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)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Kerr
Lord Wilson
Lord Sumption
Lord Reed
Lord Hughes
Lord Toulson (1-4 Feb 2016)
Lord Hodge (26 Oct 2016)

JUDGMENT GIVEN ON

17 January 2017

Heard on 1, 2, 3 and 4 February 2016 and 26 October 2016

Appellant (Al-Waheed)	*Respondent*
Richard Hermer QC Andrew Clapham Ben Jaffey Alison Pickup Nikolaus Grubeck (Instructed by Leigh Day)	James Eadie QC Derek Sweeting QC Karen Steyn QC James Purnell (Instructed by The Government Legal Department)
Respondent (S Mohammed)	*Appellant*
Richard Hermer QC Andrew Clapham Ben Jaffey Alison Pickup Nikolaus Grubeck Julianne Kerr Morrison (Instructed by Leigh Day)	James Eadie QC Sam Wordsworth QC Karen Steyn QC Julian Blake (Instructed by The Government Legal Department)
	First Interveners Shaheed Fatima QC Paul Luckhurst (Instructed by Public Interest Lawyers)
	Interveners 2-5 (Written submissions only) Jessica Simor QC (Instructed Hogan Lovells International LLP)

Interveners:
(1) Mohammed Qasim, Mohammed Nazim, Abdullah
(2) International Commission of Jurists
(3) Human Rights Watch
(4) Amnesty International
(5) The Open Society Justice Initiative

LORD SUMPTION: (with whom Lady Hale agrees)

Introduction

1. The United Kingdom was an occupying power in Iraq from May 2003, and a mandatory power acting in support of the Iraqi government from June 2004 until her withdrawal in 2011. She was a mandatory power in Afghanistan between December 2001 and her withdrawal early in 2015. In both countries, the United Kingdom's international status depended throughout on successive resolutions of the United Nations Security Council. Substantial numbers of British troops were engaged in both theatres as part of separate multi-national forces, primarily in southern Iraq and in the Afghan province of Helmand. They were required to deal with exceptional levels of violence by organised armed groups. In the course of their operations, prisoners were taken and detained in British military facilities for varying periods of time.

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, 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.

3. Abd Ali Hameed Ali Al-Waheed was captured by HM forces at his wife's home in Basrah on 11 February 2007 during a search. The Secretary of State contends that components for improvised explosive devices (IEDs) and explosive charges and various other weaponry were found on the premises. He was held at a British army detention centre for six and a half weeks. He was then released after an internal review had concluded that a successful prosecution was unlikely, as there was no evidence that he had personally handled the explosives. At a pre-trial review before Leggatt J, it was common ground that so far as Mr Al-Waheed's claim was based on detention in breach of article 5(1) of the Convention, the judge and the Court of Appeal would be bound to dismiss it by the decision of the House of Lords

in *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332. The Appellate Committee had held in that case that article 5(1) was displaced by the United Nations Security Council Resolutions authorising military operations in Iraq. The judge was therefore invited to dismiss the claim under article 5(1) by consent and grant a certificate for a leap-frog appeal directly to the Supreme Court. A limited number of facts have been agreed, but there are no findings.

4. Serdar Mohammed, whom I shall refer to as "SM", was captured by HM forces in Afghanistan on 7 April 2010. The Secretary of State contends that he was captured in the course of a planned operation involving a firefight lasting ten hours in which a number of men were killed or wounded, and that he was seen to flee from the site, discarding a rocket-propelled grenade launcher and ammunition as he went. He was brought into Camp Bastion at Lashkar Gah, which was the joint operating base of the British army in Helmand. Intelligence is said to have identified him shortly afterwards as a senior Taliban commander who had been involved in the large-scale production of IEDs and was believed to have commanded a Taliban training camp in 2009. SM was detained for a period of three and a half months in British military holding facilities until 25 July 2010, when he was transferred to the Afghan authorities. He was subsequently convicted by the Afghan courts for offences relating to the insurgency and sentenced to ten years' imprisonment. In his case, the procedural history is more complicated. Leggatt J directed three preliminary issues to be determined on the assumption that the circumstances of SM's capture and detention, as pleaded in the Secretary of State's defence, were true. One of the preliminary issues concerned the relationship between article 5 of the Convention and the international law governing detention in the course of armed conflict. In the result, the judge held that in Afghanistan HM forces had no power, either under the relevant Security Council Resolutions or under customary international law, to detain prisoners for any longer than was required to hand them over to the Afghan authorities, and then for no more than 96 hours. He also found that they had no greater power under the domestic law of Afghanistan. On that footing, he considered that in detaining SM the United Kingdom was in breach of article 5(1) and (4) of the Convention: see [2014] EWHC 1369 (QB). The Court of Appeal, although differing from some aspects of the judge's reasoning, reached the same conclusion: see [2016] 2 WLR 247. These decisions, and the reasoning behind them, have significant implications for the Ministry of Defence and for British troops deployed to Iraq or Afghanistan and indeed other theatres to which they may be deployed under UN mandates.

5. The Secretary of State formulated eight grounds on which he sought leave to appeal to the Supreme Court in *Serdar Mohammed*. He received permission to appeal, either from the Court of Appeal or from the Supreme Court on six of them, the question of permission for the other two being deferred until the hearing. 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."

In *Al-Waheed*, the parties are agreed that the same issues arise, except that the question is whether HM armed forces had power to detain Mr Al-Waheed at all, there being no separate issue relating to the first 96 hours.

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, which had been argued before Leggatt J and the Court of Appeal. This was because it was considered to be unsatisfactory to examine the Secretary of State's ground 4 without regard to them. The additional questions substantially corresponded to the Secretary of State's grounds 5 and 6. They 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)."

7. These are complex appeals raising distinct issues, which were argued in stages. They are also related to other appeals arising out of military operations in Iraq and Afghanistan which were before the court at the same time. For these reasons the argument has extended over an unusually long period, rather more than a year. The retirement of Lord Toulson in July 2016 meant that he did not sit on the oral argument on the procedural requirements of articles 5(1) and 5(4) of the Convention, and has been concerned only with the other issues. Lord Hodge, who sat for the first time on these appeals in October 2016 has been concerned only with those procedural issues.

International and Non-International Armed Conflict

8. International humanitarian law is the modern name for what used to be called the law of war and is still commonly called the law of armed conflict. It is a body of international law based on treaty and custom, which seeks to limit for humanitarian reasons the effects of armed conflict.

9. International humanitarian law distinguishes between international and non-international armed conflict. An international armed conflict is an armed conflict between states. A non-international armed conflict is an armed conflict between one or more states on the one hand and non-state actors on the other. 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. The distinction is an ancient one. It dates back at least as far as Grotius (*De Jure Belli ac Pacis* I.4, III.6.27), who limited certain belligerent rights to public wars, on the ground that the rights of participants in civil wars were governed by municipal law administered by the municipal judge. But the crude distinction proposed by Grotius was never an adequate tool for dealing with the complex position of non-state actors. As Vattel pointed out a century later (*Droit des Gens*, III.18.293), 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.

11. None the less, it is now accepted that the law of armed conflict cannot be confined to wars waged between states. A non-international armed conflict is an armed conflict for the purposes of international humanitarian law, albeit that it raises more difficult problems of definition and classification than an international armed conflict. The leading modern authorities are the decisions of the International Criminal Tribunal for Yugoslavia, whose jurisdiction depends on the existence of an armed conflict. They identify non-international armed conflicts by reference to their duration, their intensity and the degree of organisation of the non-state actors engaged. In its widely cited decision in *Prosecutor v Duško Tadić* (Jurisdiction of the Tribunal) ICTY Case No IT-94-1-AR72 (2 October 1995), the Tribunal held (para 70) that an armed conflict existed "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state", provided that it exceeds the "intensity requirements applicable to both international and internal armed conflicts". The intensity requirements were considered in greater detail in *Prosecutor v Ramush Haradinaj* ICTY Case No IT-04-84-T (3 April 2008). Indicative factors included (para 49):

> "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict."

In short, the test is whether the operations conducted by non-state actors are characteristic of those conducted by the armed forces of the state, as opposed to its police force. It is common ground that British troops in Afghanistan were engaged in an armed conflict.

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, adopted in 1977 in cases where dissident armed forces or other armed groups control part of the territory of a state so as to enable them "to carry out sustained and concerted military operations and to implement this Protocol": article 1.

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. To establish the existence of a rule of customary law, two things are required. First, there must be a uniform, or virtually uniform practice of states conforming to the proposed rule, reflected in their acts and/or their public statements; and, secondly, the practice must be followed on the footing that it is required as a matter of law (*opinio juris*). It follows that although 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: see *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 AC 270 at para 63 (Lord Hoffmann). Lord Reed has dealt fully in his judgment with the question whether the detention of members of the opposing armed forces is sanctioned by

customary international law in a non-international armed conflict. He concludes that as matters stand it is not, and I am inclined to agree with him about that. But for reasons which will become clear, I regard it as unnecessary to express a concluded view on the point. It is, however, right to make certain observations about it which bear on the construction of the relevant Security Council Resolutions.

15. The first is that, whether 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 recently 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 in holding, in *Hamdi v Rumsfeld* 542 US 507 (2004), at p 10, that a power of detention was implicitly conferred by a statute authorising the use of "all necessary and appropriate force":

> "Detention of individuals falling into the limited category we are considering [the Taliban and Al-Qaeda], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."

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. As the majority of the US Supreme Court observed in *Hamdi*, at p 11, citing the earlier decision in *In re Territo* 156 F 2d 142, 145, (1946)

> "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released."

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

18. It is convenient to start with the position in Iraq.

19. At the time of Mr Al-Waheed's detention, the relevant Security Council Resolution was 1723 (2006). This extended the authority conferred by Resolution 1546 (2004), which had marked the point at which Britain ceased to be an occupying power in Iraq and became a mandatory power acting in support of the newly formed indigenous government of Iraq. Articles 9 and 10 of Resolution 1546 (2004)

reaffirmed the authorisation conferred by earlier resolutions for the multinational force to operate in Iraq, and conferred on it

> "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in para 7 above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities."

The attached letters included a letter of 5 June 2004 from the US Secretary of State, which expressed the willingness of the United States to deploy forces to maintain internal security in Iraq. Their activities, he said

> "include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security …"

20. *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332 arose out of the detention of the applicant by HM forces in Iraq in October 2004. Article 103 of the UN Charter provides that the obligations of members under the Charter should prevail over their obligations under any other international agreement. The main issue on the appeal was whether that meant that the Security Council Resolutions authorising military operations in Iraq displaced article 5 of the European Convention on Human Rights. This depended on whether detention in the course of those operations was an obligation, or merely a power. The House of Lords held that Resolution 1546 both authorised and required the exercise of a power of detention where this was "necessary for imperative reasons of security". Lord Bingham, with whom the rest of the House agreed, gave three reasons for this. The first was that British forces occupying Iraq before Resolution 1546 came into effect had been authorised to intern persons for imperative reasons of security. This was because detention in those circumstances was authorised by the Hague Regulations (1907), and

> "if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person." (para 32)

Resolution 1546 was intended to continue the pre-existing security regime, not to change it. Lord Bingham's second reason was that although the resolution was couched in permissive terms, this merely reflected the fact that the United Nations can invite but not require states to contribute forces for purposes such as the security of Iraq. Applying a purposive approach, and adopting the view of a substantial body of academic writing, he considered the exercise of that authority to be an obligation for those who accede to that invitation. The third reason was that those states which contributed forces became bound by articles 2 and 25 of the UN Charter to carry out the decisions of the Security Council so as to achieve its objectives. They were therefore bound to exercise the power of detention where this was necessary for imperative reasons of security. The decision of the Appellate Committee in *Al-Jedda* was rejected by the European Court of Human Rights when the matter came before them: *Al-Jedda v United Kingdom* (2011) 53 EHRR 23. I shall return to the implications of this decision below. But it was rejected only insofar as it treated the exercise of the power of detention as an obligation. It was not suggested that the exercise of the power of detention was not even authorised by the Security Council Resolution.

21. Turning to the position in Afghanistan, Security Council Resolution 1386 (2001) authorised the establishment of "an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas so that the Afghan Interim Authority … can operate in a secure environment." It called on the International Security Assistance Force ("ISAF") to "work in close consultation with the Afghan Interim Authority in the implementation of the force mandate", and on member states to contribute personnel and resources to ISAF. Article 3 "authorised member states participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate." The mandate was subsequently extended by Resolution 1510 (2003) to the provision of security assistance for reconstruction and humanitarian efforts throughout Afghanistan.

22. At the time of SM's detention, the most recent Security Council Resolution was 1890 (2009), which extended the mandate by twelve months and reaffirmed its earlier resolutions. Resolution 1890 contained a number of recitals which throw light on the nature of ISAF's role as it was then perceived to be and on the dangerous character of its mission. The recitals recognised that the responsibility for providing security and law and order resided with the government of Afghanistan, and that the mandate of ISAF was to "assist the Afghan government to improve the security

situation." What was meant by the "security situation" appears from a subsequent recital expressing the Security Council's strong concern about

> "the security situation in Afghanistan, in particular the increased violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups, criminals and those involved in the narcotics trade, and the increasingly strong links between terrorism activities and illicit drugs, resulting in threats to the local population, including children, national security forces and international military and civilian personnel."

The recitals go on to express concern about the high level of civilian casualties, and

> "the harmful consequences of violent and terrorist activities by the Taliban, Al-Qaida and other extremist groups on the capacity of the Afghan Government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the full enjoyment of their human rights and fundamental freedoms."

They condemned

> "in the strongest terms all attacks, including Improvised Explosive Device (IED) attacks, suicide attacks and abductions, targeting civilians and Afghan and international forces and their deleterious effect on the stabilization, reconstruction and development efforts in Afghanistan, and *condemning* further the use by the Taliban, Al-Qaida and other extremist groups of civilians as human shields."

They recorded the Security Council's support for ISAF's work in improving the security situation in Afghanistan in the face of these threats, and welcomed ISAF's intention

> "to undertake continued enhanced efforts in this regard including the increased focus on protecting the Afghan population as a central element of the mission, and *noting* the importance of conducting continuous reviews of tactics and procedures and after-action reviews and investigations in cooperation with the Afghan Government in cases where

> civilian casualties have occurred and when the Afghan Government finds these joint investigations appropriate."

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. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion [1971] ICJ Rep 16, paras 115-116, the International Court of Justice confirmed that these provisions are binding not only by treaty on members of the United Nations but as a matter of customary international law on the small number of states which are not members. In *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, at para 115, Lord Steyn described them as embodying a "principle of international public policy". At para 114 he summarised their status in the following terms:

> "Not only has the Charter of the United Nations been adhered to by virtually all states, that is 189 states, but even the few remaining non-members, have acquiesced in the principles of the Charter: *American Law Institute, Restatement of the Law, The Foreign Relations of Law of the United States*, 3d (1987), Section 102, comment (h). It is generally accepted that the principles of the United Nations Charter prohibiting the use of force have the character of *jus cogens*, ie is part of peremptory public international law, permitting no derogation: see Restatement, p 28, para 102, comment (k). Security Council Resolutions under Chapter VII of the Charter, and therefore the resolutions in question here, were binding in law on all members including the United Kingdom and Iraq … It would have been contrary to the international obligations of the United Kingdom were its courts to adopt an approach contrary to its obligations under the United Nations Charter and under the relevant Security Council Resolutions."

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 (2007) 45 EHRR SE10 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.
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> 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. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim."

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. Sir Michael Wood, a former Principal Legal Adviser to the Foreign and Commonwealth Office, has made the point that Security Council Resolutions are not usually drafted by the Secretariat, but within the various national missions. For this reason they are not always clear or consistent either in themselves or between one resolution and another: "The Interpretation of Security Council Resolutions", *Max Planck Yearbook of United Nations Law* [1998] 73. The meaning of a Security Council Resolution is generally sensitive to the context in which it is made. In its advisory opinion of June 1971 on the *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 53, para 114, the International Court of Justice observed:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under article 25 [which requires member states to carry out decisions of the Security Council], the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."

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: see Joint Doctrine Publication 1-10 (*Prisoners of War, Internees, Detainees*, April 2006), at para 113. 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 is must be "necessary" for the performance of the mission.

29. Leggatt J accepted this up to a point, but considered that it could authorise detention only for a very short period. His reason was that once a prisoner had been captured and disarmed, he no longer represented an imminent threat to the security of HM forces or the civilian population. His continued detention thereafter could not therefore be justified under the Security Council Resolutions. This seems a surprising conclusion and it was rejected, rightly to my mind, by the Court of Appeal. 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) in the case of SM the question whether that authority was limited to 96 hours by virtue of the detention policy of ISAF, and (ii) in the case of both SM and Mr Al-Waheed, the question whether the authority conferred by the relevant Security Council Resolutions was limited by article 5 of the European Convention on Human Rights.

The alleged limitation of detention to 96 hours in Afghanistan

31. This issue arises from differences between the detention policy applied generally by ISAF and that operated by United Kingdom forces and the forces of certain other troop-contributing nations in their own areas of operation. Both Leggatt J and the Court of Appeal concluded that although detention was in principle authorised by the Security Council Resolutions for imperative reasons of security, in Afghanistan the duration of that detention was limited to 96 hours by ISAF's detention policy. In order to address this question, it is necessary to say something about the relationship between ISAF and the command structure of British forces in Afghanistan.

32. Overall command of ISAF was exercised by its commander in Afghanistan who was himself under the command of NATO at the relevant time. ISAF's detention policy was contained in its Standard Operating Procedures for detention (SOP 362). Paras 4-8 of SOP 362 provided that the only grounds on which a person might be detained were that detention was necessary for ISAF force protection, self-defence of ISAF or its personnel or the accomplishment of the ISAF mission. Detention was limited to 96 hours, after which the person must either be released or transferred to the Afghan authorities. That period could be extended on the specific authority of the ISAF commander or his delegate, or in a case where there were logistical difficulties about effecting his release or transfer within the 96 hour period.

