Saar Blueprints

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Where do we find the key to lock them away? – The right to detain in non-international armed conflict

Programm für lebenslanges Lernen

06 / 2021 EN

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Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany. For more information and content visit http://jean-monnet-saar.eu/.

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ISSN

2199-0050 (Saar Blueprints)

Citation

Owers, Rebecca, Where do we find the key to lock them away? – The right to detain in non-international armed conflict, 06/21 EN, online via: https://jean-monnet-saar.eu/?page_id=67

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List of Abbreviations

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
Copenhagen Process	The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC III	Geneva Convention Relative to the Treatment of Prisoners of War
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICRC Process	ICRC Process of Strengthening IHL Protecting Persons Deprived of Their Liberty
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ISAF	International Security Assistance Force
NIAC	Non-International Armed Conflict
UNSCRs	UN Security Council Resolutions

A. INTRODUCTION

Since the end of World War II, most armed conflicts have been non-international, for example the recent conflicts in Syria, Iraq, and Afghanistan.[1] With this change in the type of conflicts the world is having, also come changes in the ways we regulate wars and conflicts.[2] The "*asymmetric nature*"[3] of non-international armed conflicts (NIACs) mean that whilst states might guarantee certain rights for their own citizens and during a NIAC, those same rights may well not extend to the individuals on the other side of the conflict who form the non-state armed groups (non-state armed groups), such as insurgents with allegiances to groups like the Al-Qaeda or ISIS.

The UK's interference in the war on terror has cast a long shadow over many aspects of British public life from the distrust of certain political parties and relationships with old allies. One of the most heightened consequences, however, has been the effect on human rights and humanitarian laws and the public view of human rights, whether the view is made with verifiable information or not. Right wing media has whipped up a frenzy of distrust against European institutions for forcing human rights on to British military leaders and allegedly misapplying such rights to the battlefield.[4]

One of the most pressing issues in modern conflict is that of detention in NIACs and especially the procedural safeguards surrounding detention. Detention is a fact of life in wartime and the conditions in which armed forces, particularly British forces, detain individuals in NIACs has been of growing concern in the last few years for two reasons.

Firstly, the public discourse on the legality and morality of British involvement in particular conflicts has been heightened. The dichotomy between people who believe that British forces acting abroad should have carte blanche power to detain suspected terrorists and those who believe that all humans deserve a baseline of rights, guarded by conventions such as the ECHR, seems like it has been growing ever wider, no thanks to the British tabloids.

Secondly, it has been well recognised in both the judicial and academic community that there are issues with the differences not only between the International Humanitarian Law covering International Armed Conflicts (IACs) and that which covers NIACs, but also in the relationship

[1] *Johnson*, in: Gill et al. (eds.), p.53, 54.
[2] Ibid.
[3] Ibid.
[4] *Rooney*, PL 2016, p.563, 565.

between IHL and International Human Rights Law (IHRL), which some view as a "*gradual process of convergence*".[5]

It was in this legal and political climate that the UK Supreme Court has had to make difficult legal decisions in the case of *Serdar Mohammed & Others v Ministry of Defence*[6], balancing military necessity with rights of detainees.

This case and the case of *Hassan v United Kingdom*[7] have brought up questions as to where the legal basis to detain in a NIAC comes from and these decisions will have consequences for how the British armed forces may have to act in future conflicts.

The main issues of these two cases are:

- The role of the ECHR during armed conflict**;**
- Is there a right to detain in NIACs, and, if so, where that right comes from; and

With these issues in mind, this paper begins in Section B by setting out the definition of NIACs and the treaties governing them. Thereafter, it will consider the law surrounding detention in IHL, both in IAC and NIAC situations, before turning to the relationship between IHL and IHRL. Afterward, we will consider the factual and legal background of the cases of *Hassan* and *Mohammed* and the questions of whether these cases were correctly decided and the reasoning behind them will be considered.

In Section C, we will look at the arguments surrounding an inherent authority to detain under IHL and the constraints of these arguments.

Finally, in Section D, there will be an outline of the future developments for NIAC detention and whether IHL has the potential to be strengthened in this area.

Overall, this paper will show that there is the potential to find a right to detain in NIACs, however the path to getting there is lined with some shaky judicial decisions and that more needs to be done to strengthen IHL in NIAC situations, so we do not end up relying on creative judicial interpretations in the future.

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[5] *Aughey, Sari*, ILS, 2015, p. 61- 62.
[6] UK Supreme Court, *Mohammed and others v Ministry of Defence*, [2017] UKSC 1 & [2017] UKSC 2, 17 January 2017.
[7] ECtHR, *Hassan v United Kingdom* [GC], App no: 29750/09,16 September 2014.

B. FACTUAL AND LEGAL BACKGROUND

I. DEFINING NIACS

IHL applies to armed conflicts, however, there is a distinction to be made between IAC and NIAC IHL. NIAC IHL is less developed and more restrictive than IAC IHL because most states use their domestic law in the case of NIACs in their own territory, e.g., the British state would usually use British domestic law to detain individuals suspected of being part of a NSAG if the NIAC conflict took place within British territory. Another reason that states have been reticent to extend NIAC IHL is that doing so may give non-state armed groups, such as ISIS or Al-Qaeda, some form of legal recognition or legitimacy. Related to that argument, is the issues of equality, equivalence and reciprocity could give these non-state armed groups the same privileges as states, which would be especially concerning if such non-state armed groups were to detain or target members of states' armed forces. This section focuses on how to define a NIAC in comparison to IAC, the relevant legal sources and key differences between the regulation of IACs in IHL compared to NIACs.

1. IHL TREATIES ON NIACS

The two main treaty sources on NIACs are Common Article 3 to the Geneva Conventions of 1949 (CA3) and Additional Protocol II to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (APII).

Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*". A defining characteristic of NIACs is where one or more non-state armed groups is involved in the conflict. According to CA3, a conflict may be defined as a NIAC where a non-state armed force is fighting either state armed forces or another NSAG.[8]

APII provides some extra context to the meaning of a NIAC and distinguishes between a NIAC and lower level threats such as riots and banditry.[9] Article 1(2) of APII and International Criminal Tribunal for the former Yugoslavia (ICTY) Jurisprudence use two criteria to distinguish between the types of conflict:

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[8] *ICRC*, How is the Term "Armed Conflict" Defined in International Humanitarian Law? ICRC Opinion Paper, page 3, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (last accessed on 11/03/2021).
[9] Ibid.

1. Hostilities need to reach a minimum level of intensity to be classified as a NIAC, for example, when the state must use military force against the non-state armed forces rather than only the police.
2. The non-state groups are regarded as "*parties to the conflict*", which means they have some kind of organised armed force with a command structure and can carry out military manoeuvres.[10]

The definition in Article 1(1) of APII is even narrower, noting that it applies to "*all armed conflicts… which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*."

The APII definition is constricted compared to CA3 since it only applies to armed conflicts between a state and a NSAG, therefore it does not apply in the context of conflicts between two non-state armed groups.[11] APII also necessitates control of some part of the territory of the HCP. However, the Statute of the International Criminal Court (ICC) notes that the CA3 NIAC definition continues to apply[12] since Article 1(1) of APII supplements CA3 "*without modifying its existing conditions of application*".

Article 75 of Additional Protocol I is also deemed to be part of the NIAC IHL Treaty law, since many states, academics and international organisations consider it to be custom in both IAC and NIAC situations.[13]

2. CASE LAW

In the *Tadic* case, the ICTY held that non-international armed conflict is, "*protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*".[14] This confirms the CA3 definition so as to include situations where state forces are not involved.[15] Later case law also contributed to defining factors on the criteria for the organisation and intensity.[16]

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[10] Ibid.
[11] Ibid.
[12] Statute of the ICC, art. 8 para. 2 (f) in: *ICRC*, (fn.9), p. 4.
[13] *Bellinger, Padmanabhan*, AJIL, 2011, p. 201, 206, 207.
[14] *ICTY*, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70, in: *ICRC*, (fn.9), p. 4.
https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (last accessed on 11/03/2021).
[15] *ICRC*, (fn.9), p. 4.
[16] *Murray*, LJIL 2017, p. 435-456, p. 445.

3. APPLYING THE NIAC DEFINITIONS TO *MOHAMMED*

The High Court in Mohammed noted that the Afghanistan conflict could be categorised as a "*multi-national NIAC*"[17] since it took place in Afghanistan and the Afghan state forces consented to working alongside international forces, including British armed forces, against organised armed groups.[18] The Taliban met the requirements of an armed group who is "*party to the conflict*" since it is well-documented as having a military-like command structure with leadership, the capacity to conduct military-style operations and held territory in Afghanistan.[19]

It is also considered true that the Afghanistan conflict as having met the required level of intensity for a NIAC due to the ongoing violence and major attacks in the conflict areas and the impact of the conflict on the Afghani population.[20]

4. KEY DIFFERENCES BETWEEN IACS AND NIACS

The distinction between IACs and NIACs is both a historical[21] and essential one[22] since the treaty obligations flowing from each are markedly different. Using the example of detention below, it becomes clear that the IHL governing IACs is much more detailed and sophisticated than that for NIACs.

One key difference between an IAC and NIAC, which may cause extra difficulties in regulating the latter, include that it can be difficult to delineate between combatants and civilians when you are dealing with non-state armed forces in a way that does not typically happen when dealing with two or more states in an IAC with a regimented armed force system.[23] There are also some moral differences to take heed of during a NIAC which may not come up in an IAC. For example, with detention in the case of an IAC, usually the IAC will finally end, and some kind of peace agreement is reached between the parties to the conflict. At this point, any detainees and POWs would be released and sent home. However, in a NIAC situation, there may never be an end point with a formal peace agreement, so there could be no limit to how

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[17] UK High Court, *Serdar Mohammed v Ministry of Defence*, [2014] EWHC 1369 (QB), 02 May 2014, para. 231.
[18] Ibid.
[19] *RULAC, Geneva Academy of International Humanitarian Law and Human Rights*, Non-international armed conflicts in Afghanistan, https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan#collapse2accord (last accessed on 11/03/2021).
[20] Ibid.
[21] *Akande*, in: Saul, Akande, (eds.), p. 29, 29.
[22] *Akande*, (fn.21). p.30.
[23] *Johnson*, (fn. 1), p. 54.

long an individual is detained for. Whether detention of an individual is reasonable is another quandary with a through line throughout the detention – the detention may have been reasonable at the moment the individual was detained if they were deemed a threat, but whether that individual continues to be a threat and whether the detention continues to be reasonable is can leads to more problems, particularly once we involve IHRL, as we will see below.[24] Difficulties such as these are why IHL for NIAC situations is generally much more restrictive, and particularly so when it comes to detention, as we will see in the next section.

Despite these differences, some argue that the distinction between the two types of conflict is slowly breaking down as over the last few decades many conflict treaties have been applied to both IACs and NIACs.[25] Further, customary IHL has closed some of the gaps in NIAC IHL, for example, the ICTY held that certain IAC rules protecting civilians and relating to methods of war also apply to NIACs.[26] The International Committee of the Red Cross (ICRC) has also found that many gaps in NIAC IHL were filled by state practice.[27]

II. THE LAW SURROUNDING DETENTION IN IHL

The following section will outline the treaty rules governing detention in both IACs and NIACs. It should be noted that there are some who have put forward that the parties to a NIAC could allow for the legal basis from IAC IHL to be transposed through a special agreement,[28] however a thorough analysis of this particular topic is outwith the scope of this paper, and in any event, it does not solve the issue for most NIACs.

