

## United Kingdom, The Case of Serdar Mohammed (High Court Judgment)

*More recent judgments were issued on this case by the Court of Appeal and the Supreme Court, see United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments).*

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### High Court of Justice Queen's Bench Division, Serdar Mohammed v. Ministry of Defence

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[**Source:** Neutral Citation Number: [2014] EWHC 1369 (QB), Case No: HQ12X03367, In the High Court of Justice Queen's Bench Division, Royal Courts of Justice Strand, London, WC2A 2LL, date 02/05/2014, before: Mr Justice Leggatt, between: Serdar Mohammed and Ministry of Defence, and between (1) Mohammed Qasim (2) Mohammed Nazim (3) Abdullah and Secretary of State for Defence, available at: <http://www.judiciary.gov.uk/judgments/serdar-mohammed-v-ministry-of-defence-and-others/> Footnotes omitted] [...] **Introduction and Summary** 1. The important question raised by this case is whether the UK government has any right in law to imprison people in Afghanistan; and, if so, what is the scope of that right. The claimant, Serdar Mohammed ("SM"), was captured by UK armed forces during a military operation in northern Helmand in Afghanistan on 7 April 2010. He was imprisoned on British military bases in Afghanistan until 25 July 2010, when he was transferred into the custody of the Afghan authorities. SM claims that his detention by UK armed forces was unlawful (a) under the Human Rights Act 1998 and (b) under the law of Afghanistan. [...] 3. UK armed forces have since 2001 been participating in the International Security Assistance Force ("ISAF"), a multinational force present in Afghanistan with the consent of the Afghan

government under a mandate from the United Nations Security Council. Resolutions of the Security Council have: (1) recognised Afghan sovereignty and independence and that the responsibility for providing security and law and order throughout the country resides with the government of Afghanistan; (2) given ISAF a mandate to assist the Afghan government to improve the security situation; and (3) authorised the UN member states participating in ISAF to “take all necessary measures to fulfil its mandate”. 4. ISAF standard operating procedures permit its forces to detain people for a maximum of 96 hours after which time an individual must either be released or handed into the custody of the Afghan authorities. UK armed forces adhered to this policy until November 2009, when the UK government adopted its own national policy under which UK Ministers could authorise detention beyond 96 hours for the purpose of interrogating a detainee who could provide significant new intelligence. This UK national policy was not shared by the other UN member states participating in ISAF nor agreed with the Afghan government. 5. SM was captured by UK armed forces in April 2010 as part of a planned ISAF mission. He was suspected of being a Taliban commander and his continued detention after 96 hours for the purposes of interrogation was authorised by UK Ministers. He was interrogated over a further 25 days. At the end of this period the Afghan authorities said that they wished to accept SM into their custody but did not have the capacity to do so due to prison overcrowding. SM was kept in detention on British military bases for this ‘logistical’ reason for a further 81 days before he was transferred to the Afghan authorities. During the 110 days in total for which SM was detained by UK armed forces he was given no opportunity to make any representations or to have the lawfulness of his detention decided by a judge. [...] **I. THE CLAIM AND THE ISSUES** [...] 9. According to the amended particulars of SM’s claim: i) In the early morning of 7 April 2010 he was irrigating his family’s fields near his home in northern Helmand when British soldiers arrived by helicopter and arrested him. [...] iii) He was held in detention by UK armed forces for around 110 days at their detention facilities at Camp Bastion and Kandahar Airfield, without charge or trial. [...] iv) On 25 July 2010 SM was transferred to the Afghan authorities [...]. He was sentenced to 16 years’ imprisonment, later reduced to 10 years’ imprisonment on an appeal. [...] 10. In its amended defence the MOD gives a very different account of SM’s capture and detention. In particular, the MOD alleges that: i) SM was detained at around 03.20 am (Afghan time) on 7 April 2010 as part of a planned ISAF operation involving UK armed forces. The operation targeted a senior Taliban commander and the vehicle in which he was believed to be travelling. When the operation was launched, approximately four people were seen leaving the vehicle and entering two compounds. [...] vii) On arrival at Camp Bastion, SM was informed, with the aid of an interpreter, that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission and would either be released or transferred to the Afghan authorities as soon as possible. viii) SM was held at Camp Bastion for approximately 7 days and was then taken to the UK detention facilities at Kandahar Airfield on 14 April; he was returned to Camp Bastion on or about 31 May 2010 and remained there until his transfer to an Afghan prison on 25 July 2010. [...] x) In response to questioning, SM said that he was a farmer. However, the MOD subsequently received information that he was a senior Taliban commander [...]. xi) While in UK custody, SM’s detention was reviewed every 72 hours by the Detention Review Committee in Camp Bastion. The first such review took place on 8 April 2010 and the last on 4 May 2010. However, he did not have access to a lawyer or receive family visits. xii) Ministers approved SM’s short term detention in UK custody on the grounds that it appeared likely that questioning him would provide significant new intelligence vital for force protection purposes [...]. **II. INVOLVEMENT IN AFGHANISTAN** 20. UK armed forces are engaged, as part of the International Security Assistance Force (“ISAF”), in a non-international armed conflict between the government of Afghanistan and various insurgent forces. [...] **The establishment of ISAF** 21. UK military involvement in Afghanistan began in October 2001 when UK armed forces joined Coalition forces, led by the

United States, in Operation Enduring Freedom. [...] 22. In the latter part of 2001 the UN held talks on Afghanistan in which all the main Afghan political factions apart from the Taliban took part. These talks resulted in an “Agreement on Provisional Arrangements in Afghanistan pending the Re establishment of Permanent Government Institutions” dated 5 December 2001 (known as the “Bonn Agreement”). The Bonn Agreement provided for the establishment of an Interim Administration in Afghanistan on 22 December 2001. [...] 24. In a resolution adopted on 6 December 2001 (UNSCR 1383), the UN Security Council endorsed the Bonn Agreement [...]. 25. In a letter dated 19 December 2001 to the President of the Security Council, the Acting Minister for Foreign Affairs of the Interim Administration of Afghanistan informed the Security Council that, “taking into account all relevant considerations, an international security force could be deployed under Chapters VI or VII of the [UN] Charter.” 26. On 20 December 2001 the UN Security Council adopted Resolution 1386, which established ISAF. Acting under Chapter VII of the UN Charter, the Security Council:

- i) Authorised “the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment”; [...]
- iii) Authorised “the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate”. [...]

