Kingdom could have applied the IHL rules of detention without violating art 5,[123] and the ICJ has also emphasised that IHRL obligations apply *unless* a valid derogation is in place.[124] However, while use of art 15 seems at first glance like a straightforward answer to the problems posed by *Hassan,* its applicability in situations of extraterritorial armed conflict has not been extensively explored either in scholarship or by the ECtHR, and the possibility of such application has been dismissed by many. In fact, as the Court identified in *Hassan*:[125]

> Leaving aside a number of declarations made by the United Kingdom between 1954 and 1966 in respect of powers put in place to quell uprisings in a number of its colonies, the derogations made by Contracting States under Article 15 of the Convention have all made reference to emergencies arising within the territory of the derogating State.

In *Al-Jedda,* Lord Bingham opined that the requirements of art 15 were very unlikely to ever be met "…when a state has chosen to conduct an overseas peacekeeping operation … from which it could withdraw",[126] implying that derogation can only apply in an emergency which a state cannot choose to avoid. More recently in *Hassan,* the United Kingdom argued it had not derogated from the ECHR because it was not state practice to do so, and "since the Convention could and did accommodate detention in such cases" (based on the belief that art 5 can incorporate IHL).[127] Despite these views, there has not yet been a conclusive statement from the ECtHR on this issue. In *Al-Jedda*, although the United Kingdom had argued that it is not possible to enter a derogation under art 15 in an IAC,[128] the Court's response did not address the correctness of that argument. Instead, it noted that the United

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[123] At [9] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.

[124] See *Legality of the Threat of Use of Nuclear Weapons,* above n 65, at 240; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* above n 66, at 178.

[125] At [40].

[126] *Al-Jedda v Secretary of State for Defence,* above n 102, at [38] per Lord Bingham; see also at [150] per Lord Brown.

[127] At [90].

[128] *Al-Jedda v United Kingdom,* above n 13, at [92].

Kingdom had not purported to derogate in that situation.[129] Bart van der Sloot took this to mean art 15 could possibly be invoked "… with reference to extraterritorial derogations in case of a State's forces engaged in operations abroad".[130] While it is promising that the Court did not explicitly agree with the United Kingdom, it is also not decisive and the issue requires further analysis. The state practice is also not conclusive, as the reason behind the lack of derogation could be that states do not wish to acknowledge extraterritorial ECHR jurisdiction. For example, on 7 April 2004, the United Kingdom Armed Forces Minister stated:[131]

> …The ECHR can have no application to the activities of the United Kingdom in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition forces.

As explained above though,[132] ECHR jurisdiction is not contentious in situations of detention. This part will therefore endeavour to determine whether derogation is a viable alternative to the reasoning in *Hassan,* and will take into account the facts of *Mohammed,* due to the Court of Appeal's indication that the reasoning from *Hassan* would be followed if IHL authorised detention in NIAC. The main question to be answered is whether a valid derogation could be made in respect of an extraterritorial military operation. The greatest barrier to the application of art 15(1) in that situation is the requirement that there must be a war or public emergency threatening the life of the nation. The other requirements, that measures taken must be strictly required (also known as the proportionality requirement)[133], in conformity with other international obligations, and that notification

[129] At [98].

[130] van der Sloot, above n 115, at 345-346.

[131] Adam Ingram MP, Ministry of Defence, Letter to Adam Price MP, 7 April 2004; See also Bill Bowring "How will the ECtHR Deal with the UK in Iraq?" in Phil Shiner and Andrew Williams (eds) *The Iraq War and International Law* (Hart Publishing, Oxford, 2008) 285 at 290.

[132] See above at 11.

[133] Jan-Peter Loof "Crisis Situations, Counter Terrorism and Derogation from the European Convention on Human Rights, A Threat Analysis" in Antoine Buyse (ed) *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict* (Intersentia, Antwerp, 2010) 35 at 40.

must be given, could be satisfied without difficulty in a situation of extraterritorial military activity.

B A Public Emergency Threatening the Life of the Nation

Article 15(1) permits derogation "in time of war or other public emergency" (sometimes referred to as the requirement of 'exceptional threat'). 'In time of war' refers to situations of IAC,[134] one example of a public emergency threatening the life of the nation. It is therefore important to examine the broader meaning of the public emergency requirement.[135] In *Lawless v Ireland,* the ECtHR explained that the requirement referred to "…an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed…".[136] Later cases have also required that there must be imminent danger.[137] The major issue, regarding cases like *Hassan* and *Mohammed*, is that art 15 seems to require an emergency in and affecting the nation entering the derogation – in *Hassan* and *Mohammed*, the United Kingdom. However, the jurisprudence surrounding art 15 indicates that the requirement is broader than it initially appears.

First, recent case law shows that what constitutes a public emergency is adapting in accordance with modern issues. Whereas older case law involved emergencies caused by uprisings within states by groups wishing to overthrow the government, international terrorism has recently been the cause of a 'public emergency' in the United Kingdom. On 18 December 2001 the United Kingdom government lodged a derogation with the Secretary General of the Council of Europe, based on the United Kingdom's response to the September 11 attacks and international terrorism, the Anti-terrorism, Crime and Security Act 2001 (which provided power to arrest and detain foreign nationals believed

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[134] van Dijk and others, above n 10, at 1059.

[135] Loof, above n 133, at 39.

[136] *Lawless v Ireland* (1979-80) 1 EHRR 1 at [28].

[137] See for example *Denmark, Norway, Sweden and the Netherlands v Greece* (1969) 12 Yearbook 186 (EComHR).

to be a risk to national security).[138] As there would be no immediate possibility of deportation, such detention would usually be a breach of art 5.[139] A case challenging this legislation and derogation eventually made its way to the House of Lords (*A and Others v the United Kingdom*).[140] The House of Lords held there was a public emergency threatening the life of the nation, but that the measures the government had taken were disproportionate as they only applied to non-nationals.[141] The applicants then lodged claims to the ECtHR, where the Court held it was acceptable for the United Kingdom government to decide there was a credible terrorist threat, and that it was an imminent threat as it could be carried out without warning at any time.[142] Like the lower courts, the ECtHR concluded that the measures taken in response to the emergency were disproportionate as they "discriminated unjustifiably" against non-nationals.[143]

Even more recently, France entered a derogation to the ECHR in the wake of the terrorist attacks that occurred in Paris on 13 November 2015.[144] Commentator Marko Milanovic suggests that, based on the responses of human rights groups to the emergency measures taken by France,[145] this derogation notice is likely to be the source of litigation in both French courts and possibly the ECtHR.[146] It is impossible to determine when or whether such litigation will eventuate, but if it does, it may provide an opportunity for the ECtHR to clarify the meaning of a public emergency threatening the life of the nation. However, the existing case law demonstrates that the ECtHR is willing to take a broad view of this

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[138] *A and Others v United Kingdom* (2009) 26 BHRC 297 (Grand Chamber, ECHR) at [11].

[139] *A and Others v United Kingdom,* above n 138, at [11]; see also *Chahal v the United Kingdom* (1996) 23 EHRR 412 (ECHR) at [112].

[140] See *A and Others v The United Kingdom* (2004) UKHL 56.

[141] At [118]-[119].

[142] *A and Others v United Kingdom,* above n 138, at [177].

[143] At [190].

[144] Council of Europe "Declaration Contained in a Note Verbale from the Permanent Representation of France, Dated 24 November 2015" (24 November 2015) <www.coe.int>.

[145] See for example Human Rights Watch "France: New Emergency Powers Threaten Rights" (24 November 2015) <www.hrw.org>.

[146] Marko Milanovic "France Derogates from ECHR in the Wake of the Paris Attacks" (13 December 2015) <www.ejiltalk.org>.

requirement, and will not limit the application of art 15 to situations of traditional threats and conflicts.

Second, the ECtHR has also taken a broader approach to the location (or life of the nation) element of the threat than may have been expected from the wording of art 15. As Aly Mohktar states, case law has relaxed the 'life of the nation' standard and "… it has been accepted that the whole population may be affected by events in only part of a state and that the derogation may be restricted to that part".[147] This is particularly evident in the case law regarding Northern Ireland, which indicates that the entire population does not have to be impacted, and that "conflict in a specific sub-region of a country may also be enough":[148] In *Brannigan and McBride v United Kingdom,* the Court allowed a derogation based on terrorist violence "…in Northern Ireland and elsewhere in the United Kingdom".[149] The United Kingdom was also able to derogate in *Ireland v the United Kingdom,* based on widespread violence in Ireland.[150] In *Aksoy v Turkey,* the ECtHR took a similar approach and concluded that terrorist activity in a particular region of South-East Turkey had created a public emergency threatening the life of the nation.[151] In each of these cases, derogation has been permitted when there is conflict in an area geographically disconnected from the rest of the nation.