It is important to note at the outset that none of the IHL treaties explicitly prohibit “arbitrary” detention, however, it is accepted by customary IHL that arbitrary detention is forbidden.[29] Since customary IHL does not have codified details, there is little guidance on when detention could be considered arbitrary during armed conflict.[30]

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[24] *Johnson*, (fn. 1), p. 66.
[25] *Akande*, (fn.21)., p. 31.
[26] Ibid.
[27] Ibid.
[28] *Amstel*, IHLS, 2012, p. 160, 183- 186.
[29] *Pejic*, in: Saul, Akande, (eds.), p. 277, 277.
[30] Ibid.

1. IAC RULES

The Geneva Conventions lay down rules on detention and internment for IAC situations, particularly the Third and Fourth Geneva Conventions of 1949 (GC III and GC IV respectively). It has been noted that the IAC IHL detention framework works well for the realities of armed conflict[31], and, for this reason, some have proposed the extension of the IAC detention framework to NIACs, an argument which is delved into further below.

Within this legal framework, an individual may only be detained for reasons and in accordance with procedures that are provided for by either domestic and/or international, which is known as the principle of legality.[32] A State should only detain individuals where "*absolutely necessary*", according to Article 42 of GC IV, or for "*imperative reasons of security*" as laid down in Article 78.[33] Further, Article 78 GC IV goes on to stipulate procedures to ensure the legality of a detention so as to not make the detention arbitrary, such as giving detainees a right to appeal and periodic reviews.[34]

Generally, all detainees in an armed conflict should be treated humanely and should be given judicial and procedural guarantees surrounding the circumstances of their detention.[35] One of the main principles is that the detention must end as soon as the reason for detaining that individual no longer exists, thus indefinite detention is not allowed.[36] However, these general principles may change depending on the type of detainee since there are specific rules on prisoners of war, civilians and medical professionals.[37]

Prisoners of war are covered by GC III and is given to individuals classed as lawful combatants under Article 45(2) of AP I, meaning members of the armed forces of a party to an international conflict, except for medical and religious personnel, and participants in a *levée en masse*.[38] This status confers different rights compared to other types of detainees. For example, prisoners of war can be detained without any judicial or administrative procedure since detaining prisoners of war is viewed as preventative rather than punitive.[39]

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[31] *Mahnad*, in: Gill et al. (eds.), p.33, 44.
[32] *Pejic*, IRRC, p. 375, 380.
[33] Ibid.
[34] *Pejic*, (fn. 32), p. 383.
[35] *Melzer*, International Humanitarian Law, A Comprehensive Introduction, ICRC, 2019, p.170 ff. https://www.icrc.org/en/publication/4231-international-humanitarian-law-comprehensive-introduction (last accessed on 15/03/2021).
[36] *Pejic*, (fn. 32), p. 382.
[37] *Melzer*, (fn. 35), p.171, 172.
[38] *Melzer*, (fn. 35), p.82 ff., p172.
[39] *Melzer* (fn. 35), p.175.

According to the Article 28(2) of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, medical and religious personnel are not considered to be prisoners of war, even if they are also members of armed forces. They are not considered to be detained, rather they there to provide medical and spiritual needs of the detained prisoners of war. This category enjoys the same protections as prisoners of war.

Article 4 of GC IV protects individuals who don't qualify for prisoner of war status, such as civilians and members of the armed forces who have lost their entitlement to prisoner of war status. However, the rules differ for these "*protected persons*", since Article 42 of GC IV states that "*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*." In the circumstances of an occupation, Article 78 (1) goes further stating "*If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."* Further, Article 27 contains rules on the humane treatment of detainees under the umbrella of protected persons and Article 132 states that detainees should be released "*as soon as the reasons which necessitated his internment no longer exist*."

Therefore, the Geneva Conventions set out quite a thorough and fairly detailed framework for the detention of various types of individuals, whilst also covering their treatment throughout detention and their release.

2. NIAC RULES

In contrast to the detail and precision of the IAC framework, the rules for detention in NIACs contained in IHL are much more limited.

Article 4 of APII sets out some fundamental guarantees to ensure the humane treatment of persons deprived of their liberty, which is also found in paragraph 1(1) of CA3. These include protection from slavery, torture, humiliation, and degrading treatment. Article 5(1) of APII does also set out some standards for the circumstances of the detention, including assurances that detainees are provided with sustenance, healthcare and are allowed to practice their religion.

Whereas the Geneva Conventions lay out procedural standards for detention in IACs, neither CA3 nor APII contain an explicit basis for detention, nor do they provide thorough protections such as rights to appeal and periodic reviews. CA3 does mention in paragraph 1(1)(d) that the HCP are prohibited from "*passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial*

guarantees which are recognised as indispensable by civilized peoples" onto detained persons, however the Article does not further explain what is meant by a constituted court or which kinds of judicial guarantees are necessary. This shows the difference in precision and adequate protections compared to the more detailed provisions covering IAC detentions.

The principle against indefinite detention mentioned above is particularly important in NIACs since indefinite detention is prohibited under IHRL as it is deemed arbitrary.[40] For example, both the ECHR and International Covenant on Civil and Political Rights (ICCPR) provide for rights to liberty[41] whereby a detainee must be given the chance to challenge the lawfulness of their detention before a court.[42] This was referenced by Justice Leggatt in the High Court decision of *Mohammed*, who noted that CA3 and APII do not provide procedural safeguards for detention and yet NIACs can go on for many years. Therefore, if one were to imply a power to detain from these provisions, an indefinite power to detain would be especially problematic.[43]

III. RELATIONSHIP BETWEEN IHL AND IHRL

The relationship between IHL and IHRL was traditionally quite different since IHL was drafted specifically for armed conflicts whilst IHRL was created with peacetime in mind.[44] IHL is considered the *lex specialis* during armed conflicts, however, this does not preclude the continued application of IHRL.[45] The relationship between these two sources of law has been at times difficult to resolve. It is well accepted that the protections provided for by IHRL continue during armed conflict, however, they can be derogated from in certain instances.[46] For example, in the case of IACs, the IHL rules permit departures from the usual requirements of IHRL since it is generally accepted that some of the IHRL rules are not possible during an ongoing conflict, however whether such a departure is allowed in NIACs is still up for debate.[47] However, it is also worth noting that the IHRL rules such as ICCPR have been recognised as applying at all times, as noted in General Comment No. 31 of the Human Rights Committee

[40] *Pejic*, (fn. 32), p. 382.
[41] See Article 5 (4) ECHR and Article 9(4) ICCPR.
[42] *Pejic*, (fn. 32), p. 382, 383.
[43] UK High Court, (fn. 17), para. 248.
[44] *Sassòli*, in: Saul, Akande, (eds.), p. 381, 382.
[45] *RULAC,* (fn. 19).
[46] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para 106.
[47] *Mahnad*, (fn. 31), p. 36.

that "*the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable*."[48]

One of the difficulties is that IHL is a much more consistent system when compared to IHRL which spans both regional and universal treaties. However, it is noted that many of the substantive rules have the same aims of protection and respect for lives.[49] The only major differences are on the use of force and the grounds, basis and procedural safeguards for detention.[50]

It is important to note that Article 15 ECHR allows for derogations from certain obligations during "*war or other public emergency threating the life of the nation*" however, this is qualified in that any actions taken whilst derogating must not conflict with other obligations under international law.

As noted above, the IHL governing NIACs has been expanded somewhat through customary law, however, this has also given rise to increasing questions on conflicts between IHL and IHRL. Controversially, some view that this gap-closing of NIACs means that the relationship between IHL and IHRL in NIACs is increasingly similar to IACs.[51]

In a situation where both IHL and IHRL apply, we typically look to the *lex specialis* principle, meaning that the more specific subject matter rule should apply, however, *Sassòli* notes that:

"*It is not because IHL applies to and was designed for armed conflicts that it always constitutes the lex specialis. In an armed conflict, IHL constitutes the lex specialis on certain questions, whereas IHRL is lex specialis on others*."[52]

This seems like the most pragmatic and sensible approach to my view. I am inclined to agree that in IACs we should look at the purpose of the law as well as whether the type of operation, whether that be military or law enforcement.[53] The situation in NIACs is more problematic, since it is not easy to determine the *lex specialis* when so much of the IHL purportedly governing NIACs is only found through analogy to IAC rules, which could result in some difficult

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[48] *Human Rights Committee*, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, para. 11 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3d%3d (last accessed on 13/06/2021).
[49] *Sassòli*, (fn. 44), p. 383.
[50] Ibid.
[51] *Sassòli*, (fn. 44), p. 385.
[52] *Sassòli*, (fn. 44), p. 397.
[53] *Sassòli*, (fn. 44), p. 398.

legal decisions.[54] Nevertheless, even if we are to allow the lex specialis to prevail, one must still take the *lex generalis* into account.

IV. EXTRATERRITORIALITY OF THE ECHR

It has long been accepted that the ECHR's jurisdiction is not limited to the contracting parties' territories, rather it may extend to everyone under the contracting parties' jurisdiction, as asserted in Article 1 of the ECHR, which states that *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*

The European Court of Human Rights (ECtHR) has found that extraterritorial jurisdiction may apply where a State exercises either spatial or personal control in another State[55]. This effective control may result from both lawful and unlawful military actions.[56] In *Al-Skeini and Others v. the United Kingdom*[57], the ECtHR refined the scope of the *ratione loci* of the ECHR by extending the scope to include where a State exercises public powers over a given territory, even if the State does not have full effective control.[58]

V. *HASSAN* CASE

The following section will lay out the basis of the Hassan case, beginning with the factual background. Thereafter, it will look at the arguments and reasoning of the ECtHR, starting with the extraterritoriality of the ECHR, then the lex specialis argument, considering the arguments and reasoning on derogation from Article 5 and finally the decision of the ECtHR will be laid out.

1. FACTS AND BACKGROUND

The applicant in the *Hassan* case is Mr Khadim Resaan Hassan, an Iraqi national, who, prior to the invasion of Iraq in 2003, was a member of the Ba'ath Party, the governing party of

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[54] Ibid.
[55] See ECtHR *Loizidou v Turkey* (1995) Ap. No 15318/89, 23 March 1995 para 62-64 ff.
[56] *Press Unit, ECtHR*, Extra-territorial jurisdiction of State Parties to the European Convention on Human Rights, https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf (last accessed on 12/03/2020).
[57] ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], App no. 55721/07, 7 July 2011.
[58] *Ryngaert*, UJIEL 2012, p 57, https://www.utrechtjournal.org/articles/10.5334/ujiel.ba/galley/27/download/ (last accessed on 09/03/2021).

Sadaam Hussein.[59] As a result of the British army arresting senior members of the Ba'ath Party in April 2003, the applicant went into hiding.

The applicant's brother, Mr Tarek Hassan, stayed at the family home where he was arrested by the British army on 23 April 2003. The applicant asserted that Tarek was taken from the family home in the early hours, however the UK Government stated that Tarek Hassan was arrested as a suspected prisoner of war in line with the Third Geneva Convention. British forces asserted that Tarek Hassan was that he was on the roof of the family home with an AK-47 machine gun, and this amounted to grounds for his arrest.