33. Across Afghanistan there was a regional command structure with distinct task forces. Most British troops, including those who detained SM, were deployed in Helmand as part of Task Force Helmand. They operated there under their own national chain of command. British commanders in the field reported up their chain of command to UK Permanent Joint Headquarters, which in turn reported to the Ministry of Defence. The judge found that the conduct of operations in Afghanistan, including detention policy, was regarded as United Kingdom "sovereign business". He described the relationship between the UK Detention Authority and the ISAF chain of command as "one of liaison and coordination only". The British position, summarised in a military assessment report of September 2006, was that the United Kingdom was responsible for complying with its domestic and international legal obligations and that this required that responsibility for detention should rest with British officials. The judge found (para 181) that ISAF headquarters tacitly accepted

this, and that thereafter detention decisions continued to be taken by British officials without involving ISAF. It was essentially for this reason that the judge and the Court of Appeal found that the United Kingdom and not the United Nations was responsible for SM's detention, a conclusion which is no longer challenged.

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. This was unsatisfactory to the main detaining nations (identified as the United States, the United Kingdom, Canada and the Netherlands), but it was considered that agreement to a change would not be obtained from other detaining nations or from non-detaining nations. For these reasons, the United Kingdom decided in November 2009 to adopt its own detention policy. The UK policy was announced in Parliament on 9 November 2009: see Hansard (HL (Written Statements)), 9 November 2009, cols WS 31-32). The minister recorded that under ISAF guidelines, detainees were either transferred to the Afghan authorities within 96 hours for potential prosecution, or released. He said that "in the majority of cases, UK forces will operate in this manner." However, "in the light of the evolving threat to our forces", they would detain for longer periods those prisoners who

> "can yield vital intelligence that would help protect our forces and the local population - potentially saving lives, particularly when detainees are suspected of holding information on the placement of improvised explosive devices.
>
> Given the ongoing threat faced by our forces and the local Afghan population, this information is critical, and in some cases 96 hours will not be long enough to gain that information from the detainees. Indeed, many insurgents are aware of the 96 hours policy and simply say nothing for that entire period. In these circumstances the Government have concluded that Ministers should be able to authorise detention beyond 96 hours, in British detention facilities to which the ICRC has access. Each case will be thoroughly scrutinised against the relevant legal and policy considerations; we will do this only where it is legal to do so and when it is necessary to support the operation and protect our troops."

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

35. The detention policy applied by HM forces in Afghanistan was contained in UK Standard Operating Instructions (SOI) J3-9 (Stop, Search and Detention Operations in the Herrick JOA), issued on the authority of UK Permanent Joint Headquarters. It was originally issued in 2006. At the time of SM's capture, the version in force was Amendment 1, issued on 6 November 2009. This was replaced on 10 April 2010, three days after SM's capture, by Amendment 2, which was issued to forces in the field two days later on 12 April. Since Amendment 2 was in force for substantially the whole of the period when the judge found SM's detention to have been unlawful, I shall refer throughout to this version.

36. SOI J3-9 authorised British troops to "conduct stops, search, detention and questioning procedures in accordance with [Security Council Resolutions] for reasons of force protection, mission accomplishment and self-defence." The introduction sets out in general terms the principles governing detention policy. It provided:

> "6. **Detention Criteria.** UK Forces are authorised to conduct stop, search, detention and question procedures in accordance with Reference A for reasons of Force Protection, Mission Accomplishment and Self-Defence. ISAF authorises detention for up to a maximum of 96 hours following the point of detention …
>
> 7. **Post-detention requirements.** Within 96 hours detainees will in most cases be either handed over to the Afghan Authorities in accordance with [the UK/Afghan Memorandum of Understanding] or released. Detention and evidence-gathering processes must be managed as a capability to ensure that they support the collection of tactical intelligence and assist the Afghan criminal justice system in achieving lawful convictions. In almost all cases, 'Afghan Authorities' in this context refers to the National Directorate of Security (NDS) and it is to the NDS that transfers will normally be made … Detainees should only ever be detained beyond 96 hours in exceptional circumstances as follows:
>
> > a. On medical or logistic grounds, with HQ ISAF authorisation (and ministerial authority where appropriate) …

b. With PJHQ and ministerial authority …"

37. Part I of SOI J3-9 dealt with the initial capture of a detainee. It provided:

> "8. As in the case of stop and search, a person must only be detained if it is deemed necessary to do so. If items found during the search of the individual or any other factors indicate that he may be a threat to mission accomplishment, the call-sign or wider force protection, he should be detained. If items found relate purely to criminal conduct and do not threaten the accomplishment of the mission, there are no grounds for UK FE to detain. In such circumstances the individual should be released and his details passed to the ANP … Force protection must always be the primary concern in such situations.
>
> 9. **Decision to Detain.** UK FE can detain persons only if:
>
> a. The person is a threat to force protection; and/or
>
> b. The person is a threat to mission accomplishment; and/or
>
> c. It is necessary for reasons of self-defence."

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, even in the exceptional circumstances envisaged in SOI J3-9. 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 (quoted above) 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, as the United States Supreme Court has recognised in the case of American forces participating in multinational forces under United Nations auspices: *Munaf v Geren* (2008) 533 US 674. 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, in agreement with Lord Mance and for the same reasons, I consider that the unchallenged evidence, accepted by the judge, shows that 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

40. All international human rights instruments include provisions which potentially affect the conduct of military operations in an armed conflict. Those which protect the rights to life and liberty are the most likely to be relevant. In the European Convention on Human Rights, these rights are protected by articles 2 and 5. Article 5 provides, so far as relevant:

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably

considered necessary to prevent his committing an offence or fleeing after having done so.

…

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

…

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

41. The enforcement of human rights has from its inception been a significant part of the United Nations' mission under its Charter. It is therefore appropriate to construe Security Council Resolutions on the footing that those acting under their authority will respect the human rights of those with whom they deal, so far as that is consistent with the proper performance of the functions entrusted to them. But that qualification is important. 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. In particular it is not a feature of the corresponding provision, article 9, of the International Covenant on Civil and Political Rights. The Covenant, which is an expansion in treaty form of the Universal Declaration of 1948, has been ratified by 167 states to date and may be regarded as the paradigm statement of internationally recognised human rights. Article 9.1 provides:

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

The rest of article 9 is concerned with procedural safeguards. These include provisions for judicial supervision and a right of resort to a court to challenge the detention. No attempt is made to prescribe exhaustively the grounds on which the law may authorise detention, provided that those grounds do not amount to a licence for arbitrary detention. The attempt by the draftsmen of article 5 of the European Convention to codify the exceptions more precisely makes it unusually inflexible if applied according to its literal meaning in a situation of armed conflict. In some circumstances, some of the six grounds may adventitiously accommodate military detention. But as the Strasbourg court recognised in *Hassan v United Kingdom* (2014) 38 BHRC 358, para 97, they are not designed for such a situation and are not well adapted to it.

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 not some particular code of human rights, let alone a national or regional one. It 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. In the case of a non-international armed conflict, this includes Common Article 3 of the Geneva Conventions and, where it applies, Additional Protocol II. In *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, the

International Court of Justice considered the interrelation between international humanitarian law and international human rights law, taking the International Covenant on Civil and Political Rights as the measure of the latter. Article 6 of the International Covenant on Civil and Political Rights provides that no one may be arbitrarily deprived of his life. At para 25 of its advisory opinion, the Court observed that

> "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

Referring to these observations in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, the International Court of Justice said, at para 106:

> "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis,* international humanitarian law."

Cf *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment, [2005] ICJ Rep, 168, para 216. As a study group of the United Nations International Law Commission has observed, "when *lex specialis* is being invoked as an exception to the general law, then what is being suggested is that the special nature of the facts justifies a deviation from what otherwise would

be the ‘normal’ course of action”: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (2006) A/CN.4/L.682. These observations, which were made in the context of article 6 of the International Covenant on Civil and Political Rights, are equally true of the prohibition in article 9 of the Covenant of arbitrary detention or detention otherwise than in accordance with law. Article 9, like article 6, applies in hostilities. But the question what is arbitrary or in accordance with law in an armed conflict cannot be answered in the same way as it would be in peacetime.

44. International humanitarian law does not specifically authorise detention in a non-international armed conflict. But, as I have explained, the relevant Security Council Resolutions did authorise detention, and international humanitarian law regulates its consequences on the assumption that it is an inevitable feature of state practice. In that respect, the 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.

45. The next question is how these considerations can live with the European Convention when troops are contributed to a United Nations multinational force by a member state of the Council of Europe. The European Convention is not easy to apply to military operations outside the national territory of a contracting state. Article 2(2)(c) provides that the right to life is not infringed when it results from necessary action taken to quell an insurrection, but there is no corresponding provision for killing in the course of an international armed conflict. Article 5 of the European Convention, as I have observed, lists the permissible occasions for a deprivation of liberty in terms which take no account of military detention in the course of an armed conflict, whether international or non-international. In the case of an armed conflict on the national territory of the member state concerned, these problems may be resolved by resort to article 15, which permits derogation from (among others) article 2 in respect of deaths resulting from lawful acts of war and from article 5 generally. But derogation under article 15 is permitted only “in time of war or other public emergency threatening the life of the nation”. Like Lord Bingham of Cornhill in *R (Al-Jedda) v Secretary of State for Defence* [2008] AC 332, para 38, I am inclined to think that “the nation” in article 15 means the nation seeking to derogate. It cannot, as Leggatt J suggested, mean Iraq or Afghanistan. It is of course theoretically possible that an armed conflict outside the United Kingdom might threaten the life of the British nation. The fighting in France in 1939-40 could no doubt have been so described. But it is difficult to imagine any circumstances in which this would be true of an armed conflict abroad in which UK armed forces were engaged as part of a peacekeeping force under the auspices of the United Nations.

46. In *Bankovic v Belgium* (2001) 44 EHRR SE5, the European Court of Human Rights rejected an argument that a Convention state's obligation under article 1 to secure to "everyone within their jurisdiction" the rights and freedoms secured by Section I, could apply to those affected by military operations conducted abroad, unless they occurred in the territory of another Convention state or in a non-Convention territory where a Convention state exercised effective governmental control. Two features of the reasoning are particularly significant for present purposes. The first was the Court's view that the rights protected by Section I of the Convention were a total package. It could not be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in question" (para 73). The Convention could not therefore be applied in a non-Convention territory where the Convention state in question was not in a position to apply it as a whole. The second significant feature of the reasoning concerned the relationship between the Convention and international law generally. In *Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR SE10 at para 122, the Court cited the decision in *Bankovic* in support of the broader proposition that

> "the principles underlying the Convention … must … take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine state responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty."

The principle thus stated corresponds to the ordinary principle on which treaties are interpreted, taking into account any relevant rules of international law: see Vienna Convention on the Law of Treaties, article 31(3)(c).

47. In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, the Grand Chamber adopted what was widely regarded as a radically different approach. The Convention was held to apply, so far as relevant, to extra-territorial military operations in any case where the agents of a Convention state exercised control and authority over an individual, even if they did not exercise governmental powers in the place where the relevant operations occurred. The procedural requirements of article 2 were accordingly applied to the deaths of Iraqi citizens in the course of firefights with British troops. The implications of this for the conduct of military operations were apparent from the Grand Chamber's judgment in *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, which was delivered on the same day as *Al-Skeini*. The Strasbourg court, rejecting the prior decision of the House of Lords, held that in the absence of a derogation under article 15 military detention in the course of an armed conflict outside the national territory of a Convention state contravened article 5, because it could not be brought within any of the six permitted occasions for detention in article 5(1). It rejected the submission that under article 103 of the UN Charter, UN member

states had an obligation to give effect to resolutions of the Security Council which prevailed over obligations under the European Convention. This was because the relevant Security Council Resolution left the choice of methods to the multinational force in Iraq. In the absence of sufficiently specific language the Security Council's authorisation to use "all necessary measures" did not therefore create an obligation to detain even if it created a power to do so. The Strasbourg court reached a similar conclusion in two cases arising out of Security Council Resolutions imposing sanctions on specified individuals: *Nada v Switzerland* (2012) 56 EHRR 18, and *Al-Dulimi and Montana Management Inc v Switzerland* (Application No 5809/08) (judgment delivered 21 June 2016). In both cases article 103 of the United Nations Charter was held to be inapplicable because the sanctions resolutions left enough discretion to member states to fall short of an obligation.

48. In equating the application of physical force with the exercise of jurisdiction, the decision of the Strasbourg court in *Al-Skeini* was consistent with the opinion of the United Nations Human Rights Committee, which has treated extraterritorial kidnappings as exercises of state jurisdiction: see *Lopez Burgos v Uruguay* (Case No C-52/79) (1981) 68 ILR 41 and *Lilian Celiberti de Casariego v Uruguay* (Case No C-56/79) (1981) 68 ILR 29. The principle in *Al-Skeini* was also adopted by this court in *Smith v Ministry of Defence* [2014] AC 52, in the admittedly rather different context of the state's duties to its own soldiers. But it goes substantially further than the jurisprudence of the International Court of Justice, which has thus far recognised the extraterritorial application of human rights treaties only in cases where governmental powers are exercised by a state in the course of a military occupation of foreign territory: see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136, para 109; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment, [2005] ICJ Rep 168, para 216. It also gives rise to serious analytical and practical difficulties, when applied to a state's treatment of enemy combatants outside its own territory, because the practical effect is to apply the Convention to any extra-territorial exercise of force. This is not consistent with the essentially regional character of the Convention. It goes well beyond the ordinary concept of extra-territorial jurisdiction in international law, which is generally confined to territory where the state is the governmental authority or occupying power and to enclaves of national jurisdiction such as ships, aircraft, military establishments or diplomatic premises. It thereby requires a Convention state to apply its terms in places where it has no effective administrative control and no legal right to effective administrative control. It brings the Convention into potential conflict with other sources of international law such as the Charter and acts of the United Nations, as well as with the municipal law of the territory in question. It requires the application of the Convention to the conduct of military operations for which it was not designed and is ill-adapted, and in the process cuts across immunities under national law which may be fundamental to the constitutional division of powers, as they arguably are in the United Kingdom. The ambit of article 1 of the Convention is a matter of particular sensitivity to any Convention state. At

the level of international law, by defining the extent of the Contracting Parties' obligation to give effect to its provisions, it identifies the limits of what they have agreed in an altogether more fundamental sense than the following articles which set out the rights protected. At the level of municipal law, the authority of the courts to apply the Convention is a creature of the Human Rights Act 1998. It is ultimately a matter for the courts of the United Kingdom to decide the territorial ambit of the obligation of public authorities under section 6 to act compatibly with the Convention. In doing so it will in accordance with established principle assume that the legislature intended to act consistently with the United Kingdom's treaty obligations. It will not depart from the interpretation of those obligations by the European Court of Human Rights without very good reason. But it cannot in the last resort be bound by the view of the Strasbourg court on that question if it is satisfied that that view goes beyond what Parliament has enacted. As Lord Neuberger and Lord Mance observed of the European Communities Act 1972 in *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324, para 207, there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, whose abrogation Parliament neither contemplated nor authorised.

49. The particular application of the principle in *Al-Skeini* by the Strasbourg court in *Al-Jedda* gives rise to further difficulties of its own. It caused consternation among those concerned with the enforcement of international humanitarian law, because it appeared to undermine its role in armed conflicts as well as the efficacy of international peacekeeping operations. In an influential article in the International Review of the Red Cross ("The European Court of Human Rights' *Al-Jedda* judgment: the oversight of international humanitarian law", (2011) 93 IRRC 837), Jelena Pejic, the Legal Adviser in the Legal Department of the International Committee of the Red Cross and a distinguished authority in this field, criticised the decision on the grounds (i) that it required authority to detain in armed conflicts to be specifically conferred by the language of a Security Council Resolution, when the relevant *lex specialis* in international law was the Geneva Conventions; and (ii) that to make detention an obligation of powers participating in an armed conflict would restrict their discretion in a way which would be operationally counter-productive and "hardly a human-rights-friendly outcome" (pp 847-848). "For the moment", she concluded (p 851),

> "*Al-Jedda* casts a chilling shadow on the current and future lawfulness of detention operations carried out by ECHR states abroad. In addition, their ability to engage with other, non-ECHR, countries in multinational military forces with a detention mandate currently remains, at best, uncertain."

50. It is, however, unnecessary to explore these problems any further in the present case, because of the relatively narrow basis on which *Al-Jedda* was argued

and decided and because of the development of the jurisprudence of the Strasbourg court since it was decided. *Al-Jedda* was presented as a case of conflicting obligations. The argument in the Strasbourg court proceeded, as it had done in the House of Lords, on the footing that there was an irreconcilable conflict between the Security Council Resolutions and article 5 of the European Convention, one of which must be displaced by the other: see para 105. By declining to treat military detention as an obligation, as opposed to a discretionary power, the court was able to treat article 5 as consistent with the United Kingdom's obligations under the UN Charter. But, in the light of later developments, perhaps the most significant feature of the decision in *Al-Jedda* was that it marked a clear (though unacknowledged) departure from the principle stated in *Bankovic* that the Convention could not be "divided and tailored" for particular situations and had to be applied on an all or nothing basis. It thereby opened the possibility of a partial or modified application of the Convention to the extra-territorial acts of Convention states. In particular, some adaptation of the Convention might be required by the international law context in which those acts occurred: see paras 76, 102. This suggests that a more fruitful approach in *Al-Jedda* would have been to reconcile the terms of the Convention with those of the Security Council Resolutions by adapting the former to the situation created by the latter.

51. This was the step which the Grand Chamber ultimately took in *Hassan v United Kingdom* (2014) 38 BHRC 358, a decision which was considered by the Court of Appeal but unfortunately appeared too late to be taken into account by Leggatt J. The facts were that the applicant's brother had been detained by British forces in Iraq for a period of nine days. When it was ascertained that he was a civilian who posed no threat to security, he was released. This happened in 2003, immediately after the invasion of Iraq by coalition forces, at a stage when the armed conflict was international in character. Hassan's detention did not fall within any of the six cases specified in article 5(1) where detention might be permitted, and he had no effective access to a court for the purposes of article 5(4). The Grand Chamber none the less held that there was no violation of article 5. It rejected the argument that article 5 was displaced, as it had in *Al-Jedda*, but held that it fell to be adapted to a context in which international humanitarian law provided the relevant safeguards against abuse. The judgment calls for careful study.