Furthermore, the United Kingdom was able to enter a valid derogation concerning Cyprus, a colony. The derogation was entered in relation to measures taken to combat an armed resistance movement. Even though the United Kingdom asserted there was a public emergency threatening the life of the nation, it did not intend to recognise Cyprus as a separate nation, or to argue that the whole nation of Britain was threatened.[152] Instead, the United Kingdom submitted it was common ground that the 'nation' referred to for this

[147] Aly Mokhtar "Human Rights Obligations v Derogations: Article 15 of the European Convention on Human Rights" (2004) 8 IJHR 65 at 69.
[148] van der Sloot, above n 14, at 345; see also Loof, above n 133, at 41.
[149] *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539 (ECHR) at [47].
[150] *Ireland v the United Kingdom* (1979-80) 2 EHRR 25 at [212].
[151] *Aksoy v Turkey* (1996) 1 BHRC 625 (ECHR).
[152] *Greece v United Kingdom* (1958) 18 HRLJ 348 (EComHR) at [113].

purpose was Cyprus, "… not the United Kingdom or the Commonwealth".[153] The Commission concluded that:[154]

> … the term 'nation' means the people and its institutions, even in a non-self-governing territory, or in other words, the organized society, including the authorities responsible both under domestic and international law for the maintenance of law and order.

On this basis, a valid derogation was entered concerning a threat that was certainly not a threat to the entire nation of the United Kingdom, or even closely geographically connected. Thus, the case law of the ECtHR makes clear that a public emergency threatening the life of the nation does not have to impact the territory of the entire nation, and may be geographically disconnected from the derogating state.

C The ECtHR's Approach to Interpretation

A noteworthy element of the ECtHR's jurisprudence is that the Court acts with deference towards the decisions of national parliaments and governments. The Court has explained this 'margin of appreciation' in almost all cases concerning derogation,[155] often with identical wording:[156]

> … the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

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[153] At [130].

[154] At [130].

[155] Oren Gross and Fionnuala Ni Aoilain "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights" (2001) 23 HRQ 625 at 633.

[156] *Brannigan and McBride v United Kingdom,* above n 149, at [43]; *A and Others v United Kingdom*, above n 138, at [173]; *Aksoy v Turkey,* above n 151, at [68]; and *Ireland v the United Kingdom,* above n 150, at [207].

This approach is based on the principle of subsidiarity – the idea that the Convention judicial system is subsidiary to domestic systems.[157] However, the ECtHR also frequently notes that parties do not enjoy an "unlimited power of appreciation", and that European supervision accompanies the domestic margin of appreciation.[158] The approach has been criticised, and many have argued that the Court should take a more active role in its 'supervision'.[159] At present though, the jurisprudence of the Court suggests it will continue to give such a margin to national authorities, especially in decisions about whether there is a public emergency threatening the life of the nation.

In its judgments, the ECtHR has also stressed that the Convention is a living instrument, and must be interpreted with regard to contemporary conditions;[160] this approach is "…firmly rooted in the Court's case law".[161] This is another factor which may mean the Court could allow a wide interpretation of art 15, considering that the nature of conflict has changed dramatically since the formation of the Convention. However, application of this approach is not as clear as the margin of appreciation approach: It has been suggested that this approach may only apply to substantive ECHR provisions, as opposed to non-substantive procedural provisions.[162] For example, in *Hassan,* the United Kingdom argued that the concept of jurisdiction was not subject to the "living instrument" doctrine".[163] Thus, this approach may be of limited assistance if those arguments are accepted and if art 15 is considered a non-substantive provision.

D *Applicability of art 15 to the facts of* **Hassan** *and* **Serdar Mohammed**

[157] Gross and Aoilain, above n 155, at 640.
[158] See *Brannigan and McBride v United Kingdom,* above n 156, at [43].
[159] See Rhonda Powell "Human Rights, Derogation and Anti-Terrorist Detention" (2006) 69 SLR 79 at 82; Gross and Aoilain, above n 155, at 628 "; and Harris and others, above n 10, at 644.
[160] George Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, Oxford, 2007) at 59.
[161] *Matthews v United Kingdom* (1999) 28 EHRR 361 (Grand Chamber, ECHR) at [39].
[162] Letsas, above n 160, at 68.
[163] *Hassan v United Kingdom,* above n 3, at [70].

This discussion will show that, if the ECtHR was willing to consider allowing a derogation effective outside the territory of the derogating state, arguments *could* be made that there was a threat to the life of the nation, on the facts of both *Hassan* and *Mohammed.* The fact that the Court is willing to allow a wide margin of appreciation to domestic bodies lends support to the possibility that it may consider such a derogation to be valid if all requirements are satisfied, as does the possibility of the 'living instrument' approach to interpretation. Allowing derogation would also be in line with the jurisdiction of the ECHR. As the Convention applies extraterritorially where the parties have the requisite degree of control, it is logical to extend derogation to such situations, if a public emergency can be shown to exist. In the High Court *Mohammed* decision, Leggat J stated:[164]

> Now that the Convention has been interpreted, however, as having such extraterritorial effect … Article 15 must be interpreted in a way which reflects this. It cannot be right to interpret jurisdiction under Article 1 as encompassing the exercise of power and control by a state on the territory of another state … unless at the same time Article 15 is interpreted in a way which is consonant with that position and permits derogation to the extent that it is strictly required by the exigencies of the situation.

The following discussion proceeds on the assumption that the ECtHR would primarily have the derogating state in mind when assessing the exceptional threat requirement, rather than the state where the conflict is occurring. This approach is logical and in accordance with previous ECtHR case law.[165] If a court would instead consider whether Afghanistan or Iraq was experiencing a public emergency threatening the life of the nation, the answer would be likely to be affirmative, considering the conflicts occurring at the relevant times.

1 Hassan (Iraq)

[164] *Serdar Mohammed v Minister of Defence,* above n 42, at [155].

[165] See above at 29-30.

The Government submitted,[166] and the Court agreed,[167] that this was a situation of IAC. However, the fact that IAC was not occurring in the United Kingdom means its existence alone is unlikely to constitute a public emergency threatening the life of the nation.[168] United Kingdom forces were in Iraq at the time of Hassan's detention as part of a coalition led by the United States. Justifications for the invasion were based on Iraq's supposed violations of its disarmament obligations under a number of UNSCRs.[169] Prime Minister at the time Tony Blair emphasised that weapons of mass destruction (WMDs) and terrorist groups (in Iraq) were a threat to Britain: "My fear, deeply held, based in part on the intelligence that I see is that these threats come together and deliver catastrophe to our country and our world".[170] It is acknowledged now that "the British Government put a weight on available intelligence that it could not bear", and that the threat was overstated.[171] However, in *A and Others*, the ECtHR stated that "…the existence of the threat to the life of the nation must be assessed primarily with reference to those facts which were known at the time of the derogation…".[172] Whether the threat of Iraq's supposed WMDs constituted a public emergency would likely depend on the time at which this was examined. If the derogation had been entered before doubts were confirmed as to the intelligence used, it is plausible that a derogation would have been valid.

The timing of the United Kingdom and United States' occupation of Iraq may also be important, as it is more likely that derogation would be permitted when a state is occupying another, due to the involvement and control occupation entails. In *Al-Jedda,* the House of Lords explained the legal status of the Coalition Provisional Authority (CPA) in Iraq: "… the CPA assumed all executive, legislative and judicial authority necessary to achieve its

[166] *Hassan v United Kingdom*, above n 3, at [86].
[167] At [104].
[168] See Debuf, above n 1, at 95.
[169] Anthony Carty "The Iraq Invasion as a Recent United Kingdom 'Contribution to International Law'" (2005) 16 EJIL 143 at 144.
[170] Tony Blair, Prime Minister of the United Kingdom "Address to the Nation" (London, United Kingdom, 20 March 2003).
[171] Carty, above n 169, at 145.
[172] At [177].

objectives, to be exercised under relevant UNSCRs…”.[173] An argument could be made that, because the United Kingdom was occupying Iraq, it was directly threatened by what was occurring there. This also impacts the strength of Lord Bingham’s comment that states are unable to derogate when they have chosen to be involved in extra-territorial operations;[174] if a state is an occupying power, the suggestion that it has the option to leave at any time has less strength. Furthermore, in *Greece v United Kingdom*, the Commission focused on the high degree of control that the United Kingdom had over Cyprus, when determining that the United Kingdom could enter a derogation. The United Kingdom’s control over Iraq during occupation was extensive,[175] and is comparable to the control the United Kingdom exercised in Cyprus, when it was “… responsible … for the maintenance of law and order”.[176] Thus, if detention occurred during occupation, it seems plausible that the occupying power could enter a valid derogation.