Both parties accept that Tarek was detained at a US facility, Camp Bucca. Although Camp Bucca was operated by American forces, the British forces exercised control over detainees they themselves had arrested.[60] The UK Government states that Tarek was pronounced to be a non-combatant and not a threat to security. Therefore, according to the UK authorities, Tarek Hassan was released from Camp Bucca on or around 2 May 2003. However, Tarek's family assert that he was not seen again until his body was found with bullet wounds in September 2003.

After unsuccessful proceedings in the UK courts, the applicant brought the case before the Grand Chamber of the ECtHR complaining of a breach of Article 5 that the detention of his brother was arbitrary, unlawful, and lacked procedural safeguards. The case also included claims under Articles 2 and 3 that the UK failed to carry out an inquiry into his brother's detention, ill-treatment and death.[61] The Court found that there was no evidence of ill-treatment or connection to the death by the UK and so the latter two claims did not proceed.[62]

2. EXTRATERRITORIALITY OF THE ECHR

This case concerns the extraterritorial jurisdiction and application of the ECHR in the context of an IAC. The applicant's argument under Article 5 hinged on whether the ECtHR accepted that the UK had jurisdiction. The Government tried to argue that the ECHR should not apply extraterritorially in the case where the UK was not the occupying power in the IAC, and instead that IHL should apply.[63] It also tried to argue that jurisdiction should not apply during active

[59] *Reed*, ECHR: UK Did Not Violate Hassan's Human Rights, https://www.justsecurity.org/15074/echr-uk-violate-hassans-human-rights/#more-15074 (last accessed on 09/03/2021).
[60] ECtHR, (fn. 7), para. 8 ff.
[61] Ibid.
[62] Ibid.
[63] ECtHR, (fn. 7), para. 86, 87.

hostilities in an IAC and instead the conduct of the State should be subject to the requirements of IHL. However, this argument directly contradicts with the ECtHR's case law.[64]

The Court also did not agree that once Tarek Hassan was detained in Camp Bucca that this amounted to him being solely under US jurisdiction since the UK retained authority and control over Tarek while he was detained.[65] The Court found that the UK retained authority and control over Tarek Hassan from the moment he was captured by British troops until he was released.[66] The *Al-Skeini* judgment was followed in *Hassan*, as the ECtHR found that it was not necessary to decide if the UK had effective control of the area, since the UK had jurisdiction over Tarek Hassan on another ground.[67] The ECtHR, therefore, concluded that Tarek Hassan has been under UK jurisdiction from his arrest on 23 April 2003 until his release from Camp Bucca on 2 May 2003.[68]

3. THE *LEX SPECIALIS* ARGUMENT

The UK argued that if Hassan was found to be under the UK's jurisdiction during his detention, then Article 5 ECHR must be considered in the context of armed conflict and particularly "*the fundamental importance of capture and detention of actual or suspected combatants in armed conflict*".[69] It argued that applying the procedural safeguards of Article 5 ECHR during armed conflict could not possibly be the intended practice. The UK considered that Article 5 was either displaced by IHL since it is the *lex specialis* and should prevail over the ECHR. Alternatively, the UK contended that Article 5 was modified so as to allow for capture and detention in line with GC III and GC IV.[70] It was also argued that the permitted purposes of detention in Article 5(1) should be interpreted so as to be compatible with IHL.[71] This was the first time where a Contracting State to the ECHR had tried to disapply its Article 5 obligations in light of powers under IHL, which, as outlined above, allow for prisoners of war to be detained during IACs.[72] This contention was rejected by the Court as this could have the effect of displacing the whole ECHR in contexts in which IHL applies.[73]

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[64] See ECtHR, *Al-Skeini and Others v. The United Kingdom* [GC], (fn. 57).
[65] *Reed*, (fn. 59).
[66] ECtHR, (fn. 7), para. 75.
[67] Ibid.
[68] ECtHR, (fn. 7), para. 8 ff.
[69] Ibid.
[70] Ibid.
[71] *Reed*, (fn. 59).
[72] ECtHR, (fn. 7), para. 99 ff.
[73] *Hill-Cawthorne*, The Grand Chamber Judgment in Hassan v UK, https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/ (last accessed on 12/03/2021).

4. DEROGATION FROM ARTICLE 5

The UK argued that there had been no need to formally derogate from Article 5 ECHR in order to detain in the IAC in this case because the ECHR allowed for detention in such cases. This argument again centred around the ECHR having regard to IHL as the *lex specialis*. The Government further argued that Article 5 should not be interpreted and applied in times of conflict in the same way as it would be interpreted in peacetime.[74] If an Article 5 derogation was necessary before detaining individuals in IACs, this would risk undermining IHL as the *lex specialis*.[75]

The ECtHR examined the ECHR in view of the rules of treaty interpretation, taking into account state practice.[76] The Court found that the Contracting States did not have the practice of derogating from their Article 5 obligations when detaining individuals under GC III and GC IV during IACs.[77] Therefore, the Court accepted that there was no need for the UK to formally derogate under Article 15 ECHR from its Article 5 obligations. The Court also found that States do not consider Article 5 to prohibit lawful internment during armed conflict, despite it not being included in the list of permissible grounds for detention.[78] Therefore, Article 5 should be interpreted in a manner which is consistent with IHL so that it does not prohibit lawful detention during armed conflict. Since the grounds to detain lawfully during an IAC were read into Article 5, it was deemed not necessary for the UK to make a derogation.[79] The Court deemed this to be a reconciliation of the norms of IHRL with IHL.[80]

5. DECISION

It was deemed that the UK had met the requirements under IHL which were read into Article 5 ECHR. The Grand Chamber held that Tarek Hassan had been under the UK's jurisdiction during his detention, however, there was no violation of Article 5 (1), (2), (3) or (4) in respect to his apprehension and detention, therefore his detention was not arbitrary.

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[74] ECtHR, (fn. 7), para. 90.
[75] Ibid.
[76] ECtHR, (fn. 7), para. 100,101 ff.
[77] ECtHR, (fn. 7), para. 101.
[78] *De Koker*, UJIEL, 2015, p.90, 92.
[79] Ibid.
[80] ECtHR, (fn. 7), para. 104.

VI. MOHAMMED CASE

The following section will lay out the basis of the Mohammed case, beginning with the factual background. Thereafter, it will look at the arguments and reasoning of the High Court, Court of Appeal and the Supreme Court.

1. FACTS AND BACKGROUND

Serdar Mohammed, an Afghan national suspected of being a Taliban commander, was captured and detained by British armed forces acting as part of the International Security Assistance Force (ISAF), a multinational force under NATO command deployed to maintain security in Afghanistan, on 7 April 2010.[81] The ISAF was operating under the umbrella of NATO in accordance with UN Security Council Resolution (UNSCR) 1890 (2009) adopted under Chapter VII of the UN Charter. Mr Mohammed was detained at British detention facilities until 25 July 2010 in Helmand Province, Afghanistan with the intention to bring the detainee before an Afghan judge.[82]

The detention policy of the ISAF is laid down in ISAF Standard Operating Procedures for detention (SOP 362).[83] The applicable provisions of ISAF SOP 362 are:

"*4. Authority to Detain. The only grounds upon which a person may be detained under current ISAF Rules of Engagement (ROE) are: if the detention is necessary for ISAF force protection; for the self-defence of ISAF or its personnel; for accomplishment of the ISAF Mission.*

5. Detention. … The current policy for ISAF is that detention is permitted for a maximum of 96 hours after which time an individual is either to be released or handed into the custody of the ANSF [i.e., Afghan National Security Forces]/GOA [i.e., Government of Afghanistan].

7. The Powers of the Detention Authority. A Detention Authority [defined as an individual authorised to make detention decisions] may authorise detention for up to 96 hours following initial detention. Should the Detention Authority believe that continued detention beyond 96 hours is necessary then, prior to the expiration of the 96-hour period, the Detention Authority shall refer the matter by the chain of command to HQ ISAF.

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[81] *Ekins, Verdirame,* LQR 2016, p.206, 206.
[82] *Rooney*, (fn. 4), p. 565.
[83] UK High Court, (fn. 17), para. 35.

8. Authority for Continued Detention. The authority to continue to detain an individual beyond the 96 hour point is vested in COMISAF (or his delegated subordinate). A detainee may be held for more than 96 hours where it has been necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer term detention but is intended to meet exigencies such as that caused by local logistical conditions e.g., difficulties involving poor communication, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him. …"[84]

Therefore, under ISAF SOP 362, Mr Mohammed could only be detained for 96 hours, however, his detention after this 96 hour period was extended with the authorisation of UK Ministry of Defence Ministers. During this period of detention, Mr Mohammed was interrogated for a further 25 days, at the end of which the Afghan authorities expressed their willingness to accept Mr Mohammed into their custody, however, the Afghan authorities did not have the capacity to do so due to prison overcrowding and so Mr Mohammed was detained on British military bases for a further 81 days before his eventual transfer to the Afghan authorities. During the 110 days of British detention, Mr Mohammed was not brought before a judge or given the opportunity to represent himself in a judicial setting.[85]

Mr Mohammed claimed that his detention by the UK armed forces was as such unlawful under the Human Rights Act 1998 and also under Afghan law. He alleged that under Article 5 of the ECHR his detention had been arbitrary after the initial 96 hours and that the requisite procedural safeguards were not in place.

For our purposes, the pertinent issues of the Serdar Mohammed case are whether British forces had the power to detain Mohammed for more than 96 hours and, if so, does that power come from customary IHL, UNSCRs or another source?

2. AUTHORITY TO DETAIN IN NIAC – ARGUMENTS IN *MOHAMMED*

The following sections outline some of the main arguments regarding the authority to detain in and some of the conclusions drawn from the courts. Note that the below discussion details the reasoning of the various courts in Mohammed in order to show the through line and how the final Supreme Court decision built upon some of the groundwork laid down by the lower courts.

[84] UK High Court, (fn. 17), para. 35.
[85] UK High Court, (fn. 17), para. 5.

a) DOMESTIC AFGHAN LAW

HIGH COURT AND COURT OF APPEAL

It was noted in the High Court that the Afghan legal system was wrecked by Taliban rule,[86] however the interim criminal codes only gave the authority to detain a suspect for up to 72 hours to police and prosecutors. Thereafter, the suspect must be released or transferred to a prosecutor.[87] The High Court also observed that the Afghan domestic codes had no provisions allowing for detention by either the Afghan army or foreign armed forces operating in Afghanistan.[88] Expert witnesses noted that the Afghan Supreme Court could potentially allow for detention by ISAF up to 72 hours to correspond with the powers given to the Afghan police, however this was not certain.[89]

It was concluded that the UK's detention policy had no legal basis in Afghan law, therefore, both the High Court and the Court of Appeal in Mohammed could not find a legal basis to detain under domestic Afghan law.[90]

SUPREME COURT

The Supreme Court held that it was not necessary for the UK to establish a right to detention under domestic Afghan law in order to read the right to detain under IHL into Article 5 EHCR.[91]

b) UNSCRs

As noted above, under ISAF SOP 362, detention was allowed for up to a maximum of 96 hours.[92] The only noted exceptions to the 96 hour rule were if more time was needed to ensure the detainee was released safely or transferred safely, for example, to the Afghan authorities. However, this exception did not give the UK forces the power or authority to hold a detainee for a longer term detention – it was to be used in difficult logistical situations only.[93]

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[86] UK High Court, (fn. 17), para. 64.
[87] UK High Court, (fn. 17), para. 74.
[88] UK High Court, (fn. 17), para. 75.
[89] Ibid.
[90] UK Court of Appeal, *Serdar Mohammed & Others v Secretary of State for Defence*, [2015] EWCA Civ. 843, 30 July 2015, para. 125 ff.
[91] UK Supreme Court, (fn. 6), para. 139, 202.
[92] *Rooney*, (fn. 4), p.563, 566.
[93] *Rooney*, (fn. 4), p. 567; UK High Court, (fn. 17), para. 155.