52. The starting point is that on the Court's analysis no question arose of conflicting international obligations or of a Security Council Resolution displacing or overriding article 5 of the European Convention. Cases of conflicting obligations may have to be resolved by deciding which of them is to override the other. But where an obligation is inconsistent with a mere power, there is normally no conflict. The power does not have to be exercised. The United Kingdom relied in *Hassan* on article 21 of the Third Geneva Convention and article 78 of the Fourth Geneva Convention. These provisions did no more than confer a power to detain. No one suggested that they gave rise to an obligation to detain or that they overrode article

5 of the Convention. The question was a different one, namely what did article 5 mean in the context of an armed conflict. Or, as the Grand Chamber put it (para 99), whether the Court should "interpret [the obligations of the United Kingdom under article 5] in the light of powers of detention available to it under international humanitarian law." In particular, the question was whether the six cases of permissible detention listed in article 5(1) were to be interpreted as exhaustive in that context. This involved interpreting it according to the ordinary principles of international law, taking account of state practice in its application and of any relevant rules of international law: see article 31(3)(b) and (c) of the Vienna Convention. In the result, the Grand Chamber held that article 5(1) fell to be modified by treating the six cases as non-exhaustive so as to accommodate the existence of a power of detention in international law. This was a very different issue from the one which had arisen in *Al-Jedda*, as the court pointed out at para 99.

53. The court began (para 97) by drawing attention to the incongruity of the six permitted grounds of detention in article 5(1) of the Convention in a situation of armed conflict:

> "It has long been established that the list of grounds of permissible detention in article 5(1) does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time (see *Lawless v Ireland* [1961] ECHR 332/57 at paras 13 and 14; *Ireland v UK* [1978] ECHR 5310/71 at para 196; *Guzzardi v Italy* [1980] ECHR 7367/76 at para 102; *Jecius v Lithuania* [2000] ECHR 34578/97 at paras 47-52; and *Al-Jedda v UK* (2011) 30 BHRC 637 at para 100). Moreover, the court considers that there are important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in sub-paras (a) to (f). Although article 5(1)(c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence. As regards combatants detained as prisoners of war, since this category of person enjoys combatant privilege, allowing them to participate in hostilities without incurring criminal sanctions, it would not be appropriate for the court to hold that this form of detention falls within the scope of article 5(1)(c)."

54. The court went on to consider whether these inconsistencies could be resolved by resort to the right of derogation under article 15. It did not decide whether derogation was available in respect of armed conflict in Iraq, but concluded that it was unnecessary to do so, because the consistent practice of states was not to derogate from article 5 of the European Convention or article 9 of the International Covenant on Civil and Political Rights in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflict:

> "However, in respect of the criterion set out in article 31(3)(b) of the Vienna Convention …, the court has previously stated that a consistent practice on the part of the high contracting parties, subsequent to their ratification of the convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the convention (see, mutatis mutandis, *Soering v United Kingdom* [1989] ECHR 14038/88 at paras 102-103 and *Al-Saadoon v United Kingdom* [2010] ECHR 61498/08 at para 120)." (para 101)

55. In those circumstances, the solution was to adapt the state's obligations under the European Convention so as to accommodate the *lex specialis* applicable to armed conflict:

> "The court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part … This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The court has already held that article 2 of the Convention should 'be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict' (see *Varnava v Turkey* [GC] … para 185, ECHR 2009), and it considers that these observations apply equally in relation to article 5. Moreover, the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict … In its judgment *Armed Activities on the Territory of the Congo*, the International Court of Justice observed, with reference to its

advisory opinion concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that '[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law'… The court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice." (para 102)

56. The Court's conclusion is set out at paras 104-106. Dealing first with the lawfulness of detention, it observed:

> "104. None the less, and consistently with the case law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence 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. The court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by article 5 of the Convention without the exercise of the power of derogation under article 15 (see para 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that article 5 could be interpreted as permitting the exercise of such broad powers.
>
> 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 para 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of article 5 para 1, which

> is to protect the individual from arbitrariness (see, for example, *Kurt v Turkey* (1998) 5 BHRC 1, para 122; *El-Masri v former Yugoslav Republic of Macedonia* (2012) 34 BHRC 313, para 230; see also *Saadi v Italy* (2008) 24 BHRC 123, paras 67-74, and the cases cited therein)."

57. In para 104 of the judgment the Grand Chamber referred to the "co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict." It is clear that the fact that the relevant *lex specialis* applicable to armed conflict contained its own safeguards against abuse, albeit less extensive than those of article 5 of the Convention, was at least part of the reason why it was legitimate to "accommodate" the six permitted grounds of detention to cater for detention in the course of armed conflict. The rules of international humanitarian law which the court had in mind are identified in para 106 of the judgment:

> "106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, article 5 paras 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment 'shall be subject to periodical review, if possible every six months, by a competent body'. Whilst it might not be practicable in the course of an international armed conflict for the legality of detention to be determined by an independent 'court' in the sense generally required by article 5 para 4 (see, in the latter context, *Reinprecht v Austria*, para 31, ECHR 2005 no 67175/01), none the less, if the contracting state is to comply with its obligations under article 5 para 4 in this context, the 'competent body' should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay."

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.

59. It was argued before us that these observations had no bearing on a non-international armed conflict such as we are concerned with on these appeals, and no bearing on detentions under the authority of a Security Council Resolution as opposed to international humanitarian law. There are occasional passages in the judgment which can be cited in support of these arguments. But I would not accept them, for two main reasons.

60. In the first place, the Grand Chamber in *Hassan* dealt with the point before them by reference to international armed conflicts because that was the character of the Iraqi conflict at the time of the events in question. It followed that the relevant source of the international law power to detain was the Third and Fourth Geneva Conventions. But the essential question was whether article 5 of the European Convention on Human Rights should be interpreted so as to accommodate an international law power of detention which was not among the permissible occasions for detention listed at article 5(1). The question is the same in the present cases, although the source of the international law power to detain is a resolution of the Security Council under Chapter VII of the Charter instead of the Geneva Conventions. I have already pointed out that resolutions under Chapter VII are a

cornerstone of the international legal order. Their status as a source of international law powers of coercion is as significant as the Geneva Conventions, and is just as relevant where the Convention falls to be interpreted in the light of the rules of international law.

61. Secondly, I reject the argument that the decision has no application to non-international armed conflicts because, while there are differences between the two classes of armed conflict, those differences do not, as it seems to me, affect the particular features of the reasoning in *Hassan* which are critical to the resolution of these appeals. The fundamental question in *Hassan* was whether the six permitted grounds listed in article 5(1) of the Convention were to be treated as exhaustive in the context of armed conflict. The Court decided that they were not. This was because the exhaustive list of permitted grounds was designed for peacetime and could not accommodate military detention in the very different circumstances of an armed conflict: para 97. The Grand Chamber referred at para 102 to the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo*, and its advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. At para 104, it drew the same distinction as the International Court of Justice had made between peacetime norms, such as the prohibition of internment by international human rights instruments, and detention in the course of an armed conflict. These points do not depend on the international character of the armed conflict in question. The taking of prisoners of war and the detention of civilians posing a threat to security are inherent in international and non-international armed conflicts alike. The practice of states to detain is common to both and is universal in both contexts. It is right to add that the state practice as regards derogations, to which the Grand Chamber attached some importance, is the same in both international and non-international armed conflicts. No member of the Council of Europe has ever derogated from the European Convention with respect to military action of whatever kind taken abroad: see *Pejic*, *art cit*, at p 850.

62. It is fair to point out that some aspects of the functions of the peacekeeping forces deployed in Iraq and Afghanistan can more readily be accommodated within the six specified grounds in article 5(1) than the internment of prisoners of war in an international armed conflict. In particular, where armed forces are operating in support of the government of the territory, article 5(1)(c) may apply (detention for the purpose of bringing a person before a competent legal authority on suspicion of having committed an offence or to prevent him from committing one). But the enforcement of the criminal law against individual suspects is far from exhausting the functions of the forces deployed in either theatre. As I have pointed out (paras 21-22, 28 above), their mandate under the relevant Security Council Resolutions extended well beyond operating as an auxiliary police force. It required them to engage as combatants in an armed conflict with the forces of a violent, organised

insurrection, with a view to defending itself, protecting the civilian population, and creating a secure environment for the reconstruction of the country.

63. Once one concludes that the six grounds are not necessarily exhaustive in a situation of armed conflict, the next question is whether there is some alternative legal standard to determine what circumstances justify detention and subject to what procedural safeguards. The court in *Hassan* answered this question by seeking to identify the "fundamental purpose" of ECHR article 5(1) and to consider whether that purpose would be sufficiently served by the rules applicable in armed conflict even if the case did not come within the six permitted grounds. They considered that, as with other international human rights instruments, the fundamental purpose of article 5 was to "protect the individual from arbitrariness" (para 105). The essence of arbitrariness is discretion uncontrolled by law. There were two essential conditions for ensuring that detention was not uncontrolled by law. The first was that there should be a legal basis for it. In other words, there must be a legal power to detain and it must not be exercisable on discretionary principles so broad, flexible or obscure as to be beyond legal control. The second was that there must be some sufficient means available to the detainee to challenge the lawfulness of his detention. In these respects article 5 of the European Convention, although a great deal more prescriptive in detail, shares the objective of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights.

64. The relevance of the Geneva Conventions in *Hassan* was that in the context of an international armed conflict, they provided an appropriate alternative legal standard to the literal application of article 5. But it does not follow that in a conflict to which the relevant provisions of the Geneva Conventions do not directly apply, anyone detained by the peacekeeping forces must necessarily be treated as being detained arbitrarily. The present question is whether there is an appropriate legal standard in a non-international armed conflict, notwithstanding that the relevant provisions of the Geneva Conventions do not directly apply.

65. As far as the right of detention itself is concerned, the answer is reasonably straightforward. There is, for the reasons which I have explained, a sufficient legal basis for detention in the Security Council Resolutions. The implicit limitation to occasions where detention is necessary for imperative reasons of security, provides a clear legal standard which is no wider than the purpose of the UN mandate requires. Indeed, it is the same standard as that which applies under articles 42 and 78 of the Fourth Geneva Convention, which the Grand Chamber endorsed in the context of an international armed conflict.

66. The claimants argue that the Grand Chamber 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, to which the Grand Chamber attached importance, 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. They are, as I have observed, mainly civilian non-combatants. The definition of "protected persons" expressly excludes those who are protected by the Third Geneva 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. It is of course possible that the Grand Chamber intended to confine the "accommodation" between international humanitarian law and article 5 of the European Convention on Human Rights strictly to the limited category of detainees entitled to the benefit of articles 43 and 78 of the Fourth Geneva Convention. This would, however, have been a rather arbitrary choice. The Grand Chamber was not concerned to define the ambit of international humanitarian law but to adapt article 5 of the Convention to conditions of armed conflict for which it was not primarily designed. I think it unlikely that they intended that article 5 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. The essential purpose of article 5, as the court observed at para 105 of *Hassan*, is to protect the individual from arbitrariness. This may be achieved even in a state of armed conflict if there are regular reviews providing "sufficient guarantees of impartiality and fair procedure to protect against arbitrariness" (para 106).

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

> (1) The Strasbourg court was concerned in *Hassan* with the interface between two international legal instruments in the domain of armed conflict outside the territory of a Convention state. This is pre-eminently a domain governed by international legal norms. In that context, the Grand Chamber recognised that international law may provide a sufficient legal basis for military detention for the purposes of article 5, which requires that any detention should be lawful. This is consistent with the court's approach in *Medvedyev v France* (2010) 51 EHRR 39, in which the adequacy of the legal basis for the detention of the applicant on a Cambodian merchant ship on the high seas by French armed forces was analysed wholly in terms of international law. 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. It does not of course follow from the fact that international law authorises military detention for the purposes of article 5 of the Convention, that it also constitutes a defence to a claim in tort. That depends on other considerations lying wholly in the realm of municipal law, notably the concept of Crown act of state, which are addressed in the *Serdar Mohammed* case in a separate judgment.
>
> (2) *Hassan* does not add a notional seventh ground of permitted detention to those listed at (a) to (f) of article 5(1), namely military detention in the course of armed conflict. 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. This means that where the armed forces of a Convention state are acting under a mandate from the Security Council to use all necessary measures, article 5(1) cannot be taken to prevent them from detaining persons for imperative reasons of security.

(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. These are the minimum requirements for protection against arbitrary detention, and nothing in the Grand Chamber's decision in *Hassan* justifies any departure from them. Indeed, it is clear that in the Court's view, the continuing existence of these procedural obligations in large measure justified reading the six permitted occasions for detention as non-exhaustive in conditions of armed conflict. In the following sections of this judgment, I shall deal with the safeguards which were available to those in SM's position.

The circumstances of SM's detention after his capture

69. Part II of SOI J3-9 dealt with the processing of detainees through temporary holding facilities after capture, and their ultimate release or transfer to the Afghan authorities.

70. The Detention Authority was required to decide within 48 hours whether the prisoner should be released, further detained or transferred to the Afghan authorities. The relevant paragraphs of Part II provided:

> "19. The Detention Authority must decide whether to release, transfer or further detain the detainee. This decision must be made within 48·hours of the time of detention of the detainee. To authorise continued detention, the Detention Authority will need to be satisfied, on the balance of probabilities, that it is necessary for self-defence or that the detainee has done something that makes him a threat to Force Protection or Mission-Accomplishment.
>
> …
>
> 24. **Logistical Extensions.** On some occasions, practical, logistic reasons will entail a requirement to retain a UK detainee for longer than the 96 hours. Such occasions would normally involve the short-notice non- availability of pre-

planned transport assets or NDS facilities to·receive transferred detainees reaching full capacity. These occasions may lead to a temporary delay until the physical means to transfer or release correctly can be reinstated. Where this is the case, authority to extend the detention for logistic reasons is to be sought from both HQ ISAF and from Ministers in the UK through the Detention Authority.

25. **Initial Detention Review.** The Initial Detention Review must take place within 48 hours of the point of detention … The Detention Authority does not have the authority to hold a detainee for longer than 96 hours from the point of detention (this authority must be sought from Ministers through· the Detention Review Committee (DRC) - see paras 26-29 below. Routinely, therefore, within the 96 hour point the detainee must be either released or transferred to the Afghan authorities. Detention beyond 96 hours is only permitted in exceptional circumstances.

26. **Detention Review Committee (DRC).** The DRC is the mechanism which supports the Detention Authority in managing detention cases in the Op HERRICK theatre. The key role of the DRC is in assessing applications for exceptional extension to detention before they are submitted through PJHQ and from there on to the MoD for Ministerial approval as necessary. The committee should be convened by the Detention Authority as and when required and may take the form of a standing committee. The committee's membership is flexible (and should be reviewed regularly by the Detention Authority), but should include the following as a minimum: Detention Authority (chair), [Chief of Staff Joint Force Support Afghanistan, Joint Force Support Afghanistan Legal Adviser, Commanding Officer Intelligence Exploitation Force, Force Provost Marshall, Staff Officer Grade 2, J3 Branch (current operations), Joint Force Support Afghanistan Policy Adviser, Task Force Helmand Liaison Officer Joint Force Support Afghanistan] … The chair may call on SME advice from Comd Med, S02 J2X and the [redacted] as necessary, but the core membership must remain outside the chain of command for targeting and tactical legal issues, with the aim of being able to present cases to the Detention Authority 'cold'. Members do not hold a vote as such, but attend in order to provide expert advice to the Detention Authority to assist in his decision making …"

71. Detention beyond the 96 hour limit applied by ISAF was permitted only in exceptional circumstances on medical or logistic grounds or with the authority of both the UK Permanent Joint Headquarters and ministers in London. The criteria used to assist ministers in deciding whether to approve continued detention were set out in paragraph 27 of Part II and the procedure was described in para 29. They provided, so far as relevant, as follows:

> "27. **Extension of Detention.** Where it is believed that there are exceptional circumstances which justify an extension to the 96 hour limit, the Detention Authority should make an application for an extension through the DRC to PJHQ, using the form at Annex G. This application should describe the background to the application, the operational imperative for the extension, any anticipated impacts of the decision and any other pertinent factors to assist in the consideration of the application. The following criteria are used to assist Ministers in deciding whether or not to approve applications for extension of detention:
>
> > a. Will the extension of this individual provide significant new intelligence vital for force protection?
> >
> > b. Will the extension of this individual provide significant new information on the nature of the insurgency?
> >
> > c. How long a period of extension has been requested - [redacted]
>
> …
>
> 29. **Extended Detention Review Process.** In exceptional cases, where extended detention is authorised beyond 96 hours, the detention is to be the subject of review as follows:
>
> > a. **Detention Authority.** The Detention Authority is to conduct an internal review of the detention through the DRC every 72 hours after extended detention starts. The Detention Authority is similarly to submit a review to PJHQ at the 14-day period to seek authorisation for continued extended detention, using Annex H.

> b. **PJHQ.** PJHQ J3 will review all periods of extended detention every 14 days, informed by a submission from Theatre …
>
> c. **Ministerial Level.** The Minister authorising the extension is to review the decision every 14 days … The maximum detention permissible (inclusive of the initial ISAF-permissible 96 hours), as endorsed by UK Ministers and the Attorney General, is [redacted] …"

72. The judge found that until some point shortly before 12 April 2010 (five days after SM's capture) the Detention Authority for British forces in Helmand was the commander of Task Force Helmand. He delegated his authority to handle routine authorisations and reviews to the commander of the Camp Bastion Joint Operating Base. At some point on or shortly before that date the commander of Joint Force Support (Afghanistan) became the Detention Authority. The evidence about which officer was the Detention Authority at the time when the first application was made to extend SM's detention beyond 96 hours was unclear, but the Secretary of State's case proceeded on the basis that it was the later arrangements which applied, and the judge proceeded on the same basis. As Part II, paragraph 27 records, the Detention Authority chaired the Detention Review Committee, whose function was to support him in managing detention cases and to provide him with expert advice. The Committee had an important role in preparing the reports on which any decision would be based and in advising the Detention Authority. But the decision rested with the Detention Authority alone.

73. SM was captured in the early hours of 7 April 2010. Upon his arrival at Camp Bastion, he was informed that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission, and that he would either be released or transferred to the Afghan authorities as soon as possible. He was told that he was entitled to make a statement about his detention if he wished, to which he replied through the interpreter that he was working in his field when a helicopter arrived, and so he lay down in the field until he was attacked by a military dog and then arrested. He was told that he was entitled to contact the International Committee of the Red Cross, and on being asked whether there was any one whom he wished to be informed of his capture he gave the name of his father. Thereafter, he was detained in British military detention facilities, at Camp Bastion and at Kandahar airport.