2 Serdar Mohammed (Afghanistan)

British forces were initially in Afghanistan as part of Operation Enduring Freedom – a coalition with the United States, “…launched against Osama Bin Laden, the Taliban and Al-Qaeda in consequence of the attacks of 11 September 2001 …”.[177] As the Court of Appeal identified, at the time of Mohammed’s arrest and detention the British forces operated as part of ISAF, initially authorised by UNSCR 1386, and affirmed by UNSCR 1890 in 2009.[178] Both Resolutions refer to threats posed by the Taliban, Al-Qaida and other extremist groups in Afghanistan,[179] and UNSCR 1890 confirms that the situation in Afghanistan remains a threat to international peace and security. Considering that the ECtHR decided in *A and Others* that international terrorism was capable of creating a

[173] *Al-Jedda v Secretary of State for Defence,* above n 102, at [9].
[174] See above at 27.
[175] Bowring, above n 131, at 292.
[176] *Greece v United Kingdom,* above n 152, at [130].
[177] *Serdar Mohammed v Minister of Defence,* above n 4, at [29].
[178] At [35].
[179] *Resolution on the situation in Afghanistan* SC Res 1386 S/RES/1386 (2001); and *Resolution on extension of the authorization of the International Security Force in Afghanistan (ISAF)* SC Res 1890 SC/RES/1890 (2009).

public emergency threatening the life of the nation,[180] it does not seem overly presumptuous to say the same about the situation in the areas of Afghanistan where the United Kingdom was operating.[181] If it entered a derogation, the United Kingdom could have argued that it was operating in Afghanistan due to an emergency (international terrorism) threatening the United Kingdom, and that its detention procedures were a responsive emergency measure. Based on the above discussion, it is quite possible that such an argument would be accepted.

E Why Derogation is a Preferable Approach

Even though allowing derogation in these situations would be a significant departure from the norm, it is preferable to the reasoning in *Hassan.*[182] As well as being clearly mandated by the ECHR, the requirements of art 15 ensure protection for human rights. The notification requirement means the Secretary General of the Council of Europe must be kept informed, which in turn means other contracting states are able to assess the relevant measures, and may make a complaint.[183] There is therefore more transparency and control involved in this process. The approach taken in *Hassan* reaches a similar result, without states having to undergo:[184]

> …the openly transparent and arduous process of lodging a derogation from Article 5 §1, the scope and legality of which is then subject to review by the domestic courts, and if necessary, by [the ECtHR] under Article 15.

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[180] See above at 30.

[181] See also Virginia Helen Henning "Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom made a Valid Derogation from the European Convention on Human Rights (2002) 17 AUILR 1263 at 1284.

[182] Borelli "*Jaloud v Netherlands* and *Hassan v United Kingdom",* above n 75, at 27.

[183] van der Sloot, above n 115, at 323.

[184] *Hassan v United Kingdom,* above n 3, at [5] per Judge Spano, joined by Judges Nicolaou, Bianku, and Kalaydjieva, dissenting.

It seems more than reasonable to require states to consider and explain these human rights issues.[185] Because the *Hassan* and *Mohammed* cases (among others) make clear that the ECHR applies to these situations, states entering derogations regarding detention procedures would not be acknowledging any jurisdiction that does not already exist. Further, this approach stipulates *how* IHL is to be taken into account, as measures implemented requiring derogation must still be consistent with other international obligations, including IHL. That criterion has played a surprisingly small part in ECtHR jurisprudence so far, with the Court often briefly stating it is satisfied.[186] However, there is ample room for it to play a larger part, with IHL being an obvious source of international obligations.[187] For example, if a valid derogation had been entered in *Hassan,* the Court could then have determined whether the IHL rules of detention were complied with.

F Conclusion on Derogation

While it would take the ECtHR's jurisprudence in a new direction, it is plausible that a valid derogation could be entered in respect of extra-territorial military operations. Even though this may have a similar outcome to adherence to the reasoning from *Hassan,* use of the derogation procedure is preferable. Article 15 clearly dictates a procedure to be followed, and does so with the purpose of protecting human rights as well as possible in emergency situations. In contrast, the reasoning in *Hassan* undermines the clearly delineated grounds for detention in art 5 and makes for a confusing interaction between IHL and IHRL. While it would be best for art 15 to be reframed to be more obviously applicable to modern conflict, this is unlikely to happen in the near future.[188] Instead, the next court to be faced with these issues should confirm that derogation is possible in these situations, and that if there is no derogation, the clear wording of the ECHR applies and states must act in accordance with their ECHR obligations.

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[185] Borelli "The (Mis)-Use of General Principles of Law", above n 72.

[186] See for example, *Lawless v Ireland*, above n 136; and *Ireland v the United Kingdom*, above n 150, at [222].

[187] Harris and others, above n 10, at 637.

[188] van der Sloot, above n 115, at 355.

V The Reasoning and Result in Serdar Mohammed

Regardless of whether the approach in *Hassan* is followed, or a derogation from ECHR obligations is entered, legality of detention under IHL is important: Following *Hassan*, detention must be authorised by IHL in order to alter the ECHR, and, if a state derogates from the ECHR it must still act in accordance with its international obligations, including IHL. The fact that IHL provides authority to detain in IAC is well accepted, as discussed in *Hassan.* Following *Mohammed* though, the IHL regarding detention in NIAC is much less clear. To reiterate, in *Mohammed,* the Court held that the reasoning from *Hassan* could not apply, as IHL does not provide authority to detain in NIAC. This is a finding of great significance regarding situations like *Hassan* and *Mohammed*, because, as the Court in *Mohammed* indicates, authority to detain in NIAC must therefore be found in domestic law or UNSCRs – both of which are problematic sources.

The Court of Appeal introduced the claimed breach of art 5 by stating that the detention would not be unlawful "…if there was a lawful power to detain which was not arbitrary and the detention was subject to the requisite procedural safeguards".[189] Status of the detention under Afghan law was also important, because the Court decided that it would be "…an extraordinary and unjustifiable extension of the Strasbourg court… to decide that further requirements of the ECHR prevailed … over the law of Afghanistan".[190] If detention was authorised by Afghan law, there would be no claim under art 5.[191] These considerations led to a discussion of the source of authority to detain in this particular conflict, which creates important ramifications for future conflicts. The Court examined three possible sources for the authority to detain: The law of Afghanistan, the relevant UNSCRs, and IHL.[192] The Court found there was authority in Afghan law allowing United Kingdom forces to arrest Mohammed, but not to detain him after 10 April 2010 (he was in fact detained until 25 July 2010).[193]

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[189] *Serdar Mohammed v Minister of Defence,* above n 4 at [44].
[190] At [127].
[191] At [127].
[192] At [125].
[193] At [135].

The relevant UNSCR was Resolution 1890 (2009), which extended the mandate of ISAF and allowed Member States to take all necessary measures to fulfil that mandate.[194] The Secretary of State argued that the Resolution provided power for British forces to detain for the purposes of fulfilling their mission, and thus to detain Mohammed, as he posed a threat to that mission.[195] In response, the Court held that the UNSCR granted ISAF authority to detain, but that it was up to ISAF to determine the conditions of detention.[196] The detention policy (ISAF SOP 132) dictated that detention could only occur for 96 hours.[197] So, the United Kingdom policy to detain for more than 96 hours was outside the scope of the UNSCR's authorisation.[198]

The Court then examined whether IHL provided authority to detain in NIAC – a controversial issue which had not previously been the subject of an ECtHR decision. First, it considered treaty sources, namely CA3, and APII.[199] The reasoning will be discussed in more depth below,[200] but the Court concluded that IHL treaties do not authorise detention in NIAC.[201] It also examined whether authorisation could be found in CIL and concluded that, while such a power would be logical, it is not possible to base authority to detain in NIAC on CIL.[202] Thus, authority for detention in NIAC must come from either domestic law, or UNSCRs.[203] Relying on either source to provide authority to detain in NIAC is problematic, especially in the context of forces acting extraterritorially.

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[194] *Resolution on extension of the authorisation of the International Security Assistance Force in Afghanistan,* above n 179.
[195] At [142].
[196] At [149]. For a critique of this reasoning see Sean Aughey & Aurel Sari "The Authority to Detain in NIACs Revisited: Serdar Mohammed in the Court of Appeal" (5 August 2015) <www.ejiltalk.org>.
[197] *Serdar Mohammed v Minister of Defence* [2015] EWCA Civ 843, above n 4, at [149]-[150].
[198] At [156].
[199] At [165].
[200] This finding will be further discussed in Part VII.
[201] At [219].
[202] At [215].
[203] See Andrea Bianchi and Yasmin Naqvi *International Humanitarian Law and Terrorism* (Hart Publishing, Oxford, 2011) at 329.