The Ministry of Defence argued that detention which is essential to fulfilling the mandate of the ISAF is thereby authorised by the UNSCR even if the detention could be considered contrary to Article 5 ECHR. Further, such a necessary detention is an obligation under the UN Charter and this obligation prevails over the UK's obligations under Article 5 ECHR.[94]

HIGH COURT

The High Court looked to the *Al-Jedda*[95] case, where a similar argument was put forward in the case of an individual detain in Iraq. The House of Lords had ruled that the detention was lawful with authorisation from a UNSCR where it was "*necessary for imperative reasons of security*". However, the ECtHR decision in this case held that the UNSCR did not supersede the UK's obligations under Article 5 ECHR.[96] The High Court distinguished the UNSCRs in the present case in Afghanistan from those of the Iraqi circumstances, since UNSCR 1890 (2009) does expressly reference detention and gave no authority to detain even to the Afghan government. Still, the High Court did refer to the fact that the UNSCR authorised the use of lethal force for the purposes of self-defence and therefore, it should be understandable that the lesser step of detaining individuals who pose an imminent threat must surely also be allowed.[97] However, the Court did not view that such an implicit authorisation would give ISAF the power to detain after they ceased to be an imminent threat.[98] Further, there could be no reason to interpret the ISAF as allowing detention in contravention of IHRL.[99]

Therefore, the High Court did not consider that UNSCR 1890 (2009) should be interpreted as allowing the UK government to violate Article 5 ECHR.[100] The High Court also found that the UK forces went beyond the 96 hour limit set out by ISAF SOP 362.[101]

THE COURT OF APPEAL

The Court of Appeal thought that the High Court's approach regarding an implicit right to detain stemming from the authorisation of the use of lethal force to be too restrictive.[102] The Court of

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[94] UK High Court, (fn. 17), para. 192.
[95] ECtHR, Al-Jedda v. The United Kingdom, [GC], App no. 27021/08, 7 July 2021.
[96] UK High Court, (fn. 17), para. 207.
[97] UK High Court, (fn. 17), para. 219.
[98] Ibid.
[99] UK High Court, (fn. 17), para. 221.
[100] UK High Court, (fn. 17), para. 226.
[101] Ibid.
[102] *Aughey, Sari*, The Authority to Detain in NIACs Revisited: Serdar Mohammed in the Court of Appeal, https://www.ejiltalk.org/the-authority-to-detain-in-niacs-revisited-serdar-mohammed-in-the-court-of-appeal/ (last accessed on 13/03/2021).

Appeal held that the UNSCRs authorised both the use of force and detention where necessary to fulfil the mandate of the ISAF, which was therefore not limited to 96 hours.[103]

The Court of Appeal reasoned differently to the High Court when it came to the obligations of the ECHR, noting that whether the authority given by the UNSCR could be limited by IHRL is a distinct question.[104] The Court of Appeal accepted that UNSCRs could displace any conflicting ECHR obligations.[105] In constructing its reasoning for this conclusion, the Court of Appeal looked to the decision in *Hassan,* noting that:

"*In our view, by parity of reasoning, if detention under the Geneva Conventions in an international armed conflict can be a ground for detention that is compatible with Article 5 ECHR, it is difficult to see why detention under the UN Charter and UNSCRs cannot also be a ground that is compatible with Article 5*."[106]

Crucially, however, the Court of Appeal did not find that the UK detention policy was authorised under UNSCR 1890 (2009). The reason for this is that the authority to detain was given to ISAF and, therefore, it was up to ISAF to lay down the conditions within which participating armed forces could detain. Since the ISAF policy was limited to 96 hours, the UK went beyond the limits set down by ISAF SOP 362.[107]

THE SUPREME COURT

In the Supreme Court, Lord Sumption essentially expanded the *Hassan* judgment that detention authorised under IHL is not incompatible with Article 5 ECHR. In doing so, the Court extended Hassan beyond IACs to NIAC situations, which will be critiqued further below.

As explained above, in *Hassan*, the ECtHR departed from Article 5(1) ECHR to allow an exception for preventive detention when this detention is authorised by IHL in IAC situations. The Supreme Court in *Mohammed* reasoned, therefore, that this exception could be transposed to other international law instruments, in this case, a UNSCR. It concluded that the UNSCRs provided authority to detain when required for imperative reasons of security[108] since the language of "all necessary measures" undoubtedly includes detention.[109]

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[103] UK Court of Appeal, (fn. 90), para. 148.
[104] Ibid.
[105] UK Court of Appeal, (fn. 90), para. 162.
[106] UK Court of Appeal, (fn. 90), para. 162.
[107] UK Court of Appeal, (fn. 90), para. 155, 156.
[108] UK Supreme Court, (fn. 6), para. 30.
[109] UK Supreme Court, (fn. 6), para. 119.

Therefore, the Supreme Court majority found that there is an authority to detain in NIACs which is an exception from Article 5(1) ECHR. However, Lord Sumption was clear that the extension of *Hassan* can only work when there is a positive authority for detention in another part of international law, such an UNSCR in this case.[110]

c) IHL

HIGH COURT

Justice Leggatt in the High Court could not accept that CA3 and APII have an implied power to detain since he considered that if they were intended to have such a power, this would have been provided for expressly as has been done in the case of GC III covering IACs.[111] However, this argument fails to consider that states are hesitant to regulate NIACs since they do not wish to confer any legitimacy on to non-state armed groups.[112]

Further, Justice Leggatt understands that CA3 and APII do contemplate that detention will happen in NIACs, he believes that such detention must be provided for in another source of law, such as the domestic law of the territory where the conflict is taking place, in this case Afghanistan.[113] He also contends that CA3 and APII are "*purely humanitarian*" in purpose, aiming only to guarantee basic standards when individuals are detained, whether or not that detention is legal.[114] Justice Leggatt also referenced the hesitancy of states to give powers to detain to non-state armed groups through CA3 and APII. He noted that doing so could bestow non-state armed groups with some kind of legitimacy if they allowed to detain individuals since this is a feature of state sovereignty.[115] Finally, Justice Leggatt argues that he cannot see how CA3 and APII could provide a power to detain when there are no details given regarding the grounds to detain and procedural safeguards.[116]

Justice Leggatt also considered whether there could be a power to detain as a matter of customary IHL. He reasoned that in order to show a general practice of detention in NIACs, it would also be necessary to determine the scope of that alleged rule, for example the length of detention, grounds and procedural safeguards.[117] Reference was also made to the Copenhagen Principles, however, as noted below, these principles were also not found to be

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[110] UK Supreme Court, (fn. 6), para. 60.
[111] UK High Court, (fn. 17), para. 242.
[112] *Aughey, Sari*, (fn. 5), p. 88.
[113] UK High Court, (fn. 17), para. 243.
[114] UK High Court, (fn. 17), para. 244.
[115] UK High Court, (fn. 17), para. 245.
[116] UK High Court, (fn. 17), para. 246.
[117] UK High Court, (fn. 17), para. 258.

provide a power to detain. Therefore, the High Court could not find an authorisation to detain in customary IHL.[118]

COURT OF APPEAL

The Court here agreed with Justice Leggatt that the regulation of detention in CA3 and APII does not imply a power to detain, "*regulation is not the same authorisation*".[119] The argument that if there is an authorisation to kill, then this also implies the lesser power to detain was considered by the Court here too, however, it found that it was insufficient to imply a power to detain.[120] The reasoning here includes that there was no intention of states to expand the law in this way and, following Justice Leggatt, that it was impossible to deduce the scope of such an implied power to detain.[121]

Regarding customary IHL, the Court of Appeal concluded that there was no authority to detain found here either since it could not see evidence of state practice relying on the authority to detain based on IHL in an NIAC.[122] The Court also stressed the prohibitory nature of IHL and that its purpose is to protect individuals as opposed to authorising states to detain individuals.[123]

SUPREME COURT

The Supreme Court noted that IHL does not positively authorise detention in NIACs, unlike in IACs. However, it should be noted that the majority here did not make an express conclusion that customary IHL does not allow for detention in NIACs.[124]

3. SUPREME COURT DECISION

The Supreme Court decided that British forces did have the power to detain prisoners for more than 96 hours if necessary for imperative security reasons.[125] However, the Court held that the procedures for holding prisoners did not comply with Article 5(4) ECHR as there is no effective right for the prisoners to challenge their detention.[126] Article 5(4) ECHR requires an impartial

[118] UK High Court, (fn. 17), para. 268.
[119] UK Court of Appeal, (fn. 90), para.180 ff.
[120] UK Court of Appeal, (fn. 90), para. 214 ff.
[121] UK Court of Appeal, (fn. 90), para. 217.
[122] UK Court of Appeal, (fn. 90), para. 228-230.
[123] *Rooney*, (fn. 4), p. 569.
[124] UK Supreme Court, (fn. 6), para 14.
[125] UK Supreme Court, (fn. 6), para 30.
[126] UK Supreme Court, (fn. 6), para 109.

judicial body to carry out regular reviews in accordance with a fair procedure, and this was not provided for Mr Mohammed.

Just as the High Court and Court of Appeal had found previously, the Supreme Court believed that IHL does not authorise detention of individuals in NIACs.[127] However, the Supreme Court differed from the lower courts in that it did not make an unequivocal holding on this point and some have argued that this could be because this issue could change in the near future and customary international law may provide authority in the long run.[128]

Instead, the Supreme Court deemed the power to detain to come implicitly from the UN Security Council resolutions, which will be expanded upon further below.[129]

VII. DISCUSSION AND CRITIQUE OF THE DECISIONS IN *HASSAN* AND *MOHAMMED*

The following section will cover some of the main critiques and discussion surrounding the decisions in Hassan and Mohammed, beginning with a brief examination of the extraterritoriality of the ECHR and thereafter the use of state practice by the ECtHR. Subsequently, it will consider how IHL was read into Article 5 (1) ECHR and finally look at the problems of applying the ECtHR's IAC exception to the NIAC in *Mohammed*.

1. EXTRATERRITORIAL APPLICATION OF THE ECHR

It has been argued that in *Hassan*, the ECtHR could have built upon the decisions in *Al-Skeini* and *Al-Jedda* by holding that if the UK had jurisdiction over Tarek Hassan and no derogation has been made, then the UK must continue to abide by its usual obligations under Article 5 without any IHL context being added. However, this may have led to states adopting policies to derogate in extraterritorial contexts, [130] something which is discussed further below.

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[127] UK Supreme Court, (fn. 6), para 14.
[128] *Milanovic*, A Trio of Blockbuster Judgments from the UK Supreme Court, https://www.ejiltalk.org/a-trio-of-blockbuster-judgments-from-the-uk-supreme-court/ (last accessed on 13/03/2021).
[129] UK Supreme Court, (fn. 6), para 30.
[130] *Hill-Cawthorne*, (fn. 73).

