

## United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)

*INTRODUCTORY TEXT: This case concerns the detention of Mr. Serdar Mohammed in Afghanistan, following his capture by British armed forces. The Court of Appeal agrees with the UK High Court in considering that there is no implied authority to detain in IHL treaties, nor in customary law, for extraterritorial NIACs. The UK Supreme Court, (UKSC) however, recognized that the UK forces had the power to detain individuals pursuant to the United Nations Security Council Resolution authorising the use of “all necessary measures”, if the detention was found to be required for imperative reasons of security. Nevertheless, the UKSC found that the procedural guarantees in place were not in compliance with Article 5(4) of the European Convention of Human Rights.*

*The judgments discussed in this case followed on from the initial case United Kingdom, The Case of Serdar Mohammed (High Court Judgment).*

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**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.

### A. COURT OF APPEAL JUDGMENT

**Court of Appeal (Civil Division), Serdar Mohammed & Others v. Secretary of State for Defence**

A2/2014/4086, In the Court of Appeal (Civil Division), Royal Courts of Justice, Strand, London, WC2A 2 LL, date 30/07/2015, before: The Lord Chief Justice of England and Wales Lord Justice Lloyd Jones and Lord Justice Beatson, between: Serdar Mohammed & Others and Secretary of State for Defence, and between Yunus Rahmatullah & the Iraqi Civilian Claimants and Ministry of Defence and Foreign and Commonwealth Office, available at: <https://www.judiciary.gov.uk/judgments/mohammed-and-others-v-secretary-of-state-for-defence-rahmatullah-v-mod/> (footnotes omitted)]

[...]

## I. THE ISSUES AND SUMMARY

### (1) The main appeal

#### (a) *The central issue*

1. The main appeal arises from the determination by Leggatt J of preliminary issues in relation to claims arising out of the detention of Serdar Mohammed (SM) by Her Majesty's armed forces (HM armed forces) in 2010 in Afghanistan. They were acting as part of the International Security Assistance Force (ISAF), a multinational force under NATO command that was deployed to assist the Afghan Government in the maintenance of security in Afghanistan and to fight the insurgency led by the Taliban and others. [...]

[...]

3. The assumed premise for the determination of the preliminary issues was that SM was a commander in the Taliban who [...] posed a threat to the safety of HM forces and ISAF's mission when detained. On that assumption [...] the Secretary of State contended that SM was lawfully detained from 7 April 2010 (when he was captured) until 25 July 2010 (when he was handed over to the Afghan authorities).

4. However, it was contended by SM that under the arrangements under which HM armed forces operated in Afghanistan they were not authorised to detain him for more than 96 hours after his capture. On the expiry of the period of 96 hours, the obligation of HM armed forces was to hand him over to the appropriate Afghan authorities or to release him. SM contends therefore that his detention from 10 April 2010 until 25 July 2010 was unlawful. He claims damages for that period of detention.

#### (b) *The two bases of SM's claim*

5. SM's claim is made on two distinct bases:

i) As a public law claim under the Human Rights Act 1998 for breach of his rights under the European Convention on Human Rights (the ECHR). [...]

ii) As a private law claim in tort. [...]

*(c) The position of the Secretary of State*

6. The position of the Secretary of State was:

i) No claim lay against the Secretary of State as HM armed forces were operating as part of ISAF and SM's claims were not attributable to the Secretary of State but to the United Nations

[...]

iii) There was [...] no breach of Article 5 [of the ECHR] as the detention of SM was not arbitrary. First, it was authorised under (1) Afghan law and/or (2) UN Security Council Resolution (UNSCR) No 1890 of 2009 and/or (3) international humanitarian law as applicable to the conflict in Afghanistan. Secondly, in light of the nature of the armed conflict in Afghanistan and the requirements of international humanitarian law, proper procedural protections were in place which were compatible with Article 5.

iv) The private law claim in tort failed [...]

## **II. THE FACTS, FACTUAL ASSUMPTIONS AND LEGAL ASSUMPTIONS**

### **(1) The facts in relation to SM's claim**

29. HM armed forces first became involved in Afghanistan in October 2001 as part of the coalition forces led by the United States as part of "Operation Enduring Freedom" [...].

[...]

31. On 5 December 2001, talks in which a number of States and the main Afghan political interests (apart from the Taliban) took part resulted in an "Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions". The agreement (known as the Bonn Agreement) provided for the establishment of an Interim Administration in Afghanistan on 22 December 2001. Annex 1 to the Bonn Agreement contained a request to the United Nations to provide an international security force [...].

32. It is important to note that this agreement reflected a basic norm of international law that within the territory of Afghanistan, as a sovereign State, the responsibility for the rule of law and the maintenance of public order is that of the authorities of Afghanistan; the role of the international community through its armed forces was to assist those authorities. [...]

33. The agreement was subsequently endorsed by the UN Security Council.

34. On 20 December 2001, the UN Security Council passed UNSCR 1386 under Chapter VII of the UN Charter.

i) It authorised “the establishment for 6 months of [ISAF] to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas [...]”;

[...]

iii) Authorised “the Member States participating in [ISAF] to take all necessary measures to fulfil its mandate”.

35. Successive resolutions were passed in very similar terms. The one current at the date of arrest and detention of SM was UNSCR 1890 of 2009. [...]

36. On 14 January 2002, A Military Technical Agreement was made between ISAF and the interim administration of Afghanistan:

i) Article I(2) of the Military Technical Agreement stated that the Interim Administration “understands and agrees the Mission of the ISAF is to assist it in the maintenance of security” [...]

[...]

39. ISAF established a policy and procedure for detention set out in ISAF Standard Operating Procedures for detention (ISAF SOP 362) [...]. The principal feature of this policy was that it authorised detention for only 96 hours before transfer to the Afghan authorities was required. The United Kingdom, however, formulated its own policy in relation to the operations in Afghanistan in early 2006 [...]. Its policy was set out in Standard Operating Instruction J3-9 (UK SOI J3-9) [...].

40. [...] By the time of SM's detention in 2010, the policy operated by the United Kingdom provided a mechanism for approving longer periods of detention than ISAF policy, principally to try to obtain intelligence, before handover to the Afghan authorities. [...]

[...]

## **(2) The factual assumptions as to the detention of SM**

43. SM is a citizen of Afghanistan. On 7 April 2010, he was arrested by HM armed forces. There is a factual dispute about the circumstances and reasons for his capture. [...] It was agreed that the preliminary issues would be determined on the basis of the facts [...] summarised as follows:

i) SM was detained on 7 April 2010 as part of a planned ISAF operation involving HM armed forces targeting a vehicle believed to be carrying a senior Taliban commander.

[...]

iii) SM was taken to Camp Bastion, Lashkar Gah, Helmand Province. He was told that he had been detained. The reasons given to him were that he posed a threat to the accomplishment of the ISAF mission [...].

[...]

vii) SM's detention was reviewed on 8 April 2010 by the Detention Review Committee at Camp Bastion. It was thereafter reviewed every 72 hours until 4 May 2010 [...]. He had no access to a lawyer and did not receive family visits. [...]

viii) On 12 April 2010, a Minister at the United Kingdom MoD reviewed SM's detention and approved his short term detention on the basis that it appeared likely that questioning him would provide significant new intelligence [...].

ix) Following the last review by the Detention Review Committee at Camp Bastion on 4 May 2010, the Afghan National Directorate of Security stated that they wished to accept SM into their custody but at the time did not have the capacity to do so [...].

x) SM was therefore held from 6 May until 25 July 2010 under "logistical detention" pending transfer to the Afghan authorities. He was not interrogated during this period.

xi) He was transferred to the Afghan authorities on 25 July 2010. [...]

[...]

### **III. THE LIABILITY OF THE SECRETARY OF STATE ON BEHALF OF THE UNITED KINGDOM AND THE AVAILABILITY OF UNITED NATIONS IMMUNITY**

49. The Secretary of State contended that the claims against the United Kingdom fail on two preliminary grounds:

- (i) The actions of the HM armed forces were not attributable to the United Kingdom but either to ISAF or to the United Nations
- (ii) HM armed forces were entitled to the immunities enjoyed by the United Nations.

#### **(1) ATTRIBUTION TO ISAF/UN**

[...]

*(b) The applicable legal principles: Behrami/Saramati and Al-Jedda*

52. In *Behrami v. France, Saramati v. France, Germany and Norway* (2007) 45 EHRR SE10 the Grand Chamber was concerned with questions of attribution in relation to the activities in Kosovo of the interim administration (UNMIK) and the international security presence (KFOR). [...] The *Saramati* case concerned detention by UNMIK police officers acting on the orders of the commander of KFOR. Mr Saramati complained that his extra-judicial detention for a period of about six months between July 2001 and January

2002 was contrary to article 5 ECHR and that Norway and France, the States of nationality of the successive commanders of KFOR, were liable.

53. The Grand Chamber rejected that submission and held that the detention was solely attributable to the United Nations. It considered that the key question was whether the Security Council “retained ultimate authority and control so that operational command was delegated”. [...]

54. The Grand Chamber found that the UNSCR gave rise to a chain of command. The Security Council retained ultimate authority and control over the security mission and it delegated to NATO both the power to establish and the operational command of the international presence KFOR. [...]

55. [...] Having found that the conduct of the commander of KFOR in authorising Mr Saramati’s detention was attributable to the UN, the court went on to hold that those actions could not be attributed to the respondent States. [...]

56. In *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 the claimant sought judicial review of his detention by the HM armed forces in Iraq on the ground that it violated Article 5 ECHR. [...]

[...]

59. The *Al-Jedda* case was subsequently considered by the Grand Chamber of the Strasbourg court (*Al-Jedda v United Kingdom* (2011) 53 EHRR 23). The Grand Chamber did not consider that, as a result of the authorisation contained in UNSCR 1511 adopted on 16 October 2003, the acts of soldiers within the Multi-National Force became attributable to the United Nations or ceased to be attributable to the troop-contributing nations. [...]

60. [...] [T]he Grand Chamber considered that that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that, accordingly, the applicant’s detention was not attributable to the UN (para 84). [...]

*(c) The judge’s decision*

61. Having referred to the authorities considered above, the judge came to the following conclusions:

(i) The United Nations Security Council had effective control (and ultimate authority and control) over ISAF in the sense required to enable conduct of ISAF to be attributed to the UN (at [178]).

(ii) However, neither the commander of ISAF nor any other ISAF detention authority authorised the detention of SM. On the contrary, he was detained by the United Kingdom pursuant to its own detention policy and procedure [...]. In the circumstances, [...] the detention of SM was attributable to the United Kingdom (at [180] and [187]).

[...]

*(f) Did ISAF consent by acquiescence to the United Kingdom's detention practice?*

70. Before us, the Secretary of State submitted that the judge erred in failing to conclude that ISAF acquiesced in the UK practice in relation to detention, with the result that it should be regarded as having been carried out under the authority of ISAF. In this regard, he pointed out that [...] ISAF Headquarters were informed on each occasion on which a detainee was held beyond 96 hours [...] and this had not resulted in a protest on the part of ISAF. [...]

71. However, we do not consider the failure to protest in these circumstances can be considered as to amount to tacit consent. [...]

72. We consider therefore, that the judge [...] was correct in his conclusion that it is the United Kingdom and not ISAF which is responsible for SM's detention. [...]

## **(2) CAN THE SECRETARY OF STATE INVOKE THE IMMUNITIES OF THE UN?**

73. On behalf of the Secretary of State, it was submitted that the public law and private law claims for unlawful detention are barred by reason of the immunity given to experts on a United Nations mission by Section 22, Convention on the Privileges and Immunities of the United Nations (the General Convention).

74. Section 22 of the General Convention provides in relevant part:

“Experts ... performing missions for the United Nations shall be accorded such privileges and immunities as necessary for the independent exercise of their functions during the period of their missions, [...]. In particular, they shall be accorded:

...

(b) In respect of ... acts done by them in the course of the performance of their mission, immunity from legal process of every kind. [...]”