74. On 9 April 2010, two days after SM's capture, a request was made to the Ministry of Defence in London "to exceptionally extend the 96 hour detention limitation in order to gain intelligence from [SM]", on the basis that in-theatre reviews of the continuing utility of his detention would be conducted every 72 hours.

The official submission to the minister was consistent with the criteria set out in Part II, paragraph 27 of SOI J3-9. It recommended that SM should be further detained "to gain valuable intelligence", and advised that this was "necessary in the particular case for intelligence exploitation." It described the circumstances of his capture, summarised what was known or believed about him, and set out the information relevant to each of the three criteria listed in paragraph 27. On 12 April, a minister authorised his continued detention "to gain valuable intelligence". Writing to the Foreign Secretary to report his decision, the minister recorded his view that questioning SM would provide significant intelligence which was vital for force protection purposes and would provide valuable information about the nature of the Taliban insurgency. Thereafter, in-theatre reviews were conducted every 72 hours until 4 May, and after that roughly every 14 days.

75. Responsibility for making decisions about the prosecution of detainees rested with the Afghan authorities, principally the National Directorate of Security ("NDS"). The review documentation suggests that after an initial assessment of SM, the Detention Review Committee took the view that the prospect of a successful prosecution was weak unless a confession was obtained. This was because the rocket-propelled grenade launcher had not been recovered and the biometric evidence linking him with other weaponry was judged to be of poor quality. On 19 April it is recorded that "the NDS will be consulted further", and on 22nd it is recommended that he be "held until the [redacted] point and then transferred to the NDS for investigation by the Afghan authorities". Although there are references to discussions on the point with the NDS from 24 April 2010, the Secretary of State's pleading and evidence is that the NDS was not asked until 4 May, when the British authorities had concluded that there was no more intelligence to be obtained from him. On that date it was decided that SM should remain in UK custody for interrogation until 6 May. Contact was then made with the NDS to find out whether they wished to take him into their custody for investigation and possible prosecution. They replied that they did, but had insufficient capacity to do so at the prison to which he was to be transferred. At the time, there was a serious capacity problem, partly because of an increase in the number of detentions following the "surge" of the previous year; and partly because the British authorities had a policy of refusing to transfer detainees to a number of NDS prisons at which they had reason to believe that detainees were liable to be maltreated. The result was that from 6 May 2010 the British authorities regarded themselves as holding SM on behalf of the Afghan authorities until capacity became available at an acceptable prison. He was finally transferred on 25 July.

76. The judge distinguished between three periods of detention. He found that for the first 96 hours after his capture (the "first period"), SM was detained for the purpose of bringing him before an Afghan prosecutor or judge in circumstances where he was believed to be a senior Taliban commander involved in the production of improvised explosive devices. He found that his detention beyond 96 hours had

been authorised by Ministers for the sole purpose of interrogating him with a view to obtaining intelligence, and that that remained the sole purpose of his detention for the next 25 days until 4 May, when the NDS formally expressed their intention of taking him into their custody as soon as they could (the "second period"). From 4 May to 25 July 2010, (the "third period"), the judge considered that SM was once again being held for the purpose of bringing him before the competent legal authorities on reasonable suspicion of having committed an offence.

Application of ECHR: article 5(1)

77. Of the six permissible grounds of detentions listed in article 5(1), only two were relied upon by the Secretary of State before us. They were ground (c), which deals with lawful detention for the purpose of bringing a suspect before a competent legal authority, and ground (f), which deals with detention pending extradition.

Ground (f): detention pending extradition

78. I can deal shortly with this ground. The judge accepted that the transfer of a detainee to the Afghan authorities was capable of being an extradition, but held that it did not apply on the facts. For my part, I would not even accept that it was capable of being an extradition. The judge's reasoning on this point was that the Convention was only engaged because SM was regarded as being within the jurisdiction of the United Kingdom for the purposes of article 1. It followed that the transfer constituted a removal of the detainee from the jurisdiction of the United Kingdom to that of Afghanistan, notwithstanding that it occurred within the national territory of Afghanistan. In my opinion, this analysis stretches the meaning of sub-paragraph (f) further than it will go, and is not consistent with what actually happens when a detainee is transferred from British to Afghan custody. Sub-paragraph (f) is concerned with movements between the territorial jurisdiction of one state and that of another. Thus it deals with detention in the course of enforcing immigration control and with deportation on the same footing as extradition. SM was not within the territorial jurisdiction of the United Kingdom at any time. He was not even in a place where the United Kingdom exercised effective governmental control. He was within its jurisdiction for the purpose of article 1 of the Convention in a different sense, namely that he was under the physical power and control of the United Kingdom's agents: see *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, para 136. That physical power and control was exercised, like other functions of HM forces, in support of the government of Afghanistan. It is not therefore correct to speak of a transfer from the jurisdiction of the United Kingdom to that of Afghanistan. Afghanistan always had criminal jurisdiction in Helmand Province and in other places where British forces operated. In transferring a detainee to the Afghan criminal justice system British forces were simply enabling the criminal jurisdiction which Afghanistan already possessed over SM to be more effectually exercised.

Ground (c): detention for the purpose of bringing SM before a competent legal authority

79. The judge concluded that SM's detention was justified on ground (c) during the first 96 hours. He held that ground (c) did not apply during the second period, because in that period he was being held solely for intelligence exploitation and not for ultimate transfer to the Afghan authorities.

80. The Strasbourg court has consistently ruled that detention for the sole purpose of intelligence exploitation is incompatible with article 5(1) of the Convention in a domestic context, even in the face of a significant terrorist threat: *Sakik v Turkey* (1998) 26 EHRR 662, para 44, *Őcalan v Turkey* (2005) 41 EHRR 45, para 104, *Medvedyev v France* (2010) EHRR 39, para 126. The Grand Chamber's decision in *Hassan* does not in my opinion justify a departure from that principle in an armed conflict. Nor does the Secretary of State suggest otherwise. However valuable the intelligence is expected to be, its exploitation lacks the immediate connection with the neutralisation of the threat which justifies detention for imperative reasons of security. As Justice O'Connor pointed out in the Supreme Court of the United States in *Hamdi v Rumsfeld* 542 US 507 (2004), the considerations of military security which justify the detention of combatants do so only for the purpose of preventing them from returning to the battlefield. Since imperative reasons of security were the only ground on which detention was authorised by the relevant Security Council Resolutions, it follows that the new policy announced to Parliament in November 2009, which permitted extended detention solely for the purpose of intelligence exploitation, had no basis in international law.

81. In other circumstances, it might have been argued that the intention to transfer SM to the Afghan authorities persisted during the second period notwithstanding that advantage was being taken of his detention to question him. But that would not be consistent with the facts. The evidence shows that after an initial assessment following his capture, there was thought to be little prospect that the evidence would support a prosecution. The NDS was not asked at this stage whether they wanted him for further investigation and possible prosecution. If SM had been detained in the second period in order to obtain better evidence against him, the case might have fallen within sub-paragraph (c), even if that evidence was not forthcoming: see *Brogan v United Kingdom* (1988) 11 EHRR 117 at para 53. But in fact the intelligence that the British authorities hoped to obtain by detaining him related not to his own criminality but to the nature of the Taliban insurgency and the requirements of force protection generally. It follows that SM's detention in the second period cannot be justified by reference to article 5(1)(c).

82. It does not follow from this that SM would or should have been released on 11 April if ministers had not authorised his further detention for intelligence

exploitation. While this must be a matter for trial, it is on the face of it more likely that if SM had not been detained for intelligence exploitation during the second period, the British authorities would have asked the NDS earlier whether they wanted to take custody of him, and would have received the same answer. He would then have been further detained until he could be transferred to them, although not necessarily until 25 July. To the extent that his detention was prolonged by the interlude of intelligence exploitation, and that this was not taken into account in determining the duration of his imprisonment pursuant to the sentence of the Afghan court, he may have suffered a recoverable loss.

83. Turning to the third period, the judge held that article 5(1)(c) applied in principle because from 4 May 2010 SM was once again being detained for the purpose of being transferred to the Afghan authorities. But he held that his detention in the third period could not be justified on that ground because he was not brought promptly or at all before a judicial officer as required in such cases by article 5(3). I shall return to article 5(3) when I come to deal with the procedural requirements of article 5.

Detention for imperative reasons of security

84. I have explained earlier in this judgment why, even on the footing that none of the of the six grounds of detention specified in article 5(1) of the Convention applies, military detention may be justified. Notwithstanding the ostensibly exhaustive character of the six grounds, that article cannot be taken to prevent HM forces from detaining persons in the course of an armed conflict for imperative reasons of security. The real question in those circumstances is whether this was in fact why SM was detained in the second and third periods.

85. The judge made findings about the reasons for SM's detention on which the claimants naturally rely. But the problem about these findings is that they were made for the purpose of determining whether SM's detention was justified on any of the six grounds specified in article 5(1). It is not easy to redeploy them for the rather different purpose of determining whether detention was justified by imperative reasons of security. This is not only because, coming to the matter as he did before the judgment of the Strasbourg court in *Hassan*, the judge regarded the six grounds as exhaustive, and imperative reasons of security as irrelevant. The judge also believed that there could be no imperative reasons of security for detaining someone once he had been captured and disarmed. He did not therefore consider the possibility that imperative reasons of security might have been a concurrent reason for SM's detention during the second and third periods. I have already said, in agreement with the Court of Appeal, that in my opinion he was wrong about this. For that reason, I do not think it possible to attach any weight to his finding that interrogation was the sole purpose of SM's detention in the second period, nor to his

implicit view that detention pending the availability of prison capacity to the NDS was the sole reason for his detention in the third period. 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.

86. There is, as it seems to me, a real issue about whether imperative reasons of security continued to operate after the first 96 hours concurrently with other factors. It is clear from SOI J3-9, the relevant part of which I have quoted, that the British authorities in Afghanistan did not regard themselves as entitled to detain any person unless his detention was and remained necessary for "self-defence, force protection, or wider mission accomplishment." Persons arrested on these grounds might, consistently with the Security Council Resolutions, have been detained for as long as they continued to represent a threat. In fact, however, as the minister explained to Parliament when announcing the new detention policy in November 2009, the policy was to hold them only pending transfer to the Afghan authorities or (subject to ministerial authorisation) for intelligence exploitation. In the absence of one or other of these grounds, the detainee would be released, as SM would have been if the NDS had shown no interest in him on 4 May 2010. For that reason, the only question with which a minister was concerned when considering whether to authorise extended detention for intelligence exploitation was whether it was justified for that purpose. There is nothing in SOI J3-9 or in the ample documentation concerning SM's detention to suggest that the minister was concerned with any other grounds for his detention.

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. The detention documentation relating to SM appears to suggest that this test was applied at each review after the ministerial authorisation had been received. On each occasion, the Detention Review Committee's assessment for the authorising officers included an account of the circumstances of his capture, followed by the following statement:

> "Legal issues. The test to be applied is whether, on the balance of probabilities, [SM] has done something which makes him a threat to self-defence, force protection, or wider mission accomplishment. Having considered that [SM] was seen running from a Col known to have links with Obj WHITE, in an attempt to evade [redacted] after they had been engaged from nearby compounds, the route along which he was running was found to contain a hidden RPG launcher and two rounds and the assessment that he may be Obj WHITE's deputy, I advise that the policy test is satisfied."

The judgment of those involved was presumably that this test was satisfied in SM's case. On that basis, there may have been concurrent reasons for holding any detainee, because imperative reasons of security were a necessary condition for detention, even if not the only one.

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. It is not necessary for this court to express a concluded view on these points, and not appropriate to do so on the inevitably incomplete information before us. They will be open to the parties at the full trial of the action. At that trial, my discussion of the facts at paras 86-88 may turn out to be very wide of the mark. 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: Procedural safeguards

90. Article 5 imposes procedural requirements on any deprivation of liberty at four points. Under article 5(1), the detention must be "in accordance with a procedure prescribed by law." Under article 5(2), the detainee must be informed promptly, in a language that he understands, of the reason for his detention. Under article 5(3), where a person is detained in accordance with article 5(1)(c) (detention of suspects for the purpose of bringing them before the competent legal authorities), he must be brought "promptly" before such an authority. And under article 5(4) the detainee must be entitled to "take proceedings by which his detention shall be decided speedily by a court, and his release ordered if the detention is not lawful." The claimants allege breach of all of these requirements except for the one imposed under article 5(2).

ECHR article 5(1): "in accordance with a procedure prescribed by law"

91. There is a substantial overlap between the requirement of article 5(1) that any detention should be "in accordance with a procedure prescribed by law" and the requirements of the other sub-articles, in particular article 5(4). In substance, the difference is that this part of article 5(1) requires that the detention should be authorised by law. Moreover, as explained over the years in the jurisprudence of the Strasbourg court, it also implicitly defines what kind of rules may properly be regarded as law for this purpose. By comparison, article 5(4) prescribes the minimum content of that law in one critical area, namely the availability of an effective right to challenge the lawfulness of the detention. Both sub-articles are concerned with the protection of persons against arbitrariness, which the Grand Chamber in *Hassan* identified as the core function of article 5. I have dealt with the Grand Chamber's analysis of this point at paras 63 and 68(3) above.

92. The requirement that the procedure should be "prescribed by law", is intended to satisfy the test of legal certainty which is inherent in any prohibition of arbitrary detention. "Law" for this purpose has the enlarged meaning which it normally bears in the Convention. It is not limited to statute, but extends to any body of rules which is enforceable, sufficiently specific, and operates within a framework of law, including public law: *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139, at para 54; *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307, paras 32-34. In *Medvedyev v France*, *(supra,)* another case of extraterritorial military detention, the Strasbourg court observed at para 80 that it was

> "… essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizens - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail."

93. As I have pointed out (para 63), this means in a case like the present one, that 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. I have summarised this document above, and quoted the essential parts of it. Its requirements were precise, comprehensive and mandatory. The principles on which discretionary judgments

were to be made, whether by the Detention Authority in the theatre or by ministers in London, were exactly specified. 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"

94. Article 5(3) qualifies the ground of detention specified in article 5(1)(c). It requires that a person suspected of having committed an offence, who is detained for the purpose of bringing him before the competent legal authority, must be brought "promptly" before a judge or other officer authorised by law. It is relevant to this appeal only so far as it is sought to justify his detention under article 5(1)(c) during the third period.

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. Without the benefit of the decision in *Hassan*, the judge understandably did not appreciate the significance of this question and did not deal with it. The Court of Appeal recorded the judge's conclusion, but did not address article 5(1)(c) at all, presumably because it was irrelevant in the light of their conclusion that any authority to detain conferred by the Security Council Resolutions was limited to the 96 hours prescribed by the ISAF policy.

96. This is, I think, a more difficult question than the judge appreciated. Articles 5(3) and 5(4) are both directed to the requirement for independent judicial oversight of any detention. Article 5(3) must be read with article 5(1)(c), to which it is ancillary. Unlike article 5(4), which applies generally, article 5(3) is concerned only with prospective criminal proceedings. What is envisaged is that the suspect will be brought promptly before a judge or other officer with jurisdiction either to try him summarily or to release him summarily or to make arrangements for his continued detention or release on bail or otherwise pending a later trial. In the present case, that posits a judge or other officer with criminal jurisdiction under Afghan law. It is far from clear what if any procedures of this kind existed in Afghanistan. The judge's findings about Afghan criminal procedure do not identify any. The judge adopted the statement of principle by the Strasbourg court in *Demir v Turkey* (1998) 33 EHRR 43, para 41, that "where necessary, it is for the authorities to develop forms of judicial control which are adapted to the circumstances but compatible with the Convention." This gives rise to no particular difficulty in a purely domestic case such as *Demir*, where the state is responsible both for the arrest and detention of the suspect and for the process of prosecution and trial. But in citing *Demir* the judge appears to have thought that the British government assumed the same responsibility

in Afghanistan. This cannot in my view be correct. 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. 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." I doubt whether there can be even a prima facie rule about the appropriate period of detention which applies as a matter of principle in all circumstances for the purpose of article 5(3) of the Convention, although four days is probably a reasonable maximum in the great majority of cases. 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.

98. The judge recorded that the Secretary of State adduced no evidence that it was impractical to bring SM before an Afghan judicial officer and that accordingly the Secretary of State had failed to justify the detention under articles 5(1)(c) and 5(3). I confess to finding this an unsatisfactory basis on which to resolve this question. The judge cannot be criticised for adopting it, because he understandably assumed in the light of the then state of Strasbourg jurisprudence that article 5 of the Convention fell to be applied without modification to military detention in Afghanistan. There are difficulties about determining preliminary issues of law in a complex case, in conjunction with limited questions of fact, the answers to which are not only inter-related but dependent on the answers to the issues of law. The difficulties are increased when the issues of fact fall to be determined partly on assumptions derived from the pleadings and partly on evidence. They are further increased when the basis on which article 5 of the Convention falls to be applied is changed by developments in the jurisprudence of the Strasbourg court after the judge has given judgment, with the result that findings made in one legal context have to be applied in another. On any view there will have to be a trial before SM's claims can be finally determined. I would therefore decline to determine at this stage whether the procedure adopted in SM's case was compatible with article 5(3) of the

Convention, and would leave that question to a trial at which the relevant facts can be found and assessed in the light of the judgments on this appeal.