2. DEROGATION FROM ARTICLE 5 – STATE PRACTICE

In *Hassan*, the ECtHR looked at state practice of not derogating when detaining in IACs, however, this line of reasoning fails to consider that many Contracting States do not explicitly acknowledge the extraterritorial application of the ECHR.[131] There are also concerns that the Court failed to consider the debate on state practice in the context of human rights treaties fully.[132]

There has also been some criticism of the ECtHR's attempt to harmonise the norms of IHL and IHRL, particularly in the dissenting opinion of *Hassan*,[133] which argues that the Court has rendered the derogation power of Article 15 ECHR useless in respect to detention in armed conflict.[134] Although the harmonisation of apparent norms of IHL and IHRL has been touched on by the ECtHR previously,[135] the conflict in *Hassan* seems to be a genuine norm conflict due to the conflicting purposes and objectives of IHL and IHRL.[136] The indefinite and preventative detention available under IAC IHL is the complete opposite of what Article 5 ECHR is trying to achieve.[137] It is hard to imagine that the drafters of the treaty had indefinite detention in an armed conflict in mind when drawing up the exhaustive grounds to detain of Article 5.[138]

It is noted that the end result of *Hassan* is the same as if a derogation had been used, since the ECHR still applies, even if it is downgraded somewhat by the IHL standards.[139] Further, it is worth considering the political considerations at stake here. If the ECtHR had held in Hassan that states must derogate from Article 5 in armed conflicts in order to ensure Convention compliance when detaining under IHL, states may have adopted policies to get around this by derogating from the ECHR every time they entered into a foreign conflict or passed the detention responsibility on to states outside the ECHR system.[140]

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[131] Ibid.
[132] Ibid.
[133] Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicalaou, Bianku and Kalaydjieva, ECtHR, *Hassan v United Kingdom* [GC], App no: 29750/09,16 September 2014, para 6.
[134] *Spieker*, MPIL Research Series, p.1, 7.
[135] *Spieker*, (fn. 130), p. 8.
[136] *Spieker*, (fn. 130), p. 9.
[137] *Spieker*, (fn. 130), p. 10.
[138] Ibid.
[139] *Spieker*, (fn. 130), p.10.
[140] *Ní Aoláin*, To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed, https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/#:~:text=Al%2DWaheed%20and%20Serdar%20Mohammed,for%20imperative%20reasons%20of%20security (last accessed on 13/03/2021).

3. READING IHL INTO ARTICLE 5(1) ECHR

By reading lawful detention under IHL during an IAC into Article 5, the dissenting opinion of the ECtHR in *Hassan* argues that the majority has gone too far and effectively amended the treaty since the grounds for detention under Article 5 were listed exhaustively.[141]

In the case of *Mohammed*, the reasoning of this decision has been criticised by many, especially since it seems to miss the point of *Al-Jedda*, which found that the UK had violated Article 5(1) in detaining an individual under the authorisation of a UNSCR.[142] The Supreme Court tried to distinguish *Mohammed* from Al-Jedda since the latter concerned whether the UK had an "*obligation to detain*", whereas the former concerns an "*authorisation to detain*", however this distinction is weak.[143]

Further, *Mačák* considers that it is problematic to interpret IHRL, in this case the ECHR, detention rules as giving permission to detain since this is the exact opposite of what the ECHR seeks to achieve.[144] IHRL is restrictive in nature and should not be seen as giving authorisation to the deprivation of liberty.[145]

4. APPLYING THE ARTICLE 5 IAC EXCEPTION FROM *HASSAN* TO NIACS IN *MOHAMMED*

The ECtHR in *Hassan* stated that a formal derogation is not necessary when interpreting Article 5 ECHR within the context of IHL to allow for detention. However, the Court expressly notes that Article 5 interpretation exception can only be used in cases of IACs "*where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law*".[146] The Court goes on to explain that detention in an IAC must be lawful and comply with the rules of IHL in order to not violate Article 5[147] and points to the procedural safeguards of Articles 43 and 78 of GV IV, particularly periodic reviews.[148] The Court seems keen to ensure that such periodic reviews are impartial and fair and provides further guidelines on the procedure in order that the detention is not deemed

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[141] Partly Dissenting Opinion of Judge Spano, Joined by Judges Nicalaou, Bianku and Kalaydjieva, ECtHR, (fn. 131), para 19.
[142] *Milanovic*, (fn. 126).
[143] Ibid.
[144] *Mačák*, IYHR, p1, 8.
[145] Ibid.
[146] ECtHR, (fn. 7), para. 104.
[147] ECtHR, (fn. 7), para. 105.
[148] ECtHR, (fn. 7), para. 106.

arbitrary.[149] This actually means that the ECtHR expects a higher standard of procedural safeguards than those laid down in Article 43 of GC IV.[150]

It is somewhat surprising to some that the Supreme Court in *Mohammed* found that the *Hassan* decision could be extended to NIACs. It seems pretty clear that the ECtHR did not mean for this Article 5 exception in *Hassan* to be used in NIAC conflicts[151] where, as detailed above, the applicable IHL is much less developed and has much less detail detention and is especially silent on specific procedural safeguards.

VIII. CONCLUSION ON FACTUAL AND LEGAL BACKGROUND

In this section, the background on NIACs and the main differences between the regulation of NIACs compared to IACs was laid out. These differences were important when we turned to considering the *Hassan* and *Mohammed* decisions and considered whether the reasoning of *Hassan* can be transposed to a NIAC situation like *Mohammed*.

I am not particularly convinced that this is what the ECtHR had in mind when deciding *Hassan*. This seems a bit of a stretch to me, we are already stretching Article 5 ECHR pretty far in accommodating IHL in the facts of an IAC. To do so in a NIAC, in my opinion, loses sight of the purpose of IHRL and particularly the ECHR. I cannot consider that the drafters of the ECHR meant for this exception to be carved out when prohibiting arbitrary detention under Article 5. It remains to be seen if this decision will hold up in the future and if any case with similar circumstances to *Mohammed* eventually ends up in the ECtHR, what the opinions on the Supreme Court's transposition to NIACs will be.

In looking at the decision of the Supreme Court in *Mohammed*, I am inclined to agree with the result that there was a legal basis for the power to detain in NIACs found in the UNSCRs. However, I think the path the Supreme Court took in getting there was complicated, cumbersome and probably not to be replicated or used as an example of good practice for British forces in future extraterritorial military operations.

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[149] Ibid.
[150] *Hill-Cawthorne*, (fn. 73).
[151] *English*, Law of armed conflict means that anti-setention provisions in ECR may be disapplied re Iraqi detainee, https://ukhumanrightsblog.com/2014/09/16/law-of-armed-conflict-means-that-anti-detention-provision-in-echr-may-be-disapplied-re-iraqi-detainee/ (last accessed on 12/03/2021).

The Supreme Court hesitated to confirm if the basis came from customary IHL and it seems like the Supreme Court recognised that the issue of detention in NIACs is an evolving area which could soon change.[152]

C. DOES IHL CONTAIN AN IMPLICIT LEGAL BASIS FOR DETENTION?

There has been much academic and judicial debate over if there is an implicit authority to detain in a NIAC, and, if so, where it can be found. The following sections outline some of the main arguments and analyses these arguments with the reasoning of the Courts in *Hassan* and *Mohammed*.

I. REGULATION DOES NOT EQUAL AUTHORISATION

The mere fact that there are rules covering an activity does not implicitly authorise that activity. This principle can be applied to detention - that states have IHL regulating detention does not mean that detention is implicitly authorised.[153]

This argument centres on the *Lotus*[154] principle, which holds that states can lay down rules and act however they wish without needing a legal basis to do so, so long as the acts and rules are not explicitly prohibited by international law.[155] If an activity is expressly prohibited, then this prohibition forms part of customary international law. As Murray argues, "*The Lotus principle cannot, therefore, apply to detention in non-international armed conflict, and states do not enjoy freedom of action in this regard. As all detention-related activity must be consistent with the prohibition of arbitrary detention, a legal basis is therefore required*."[156]

The UK Government followed a similar line of argument in the High Court case of Mohammed, where the Government argued that NIAC Treaty law, specifically CA3 and APII, contained an implicit authority to detain. The Government argued that express references to detention in these articles and the fact that there are any rules on detention in NIACs at all must mean that

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[152] Ní Aoláin, (fn. 140).
[153] See Jinks, Derek, 'International Human Rights Law in Time of Armed Conflict', in *Clapham, Gaeta,* (eds.), p. 666-9.
[154] *Handeyside*, The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?, Michigan Journal of International Law, 2007, Volume 29, Issue 1.
[155] *Murray*, (fn. 16), p. 442.
[156] Ibid.

these provisions also contain an inherent power to detain.[157] The High Court, however, followed the reasoning of the ICRC that "*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*."[158] The ICRC explains further that such "*additional authority*"[159] would need to be found in the form of an international agreement between, in this case, the Afghan state authorities and the multinational forces aiding them, in domestic Afghan law, or in the operating procedures of the multinational forces, e.g., the ISAF SOP 362.[160] Hence, since neither CA3 nor APII provided for grounds for detention, this had to come from these alternate legal sources.

Some have argued that if IHL does not contain an implied authority to detain, then all detention by non-state armed groups would be outside legal authority.[161] This flows from the fact that domestic laws do not give non-state armed groups the authorisation to detain in NIACs.[162] *Pejic* argues that it is illogical for us to expect that non-state armed groups should follow CA3 and APII, which contain references to how detainees should be treated if they do not even have the authority to detain.[163]

I am not particularly convinced of this argument and would be more inclined to follow the reasoning above that regulating an activity does not equal authorisation thereof. I also consider that IHL has at its heart a humanitarian purpose, as noted by the High Court in *Mohammed*.[164] Whether or not an individual is detained legally or not, they should still be treated humanely and have basic needs met. However, it is true that this does not work well for the realities of armed conflict, and it can be argued that detention for security purposes can actually be a humanitarian act, for example, in preventing a terrorist attack.[165] The latter argument, however, is stretching too far into Bush and Blair era policies for my liking.

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[157] UK Court of Appeal, (fn. 90), para. 200.
[158] *ICRC,* Internment in Armed Conflict: Basic Rules and Procedure, November 2014, p.8. https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges (last accessed on 12/03/2021).
[159] Ibid.
[160] Ibid.
[161] *Pejic*, (fn. 29), p. 289.
[162] Ibid.
[163] Ibid.
[164] UK High Court, (fn. 17), para. 244
[165] *Mačák*, (fn. 144), p 11.