VI Authority to Detain in Armed Conflict

A Authority to Detain in Domestic Law

The Court found no authority to detain Mohammed in the domestic law of Afghanistan, because the relevant obligations (created by the executive in the Military Technical Agreement between ISAF and the interim administration of Afghanistan, and by UNSCRs)[204] did not have the status of domestic law in Afghanistan.[205] This highlights the fact that in NIAC, especially one involving foreign intervention, it is often not possible or desirable to rely on domestic law. It is not uncommon for institutions to cease to function as normal in NIAC. The High Court in *Mohammed* noted that "The Afghan legal system was almost entirely destroyed when Afghanistan was ruled by the Taliban and has had to be rebuilt".[206] Foreign intervention meant that new forces were operating in Afghanistan and, as in the case of British forces,[207]existing legislation did not give them power to detain for imperative reasons of security, for a practical length of time. In NIAC it is not realistic to anticipate that relevant obligations will be implemented via domestic law, perhaps emphasised by the fact that the United Kingdom made no attempt to seek a change of Afghan law to accommodate their policy.[208] Furthermore, implementing the various agreements between the Government of Afghanistan and the assisting states, through legislation, would have been a daunting task.[209] Afghanistan did not consent to English law applying on its territory, and the United Kingdom at no point attempted to apply its own detention laws in Afghanistan. Regardless, detention by a military authority of a civilian for more than 96 hours would also not have been legal under United Kingdom law.[210]

[204] At [36].

[205] At [135].

[206] *Serdar Mohammed v Minister of Defence,* above n 42, at [64]. See also Ali Wardak "Building a post-war Justice System in Afghanistan" (2004) 41 Crime Law Soc Change 319 at 328, and Nasreen Ghufran "Afghanistan in 2005: The Challenges of Reconstruction" (2006) 46 Asian Survey 85 at 86.

[207] Peter Rowe "Is there a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?" (2012) 61 ICLQ 697 at 699.

[208] *Serdar Mohammed v Minister of Defence,* above n 4, at [153].

[209] Rowe, above n 207, at 699.

[210] Rowe, above n 207, at 707; see Armed Forces Act 2006 (UK), s 101(4).

This problem is unlikely to be unique to the conflict in Afghanistan: foreign intervention in NIAC is common, and raises the complex question of whose law applies.[211] For example, in cases concerning Iraq it was argued that the MNF had the power to arrest and acted as agent for the Iraqi Courts.[212] The Iraqi government had declared that it would be responsible for detention, with assistance from the MNF.[213] However, the British forces were never given an express statutory power to detain in Iraq,[214] meaning their actions of detention were not authorised by domestic law. In order to legally detain under host domestic law, intervening states (like the United Kingdom) need to be careful to ensure their actions are authorised by legislation. While states may be more aware of this issue after *Mohammed,* ensuring that domestic legislation is created will continue to be a challenge in NIAC.

Even if it is feasible to rely on domestic law, it is not necessarily desirable, especially when the benefits of IHL are compared with the drawbacks of domestic law. If domestic laws are implemented, they should be in accordance with the relevant state's human rights obligations. However, these obligations (unlike IHL) can be derogated from.[215] If new domestic laws are implemented in NIAC, they may also create potential for future abuses (and easier deprivation of liberty),[216] especially if the domestic process is rushed or altered.[217] Els Debuf explains how authority to detain in IHL would avoid this issue:[218]

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[211] Robert Kolb *Advanced Introduction to International Humanitarian Law* (Edward Elgar Publishing, Cheltenham, 2014) at 27.
[212] Rowe, above n 207, at 708; see also *R (Application of Al-Saadoon) v Secretary of State for Defence* [2010] 2 LRC 1 at [33] per Laws LJ.
[213] Rowe, above n 207, at 708; see also *Resolution on Iraq* SC Res 1790 S/RES/1790 (2007).
[214] Rowe, above n 207, at 699.
[215] Sassoli and Olson, above n 68, at 626.
[216] See Moira Katherine Lynch "A Theory of Human Rights Accountability and Emergency Law: Bringing in Historical Institutionalism" (2015) 14 JHR 502; and Deeks, above n 1, at 403.
[217] See for example Deeks, above n 1, at 425.
[218] Debuf, above n 1, at 495-496.

> If directly provided for in IHL, the legal basis to intern for reasons of military necessity will be available only in situations that indeed meet the threshold of armed conflict and be safer from abuse in situations that do not meet the threshold.

Having different domestic detention regimes operating in conflict is also troublesome. Forces would be required to follow the IHL regime in IAC, and to apply a range of different regimes in NIAC, depending on location. Differing domestic regimes may also provide varying degrees of protection. In contrast, IHL is designed to be understood and applied by commanders from a variety of places and backgrounds,[219] and endeavours to provide minimum standards of humanitarian protection,[220] which may not be guaranteed in domestic law. Relying on domestic law for authority to detain in NIAC is therefore a problematic step backward and away from the minimum standards of humanitarian protection and clarity provided by IHL.[221]

B Authority to Detain under UNSCRs

Relying on UNSCRs to provide authority to detain is also complicated. Even if a UNSCR is promulgated regarding a specific conflict and appears to authorise detention, it may not guarantee the legality of such detention, if detention would otherwise breach an IHRL agreement. The Court in *Mohammed* decided the resolution in question (UNSCR 1890 of 2009) did not provide authority to detain outside the scope of the ISAF policy,[222] but that if it had, "…it is difficult to see why detention under the UN Charter and UNSCRs cannot also be a ground that is compatible with Article 5".[223] It is hard to determine exactly what this means. The Court made this statement when discussing the reasoning from *Hassan,* and the statement therefore implies that UNSCR obligations could be read into art 5 as

[219] Abresch, above n 106, at 743.
[220] Kolb, above n 211, at 27.
[221] Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford, 2012) at 54.
[222] *Serdar Mohammed v Minister of Defence,* above n 4, at [156] and [157].
[223] At [162].

another ground of detention, as IHL was in *Hassan*. This would be problematic, as, like the reasoning in *Hassan,* it would undermine art 5.[224] The statement in *Mohammed* could instead mean that art 103 of the UN Charter would displace art 5, in so far as UNSCR obligations were incompatible with art 5, making detention legal if based on UNSCR obligations. This is the more logical and likely way that a court would deal with the interaction between IHRL and UNSCRs. Article 103 states:[225]

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Like derogation, while this seems to provide a straightforward framework for interaction between different obligations, the reality is more complex. There has been debate about how UNSCRs are to be interpreted, and about the extent of clarity required before a conflict between obligations will be recognised. A relevant discussion of this issue occurred in *Al-Jedda* (House of Lords).[226] Hilal Al-Jedda, a British national, was detained in a British detention facility in Basra between 2004 and 2007, on the basis that his interment was "necessary for imperative reasons of security".[227] He was believed to have recruited terrorists, but was not facing charges or trial.[228] The United Kingdom accepted that he was within ECHR jurisdiction,[229] but argued that UNSCR 1546 authorised Al-Jedda's detention by the MNF.[230] The United Kingdom contended that, based on art 103, the UNSCR obligations must prevail over the ECHR obligations.[231] Resolution 1546 (2004) states:[232]

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[224] See discussion above at Part III.

[225] Charter of the United Nations 1 UNTS XVI (opened for signature 26 June 1945, entered into force 24 October 1945), art 103.

[226] *Al-Jedda v Secretary of State for Defence,* above n 102.

[227] At [2].

[228] At [2].

[229] At [16].

[230] At [16]; see also at [64].

[231] At [100].

[232] *Resolution on Formation of a Sovereign Interim Government of Iraq* SC RES 1546 S/RES/1546 (2004) (emphasis added).

> …the multinational force shall have the authority *to take all necessary measures* to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution …

One of the annexed letters referred to, from the United States Secretary of State, acknowledges that the MNF is ready to assist Iraq, and that it will undertake a number of things in order to maintain security, including "… internment where this is necessary for imperative reasons of security".[233] The House of Lords concluded that, under the UNSCR, the multinational force was obliged to "exercise its power of detention where this was necessary for imperative reasons of security",[234] and that art 103 meant this would not be a breach of the ECHR.