28. A Military Technical Agreement (“MTA”) dated 14 January 2002 was concluded between ISAF and the Interim Administration of Afghanistan to define their respective obligations and responsibilities. Article I(2) of the MTA stated that the Interim Administration “understands and agrees the Mission of the ISAF is to assist it in the maintenance of security” in the geographical area of responsibility covered by the MTA. [...] **UN extensions of ISAF’s mandate** 30. The authorisation of ISAF was subsequently extended by the UN Security Council both in time and in geographical scope. [...] Since then, there have been annual extensions of the authorisation of ISAF on materially identical terms for periods of 12 months at a time. At the time of SM’s detention in 2010, the applicable resolution was UNSCR 1890 (2009). [...] **III. DETENTION POLICY IN AFGHANISTAN** [...] **ISAF’s policy** 35. The policy and procedures governing detention operations by ISAF are set out in ISAF Standard Operating Procedures for detention (SOP 362). Relevant provisions of SOP 362 are as follows: “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. 8. Authority for Continued Detention. [...] 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. ...” 36. A footnote to paragraph 5 states that: “It is accepted that detention will take place under National guidelines. However, the standards outlined within this SOP are to be considered the minimum necessary to meet international norms and are to be applied.” I interpret this to mean that (amongst other things) detention for

more than 96 hours other than in the circumstances outlined in paragraph 8 was not considered to meet international norms. 37. Annex C to ISAF SOP 362 deals with detention procedure. Paragraph 6 of Annex C states that, on arrival at an ISAF holding facility, the detained person will be informed, in a manner they understand, of his/her rights under international law and of their right to file a grievance with the detention authority in order to bring attention to any matters concerning the reasons for detention, length of detention, conditions of detention or treatment during detention. Paragraph 7 states that a detained person “must be permitted access to legal counsel or representative, subject to operational security concerns”. Paragraph 17 deals with review procedure as follows: “The obligation upon the Detention Authority to review the conditions of detention is continuous. Once the circumstances supporting any of the justifying grounds outlined within the Authority to Detain are no longer present, then ISAF must release that individual. The fact that a person may have information of intelligence value is not by itself a basis for ISAF detention.” **UK detention policy** [...] 40. The basis for UK detention policy in Afghanistan was outlined in a MOD memorandum dated 1 March 2006, as follows: “5. To date our policy in Afghanistan has been to avoid detaining individuals wherever possible. [...] Although this policy has been tenable in Kabul and north Afghanistan the more challenging security environment in Helmand has required a review of the UK’s policy on detention. [...] 43. In April 2006, the UK concluded a Memorandum of Understanding (MOU) with the government of Afghanistan concerning the transfer by UK armed forces to Afghan authorities of persons detained in Afghanistan. “Detention” was defined in the MOU as “the right of UK forces operating under ISAF to arrest and detain persons where necessary for force protection, self-defence, and accomplishment of mission so far as is authorised by the relevant UNSCRs”. Para 3.1 of the MOU stated: “The UK AF [armed forces] will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK AF in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility.” The MOU made no provision for UK forces to keep hold of persons for the purpose of interrogation instead of transferring them at the earliest opportunity, but it provided for UK personnel to have “full access to question” any persons transferred to the Afghan authorities whilst such persons were in custody. [...] 46. A confidential MOD note describes how the UK came to apply what the note refers to as a “national policy caveat” to the ISAF 96 hour rule: [...] 47. [...] It said: “In the light of the evolving threat to our forces, we have continued to keep our approach to these [detention] operations under review. Under NATO guidelines individuals detained by ISAF are either transferred to the Afghan authorities within 96 hours for further action through the Afghan judicial process or released. And in the majority of cases, the UK armed forces will operate in this manner. However, in exceptional circumstances, detaining individuals beyond 96 hours can yield vital intelligence that would help protect our forces and the local population – potentially saving lives [...]. 48. NATO was informed of the Ministerial decision by a letter dated 5 November 2009 [...]. 50. Amendment 2 to SOI J3-9 [...] was issued on 12 April 2010. It was this version of SOI J3-9 which applied at the time of SM’s arrest and detention. Under the heading “Detention Principles”, this guidance stated: “6. **Detention Criteria.** UK forces are authorised to conduct stops, search, detention and questioning procedures in accordance with [UNSCRs] [United Nations Security Council Resolutions] for reasons of Force protection, Mission Accomplishment and Self-Defence. ISAF authorises detention for up to a maximum of 96 hours following the point of detention. ... 7. **Post-detention Requirements.** Within 96 hours detainees will in most cases be either handed over to the Afghan Authorities in accordance with [the MOU] or released. Detention and evidence-gathering processes must be managed as a capability to ensure that they support the collection of tactical intelligence and assist the Afghan criminal justice system in

achieving lawful convictions. ... Detainees should only ever be detained beyond 96 hours in exceptional circumstances as follows: a. On medical or logistic grounds, with HQ ISAF authorisation (and Ministerial authority where appropriate) [...]" Part 2 of this guidance included the following: "19. The Detention Authority must decide whether to release, transfer or further detain the detainee. This decision must be made within 48 hours of detention of the detainee. To authorise continued detention, the Detention Authority will need to be satisfied, on the balance of probabilities, that it is necessary for self-defence or that the detainee has done something that makes him a threat to Force Protection or Mission-Accomplishment. 22. NDS [the Afghan National Directorate of Security] are only allowed to hold a detainee for 72 hours without any evidence before they are forced to charge or release the detainee. ... 23. **Detention Timelines.** Detainees should not routinely be held to the limit of detention. Although the Detention Authority has up to 96 hours from the point of detention to hand over a Detainee to the Afghan Authorities, as soon as he is satisfied that all evidence has been collated and is available ... then the Detention Review should proceed.

[...] 31. **Ministerial Approval of Logistical Delays to Extension.** In cases where UK forces wish to hold a detainee for longer than 96 hours or for longer than the existing ministerially- approved timeline ... on the basis of logistic grounds as at para 23 above, further Ministerial approval is required. [...]" 51. In his witness statement dated 7 June 2013, Mr Devine explained that almost all individuals held by UK armed forces in Afghanistan beyond the initial 96 hour period fall into two categories: i) Those held beyond 96 hours for the purposes of intelligence exploitation; and ii) Those held pending their transfer to the Afghanistan authorities for investigation and potential prosecution. [...] 53. As a matter of policy, the UK does not permit the transfer of detainees to the Afghan authorities if, judged at the time of intended transfer, there are substantial grounds for believing that there is a real risk of torture or serious mistreatment following transfer. [...]