II. INTERNATIONAL LAW MAY REGULATE ACTIVITIES WITHOUT PROVIDING ANY LEGAL AUTHORITY FOR THOSE ACTIVITIES

Another argument which is critical of an implied legal basis for NIAC detention is that international law regulates situations without having to provide authority for those situations. For example, IHL, *jus in bello*, applies to parties to a conflict whether or not the conflict itself is just or legal, *jus ad bellum*.[166] However, Murray argues that this argument does not hold water when it is transposed to the issue of detention[167] since there is a distinction between *jus ad bellum* and *jus in bello*, whereas all detention should be unarbitrary. *Murray* uses the example of torture – "*instances of torture cannot be regulated as torture is subject to an absolute prohibition*".[168] Following this, one could say that since all detention must not be arbitrary, there is no way to regulate arbitrary detention.[169]

III. THE LACK OF GROUNDS AND PROCEDURES FOR DETENTION MEANS THERE WAS NO INTENTION TO IMPLICITLY AUTHORISE DETENTION

Another argument is that in order for there to be an implicit legal basis to detain, there should also be grounds and procedures regulating the detention. This argument featured in the High Court finding that neither IHL nor customary international law authorised detention in NIACs in *Mohammed*:

"*I do not see how CA 3 or APII could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it was possible to identify the scope of the power. However, neither CA 3 nor APII specifies who may be detained, on what grounds, in accordance with what procedures, or for how long*."[170]

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[166] *International Committee of the Red Cross*, What are jus ad bellum and jus in bello?, https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 (last accessed on 15/03/2021).
[167] *Murray*, (fn.16), p. 443.
[168] Ibid.
[169] Ibid.
[170] UK High Court, (fn. 17), para. 246.

Critics of this argument note that international law is often inexhaustive and lacks precise details.[171] That a law is not detailed does not mean that it does not apply and provide authority to carry out an activity.[172]

International law is especially absent of details in many cases since it often grants general protections and rights. The details may be left to judicial interpretation and other sources of law, such as IHRL and soft law instruments, particularly in the case of international law which may leave the details for states or regional bodies.[173]

Further, states have been reluctant to codify NIAC rules so as to not provide non-state armed groups any legitimacy.[174] It is also noted that the *travaux préparatoires* of APII show that states recognised that detention is a part of NIACs.[175]

Therefore, there does lie the possibility that IHL may provide for an implied legal authority to detain without providing details on the grounds and procedures which should regulate the detention. It has been suggested that the criteria determining the grounds and procedures of IAC IHL could be transposed into NIAC situations.[176] This would mean using one of two legal bases for detention – "*where necessary for the security of the detaining power,*" as found in Article 42(1) of GC IV, or for "*imperative reasons of security,*" as found in Article 78(1) of GC IV, in occupied territory. Further consideration of this is given below.

IV. THE POWER TO DETAIN IS IMPLIED IN CUSTOMARY INTERNATIONAL LAW THROUGH STATE PRACTICE AND *OPINIO JURIS*

Customary international law requires both state practice and *opinio juris* in order to establish a legally binding custom. There is much state practice ton be found on detention during NIACs and it has been highlighted that detention is considered a crucial aspect of conflict.[177] It is also considered that *opinio juris* on NIAC detention exists, for example the United States considers detention to be authorised by IHL.[178]

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[171] *Murray*, (fn.16), p. 445.
[172] *Aughey, Sari*, (fn. 5), p. 95, 96.
[173] Ibid.
[174] *Mačák*, (fn. 144), p 3.
[175] *Mačák*, (fn. 144), p 14.
[176] *Mačák*, (fn. 144), p. 12.
[177] *Mačák*, (fn. 144), p.15.
[178] *Mačák*, (fn. 144), p.16.

In the High Court case of Mohammed, the UK Government put forward the argument that *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principle and Guidelines* (Copenhagen Principles), could amount to state practice. This argument centred on an excerpt of the preamble noting that the participating states "*recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations.*"[179] The High Court disagreed with the UK Government's line of reasoning since elsewhere in the Copenhagen Principles it was made clear that the Principles were not legally binding and did not establish a legal basis for detention.[180]

V. THE LAWS OF TREATY INTERPRETATION POINT TO AN IMPLICIT LEGAL BASIS FOR DETENTION IN CA3 AND APII

Treaties must be interpretated teleologically as detailed in the 1969 Vienna Convention on the Law of Treaties, which states that a "*treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".

As outlined above, the legal background for NIACs do not explicitly provide a legal basis for detention, nor do they exclude one. It seems safe to assume that states intended to regulate detention in NIAC, otherwise why would they mention it in CA3 and APII at all? We can probably also safely argue that the object and purpose of CA3 and APII is to regulate internment and detention by state and non-state armed groups. It's important to consider that IHL is also based on military necessity, which has been held to allow "*the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger*".[181]

Murray argues further that "*in order for detention to be lawful, it must conform to the prohibition of arbitrary detention: a legal basis for that detention must exist*."[182] This legal authority to detain must either come implicitly from IHL or it must be provided for elsewhere.[183] If there were no basis anywhere, in IHL or elsewhere, for detention in NIAC, then every detention would be illegal and violate the prohibition of arbitrary detention.[184] It seems senseless that states would put down in treaty law provisions regulating detentions in NIACs if in fact all

[179] UK Court of Appeal, (fn. 90), para. 224.
[180] UK Court of Appeal, (fn. 90), para. 226.
[181] US Military Tribunal, *L. Rpts. Trials of War Criminals* 34, 1253 (1949), 19 February 1948) in: *Mačák*, (fn. 144), p 11.
[182] *Murray*, (fn.16), p. 448.
[183] Ibid.
[184] Ibid.

detentions were illegal.[185] Further, this would undermine the effectiveness of IHL.[186] This would also be quite an impossible situation for the military and non-state armed groups to be in if every detention were considered illegal and arbitrary[187] and could have quite serious criminal consequences.[188]

Murray argues, therefore, that the laws of treaty interpretation require IHL to be interpretated as providing for a legal basis for detention in NIACs.[189] I am not particularly convinced by this argument, I think it still fails to consider that laws regulate activities without authorising them. I do agree that a source for the authority to detain should be found in order to uphold the effectiveness of IHL, however, I do not agree that this is the best way to achieve it.

VI. THE POWER TO DETAIN IS IMPLIED FROM THE POWER TO TARGET AND KILL

It has also been argued that inherent in the power to target individuals is an implied power to cause less harm by detaining individuals rather than killing them.[190] The premise of this argument is that if an individual surrenders themselves to armed forces during a military operation, then the armed forces must be able to choose to detain them rather than kill them.[191] The High Court in *Mohammed* found that this argument was weak since it failed to justify the UK's detention policy in Afghanistan. Once the imminent threat had passed, then the use of lethal force would no longer be justified and flowing from that neither would the detention.[192] The Court of Appeal in *Mohammed* considered this reasoning somewhat flawed since it is safe to assume that a detained person could become an imminent threat again on release.[193]

Aughey and Sari argue, however, that the use of force could be compliant with Article 2(2) ECHR where necessary and legitimate and that if the ECHR could allow for this, then NIAC IHL should also permit the use of force.[194] They argue that the principle of military necessity gives states the right to defend themselves.[195]

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[185] Ibid.
[186] *Mačák*, (fn. 144), p. 18.
[187] Ibid.
[188] *Mačák*, (fn. 144), p 10.
[189] *Murray*, (fn.16), p. 448.
[190] *Mačák*, (fn. 144), p. 15.
[191] UK High Court, (fn. 17), para. 252.
[192] UK High Court, (fn. 17), para. 253.
[193] UK Court of Appeal, (fn. 90), para. 212.
[194] *Aughey, Sari*, (fn. 5), p. 98, 99.
[195] Ibid.

One of the insufficiencies of this argument is that not everyone who could be detained would also be targeted since states may need to detain individuals who have not directly participated in the conflict, i.e., for interrogation and intelligence purposes.[196] Further, as *Mačák*, points out, there is no explicit legal basis for use of force or targeting within the NIAC treaties.[197]

VII. CONCLUSION ON IMPLIED AUTHORITY FROM IHL

Firstly, it must be noted that a thorough examination of the arguments surrounding the implied authority to detain could each be covered by their own research papers, such is the wealth of academic comment and disagreement on them. Therefore, this brief examination gives us more to ponder.

In my opinion, many of these arguments have some allure, however, it is particularly convincing to me that the drafters contemplated an implicit authority to detain. I do not suppose that we need an explicit basis as the High Court in *Mohammed* suggested.

Further, I would be inclined to agree with *Murray* that a legal basis to detain should be found in IHL in order that we do not fall into the conundrum of all detention being illegal and arbitrary in NIACs. I would also agree that we should find a power in IHL in order to uphold the effectiveness of IHL, however, I cannot overstate the importance of ensuring some further procedural safeguards for detainees in NIAC.

D. THE WAY FORWARD

It is fair to say that the Supreme Court's decision in *Mohammed* has not unequivocally settled this issue. The ad hoc solution by way of reliance on UNSCRs is not desirable long-term. Critics of this decision will be relieved to know that the issue of detention in NIACs is likely to continue to be discussed for some time. I think many would consider that a better, more durable solution could have been made by the Supreme Court, therefore in the following sections, this paper will consider the various developments in this area. Firstly, it will consider proposals for legislation at the UN and domestic level, as well as policies on derogation. Thereafter, it will consider the transplant of IAC rules to NIAC detention. Finally, it will look at the processes aiming to strengthen and develop IHL in the area of NIACs.

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[196] *Mačák*, (fn. 144), p. 6.
[197] Ibid.

I. WAYS OUT OF THE NIAC DETENTION QUANDARY

Throughout the judicial and academic discussion, various proposals to make sure that a legal basis to detain is made clearer in NIACs from legislative developments at the domestic and international level to derogating from the ECHR during military operations. The next section will look at some of these proposals and critically analyse how likely it is that they would come to fruition and whether they would be an effective way to close the gap in NIAC IHL.

1. INTRODUCTION OF LEGISLATION

a) UNSCRS

There have been suggestions put forward that a legal base could be drafted into UNSCRs in future NIACs. Firstly, as *Rooney* notes, inserting an authority to detain into UNSCRs would be a possibility, however, it would likely not happen because of how politically demanding it would be in the drafting process for states to agree on the grounds and conditions of detainment.[198] This could potentially be extra difficult in NIACs with multinational forces involved where there may be some parties bound to ECHR obligations and others without such obligations.

b) DOMESTIC LAW

The High Court and Court of Appeal in Serdar Mohammed also suggested that the UK government should introduce legislation in order to avoid such cases in the future. Proposals have included providing authority to detain for over 96 hours in order to avoid Article 5 ECHR violations in the future.[199] However, ensuring a detention policy which is non-arbitrary is easier said than done. The form of the act is also questioned – should legislation be introduced, or an executive order made?[200] It was also put forward that there could be legislation giving the legal authority to detain specifically for military operations abroad.[201] Other suggestions were legislation preventing foreign nationals making claims, however, this would be discriminatory under human rights laws.[202] Quite apart from that, legislating detentions in domestic law is

[198] *Rooney*, (fn. 4), p. 569.
[199] *Rooney*, (fn. 4), p. 565.
[200] *Heffes*, JCSL, p. 229, 238.
[201] UK Court of Appeal, (fn. 90), at para. 10, 363.
[202] Ibid.

arguably insufficient for extraterritorial military operations.[203] In addition, the standards for detention would need to be Article 5 ECHR compliant and also compliant with IHL.[204]

One must also consider one of the essential components of NIACs – non-state actors. If a state were to consider legislation authorising detention in domestic law, surely only authorised governmental authorities such as the military or the police could use that power to detain. This would fail to take account of non-state armed groups who detain and would make any detention they carry out illegal.[205]

2. DEROGATING FROM THE ECHR IN FUTURE MILITARY OPERATIONS

In October 2016, the then UK Secretary of State declared that the government intends to derogate from the ECHR before entering into any significant military operations in the future if this is deemed appropriate for the particular operation.[206] One of the reasons given for this include the difficulties reconciling IHL with IHRL, in particular with the ECHR, and that doing so is causing the UK Armed Forces risk while carrying out military operations.[207] Now, a few years later, the Overseas Operations Bill giving the UK Secretary of State an obligation to consider derogating from the ECHR before entering into overseas military operations is currently making its way through the House of Lords at the time of writing[208].