75. The Secretary of State submitted that ISAF and ISAF personnel have immunity from legal process for the acts done in the performance of ISAF's mission [...].

[...]

78. By letter dated 17 April 2015 to the UK Permanent Representative, Mr Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, stated:

“[...] The 1946 Convention on the Privileges and Immunities of the United Nations applies to Security Council subsidiary organs such as the United Nations peacekeeping operations. It does not, however, apply to operations authorised by the Security Council and conducted under the control of States or regional organisations.

Consequently, the 1946 Convention on the Privileges and Immunities of the United Nations does not apply as such to ISAF and its personnel. [...]”

[...]

81. So far as the Secretary of State's claim to immunity under the General Convention is concerned, we consider that it is misconceived for the reasons given by the Under-Secretary-General for Legal Affairs. [...]

#### **IV. THE PUBLIC LAW CLAIM: THE SCOPE OF THE ECHR AND ITS RELATIONSHIP TO INTERNATIONAL HUMANITARIAN LAW**

82. In examining the claim under Article 5 ECHR, it is necessary first to consider whether the ECHR applies to the actions of HM armed forces in detaining SM and if so, the extent to which the provisions of Article 5 can in principle be modified by the *lex specialis*, namely international humanitarian law [...].

##### **(1) THE SCOPE OF THE ECHR AS APPLIED TO HM ARMED FORCES IN AFGHANISTAN**

[...]

84. In his main judgment the judge considered at length the scope of the application of the ECHR (at [113] to [152]) and concluded (at [148]) that SM was within the jurisdiction of the United Kingdom for the purposes of the ECHR from the time of his capture by HM armed forces [...] until the time when he ceased to be in their custody [...]. His reasoning and his conclusions are not challenged on these appeals.

[...]

##### **(2) THE RELATIONSHIP OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW**

107. Although as a result of the decision in *Al-Skeini* the ECHR has been extended territorially so that it can in principle apply to the actions of HM armed forces in Afghanistan in arresting and detaining SM, it is necessary [...] to consider the extent to which such a system of human rights law applies in a situation of non-international armed conflict and where a State acts outside its sovereign territory.

108. The answer to the general question will turn upon the precise relationship of human rights systems to international humanitarian law and on the extraterritorial scope of the particular human rights system under consideration [...]. In certain circumstances international humanitarian law operates as a *lex specialis* so as to require the modification of general rules of human rights law.

109. It was the submission of the Secretary of State that the system of international humanitarian law applying to non-international armed conflicts displaced or modified Article 5 ECHR in respect of the actions of HM armed forces in Afghanistan.

[...]



(b) *The judge's decision in relation to international humanitarian law as lex specialis*

[...]

115. The judge (at [273] to [294]) considered three different versions of the Secretary of State's submission that international humanitarian law operated as *lex specialis* to displace or qualify the ECHR, rejecting each.

(i) He rejected as "impossible to maintain" a submission that in a situation of armed conflict international humanitarian law displaced rights under the ECHR altogether. This would be inconsistent with the jurisprudence of the ICJ referred to above, and with the position of the UN General Assembly and the UN Human Rights Committee.

(ii) He rejected a subsidiary version of the submission, namely that, where there was a conflict between international humanitarian law and a State's obligations under the ECHR, international humanitarian law should prevail. In certain circumstances derogation might be permissible under Article 15 ECHR. However, where the defined circumstances permitting derogation were not satisfied, it was difficult to see that there was any room for the *lex specialis* principle to operate.

(iii) While accepting in principle that *lex specialis* might operate as a principle of interpretation, he concluded that there was little scope for its operation given the specificity of Article 5 ECHR. [...]

(c) *The decision of the Strasbourg Court in Hassan (September 2014)*

116. Since the judge's decision, the Grand Chamber of the Strasbourg court has delivered its judgment in *Hassan v United Kingdom* (Application No. 29750/09, 16 September 2014) [...]. [...]

[...]

119. [...] The court noted that the ICJ had held that the protection offered by human rights conventions and that offered by international humanitarian law co-existed in situations of armed conflict and that the court must endeavour to interpret and apply the ECHR in a manner which was consistent with this framework under international law.

118. The Strasbourg court accepted that the lack of a formal derogation under Article 15 did not prevent the court from taking account the context and provisions of international humanitarian law when interpreting and applying Article 5 [...]. It then continued:

"104. ... By reason of the coexistence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. [...]

105. [...] As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law [...]."

[...]

*(d) The extension of international humanitarian law to a non-international armed conflict*

121. Although a number of passages in *Hassan* refer in general terms to “armed conflict” the specific context was the international armed conflict in Iraq.

122. The Secretary of State submitted before us that the underlying reasoning must apply equally to a non-international armed conflict and that article 5 [of the ECHR] must be modified in the same way. [...]

123. In our view, the reasoning in *Hassan* can be extended to a situation of a non-international armed conflict [...] only if in a non-international armed conflict international humanitarian law provides a legal basis for detention. [...]

124. We address that issue and the procedural safeguards that are required by international humanitarian law in a situation of non-international armed conflict after considering whether there is a legal basis for SM's detention in Afghan law or the UNSCRs pursuant to which HM armed forces operated as part of ISAF in Afghanistan.

**V. THE PUBLIC LAW CLAIM: LAWFUL AUTHORITY TO DETAIN**

125. In this section, we consider the three alternative sources for the authority to detain:

- (i) The law of Afghanistan
- (ii) The UNSCRs
- (iii) International humanitarian law [...]

[...]

**(1) POWER TO DETAIN UNDER THE LAW OF AFGHANISTAN**

[...]

131. The judge [...] found (at [110] to [112]) that [...] HM armed forces were entitled to arrest SM as he was reasonably believed to be an imminent threat to them, but they were not entitled to detain him after 10 April 2010. Afghan law therefore did not provide a basis for SM's detention. [...]

[...]

**(2) THE POWER UNDER THE UNSCRS**

[...]

140. UNSCR 1890, like other resolutions before and after it, continued the authorisation to “the Member States participating in [ISAF] to take all necessary measures to fulfil its mandate”

[...]

142. It was the submission of the Secretary of State that the UNSCR [...] provided [...] a power to detain for the purposes of fulfilling the mission entrusted to HM armed forces [...].

[...]

146. We agree [...] that the terms of the UNSCR were plainly wide enough to authorise armed forces operating under ISAF to detain those who posed a threat to ISAF fulfilling its mandate. [...]

[...]

152. [...] [I]n accordance with ISAF policy there was authority under the UNSCR to detain a person for up to 96 hours before release or hand over to the Afghan authorities [...].

153. However, the policy put in place by HM armed forces [...] went further than this. [...]

[...]

156. [...] As the authority under the UNSCR was granted to ISAF, any extension of periods of detention beyond that had to be authorised by ISAF.

[...]

162. 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.

163. If therefore we had concluded that the UK policy for detention (under which SM was detained) was authorised under UNSCR 1890 of 2009 (which we have not), then this would have provided a ground which was compatible with Article 5, provided the procedural safeguards in relation to detention and its review were also compatible. [...]

### **(3) POWER UNDER INTERNATIONAL HUMANITARIAN LAW**

#### **(a) Introduction**

[...]

166. There are three stages to the analysis of the Secretary of State's defence to SM's claim based on his contention that there was power or authority to detain under international humanitarian law. The first and second are to consider whether international humanitarian law conferred power or authority on HM armed forces to detain him, and, if it did, on what grounds. These questions are closely linked to the third stage of the analysis, the procedural safeguards required by international human rights law in order for detention to be lawful [...].

## **(b) Overview of the positions of the parties on international humanitarian law**

### *(i) International armed conflict and non-international armed conflict distinguished*

167. There is a fundamental difference between the parties about international humanitarian law. [...] SM [...] contended and the judge held that legally there was still a binary distinction between the legal rules governing an international armed conflict [...] and those governing a non-international armed conflict [...].

168. The Secretary of State contended that the legal position now reflected a more complex factual position. [...]

169. At the material times for these proceedings, the conflict in Afghanistan involved multinational armed forces fighting alongside the forces of the Afghan host State in its territory and with its consent against organised armed groups of an international nature. [...].

### *(ii) A third classification: an internationalised non-international armed conflict*

170. The Secretary of State argued that the features of the conflict summarised above meant that the conflict might, to this extent, be considered as "internationalised", and that this affected the legal regime governing it.

[...]

173. The conflict in Afghanistan was clearly not a "traditional" non-international armed conflict. The question is whether the typology of non-international armed conflicts which distinguished "traditional" non-international armed conflicts which were purely internal from those which were "internationalised" is purely descriptive or whether the identification of a non-international armed conflict as "internationalised" affects the legal rules governing it. [...]

### *(iii) The Secretary of State's case*

174. The Secretary of State's case was that it was clear from the purposes of international humanitarian law and the structure and terms of Common Article 3 and APII that power to detain for reasons related to the conflict or for imperative reasons of security was necessarily implicit in situations to which those provisions applied. [...] His alternative case was that such a power was established [...] as a matter of customary

international law. [...]

*(iv) The claimants' case*

175. At the core of the position of the claimants was the proposition that Common Article 3 and APII described minimum standards of treatment for those who were in fact detained in “an armed conflict not of an international character” [...]. They contended that the question whether such *de facto* detention was authorised by law depended not on international humanitarian law, but on either domestic law or the provisions of the relevant UNSCR. [...] The judge accepted that argument (see [243] to [244] and [251]) but also gave other reasons for his conclusion that Common Article 3 and APII did not confer a legal power to detain (see [242], [245] to [250]) [...].

[...]

177. Our starting point is to make four observations about the background which suggest that the approach of the judge is correct and four observations which favour the Secretary of State's critique of his judgment.

**(c) Considerations supporting the judge's conclusions**

*(i) The omission from the Geneva Conventions of a power to detain in a non-international armed conflict*

178. The first of the observations supporting the approach of the judge is that the original ICRC draft of the Geneva Conventions which provided for the application of the Conventions in their entirety to non-international armed conflicts was rejected: see the ICRC's 1952 *Commentary on the 1949 Geneva Conventions*, edited by Pictet, then Director for General Affairs of the ICRC, at pg 48. One of the reasons why the States subscribing to what became Common Article 3 and APII did not make provision for a power to detain in a non-international armed conflict was that to do so would have enabled insurgents to claim that the principles of equality, equivalence and reciprocity [...] meant that they would also be entitled to detain captured members of the government's army.

[...]

180. International humanitarian law regulates the conduct of both States and insurgents during a non-international armed conflict. Regulation is not the same as authorisation. It does not follow from the fact that detention and internment by insurgents is regulated under international humanitarian law that such behaviour is authorised. Equally, it does not follow from the fact that Common Article 3 and APII regulate detention and internment by government forces, that they authorise such detention and internment.

[...]

*(ii) The role of domestic law in a non-international armed conflict*

182. Secondly, [...] if a power to detain is implied in a purely internal conflict, the government involved might be entitled (or claim to be entitled) in international law to detain even where it had no power to do so under its

own domestic law. [...]

*(iii) Academic commentaries*

183. Thirdly, the dominant approach in the international humanitarian law literature put before us [...] is that power to detain in a non-international armed conflict is to be determined by the domestic law of the place at which detention took place or of the detaining power. Alternatively, it can be found in an appropriately drafted UNSCR. Moreover, the rules of international humanitarian law are principally prohibitory rather than facilitative. This is seen in the approach in *Customary International Humanitarian Law* (2005) by Henckaerts and Doswald-Beck undertaken for the ICRC (*Customary International Humanitarian Law* (2005)).

*(iv) The UK Joint Service Manual*

184. Fourthly, [...] support for the judge's approach can be found in the 2004 edition of the United Kingdom's *Joint Service Manual of the Law of Armed Conflict* [...].

[...]