**IV. AFGHAN LAW** [...] **Conclusion on power of detention** 101. While I of course accept that 100% certainty, in so far as it is ever attainable, is not possible in the absence of an authoritative decision of the Afghan Supreme Court, the expert evidence led to the clear conclusion that the UK armed forces operating in Afghanistan have had no legal power of detention under Afghan law other than a power to arrest suspected criminals and deliver them to the Afghan authorities immediately, or at the latest within 72 hours. 102. [...] It seems reasonable to assume that, in deciding what constitutes immediate handover, an Afghan court would take account of the realities of the situation in which UK armed forces have been operating in southern Afghanistan and the logistics involved in getting someone captured on the battlefield to an Afghan detention facility (or, if they were not to be handed over to the Afghan authorities, to a place where they could be released safely). [...] I do not think it realistic to require this to be accomplished within less than three or four days. [...] 111. I conclude that under Afghan law SM's detention by UK armed forces from 10 April 2010 until 25 July 2010 was unlawful and that Afghan law gives him a right to be paid compensation for that unlawful detention. [...]

**V. THE ARTICLE 5 CLAIM** 113. [...] SM claims compensation under Article 5(5) of the [European] Convention [on Human Rights] [...]. **VI. TERRITORIAL SCOPE OF THE CONVENTION** [...] 121. The essentially territorial nature of jurisdiction under Article 1 has been confirmed by the European Court, most notably by its Grand Chamber in *Bankovic v Belgium* [2001] [...]. 122. [...] **The Al-Skeini case** 123. The decision in the *Bankovic* case was clearly intended to be authoritative and definitive on the scope of Article 1, and was treated as such by the English courts when questions of extraterritorial jurisdiction arose in *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153. [...] 136. A disappointing feature of the judgment of

the European Court in the Al-Skeini case is its lack of transparency in dealing with its previous decision in the Bankovic case. [...] 137. It is clear, however, that in the Al-Skeini case the European Court has indeed departed from its approach in the Bankovic case [...]. In particular: i) The Court has now endorsed a principle of jurisdiction based on the exercise of effective control by a state over an individual; ii) The Court has expressly resiled from the notion that Convention rights constitute a single, indivisible package and has said that they can be “divided and tailored”; iii) The Court held that jurisdiction under article 1 is not limited to the territory of states which are parties to the Convention; iv) In endorsing an approach which goes well beyond what the Court had found in the Bankovic case to be ordinary meaning and original intention of Article 1, the Court has effectively treated Article 1 as a “living instrument”; v) Although the Court continued to pay lip-serve to the notion that jurisdiction is “essentially territorial” and that extraterritorial jurisdiction is exceptional, it is difficult to see how this can remain so when jurisdiction arises wherever in the world a state exercises effective control over an individual. [...] **Jurisdiction in the present case** 141. The decision of the European Court in the Al-Skeini case leaves many unanswered questions which will no doubt have to be worked out in later cases. For example, it is unclear whether, once jurisdiction is understood to rest on the exercise of control over individuals, there is any stopping point short of what the European Court in the Bankovic case saw as the logical conclusion that jurisdiction under Article 1 exists whenever an act attributable to a contracting state has an adverse effect on anyone anywhere in the world; and if so, what that stopping point is. In the present case, however, such difficult questions do not arise because the facts fall squarely within one of the core examples of the control principle set out in the Al-Skeini case and not merely within its penumbra. 142. The present case involves detention on a British military base in Afghanistan. [...]. **Conclusion** [...] 148. Applying this test of physical control over the person, as I am bound to do, it is clear that SM was within the jurisdiction of the UK under Article 1 of the Convention from the time of his capture by UK armed forces until the time when he ceased to be in their custody upon his transfer into the custody of the Afghan authorities. [...] **Article 15** 153. I will, however, mention at this stage an aspect of the approach to extraterritorial jurisdiction articulated in the Al-Skeini case which seems to me to be of considerable importance. A consequence of the recognition of a principle of jurisdiction based on the exercise of physical control over individuals on foreign territory is that it hugely expands the potential application of the Convention in situations of armed conflict [...]. 155. Article 15 accordingly permits a state, within defined limits, to derogate from its obligations under the Convention “in time of war or other public emergency threatening the life of the nation.” This wording, however, (in particular the word “other”) tends to suggest that Article 15 was not intended to apply to a war overseas which does not threaten the life of the nation. [...] Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this. [...] **VI. RESPONSIBILITY FOR ACTS OF UK ARMED FORCES** 158. [...] The MOD has argued that the UK government is not legally responsible for the actions of its armed forces in capturing and detaining SM because they were operating as part of ISAF under a mandate from the United Nations Security Council and the legal responsibility for their actions lies solely with the UN. **The Behrami and Saramati cases** 159. The foundation for this argument is the decision of the Grand Chamber of the European Court in Behrami v France, Saramati v France, Germany and Norway (2007) 45 EHRR SE10, which related to events in Kosovo. [...] 161. [...] Mr Saramati was arrested on 13 July

2001 by UNMIK police officers by order of the Commander of KFOR (“COMKFOR”), who was a Norwegian officer at the time. His detention was subsequently continued pending and during a trial, which ended with his conviction for attempted murder on 23 January 2002. (The conviction was later quashed on appeal). During this period of detention a French General took over the position of COMKFOR. Mr Saramati complained that his detention was contrary to Article 5 of the Convention and that the states of Norway and France were responsible for it on the grounds that COMKFOR was first a Norwegian and then a French army officer.

162. The European Court rejected that contention, holding that the actions of COMKFOR in authorising Mr Saramati’s detention were solely attributable to the UN. [...] 163. [...] The Court’s reasoning (at para 149) was based principally on the policy consideration that: “Since operations established by UNSC Resolutions under Ch. VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from Member States, the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by the UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.

[...] **The Al-Jedda case** [...] 168. The Al-Jedda case was subsequently considered by the European Court of Human Rights [...]. The Court considered (at para 84) that the UN Security Council “had neither effective control nor ultimate authority and control over the acts and omissions of troops within the [MNF]”. [...] **The**

**MOD’s argument.** 169. The MOD contends that the situation in Afghanistan has greater similarity to that in Kosovo than to the situation in Iraq. [...] **Are actions of ISAF attributable to the UN?** [...] 178. In these circumstances, although I do not find the question easy, I consider that the UN Security Council has “effective control” (and “ultimate authority and control”) over ISAF in the sense required to enable conduct of ISAF to be attributed to the UN. Thus, if the detention of SM had been authorised by COMISAF (in the way that COMKFOR authorised the detention of Mr Saramati) and a claim had been brought against the state from whose armed forces COMISAF was drawn on the basis that that state was in breach of Article 5 of the Convention, I would expect the European Court to hold that the detention was not attributable to the respondent state, applying the same analysis as it did in the Behrami and Saramati cases. [...] **Is ISAF**