The case came before the ECtHR, which found there was no conflict between ECHR obligations and the UNSCR, on the basis that when interpreting UNSCRs "… there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights".[235] Although the annexed letters contemplated internment, the Court did not consider the wording indicated "unambiguously" that the Security Council intended to oblige the MNF to "… use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention".[236] This approach led to the majority's conclusion that the provisions of art 5 were not displaced, and that the detention constituted a violation of art 5(1).[237]

Following *Al-Jedda,* the current ECtHR approach regarding art 103 is that clear and explicit language is required before a conflict between UNSCR obligations and ECHR obligations will be recognised. As mentioned, the Court of Appeal in *Mohammed* found that ISAF was

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[233] *Resolution on Formation of a Sovereign Interim Government of Iraq,* above n 232, at annex.
[234] At [34] per Lord Bingham.
[235] *Al-Jedda v United Kingdom,* above n 13, at [102].
[236] At [15]. See also Kair Starmer "Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability" in Phil Shiner and Andrew Williams (eds) *The Iraq War and International Law* (Hart Publishing, Oxford, 2008) 265 at 282.
[237] At [110].

authorised to detain, but that Mohammed's detention did not fall within that authorisation as the United Kingdom acted outside ISAF's detention policy.[238] When discussing art 103, the Court of Appeal referred only briefly to the ECtHR decision in *Al-Jedda*, and did not discuss why the ECtHR had found no conflict between the UNSCRs and ECHR.[239] It then went on to state that, if the detention policy had been authorised by UNSCR 1890, it would have provided a ground for detention compatible with art 5.[240] The reasoning in this section is particularly sparse, and would likely be subject to criticism if the case reaches higher courts. It fails to address the core issues surrounding the application of art 103, which are the reason behind the *Al-Jedda* requirement of unambiguous language. Another court would be likely to address the following core issues which the Court in *Mohammed* failed to address, and which support the argument that clear language should be required before a conflict between UNSCR and other obligations is found.

Lord Bingham's wide reading of art 103 in *Al-Jedda* was based on the UNSC's role in maintaining international peace and security, the importance of which he thought "… can scarcely be exaggerated".[241] As well as being security-focused, this approach is practical and consistent with current UNSC practice. Aughey and Sari (when discussing the High Court *Mohammed* decision) argue that the phrase 'all necessary measures' is clear enough to "…satisfy the European Court's requirement for explicit language".[242] To require anything more express "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…",[243] and would require the impractical measure of the Security Council having to spell out all measures to be taken, in advance.[244]

[238] *Serdar Mohammed v Minister of Defence,* above n 4, at [156].

[239] At [160].

[240] At [163].

[241] At [33].

[242] Aughey and Sari "Targeting and Detention in Non-International Armed Conflict", above n 9, at 79.

[243] Aughey and Sari "Targeting and Detention in Non-International Armed Conflict", above n 9, at 79.

[244] Aughey and Sari "Targeting and Detention in Non-International Armed Conflict", above n 9, at 79.

However, the purpose of the United Nations also includes promoting and encouraging respect for human rights and fundamental freedoms,[245] and it has consistently reminded states that measures taken under UNSCRs should comply with IHRL obligations.[246] The ECtHR approach in *Al-Jedda* is more positive in terms of human rights protection,[247] and for that reason may be preferred by the ECtHR in future. The ECtHR has continued to follow a similar approach,[248] as it found in *Nada v Switzerland* that there was no conflict between ECHR obligations and UNSCR obligations. That case concerned a much more specific UNSCR than *Al-Jedda,* but the ECtHR found the Swiss Government had failed to show that they attempted, as far as possible "to harmonise the obligations that they regarded as divergent".[249] This shows that the ECtHR will not be quick to find a conflict between ECHR and UNSCR obligations.

Whether UNSCRs could be relied upon to authorise detention that is in conflict with IHRL is therefore not clear. While it is possible that a court may interpret phrases like 'all necessary measures' to include measures which breach fundamental rights, the reasoning in *Al-Jedda* (ECHR) tends towards the alternate conclusion that explicitly worded UNSCRs, to an extent that is not commonplace,[250] will be required. If wording is not explicit, the ECtHR would likely continue, as it did in *Al-Jedda* and *Nada,* to find that art 103 is not activated.

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[245] Charter of the United Nations, above n 225, art 1(3); see also Misa Zgonec-Rozej "Al-Jedda v United Kingdom" (2012) 106 AJIL 830 at 835.

[246] See for example *Resolution on Combatting Terrorism,* SC Res 1426, S/RES/1426 (2003); see also Robert K Goldman "Extraterritorial Application of the Human Rights to Life and Personal Liberty, including *Habeas Corpus,* During Situations of Armed Conflict" in Robert Kolb and Gloria Gaggioli (eds) *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing, Cheltenham, 2013) 104 at 104.

[247] See Laura Henderson "With (Great) Power Comes (Great) Responsibility: A Move to Greater Responsibility for States Exercising Power Abroad" (2012) 28 Utrecht J Intl & Eur L 50 at 55.

[248] See *Nada v Switzerland* (2013) 56 EHRR 18 (Grand Chamber, ECHR); and Marjolein Busstra "The Thin Line Between Deference and Indifference: The Supreme Court of the Netherlands and the Iranian Sanctions Case" (2013) 44 NYIL 204.

[249] Busstra, above n 248, at 210.

[250] Erika de Wet "From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions" (2013) 12 Chinese JIL 787 at 806.

C Conclusion on Authority to Detain in NIAC

While it is possible to find authority to detain in NIAC in both domestic law and UNSCRs, complete reliance on either source is troublesome. Domestic law is hard to change in NIAC, unlikely to already provide for foreign intervention, and less beneficial than IHL in many ways. UNSCRs may be more easily created in NIAC, but ECtHR jurisprudence thus far means they are unlikely to prevent detention from being illegal under the ECHR unless they are unusually specific in requiring violations of fundamental rights. The ruling in *Mohammed* has therefore identified (or some may say created) a concerning void in IHL; it would be preferable if authority to detain in NIAC could be found in IHL.

VII *Future Developments Concerning Authority to Detain in NIAC*

Following the Court of Appeal's decision in *Mohammed,* there is no consistently reliable source in which to find authority to detain in NIAC. However, critics of the decision in *Mohammed* can rest assured that the IHL of detention in NIAC is unlikely to remain stagnant, due to the prevailing discourse about the existence of authority to detain in NIAC in treaty law, and the development and implementation of soft law instruments which may impact the existence of such a power in CIL. Numerous commentators,[251] and even the Court in *Mohammed,*[252] believe, unsurprisingly, that it would be best for IHL to provide authority to detain in NIAC. Thus, this part of the paper will investigate the likelihood of change to the ruling in *Mohammed,* concerning authority to detain in NIAC. While it will demonstrate that change is likely in the near future, and will most likely be due to soft law developments, the paper will not speculate as to the exact details of such change, other to anticipate that change regarding authority to detain in NIAC will occur. Any other details are, as of yet, impossible to predict with certainty.

A Whether Treaty Law Could Provide Authority to Detain in NIAC

[251] See for example Debuf, above n 1, at 449.

[252] *Serdar Mohammed v Minister of Defence,* above n 4, at [252].

As explained,[253] the conclusion in *Mohammed* that there is no IHL authority to detain in NIAC was based on the Court's finding that, first, there is no authority to detain in treaty law, and second, there is no authority to detain in CIL. Treaty law is less likely than CIL to develop in this area, but interpretation of the relevant treaties remains contentious and could change in future.

The starting point for the discussion of treaty law in *Mohammed* was the absence, in the Geneva Conventions, of a rule allowing detention in NIAC.[254] While the possibility of detention in NIAC is recognised by IHL (such as APII), IHL treaties do not provide express grounds and procedure for detention in NIAC.[255] The United Kingdom Secretary of State therefore submitted in *Mohammed* that CA3 and APII mean there is *implicit* power to detain in situations those provisions apply to.[256] It was argued that the requirement in CA3 that persons detained shall be treated humanely,[257] and the references in arts 2, 4(1), 5, and 6 of APII, to those whose liberty has been deprived or restricted,[258] mean there is implied authority to detain in NIAC.[259] Proponents of this viewpoint argue that these provisions would be pointless if there was no power to detain in NIAC, while those who argue against it posit that regulation does not equal authorisation.[260] In the same vein, Mohammed argued that CA3 and APII only describe minimum levels of treatment for detainees, but do not provide power to detain.[261] Mohammed's lawyers provided a table of 14 academic contributions which concluded that "authorisation to detain in a non-international armed conflict cannot be found in international humanitarian law …".[262] The Court agreed, and concluded the references mentioned above cannot create a power to detain, and that authority to detain had to be explicitly outlined. While in the past *SS Lotus* has been used

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[253] See above at Part V.

[254] John B Bellinger III "Legal Issues Related to Armed Conflict with Non-State Groups" in Sibylle Scheipers (ed) *Prisoners in War* (Oxford University Press, New York, 2010) 251 at 251.

[255] See above at Part IID.

[256] At [74].

[257] Common Article 3, above n 59.

[258] Protocol II, above n 60.

[259] At [200].

[260] *Serdar Mohammed v Minister of Defence,* above n 4, at [175] and [180].

[261] At [175].