186. Significantly, the *Manual* also states (see its commentary on AP II at §50.40.2) that internal armed conflicts are "principally governed by domestic law and because of this will inevitably lead to an increase in detention and other restrictions being imposed by that law for security reasons relating to the conflict". [...] [T]he *Manual* proceeds on the basis that authority for detention is principally to be found in national law.

[...]

**(d) Considerations supporting the Secretary of State's submissions**

*(i) Convergence of legal regimes in respect of international armed conflicts and non-international armed conflicts*

188. The first of the considerations which favour the Secretary of State's critique of the judgment below is that it is broadly accepted that most modern conflicts are non-international armed conflicts, and that there has been a convergence of the regimes governing international armed conflicts and non-international armed conflicts by extending the protection formerly only available in an international armed conflict to individuals involved in a non-international armed conflict. The proliferation of "internationalised" non-international armed conflicts [...] has led some to state that [...] the legal regime governing it differs from that in a purely internal armed conflict [...].

*(ii) The inapplicability of the domestic law of the troop contributing State*

189. Secondly, where the armed forces in question are operating outside their own State, their own domestic law may be inapplicable because it does not have extra-territorial effect. Moreover, where it has, or purports to have, such effect, the principles of sovereignty and non-intervention will prevent action without the host

State's consent. [...]

*(iii) The fragmentation of legal regimes*

190. Thirdly, it is also suggested that, if the powers of States in an internationalised non-international armed conflict are determined by the domestic law of the State of the armed forces in question, they could vary dramatically from one conflict to another. In the case of an internationalised non-international armed conflict where there are forces from several States in the host State, they could also depend on which State's forces in fact detain a person [...].

[...]

*(iv) The logic of international humanitarian law*

193. Fourthly, if international humanitarian law is limited to or principally about prohibitions, it remains necessary to explain why the rules (for example, set out in *Customary International Humanitarian Law* (2005)) distinguish between the positions of combatants and civilians, and delineate who is entitled to be protected from lethal force and military operations.

**(e) The overarching question**

194. In the light of those submissions and considerations, we turn to the question whether at the material time international humanitarian law authorised or conferred the power of detention in the case of an "internationalised" non-international armed conflict. [...]

**(f) Is it necessary to show a positive power to detain?**

195. We first consider the legal position on a power to detain, if international humanitarian law does not positively prohibit detention in a non-international armed conflict.

196. Rule 99 of *Customary International Humanitarian Law* (2005) states only that "arbitrary deprivation of liberty is prohibited" (emphasis added). Does international humanitarian law therefore "allow for", "permit" or "licence" non-arbitrary detention? This would only be so if the absence of prohibition is sufficient to constitute legal authority.

197. There is support for the sufficiency of an "absence of prohibition" in the judgment of the Permanent Court of International Justice in *The Lotus* (1927) PCIJ Ser A No.10, 16, 19, a case about jurisdiction. [...]

The "absence of prohibition equals authority" approach has, however, been much criticised and is considered to be outdated [...]. Sir Robert Jennings and Sir Arthur Watts tellingly sum up the modern view [...] in their 9<sup>th</sup> edition of *Oppenheim's International Law* (1992), as follows:

"... Although there are extensive areas in which international law accords to states a large degree of freedom

of action (for example in matters of domestic jurisdiction), it is important that the freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community.” (at 12)

We accept that this is an accurate view of modern international law.

[...]

## **(h) Implicit authority to detain from treaties: Common Article 3 and AP II**

### *(i) Implications from the language*

200. The first limb of the Secretary of State’s argument was that Common Article 3 and APII implicitly authorised detention in a non-international armed conflict, and were thus the source of the power to detain. The Secretary of State relied on the express references in Common Article 3 to “detention” and in APII, Articles 2, 4(1), 5(1) and (2), and 6 to those “deprived of their liberty or whose liberty has been restricted for reasons related to the conflict” and to “detention” and “internment”. He submitted that the premise of those references and the existence of rules in Common Article 3 and APII for the protection of those detained in a non-international armed conflict was that there was an inherent power to detain provided that was done in accordance with those rules. [...] His argument has the support of a number of commentators [...].

[...]

202. The ICRC reiterated its view in *Internment in Armed Conflict*, an “Opinion Paper” published in November 2014, [...]. [...] We observe that, in this statement, the ICRC derives a positive power to intern from an absence of prohibition.

203. [...] [T]he institutional views of the ICRC on the requirements of international humanitarian law and the interpretation of the Geneva Conventions command considerable respect. It should, however, be noted that, despite the ICRC’s view that there is at present power to detain and intern in a non-international armed conflict, it also stated in 2014 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”.

204. It envisages an international agreement between international forces and the host State, the adoption of the host State’s domestic law, or provisions for grounds and process in the standard operating procedures of the international forces. [...]

### *(iii) The a fortiori implication from the nature and structure of international humanitarian law: the Catch-22 issue*

205. The Secretary of State’s response to the argument that implying a power to detain is inconsistent with



the express decision [...] to make no provision for detention in non-international armed conflicts [...] was to submit that some implication must be possible because it was clear that there was power to use lethal force against armed groups. For the first stage of this submission (namely that there was power to attack and use lethal force on insurgents who participate in the conflict) the Secretary of State relied on the ICRC's *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009). This states:

“Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of international humanitarian law. ...” (at 12)

[...]

207. The next stage of the Secretary of State's submission was that, if there was an implied power or licence to kill, that “logically encompassed operational detention” and *a fortiori* must include an implied power or licence to detain. It was said that this reflected the balance required between military necessity and the requirements of humanity that underpin all the rules of international humanitarian law. [...]

[...]

211. The judge rejected the *a fortiori* argument on the ground that it did not go further than justifying the capture of a person who may lawfully be killed. He did so because “as soon as [the person] 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”: at [253], and see also [219] [...]

212. However, neither the judgment nor [...] address the “Catch-22” position [...]. A person may not pose an imminent threat while he is in fact detained. Assume, however, that he will do so immediately on release and that he cannot be transferred safely or lawfully to Afghan control. In this scenario [...] we consider that a person who is detained but who has to be released after such a short time should generally be regarded as posing an imminent threat, albeit one subject to a contingency.

#### (iv) Conclusion

214. The *a fortiori* argument based on the lawfulness of the use of lethal force is undoubtedly a powerful one but for a number of reasons, we consider that it is insufficient to provide [...] a treaty basis for authority to detain.

215. First, it is not suggested that such a power should be implied in the case of a purely internal armed conflict i.e. a “traditional” non-international armed conflict. Indeed, there are good reasons for not doing so (see paragraphs 178 to 182 above) [...].

216. Secondly, the background of refusal by the States which are signatories to Common Article 3 and APII to include express words to this effect [...] show an intention to reject the expansion of the law in the treaties

governing international armed conflicts to all types of non-international armed conflicts.

217. Thirdly, finding a treaty basis for such authority or power to detain has to overcome the fact [...] that it is not possible to deduce the scope of the power, i.e. the grounds of detention, and the procedural safeguards from Common Article 3 and APII themselves. The proposition that the provisions in Geneva III and Geneva IV can be applied by analogy to do this is highly controversial. [...]

218. The proponents of a power to detain in a non-international armed conflict recognise these problems: see, for example, the position of the ICRC [...] at paragraphs 203 to 204 above [...]. They seek to find the scope of the power and the safeguards in other rules of international humanitarian law, including international human rights law. There is, however, a certain artificiality in basing the authority to detain in a non-international armed conflict on Common Article 3 and APII, but basing its scope and the safeguards on a different legal source. Finally, as the judge stated (at [244]), the purpose of Common Article 3 and APII is to protect individuals rather than to establish a legal framework [...].

219. In conclusion, it is not possible to base any implication of a power to detain in an internationalised non-international armed conflict purely on treaty. If Common Article 3 and APII are not in themselves the source of such a power, it is necessary to consider whether the source can be found in customary international law.

#### **(i) Authority to detain from customary international law**

##### *(i) The requirements for the formation of customary international law*

220. The two requirements for the establishment of a rule of customary international law are: general practice by States, and the conviction that such practice reflects or amounts to law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessitatis*) [...]. In the *North Sea Continental Shelf* cases [...] the ICJ stated (at [74]) that “State practice ... should ... [be] both extensive and virtually uniform ...” and “that the practice must “... have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

221. [...] There is also some suggestion [...] that the requirements of practice may not be as high or as stringent when it comes to the emergence of a principle or a rule reflecting the laws of humanity, i.e. international humanitarian law.

##### *(ii) State practice and opinio juris*

222. The Secretary of State’s argument about State practice proceeded as follows. States involved in armed conflict, and particularly internationalised non-international armed conflicts do detain, and have done so for many years. [...] States have detained individuals in such circumstances without derogating from international human rights conventions such as the ECHR. [...]

##### *(iii) The Copenhagen principles*

223. The Secretary of State’s submissions on State practice next placed significant weight on the principles

and guidelines [...] in *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (the Copenhagen Principles). [...]

224. The Copenhagen Principles apply to those who (see Copenhagen Principle 1) have been “deprived of their liberty for reasons related to an international military operation”. [...] The Secretary of State relied in particular on §III of the Preamble which states that the participants “recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations”, a term which (see §IX) referred to non-international armed conflicts. [...]

225. Principle 16 states that nothing in the Copenhagen Principles “affects the applicability of international law to international military operations conducted by the States or international organisations [...] or the applicability of international or national law to non-State actors”.

226. The judge considered that this paragraph was fatal to any attempt to rely on the Principles as evidence of customary international law. He was reinforced in that by the official commentary on Principle 16, which states *inter alia*:

“[T]his savings clause... recognises that the Copenhagen Process Principles and Guidelines is not a text of a legally binding nature and thus does not create new obligations or commitments. Furthermore, the Copenhagen Process Principles and Guidelines cannot constitute a legal basis for detention [...]”

227. [...] The consequence of Principle 16 is that, if a customary international law basis is to be found for detention of SM, it must be found independently of and prior to the agreement of the Copenhagen Principles. [...]

*(iv) Post-hearing material about State practice*

228. Until we received the Secretary of State’s note on outstanding issues dated 31 March 2015, there was no evidence of such reliance before us. The Secretary of State’s post-hearing note on outstanding issues [...] gave examples relating to three other “internationalised” non-international armed conflicts; those in Kosovo, Somalia, and Bosnia, and the position of other members of ISAF in Afghanistan. [...]

229. We have concluded that the examples from Kosovo, Somalia and Bosnia are not of such State practice. [...]

230. As to the practices of Australia, Canada, the Netherlands and the United States of America in Afghanistan, [...] save for the case of the Netherlands, the practice relied on does not provide unequivocal support for an international humanitarian law basis for authority to detain in a non-international armed conflict. [...]

[...]

*(v) Academic commentaries*

235. Turning from State practice to commentary, *Customary International Humanitarian Law* (2005) [...] states (Introduction at xxxv) [...] that the study provides evidence “that many rules of customary international law apply in both international and non-international armed conflicts, and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts”. [...]  
[...]

*(vi) The a fortiori argument in the context of customary international law*

237. [...] The argument was that the principle of distinction means that States are authorised to target non-State actors participating in a non-international armed conflict [...]. The balance required between military necessity and the requirements of humanity that underpin international humanitarian law meant that there was authority to detain in a non-international armed conflict. [...]

238. Does this mean there is general recognition by States of a rule of law conferring a power to detain for security reasons in a non-international armed conflict? [...] The ICRC considers that there is such a rule. So do a number of commentators, in particular commentators [...] who are or have been legal advisers to the ICRC.

[...]

241. Others take the view that there is no such rule. The team instructed on behalf of SM has produced a table summarising the views in 14 academic contributions which conclude that authorisation to detain in a non-international armed conflict cannot be found in international humanitarian law but must rest elsewhere, principally in domestic law, either of the State which detains or the State on the territory of which the detention occurs [...]. Moreover, *Customary International Humanitarian Law* (2005), [...] does not give any positive support for a power to detain in a non-international armed conflict based on international humanitarian law. All it does is to describe the minimum conditions international humanitarian law requires for those who are detained, reflecting the principally prohibitory nature of international humanitarian law.