**responsible for SM’s detention?** 180. Where, in my view, the MOD’s argument breaks down is that neither COMISAF nor any other ISAF ‘detention authority’ authorised the detention of SM. As I have described in part III of this judgment, the UK has established its own national detention policy in Afghanistan, which differs from that of ISAF. Furthermore, the chain of command for authorising detention set out in the MOD Standard Operating Instruction J3-9 shows that the detention authority is the Commander of Joint Force Support (Afghanistan) (“Comd JFS p(A)”), who reports directly to the UK Permanent Joint Headquarters (“PJHQ”)

[...]. By contrast, the chart shows that the relation between the UK detention authority and the ISAF chain of command is one of liaison and coordination only. [...] 185. In relation to the specific case of SM: [...] iii) The

UK detention policy under which SM’s detention was authorised differed materially from ISAF’s policy – the most striking difference being that under ISAF’s policy SM could not have been detained for more (or much more) than 96 hours whereas pursuant to the UK policy his detention could be and was authorised for a much longer period. [...] 187. In these circumstances, it is in my view quite clear that the detention of SM is

attributable to the United Kingdom. [...] **VIII. UNITED NATIONS SECURITY COUNCIL RESOLUTIONS** [...]

189. The relevant UNSCRs – including UNSCR 1890 (2009) which was applicable at the time of SM’s

detention – were adopted under Chapter VII of the UN Charter. As such, they create obligations binding on all states which are members of the United Nations by reason of Article 25 of the UN Charter. [...] 190. [...] Specifically, the UK government relies on the authorisation conferred on the member states participating in ISAF to “take all necessary measures to fulfil its mandate” as providing a legal basis for detaining people where to do so is considered necessary to assist the Afghan government to improve the security situation in Afghanistan. 191. The MOD further argues that this power of detention displaces or qualifies Article 5 of the Convention. This argument is based on Article 103 of the UN Charter [...]. **The Al-Jedda case: decision of the House of Lords** 193. A similar argument was relied on by the Defence Secretary in the Al-Jedda case to justify Mr Al-Jedda’s detention by UK armed forces in Iraq, and was accepted by the English courts at all levels including the House of Lords. [...] **The Al-Jedda case: decision of the European Court** 205. After losing his case in the English courts, Mr Al-Jedda sought just satisfaction in Strasbourg. The European Court held that [...]: “[...] In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law.” 206. Applying this presumption, the European Court did not consider that the language used in UNSCR 1546 indicated unambiguously that the Security Council intended to place member states within the MNF “under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention.” [...] [...] **Did the UNSCRs confer a power to detain?** 218. Although the UNSCRs relating to Afghanistan did not contain any express reference to detention, the MOD contends that the authorisation to “take all necessary measures” to fulfil the mandate of ISAF impliedly included an authority to capture and detain persons who posed a threat to ISAF forces, Afghan citizens or to the accomplishment of the mission. In support of this contention, Mr Eadie QC adopted the opinion of Professor Christopher Greenwood QC [...]. Referring to the authorisation to “take all necessary measures”, Professor Greenwood said: “That (or very similar) language has been employed by the UNSC when it wished to authorise the use of force and it was plainly intended to carry such a connotation in Afghanistan. It would be wholly illogical for the authorisation to extend to the use of lethal force against persons but not to include their detention.” 219. I accept this argument so far as it goes. [...] I see no necessary implication, however, that this authorisation was intended to give ISAF a power to continue to hold individuals in detention outside the Afghan criminal justice system after they had been arrested and therefore ceased to be an imminent threat. 220. [...] ISAF had no power under Afghan law to detain individuals other than to hand them over immediately to the police or a prosecutor, I can see no reason to interpret the authorisation to “take all necessary measures” to fulfil the ISAF mandate as permitting detention for any longer than was necessary to deliver them to the Afghan authorities. 221. Nor can I see any reason to interpret that authorisation as permitting detention by ISAF which violated international human rights law. [...]. 222. Furthermore, there are features of UNSCR 1890 which indicate positively that the Security Council expected states participating in ISAF to comply with their international human rights obligations. In particular, the resolution included a recital which expressly called for “compliance with international humanitarian and human rights law”. [...] [...] **IX. INTERNATIONAL HUMANITARIAN LAW** [...] **The conflict in Afghanistan The MOD’s arguments** 232. It is common ground



that the branch of IHL relating to non-international armed conflicts applies to the activities of UK armed forces in Afghanistan. The MOD has advanced two arguments based on IHL [...]. The first is that IHL provides a legal basis for detention by UK armed forces. The second argument, which builds on the first, is that Article 5 of the Convention is displaced or qualified by IHL. **Treaty law** 234. The main treaty provision which applies to non-international armed conflicts is Common Article 3 of the Geneva Conventions. [...] 235. Common Article 3 (“CA3”) has been supplemented by Additional Protocol II [...]. 237. It must be doubtful whether the Taliban or any other organised armed group exercises sufficient control over a part of Afghanistan to enable them to implement AP2. It is also unclear from the wording of Article 1 whether AP2 applies to the armed forces of states other than the state in whose territory the conflict is taking place. There is a strong body of opinion, however, relied on by the MOD, that AP2 has become part of customary IHL, and I shall assume this to be the case. [...] **Is there an implied power to detain?** 239. Neither CA3 nor Article 5 of AP2 contains any express statement that it is lawful to deprive persons of their liberty in an armed conflict to which these provisions apply. All that they do is to set out certain minimum standards of treatment which must be afforded to persons who are detained during such an armed conflict. The MOD argues, however, that a power to detain is implicit in CA3 and AP2. 240. This argument has the support of some academic writers and of the International Committee of the Red Cross (“ICRC”). Thus, Jelena Pejic, the legal advisor to the ICRC, has written: “Internment is ... clearly a measure that can be taken in non- international armed conflict, as evidenced by the language of [AP2], which mentions internment in Articles 5 and 6 respectively ...” See Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence* (2005) 87 (858) *International Review of the Red Cross* 375, 377. [...] 241. I am unable to accept the argument that CA3 and/or AP2 provide a legal power to detain, for five reasons. 242. First, I think it is reasonable to assume that if CA3 and/or AP2 had been intended to provide a power to detain they would have done so expressly [...]. 243. Second, all that seems to me to be contemplated or implicit in CA3 and AP2 is that during non-international armed conflicts people will in fact be detained. Such detention may be lawful under the law of the state on whose territory the armed conflict is taking place, or under some other applicable law; or it may be entirely unlawful. There is nothing in the language of CA3 or AP2 to suggest that those provisions are intended to authorise or themselves confer legality on any such detentions. [...] Thus, when Pejic says that internment is clearly a measure that “can” be taken in non-international armed conflict, this is obviously true as a matter of fact and is in that sense “contemplated” in CA3 and AP2 [...]. It does not follow, however, that there is anything in these provisions which implies that internment is a measure that “can”, in the sense of “may lawfully”, be taken – still less that these provisions are themselves intended to provide a legal basis for detention. 244. Third, it seems to me that the clear purpose of CA3 and Article 5 of AP2 is inconsistent with the notion that they are intended to provide a legal power to detain. As noted by the ICRC in its *Commentary on the Additional Protocols* (1987 ed) at p.1344: “Like [CA3], [AP2] has a purely humanitarian purpose and is aimed at securing fundamental guarantees for all individuals in all circumstances.” Thus, as regards detention, the aim of both CA3 and Article 5 of AP2 is to guarantee certain basic minimum standards of treatment to all individuals who are deprived of their liberty for reasons relating to the armed conflict. The need to observe such minimum standards is equally relevant to all people who are in fact detained, and does not depend on whether or not their detention is legally