[262] At [241].

to support the proposition that absence of prohibition equals authority,[263] the Court in *Mohammed* considered *SS Lotus* to be outdated.[264] Instead, the Court referred to Sir Robert Jennings and Sir Arthur Watts' alternate explanation as accurate: states have a "large degree of freedom of action", but that freedom must be derived from a legal right,"…not from an assertion of unlimited will".[265] Thus, a power to detain cannot be implied without more obvious evidence of authorisation.

The Court prioritised this line of reasoning over the argument (referred to as the '*a fortiori* argument') that the existence of an implied power to use force or kill in NIAC means there must be a corresponding power to detain.[266] However, in doing so it acknowledged that there is a large body of existing literature on this issue, and that some commentators (including the ICRC) prefer the *a fortiori* argument and are, therefore, of the view that IHL treaties must contain an inherent power to detain. Pejic is one author who argues that GCIV provides for internment of civilians in a state party's own territory and occupied territory, and sets out the procedure to be followed in both sets of circumstances.[267] While it is more common for scholars to note the similarities between the IAC and NIAC regimes for detention,[268] rather than going so far as saying the same grounds for detention apply in each, Pejic's argument is a significant one. The existence of perspectives like hers and the strength of the *a fortiori* argument (which the Court referred to as "powerful")[269] means this may remain a contentious issue which could be open to change if re-evaluated by another court. There are, however, numerous barriers which may prevent a future court from altering the stance taken in *Mohammed* on these bases.

[263] *SS Lotus (France v Turkey)* (1927) PCIJ (series A) No 10 at 16 and 19. See also *Mohammed* at [97].
[264] At [197].
[265] At [197]; see Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (Longman Publishing, London, 1992) at 12; see also Christopher Staker "Jurisdiction" in Malcolm Evans (ed) *International Law* (4th ed, Oxford University Press, Oxford, 2014) 309 at 314; and James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 40.
[266] At [207].
[267] Jelena Pejic "The European Court of Human Rights' *Al-Jedda* Judgment: The Oversight of International Humanitarian Law" (2011) 92 IRRC 837 at 847.
[268] See Crawford, above n 57, at 79.
[269] *Serdar Mohammed v Minister of Defence,* above n 4, at [217].

First, although numerous scholars believe IHL treaties should or do contain authority to detain in NIAC, many are of the view that this alone may not make detention legal. For example, the Court in *Mohammed* referred to an ICRC opinion paper which states that the ICRC believes both customary and treaty IHL contain an inherent power to detain, but that this is not enough to make detention legal:[270]

> … in the absence of specific provisions in common Article 3 or Additional Protocol II, *additional authority related to the grounds for internment and the process to be followed needs to be obtained*, in keeping with the principle of legality.

The principle of legality stems from domestic criminal law, but is also applied at an international law level.[271] It requires that a crime or offence must be prescribed by law,[272] a requirement that would not be met if authority to detain in NIAC was implied. Further, a court is likely to be reluctant to imply a power which allows deprivation of liberty, as such a power usually constitutes a violation of human rights and is not necessarily provided in other instruments.[273] For example, IHRL may provide rules for the procedure surrounding detention, but is unlikely to authorise or provide grounds for detention, as required by the principle of legality.

Second, domestic courts in particular may be unwilling to make such a strong statement of law, considering states have chosen not to reform the relevant IHL treaties. The Court concluded its discussion in *Mohammed* by referring to Lord Hoffman's decision in *Jones*

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[270] International Committee of the Red Cross "Internment in Armed Conflict: Basic Rules and Challenges" (Opinion Paper, 2014) at 8 (emphasis added). See *Serdar Mohammed v Minister of Defence,* above n 4*,* at [202].

[271] See Kenneth S Gallant *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, Cambridge, 2010) at 352-403.

[272] Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law – Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, New York, 2009), rule 101.

[273] Debuf, above n 1, at 6.

v Saudi Arabia, concerning the differences between judicial function "when considering a question of domestic law and when considering one of public international law":[274]

> …It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.

Domestic courts may be disinclined to develop IHL unless the will of states to do so is clear. In addition, the exact scope of a power would be difficult to determine, which is likely to make a court more reluctant to develop IHL. As the Court said in *Mohammed,* acknowledging an implied power from the treaty provisions mentioned above makes the scope of such a power incredibly hard to deduce,[275] meaning courts may not wish to attempt to outline the scope – even though assistance can arguably be found in either IAC law of detention, or other areas of law.[276]

Finally, new treaty law in this area seems an unlikely prospect, despite academic support. Almost all commentators who discuss detention in NIAC believe the best way to clarify this area of law would be for a new treaty to be made, or for the Geneva Conventions to be altered to specify that IHL does provide authority to detain in NIAC.[277] However, this is unlikely to happen in the near future, even though the inadequacies of the Geneva Conventions have been acknowledged.[278] When this area of law was discussed during both the Copenhagen Process and the ICRC Process, states were unwilling to formulate a

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[274] *Jones v Saudi Arabia* [2006] UKHL 26 [2007] 1 AC 270 at [63]. See *Serdar Mohammed v Minister of Defence,* above n 4, at [253].

[275] At [207].

[276] At [218]. See also Crawford *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (Oxford University Press, above n 57, at 125; and Debuf, above n 1, at 459.

[277] See for example Debuf, above n 1, at 497; and John B Bellinger III and Vijay M Padmanabhan "Detention Operations in Contemporary Conflicts: Four Challenges to the Geneva Conventions and Other Existing Law" (2011) 105 AJIL 201 at 220.

[278] See for example John Bellinger III "Legal Issues Related to Armed Conflict with Non-State Groups", above n 254, at 251.

binding agreement.[279] The ICRC has, as a result of its consultation process, concluded that while a treaty would be the most effective option, "…there appears to be a lack of sufficient political support for embarking on a treaty negotiation process at this stage".[280] Thus while there remains a chance that treaty law could be found to provide authority to detain in NIAC, this seems unlikely to occur in the near future.

B Whether Customary International Law Could Provide Authority to Detain in NIAC

The second key source examined in *Mohammed* was customary international law (CIL). It is well accepted, and was acknowledged by the Court in *Mohammed,*[281] that in order for a rule to be CIL, there must be duration and consistency of state practice, generality of that practice, and *opinio juri*s.[282] The United Kingdom Secretary of State submitted that, if a power to detain in NIAC cannot be found in CA3 and APII, such a power can be found in CIL, based on the fact that states have consistently detained people in NIAC.[283] Specific examples of state practice were provided, but the Court did not consider them convincing.[284] The most relevant example given was of the detention practices of Australia, Canada, the Netherlands and the United States in Afghanistan. The Court considered that, because this practice was confined to a single conflict, it was not sufficiently extensive nor sufficiently uniform to constitute CIL, and did not "… provide unequivocal support" for

[279] See Jonathan Horowitz "Introductory Note to the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations" (2012) 51 ILM 1364 at 1366; Lawrence Hill-Cawthorne "The Copenhagen Principles of the Handling of Detainees: Implications for the Procedural Regulation of Internment" (2013) 18 JCSL 481 at 482; and International Committee of the Red Cross *Strengthening International Humanitarian law Protecting Persons Deprived of Liberty* (Concluding Report, 2015) [*Concluding Report*] at 4.

[280] International Committee of the Red Cross, above n 279.

[281] At [220].

[282] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3 at 44. See also James Crawford, above n 265, at 24-27.

[283] At [74].

[284] At [228]-[234].

IHL authority to detain in NIAC.[285] This led to the conclusion that there is no authority to detain in NIAC in CIL,[286] an unsurprising result considering the evidence available.

However, state practice is subject to change over time, and may be influenced by soft law instruments. The Court in *Mohammed* was careful to note that its ruling is specific to the "…*present state* of the development of international humanitarian law…".[287] IHL is an area that commonly involves multilateral processes, which can contribute to law-making if the instruments adopted are translated into CIL.[288] In particular, soft law instruments "… may be evidence of existing law, or formative of the *opinio juris* or state practice that generates new law".[289]

1 *The Copenhagen Principles*

The Copenhagen Principles constitute a soft law instrument relevant to detention in IHL, and were discussed in *Mohammed.* The Principles were the result of a process "…aimed at bringing major troop-contributing States together to discuss uncertainties surrounding the legal basis for detention … during international military operations not reaching the threshold of an international armed conflict".[290] As such they are directly relevant to cases like *Mohammed* and *Hassan.*[291] Twenty four states were involved in the Copenhagen Process, as well as representatives from the African Union, European Union, North Atlantic Treaty Organisation, UN and ICRC,[292]

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[285] At [230].
[286] At [242]
[287] At [242] (emphasis added).
[288] Alan Boyle and Christine Chinkin *The Making of International Law* (Oxford University Press, Oxford, 2007) at 210. For an opposing perspective on the utility of soft law see Jan Klabbers "The Undesirability of Soft Law" (1998) 67 Nordic JIL 381.
[289] Boyle and Chinkin, above n 288, at 118, 119, and 212.
[290] Jacques Hartman "The Copenhagen Process: Principles and Guidelines" (2015) YIHL 3 at 5.
[291] Hill-Cawthorne, above n 279, at 483. "The Copenhagen Principles of the Handling of Detainees: Implications for the Procedural Regulation of Internment" (2013) 18 JCSL 481 at 483.
[292] Hill-Cawthorne, above n 279, at 482.