*(vii) Conclusion: no authority or power to detain under international humanitarian law can be derived from customary international law*

242. Despite the interplay of treaty-based sources of international humanitarian law and customary international law sources of international humanitarian law, the possibility that the requirements for the emergence of a customary rule of international law may be less stringent in the case of the emergence of a customary rule of international humanitarian law, and the position of the ICRC, we do not consider that in the present state of the development of international humanitarian law it is possible to base authority to detain in a non-international armed conflict on customary international law.

[...]

## **(j) Grounds of detention**

[...]

246. The difficulties in identifying authority under international humanitarian law to detain in an internationalised non-international armed conflict in either treaty or customary international law also apply to the identification of grounds on which such detention is permitted. We agree with the judge's conclusion that in its present stage of development international humanitarian law does not specify grounds on which detention is permitted in a non-international armed conflict: see the judgment at [291], [293], [246], [258], [260] and [261].

[...]

## **(k) Conclusion on authority to detain derived from international humanitarian law**

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

[...]

## **VI. THE PUBLIC LAW CLAIM: PROCEDURAL SAFEGUARDS**

### **(1) Introduction**

254. The judge held that the procedural safeguards required were those in Article 5 ECHR, that they could not be modified to reflect the fact that the detention took place in the course of an internationalised non-international armed conflict, and that they were not met [...].

[...]

### **(5) The contentions of the parties as to the procedural requirements**

*(a) The Secretary of State's case*

274. It was not submitted by the Secretary of State that the judge erred in concluding that the strict requirements of Article 5 [of the ECHR] had not been complied with. [...] The Secretary of State's case was that the judge erred in deciding that the requirements of Article 5 applied without any modification [...].

275. The Secretary of State relied on the decision of the Grand Chamber of the Strasbourg Court in *Hassan v United Kingdom* [...] and on the Copenhagen Principles [...] to show that [...] the procedures required had to be modified to reflect the fact that the circumstances were those of armed conflict in an internationalised non-international armed conflict. [...]

276. It was accepted on behalf of the Secretary of State that "there is room for debate about the full extent of the procedural safeguards that apply" in an internationalised non-international armed conflict. [...] The Secretary of State identified the following four:

- (i) the basic legal principle underpinning any form of detention in armed conflict was humane treatment (see Common Article 3 and Copenhagen Principles 2)
- (ii) the entitlement of detainees to be informed promptly of the reasons for their detention in a language they understand (Copenhagen Principle 7);
- (iii) periodical review by an impartial and objective authority to ensure that if, prior to the cessation of hostilities, there ceased to be imperative reasons of security to detain a person, he or she should be released (Hassan [106] and Copenhagen Principle 12); and
- (iv) detention must end as soon as the reasons justifying it ceased to exist in an individual case, with a backstop that it must cease at the end of hostilities (Hassan [106]).

It was maintained that provision for these was made in the detention policies of both ISAF and the UK [...].

[...]

## **(6) Our conclusions**

281. We concluded at paragraphs 123, 161 and 162 above that the reasoning in *Hassan*, which concerned an international armed conflict, could only be extended to an internationalised non-international armed conflict [...] if international humanitarian law provided a legal basis for detention in such a conflict. [...] we also concluded (at paragraphs 251 to 253 above) that in the current state of development of international humanitarian law, it does not do so. In view of those conclusions, it is not strictly necessary to consider what procedural safeguards international humanitarian law would require in an internationalised non-international armed conflict. [...]

282. However, [...] we think it appropriate to consider whether the irreducible core procedural requirements which the Secretary of State accepted are required to meet the international human rights law requirements recognised by international humanitarian law were in fact met in SM's case. The analysis in this section of our judgment accordingly proceeds on the assumption, contrary to our earlier conclusions, that international humanitarian law does provide authority and a legal basis for detaining in an internationalised non-international armed conflict, and identifies the grounds for detention, either by reasoning by analogy from the position in an international armed conflict and the provisions of the Geneva Conventions, or on the basis of

customary international law. [...]

298. [...] [W]e consider that, [...] the fact that SM was not offered an opportunity to provide input to any of the reviews concerning him means that, even if the Secretary of State's submissions on international humanitarian law providing a basis for detention in a non-international armed conflict are correct, the minimum core legal safeguards required by international humanitarian law and international human rights law would not have been satisfied in his case. Accordingly, even if Article 5 [of the ECHR] had to be modified to reflect the fact that this detention was in the course of a non-international armed conflict, the minimum procedural safeguards required by international law in such a conflict would not have been met.

[...]

## **B. SUPREME COURT JUDGMENT**

### **Supreme Court, Judgment in the case of Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)**

[Source: Hilary Term [2017], UKSC 2, On appeals from: [2014] EWHC 2714 (QB) and [2015] EWCA Civ 843, JUDGMENT, Abd Ali Hameed Al-Waheed (Appellant) v Ministry of Defence (Respondent), Serdar Mohammed (Respondent) v Ministry of Defence (Appellant), 17 January 2017, available at: <https://www.supremecourt.uk/cases/uksc-2014-0219.html> (footnotes omitted)]

### **LORD SUMPTION: (with whom Lady Hale agrees)**

#### **Introduction**

[...]

2. These two appeals arise out of actions for damages brought against the United Kingdom government by detainees, alleging unlawful detention and maltreatment by British forces. They are two of several hundred actions in which similar claims are made. In both cases, the claim is based in part on article 5(1) of the European Convention on Human Rights [ECHR], which provides that no one shall be deprived of his liberty except in six specified cases and in accordance with a procedure prescribed by law. They also rely on article 5(4), which requires that the detainee should be entitled to take proceedings by which the lawfulness of his detention may be tested. The appeals have been heard together with a view to resolving one of the more controversial questions raised by such actions, namely the extent to which article 5 applies to military detention in the territory of a non-Convention state in the course of operations in support of its government pursuant to mandates of the United Nations Security Council.

[...]

5. The Secretary of State formulated eight grounds on which he sought leave to appeal to the Supreme Court in *Serdar Mohammed*. [...] As a result of directions given in the course of the appeals, the sole ground of appeal before us at the opening of the hearing was the Secretary of State's ground 4. In the statement of facts and issues in *Serdar Mohammed*, the parties agreed that ground 4 raised the following issues:

"(1) Whether HM armed forces had legal power to detain SM in excess of 96 hours pursuant to:

(a) the relevant resolutions of the United Nations Security Council; and/or

(b) International Humanitarian Law applicable in a non-international armed conflict.

(2) If so, whether article 5(1) of the ECHR should be read so as to accommodate, as permissible grounds, detention pursuant to such a power to detain under a UN Security Council Resolution and/or International Humanitarian Law."

[...]

6. In the course of the hearing the parties were invited to make written submissions on two further questions arising in SM's appeal about the scope of article 5 [...]. [...] The additional questions [...] were:

"(3) Whether SM's detention was compatible with article 5(1) on the basis that it fell within paragraph (c) of article 5(1) of the Human Rights Convention (detention for the purpose of bringing a suspect before a competent judicial authority) or article 5(1)(f) (detention pending extradition); and

(4) Whether the circumstances of his detention were compatible with article 5(4) of the Human Rights Convention (if necessary, as modified)."

[...]

### **International and Non-International Armed Conflict**

[...]

9. International humanitarian law distinguishes between international and non-international armed conflict.

[...] In theory, it is the difference between an armed conflict of juridical equals and an armed conflict conducted by a lawfully constituted authority against organised rebels or criminals. [...] As Vattel pointed out [...], civil wars break the bonds of society, leaving the parties without a common judge and in the same practical position as two nations.

10. Vattel made this point in support of his argument that once a civil war achieved a level of intensity on a par with an interstate war, the humanitarian customs of war should be observed by both sides. But ever since his day, there has been a tension between the desire of states to civilise the conduct of war by extending humanitarian rules to all armed conflicts, and their desire to treat their internal enemies as rebels and criminals rather than belligerents. International humanitarian law treats the parties to international armed conflicts as juridically equal and their rights and obligations as reciprocal. It proceeds on the basis that in



such a conflict members of the armed forces of a state are reciprocally entitled to combatant immunity. They commit no offence by merely participating in the armed conflict, but only by committing war crimes proscribed by international law. Their detention is authorised on the footing that it is a purely administrative measure with no penal purpose, and must terminate when the armed conflict ends. However, notwithstanding the persistent advocacy of the International Committee of the Red Cross in favour of applying the same rules under both regimes, states have generally been reluctant to accept that a non-international armed conflict can be reciprocal in the same way as international armed conflicts. Their concern is that unless a special regime is devised for such conflicts, the corollary would be a recognition of the juridical equality of the participants and the immunity of non-state actors.

[...]

12. The main distinction between international and non-international armed conflict lies in the more limited provision made for the latter in the main relevant treaties. Although the earliest Geneva Convention was adopted in 1864, no attempt was made to provide by treaty for non-international armed conflicts until the Geneva Conventions of 1949. Article 21 of the Third Geneva Convention of 1949 in terms confers on states a right to detain prisoners of war which they had long enjoyed as a matter of customary international law, and comprehensively regulates the conditions of their detention. Article 78 of the Fourth Geneva Convention confers on an occupying power a right to detain civilians in cases where this is considered “necessary for imperative reasons of security.” But these provisions apply only in international armed conflicts: see common article 2. The International Committee of the Red Cross had proposed that the Conventions of 1949 should apply in their entirety in international and non-international armed conflicts alike. But this proposal was rejected by most states. Instead, it was agreed to confer a more limited measure of protection by common article 3, which unlike the rest of the Conventions applied “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Common article 3 does not in terms confer a right of detention. But it provides for the humane and non-discriminatory treatment of “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause”. It specifically prohibits the practice against such persons of violence, killing, mutilation, cruelty, torture, hostage-taking and outrages against their personal dignity, as well as the infliction of penal sentences upon them otherwise than by the judgment of a “regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.” Further provision for the treatment of prisoners in non-international armed conflicts is made by Protocol II [...].

13. In those circumstances, the existence of a legal right in international law to detain members of opposing armed forces in a non-international armed conflict must depend on (i) customary international law, and/or (ii) the authority of the Security Council of United Nations.

14. [...] [A]lthough the decisions of domestic courts may be evidence of state practice or of a developing legal consensus, they cannot themselves establish or develop a rule of customary international law [...]. [...]

15. [...] [W]hether or not it represents a legal right, detention is inherent in virtually all military operations of a sufficient duration and intensity to qualify as armed conflicts, whether or not they are international. As the International Committee of the Red Cross has [...] observed (Statement, 27 April 2015), “deprivation of liberty

is a reality of war. Whether detention is carried out by states or by non-state armed groups, whether it is imposed on military personnel or on civilians, it is certain to occur in the vast majority of armed conflicts.”

The same view was expressed by the Supreme Court of the United States [...], that a power of detention was implicitly conferred by a statute authorising the use of “all necessary and appropriate force” [...].

[...]

It has been the practice of states to capture and detain members of the opposing armed forces throughout the recorded history of war. That includes its recent history, which has for the most part been a history of non-international armed conflicts. The purpose of any state participating in an armed conflict is to overcome the armed forces of the other side. At any time when the opposing forces are in the field, this necessarily involves disabling them from fighting by killing them or putting them hors de combat. The availability of detention as an option mitigates the lethal character of armed conflict and is fundamental to any attempt to introduce humanitarian principles into the conduct of war. In many cases, the detention of an enemy fighter is a direct alternative to killing him, and may be an obligation, for example where he surrenders or can be physically overpowered. [...]