justified. 245. Fourth, there are cogent reasons [...] which explain why states subscribing to the Geneva Conventions and Additional Protocols would not have agreed to establish by treaty a power to detain in the circumstances of a non-international armed conflict. In particular, given that CA3 applies to “each Party to the conflict” and AP2 applies to organised armed groups who are able to implement it, providing a power to detain would have meant authorising detention by dissident and rebel armed groups. That would be anathema to most states which face a non-international armed conflict on their territory and do not wish to confer any legitimacy on rebels and insurgents [...]. 246. Fifth, I do not see how CA3 or AP2 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. [...] 247. In the context of non-international armed conflicts, defining these matters poses intractable problems. The rules applicable to international armed conflicts are based on the assumption that there is a reasonably clear distinction between combatants and civilians. [...] In non-international armed conflicts [...] the distinction between combatants and civilians may often be elusive. [...] 248. Another feature of non-international armed conflicts is that they may be of long and uncertain duration, as illustrated by the fact that such a conflict has now been continuing in Afghanistan for nearly 12 years. There may also be no clearly identifiable point at which it can be said that the hostilities have come to an end. In such circumstances a power to detain until the end of hostilities would be particularly problematic. 249. A solution to some of these difficulties advocated by the ICRC is to advocate a power of detention which depends, not on the status of the detainee, but on a determination that detention of the individual is justified by “imperative reasons of security”: see e.g. ICRC Regional Consultations 2012 Background Paper ‘Strengthening legal protection for persons deprived of their liberty in relation to non-international armed conflict’. On this approach detention is justified as long as such “imperative reasons of security” continue to exist. Even if this approach were to become generally accepted, it would still be necessary to identify procedures by which such determinations are to be made. 250. None of these matters, however, is addressed by CA3 or AP2. This confirms that it is not the purpose of these provisions to establish a legal basis for detention. [...] **Does a licence to kill imply a power to detain?** 252. A further argument pressed by Mr Eadie QC on behalf of the MOD is that the ability to detain insurgents, whilst hostilities are ongoing, is an essential corollary of the authorisation to kill them. The MOD argues that those engaged in a military operation must be able to accept the surrender of somebody who poses a threat to them and their mission and must be able to engage an adversary without necessarily having to use lethal force. It would be a serious violation of IHL to deny quarter; yet how, counsel for the MOD asked rhetorically, would soldiers be able to accept the surrender of someone who represents an imminent threat to them unless they are permitted to detain the person who constitutes the threat and thereby render that person hors de combat? 253. This argument justifies the capture of a person who may lawfully be killed. But it does not go further than that. It therefore does not begin to justify the detention policy operated by the UK in Afghanistan. In terms of the present case, the argument would justify the arrest of SM on the assumed facts, in circumstances where he was believed to represent an imminent threat. However, as soon as he had been detained and the use of lethal force against him could not be justified, the argument no longer provides a basis for his detention. [...] **Customary international law.** 254. The MOD further contends that, even if there is no power to detain in a non-international armed conflict implicit in CA3 and AP2, such a power exists as a

matter of customary international law. [...] 257. I have been shown no evidence of any recognition by states involved in non-international armed conflicts of IHL as providing a legal basis for detention. [...] This clearly indicates that the only potential sources of a power to detain are considered to be the host state's own domestic law [...] and UNSCRs. [...] 258. Furthermore, it seems to me that all the difficulties and uncertainties referred to above regarding the scope of any alleged power to detain under CA3 or AP2 equally affect any attempt to seek to identify such a power as a matter of customary IHL. [...] 259. Efforts aimed at developing international legal standards in this area have evidently been hampered by various factors, including the reluctance of many to accept that new rules are needed and disagreement among those who wish to develop the law as to how it should be developed. Some scholars and the ICRC have argued that the rules for international armed conflict should be applied in non-international armed conflicts. Other scholars and human rights groups have advocated the use of national laws, guided by human rights law, to fill gaps. [...] 260. An influential study of customary international humanitarian law has been carried out by the ICRC [...]. This study identifies what the authors consider to be 161 rules of customary IHL, one of which (rule 99) relates to deprivation of liberty. This rule is said to be that "arbitrary deprivation of liberty is prohibited". In relation to non-international armed conflicts, the commentary on the rule [...] goes on to identify what are said to be three procedural requirements established by human rights law. These are: (i) an obligation to inform a person who is arrested of the reasons for arrest; (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge; and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention. 261. Whether these matters can properly be regarded as established rules of customary international humanitarian law seems to me questionable. Even assuming that they can, however, rule 99 does not itself provide a legal basis for detention. It requires that there be such a basis provided by law; but it does not itself authorise or establish grounds for detention during an armed conflict. [...] **Conclusion** 268. For the above reasons, I am unable to accept the MOD's contention that IHL provides a legal basis for detention by UK armed forces operating in Afghanistan. **IHL as *lex specialis***. 269. As mentioned, the second argument made by the MOD based on IHL, which seeks to build on the first, is that IHL displaces or qualifies Article 5 of the Convention. [...] 271. In essence, the MOD's argument is that [...] IHL is specifically designed to apply in situations of armed conflict. In such circumstances, rules of IHL as *lex specialis* qualify or displace applicable provisions of a human rights treaty, such as Article 5 of the Convention. 272. In support of this argument, counsel for the MOD referred to advisory opinions of the International Court of Justice [...]. **The meaning of the *lex specialis* principle** 273. [...] I think it useful to distinguish three ways in which, conceptually, the *lex specialis* principle could be said to operate. **Total displacement** 274. The first and most radical of these would be to say that, in a situation of armed conflict, IHL as the *lex specialis* displaces Convention rights altogether. 275. Such a contention, however, seems to me impossible to maintain. In the first place, it cannot be said that there is any general acceptance of such a principle. If anything, the opposite is true. Thus, both advisory opinions of the ICJ [...] hold that IHL and international human rights law are not mutually exclusive. [...] 279. The difficulty is increased by the fact that the Convention contemplates and makes provision within itself for situations of war. Thus Article 15 [...] permits a state to derogate from its obligations under the Convention in a time of emergency. The clear and necessary implication of Article 15 is that the Convention continues to apply in a