The substance of the Principles is comprised of rules regarding circumstances of detention, review of detention, and protection and release of detainees. The Principles were intended to reflect "generally accepted standards" of detention.[293] Principle 16 is a savings clause which asserts that "…the Principles do not seek to create new legal obligations".[294] The Chairman's Commentary to the Principles also explicitly states that the Principles "…cannot constitute a legal basis for detention".[295] However, the Principles explain when detention might occur, and on what basis: A person may be detained for:[296]

> … posing a threat to the security of military operations, for participating in hostilities, for belonging to an enemy organised armed group, for his or her own protection, or if the person is accused of committing a serious criminal offence.

In *Mohammed,* the Secretary of State argued that the Copenhagen Principles are evidence of the state practice required to form CIL.[297] However, the Court considered that Principle 16 means "…if a customary international law basis is to be found for detention of SM, it must be found independently of and prior to the agreement of the Copenhagen Principles", and that such evidence was not provided to the Court.[298] While true that the Copenhagen Principles were not intended to restate CIL,[299] the Principles have the potential to impact CIL in this area, long after the completion of the Copenhagen Process. The ways in which the Principles could contribute to international law are explained by Jacques Hartman:[300]

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[293] Copenhagen Process on the Handling of Detainees in International Military Operations *Chairman's Commentary to the Copenhagen Process: Principles and Guidelines* (2012) [*Chairman's Commentary to the Copenhagen Principles*], at 16.2.

[294] Copenhagen Process on the Handling of Detainees in International Military Operations *Copenhagen Process: Principles and Guidelines* (2012) [*Copenhagen Principles*] at preamble para II; see also Bruce 'Ossie' Oswald "The Copenhagen Principles, Military Operations and Detentions" (2013) 17 Journal of International Peacekeeping 116 at 120.

[295] *Chairman's Commentary to the Copenhagen Principles*, above n 293, at 16.2.

[296] *Chairman's Commentary to the Copenhagen Principles*, above n 293, at 1.3.

[297] *Serdar Mohammed v Minister of Defence,* above n 4, at [224].

[298] At [227].

[299] *Chairman's Commentary to the Copenhagen Principles*, above n 293, at 16.2

[300] Hartman, above n 290, at 25-26.

> First, the adoption of non-binding texts is at times a significant step in the process of negotiating a legally binding agreement. In the case of the Principles and Guidelines, however, this prospect seems unlikely, as no further action has been taken after the conclusion of the Copenhagen Process. Second, non-binding texts may also represent an agreed understanding of binding law, and in this specific case, of human rights of international humanitarian law… Third, the Principles and Guidelines may aid the development of customary international law.

Regarding his third point, Hartman notes that, while the Commentary asserts the principles were not intended to be a restatement of CIL, this does not mean they never reflect state practice – he is of the view that some of the Principles are reflective of general practice.[301] Importantly, the Principles may also influence state behaviour to such an extent that new customary law could develop. As the Danish Minister of Foreign Affairs (at the time of the Copenhagen Process) stated, use of the Principles to fill gaps in international law "…may in time become so prevalent in the international community, that certain principles, over time will be reflected as international customary law".[302] This is particularly likely as a number of troop-contributing states, likely to be involved in NIAC, supported the principles. Furthermore, this is an area in which little guidance is available, making the principles "…an invaluable resource";[303] they are "… an important source of the practice of a significant number of states with regard to detention in international military operations".[304]

[301] Hartman, above n 290, at 25-26.

[302] Villy Søvndal, Minister of Foreign Affairs (Denmark) "The Copenhagen Process on Rules for Detainees in Military Operations" (Copenhagen, 19 December 2012).

[303] Hill-Cawthorne, above n 279, at 496.

[304] Hill-Cawthorne, above n 279, at 482.

Consequently, while the Court in *Mohammed* may have been correct to say the Copenhagen Principles do not currently represent CIL,[305] it neglected to adequately foreshadow the fact that they may, in future, be the source of CIL in this area.

2 The ICRC Process on Strengthening IHL Protecting Persons Deprived of Their Liberty

Another soft law process which may impact the customary law of detention in NIAC is the ICRC Process.[306] This consultation process came about as a result of expert identification of the absence of "detailed, universally applicable norms" regarding conditions of detention in NIAC.[307] It included four regional consultations, two thematic consultations, one meeting open to all states, and reports and conclusions intended to facilitate state discussion. The most recent outcome of this process is a Resolution adopted at the 32nd Conference of the ICRC (after the decision in *Mohammed*), which recommends further work in this area, and development of a non-legally binding outcome. The preamble acknowledges that detention is expected in armed conflict, and states that under IHL "States have, *in all forms of armed conflict, both the power to detain,* and the obligation to provide protection … for all persons deprived of their liberty…".[308] However, like the Copenhagen Principles, the Resolution endeavours to limit its own effect, as the preamble states "… this Resolution does not give rise to new legal obligations under international law".[309] Paragraph 8 provides the key action-point of the Resolution and recommends:[310]

[305] See on this Horowitz, above n 279, at 1366.

[306] See above at 10.

[307] International Committee of the Red Cross *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty: Synthesis Report from Regional Consultations of Government Experts* (2013) [*Synthesis Report*] at 4.

[308] International Conference of the Red Cross and Red Crescent *Resolution on Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty* 32IC/15/R1 (2015) [*Resolution on Strengthening IHL*] at preamble (emphasis added).

[309] At preamble.

[310] At para 8.

> the pursuit of further in-depth work … with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature … in particular in relation to NIAC.

The progress made will be revisited at the 33rd International Conference.[311] Therefore, there will eventually be a concrete outcome regarding this issue, although it is unclear what form that will take. Documents from the ICRC process can provide some insight as to what the outcome may include. There was debate among participants about whether IHL inherently (and currently) permits detention in NIAC. However, even states which did not believe IHL provides authority to detain "…expressed concern that the absence of any clearly expressed authorisation in treaty law was a gap that invited challenges … and that it would be useful to clarify its existence in an IHL instrument".[312] This indicates that the instrument developed will clarify the views of states regarding authority to detain. When grounds of detention were discussed, many states thought the best articulation of a ground for detention was "imperative reasons of security", although it was agreed that the scope of this may require some clarification.[313]

The product of the ICRC Process is likely to be more useful to states than the Copenhagen Principles, as the Process has been more extensive and inclusive. The regional consultations involved representatives from 93 states, while the thematic consultations on first, the conditions of detention and vulnerable detainee groups in NIAC, and second, the grounds and procedures for detention and detainee transfers in NIAC, involved experts from 37 states and 31 states respectively.[314] 112 state delegations attended the meeting for all states, in preparation for the 32nd International Conference of the Red Cross and Red Crescent.[315] The result of the process is, therefore, more likely to be reflective of general practice, and will be utilised by more states. The fact that the process is driven by the ICRC may also increase the likelihood of states implementing the outcome document or

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[311] At para 13.

[312] International Committee of the Red Cross *Synthesis Report,* above n 307, at 14.

[313] International Committee of the Red Cross *Synthesis Report,* above n 307, at 14.

[314] International Committee of the Red Cross *Concluding Report,* above n 279, at 2-3.

[315] International Committee of the Red Cross *Concluding Report,* above n 279, at 3.

principles, as the ICRC has long been recognised as a major driving force behind IHL development.[316] Furthermore, the Copenhagen Principles have been criticised by both human rights groups and scholars, who have argued the Principles are not strict enough and do not sufficiently protect human rights.[317] It is possible that the ICRC may be better able to avoid these criticisms, due in part to its own participation (part of the Red Cross mandate is to protect and assist victims of armed conflict),[318] and also to the benefit of hindsight; the criticisms of the Copenhagen Principles can be taken into account when a new instrument is formulated.