16. Second, if there is nevertheless an insufficient consensus among states upon the legal right of participants in armed conflicts to detain under customary international law, it is not because of differences about the existence of a right of detention in principle. At their most recent international conference (Geneva, 8-10 December 2015), the constituent associations of the Red Cross and Red Crescent approved a resolution by consensus which recited that states had the power to detain “in all forms of armed conflict” and proposing measures to strengthen the humanitarian protection available to detainees. The lack of international consensus really reflects differences among states about the appropriate limits of the right of detention, the conditions of its exercise and the extent to which special provision should be made for non-state actors. There is no doubt that practice in international and non-international armed conflicts is converging, and it is likely that this will eventually be reflected in *opinio juris*. It is, however, clear from the materials before us that a significant number of states participating in non-international armed conflicts, including the United Kingdom, do not yet regard detention as being authorised in such conflicts by customary international law.

17. Third, if there were a right of detention on whatever legal basis, there are various conditions which might be imposed for its exercise. But if the right were to have any reality, it would at least have to apply in a case where detention was “necessary for imperative reasons of security”, the test which article 78 of the Fourth Geneva Convention (1949) applies to the right of an Occupying Power to detain civilians. This is the narrowest available test, and the one which has been proposed by the International Committee of the Red Cross. On these appeals, the Secretary of State does not contend for anything less.

### **The Security Council Resolutions**

[...]

23. Under article 24 of the United Nations Charter, the Security Council has “primary responsibility for the maintenance of international peace and security”, and under article 25 the member states of the UN have a duty to carry out its decisions in accordance with the Charter. The basis of the Security Council Resolutions in Iraq and Afghanistan was Chapter VII (Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression). This confers extensive powers on the Security Council to deploy force on its own account or call on its members to do so, and imposes on members corresponding duties to support these operations. Measures taken under Chapter VII of the United Nations Charter are a cornerstone of the international legal order. They are taken under a unique scheme of international law whose binding force is now well established. [...]

[...]

24. These considerations are recognised in the jurisprudence of the European Court of Human Rights in the same way as they are by other international courts and by the domestic courts of England. In *Behrami v France*; *Saramati v France*, *Germany and Norway* [...] at paras 148-149, the Strasbourg Court declined to review the compatibility of the acts of French, German and Norwegian troops operating under direct United Nations command. In doing so it drew attention to the significance of the UN's functions in conducting peacekeeping operations or authorising member states to conduct such operations, and to the special legal framework within which these functions were performed.

“148. ... the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force.

149. ... Since operations established by UNSC Resolutions under Chapter 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 UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. [...]”

25. A Security Council Resolution adopted in the exercise of these responsibilities is not itself a treaty, nor is it legislation. But it may constitute an authority binding in international law to do that which would otherwise be illegal in international law. [...] The meaning of a Security Council Resolution is generally sensitive to the context in which it is made. [...]

26. The expression “all necessary measures”, as used in a Security Council Resolution has, however,

acquired a meaning sanctioned by established practice. It authorises the use of the full range of measures open to the United Nations itself for the purpose of maintaining or restoring international peace and security under Chapter VII of the Charter. This will normally involve the use of force under article 42, but subject to the requirement that the measures should be necessary. What is necessary depends primarily on the specific mandate, on the general context and on any conditions or limitations laid down in the resolution.

27. In Gill & Fleck's valuable Handbook of the International Law of Military Operations (2010), at para 25.03, the opinion is expressed that although Security Council Resolutions do not as a rule authorise operational detention in so many words, "a mandate to use 'all necessary means' to achieve the assigned tasks logically encompasses operational detention as one such means, if indeed necessary." A similar approach was adopted by the European Court of Human Rights in *Behrami v France; Saramati v France, Germany and Norway, supra*. In that case, the analysis of the legal responsibility of UN forces proceeded on the basis, accepted by the Court, that Security Council Resolution 1244 (1999), authorising military operations in Kosovo, implicitly authorised detention: see paras 124, 127. There was no express authority to detain. But it was deduced from the authority conferred on troop-contributing nations by article 7 to take "all necessary means" to fulfil certain responsibilities specified in article 9, including supporting the work of the international civil presence. In my opinion, that inference was inevitable, just as it is in relation to the corresponding operations in Iraq and Afghanistan. This point is not dependent on the categorisation of the relevant armed conflict as international or non-international.

28. In my opinion, it is clear that the authorisation given to troop-contributing states in Afghanistan by Resolution 1386 (2001) to use "all necessary measures" included the detention of members of the opposing armed forces when this was required for imperative reasons of security. The nature of the mission, apparent from the context recited in Resolution 1890 (2009), involved operations of two kinds. The first entailed operations ancillary to the ordinary law enforcement processes of the Afghan government, essentially heavy police work. The second entailed armed combat with the forces of an organised insurrection, with a view to defending ISAF and its contingent forces, protecting the civilian population against the continual threat of violence, and creating a secure environment for the reconstruction of the Afghan state and the country generally. The distinction between these two functions broadly corresponds to the distinction made by UK military doctrine between (i) military internment authorised either by the host state's municipal law or by United Nations Security Council Resolutions, and (ii) criminal detention in support of the national police force [...]. In performing functions in the former category they must be authorised to employ methods appropriate to military operations. In short, if detention is "imperative" for reasons of security, it must be "necessary" for the performance of the mission.

29. [...] If a person is a sufficient threat to HM forces or the civilian population to warrant his detention in the first place, he is likely to present a sufficient threat to warrant his continued detention after he has been disarmed. Unless UK forces are in a position to transfer him for detention to the civil authorities for possible prosecution, the only alternative is to release him and allow him to present the same threat to HM forces or the civilian population. This necessarily undermines the mission which constitutes the whole purpose of the army's operations.

30. I conclude that in both Iraq and Afghanistan, the relevant Security Council Resolutions in principle constituted authority in international law for the detention of members of the opposing armed forces

whenever it was required for imperative reasons of security. It was not limited to detention pending the delivery of the detainee to the Afghan authorities. I say that this was the position “in principle”, because that conclusion is subject to (i) [...] the question whether that authority was limited to 96 hours by virtue of the detention policy of ISAF, and (ii) [...] the question whether the authority conferred by the relevant Security Council Resolution [...] was limited by article 5 of the European Convention on Human Rights.

### **The alleged limitation of detention to 96 hours in Afghanistan**

[...]

34. It is clear from the recitals in the successive Resolutions of the Security Council, culminating in Resolution 1890 (2009), that the level of violence increased over time and that the threat to the force and the civilian population from suicide attacks, improvised explosive devices and other extreme methods had become very serious by 2009. The evidence is that Helmand was one of the most difficult provinces. In these circumstances, the United Kingdom government became concerned that the 96 hour limit was unsatisfactory, primarily because in some cases it did not allow long enough for the prisoner to be interrogated with a view to acquiring valuable intelligence which was judged essential for mission accomplishment. [...] For these reasons, the United Kingdom decided in November 2009 to adopt its own detention policy. [...]

The new policy was notified to NATO, which made no objection. The judge found that it was also accepted by ISAF headquarters.

[...]

38. The view of the courts below was, in effect, that the United Kingdom had no power under the Security Council resolutions to adopt its own detention policy so far as that policy purported to authorise detention for longer than was permitted by ISAF’s practice [...]. This was because they considered that the Security Council Resolutions conferred the authority to take all necessary measures on ISAF and not on troop-contributing nations. It followed that although British forces had their own chain of command leading ultimately to ministers in London, compliance with ISAF’s detention policy was a condition of any authority to detain conferred by the Security Council Resolutions. In my opinion they were mistaken about this. The Security Council Resolution has to be interpreted in the light of the realities of forming a multinational force and deploying it in a situation of armed conflict. ISAF is simply the expression used in the Resolutions to describe the multinational force and the central organisation charged with co-ordinating the operations of its national components (“liaison and co-ordination”, to use the judge’s phrase). Resolution 1386 (2001) provides for the creation of that force, but article 3 [...] expressly confers authority to take “all necessary measures” on the member states participating in it.

Both practically and legally, the British government remained responsible for the safety of its forces in Afghanistan and the proper performance of their functions [...]. ISAF was not authorised, nor did it purport to serve as the delegate of the Security Council for the purpose of determining what measures should prove necessary. It follows that the United Kingdom was entitled to adopt its own detention policy, provided that that policy was consistent with the authority conferred by the relevant Security Council Resolutions, ie

provided that it did not purport to authorise detention in circumstances where it was not necessary for imperative reasons of security.

39. For these reasons, I conclude that the authority conferred by the Security Council Resolutions on Afghanistan to detain for imperative reasons of security, was not limited to 96 hours. I would have reached the same conclusion even if I had thought that the power to detain was conferred by the Security Council Resolutions on ISAF, as opposed to the troop-contributing nations. This is because [...] ISAF tacitly accepted the United Kingdom's right to adopt its own detention policy within the limits allowed by the Resolutions.

### **Impact of the European Convention on Human Rights**

[...]

41. [...] In the first place, although it is axiomatic that under a resolution authorising "all necessary measures", the measures must be necessary, ie required for imperative reasons of security, military operations will in the nature of things interfere with rights such as the right to life, liberty and property. Secondly, most if not all schemes of human rights protection assume a state of peace and basic standards of public order. This is particularly true of provisions protecting liberty, which are generally directed to penal and police procedures. They assume not just minimum levels of public order, but a judiciary with effective criminal jurisdiction and a hierarchy of state officials with a chain of responsibility. The rights which they protect cannot be as absolute in a war zone in the midst of a civil war, where none of these conditions necessarily obtains. Thirdly, Security Council Resolutions such as those authorising peacekeeping operations in Iraq and Afghanistan are addressed to every country in the world. They must be taken to mean the same thing everywhere. This means that they cannot be construed by reference to any particular national or regional code of human rights protection, such as the European Convention on Human Rights. The United Kingdom is a member of the Council of Europe and a party to the European Convention, but about 50 countries participated in ISAF many of which were not.

42. These considerations are particularly important when it comes to article 5 of the European Convention, which is unique among international codes of human rights protection in containing an exhaustive list of six grounds on which the law may authorise a deprivation of liberty. No other major international human rights instrument has this feature. [...]

43. When the Security Council calls upon member states of the United Nations to participate in an armed conflict, the relevant source of human rights protection as far as the Security Council is concerned is [...] the body of principle which applies as a matter of international law in armed conflicts. The laws of armed conflict are *lex specialis* in relation to rules laying down peace-time norms upon the same subjects. [...]

44. [...] [T]he Resolutions served the same function in a non-international armed conflict as the authority to detain under article 21 of the Third Geneva Convention does in an international armed conflict. It conferred an authority in international law to detain in circumstances where this was necessary for imperative reasons of security.

[...]

58. The reference to articles 43 and 78 of the Fourth Geneva Convention is of some importance. Leaving aside common article 3, the Fourth Geneva Convention is concerned with the treatment of “protected persons” (essentially civilian non-combatants) who in the course of an international armed conflict “find themselves” in the hands of a belligerent or occupying power of which they are not nationals.

The Convention authorises the internment of aliens found in the territory of a party to the conflict (article 42) and of protected persons generally in an occupied territory (article 78). The analogy between those situations and the present one is that internment is authorised under article 42 “only if the security of the Detaining Power makes it absolutely necessary” and under article 78 only for “imperative reasons of security”. The difference of phraseology reflects the fact that internment in an occupied territory may be necessary for the security of those interned. There is no substantial difference in the test of necessity as between the two situations. This contrasts with the position relating to prisoners of war under the Third Geneva Convention, where it is enough to justify their detention that they belong to a hostile organised armed force or a civilian service ancillary to such a force. Since the factual basis of internment is more readily disputable under Fourth Convention, article 43 confers on those interned under article 42 a right to have their internment “reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.” If continued detention is authorised, the court or administrative board must review the case at least twice a year to determine whether detention is still justified. Article 78 confers similar rights on persons interned under that article. In either case, article 132 provides that an internee shall be released “as soon as the reasons which necessitated his internment no longer exist.” With the possible exception of article 5 of the Third Geneva Convention (which provides for a “competent tribunal” to determine disputed claims to prisoner of war status), articles 43 and 78 of the Fourth Geneva Conventions are the only provisions of the Geneva Conventions which confer rights on detainees that can in any sense be said to correspond to those conferred by article 5 of the European Convention on Human Rights.