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

99. If the essence of arbitrariness is discretion uncontrolled by law, article 5(4), although procedural in nature, is fundamental to the values protected by article 5. 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. This appears always to have been the British government's position in relation to military detention in Iraq and Afghanistan. There is aged but respectable authority that *habeas corpus* will not be granted to prisoners of war: see *R v Schiever* (1759) 2 Keny 473, *Furly v Newnham* (1780) 2 Dougl 419, *The Case of Three Spanish Sailors* (1779) 2 W Bl 1324. Nor will it be granted to those interned as enemy aliens in the United Kingdom in time of war: *Ex p Weber* [1916] 1 KB 280; [1916] 1 AC 421, *R v Superintendant of Vine Street Police Station, Ex p Liebmann* [1916] 1 KB 268. None of these cases, however, decided that there is no jurisdiction to grant *habeas corpus*. They decided only that it would not be granted on the merits because the detention of prisoners of war and enemy aliens was a lawful exercise of the prerogative of the Crown. These classes of persons were regarded as liable to internment merely on account of their status. Thus in *Ex p Weber*, and in the later case of *R v Home Secretary, Ex p L* [1945] KB 7, where there was an issue about whether the applicant was in fact an enemy alien, the court resolved it. It must have had jurisdiction to do that. The only case in which the courts have declined to entertain the issue was *R v Bottrill, Ex p Kuechenmeister* [1947] KB 1, a questionable decision in a case where the Crown had continued to detain a civilian internee after the war had ended. The application for *habeas corpus* was met with the answer that the courts would not review the Crown's prerogative to determine whether or not the United Kingdom was still at war. If this decision was ever good law, it has certainly not been since the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 that the exercise of prerogative powers is in principle reviewable.

101. Once that is accepted, the rest is legally straightforward. A writ of habeas corpus is a personal remedy directed against the person alleged to have possession or control of the applicant. Jurisdiction to issue it depends on the respondent being within the jurisdiction of the court, and not on the location of the applicant. 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. SM was an illiterate man with, by his own account, limited formal education, detained by troops who did not speak his language and who worked within a system of military law which he had no reason to understand. In these respects, his position must have been similar to that of many other detainees. Without sponsors in the United Kingdom, a detainee in Afghanistan would face formidable practical difficulties in applying for habeas corpus in an unfamiliar court in a distant foreign country, even if the circumstances of his detention allowed it. In fact, however, they did not allow 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. Wisely, Mr Eadie QC, who appeared for the Secretary of State, did not press this aspect of his case.

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 procedure put in place by SOI J3-9 operated wholly internally. In itself this was not necessarily objectionable. The Grand Chamber in *Hassan* (para 106) envisaged that it might not be practical in a war zone to bring the detainee before a court. Articles 43 and 78 of the Fourth Geneva Convention, which they regarded as providing an alternative standard in that event, provide for a review by "an appropriate court or administrative board designated by the Detaining Power for that purpose" (article 43), or in the case of an occupying power "a competent body set up by the said Power" (article 78). The essential requirements emphasised by the Grand Chamber 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. It is true, as counsel for the Secretary of State pointed out, that in addition to fairness the fundamental requirement in the eyes of the Grand Chamber was impartiality, and that independence is not necessarily the same thing. This is, however, an unsatisfactory distinction in practice. We are concerned with the framework of rules governing military detention, and not with the circumstances of any individual case. What is required is not just impartiality in fact, but the appearance of impartiality and the existence of sufficient institutional guarantees of impartiality. I would accept that it may be unrealistic to require military detention in a war zone to be reviewed by a body independent of the army or, more generally, of the executive, especially if reviews are to be conducted with the promptness and frequency required. But it is difficult to conceive that there can be sufficient institutional guarantees of impartiality if the reviewing authority is not independent of those responsible for authorising the detention under review, as it commonly is in the practice of other countries including the United States. The Court of Appeal doubted whether the procedure for review under SOI J3-9 was sufficiently independent but considered that it was impossible to reach a concluded view on that point without further information about the procedure and the chain of command. I am bound to say that I do not see how the process described in SOI J3-9 (Amendment 2) can possibly be regarded as independent. The UK Detention Authority was responsible both for authorising detention and then for reviewing his own decision. The role of the Detention Review Committee was purely advisory and it consisted, with the possible exception of the Legal Adviser and the Political Adviser (a civilian), of his military subordinates. There was no procedure for the case to be reviewed at any higher level than the Detention Authority, except where it was referred to a minister in London for authority to detain beyond 96 hours. But the written procedures envisaged that in those cases the minister would focus on the intelligence value of extended detention, and the documentation in SM's own case does not suggest that any wider

considerations were before him. I do not doubt that those who operated this system in the field brought an objective eye to the matter. On the facts to be assumed for the purpose of this appeal, SM's detention was certainly not arbitrary. The problem is that there were no sufficient institutional guarantees that this would necessarily be so. The assumptions in SM's case have not been fully tested, as they might have been under a procedure which was fairer to the detainee.

106. The second failing of the system was that it made no provision for the participation of the detainee. SM did not in fact participate. Indeed, there is no reason to believe that he was even aware that the reviews were occurring. The right conferred on a detainee by article 5(4) of the Convention is "to take proceedings by which the lawfulness of his detention shall be decided." This is not simply a requirement that the authorities should review their own act. It is a right of challenge which must necessarily involve the detainee. Specifically, he must be entitled to challenge the existence of any imperative reasons of security justifying his detention, which was the essential condition for it to be lawful. This is, as I have observed in another context, an inherently disputable question. At each review of his detention, the Detention Authority had before him a brief written summary of what SM had said when he was first brought into Camp Bastion and asked whether he had anything to say about his detention. This recorded that he was "briefly questioned and denied he was running away or that he had been in command [redacted] stating he is simply a farmer and had no knowledge of the RPG launcher or rounds." Otherwise, the only version of the facts which was before the Detention Authority was that of the soldiers who captured him. It may well be that SM would have had little to add. But the vice of the procedure adopted is that we cannot know that, because he was never given an opportunity to do so.

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. They do not, for example, appear to have been imposed by ISAF, whose procedures permitted both communication with the outside world and contact with lawyers: see SOP 362 (Detention Procedure), para 7. In these respects, British

practice also conflicted with the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly in 1988: see Principles 17-19; and with the position taken by the International Committee of the Red Cross: see Pejic, "Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, 87 (2005), 375 at 388.

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. Even without a judicial element, a proper procedure for the fair and independent review of detention in the theatre may be faster, more efficient, better informed, and more satisfactory for both detainer and detainee than a procedure by way of application for habeas corpus or judicial review in the courts of a country on the other side of the world.

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

110. How far this conclusion will help SM remains to be seen. Article 5(4) imposes an ancillary duty on the state, breach of which does not necessarily make the detention unlawful under article 5(1): *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, para 37. It does not therefore follow from a finding of breach of article 5(4) that SM ought to have been released any earlier than he in fact was. The facts which are being assumed for the purpose of the preliminary issues may or may not be proved at trial. If they are proved, it is difficult to envisage that a fair and independent review process would have resulted in his release, and an application for *habeas corpus* would probably have failed. In those circumstances, it is far from clear that SM would be able to show that he had suffered any recoverable loss.

Conclusion

111. In the result, in *Serdar Mohammed* I would set aside paragraph 1(3)(ii) and paragraph 1(5) of the judge's order dated 20 May 2014. Subject to the parties' submissions on the form of order, I would make the following declarations:

> (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.

(6) Without prejudice to any other grounds on which it may be found that SM's detention was unlawful, the defendant is liable under ECHR article 5(5) and section 8 of the Human Rights Act 1998 to pay compensation to the claimant so far as the duration of his detention (including any detention pursuant to his conviction by the court in Afghanistan) was prolonged by his detention by HM forces between 11 April and 4 May 2010 for intelligence exploitation purposes.

All other questions raised in *Serdar Mohammed* by the issues identified in paras 5 and 6 of this judgment, should be open to the parties at any further trial.

112. In *Al-Waheed* I would make the following declarations:

(1) For the purposes of article 5(1) of the European Convention on Human Rights HM armed forces had legal power to detain Mr Al-Waheed pursuant to UN Security Council Resolutions 1546 (2004) 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.

LORD WILSON:

113. I agree with the judgment of Lord Sumption. In the light, however, of the disagreement within the court, I propose in my own words to address the main issues before it.

A: RESOLUTION 1546 (2004) REFERABLE TO IRAQ

114. The authority given by the UN Security Council in Resolution 1546 was to take "all necessary measures to contribute to the maintenance of security and stability in Iraq" in accordance with Mr Powell's letter dated 5 June 2004; and it is worth noticing that the authority was expressed to be given to "the multinational force". Mr Powell's letter included, as an example of such a measure, "internment where this is necessary for imperative reasons of security". In the *Al-Jedda* case both in the House of Lords and in the Grand Chamber of the Strasbourg court, Mr Al-Jedda therefore conceded that the resolution conferred on the UK, as one member of the multinational force, an *authorisation*, valid under international law, to detain Iraqi nationals where necessary for imperative reasons of security. Mr Al-Waheed makes the same concession.

115. But an issue remains, albeit in the end not at the centre of either of these appeals, whether in context the authorisation should, as in the *Al-Jedda* case the House of Lords accepted but the Grand Chamber rejected, be regarded as an *obligation*. In the House Lord Bingham accepted at para 31 that the language of the resolution was one of authorisation rather than of obligation. He proceeded, however, with the agreement of the other members of the House (apart from Lady Hale, who had doubts about it), to identify in paras 32 to 34 three reasons which, so he considered, justified a conclusion that, for the purposes of article 103 of the UN Charter, the resolution imposed an obligation to intern in the specified circumstances. So Lord Bingham concluded in para 39 that the conflict between the UK's obligation to detain an Iraqi national under the resolution and its obligation to uphold his right not to be deprived of his liberty under article 5 of the European Convention ("the Convention") should be the subject of what one might now conveniently describe as an accommodation: namely that the United Kingdom might detain him if necessary for the imperative reasons "but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention".

116. When the *Al-Jedda* case reached the Strasbourg court, the Grand Chamber carefully considered the reasons which Lord Bingham and the other members of the House had articulated. In para 102 of its judgment, however, it noted that, of the four declared purposes of the UN, one was to achieve international co-operation in

promoting respect for human rights. In that light it approached the task of interpreting Resolution 1546 with "a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights". It followed, so the Grand Chamber considered, that, in the event of any ambiguity in the terms of a resolution of the Security Council, the interpretation more in harmony with the requirements of the Convention should be preferred. In some of its language, for example in para 101 of the judgment, the court seemed to accept that Resolution 1546 did contain obligations; but the decision was that, insofar as it did so, the obligations did not extend to internment on the part of such states as were members of the Council of Europe because article 5(1) cast a contrary obligation upon them.

117. It was accepted without argument by the Grand Chamber in the *Al-Jedda* case that the effect of article 5(1), even when construed in the context of Resolution 1546 and its successors, was such as to impose an obligation on member states not to effect internment otherwise than with a view to criminal proceedings pursuant to subpara (c). At the outset of its assessment, namely in paras 99 and 100, the court emphasised that since, as was accepted, none of the six exceptions prescribed in article 5(1) applied, the United Kingdom did indeed have an obligation thereunder not to intern Mr Al-Jedda. So the only question was whether its obligation under article 5(1) had altogether been displaced by the resolutions in the light of article 103 of the UN Charter. The assumption of the Grand Chamber was therefore that, subject only to the possibility of its displacement altogether, the extent of the United Kingdom's obligation under article 5(1) was immutable even in the context of the resolutions; and, having made that assumption, the Grand Chamber turned to construe the resolutions in order to determine the applicability of article 103. In Mr Al-Waheed's appeal the central task of this court today is to decide whether, particularly in the light of the later reasoning of the Grand Chamber in the *Hassan* case, it is necessary to regard the extent of the United Kingdom's obligation to him under article 5(1) as having been immutable. Unless it was immutable, we have no need to wrestle with the difference of opinion as to whether Resolution 1546 cast an obligation to detain where necessary for imperative reasons of security.

B: RESOLUTION 1386 (2001) REFERABLE TO AFGHANISTAN

118. The authority given by the UN Security Council in Resolution 1386 was to take "all necessary measures" to fulfil the mandate given to ISAF; and its mandate was, by para 1, "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment". Later resolutions expanded the geographical reach of the mandate beyond Kabul and surrounding areas and they progressively extended the period for which the authority was to remain operative; but the terms of the authority itself remained untouched.

119. There can be no doubt that "all necessary measures" included a power to intern. "All" measures were included - so long as they were necessary. If, as the Security Council was later to recognise expressly when passing Resolution 1546 in relation to Iraq and when annexing Mr Powell's letter to it, all necessary measures to contribute to the maintenance of security in Iraq included a power of internment, how could the Council not have regarded it as likewise included in relation to the maintenance of security in Afghanistan? An authority to assist in the maintenance of security which did not include a power to intern would not have been a worthwhile authority at all.

120. In Mr Mohammed's case the Court of Appeal agreed that the authority included a power to intern but held that the authority had been given to ISAF and so was subject to their policy. There, in my respectful opinion, the Court of Appeal misread the resolution. The authority to take all necessary measures was given to "the member states participating in the [ISAF]". In this regard the later Resolution 1546 referable to Iraq, which, in conferring authority on "the multinational force", is accepted to have conferred authority on the United Kingdom, ran closely parallel to it. ISAF was no more than an umbrella body, which had no independent personality in law, international or otherwise. Indeed the authority to take all necessary measures was unqualified: it was not to take all such necessary measures as ISAF might identify. Were the continued internment of an insurgent after 96 hours to be objectively necessary and yet to conflict with ISAF's policy, the authority to intern under the resolution would be unaffected. How could necessity, of all things, be subordinated to policy?

C: THE *AL-SKEINI* CASE

121. In a second controversial decision handed down on the same day as its decision in the *Al-Jedda* case, namely *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, the Grand Chamber held that non-detained Iraqi civilians, shot by United Kingdom forces in the course of military operations during the second of the three periods in which United Kingdom forces operated in Iraq, namely the period of "occupation" from 1 May 2003 to 28 June 2004, had also had rights under the Convention which the United Kingdom had been bound to respect, including a right under article 2 of the Convention to an investigation into their deaths, and that the United Kingdom had breached it. The declared basis of this seemingly novel extension of the Convention was that during this period the United Kingdom had assumed authority for the maintenance of security in South-East Iraq and had thus assumed authority over the individual civilians whom they had shot, even if it had not had effective control over the area in which the shootings had occurred (para 149). The Grand Chamber added, however, that, when jurisdiction under article 1 of the Convention depended upon authority over an individual, including when a Convention state took a person into custody abroad, rather than upon effective control over an area, Convention rights could be "divided and tailored" (paras 136-

137). This was an important recognition that the court's substantial extra-territorial enlargement of the concept of jurisdiction under article 1 of the Convention required re-examination of the breadth of certain of the articles in section 1 of it. It seems obvious that in particular attention would need to be given to the "tailoring" of article 5(1) which, on the face of it, permitted no detention in the course of military operations; and the first step towards doing so was soon taken by the Grand Chamber in its decision in the *Hassan* case.

D: THE *HASSAN* CASE

122. The facts in the *Hassan* case were that on 23 April 2003 British forces, searching for the applicant who was a general in the army of the Ba'ath party, raided his home in Basra and found not him but his brother, T, who might well have been armed with an AK-47 machine gun. They arrested T either as a suspected combatant or as a civilian suspected to pose a threat to security. They detained him for eight days. At about midnight on 1/2 May 2003, having established that he was a civilian rather than a combatant and that he did not pose a threat to security, they released him. Following his subsequent death, the applicant brought a claim on T's behalf in the High Court against the Secretary of State in which he alleged a breach of T's rights under the Convention, including under article 5. The judge dismissed the claim on the ground that T's detention, albeit managed by British forces, had been in a camp officially designated as a US facility and under overall US control, with the result (so the judge held) that he had not been within the jurisdiction of the United Kingdom within the meaning of article 1 of the Convention. The applicant then made an analogous application against the United Kingdom in the Strasbourg court. Disagreeing with the High Court judge, the Grand Chamber held that, while in detention, T had been in the physical control of United Kingdom forces and that the substantive provisions of the Convention were therefore engaged. It therefore proceeded to consider the nature of its obligations to him, in particular under article 5.

123. At this stage it is important to note the context of T's detention. It occurred in the first of the three periods in which United Kingdom forces operated in Iraq, namely between 20 March 2003 and 1 May 2003, during which there was an international armed conflict ("an IAC"). Geneva Convention III, relating to the treatment of prisoners of war, and Geneva Convention IV, relating to the protection of civilians in time of war, have a common article 2, which provides that they apply "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties", in other words that they apply to an IAC. Article 21 of Convention III provides that the "Detaining Power may subject prisoners of war to internment". Article 78 of Convention IV provides that the Occupying Power may intern protected persons if it "considers it necessary, for imperative reasons of security". Insofar as British forces suspected that T was a combatant, the United Kingdom had power to detain him under article 21 of

Convention III. Insofar, alternatively, as they suspected that he was a civilian who posed a threat to security, it had power to detain him under article 78 of Convention IV. The source of the power to detain him was therefore in those two conventions rather than, for example, in any resolution of the Security Council. Section II of Part III of Convention III and Section IV of Part III of Convention IV contain elaborate provisions for the proper treatment of prisoners of war and civilian internees respectively.

124. By 13 votes to four, the Grand Chamber held that, in detaining T, the United Kingdom had not violated article 5(1) of the Convention. Its central reasoning was as follows:

(a) There were "important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict" (para 97).

(b) None of the six exceptions to the right to liberty, prescribed in article 5(1), applied (para 97).

(c) But in *Cyprus v Turkey* (1976) 4 EHRR 482 the European Commission of Human Rights had refused to examine the lawfulness of the detentions of Greek Cypriot forces by Turkey in the area of Cyprus under Turkish control because the detentions had been effected under Geneva Convention III, which accorded to the detainees the status of prisoners of war thereunder (para 99).

(d) The court should interpret article 5(1) of the Convention in the light of article 31(3) of the Vienna Convention on the law of treaties 1969 ("the Vienna Convention"), which required it to take into account, at (b), any subsequent practice in the application of the (European) Convention which established the agreement of the parties regarding its interpretation and, at (c), any applicable rules of international law (para 100).

(e) The case of *Al-Saadoon v United Kingdom* (2010) 51 EHRR 9 demonstrated that, in accordance with article 31(3)(b) of the Vienna Convention, consistent practice of the parties to the (European) Convention could even establish an agreement to modify its text (para 101). I interpolate that the central fact there had been that all but five of the member states had agreed in a protocol that "the death penalty shall be abolished". Taking it together with consistent state practice not to impose the death penalty, the Strasbourg court in the *Al-Saadoon* case had held, at para 120, that the

protocol indicated that article 2 of the Convention, which had allowed for the imposition of the death penalty in specified circumstances, had been "amended" so as to delete that part of it.