A number of factors will be relevant to whether the outcome could, over time, come to be viewed as CIL. These include the circumstances of the adoption of the instrument (such as voting patterns and the existence of reservations), the clarity of language used, and the existence of follow up procedures.[319] It is hard to speculate as to how these aspects might play out, but the ICRC's history of participation in IHL processes increases the likelihood of factors like clear language and follow up processes. Compliance is also of obvious importance in terms of creating state practice and *opinio juris.* Compliance is more likely to occur when a norm is particularly strong,[320] when institutional arrangements are in place to support a norm via information-exchange, monitoring, and verification of compliance,[321] and where "… international cooperation can overcome collective action problems

[316] Françoise Bugnion "The International Committee of the Red Cross and the Development of International Humanitarian Law" (2005) 5 CJIL 191 at 192; see also Knut Dörmann and Louis Maresca "The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialised Instruments" (2005) 5 CJIL 217 at 219 and 225.

[317] Hill-Cawthorne, above n 279, at 497; see also Hartman, above n 290, at 18.

[318] Dörmann and Maresca, above n 316, at 213.

[319] See *Legality of the Threat of Use of Nuclear Weapons,* above n 65, at 255-256; see also Christine Chinkin "Normative Development in the International Legal System" in Dinah Sheldon (ed) *Commitment and Compliance The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) 21 at 32.

[320] Abram Chayes and Dinah Shelton "Commentary" in Dinah Sheldon (ed) *Commitment and Compliance The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) 521 at 527.

[321] Chayes and Shelton, above n 320, at 529.

involving uncertain or changing risks".[322] In this instance, states evidently recognise the lack of clarity in this area of law, and wish to remedy it.[323] Thus, if a strong norm regarding detention in NIAC can be developed, it is in the interests of states to follow it, as it will likely be the clearest and most obvious option available in this area of law. While states do not have an interest in providing legal protection to members of non-state armed groups, their own desire to ensure the legal detention of members of armed groups (like Mohammed), may take priority: In response to the *Mohammed* decision, the United Kingdom Minister for the Armed Forces stated "The notion that dangerous insurgents cannot be detained for more than a few hours is ludicrous".[324] For these reasons, the ICRC Process outcome will be more appealing to states than the Copenhagen Principles, and is more likely to eventually develop into CIL.

3 United Nations Principles and Guidelines

A third soft-law instrument relevant to detention in NIAC is the United Nations Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (The UN Guidelines). These were formulated by the UN Working Group on Arbitrary Detention, at the request of the Human Rights Council,[325] which wanted the principles to "…aim at assisting Member States in fulfilling their obligations to avoid arbitrary deprivation of liberty and to comply with international human rights law".[326] Unlike the Copenhagen Principles and ICRC Process, the UN Guidelines are not specific

[322] Chayes and Shelton, above n 320, at 531; see also Edith Brown Weiss "Conclusions: Understanding Compliance with Soft Law" in Dinah Sheldon (ed) *Commitment and Compliance The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) 535 at 537.

[323] International Committee of the Red Cross *Synthesis Report,* above n 307, at 3.

[324] Ministry of Defence (UK) "Breaking News: MOD Response to Court of Appeal Judgment", above n 8.

[325] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court* WGAD/CRP.1/2015 (2015) [*Report of the Working Group on Arbitrary Detention*] at summary; see also International Commission of Jurists "ICL Legal Commentary on the Right to Challenge the Lawfulness of Detention in Armed Conflict" (14 September 2015) <www.icj.org>.

[326] Human Rights Council *Arbitrary Detention* A/HRC/20/L.5 (29 June 2012) at [10].

to situations of conflict, and apply to any situation where there is a deprivation of liberty.[327] However, Principle 16 is specific to conflict, and specifies that all persons detain in armed conflict "… are guaranteed the exercise of the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of the deprivation of liberty…".[328] Regarding grounds of detention, Principle 16 states:[329]

> Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency threatening the life of the nation and the existence of which is officially proclaimed.

This indicates that the Working Group does not believe that IHL provides authority to detain in NIAC.[330] However, although this may be the view of some states, the ICRC process is still likely to result in a different outcome. The UN Guidelines are human rights focused, and do not adequately account for the realities of armed conflict. They impose higher standards than IHL,[331] by requiring that those deprived of liberty must be able to bring their case before a court that "…shall be established by law and bear the full characteristics of a competent, independent and impartial judicial authority…".[332]This higher standard is possibly due to the fact that the Working Group drew these principles from "…recognised good practice",[333] as opposed to the "generally accepted practice" which was the basis of the Copenhagen Principles;[334] the Working Group principles are

[327] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention,* above n 325, at 1.1.

[328] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention,* above n 325, at [45].

[329] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention,* above n 325, at [49].

[330] Marco Milanovic "UN Working Group in Arbitrary Detention Adopts Principles and Guidelines on Habeas Corpus" (5 May 2015) <www.ejiltalk.org>.

[331] Milanovic "UN Working Group in Arbitrary Detention Adopts Principles and Guidelines on Habeas Corpus", above n 330.

[332] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention,* above n 325, at [27].

[333] UN Working Group on Arbitrary Detention *Report of the Working Group on Arbitrary Detention,* above n 325, at summary.

[334] *Chairman's Commentary to the Copenhagen Principles*, above n 93, at 16.2.

more reflective of ideal practice, while the Copenhagen Principles are more akin to how states actually act. The fact that the UN Guidelines are not armed conflict specific, and do not acknowledge the unique requirements of armed conflict mean they are less likely, in comparison to the Copenhagen Principles and ICRC Process, to be followed by states looking for guidance regarding detention in NIAC.

C Conclusion on Future Developments

This part has demonstrated that the finding in *Mohammed* that there is no IHL authority to detain in NIAC is highly unlikely to remain static in future. The possibility of a finding that there is authority to detain in treaty law is plausible, but much less likely than the development of such an authority in CIL. As states desire clarity regarding the legality of detention, but remain unwilling to formulate a binding treaty, instruments like the Copenhagen Principles and the outcome of the ICRC process are the obvious place to look for guidance. While authors like Jan Klabbers criticise reliance on soft-law, it is likely to be the only way in which the legal questions of states (regarding detention in NIAC) will be answered any time soon.[335] The characteristics of the ICRC Process point to the conclusion that the law in this area will eventually change to provide authority for detention in NIAC. Further, it should be noted that soft law developments can often lead to treaties, as the risk-free creation of soft law instruments can "…generate the political will, originally absent, for entering into legally binding agreements".[336] Finally, and to reiterate, the law regarding authority to detain in NIAC is important regardless of whether the approach in *Hassan* is taken, or whether a derogation is entered under the ECHR. It will, therefore, remain important for states and scholars to keep a watchful eye on the developments in this area, as change is likely.

VIII Conclusion

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[335] See Klabbers, above n 288, at 381.

[336] Chayes and Shelton, above n 320, at 533.

This paper has identified the key issues raised by *Hassan* and *Mohammed,* and demonstrated that, while these cases bring a number of issues concerning IHL to the fore, there are preferable options available which will lead to less problematic outcomes. First, the reasoning in *Hassan* led to an inappropriate amendment to the ECHR, and its implicit acceptance in *Mohammed* is thus a cause for concern. The fact that the ECtHR has amended the ECHR in a way that clearly contradicts the wording of the Convention is particularly troubling. Requiring derogation under the ECHR, instead of following the reasoning in *Hassan,* is both a plausible and preferable option, which allows for detention in armed conflict but also provides human rights protection. If a court were to take this step it would be traversing new ground in ECHR jurisprudence, but in a much more positive way than was done in *Hassan.*

The second key issue, stemming from the *Mohammed* case, is the Court of Appeal's conclusion that there is no authority to detain in NIAC. This reasoning results in a void in IHL, and means detention may not be legal in some circumstances where it would be both practical and human rights friendly (as an alternative to killing). Reliance on domestic law to detain is flawed in an armed conflict situation, and reliance on UNSCRs is not guaranteed to be legal – unless the UNSC is unusually specific in requiring violations of human rights. However, hope is provided in the form of the soft law instruments operating in this area, in particular, the Copenhagen Principles and ICRC Process. These are more likely than treaty law or interpretation to bring requisite change, and to eventually create customary law IHL authority to detain in NIAC.

At the heart of this issue and this paper is the delicate balance that must be struck between the need to detain in armed conflict, and the need to protect human rights. While these cases have not quite reached that balance, discussion of the interaction between the ECHR and IHRL in new forums is beneficial for general awareness and knowledge of both branches of law, and for those who wish to bring IHL related claims.[337] These beneficial effects are diminished by the numerous problems, identified in this paper, in the

[337] Byron, above n 75, at 895.

Mohammed and *Hassan* decisions.[338] There are, however, options available to remedy the defects of these cases. It is reasonable to hope that this area of law will improve for both states and detainees, in the relatively near future.

IX Appendix: Relevant Provisions

A European Convention on Human Rights

Article 5(1):

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; 8 9

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or

[338] See Cordula Droege "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict" (2007) 40 Isr L Rev 310 at 351.

when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 15:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

B International Covenant on Civil and Political Rights

Article 4:

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons

awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

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