[...]

66. The claimants argue that the Grand Chamber [in *Hassan*] could not have envisaged that its reasoning would be applied to non-international armed conflicts because the procedural safeguards derived from international humanitarian law, which they regarded as an acceptable substitute for the protection of article 5, were available only to those detained in the course of an international armed conflict. I recognise the force of this argument, but I think that it is mistaken. It is true that with the exception of common article 3, the Third and Fourth Geneva Conventions apply only in international armed conflicts. The duty of review in articles 43 and 78 of the Fourth Convention [...] does not apply to those detained in the course of a non-international armed conflict. But it should be noted that it does not apply to most of those detained in an international armed conflict either. It applies only to those detainees who are “protected persons” within the meaning of article 4 of the Fourth Convention. [...] The persons thus excluded from the ambit of articles 43 and 78 of the Fourth Convention include not only the armed forces and civilian ancillary services of a belligerent state, but also other persons participating in an international armed conflict as members of organised and identifiable resistance movements or militias, or as persons who on the approach of the enemy take up arms spontaneously: see article 4 of the Third Geneva Convention. The Third Convention has no equivalent provision for review of the detention of persons in these categories. [...] I think it unlikely that [the Grand

Chamber in *Hassan*] [...] intended that article 5 [of the ECHR] should apply without modification to prisoners of war taken in an international armed conflict, simply because no review procedure was available to them under the Geneva Conventions. It is in my opinion clear that they regarded the duty of review imposed by articles 43 and 78 of the Fourth Convention as representing a model minimum standard of review required to prevent the detention from being treated as arbitrary. They were adopting that standard not just for cases to which those articles directly applied, but generally.

67. Given that the Security Council Resolutions themselves contain no procedural safeguards, it is incumbent on Convention states, if they are to comply with article 5, to specify the conditions on which their armed forces may detain people in the course of an armed conflict and to make adequate means available to detainees to challenge the lawfulness of their detention under their own law. There is no reason why a Convention state should not comply with its Convention obligations by adopting a standard at least equivalent to articles 43 and 78 of the Fourth Geneva Convention, as those participating in armed conflicts under the auspices of the United Nations commonly do. Provided that the standard thus adopted is prescribed by law and not simply a matter of discretion, I cannot think that it matters to which category the armed conflict in question belongs as a matter of international humanitarian law. [...]

68. I conclude that *Hassan v United Kingdom* is authority for three propositions which are central to the resolution of these appeals:

(1) [...] [I]nternational law may provide a sufficient legal basis for military detention for the purposes of article 5, which requires that any detention should be lawful. [...] The particular source of the international law right to detain which was relevant in *Hassan* was international humanitarian law, specifically the Geneva Conventions. But I see no reason to regard the position as any different in a case where the source of the international law right to detain is a resolution of the UN Security Council under powers conferred by the UN Charter. [...]

(2) *Hassan* does not add a notional seventh ground of permitted detention to those listed at (a) to (f) of article 5(1) [...]. Its effect is rather to recognise that sub-paragraphs (a) to (f) cannot necessarily be regarded as exhaustive when the Convention is being applied to such a conflict, because their exhaustive character reflects peacetime conditions. [...]

(3) The procedural provisions of article 5, in particular article 5(4), may fall to be adapted where this is necessary in the special circumstances of armed conflict, provided that minimum standards of protection exist to ensure that detention is not imposed arbitrarily. The minimum standard of protection is a standard equivalent to that imposed by articles 43 and 78 of the Fourth Geneva Convention. This involves an initial review of the appropriateness of detention, followed by regular reviews thereafter, by an impartial body in accordance with a fair procedure. [...]

[...]

#### **Application of ECHR: article 5(1)**

[...]



Detention for imperative reasons of security

[...]

85. [...] So far as the judge rejected the possibility that SM was also being detained for imperative reasons of security, he did so on a false legal premise.

[...]

87. It seems probable that even after ministers had authorised continued detention for intelligence exploitation purposes, it was a precondition for the actual exercise of that authority in the field that detention should be assessed as necessary for imperative reasons of security. [...]

88. Unlike the judge, the Court of Appeal did consider the possibility that imperative reasons of security constituted a concurrent reason for his detention after the expiry of the initial period of 96 hours. But they did so only by reference to the grounds on which further detention was authorised by ministers in London. It is correct that the sole criterion for ministerial authorisation for continued detention beyond 96 hours was the value of the intelligence that the detainee might be in a position to provide. Indeed, that was the reason for the change of policy which led to the adoption of the procedure for ministerial authorisation. It is also correct that British troops had no right, either under SOI J3-9 or under the Security Council Resolutions, to arrest someone solely in order to interrogate them. But it does not follow that they could not interrogate a detainee who was being held for imperative reasons of security. Nor does it follow that continued detention after 96 hours for intelligence exploitation was not also justified by imperative reasons of security.

89. [...] For present purposes, it is enough to say that imperative reasons of security are capable of justifying SM's detention in all three periods.

### **Application of article 5 [of the ECHR]: Procedural safeguards**

[...]

93. [...] [I]n a case like the present one, [...] a power of detention must not only be governed by rules but those rules must not be exercisable on discretionary principles so broad, flexible or obscure as to be beyond effective legal control. The procedure governing military arrest and detention by HM forces in Afghanistan was laid down by SOI J3-9. [...] Its requirements were precise, comprehensive and mandatory. [...] The judge considered that it “defined the conditions for deprivation of liberty with sufficient clarity and precision to meet the requirement of legal certainty.” The Court of Appeal agreed, and so do I.

### **ECHR article 5(3): “brought promptly before a judge or other officer authorised by law”**

[...]

95. It is plain that SM was not brought before a judge or other officer promptly or at all in that period. The question is therefore how far the requirements of article 5(3) can properly be adapted to conditions of armed conflict in a non-Convention state. [...]

96. [...] The United Kingdom was not a governmental authority or an occupying power. It was responsible for SM's arrest and detention, but it did not have and could not have assumed responsibility for the organisation or procedures of the system of criminal justice in Afghanistan, which was a matter for the Afghan state, nor for the conduct of prosecutions, which was a matter for the NDS [Afghan National Security Directorate]. The operations of the British army in Afghanistan did not displace the role of the NDS, which had jurisdiction throughout the country, including those areas in which British troops were operating. It was seized of SM's case at the latest by 4 May 2010, when the third period began. The British authorities regarded themselves as holding SM on their behalf. If there was such a procedure as article 5(3) envisages, it was on the face of it the responsibility of the NDS and not of the British army to operate it.

97. For the same reason, I do not think that the judge can have been right to say that, quite apart from any limit on detention arising from ISAF policy, "any period of detention in excess of four days without bringing the person before a judge is prima facie too long." [...] A prima facie limit of four days takes no account of the truly extraordinary position in which British troops found themselves in having to contain a violent insurgency while dealing with the prosecuting authorities of a country whose legal system had recently been rebuilt and over which they had no control or constitutional responsibility.

[...]

#### **ECHR article 5(4): right to take proceedings to decide the lawfulness of the detention**

99. [...] The gravamen of the procedural objection to SM's detention was that he had no practical possibility of testing its lawfulness while he remained in British custody. There are three avenues by which in theory a detainee might have challenged his detention. The first was an application to the High Court in England for a writ of habeas corpus. The second was an internal challenge under the system of review provided for by SOI J3-9. The third was an application for equivalent relief to the courts of Afghanistan. No one appears to have suggested that the third possibility was available even in theory, and we have no information about it. We are therefore perforce concerned with the first two.

100. The Secretary of State submits that there would be no jurisdiction to grant a writ of habeas corpus in these cases. [...]

101. [...] There is no principle to the effect that the writ is not available where the applicant has been captured in the course of armed conflict, if he disputes the status which is said to make his detention lawful or otherwise challenges its lawfulness. Thus the US Supreme Court has recognised that habeas corpus is available to persons captured in non-international armed conflicts seeking to challenge their designation as enemy combatants: *Hamdi v Rumsfeld* 542 US 507 (2004). The same court has held that *habeas corpus* may issue to a public official whose agents have effective control over the applicant's detention outside the United States: *Boumedienne v Bush* 553 US 73 (2008). In the United Kingdom, this court has gone further

and approved the issue of the writ in a case where the applicant had been lawfully delivered in Iraq by British forces to the United States, and the only element of control over his subsequent detention was an undertaking by the United States to return him on demand: *Rahmatullah v Secretary of State for Defence* (JUSTICE intervening) [2013] 1 AC 614.

102. There was no reason in principle why SM should not have been entitled to apply for habeas corpus while he was detained by British forces in Afghanistan. I have concluded that British forces in Afghanistan were entitled to detain him if detention was and remained necessary for imperative reasons of security. On that footing, the only issue on the review would have been whether the Detention Authority had reasonable grounds for concluding that imperative reasons of security required the detention to continue.

103. The problem about treating the right to apply for habeas corpus as a sufficient compliance with article 5(4) lies not in any legal difficulty, but in the absence of any practical possibility of exercising it. [...] The British authorities did not recognise the existence of a right to challenge military detention. Like other persons detained by British forces under SOI J3-9, SM had no access to legal advice or assistance and no facilities for communicating with his family or making contact with the outside world (except with the Red Cross). It follows that although SM was entitled in point of law to apply for a writ of habeas corpus, the procedures operated by the British authorities prevented that right from being effective. [...]

104. This would not necessarily matter if there was a satisfactory alternative. I turn therefore to the system of internal review, which is the real area of dispute. [...] The essential requirements emphasised by the Grand Chamber [in *Hassan*] were (i) that the detention should be reviewed shortly after it began and at frequent intervals thereafter, and (ii) that it should provide “sufficient guarantees of impartiality and fairness to protect against arbitrariness.” In my opinion, the British procedures satisfied the first criterion but not the second. Even on the footing that a review by a court was impractical, the procedure which existed had two critical failings, both of which were pointed out by the courts below.

105. The first was that it lacked independence. [...]

106. The second failing of the system was that it made no provision for the participation of the detainee. [...]

107. There is no treaty and no consensus specifying what fairness involves as a matter of international humanitarian law. But some basic principles must be regarded as essential to any fair process of adjudication. In the present context, the minimum conditions for fairness were (i) that the internee should be told, so far as possible without compromising secret material, the gist of the facts which are said to make his detention necessary for imperative reasons of security; (ii) that the review procedure should be explained to him; (iii) that he should be allowed sufficient contact with the outside world to be able to obtain evidence of his own; and (iv) that he should be entitled to make representations, preferably in person but if that is impractical then in some other effective manner. It is a more debatable question whether he should be allowed access to legal advice and assistance. In a situation of armed conflict this may not always be possible, at any rate within the required time-scale. But there is no evidence before us to suggest that the restrictions on access to such assistance imposed by the British authorities in Afghanistan were necessary.

[...]

108. The absence of minimal procedural safeguards was unwise as well as legally indefensible, for it rendered the decisions of the Detention Authority more vulnerable than they need have been. [...]

109. I conclude that the United Kingdom was in breach of its obligations under article 5(4) of the Convention.

[...]

### **Conclusion.**

[...]

111. [...]

(1) For the purposes of article 5(1) of the European Convention on Human Rights HM armed forces had legal power to detain SM in excess of 96 hours pursuant to UN Security Council Resolutions 1386 (2001), 1510 (2003) and 1890 (2009) in cases where this was necessary for imperative reasons of security.

(2) ECHR article 5(1) should be read so as to accommodate, as permissible grounds, detention pursuant to that power.

(3) SM's detention in excess of 96 hours was compatible with ECHR article 5(1) to the extent that he was being detained for imperative reasons of security.

(4) SM's detention after 11 April 2010 did not fall within ECHR article 5(1)(f), and his detention between 11 April and 4 May 2010 did not fall within ECHR article 5(1)(c).