(f) The practice of member states, when engaged extra-territorially in IACs in which they effected detentions under Geneva Conventions III and IV, had not been to exercise their power of derogation from article 5 under article 15 of the Convention (para 101).

(g) In accordance with article 31(3)(c) of the Vienna Convention, the court should interpret article 5 of the Convention in harmony with international humanitarian law, in particular Geneva Conventions III and IV, which had been designed to protect both prisoners of war and captured civilians who posed a threat to security (para 102).

(h) The United Kingdom (which had argued - see para 90 - that it was more in the interests of a detainee that the detaining power should not derogate altogether from article 5 but should instead remain subject to a suitably accommodated interpretation of it) had been correct in saying that the lack of derogation did not disable the court from interpreting article 5 in the light of Geneva Conventions III and IV (para 103).

(i) The safeguards in article 5(2) to (4) of the Convention, albeit also to be interpreted in the light of Geneva Conventions III and IV, should continue to apply to detentions during an IAC but, in the light of those safeguards and of those in the Geneva Conventions themselves, the six exceptions to the right to liberty prescribed in article 5(1) "should be accommodated, as far as possible" with the taking of prisoners of war and the detention of civilians under the Geneva Conventions (para 104).

(j) "The court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by article 5 of the Convention without the exercise of the power of derogation under article 15 … It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that article 5 could be interpreted as permitting the exercise of such broad powers." (para 104).

(k) But the requirement in article 5(1) that every deprivation of liberty should be 'lawful' continued to apply to these cases, with the result that

detentions had to comply with the provisions of the two Geneva Conventions (para 105).

(l) Interpretation in the light of the Geneva Conventions of the safeguard in article 5(4), when applied to detentions during an IAC, required limited, but only limited, departure from its usual interpretation (para 106).

125. The central issue in these appeals is whether the reasoning of the Grand Chamber in the *Hassan* case should be applied so as to justify a conclusion that, when detaining the two claimants, the United Kingdom did not violate article 5(1) any more than when it had detained T.

126. The obvious difference is that the detention of T took place in the course of an IAC whereas the detention of the claimants took place in the course of a non-international armed conflict ("a NIAC").

127. In the *Hassan* case the Grand Chamber laid great stress on Geneva Conventions III and IV, which, as I have explained, provided both the source of the power to detain T and the safeguards which were to surround his detention. But these two Geneva Conventions scarcely relate to a NIAC. They include just one provision relating to a NIAC, namely article 3, which is common to both of them and which requires humane treatment of all those taking no active part in the conflict, whether by reason of detention or otherwise. Additional Protocol II to the Geneva Conventions, dated 8 June 1977 and expressed to relate to the protection of victims of NIACs, "develops and supplements" article 3 (Part I, article 1), in particular by elaborating upon the requirement that they be treated humanely (Part II). But the legal regulation exerted by the Geneva Conventions, together with Additional Protocol II, of states participating in a NIAC is negligible in comparison with their regulation of states participating in an IAC. This is no accident. In his article entitled "*Is There a Way Out of the Non-International Armed Conflict Detention Dilemma*?", 91 Int'l L Stud 32 (2015), Professor Rona identifies at pp 37-38 three reasons why states have traditionally had no desire to accept international regulation of the grounds of their detentions, or of the procedures relating to them, during a NIAC. They have insisted that:

(a) international regulation would be an intrusion into their sovereign right to address conflict confined to their own territory;

(b) their domestic law, in particular their criminal law, was the proper, and an entirely adequate, means of addressing it; and

(c) the prospect that international regulation would afford reciprocity of rights to the other party to the conflict, ie to the insurgents, was unacceptable.

128. On any view the claimants are entitled to place reliance on the references of the Grand Chamber in the *Hassan* case to the application in that case of the two Geneva Conventions and, of course, on the sentence in para 104 of its judgment, quoted in para 124(j) above, which begins "[i]t can only be in cases of international armed conflict …".

129. But one does not have to delve far below the surface of the Grand Chamber's judgment in the *Hassan* case in order to perceive the problems which confront the claimants in seeking to distinguish it.

130. It was inevitable that in its judgment the Grand Chamber should speak in terms of an IAC: for T had been detained in the first period of the conflict in Iraq. The court had no reason to consider detention in the course of a NIAC. Significantly the essential distinction which it drew, both in para 97 and in para 104, was between detention during an IAC, on the one hand, and detention during "peacetime" (as opposed to during a NIAC), on the other.

131. The Grand Chamber relied heavily on the requirement under article 31(3)(c) of the Vienna Convention that, in interpreting the (European) Convention, it should take account of any relevant rules of international law. It had not considered this important principle in the *Al-Jedda* case when making the assumption which I have identified in para 117 above. In the *Hassan* case the relevant authority under international law for the purposes of article 31(3)(c) was derived from the two Geneva Conventions. In the present cases, by contrast, it was derived from the resolutions of the Security Council.

132. There is no reason to afford any less interpretative significance to the resolutions of the Security Council than to the Geneva Conventions. On the contrary the resolutions may be said to have carried greater significance. The purposes of the United Nations, invested with greater world-wide authority than any other body in seeking to achieve them, are to "maintain international peace and security, and to that end … to take effective collective measures for the prevention and removal of threats to the peace" and to "achieve international co-operation … in promoting and encouraging respect for human rights": paras 1 and 3 of article 1 of the UN Charter. Primary responsibility for the maintenance of international peace and security is conferred by the UN on the Security Council which, in discharging it, must act in accordance with those purposes: article 24. Unlike the generalised authorities to detain during every IAC which are to be found in the two Geneva Conventions, the authority to detain in the resolutions was specifically devised by the Security

Council to address what it had concluded to be the threat to international peace and security which were constituted by the situations in Iraq and Afghanistan. But the authority conferred by the Security Council was appropriately narrow: internment would be lawful not because it was expedient nor even because it was reasonably deemed to be necessary but only when it was - actually - necessary for the maintenance of security.

133. Since about the end of the Second World War an apparently rigid distinction has emerged between an IAC and a NIAC. But, particularly where there is foreign intervention in an armed conflict within a state, the distinction is often difficult to apply in practice: *International Law and the Classification of Conflicts* ed Wilmshurst (2012), Chapter III by Professor Akande, p 56. Before concluding that article 5(1) of the Convention falls to be accommodated to an IAC but not to a NIAC, we should ask: why not? There is in principle no lesser need for detention in a NIAC than in an IAC. I can see no reason why, if an authorisation for detention during a NIAC is valid under international law in that it emanates from the Security Council, article 5(1) should hobble the authorisation - so long, of course, that safeguards against arbitrary or unchallengeable detention remain in place.

134. So I agree with the conclusion of the Court of Appeal in Mr Mohammed's case, at para 163, that, in the light of the *Hassan* case, a resolution of the Security Council which (contrary to that court's construction of Resolution 1386) *did* confer direct authority on a troop-contributing state to effect a detention during a NIAC would be compatible with article 5 of the Convention, provided that procedural safeguards in relation to detention and to its review were also compatible with it. Interpretation of the procedural safeguards provided in paras (2) to (4) of article 5 may also be sufficiently flexible to take account of the context of the detentions, namely that they took place in the course of armed conflict and pursuant to the resolutions (see the *Hassan* case at para 106). But any dilution of those safeguards should be to the minimum extent necessary to accommodate the demands of that context; and (if I may gratefully adopt the reasoning in para 146 of the decision in a different context of the Grand Chamber in *Al-Dulimi v Switzerland*, Application No 5809/08, 21 June 2016) these resolutions, which contained no explicit wording to the contrary, cannot justify any interpretation of the safeguards which undermines their objective that detentions should not be arbitrary.

E: "IN ACCORDANCE WITH … LAW"

135. But it is insufficient to consider only the safeguards, diluted to the minimum extent necessary, in paras (2) to (4) of article 5. In the context of detention safeguards are so important that they are subject to a double lock. The extra lock is provided by the requirement in para 1 that no one shall be deprived of his liberty save "in accordance with a procedure prescribed by law". No one suggests that this particular

phrase requires to be accommodated with the circumstances surrounding the detentions in Iraq and Afghanistan.

136. An interesting question, left open in the courts below but pressed on this court by Ms Fatima QC on behalf of the first interveners in the appeal relating to Mr Mohammed, is whether, even if the detentions were to accord with international law, the phrase would nevertheless also require their accordance with national law. Even after having studied paras 79 and 80 of its judgment in the *Medvedyev* case, cited by Lord Sumption at para 80 above, I regard the Strasbourg court as not yet having provided clear authority on this question for us to consider. On any view, however, there is much to be said in favour of Ms Fatima's submission that accordance with national law remains necessary. At the centre of the requirement is the need for the detaining state to be answerable for the detention; and that need is most obviously met in the domestic law by which the state is bound. The detention is required to accord with a "procedure" prescribed by law; within the resolutions which in these appeals represent the relevant international law there is no prescription of procedure. In its report to the UN Human Rights Council dated 4 May 2015, the Working Group on Arbitrary Detention suggested, in Guideline 17 at para 115(ii), that a detention in the course of a NIAC had to be shown to be "on the basis of grounds and procedures prescribed by law of the State in which the detention occurs and consistent with international law". Although the prescription can no doubt be by any law by which the detaining State is bound, thus including, if it is operating abroad, its own domestic law, the guideline in my view helps to identify the source of the law with which article 5 requires accordance.

137. So the next question is: what does this phrase in the opening words of article 5(1) require of domestic law? The answer is complicated first by the use in the Convention of the word "lawful" in the description of each of the six exceptions to the right to liberty in (a) to (f) of para 1; and also by the three specific safeguards, each clearly procedural, which are importantly provided by paras 2, 3 and 4 of the article. So there is overlap between the various requirements of the article in this respect. All of them are generally designed to prevent a detention from being arbitrary: *A v United Kingdom* (2009) 49 EHRR 29, para 164. Clearly, however, the precise territory of the phrase in the opening words of para 1 is procedure. In *Winterwerp v The Netherlands* (1979) 2 EHRR 387, the Strasbourg court stated at para 45:

> "The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary."

This statement has stood the test of time; and in my view the only helpful elaboration of it has been the suggestion that the phrase relates to the *quality* of the law rather than the *content* of it. As the Grand Chamber observed in *Mooren v Germany* (2009) 50 EHRR 23, para 76, it requires the relevant domestic law to be compatible with the rule of law. The court added:

> "'Quality of the law' in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness."

In para 80 of the *Medvedyev* case, cited above, these requirements were described as falling within "the general principle of legal certainty".

138. In the case of Iraq Mr Powell referred in his letter annexed to Resolution 1546 to the obligations of the multinational force under the Geneva Conventions. Why did he do so in circumstances in which, apart from those in common article 3, the obligations would not in terms relate to the NIAC which was shortly to begin? The answer is to be found in sections 1 and 6 of the revised Memorandum No 3, which was promulgated - lawfully, so I will assume - on 27 June 2004 by the administrator of the Coalition Provisional Authority. The memorandum was given continuing effect under Iraqi law after 28 June 2004, when the conflict became a NIAC, by article 26(C) of the Transitional Administrative Law which had been promulgated in March 2004 by the Iraqi Governing Council: see the *Al-Saadoon* case at para 22, cited at para 124(e) above. Under those sections the multinational force was to apply the relevant standards of Geneva Convention IV as a matter of policy during the forthcoming NIAC and specific provisions were made for regular reviews of internment. Procedural safeguards under Iraqi law, binding on the United Kingdom when operating there, were thereby put in place; and in my view it follows that Mr Al-Waheed's detention was "in accordance with a procedure prescribed by law". In para 38 of its judgment in the *Al-Jedda* case the Grand Chamber, which had set out the memorandum in para 36, referred to the Iraqi Constitution adopted in 2006; and it seemed to suggest that (or at least to question whether) articles 15 and 37 of the constitution thereafter rendered Mr Al-Jedda's detention unlawful even under Iraqi law. Unfortunately, however, the Grand Chamber's attention was not drawn to article 46 of the constitution, which allows other Iraqi laws, such as the memorandum, to limit constitutional rights in certain circumstances. In its consideration of a second claim made by Mr Al-Jedda, namely *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773, the Court of Appeal concluded that article 46 did indeed limit Mr Al-Jedda's constitutional rights, with the result that his detention remained lawful under Iraqi law even after 2006. It would be extraordinary that, by a side-wind generated by a conventional constitutional provision intended to protect civilians against arbitrary detention

during peacetime, detentions in Iraq effected by the multinational force during the final years of the armed conflict suddenly became unlawful under Iraqi law.

139. In the case of Afghanistan, the requisite obligation upon the United Kingdom under article 5(1) to effect internment there only if in conformity with the rules of national law as well as to keep within the boundaries of its authorisation under international law arose even more directly. For the Ministry's policy in that respect was set out in instruction SOI J3-9; and United Kingdom law will in principle require it to have implemented its policy. The conclusion of Leggatt J that the terms of the instruction satisfied the requirement of legal certainty in the opening words of article 5(1) does not appear to have been challenged in the Court of Appeal and is not in issue before this court.

F: CONCLUSION

140. I conclude that the effect of the resolutions of the Security Council was to modify the United Kingdom's obligations to the claimants under para 1 of article 5 of the Convention with the result (a) that its detention of Mr Al-Waheed was not in breach of it and (b) that, to the extent that Mr Mohammed was detained for imperative reasons of security, its detention of him was not in breach of it.

141. The invitation of the claimants to this court has been that it should depart from the decision of the House of Lords in the *Al-Jedda* case pursuant to *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. Any departure pursuant to the statement must be from the "previous decision" itself rather than from any of the reasoning which led to it. Like that of Mr Al-Waheed, the detention of Mr Al-Jedda by United Kingdom forces took place during the third and final period in which they operated in Iraq; and Resolution 1546 and its successors applied to it. It can now be seen that the effect of the resolutions was to modify Mr Al-Jedda's right under article 5(1) of the Convention, with the result that, by detaining him, the United Kingdom did not violate it. So, by a jurisprudential route different from that which it took, the decision of the House to that effect can now be seen to have been correct. Far more debateable is whether, in light of the points later to be made by the Grand Chamber, the reasoning of the House was correct.

142. For reasons which one can well understand but which in retrospect have proved unfortunate, the drafters of the Convention chose to identify six cases as being the only cases in which it would be lawful for a member state to deprive a person of liberty. Compare the exhaustive precision of article 5(1) with, for example, article 9(1) of the UN's International Covenant on Civil and Political Rights 1966, which, although otherwise closely modelled on article 5, provides that "[n]o one shall be deprived of his liberty except on such grounds … as are established by law".

There is nothing to indicate that the drafters of the Convention contemplated that its jurisdiction under article 1 would extend to the operations of member states in the course of armed conflict beyond their territories. Once, however, the Strasbourg court had construed the jurisdiction of the Convention as extending that far, it became essential, as indeed was swiftly recognised in the *Al-Skeini* case, that Convention rights should be so divided and tailored as to make the extension workable. Otherwise member states would be driven, insofar as they were able to do so, to derogate under article 15 from their obligations under the Convention - which would leave the human rights of those caught up in the conflict far less protected. The exercise of tailoring article 5 was duly conducted by the Grand Chamber in the *Hassan* case; and today, by a majority, the court takes forward the exercise which it charted.

143. In my view it is no part of the function of this court to speculate upon the approach of another court, not even of the Grand Chamber of the Strasbourg court, to the issue presently raised before it. We cannot foretell the determination in the Grand Chamber of any claim which might now be brought by the claimants, and by the hundreds of other claimants in our courts in a position analogous to them, of a violation by the United Kingdom of article 5(1) of the Convention. No doubt there would again be dissentient voices, concerned, in a way understandably, about a perceived dilution of Convention rights. But a vastly more important factor would be in play. For all of us judges, both in Strasbourg and in the United Kingdom, who believe - many of us, passionately - in the value of the Convention in having raised the standards of a state's treatment of its people across the Council of Europe, its very credibility is at stake in determination of the present issues. Could it be that, by reason of article 5(1), such state contributors to the multinational forces in Iraq and Afghanistan as happened also to be members of the Council of Europe would be legally disabled from effecting internments in Iraq after 28 June 2004, and from effecting internments in Afghanistan beyond 96 hours, even where necessary for the maintenance of security and even pursuant to UN resolutions which, having surveyed the nature of the conflict there, expressly sanctioned internment in such circumstances? Could it be that those contributors to the multinational force would be disabled from acting pursuant to the UN resolutions although fellow-contributors which happened not to be members of the Council of Europe would not be so disabled? Such conclusions would bring the Convention into widespread international disrepute and it is, frankly, a relief for me to have found myself persuaded that they can properly be avoided.

144. By contrast there was a clear breach of Mr Mohammed's rights under para 4 of article 5 of the Convention, irrespective of the extent to which the paragraph falls to be accommodated with the exigencies of an armed conflict; and in that regard the only remaining question for the trial judge should, in my view, be whether the breach caused Mr Mohammed to suffer loss. For the reasons given by Lord Sumption at paras 105 and 106 above, the violation of the paragraph was in each of two respects:

first, the structural system for the reviews of Mr Mohammed's detention meant that they were not sufficiently independent of those within the United Kingdom force who sought its continuation; and second, he was afforded no opportunity to contribute to them. Lord Mance argues strongly, at para 216 below, that the evidence so far filed by the Ministry about the structural system for the reviews might, if supplemented, displace a positive finding against it in the first respect; but in my view the opportunity already given to the Ministry to file the relevant evidence has been fair and there is no justification for granting to it any extra indulgence.

LORD MANCE:

Introduction

145. The present appeals concern claims for damages by two individuals in respect of their allegedly wrongful detention by British forces in respectively Iraq and Afghanistan. I have had the benefit of reading in draft three of the other judgments which have been prepared, by respectively Lord Sumption, Lord Wilson and Lord Reed.

146. A central issue of principle on these appeals is whether the United Kingdom, in the course of assisting the recognised governments of Iraq and Afghanistan to combat non-international armed insurgencies, had under international law power to detain suspected terrorists or insurgents when necessary for imperative reasons of security, or whether any power to detain must be found within the express terms of article 5 of the European Convention on Human Rights. The United Kingdom advances two bases on which it submits that it possessed such power; one is customary international law applicable to a non-international armed conflict (a "NIAC") read with the Geneva Conventions and their additional Protocols; the other is the relevant Security Council Resolutions ("SCRs") endorsing the authority of the United Kingdom to act as part of the multinational force in Iraq and as part, or indeed leader, of the International Security Assistance Force ("ISAF"), in Afghanistan at the relevant times.