situation of armed conflict [...]. **Does IHL prevail if it conflicts with the Convention?** 282. A second, weaker version of the *lex specialis* principle would accept that the Convention continues to apply generally in a situation of armed conflict but would hold that, where there is a conflict between IHL and a state's obligations under the Convention, IHL should prevail as the body of law more specifically tailored to the situation. 283. An area where such a conflict of obligations occurs concerns the detention of prisoners of war during an international armed conflict. [...] This internment regime is [...] inconsistent with Article 5 of the Convention which [...] does not permit purely preventive detention and provides for judicial review of decisions to detain. 284. At least arguably, however, even in a case where such a conflict of obligations occurs, the only way in which the European Court or a national court required to apply Convention rights can hold that IHL prevails over Article 5 is by applying the provisions for derogation contained in the Convention itself, and not by invoking the principle of *lex specialis*. In considering the extent to which derogation is "strictly required by the exigencies of the situation" and therefore permissible, Article 15(1) expressly allows regard to be had to a state's "other obligations under international law", which plainly includes IHL. The obligation of a state to comply with IHL would thus be a compelling justification for derogating from Article 5 in relation to the detention of POWs during an international armed conflict. However, in circumstances where the Convention itself defines the conditions in which and the extent to which derogation from its obligations is permitted, and makes specific provision for derogation in time of war, it is difficult to see that there is any room for the *lex specialis* principle to operate as a basis for disapplying the Convention when it conflicts with IHL. [...] 287. [...] On the view I take [...] I do not consider that there is any such conflict of obligations in relation to detention during a non-international armed conflict. That follows from my earlier conclusion that IHL does not provide a legal basis for detention in situations of non-international armed conflict. **Lex specialis as a principle of interpretation.** 288. A third version of the *lex specialis* principle treats it not as a principle for resolving conflicts between different bodies of law but as a principle of interpretation. On this view, the force of the principle is simply that, in a situation where a more specialised body of international law also applies, the provisions of the Convention should be interpreted so far as possible in a manner which is consistent with that *lex specialis*. Thus, in conditions of armed conflict, Article 5 [...] of the Convention should be interpreted so far as possible in a manner which is consistent with applicable rules of IHL. 289. I can see no difficulty with this most modest version of the argument that IHL operates as *lex specialis*. [...]. 290. It was in this sense, as a principle of interpretation, that the ICJ applied the *lex specialis* principle in the Nuclear Weapons advisory opinion. [...] A similar approach could be adopted in interpreting Article 9(1) of the ICCPR, which prohibits "arbitrary arrest or detention". 291. Unlike Article 9(1) of the ICCPR, however, Article 5(1) of the Convention is much more specific and prohibits arrest or detention "save in the following cases" which are then exhaustively defined. Given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation. Furthermore, in view of my conclusion that in a non-international armed conflict IHL does not specify grounds for detention or procedures to be followed, there are in my view no relevant rules of IHL with which to try to harmonise the interpretation of Article 5. 292. As I see it, where IHL would be relevant in applying the Convention is in situation where a state resorted to measures derogating from Article 5 on the basis that it was involved in a non-international armed conflict. In such circumstances it could be argued that, under customary IHL, certain fundamental guarantees against the arbitrary deprivation

of liberty should still be respected (see paragraph 260 above). To the extent that such guarantees form part of customary IHL, derogations from them would be “inconsistent with [a state’s] other obligations under international law” and therefore not permitted by Article 15. **Conclusion 293.** [...] If these conclusions are correct, it follows that IHL is not intended to displace and is not capable of displacing human rights law in this context. [...] **X. WAS THERE A BREACH OF ARTICLE 5? [...] Core principles 299.** The essential purpose of Article 5 is to prevent people from being deprived of their liberty except in accordance with the rule of law. Three core principles embodied in Article 5 are (i) that there must be a legal basis for depriving someone of their liberty, (ii) that this basis must be reasonably certain, and (iii) that the deprivation of liberty must be in accordance with judicial process. **Article 5(1): was SM’s detention lawful?** [...] 302. [...] On the assumed facts, SM’s arrest and the first 96 hours of his detention were in accordance with ISAF policy. I have found in part VIII of this judgment that ISAF’s policy was within the mandate conferred by the relevant UNSCRs. I therefore conclude that SM’s arrest and initial period of detention were lawful under international law and hence also for the purpose of Article 5(1). 303. However, I have also found in part VIII that the UK national policy introduced in November 2009 [...] was not within the authorisation given by the UNSCRs. In addition, in part IX I have rejected the MOD’s contention that IHL provided a legal basis for detention. It follows that there was in my opinion no legal basis for SM’s continued detention after 96 hours either in national or in international law. [...] **Article 5(1): the requirement of certainty** 304. The requirement in Article 5(1) that detention must be “lawful” and “in accordance with a procedure prescribed by law” also includes the principle that the basis of detention must be reasonably certain. [...] 305. As described in part III of this judgment [...], UK detention policy was set out in Standard Operating Instruction J3-9, which in my view defined the conditions for deprivation of liberty with sufficient clarity and precision to meet the requirement of legal certainty. 306. There is no doubt that on the assumed facts SM’s initial detention and subsequent extended detention for intelligence purposes were in accordance with SOI J3-9. However, it appears to me that his further period of detention of 81 days for logistical reasons was not. 307. As quoted earlier, the UK policy governing “logistical extensions” set out in part 2 of SOI J3-9 [...] clearly envisaged that an extension of detention for logistic reasons would be sought only as a temporary or short term measure. It would not reasonably be understood as allowing detention for a period measured not in days but in months. 308. It is also relevant to note that the UK had not given notice of any “national policy caveat” in relation to this aspect of ISAF detention policy. [...] 309. I think it clear that SM’s detention for ‘logistical’ reasons for a period of 81 days fell outside the scope of what was contemplated in the applicable UK and ISAF detention policies. Alternatively, if it be suggested that the UK policy was intended to encompass periods of extended detention for such reasons longer than a few days, then the policy fails the test of legal certainty because it provides no guidance which specifies with any clarity or precision the permitted length of such extended detention. [...] **Article 5(1): the purpose of detention** 310. The manner in which Article 5 embodies the third principle [...] that the deprivation of liberty must be in accordance with judicial process – is more complex. The archetypal case in which deprivation of liberty is justified is where a person has been convicted of a criminal offence by a court. Article 5 takes account of the fact that it is sometimes necessary to detain an individual who has not (or not yet) had a criminal trial, but it tightly specifies the circumstances in which this is permissible by allowing detention only for the purposes which are specified in sub paragraphs (a)-(f) of Article