Critics of the bill range from former military leaders to UN humans rights experts, with many viewing it as a violation of the UK's IHL, IHRL and international criminal law obligations.[209] The Ministry of Defence has confirmed that the government intends to use the derogation power for detention purposes in overseas military operations.[210] Sari argues that if the UK starts derogating from its Article 5 obligations as a matter of policy, this would undermine the ECtHR's decision in *Hassan* to add an exception to Article 5 allowing detention in IACs.[211] Additionally,

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[203] *Heffes*, (fn. 200), p. 238.
[204] Ibid.
[205] *Heffes*, (fn. 200), p. 234.
[206] *Fallon*, Military Operations – European Convention on Human Rights Derogation, https://questions-statements.parliament.uk/written-statements/detail/2016-10-10/HCWS168 (last accessed on 11/03/2021).
[207] Ibid.
[208] *UK Parliament*, Parliamentary Bills, https://bills.parliament.uk/bills/2727 (last accessed on 11/03/2021).
[209] *Sari*, The U.K. Overseas Operations Bill: An Own Goal in the Making?, https://www.justsecurity.org/73009/the-overseas-operations-bill-an-own-goal-in-the-making/ (last accessed on 11/03/2021).
[210] Ibid.
[211] Ibid.

ironically, the bill fails to achieve its objective of safeguarding and ensuring the primacy of IHL since the provisions therein could be accused of covering up war crimes.[212]

3. EXTENDING IAC RULES ON DETENTION TO NIAC

Goodman argues that it is possible to extend IAC detention rules to NIACs. It is his contention that IHL allows States to *a fortiori* carry out the same activities that are allowed under IAC IHL in a NIAC.[213]

However, one of the reasons that IAC principles and laws have not been extended to NIACs is that NIACs are a different type of conflict which include non-state armed groups and most states agree that the rules in NIACs need to be more restrictive so as to not give these non-state armed groups too many privileges.[214]

The ICRC agrees with using the standard of "*imperative reasons of security*" for detention in NIAC.[215] They also concluded further procedural safeguards such as promptly informing a detainee of the reasons for their detention in a language they understand, registering their detention and ensuring that detention take place in an officially recognised place of detention. Further, they recommend that the national authorities of the detainee should be informed unless the detainee says otherwise, and that the detainee should have the right to challenge the lawfulness their detention without delay.[216] In addition, the ICRC notes that the review of the legality of the detention should be carried out periodically by an independent and impartial body.[217] Finally, it must be ensured that the detainee has legal assistance and either the detainee has *habeas corpus* or their legal representative attends in their stead.[218]

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[212] Ibid.
[213] *Goodman*, The Detention of Civilians in Armed Conflict, AJIL, 2009, p. 48-74 in *Viswanath*, To Detain or Not To Detain? Deciphering Detention in Non-International Armed Conflicts, https://ilg2.org/2020/10/21/to-detain-or-not-to-detain-deciphering-detention-in-non-international-armed-conflicts/ (last accessed on 10/03/2021).
[214] *Viswanath*, To Detain or Not To Detain? Deciphering Detention in Non-International Armed Conflicts, https://ilg2.org/2020/10/21/to-detain-or-not-to-detain-deciphering-detention-in-non-international-armed-conflicts/ (last accessed on 10/03/2021).
[215] *ICRC*, Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict, Regional Consultations 2012-13, Background Paper, https://www.icrc.org/en/doc/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf (last accessed on 14/03/2021).
[216] Ibid.
[217] Ibid.
[218] Ibid.

It has also been suggested that not only the procedural IAC rules, but also the material rules on the conditions of detention could be extended to NIAC situations, but this is outwith the scope of this paper.[219]

II. STRENGTHENING IHL: DEVELOPMENTS AT THE INTERNATIONAL LEVEL

1. THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS AND THE COPENHAGEN PROCESS PRINCIPLES AND GUIDELINES

The Copenhagen Process on the Handling of Detainees in International Military Operations (Copenhagen Process) took place from 2007 to 2012 and focused on the standards for detention, including the relationship between IHL and IHRL and the need for common rules, guidance and standards for detention by multinational military forces.[220] The Copenhagen Process consisted of conferences, workshops and discussions with states and international organisations.[221] The Process aimed to find agreement on which international regimes apply during detention in military operations and lay down principles on detention, including procedural safeguards and humane treatment.[222]

The Copenhagen Principles were issued at the end of the Process in 2012. The Principles set out common guidelines on implementing already existing rules on detention rather than creating new legal rules or obligations.[223] The Principles to apply to NIACs and peace operations, not to IACs.[224] As noted in the case of Mohammed, the principles note from the outset that "*participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations*."[225] However, as explained above, this declaration is limited elsewhere in the Principles since the Commentary states that the Principles "*is not a text of a legally binding nature and thus, does not create new obligations*

[219] See for instance, *Mahnad*, (fn. 31), p. 47, 48, 49.
[220] *Oswald*, JIP 17/2013, p. 116, 118.
[221] Ibid.
[222] *Oswald*, (fn. 213), p. 119.
[223] *Oswald*, (fn. 213), p. 120.
[224] Ibid.
[225] Ibid.

or commitments… the Principles and Guidelines cannot constitute a legal basis for detention."[226]

The Principles are somewhat useful in developing some parts of IHL, such as clause 7 noting that detainees "*should promptly be informed of the reasons for their detention*"[227] but are criticised by some for not being detailed enough.[228]

Within the Principles, there is a distinction between types of detainees – those detained for security reasons and those suspected of a crime. Depending on the category, the detainee will either have their detention reviewed periodically in the former case, or in the case of the latter transferred or have criminal proceedings brought against them.[229] Again, these provisions are not detailed enough and could lead to differing results depending on how one interprets notions such as security reasons and how often a periodic review should be.[230]

Further, it seems that the relationship between IHL and IHRL was an obstacle for some states, particularly due to the different approaches to the extraterritorial application of human rights. [231]

Overall, although the Principles lay out guidance on detention in one place, which is certainly valuable, I would be inclined to agree with criticism that they were not ambitious enough since the uncertainty of NIAC IHL continues despite the Copenhagen Process and Principles.

2. THE ICRC PROCESS OF STRENGTHENING IHL PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

The ICRC Process of Strengthening IHL Protecting Persons Deprived of Their Liberty (ICRC Process) was a 4-year consultation process focusing on detention in NIACs. The ICRC carried out research and consulted with states and other relevant actors, on how to tackle fixing and closing the gaps of IHL when it comes to detention, including the grounds and procedures for

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[226] The Copenhagen Process on the Handling of Detainees in International Military Operations, Commentary, 16.2 in: *Oswald*, JIP 17/2013, p. 116, 124.
[227] Ibid.
[228] *Hartmann*, The Copenhagen Process: Principles and Guidelines, https://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/ (last accessed on 14/03/2021).
[229] Ibid.
[230] Ibid
[231] *Oswald, Winkler*, Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations, https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees (last accessed on 14/03/2021).

detention.[232] The ICRC Process included both regional and thematic consultations with government experts.[233] The end result was Resolution 1[234] adopted by Conference members of the 32nd International Conference and a concluding report.[235]

Resolution 1 recommended that more work was done by both states and the ICRC to create some more substantial soft law solutions to strengthen IHL in the area of NIAC detention.[236] The objectives laid down by Resolution 1 were not to draft another treaty, but rather to develop guidelines on NIAC detention which would take into consideration the realities of military operations for both parties to the conflict.[237] It's important to also note that Resolution 1 "*does not give rise to new legal obligations under international law*".[238] As a result of Resolution 1, the ICRC organised a formal meeting of states in 2017. However, the meeting proved to be unsuccessful as states could not agree on the procedure for further discussions.[239] At the 33rd International Conference of the Red Cross in 2019, a progress report was given, which noted that due to a lack of consensus among states, no further formal meetings would be organised to follow the implementation of Resolution 1.[240] Therefore, the end result of the ICRC Process was unsatisfactory and did not lead to any significant guidance or dialogue between states. This seems like a missed opportunity and *Pejic* notes that we may have to wait for a change in the political climate before any further dialogue on strengthening IHL.[241]

III. CONCLUSION ON THE WAY FORWARD

In this section we looked at various proposals and suggestions for improving on the issue of detention in IHL. Personally, I am not convinced by the legislative proposals. They seem

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[232] *ICRC*, Strengthening IHL protecting persons deprived of their liberty in relation to armed conflict https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0 (last accessed on 14/03/2021).
[233] Ibid.
[234] *ICRC,* 32nd International Conference of the Red Cross and Red Crescent, Strengthening international humanitarian law protecting persons deprived of their liberty, Resolution, http://rcrcconference.org/app//uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf (last accessed on 14/03/2021).
[235] *ICRC*, 32nd International Conference of the Red Cross and Red Crescent, Strengthening international humanitarian law protecting persons deprived of their liberty, Concluding Report, https://rcrcconference.org/app//uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf (last accessed on 14/03/2021).
[236] *ICRC*, (fn. 234).
[237] *ICRC*, (fn. 234).
[238] *ICRC*, (fn. 234).
[239] *Pejic*, (fn. 29), p. 297.
[240] *ICRC*, 33rd International Conference of the Red Cross and Red Crescent Strengthening international humanitarian law protecting persons deprived of their liberty, Progress Report, https://rcrcconference.org/app/uploads/2019/10/33IC-Deprived-of-liberty_EN.pdf (last accessed on 14/03/2021).
[241] *Pejic*, (fn. 29), p. 297.

unwieldy and any domestic level legislation does not account enough for the specificity of NIACs, particularly the fact that non-state actors are always a part of NIAC hostilities. I am also wary of the extension of such powers to the military, which brings us to the UK's derogation policy and the Overseas Operations Bill.

Personally, I cannot support such a bill and I think it is noteworthy that some of its most ardent critics are former military leaders.[242] The UK's obsession with pretending that Strasbourg (and previously, Brussels in the case of the EU) forces human rights onto members of the British armed forces has gotten completely out of hand. To my view, it is completely pandering to a certain demographic of voter who reads the Daily Mail or The Telegraph. Although it is perhaps not likely that the UK will get involved in another extraterritorial conflict of a NIAC nature in the near future, it is something that could be passed through now and forgotten about until the next conflict. I am wary of supporting a policy which erases human rights protections to such an extent.

Regarding the argument on extending the rules on detention in IAC treaties to NIACs, I think this could have some merit and I am inclined to agree with the ICRC on this point. It would be best for everyone if detainees had more information on their rights.

Overall, the Copenhagen Process and the ICRC Process brought some welcome guidance and dialogue on the issue of strengthening IHL for detention. However, I am disappointed that they resulted in being mostly without any real teeth. The UN, ICRC, and states should keep trying rather than leaving the progress made on the back burner. I hope that we can see some further developments on this soon.