Customary international law

147. Lord Reed concludes positively that customary international law and the Geneva Conventions and their Protocols do not confer any such authority to detain on states (para 263). Lord Sumption is inclined to agree with Lord Reed on this, but regards it as unnecessary to decide (para 14). His more nuanced thinking is that, while there is in principle consensus about a right to detain, there is a lack of consensus about its limits and conditions and the extent to which special provision

should be made for non-state actors, but that practice is converging and it is likely that this will ultimately be reflected in opinio juris (para 16).

148. My position is closer on this issue to Lord Sumption's than to Lord Reed's. Like Lord Sumption I also regard it as one which is in the event unnecessary to decide. But I add one observation. The role of domestic courts in developing (or in Lord Sumption's case even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

149. The potential relevance of domestic court decisions as a source of international law was recognised and discussed as long ago as 1929 by H Lauterpacht, then an assistant lecturer at the London School of Economics, in his article *Decisions of Municipal Courts as a Source of International Law* 10 British Yearbook on International Law (1929) 65-95. This drew on insights derived from Lauterpacht's joint editorship with his former LSE doctorate supervisor, the then Arnold McNair, of the Annual Digest and Reports of Public International Law Cases (now the International Law Reports) series also launched in 1929: see The Judiciary, National and International, and the Development of International Law by Sir Robert Jennings QC in vol 102 of the series (1996). There is a further extensive bibliography on the subject annexed at pp 18-19 of the *Fourth report on identification of customary international law* dated 25 May 2016 submitted by Sir Michael Wood QC as rapporteur to the International Law Commission ("ILC"). Most recently, in the chapter *The Interfaces between the National and International Rule of Law: a Framework Paper in The Rule of Law at the National and International Levels* (Hart Publishing, 2016) the "classic answer" given by Machiko Kanetake (at p 27) is that "under international law, national rule of law practices are, after all, part of state practices, which contribute to the creation of new customary international law", that they "may also form part of the general principles of international law", and "may also qualify as opinio juris".

150. Sir Michael Wood, as rapporteur to the ILC, recognised in his Second Report dated 22 May 2014 para 58 the potential significance in international law of domestic jurisprudence not only as state practice, but also, with caution, as a means for the determination of rules of customary international law: see also his Third Report dated 27 March 2015 paras 41(e) and 76(b).

151. Yet more significantly, the current draft Annual Report of the International Law Commission to the UN General Assembly for 2015, following upon Sir Michael Wood's Reports, contains the following draft Conclusion 13 (subject to finalisation in 2018):

> "Decisions of courts and tribunals
>
> 1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.
>
> 2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules."

Security Council Resolutions ("SCRs")

(a) Iraq

152. The relevant SCR for Iraq was 1723 (2006), whereby the Security Council, "recognizing the tasks and arrangements set out in letters annexed to resolution 1546 (2004) and the cooperative implementation by the Government of Iraq and the multinational force of those arrangements", reaffirmed "the authorisation for the multinational force as set forth in resolution 1546 (2004)" and decided "to extend the mandate of the multinational force as set forth in that resolution until 31 December 2007", taking into consideration the Iraqi Prime Minister's letter dated 11 November 2006, which had in turn requested such extension "in accordance with the Security Council Resolutions 1546 (2004) and 1637 (2005) and the letters attached thereto" until 31 December 2007. SCR 1546 (2004) itself reaffirming the authorisation conferred by earlier resolutions, conferred

> "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ..."

The resolution went on to state that the letters set out the tasks of the multinational force, including "preventing and deterring terrorism". The letters included a letter of 5 June 2004 from the US Secretary of State, expressing the United States'

willingness to deploy forces to maintain internal security in Iraq and to undertake activities which would, the letter said:

> "include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security …"

153. SCR 1546 (2004) is thus on its face clear. It gave authority to take all necessary measures, which, it was expressly stated, would include "internment where this is necessary for imperative reasons of security". In *Al-Jedda v United Kingdom* (2011) 53 EHRR 23, the European Court of Human Rights addressed the relevant letter (which it had earlier summarised in para 34), by concluding that it did not impose an obligation or requirement to detain (para 108). On that basis, it further concluded that the letter could not override the United Kingdom's duties under article 5 of the Convention. But it did not suggest that the SCR, read with the letter, did not contain power to detain.

154. The European Court of Human Rights in *Al-Jedda* was only concerned with arguments based under article 103 on competing obligations: see paras 101-110. Once it had concluded that there were no competing obligations, that was the end of those arguments. The relationship between a power to detain conferred by international law in circumstances of armed conflict and article 5 of the European Convention on Human Rights was not squarely addressed until *Hassan v United Kingdom* (2014) 38 BHRC 358. There it was addressed in the context of an international armed conflict ("IAC"). The Third and Fourth Geneva Conventions expressly recognise certain powers (though not *obligations*) to detain prisoners of war and civilians who pose a risk to security. The European Court of Human Rights held that the scheme provided by article 5 had to be read in the light of, and modified to reflect, the power to detain on security grounds, subject to the condition that such detention was not arbitrary, but was accompanied by a review process which was independent, even if it was not by a court.

155. The European Court of Human Rights acknowledged at the outset that the arguments raised in *Hassan* were novel. As it said (para 99):

> "99. This is the first case in which a respondent state has requested the court to disapply its obligations under article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. In particular, in *Al-Jedda v United Kingdom* (2011) 30 BHRC

> 637, the United Kingdom government did not contend that article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions. Instead they argued that the United Kingdom was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom's obligations under the convention. It was the government's case that an obligation to intern the applicant arose from the text of United Nations Security Council Resolution 1546 and annexed letters and also because the resolution had the effect of maintaining the obligations placed on occupying powers under international humanitarian law, in particular article 43 of the Hague Regulations (see *Al-Jedda v United Kingdom* (2011) 30 BHRC 637 at para 107). The court found that no such obligation arose."

156. In this passage, the European Court of Human Rights was recognising, realistically, that it had before it arguments that had not been, though they might have been, raised for its consideration in *Al-Jedda*. (This is so, even though its reference to "powers of detention provided for by the Third and Fourth Geneva Conventions" may quite possibly be open to question, in the light of paras 115-116 of this judgment.) To treat the fact that the United Kingdom did not in *Al-Jedda* present any argument about the relationship between a power to detain conferred by international law and the provisions of article 5 of the Convention as fatal to any such argument now appears to me unreal. The United Kingdom has now changed its stance, and the previous stance of one individual state cannot in context anyway be significant. As to the European Court of Human Rights, in a case law system, like that which the European Court of Human Rights operates under the Convention, courts proceed from case to case, sometimes having to reconsider or modify past jurisprudence (moreover, in Strasbourg without applying any strict doctrine of precedent). Above all, it is necessary to bear in mind the very considerable difficulty of the issues which arise, since the European Court of Human Rights' judgment in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, in applying the Convention to circumstances and territories outside any which are likely to have been in Contracting States' mind when they agreed to secure the Convention rights and freedoms to "everyone within their jurisdiction" (Convention, article 1). Finally, if *Hassan* had been decided before *Al-Jedda*, it is quite obvious that the submissions and the reasoning in the judgment in *Al-Jedda* would have been very different.

157. *Hassan* itself concerned a situation of IAC, where the Geneva Conventions confer express powers to detain. This was, not surprisingly, underlined by the European Court of Human Rights as a reason for concluding that the terms of article 5 could not be applied, and that they should be modified so as to recognise a further

and different power to detain, based on the Conventions concurrently. Thus, the court said in para 104:

> "104. None the less, and consistently with the case law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence 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. The court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by article 5 of the Convention without the exercise of the power of derogation under article 15 (see para 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that article 5 could be interpreted as permitting the exercise of such broad powers."

158. Again, it would be unrealistic to treat this (and in particular the word "only" in the last sentence) as either addressing or as decisive of the issue now before the courts, where there is on the face of SCR 1546 an unqualified power to detain where necessary for imperative reasons of security. There is no logical and substantial reason why article 5 should not adapt to a power to detain contained in a SCR directed to a NIAC, just as it does to a power to detain conferred by customary international law and/or the Geneva Conventions in the context of an IAC. The reasons why there may as yet be no recognised customary international law power to detain in a NIAC are closely associated with member states' wish to avoid recognising or giving reciprocal rights to insurgent groups. These are precisely the reasons why a host state may request, and the Security Council may under Chapter VII of the UN Charter confer, a unilateral power to detain to a friendly third state helping the host state to resist the insurgency.

159. The principal basis on which Lord Reed would refuse to recognise the existence of any such power consists in the reasoning in *Al-Jedda*, as followed in *Nada v Switzerland* (2012) 56 EHRR 18 and *Al-Dulimi and Montana Management Inc v Switzerland* (Application No 5809/08) (unreported) (judgment given 21 June 2016). In the latter two cases, the European Court of Human Rights identified the

need for "clear and specific language" if SCRs were to be read as intending states to take measures that would conflict with their obligations under international human rights law: see in particular *Al-Dulimi*, para 140. That was said in the context of the fundamental right of a person made the subject of a sanctions order to know and have the right to address the case against him or her.

160. In the present case, not only is SCR 1546 clear on its face in authorising detention, but there is nothing in general international human rights law precluding such a measure. Article 5 of the European Convention on Human Rights is alone in seeking to define and limit grounds of permissible detention. International human rights law generally is reflected by the International Covenant on Civil and Political Rights ("ICCPR"). Article 9 of the ICCPR provides a general limitation, by reference to a test of arbitrariness, no more. It reads, so far as relevant:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

161. The argument that one must start with the express terms of article 5 of the Convention, and read SCR 1546 consistently therewith is not in my opinion sustainable. SCR 1546 was not directed to states party to the Convention, but to all member states of the United Nations and to the multinational force established to operate in Iraq. It is perfectly tenable to treat a SCR as intended impliedly (in the absence of clear and specific language to the contrary) to comply with general principles of international law, as the European Court of Human Rights indicated in *Nada* and *Al-Dulimi*. But article 5 of the European Convention does not reflect general international law, and it is circular to construe SCR 1546 in the light of an assumption that it cannot have been intended to detract or differ from article 5. The starting point is not what article 5 says. The starting point is to identify what SCR 1546 says about the power to detain in a NIAC, just as the starting point in *Hassan* was to see what customary international law and the Geneva Conventions say about the power to detain in an IAC.

162. As the European Court of Human Rights said in *Hassan* (paras 77 and 102) that it had observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part. The fundamental significance in

international law of SCRs under Chapter VII of the United Nations Charter needs little underlining. It has been recorded by Lord Sumption in his judgment (para 23), and was clearly expressed by the European Court of Human Rights in *Behrami v France*; *Saramati v France, Germany and Norway* [2007] 45 EHRR SE10, para 149, when the Court said that the contribution by NATO states of troops to the KFOR security mission in Kosovo "may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim".

163. To treat SCR 1546 as contemplating that member states, participating in the peace-keeping operations in Iraq and exercising the power to detain afforded by its terms, would satisfy their European Convention obligations by derogating from the Convention appears to me unreal. Putting the same point the other way round, 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. First, it seems clear that article 15 of the Convention, which authorises derogation "in time of war or other public emergency threatening the life of the nation" was itself not conceived with this this type of situation expressly in mind. Second, if it be said that the expanded concept of "jurisdiction" now recognised in European Court of Human Rights jurisprudence under article 1 should lead to some implied modified understanding of the scope of potential derogation under article 15, that is both highly speculative, and a possibility which any contracting state can well be forgiven for missing. Third, not surprisingly, there is just as little indication that any state has ever purported to derogate under article 15 in respect of involvement in a NIAC as there is in respect of involvement in an IAC (see *Hassan*). Fourth, it would be splitting hairs to treat the reasoning and decision in *Hassan* as turning essentially on state practice not to derogate under article 15 in the course of an IAC.

164. In the light of the above, I conclude that SCR 1546, properly construed in the light of its terms and the circumstances to which it was directed, provided for a power to detain in a NIAC for imperative reasons of security. On the assumption (which the government does not now challenge on this appeal) that the matters in question fell within the United Kingdom's jurisdiction under article 1 of the Convention, and provided that sufficient procedural safeguards exist (see the next two paragraphs), I also conclude that article 5 of the Convention should be interpreted in a way which gives effect to and enables the exercise of this power. This can be done, as it was in *Hassan*, by recognising that the fundamental purpose of article 5(1) is to protect the individual from arbitrariness in accordance with the basic international law principle stated in ICCPR, article 9 (para 160 above). On that basis, the 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. It follows that I concur in principle with all that is said by Lord Sumption in para 18 to 30 and 40 to 68 and by Lord Wilson in paras 114 to 117 and 121 to 134 of their respective judgments.

165. On that basis, the only point requiring further attention is whether a power to detain "where this is necessary for imperative reasons of security", as provided in Iraq by SCR 1546, is too unspecific, or too lacking in procedural safeguards, to be recognised either generally or in conjunction with and in addition to the express terms of article 5. As already stated (para 160), the general principle of international law is that "No one shall be subjected to arbitrary arrest or detention". The relevant ICCPR article 9(1) goes on to provide that: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". The requirement for grounds to be established is met by a power to detain where necessary for imperative reasons of security.

166. The requirement for a procedure established by law was met in *Hassan* by the terms of the Third and Fourth Geneva Conventions. The Third Convention provides for the internment of prisoners of war (articles 4(A) and 21), for any doubt about their status to be determined by a competent tribunal (article 5) and for their release and repatriation without delay after the cessation of active hostilities (article 118). The Fourth Convention provides for the detention of individuals "definitely suspected of or engaged in activities hostile to the security of the state" (Fourth Convention, article 5), for any such action to be reconsidered as soon as possible by an appropriate court or administrative board, and, if maintained, to be reviewed periodically and at least twice yearly (article 43). The United Kingdom had reason to believe that Mr Hassan fell within these categories, and released him as soon as screening showed that he was a civilian who did not pose a threat to security: *Hassan*, para 109.

167. In agreement with Lord Sumption (paras 67-68), I would not read *Hassan* as requiring the procedure needed to avoid arbitrariness to be specified in the convention or other treaty or the relevant SCR authorising detention. The procedure falls to be established by or on behalf of the detaining state, and it must at least comply in a NIAC both with the minimum standard of review required in an IAC under article 43 of the Fourth Geneva Convention and accepted as appropriate in that context in *Hassan* and, subject to such alterations as are necessary to meet the exigencies of armed conflict, with the procedural requirements of article 5: see per Lord Sumption, paras 91 et seq.

(b) Afghanistan

168. The relevant SCR in respect of Afghanistan at the time of the detention of Mr Serdar Mohammed ("SM") was 1386 (2001), the operation of which was subsequently extended, lastly by SCR 1890 (2009). Lord Sumption has stated the terms of these SCRs in his paras 21-22. SCR 1386 authorised the establishment of "an International Security Assistance Force" ("ISAF") to assist in the maintenance of security in Kabul and surrounding areas, working in close cooperation with the Afghan Interim Authority, and it "authorised member states participating in [ISAF] to take all necessary measures to fulfil its mandate". This last critical phrase of article 3 of SCR 1386 falls to be read in the context of the extreme circumstances of violence (including improvised explosive device, IED, and suicide attacks targeting civilians as well as Afghan and international forces and use of civilians as human shields), terrorism, illegally armed groups, increasingly strong links between terrorism activities and illegal drugs, recounted in recitals to resolution 1890. For the reasons coinciding with those given by Lord Sumption in paras 28 and 30 and by Lord Wilson in paras 118 and 119, I consider that the critical phrase in article 3 of SCR 1386 in principle contemplated and authorised detention where necessary to fulfil the mandate, in short detention for imperative reasons of security. Again, appropriate procedural safeguards must be established, meeting the standards identified in para 160 and 165 to 167 above.

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

169. This further question arises because of SM's case that any permissible detention was governed by the detention policy guidelines adopted by ISAF, which basically restricted detention (before transfer to the custody of Afghan authorities) to 96 hours with only limited exceptions. I understand Lord Reed to conclude that it was, for reasons set out in his paras 322-334 and 343-346. The context in which this question arises can be summarised as follows. Leggatt J considered that the position of ISAF in Afghanistan broadly mirrored that of KFOR in Kosovo, as examined by the European Court of Human Rights in *Behrami*. But he went on to reject the United Kingdom's submission that the detention of SM was in reality undertaken by or on behalf of ISAF and so the United Nations, to which SM must in consequence address any claim. He rejected it, because the United Kingdom had at least in November 2009, pursuant to responsibilities which it saw as resting on itself under national and international law, established its own extended detention policy, claiming to enable it to detain for periods longer than 96 hours. It had not, in this respect, acted on behalf of or under any authority conferred, at least originally, on ISAF. ISAF originally complained about this, but Leggatt J inferred that "ISAF headquarters did subsequently accept the UK position as detention decisions continued to be taken by United Kingdom officials without involving ISAF and there is no evidence of any further complaints". But that did not mean that the United Kingdom was acting as

part of or on behalf of ISAF. See generally per Leggatt J, paras 180-184, and see further paras 181-190 below. On that basis Leggatt J held the United Kingdom responsible for the detention of SM. The United Kingdom thus failed below on the basis that the relevant SCRs gave power only to ISAF to detain, and not to individual member states participating in security operations in Afghanistan: see the Court of Appeal's judgment, paras 155-156.

170. Lord Sumption (para 38) and Lord Wilson (para 120) consider that the correct analysis is that the relevant SCRs conferred power to act on the individual participating member states, and that there is no basis for limiting this power (as between the United Kingdom and SM) by reference either to ISAF's detention policy or to any agreement between the United Kingdom and the Afghan authorities, such as that dated 23 April 2006, by clause 3.1 whereof it was agreed that the "The United Kingdom AF will only arrest and detain personnel where permitted under ISAF Rules of Engagement". In these circumstances, Lord Sumption concludes that the United Kingdom was entitled to operate its own detention policy vis-à-vis SM, provided of course that this complied as a minimum with the procedural standards required under international law to avoid arbitrariness.