5(1). [...] As a general principle, detention is permitted under Article 5(1) only pursuant to the order of a court or for the purpose of judicial process. [...] **Articles 5(1)(c) and 5(3)** 315. The MOD also relies on Article 5(1)(c). [...] The requirement that the arrest or detention must be for the purpose of bringing the person before the competent legal authority applies to each of the three categories of case referred to in this provision. That is, it applies irrespective of whether the person is detained (i) on reasonable suspicion of having committed an offence or (ii) to prevent him committing an offence or (iii) to prevent him from fleeing after having committed an offence: see *Lawless v Ireland (No 3)* (1979-80) 1 EHRR 15 at paras 13-14. 316. Article 5(1)(c) needs to be read together with Article 5(3) [...]. 317. Four points about the effect of these provisions, relevant in the present case, are confirmed by the case law of the European Court. 318. First, the phrase “competent legal authority” in Article 5(1)(c) means the same as “a judge or other officer authorised by the law to exercise judicial power”, which is the description used in Article 5(3). This description is wider than the term “court”, but the officer authorised to exercise “judicial power” must be independent of the executive and of the parties [...]. 319. Second, it has also been clearly established [...] that the review by a judicial officer guaranteed by Article 5(3) has both a procedural and a substantive requirement. The procedural requirement obliges the judicial officer to hear in person the individual brought before him; and the substantive requirement obliges the officer to consider whether there are reasons to justify the detention and to order release if there are not such reasons: see [...] *McKay v United Kingdom* (2007) 44 EHRR 41 at para 35. [...] 321. Fourth, the period for which a person may be detained on suspicion of committing an offence without being brought before a judicial officer is short. “[...] Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5(3), that is the point of effectively negating the state’s obligation to ensure a prompt release or a prompt appearance before a judicial authority”. [...] 324. The conclusion to be drawn from the case law is thus that where a person is detained on reasonable suspicion of having committed an offence any period of detention in excess of four days without bringing the person before a judge is prima facie too long. In circumstances where most of the nations participating in ISAF are also parties to the Convention, I do not suppose it to be a coincidence that ISAF policy set 96 hours as the maximum permitted period of detention within which the individual had to be released or transferred into the custody of the Afghan authorities. [...] **The first period: SM’s arrest and first 96 hours of detention** [...] 331. [...] I consider that detention in accordance with ISAF policy for up to 96 hours was compliant with Article 5(3). If SM had been released within that period, he would have been released ‘promptly’ before any judicial control of his detention was feasible. 332. However, it is equally clear that [...] the detention of SM in this case for 110 days without bringing him before a judge was a stark violation of Article 5(3). **The second period: SM’s detention for 25 days for interrogation** 333. The extension of SM’s detention after 96 hours was authorised by Ministers solely for the purpose of interrogating him with the aim of gaining valuable intelligence. Not only is that the sole purpose of the extension alleged in the MOD’s Defence, but there was no other criterion set out in the UK policy guidance SOI J3-9 which could have been used by Ministers to approve an extension of detention at that time. As already indicated, that is not a purpose for which detention is permitted under Article 5(1). 334. Even if (contrary to my view) it could be said that SM was being detained during this period for the purpose of bringing him before the competent

authority on reasonable suspicion of having committed an offence, his detention did not comply with Article 5(3) as he was not brought promptly – or indeed at all – before a judicial officer. **The third period: SM's 'logistical' detention for 81 more days** [...] 336. SM's detention during this period was contrary to Article 5(3) because he was not brought before a judicial officer promptly or at all. [...] **Lack of prison capacity** 337. The MOD contended that, in assessing promptness, account should be taken of the fact that, at times, Afghanistan lacked sufficient capacity to accommodate detainees. That fact might justify an arrangement under which, by agreement with the Afghan authorities, detainees were held on UK bases instead of Afghan prisons until space in an Afghan prison became available. But it cannot by itself justify keeping people in detention without bringing them before a judicial officer. It is the duty of the UK to secure that there are forms of judicial control adapted to the circumstances and compatible with the Convention [...]. **Did detention reviews comply with Article 5(3)?** 341. An alternative contention put forward by the MOD is that, in the context of the armed conflict in Afghanistan, the “competent legal authority” referred to in Article 5(1)(c) can be interpreted as including a non-judicial authority, as can the corresponding reference to “a judge or other officer authorised by law to exercise judicial power” in Article 5(3). For the reasons indicated above, this contention is inconsistent with the language and purpose of these provisions, as well as with the long established case law of the European Court [...]. 342. Although the merits of SM's detention were reviewed by UK officials and by a UK Minister within 96 hours of his capture, the review did not comply with Article 5(3) in two fundamental respects: i) The review was carried out by the executive, and not by a judicial officer independent of the executive as Article 5(3) requires; and ii) SM was not brought before and heard by the detaining authority, and was given no opportunity to make representations. **Divide and tailor** 343. [...] Counsel for the MOD submitted that [...] if Article 5(3) cannot be interpreted sufficiently flexibly to accommodate the fact that the UK had no power to bring SM before an Afghan court, then it must be regarded as inapplicable. 344. As already mentioned, the MOD has not shown that it was impracticable either to arrange for detainees awaiting transfer to an Afghan prison to be brought before an Afghan judicial officer in liaison with the Afghan authorities or, alternatively, to arrange for detention reviews to be carried out by a British judicial officer. Even if, however, neither of these arrangements was feasible, there is in my view sufficient flexibility in Article 5(3) by reason of the fact that it did not require the UK authorities to procure that an arrested person was brought promptly before a judicial officer unless they chose to keep that person in their custody. Thus, Article 5(3) could be complied with by releasing the arrested person if he could not be transferred promptly into the custody of the Afghan authorities. [...] Furthermore, the reasons which constrained the ability of UK forces to keep people lawfully in their custody derived from the inability to fulfil the object of detention operations – which was to deliver those arrested to the Afghan authorities – and not from a lack of extraterritorial power. [...] **Article 5(4): habeas corpus** [...] 353. Article 5(4) operates independently of Article 5(1). Hence, even if SM's detention was lawful under Article 5(1), there was still an obligation to comply with Article 5(4). 354. While the “court” referred to in Article 5(4) does not have to be a court of law of the classic kind integrated within the judicial machinery of the state, it must be a body of a judicial character which is independent of the executive and of the parties [...]. Furthermore, the proceedings must comply with basic requirements of procedural fairness, including at a minimum an opportunity to make representations, if not an oral hearing: see *A v United Kingdom* (2009) 49 EHRR 29 at paras 203-204. [...]