(5) The arrangements for SM's detention were not compatible with ECHR article 5(4) in that he did not have any effective means of challenging the lawfulness of his detention.

[...]

### **LORD MANCE:**

[...]

*Security Council Resolutions ("SCRs")*

*(a) Iraq*

[...]

163. [...] I see no basis for treating member states party to the Convention when exercising such power to

detain as being in breach of article 5 unless they derogated from the Convention. [...]

164. [...] [T]he more detailed express terms of article 5(1) may be seen as illustrations of, rather than limitations on, the exercise of the power to detain. This in turn allows scope for or accommodates the operation of wider powers to detain in situations of armed conflict, where provided by general international law or by a specific SCR under Chapter VII. [...]

[...]

#### **Afghanistan - do the SCRs give powers to ISAF alone or to both ISAF and its member states?**

[...]

180. Viewing the SCRs overall, I am unable to read them as authorising member states to act otherwise than as participants in or in collaboration with ISAF. The alternative construction [...] amounts to saying that member states received their own authorisation entitling them each to act quite independently of ISAF and each other. This appears to me ultimately a recipe for confusion and unlikely to have been intended by the Security Council. [...]

[...]

#### **LORD REED: (dissenting) (with whom Lord Kerr agrees)**

[...]

234. There are also some matters on which I have reached a different conclusion, in agreement with the courts below: in particular, whether UN Security Council Resolutions (“SCRs”) 1546 (2004) and 1890 (2009) should be interpreted as authorising detention in circumstances other than those specified in article 5(1)(a) to (f) of the Convention, and in consequence whether HM Forces were entitled to detain [...] Mr Mohammed in such circumstances, pursuant to those SCRs. Having reached that conclusion, I also require to consider whether a right to detain was conferred by international humanitarian law [...]. In relation to that issue, I conclude that no right of detention arose under international humanitarian law. I therefore reach the conclusion that Mr Mohammed’s detention between 11 April and 4 May 2010, being authorised neither by an SCR nor by international humanitarian law, was in violation of article 5(1).

[...]

#### *Detention and the Geneva Conventions*

[...]

253. Whereas articles 4 and 21 of the Third Geneva Convention, and articles 4, 42, 43, 68 and 78 of the Fourth Geneva Convention, confer explicit authority to detain in an international armed conflict, and contain detailed provisions concerning the grounds and procedures governing detention in those circumstances, no

comparable treaty provisions of international humanitarian law apply in relation to non-international armed conflicts. Instead, legal authority for the detention of participants in a civil conflict, and the grounds and procedures governing detention in those circumstances, are normally regulated by the domestic law of the state where the conflict occurs. They may also be regulated for some purposes by the domestic law of the detaining state, if different from the state where the conflict occurs; or by SCRs. [...]

254. This distinction reflects the fact that prisoners of war have committed no offence by their participation in an international armed conflict. They are detained purely as an administrative measure, for the duration of the hostilities. Non-state actors who participate in a non-international armed conflict, on the other hand, commit offences against the law of the country in question when fighting to overthrow its government (as in most, but not all, non-international armed conflicts), and killing or injuring individuals in the course of doing so. They are therefore subject to penal proceedings, including detention pending trial or following conviction.

255. The distinction has long been understood and accepted by the British Government. [...] When the Government wished to impose administrative internment on suspected members of the IRA, instead of dealing with them through the criminal justice system, Parliament enacted legislation in order to enable it to do so. The Ministry of Defence summarised the general position in *The Joint Service Manual of Armed Conflict* (2004 ed), paras 15.6.2-15.6.3:

“Unlike combatants in an international armed conflict, members of dissident armed forces remain liable to prosecution for offences under domestic law. These can include normal acts of combat - for example, a dissident combatant who kills or injures a member of the government forces may be prosecuted for murder or other offences against the person - and even membership of the dissident group. A member of the security forces who kills a dissident or a civilian will also have to justify his actions under domestic law and may be tried before the courts for any offence he may have committed.

A captured member of dissident fighting forces is not legally entitled to prisoner of war status. He may be dealt with according to the law of the state for any offences he may have committed. A member of the security forces who is captured by the dissidents is not entitled to prisoner of war status but any mistreatment of him is likely to amount to an offence against the law of the state.”

It added at para 15.30.3:

“Prisoner of war status does not arise in internal armed conflicts unless the parties to the conflict agree, or decide unilaterally, as a matter of policy, to accord this status to detainees. Otherwise, the treatment of detainees is governed by the domestic law of the country concerned, and human rights treaties binding on that state in time of armed conflict and the basic humanitarian principles mentioned in [common article 3 and Additional Protocol II].”

*Arguments in favour of the view that detention in non-international conflicts is authorised by international humanitarian law*

256. Some commentators [...] argue that common article 3 and Additional Protocol II, in requiring detention in non-international armed conflicts to comply with certain humanitarian standards, impliedly recognise that

detention is authorised by international humanitarian law in such circumstances. They also argue that, since states are undeniably entitled to use lethal force in combating insurgents in non-international armed conflicts, they must also be authorised to use the lesser alternative of detention. It is inherent in the nature of any armed conflict that parties to such a conflict may capture persons who, if at liberty, would pose a threat to their security. There must, it is contended, be an implied authority under international humanitarian law to intern such persons, since otherwise the alternatives would be either to release them or to kill them.

257. A related approach has been adopted by the International Committee of the Red Cross (“ICRC”) in its Opinion Paper, “Internment in Armed Conflict: Basic Rules and Challenges” (2014), where it distinguishes between “traditional” non-international armed conflict, occurring between government armed forces and non-state armed groups, and non-international armed conflict “with an extraterritorial element”, in which “the armed forces of one or more state, or of an international or regional organisation, fight alongside the armed forces of a host state, in its territory, against one or more organised non-state armed groups” (p 7). In a situation of “traditional” non-international armed conflict, the ICRC Opinion Paper acknowledges that domestic law constitutes the legal framework for possible internment whereas, in a situation of non-international armed conflict with an extraterritorial element, the Opinion Paper contends that common article 3 and Additional Protocol II, and also customary international humanitarian law, reflected in those instruments, contain an inherent legal basis to intern (pp 7-8).

#### *Arguments against that view*

[...]

#### *Textual arguments*

260. First, whereas articles 4 and 21 of the Third Geneva Convention (concerning prisoners of war), and articles 4, 42, 68 and 78 of the Fourth Geneva Convention (concerning civilians) confer express authority to detain specified categories of person on specified grounds in situations of international armed conflict, the Conventions and their Additional Protocols contain no provisions expressly conferring such authority in situations of non-international armed conflict. Applying ordinary principles of interpretation (*expressio unius, exclusio alterius*), it is unlikely in those circumstances that the contracting parties intended to confer such authority by implication.

261. Secondly, the Geneva Conventions and Additional Protocol II are silent as to the grounds of detention and the applicable procedural safeguards in a non-international armed conflict, in contrast to the detailed provision made for international armed conflict. It is argued that it is difficult to suppose that these instruments were intended to confer an authority to detain, or to interpret them as doing so, when they contain no indication of the scope of the power supposedly conferred. The ICRC Opinion Paper suggests that these matters can be addressed, in the context of an “extraterritorial” non-international armed conflict, by an ad hoc international agreement between the international forces and the host state, or by the domestic law of the host state (p 8). In that event, however, the legal basis for detention would be the international agreement or domestic law.

#### *Contextual arguments*

262. [...] It is apparent from the *travaux préparatoires* that states regarded it as important to maintain their sovereignty over internal matters. [...]

263. A further concern was to avoid giving the appearance of a legitimate status to those who rebel against their government [...]. [...]

#### *Arguments against inferential reasoning*

264. [...] Provisions requiring that persons interned in a non-international armed conflict should be treated humanely implicitly recognise that detention occurs in fact, but, it is argued, do not imply that it is authorised by law, let alone that it is authorised by international law rather than by the domestic law of the place where the conflict takes place or some other applicable law, still less that it is authorised by those very provisions. Common article 3 and Additional Protocol II, it is argued, are not concerned with the grant of powers to detain: they are simply intended to ensure the humane treatment of all persons who are detained, including those detained by non-state groups, and apply whether their detention is legally justified or not. [...]

[...]

#### *Arguments based on the absence of protection against arbitrary detention*

268. Sixthly, it is argued that the contention that common article 3 and Additional Protocol II authorise detention in non-international armed conflict is difficult to reconcile with the requirement under international law that the deprivation of liberty must be non-arbitrary. [...]

[...]

270. Specifically in relation to security detention in situations of armed conflict, the Human Rights Committee has stated that “security detention *authorised and regulated by and complying with* international humanitarian law in principle is not arbitrary” (General Comment No 35, para 64; emphasis added). In other words, in order for detention for reasons of security not to be arbitrary, on the hypothesis that it is (1) authorised by international humanitarian law, it must also be (2) regulated by international humanitarian law, so that (3) it is possible to determine whether the detention is in compliance with international humanitarian law. These requirements are satisfied in situations of international armed conflict by the provisions of the Third and Fourth Geneva Conventions which were discussed earlier. In non-international armed conflict, on the other hand, it is argued that neither common article 3 nor Additional Protocol II defines who may be detained, on what grounds, in accordance with what procedures, or for how long. In consequence, it is argued, there is no possibility of determining whether detention in non-international armed conflict complies with any such requirements.

#### *Arguments relating to customary international humanitarian law*

[...]



272. So far as state practice is concerned, it is of course true that states involved in non-international armed conflicts have detained persons, but, it is argued, it does not follow that they have done so in reliance on a right to do so under international humanitarian law (rather than the absence of a prohibition of such detention under international humanitarian law, and a right under domestic law, or under an SCR). [...]

273. In addition, it has been pointed out that the ICRC itself accepts that customary international humanitarian law prohibits the arbitrary deprivation of liberty: see ICRC, Customary IHL, rules 87 and 99. That prohibition is said to be a rule applicable in both international and non-international armed conflict [...].

### *Conclusions*

274. [...] My current view, based on the submissions in the present case, is that the arguments against that contention [...] are cumulatively the more persuasive.

275. Customary international humanitarian law is a developing body of law, and it may reach the stage where it confers a right to detain in a non-international armed conflict. The submissions made on behalf of the Ministry of Defence have not, however, persuaded me that it has yet reached that stage. [...]

276. In short, it appears to me that international humanitarian law sets out a detailed regime for detention in international armed conflict [...]. In contrast, subject to compliance with minimum standards of humane treatment, international humanitarian law leaves it to states to determine, usually under domestic law, in what circumstances, and subject to what procedural requirements, persons may be detained in situations of non-international armed conflict. It follows that the Ministry of Defence's argument in the present case that the detention of [...] Mr Mohammed was authorised by conventional or customary international humanitarian law should be rejected.

[...]

### **Application to the facts of Mr Mohammed's case**

351. On the facts of the case, Mr Mohammed's detention by HM Forces between 11 April 2010 (ie after 96 hours) and 4 May 2010 (when he ceased to be held for intelligence purposes) was not in my view compatible with article 5(1), since it was not for any of the purposes listed in sub-paras (a) to (f). In particular, the reason for his detention at that time was not to bring him as a suspect before a competent judicial authority, within the meaning of article 5(1)(c). Nor was he, either then or later, detained pending extradition within the meaning of article 5(1)(f) [...].

352. Even if SCR 1890 were to be construed as going beyond article 5(1)(a) to (f), and as authorising detention when necessary for imperative reasons of security, I would not regard it as authorising Mr Mohammed's detention during this period. Although I accept that detention for imperative reasons for security would not become unauthorised by reason of a concurrent purpose of obtaining intelligence, it appears to me to be clear from the facts found by the judge that the obtaining of intelligence was the only reason why HM

Forces detained Mr Mohammed during the period in question, rather than enquiring of the Afghan authorities whether they wished to have him transferred to their custody. That was not a reason for detention falling within SCR 1890. Nor was Mr Mohammed's detention during this period in accordance with the commitment in SCR 1890 to respect Afghan sovereignty, since it was based on a policy to which the Afghan Government had not agreed.