E. CONCLUSION

At the outset, this paper aimed to consider two main issues in the context of the *Hassan* and *Mohammed* cases:

- The role of the ECHR during armed conflict;
- Is there a right to detain in NIACs, and, if so, where that right comes from; and

Taking the first issue, this paper considered the accommodation made by the ECtHR in *Hassan* that Article 5 should be interpreted in a manner which is consistent with IHL so that it does not prohibit lawful detention during armed conflict and therefore the UK did not need to make an Article 15 derogation. This 'reading in' of IHL into Article 5 seems a little too judicially creative

[242] *Sari*, (fn. 209).

for my liking. I am inclined to agree with some of the points made in the dissenting opinion that this amounts to judicial treaty amendments. Further, I think it could complicate the relationship between IHL and IHRL even further.

In considering the way forward for the ECHR in foreign military operations, this paper looked at some of the strategies that the UK is considering to get around having to derogate from the ECHR. This is a troubling strategy and should be watched closely by lawyers and human rights organisations.

The issue of transposing the *Hassan* decision onto the NIAC circumstances of *Mohammed* was also considered and found to be dubious. I cannot imagine that the ECtHR had this in mind when deciding *Hassan*. The circumstances of NIACs are too different to those of IACs to allow for a straight transfer of the *Hassan* reasoning. The judicial creativity of the UK Supreme Court was considered and found to be stretching the ECHR to its limits.

Coming to the second issue, of whether there is a right to detain in NIAC and where that authority could come from, this paper demonstrated that the Supreme Court in *Mohammed* found an unlikely route to finding a legal basis to detain. It is noted that this route is not recommended to be followed in the future and so an alternative basis should be found.

Section C considered some of these alternative bases, particularly the arguments surrounding whether there is an implied legal basis for detention to be found in IHL. This covered finding a basis from customary IHL or from the power to kill and whether regulating detention could imply an authority to detain. It was concluded that many of these arguments hold water, particularly looking at the intentions of the drafters through treaty interpretation rules. Despite some deficiencies regarding procedural rights, it is believed that there could be a power to detain in NIAC IHL.

However, it is worth noting that if there is a power to detain in NIACs from IHL, there is more work to be done at the international level to ensure that states follow a best practice when conducting foreign military operations. As noted in Section D, legislation at the domestic level is not a recommended way forward. The ICRC Process and Copenhagen Process and Principles should be the basis for further dialogue and work.

Overall, it has been an interesting, winding journey to get here. The ECtHR and Supreme Court decisions were creative, and it remains to be seen how these decisions will be responded to in future cases. It seems that states have been their own worst enemies in some way, since the ICRC Process and Copenhagen Process and Principles failed to make headway due to states being unable to reach consensus. Hopefully more work will be done on this in the future and a more explicit power to detain could be found which is mindful not only of the legal complications, but also of the realities of military operations, the involvement of non-state

armed groups, human rights protections, and the safety of detainees. Then again, maybe that is asking for too much!

F. BIBLIOGRAPHY

- Amstel, Nelleke van, In Search of Legal Grounds to Detain for Armed Groups, in: Journal of International Humanitarian Legal Studies, January 2012, Volume 3, p. 160-191.
- Aughey, Sean and Sari, Aurel Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, in: International Law Studies, 91/2015, p.60 – 118.
- Aughey, Sean and Sari, Aurel The Authority to Detain in NIACs Revisited: Serdar Mohammed in the Court of Appeal, EJIL:Talk!, 5 August 2015, https://www.ejiltalk.org/the-authority-to-detain-in-niacs-revisited-serdar-mohammed-in-the-court-of-appeal/ (last accessed on 13/03/2021).
- Clapham, Andrew and Gaeta, Paola, The Oxford Handbook of International Law in Armed Conflict, 1st ed., Oxford, 2014.
- De Koker, Cedric, Hassan v United Kingdom: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts, in: Utrecht Journal of International and European Law, 2015, 31(81), p. 90 – 96.
- European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf
- Ekins, Richard and Verdirame, Guglielmo, 'Judicial power and military action' in: Law Quarterly Review 132/2016, p. 206-212.
- English, Rosalind, Law of armed conflict means that anti-detention provision in ECHr may be disapplied re Iraqi detainee, UK Human Rights Blog, 16 September 2014, https://ukhumanrightsblog.com/2014/09/16/law-of-armed-conflict-means-that-anti-detention-provision-in-echr-may-be-disapplied-re-iraqi-detainee/ (last accessed on 12/03/2021).
- Fallon, Michael, Military Operations – European Convention on Human Rights Derogation, UK Parliament Written questions, answers and statements, 10 October 2016, https://questions-statements.parliament.uk/written-statements/detail/2016-10-10/HCWS168 (last accessed on 11/03/2021).
- Goodman, Ryan, 'The Detention of Civilians in Armed Conflict' in: American Journal of International Law, Volume 103, 01/2009, p. 48-74.
- Handeyside, Hugh,'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' in: Michigan Journal of International Law, University of Michigan, 2007, Volume 29, Issue 1, p. 71-94.

- Hartmann, Jacques, The Copenhagen Process: Principles and Guidelines, EJIL:Talk!, 3 November 2012, https://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/ (last accessed on 14/03/2021).
- Heffes, Ezequiel, Detentions by Armed Opposition Groups in Non-International Armed Conflicts: Towards a New Characterisation of International Humanitarian Law in: Journal of Conflict & Security Law, Volume 20, 2015, p. 229 – 250.
- Hill-Cawthorne, Lawrence, The Grand Chamber Judgment in Hassan v UK, 16 September 2014, https://www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk/ (last accessed on 12/03/2021).
- Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3d%3d (last accessed 13/06/2021).
- International Committee of the Red Cross, How is the Term “Armed Conflict” Defined in International Humanitarian Law?, ICRC Opinion Paper, March 2008, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf (last accessed 11/03/2021).
- International Committee of the Red Cross, Internment in Armed Conflict: Basic Rules and Challenges, International Committee of the Red Cross, November 2014. https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges (last accessed 12/03/2021).
- International Committee of the Red Cross, Strengthening IHL protecting persons deprived of their liberty in relation to armed conflict, International Committee of the Red Cross, International Committee of the Red Cross, 01 April 2017, https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0 (last accessed on 14/03/2021).
- International Committee of the Red Cross, Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict, Regional Consultations 2012-13, Background Paper, International Committee of the Red Cross, 2012-2013, https://www.icrc.org/en/doc/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf (last accessed on 14/03/2021).
- International Committee of the Red Cross, What are jus ad bellum and jus in bello?, International Committee of the Red Cross, 22 January 2015, https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 (last accessed on 15/03/2021).

- International Committee of the Red Cross, 32nd International Conference of the Red Cross and Red Crescent, Strengthening international humanitarian law protecting persons deprived of their liberty, Concluding Report, International Committee of the Red Cross, 8-10 December 2015, (Document prepared October 2015), https://rcrcconference.org/app//uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf (last accessed on 14/03/2021).
- International Committee of the Red Cross, 32nd International Conference of the Red Cross and Red Crescent, Strengthening international humanitarian law protecting persons deprived of their liberty, Resolution, International Committee of the Red Cross, International Committee of the Red Cross, 8-10 December 2015, http://rcrcconference.org/app//uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf (last accessed on 14/03/2021).
- International Committee of the Red Cross, 33rd International Conference of the Red Cross and Red Crescent Strengthening international humanitarian law protecting persons deprived of their liberty, Progress Report, International Committee of the Red Cross, https://rcrcconference.org/app/uploads/2019/10/33IC-Deprived-of-liberty_EN.pdf (last accessed on 14/03/2021).
- Johnson, James Turner, A Dialogue: Ethics, Law, and the Question of Detention in Non-International Armed Conflicts, in: Gill, Terry et al. (eds.), Yearbook of International Humanitarian Law 2013, The Hague, 2014, p. 53 – 68.
- Mačák, Kubo, A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict, in: Israel Yearbook on Human Rights, Volume 45, 2015.
- Mahnad, Ramin, Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict, in: Gill, Terry et al. (eds.), Yearbook of International Humanitarian Law 2013, The Hague, 2014, p. 33 – 51.
- Melzer, Nils, International Humanitarian Law, A Comprehensive Introduction, International Committee of the Red Cross, 2019. https://www.icrc.org/en/publication/4231-international-humanitarian-law-comprehensive-introduction (last accessed 15/03/2021).
- Milanovic, Marko, A Trio of Blockbuster Judgments from the UK Supreme Court, EJIL:Talk!, January 17 2017, https://www.ejiltalk.org/a-trio-of-blockbuster-judgments-from-the-uk-supreme-court/ last accessed on 11/03/2021).
-
- Murray, Daragh, International Law and Practice, Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward in: Leiden Journal of International Law, 2017, p. 435-456.

- Ní Aoláin, Fionnuala, To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed, Just Security, 2 February 2017,
- https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/#:~:text=Al%2DWaheed%20and%20Serdar%20Mohammed,for%20imperative%20reasons%20of%20security (last accessed 13/03/2021).
- Oswald, Bruce, The Copenhagen Principles, International Military Operations and Detentions in: Journal of International Peacekeeping, 2017, Volume 17, p.116 -
- Oswald, Bruce and Winkler, Thomas, Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations, American Society of International Law, 26 December 2012, https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees (last accessed on 14/03/2021).
- Pejic, Jelena, Procedural principles and safeguards for internment/ administrative detention in armed conflict and other situations of violence, in: International Review of the Red Cross, 2005, Volume 87, Number 858, p. 375 – 391.
- Press Unit, European Court of Human Rights, Extra-territorial jurisdiction of State Parties to the European Convention on Human Rights, July 2018, https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf (last accessed on 09/03/2021).
- Reed, John, ECHR: UK Did Not Violate Hassan's Human Rights, Just Security, 16 September 2014, https://www.justsecurity.org/15074/echr-uk-violate-hassans-human-rights/#more-15074 (last accessed on 09/03/2021).
- Rooney, Jane, A legal basis for non-arbitrary detention: Mohammed v Secretary of State for Defence, in: Public Law, 2016, p. 563-572.
- Ryngaert, Cedric, Clarifying the Extraterritorial Application of the European Convention on Human Rights, in: Utrecht Journal of International and European Law, 2012, Volume 28, Issue 74, p. 57-60.
- Sari, Aurel, The U.K. Overseas Operations Bill: An Own Goal in the Making?, Just Security, 27 October 2020, https://www.justsecurity.org/73009/the-overseas-operations-bill-an-own-goal-in-the-making/ (last accessed on 11/03/2021).
- Saul, Ben and Akande, Dapo (eds.), The Oxford Guide to International Humanitarian Law, 1st ed., Oxford, 2020.
- Spieker, Luke Dimitrios, Does Article 15 ECHR Still Matter in Military Operations Abroad? The UK government's 'presumption to derogate', MPIL Research Paper Series, Max Planck Institute for Comparative Public Law and International Law, 2019/02.

- UK Parliament, Overseas Operations (Service Personnel and Veterans) Bill, UK Parliament Parliamentary Bills, 11 March 2021, https://bills.parliament.uk/bills/2727 (last accessed on 11/03/2021).
- Viswanath, Raghavi, To Detain or Not to Detain? Deciphering Detention in Non-International Armed Conflicts, IntLawGrrls, 21 October 2020, https://ilg2.org/2020/10/21/to-detain-or-not-to-detain-deciphering-detention-in-non-international-armed-conflicts/ (last accessed on 10/03/2021)