355. For similar reasons as establish a breach of Article 5(3), there was also a clear breach of SM's rights under Article 5(4). In particular, although the term "speedily" indicates a lesser urgency than "promptly", it is impossible to say that this requirement was complied with when SM was given no opportunity to have the lawfulness of his detention decided by a court throughout the entire period of his detention by the UK. Such reviews as took place were insufficient for at least two reasons: i) The reviewing bodies were not independent of the executive. All reviews were conducted by Ministers, senior government officials or a military detention review committee; and ii) Not only was there no hearing but SM was given no opportunity to make representations of any kind, either himself or through a representative. **Conclusions** 357. It follows [...] that SM has an "enforceable right to compensation" under Article 5(5). [...]

## Discussion

**I. General questions** 1. (*Paras. 1 – 10, 299 – 357*) Who is Mr. Serdar Mohammed? What was the nature of Mr. Mohammed's claim before the High Court of Justice? What did Justice Leggatt decide? **II. The law relating to detention** 2. (*Paras. 20, 232 - 237*) From the facts of the case, how would you qualify the situation in Afghanistan? Which rules of IHL apply? Does AP II bind the UK in Afghanistan? Is it customary law? Has it, as customary law, a different territorial field of application than it has as treaty law? (GC I-IV, Art. 3; P II, Art. 1) 3. (*Paras. 241 – 250*) In an IAC, does IHL provide rules as to the grounds and conditions under which a person may be detained? What are those rules? Does the IHL of NIAC provide for grounds and conditions of detention? 4. (*Paras. 242 - 245*) Why did States accept more stringent obligations under the law applicable in IACs than in NIACs? In light of your answer, do you agree with Justice Leggatt that it is "reasonable to assume that if CA3 and/or AP2 had been intended to provide a power to detain they would have done so expressly"? 5. (*Paras. 243*) If a particular act is not expressly authorised by rules of IHL, does this mean it is prohibited? Conversely, if a particular act is not expressly prohibited by rules of IHL, does this mean that it is permissible? How are these questions relevant in the present case? 6. (*Paras. 244*) What is the purpose of security internment in IAC? Do you agree with the statement that the purpose of Art. 3 Common and AP II is inconsistent with the notion that these provisions provide a legal basis for detention? (GC I – IV, Art. 3; P II, Art. 5; GC IV, Art. 42 and 78) 7. (*Paras. 246 - 249*) Do you agree with what Justice Leggatt states in para. 246? Why? According to the suggestions mentioned in para. 249, from which rules could the requisite standard be drawn from? From which one of the four Geneva Conventions does it stem? 8. (*Paras. 252*) In light of the present case, please comment on the following statement: if IHL of NIAC does not provide the power to detain, parties would have no alternative but to kill their enemies. Does the authority to kill imply an authority to detain? To detain without domestic legal basis and without judicial control? 9. (*Paras. 72 – 111*) If it is domestic law that must provide the basis for detention, then whose legal framework counts in a situation where one state conducts detention operations on the territory of another? What is the relationship between this domestic law and international human rights law (IHRL)? Can the Security Council override domestic law? IHRL? 10. (*Paras. 259*) When the rules provided by the IHL of NIAC are insufficient, should reference be made to the rules of IAC by analogy or, instead, to IHRL? 11. (*Paras 269 – 293*) What is the principle of *lex specialis*, and how is it relevant for this case? What particular reading of the *lex specialis* principle articulated by Justice Leggatt in this case do you agree with? 12. Assuming that



IHL of NIAC provided a legal basis for detention, might this have changed the conclusions reached in the present judgment? Why/Why not? 13. Under what conditions can internment be considered lawful? Does your answer remain the same for cases of internment carried out by armed groups? What legal framework is applicable to them? Considering the principle of equality of belligerents? If a UK soldier is detained by armed groups, is he a hostage? Why/Why not? 14. (Paras. 282 – 284) Do you agree with the court’s reasoning which concludes that internment of POWs necessarily presupposes a derogation from obligations of the ECHR? Could, rather, internment be justified by considering IHL as the *lex specialis*? Could this explain the fact that States do not normally derogate from their human rights obligations in wartime? In your opinion, when resolving a conflict of two legal norms, is the *lex specialis* principle one of conflict avoidance or of conflict resolution? According to Justice Leggatt? 15. (Para. 291) What is your opinion in relation to the court’s statement: “Given the specificity of Article 5, there is little scope for *lex specialis* to operate as a principle of interpretation”? In the context of an IAC, would preventive detention be considered legitimate, in the absence of a derogation? 16. Why was the detention up to 96 hours found to be in compliance with the applicable law? Why was the further detention of Mr Mohammed on the other hand considered unlawful? What should or could the UK have done to comply with the relevant law? 17. (Paras. 315 – 342) Assuming that IHL of IAC applied, would the detention of Mr. Mohammed have been lawful under IHL? Under the ECHR? In light of the reasoning of the court? (GC IV, Art. 42 and 78; ECHR, Art. 5) **III. Miscellaneous** 18. (Paras. 127 – 143) Why does the court cite the *Al-Skeini* judgment? What does the court criticize about this judgment? Does jurisdiction under Article 1 ECHR exist whenever an act attributable to a contracting state has an adverse effect on anyone anywhere in the world? If jurisdiction is understood to rest on the exercise of control over individuals, is there a stopping point beyond which an act is not attributable to a State? Was this issue relevant in the present case? Why? [See ***Bankovic and Others v. Belgium and 16 other States***, para. 75 and ***ECHR, Al – Skeini et al. v. UK***] 19. (Paras. 158 – 187) Why does the court argue that Mr. Mohammed’s detention was still attributable to the UK and not to the UN? What, according to the court, differentiates the present case from *Berhami and Saramati*? 20. (Paras. 218 – 219) Why, according to the court, could the authorisation by the Security Council to “take all necessary measures” to fulfil the ISAF mandate not be interpreted as permitting detention for any longer than was necessary to deliver the detainee to the Afghan authorities? In this regard, how does the court refer to the *Al-Jedda* cases? In light of the situation in Iraq and Afghanistan, do you agree with the approach adopted by the court? [See ***ECtHR, Al – Jeddah v. UK***] 21. (Paras. 240) Is it the ICRC’s position that there is an inherent power to detain in the IHL of NIAC? Does the ICRC have an official position on the issue that is mentioned in the present case? Is it relevant that the article published in the *International Review of the Red Cross* referred to in the judgment indicates in a footnote that it merely represents the opinion of the author?