353. I respectfully disagree with Lord Sumption's conclusion that there remains a question whether Mr Mohammed's detention between 11 April and 4 May 2010 was for imperative reasons of security, which should be determined after trial. The grounds for his initial detention clearly fell within the scope of that phrase, but it seems to me to be clear that this was not the reason why he continued to be detained by HM Forces after 11 April. As the judge observed at para 333 of his judgment, not only was the obtaining of intelligence the sole purpose alleged in the Secretary of State's defence, but there was no other criterion set out in the UK policy which could have been used to approve an extension of Mr Mohammed's detention at that time (the availability of space in Afghan detention facilities not having been investigated). [...]

[...]

## Conclusions

360. [...] In agreement with the judge and the Court of Appeal, I would have dismissed the Secretary of State's appeal in the case of Mr Mohammed [...].

## Discussion

### I. General Questions

1. (*Document A, para. 43*) Who is Mr Serdar Mohammed and why was he detained by the UK armed forces in Afghanistan? How long was he detained before he was transferred to the Afghan authorities?
2. (*Document A, paras 39 – 40*) What was the United Kingdom's detention policy in Afghanistan? Was it different from ISAF's policy? Why?

### II. Classification of the situation

3. (*Document A, paras. 29 – 32*) According to the facts of the case, how would you qualify the conflict in Afghanistan? Is it an IAC or NIAC? Were the ISAF forces occupying Afghanistan?
4. If it is a NIAC, what are the IHL treaty rules that apply? Are these rules applicable to the UK in Afghanistan? If not, are they applicable as customary international law? (GV I-IV, Art. 3; P II, Art. 1)
5. (*Document A, paras. 167 – 173*) What is an "internationalised" non-international armed conflict? Was the conflict in Afghanistan an "internationalised" NIAC? Are the IHL rules that apply to "internationalised" NIACs different from those that apply to "traditional" NIACs?

### III. Liability of the Secretary of State

6. (*Document A, paras 49 – 72; Document B, paras 30, 34 - 38*) Are the actions of the HM armed forces attributable to the UK? Did the United Nations Security Council have effective control over ISAF? If yes,

could the UK still be held responsible for the detention of SM? Did ISAF authorise the UK's detention policy? According to the Supreme Court, was the UK entitled to adopt its own detention policy? Was the authority of UK forces to detain limited to detention pending the delivery of the detainee to the Afghan authorities?

7. (*Document A, paras. 73 – 81*) Can the Secretary of State invoke the immunities of the UN before domestic courts? Does ISAF or do ISAF personnel qualify as experts on mission for the purposes of section 22 of the Convention on the Privileges and Immunities of the United Nations?

#### **IV. Scope of application of the ECHR:**

8. (*Document A, para. 84*) Can the ECHR apply to the actions of the HM armed forces in Afghanistan? Does it apply to all actions of HM armed forces, or only actions in detaining? Does the Secretary of State challenge the conclusion reached by the judge at the court of first instance (Justice Leggatt) that SM was within the jurisdiction of the UK?

#### **V. Relationship between IHL and international human rights law (IHRL)**

9. What is meant by security internment? Is it authorised in IAC and NIAC? Is this a ground for detention under article 5 of the ECHR? If not, do IHL and IHRL conflict on the issue of detention?

10. (*Document A, paras 107 – 124; Document B, paras 41 – 43, 68*)

a. What is the principle of *lex specialis*? On the basis of which arguments can IHL be considered the *lex specialis* applicable in armed conflicts? What are the submissions of the Secretary of State? How does Justice Leggatt reject the Secretary of State's submissions that IHL is the *lex specialis*? Does the *Hassan* judgment change the Court of Appeal's conclusion?

b. What does the Supreme Court argue? What reasoning does Lord Sumption apply to argue that the obligations set forth in the ECHR, in particular the ones arising from article 5, should be interpreted in the light of the existence of an armed conflict?

c. Can, in your opinion, a determination on whether IHL or IHRL can constitute the *lex specialis* be made as a general rule or should it be assessed for each single rule applicable to the particular circumstances of the case? If IHL is considered *lex specialis*, should it be referred to for interpretative purposes, to support the analysis of the relevant IHRL norm in the light of their compatibility with IHL? Or should it be considered as implying a "displacement" of IHRL obligations, qualified by the applicability of IHL to the circumstances of the case?

#### **VI. Lawful authority under Afghan law and the UNSCR**

11. (*Document A, para. 125 – 131*) What are the three sources the Secretary of State submits to give HM forces the power to detain in Afghanistan? Did Afghan law give the UK armed forces authority to detain SM?

12. (*Document A, paras 140 – 163, Document B, paras 23 – 29, 39*) Did UNSC Resolution 1890 give the UK armed forces authority to detain? Can, according to the UK Supreme Court, a UNSC Resolution constitute the legal basis to detain in a NIAC, even when it contains the expression "all necessary means" without further specification? If yes, on what grounds? Did it give them authority to detain SM beyond 96 hours? Do the findings of the Court of Appeal differ from the ones of the Supreme Court?

13. (*Document A, para. 162*) Do you agree with the Court's reasoning that, if detention under the Geneva Conventions in an IAC can constitute a ground for detention compatible with Article 5 ECHR (see *Hassan*), then detention under a UNSC Resolution could also be compatible with Article 5? Can the ECHR be displaced by a UNSC Resolution according to article 103 of the UN Charter? (See ECtHR, *Al-Jedda v. the United Kingdom*, Judgment, 7 July 2011, paras 100 – 109)

14. (*Document B, paras 41 – 43, 68*) How does the Supreme Court assess the interplay between the UNSC Resolution, as a universal tool adopted to ensure respect for international peace and security, and the ECHR, a regional instrument binding only on its State Parties?

## VII. The power to detain under IHL

15. What IHL rules apply in detention in IACs and NIACs? In IAC, does IHL provide rules as to the grounds and procedures under which a person may be detained? What about NIACs? If there are no such rules, does IHL still regulate the treatment of detainees? (GC III, Art. 21 and 118; GC IV, Art. 42, 78, 132 and 133; GC I-IV, Art. 3; P II, Art. 4, 5 and 6)

16. (*Document B, paras. 58 – 66*) Do you agree with the Supreme Court finding that the difference between GC IV, Arts 42 and 78 lays in the fact that “internment in an Occupied Territory may be necessary for the security of those interned”? Why? (GC IV, Art. 42 and 78)

17. (*Document A, paras. 167 – 193, Document B, para. 10 - 12*)

a. What are the positions of the parties on the issue of detention in IHL? What considerations does the Court of Appeal give to support their submissions?

b. How does the Supreme Court assess the main distinction between the legal regime governing detention in IACs and its applicability in NIACs? Why did States not make provision in the Geneva Conventions for authority to detain in NIACs? Does IHL apply equally to States and armed groups in NIACs? (GC III, Art. 21; GC IV, Art. 78; GC I-IV, Art. 3)

18. (*Document A, paras 197 – 204, 214 – 219; Document B, paras 256 – 273*) What are the arguments, as summarized by the Supreme Court’s dissenting Judge Lord Reed, to support the view that detention in NIACs is authorized by IHL? And the arguments contrary to that view? What does Lord Reed conclude on the issue? Is there a need to show a positive power to detain, or does the absence of a prohibition suffice to give authority to detain? Under IHL alone? Under IHRL? Is the power to detain in NIACs implied in the language of GC I-IV, Art. 3 and P II? Which view does the ICRC support? Is the ICRC’s view binding? Why? Why not?

19. (*Document A, paras 205 – 212, 214 – 219; Document B, para. 15*) Are the rules of IHL only prohibitive or do they authorise some forms of behaviour? Is there an authority to kill in NIACs? If yes, does that imply a *fortiori* a power to detain in NIACs? How does the judge of first instance handle such arguments? Does the Court of Appeal agree? (*Document A, para. 212*) What does the statement of the Court of Appeal concerning the Catch-22 issue imply? On what basis does the Court of Appeal set aside the *a fortiori* argument? What is the position of the Supreme Court on the issue? (*Document B, para. 15*) What does the Supreme Court refer to when it argues that “the detention of an enemy fighter [...] may be an obligation”? Under IHL, is there a clear obligation to capture rather than kill upon the belligerents?

20. (*Document A, paras 217 – 218, 242; Document B, para. 17*) If we accept that there is an implied power to detain in treaty rules of NIAC, what grounds and procedures must be respected? Does IHL of NIAC provide such rules? Can we apply the provisions of IHL of IAC by analogy? If yes, which IHL provisions of IAC should apply? Only the provisions of GC IV, or those of GC III? (GC III, Arts 21 and 118; GC IV, Arts 42, 78, 132 and 133)

21. (*Document A, paras 220 – 236; Document B, paras 14 – 16*) In the absence of a power to detain in conventional IHL of NIACs, can such a power be implied in customary international law (CIL)? What are the required elements for a rule of CIL? Are the requirements for IHL rules of CIL different? Can the Copenhagen principles be relied on to establish a customary power to detain in NIAC? Why? Why not? Are there

examples of State practice that prove the existence of such a norm? Does the Supreme Court find that there is a legal basis in CIL for detention in NIAC? Why? Why not?

22. (*Document A, paras 237 – 241*) Does the customary principle of distinction imply *a fortiori* a power to detain for security reasons in NIAC? Does the ICRC and do commentators support this view? How does Court of Appeal handle this argument? (CIHL, Rule 1)

23. (*Document A, paras 189 – 190, 205, 211 – 212*) If there is no power to detain in NIAC under treaty or customary rules of IHL, on what legal basis can a State participating in an “internationalised” NIAC detain? Does the law of the State where the detention occurs apply? Or the domestic law of the State that is detaining? If neither of these legal regimes authorise security detention, must the detaining State release the detainees? What if they still represent a threat to the security of the armed forces? Can they be targeted once they are released?

24. (*Document B, paras 87 – 89, 352 – 353*) Does the Supreme Court consider that the ground of imperative security reasons, justifying detention under the authority of the UNSCR, was met in the case of SM? Why? Can the value of the intelligence information that SM could provide be considered sufficient alone to determine the existence of a reason of “imperative security”? In your opinion? According to Lord Sumption? Does Lord Reed reach a different conclusion?

### **VIII. Procedural safeguards:**

25. (*Document B, paras 58 – 66, 253 – 255*)

a. Which procedural guarantees do civilian internees benefit from under IHL? Are there similar provisions for POWs? Why? Why not? In the opinion of the Supreme Court? (GC IV, Arts 43 and 78)

b. Can a civilian be tried for the mere fact of having participated in hostilities? In both IACs and NIACs? Can combatants in an IAC? And members of an armed group party to a NIAC?

26. (*Document A, paras 254 – 276, 281 – 298*) What procedural safeguards does Article 5 of the ECHR guarantee? Do the Article 5 requirements apply during NIACs, or should they be modified to take into account the existence of armed conflicts? According to the Secretary of State, what procedures apply during NIACs? Do the procedural safeguards identified by the Secretary of State exist in “internationalised” NIACs? Were these procedural safeguards satisfied in SM’s case, according to the Appeals Court?

27. (*Document B, paras. 67 – 68, 95 - 109*) According to the Supreme Court, what should States Parties to the ECHR do, in order to comply with the requirements of Article 5, where the legal basis for the detention is found in a UNSC Resolution? What is, according to the UK Supreme Court, the minimum standard of protection that needs to exist to ensure that the detention is not “arbitrary”? Does the UK Supreme Court find that the procedural requirements of article 5(3) ECHR were respected in SM’s case? Why? Why not? Does the UK Supreme Court find that the right to *habeas corpus* is available in armed conflict situations? On which basis? Was this guarantee available to SM? How does the Supreme Court deal with the practical difficulties of exercising *habeas corpus* in the circumstances of the case? Was there a breach of Article 5(4) ECHR? Why?