171. The difference on this point between Lord Reed on the one hand and Lord Sumption and Lord Wilson on the other turns on the construction of the relevant SCRs. It is correct that article 3 of SCR 1386 authorised "the member states participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate". This followed recitals which inter alia recorded a request in the Bonn Agreement to the Security Council to consider authorising "the early deployment to Afghanistan of an international security force" and welcomed a letter from the United Kingdom government and took note of the United Kingdom's offer contained therein "to take the lead in organising and commanding an International Security Assistance Force".

172. In the light of these recitals, articles 1 and 2 of SCR 1386 went on to authorise "as envisaged in Annex 1 to the Bonn Agreement, the establishment for six months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment" and, second, to call "upon member states to contribute personnel, equipment and other resources to the International Security Assistance Force". Article 3 was, further, followed by articles 4 and 5, respectively calling "upon the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the force mandate, as well as with the Special Representative of the Secretary-General" and calling "upon all Afghans to cooperate with the International Security Assistance Force and relevant international governmental and non-governmental organizations, and welcom[ing]

the commitment of the parties to the Bonn Agreement to do all within their means and influence to ensure security …”.

173. The Bonn Agreement itself contained recitals “reaffirming the independence, national sovereignty and territorial integrity of Afghanistan”, “recognizing that some time may be required for a new Afghan security force to be fully constituted and functional and that therefore other security provisions detailed in Annex I to this agreement must meanwhile be put in place” and “considering that the United Nations, as the internationally recognized impartial institution, has a particularly important role to play, detailed in Annex II to this agreement, in the period prior to the establishment of permanent institutions in Afghanistan”.

174. Consistently with the references contained in SCR 1386, Annex I to the Bonn Agreement provided:

> “3. Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, as appropriate, be progressively expanded to other urban centres and other areas.
>
> 4. The participants in the UN Talks on Afghanistan pledge to withdraw all military units from Kabul and other urban centres or other areas in which the UN mandated force is deployed. It would also be desirable if such a force were to assist in the rehabilitation of Afghanistan’s infrastructure.”

Annex II to the Bonn Agreement included the provision that:

> “1. The Special Representative of the Secretary-General will be responsible for all aspects of the United Nations’ work in Afghanistan.”

The Bonn Agreement therefore envisaged a UN mandated force (ISAF) under UN control to assist the Afghan Interim Authority. It does not support the idea of individual contributing nations operating on their own authority or terms to support the UN’s role or give effect to its aims.

175. SCR 1510 (2003) authorised "expansion of the mandate of [ISAF] to allow it, as resources permit, to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs" (article 1). It called upon ISAF to continue to work in close consultation with the Afghan Transitional Authority and its successors and the Special Representative of the Secretary-General as well as with the Operation Enduring Freedom Coalition in the implementation of the force mandate, and to report to the Security Council on the implementation of the measures set out in article 1 (article 2). It decided also "to extend the authorization of ISAF, as defined in resolution 1386 (2001) and this resolution, for a period of 12 months (article 3), and it authorised "the member states participating in [ISAF] to take all necessary measures to fulfil its mandate (article 4) and requested "the leadership of [ISAF] to provide quarterly reports on the implementation of its mandate to the Security Council through the Secretary-General".

176. SCR 1890 (2009) decided "to extend the authorization of [ISAF], as defined in resolution 1386 (2001) and 1510 (2003), for a period of 12 months beyond 13 October 2009 (article 1). It authorised "the member states participating in ISAF to take all necessary measures to fulfil its mandate" (article 2). It recognised "the need to further strengthen ISAF to meet all its operational requirements, and in this regard calls upon member states to contribute personnel, equipment and other resources to ISAF" (article 3), and stressed "the importance of increasing, in a comprehensive framework, the functionality, professionalism and accountability of the Afghan security sector, encourage[ing] ISAF and other partners to sustain their efforts, as resources permit, to train, mentor and empower the Afghan national security forces …" (article 4). It further called "upon ISAF to continue to work in close consultation with the Afghan Government and the Special Representative of the Secretary-General as well as with the OEF coalition in the implementation of the force mandate (article 5), and requested "the leadership of ISAF to keep the Security Council regularly informed, through the Secretary-General, on the implementation of its mandate, including through the provision of quarterly reports" (article 6).

177. Under these SCRs, member states were, necessarily, to provide the personnel and resources which ISAF needed, and were thus authorised to participate in ISAF and take all necessary measures to fulfil its mandate. But the SCRs are replete with references to ISAF acting and being authorised to act, to ISAF having or being given resources and to ISAF reporting to the Secretary General.

178. SCRs also need to be read in light of the principle of proportionality: see Simma et al, The Charter of the United Nations: A Commentary (2012), who continue:

> "This will typically lead to a restrictive reading: resolutions should be understood to embody less restrictive measures - generally favoured on proportionality grounds - unless the SC has clearly used its discretion to decide otherwise. Thus, in cases of deliberate ambiguity, especially as regards delegations of powers and authorizations to use force, a narrow interpretation is appropriate."

179. Against a narrow view, Lord Sumption notes the exceptional and escalating levels and threats of violence faced by UK forces. That these were particularly serious in Helmand Province where UK troops were located is a fact. On the other hand, the wording of the mandate conferred by the SCRs goes back to the outset of UN involvement, when these levels and threats were not necessarily apparent.

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, which Lord Sumption and Lord Wilson adopt, 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. That is not however the end of the matter as regards the United Kingdom's authority to operate its own detention policy.

ISAF's and the United Kingdom's policies regarding detention

181. The position is summarised in Lord Sumption's judgment in paras 31 to 37. ISAF policy under its Standard Operating Procedures SOP 362 allowed up to 96 hours for release or handing over into the custody of Afghan authorities, subject in para 8 to authority, vested in the ISAF commander in the following terms:

> "The authority to continue to detain an individual beyond the 96-hour point is vested in COMISAF (or his delegated subordinate). A detainee may be held for more than 96 hours where it is deemed necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer-term detentions but is intended to meet exigencies·such as that caused by local logistical conditions eg difficulties involving poor communications, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him. Where this exigency applies, COMISAF must be notified. Where, in the opinion of COMISAF (or his delegated

> subordinate), continuation of detention is warranted, COMISAF (or his delegated subordinate) may authorize continued detention."

182. Although no change was made in ISAF's guidelines, the United Kingdom did over the years develop and operate its own policy relating to detention. In the years prior to November 2009, this involved decisions regarding detention being taken by United Kingdom officials, rather than ISAF. On the evidence of Mr Devine, called by the Ministry and unchallenged on this point, ISAF was kept informed both of the United Kingdom's policy in this respect and of individual detentions made under it. Leggatt J made significant findings in this connection. In para 181, he referred to a United Kingdom report of an initial objection by the Chief of Staff of ISAF in this connection in 2006, to the effect that ISAF, rather than United Kingdom officials should be taking detention decisions. The United Kingdom rejected this objection, explaining that it considered that the United Kingdom had to take such decisions in order to ensure that its legal obligations were properly discharged. The report concluded by saying that, now United Kingdom officials had made this point to NATO HQ, "it is hoped that HQ ISAF will soon be directed to accept the UK position". Importantly, Leggatt J went on to say, in the passage already quoted in para 25 above:

> "I infer that ISAF headquarters did subsequently accept the UK position as detention decisions continued to be taken by UK officials without involving ISAF and there is no evidence of any further complaints."

183. Until November 2009, United Kingdom policy matched ISAF policy with regard to the length of detention. But, with effect from November 2009, the United Kingdom's detention policy changed to allow detention beyond 96 hours not only in accordance with ISAF policy, on the grounds set out in para 8 of SOP 362 and with ISAF HQ authorisation, but also in "exceptional circumstances" with the authority of United Kingdom HQ and United Kingdom ministerial authorisation. The revised policy was set out in BRITFOR Standard Operating Instruction J3-9 dated 6 November 2009. Annex G required detailed justification to be submitted with any application for extension of detention beyond 96 hours. The notes to assist its compilation identified as relevant factors the intelligence gained to date and likely to be obtained by further detention and its relevance for any prosecution, together with (and emphasised) the likely impact of detention for United Kingdom/Coalition forces, and in particular whether detention would save life and limb and what the detained was likely to do if released, as well as any legal issues relevant to continued detention.

184. Mr Devine also gave evidence that ISAF was made aware at the highest level of the change introduced in November 2009 and of its application thereafter in individual cases and never objected. He said in one passage:

> "No, my point under this policy is when we introduced the policy in November 2009 we informed ISAF both through its senior body, the North Atlantic Council, and I assume, I don't recall, ISAF through its chain of command. The chain of command, and indeed the NATO political authority, the North Atlantic Council, were fully aware of the policy we were undertaking. I think we can take that - understanding how NATO works, I think we can take that consent as NATO authority for our actions."

Mr Devine's evidence on this point was again not challenged by cross-examination.

185. In this connection, Leggatt J said this in para 184:

> "The MOD has argued that the UK did not operate a detention policy which was separate from ISAF policy because ISAF policy envisaged and accommodated some variations in national practice and, in particular, ISAF accepted the need for the UK to depart from the ISAF 96-hour detention limit in exceptional circumstances in light of the fact that UK armed forces were operating in an area of Afghanistan where there is a particularly high level of insurgent activity. I have accepted the evidence of Mr Devine that NATO was informed of the UK's decision to apply a 'national policy caveat' to the ISAF 96-hour limit and did not object to this. But that is a very long way from showing that either UK detention operations generally or individual detentions by UK armed forces were under the command and control of ISAF. It is clear that they were not."

The documentation shows that NATO was indeed informed in the most formal way and at the highest level, by letter dated 5 November 2009 to its Secretary-General, Mr Anders Rasmussen, giving full details and the explanation for the change in policy. The terms would clearly have been expected to elicit an objection, if objection there had been. In fact there was none.

186. In the light of Mr Devine's evidence, I read Leggatt J's findings in paras 181 and 184 as accepting as an inference that ISAF acquiesced in the UK position that it was open to the UK to take its own detention decisions within the 96 hour period, and, in and after November 2009, to apply its own policy regarding detention in excess of 96 hours in "exceptional circumstances".

187. In international law terms, the position is in my opinion covered by the judgment in *Case Concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) Merits, [1962] ICJ Rep (judgment of 15 June 1962), where the ICJ said this at p 23:

> "It has been contended on behalf of Thailand that this communication of the maps by the French authorities was, so to speak ex parte, and that no formal acknowledgment of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgment by their conduct was undoubtedly made in a very definite way; but even if it were otherwise it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. Qui tacet consentire videtur si loqui debuisset ac potuisset."

188. The Court of Appeal did not consider that ISAF's failure to protest in these circumstances could be considered to amount to tacit consent (para 71). I do not agree with the Court of Appeal's analysis. The Court of Appeal did not refer to Leggatt J's clear conclusion in para 181 that ISAF did subsequently accept the UK's position regarding detention, and para 184, which the Court of Appeal did cite, is directed not to the contrary, but to the question of command and control. Leggatt J expressly accepted the evidence of Mr Devine, which also establishes that ISAF was kept fully and regularly informed of the UK detention policy and its application to particular detainees. The natural inference from this and from the absence of any further complaints by ISAF at any time is, in my opinion, that ISAF did accept the UK's right to apply its policies and procedures both before and after November 2009, even though they differed from ISAF's.

189. I add that it seems that two other members of ISAF also adopted different policies regarding the 96-hour limit, the USA by enacting domestic legislation and Canada by reaching specific agreement with the Afghan authorities to treat detainees as prisoners of war. Domestic legislation would protect US forces in at any rate the United States. It may be that an agreement with the Afghan authorities could be presented as an independent source of authority to detain under local law. The UK

did not pursue either of these protective routes. But in no case is there an indication that ISAF raised any objection to this conduct by members of ISAF.

190. I add that, had I not concluded that ISAF tacitly accepted (and indeed that the judge's findings amount to acceptance that ISAF tacitly accepted) the UK's position regarding its policies both before and after November 2009, I would not have determined this largely factual point against the Ministry of Defence. I would have remitted it to the judge for further examination, on the basis that Mr Devine's evidence on the point was effectively unchallenged, such potential significance as the point may have does not appear to have emerged very clearly at the hearing before him, and the point should now be clearly addressed and determined.

The consequences of the above analysis

191. The above analysis means that the UK was, when implementing its detention policies before and after November 2009, acting in a way which was accepted as permissible by ISAF. ISAF could not however authorise any detention policy by a state whose forces were participating in ISAF outside the scope of the authority which ISAF had under the relevant SCRs. The SCRs did not authorise detention save where necessary for imperative reasons of security. Any policy involving detention purely for intelligence-gathering reasons, without the co-existence of some other ground such as danger to UK forces or the ISAF mission generally, could not properly have been authorised by ISAF, or applied by the UK. But, subject to that caveat, I see no reason why ISAF should not accept the operation by a particular state participating in ISAF of its own detention policy, separate from ISAF's own guidelines.

192. A number of possibilities arise from these conclusions. One is that, as a result of ISAF's tacit assent to the United Kingdom's operation of its own policies, responsibility for any detention by United Kingdom forces should be borne by ISAF, not the United Kingdom. The Ministry of Defence argued as much before the courts below, relying on the decision of the Grand Chamber of the European Court in *Behrami v France*, *Saramati v France, Germany and Norway* (2007) 45 EHRR SE10. Leggatt J rejected the argument for the reasons given in his para 184 (quoted in para 185 above). The essential reason was that the UK forces were not in this respect under the command and control of ISAF. The Ministry of Defence originally sought permission to appeal against this conclusion (by a proposed Ground 3 in its notice of appeal to this court). The Ministry has not however pursued that application, so that Leggatt J's conclusion in para 184 stands.

193. That is again not the end of the matter. The issue to which Leggatt J was referring in his para 184 - whether UK armed forces were under the command and

control of ISAF in relation to detention - is one thing. Whether the UK was authorised by ISAF to pursue its own detention policy in the context of its activities as a participating member of ISAF is another. Accordingly, subject to the caveat that detention purely for intelligence gathering reasons could not be justified, the primary question in relation to each period of detention in respect of which SM complains is whether there was a good reason for his detention for imperative reasons of security, and if so whether "exceptional circumstances" existed justifying United Kingdom forces in continuing to act as the detaining authority, rather than handing SM over to the Afghan authorities, after the first 96 hours. If such circumstances operated as a concurrent reason for continued detention, they could justify the detention, even if another illegitimate reason, such as a desire to interrogate, was also in operation. Even if the only motive for continued detention present in the United Kingdom authorities' mind was to continue interrogation, that does not exclude the possibility that another basis in fact existed, which would have justified and led to continued detention, had the United Kingdom authorities directed themselves correctly. SM is claiming damages for wrongful detention. It is highly material to consider whether, but for any failures which he may establish in United Kingdom authorities' reasoning or procedures, he would have been any better off - in other words, anywhere other than in custody. Further, if the answer is that he would not have been in the custody of United Kingdom forces, but would have been in the custody of Afghan forces, it would be material to consider whether this would have involved him in any form of detriment, justifying an award to damages.

194. Exceptional circumstances could well exist if extended detention was or would have been necessary because SM represented a real danger to United Kingdom forces or ISAF's mission generally, but could not in the meanwhile be transferred to Afghan custody because the Afghan facilities were for the time being either unsatisfactory or full. As to this, para 44 of the Ministry's amended defence, which is for the purposes of the issues now before the Court to be taken as correct, indicates that overcrowding and lack of capacity in Afghan facilities was a reason for non-transfer during the third period from 6 May to 25 July 2010 in respect of which SM complains. It seems unlikely that this situation did not also exist during the second period starting on 10 April 2010. Another factor of potential relevance is that throughout that period a legal challenge was on foot as to the appropriateness of any transfers of detainees to any of the three detention facilities operated by the National Directorate of Security ("NDS") of Afghanistan in Kabul, Kandahar and Lashkar Gah. The relevant proceedings were heard in the Divisional Court on 19 to 23 and 26 to 29 April 2010. They led to a judgment given 25 June 2010, which concluded that it would be unlawful for United Kingdom transfers to be made to NDS's Kabul facility. It could hardly lie in the mouths of the present respondents to assert that they could have been transferred to a facility to which it would have been unlawful for such a transfer to be made.

195. As to the danger or risks for United Kingdom forces or the ISAF mission, the assumed facts set out in paras 26 to 65 of the amended defence speak for themselves. I set out the most material:

> "26. … The claimant was detained at around 3.20 am (Afghan time) on 7 April 2010 as part of a planned ISAF operation. The team which undertook this operation included UK military personnel, members of the Afghan Partnering Unit and ISAF military working dogs. The operation targeted a senior Taliban commander and the vehicle in which it was believed he was travelling. When the operation was launched, approximately four people were seen leaving the vehicle and entering two compounds.
>
> 27. From the outset of the operation, as their helicopter touched down near the two compounds, the capturing team came under heavy fire.
>
> 28. The claimant ran from one of the two compounds, along with another insurgent. The other insurgent fired upon UK military personnel and was killed. The claimant fled from the compound into a field about 450 metres from the compound. He was asked a number of times via an interpreter to identify his location and to come out with his hands up. He did not do so. He was considered to present a significant and imminent threat. Accordingly, a military working dog was released into the field by its handler and the dog apprehended the claimant, in the process causing him to suffer a bite to his right arm.
>
> 29. Halfway along the route along which the claimant was observed to have fled, between the compound and the place of his arrest, UK Armed Forces found a rocket propelled grenade ('RPG') launcher and two RPG rounds.
>
> 30. During the course of the operation, another two insurgents were found in one of the two compounds. One of them engaged UK armed forces and was killed. The other insurgent was captured.
>
> 31. UK Armed Forces safely extracted the claimant and the other captured insurgent. They did so whilst under heavy and

> sustained small arms and RPG fire. The extraction took about ten hours. Three members of UK Armed Forces were wounded in action.
>
> 32. The claimant was lawfully captured and detained in accordance with ISAF's standard operating procedures, pursuant to authorisation contained in UN Security Council Resolution 1890 (2009) and in compliance with IHL.
>
> 33. … the claimant's asserted ignorance of the RPGs and launcher is denied. The Detainee Transfer Paperwork records that explosive traces were found on the claimant's clothes.
>
> …
>
> 36. … In response to questioning the claimant stated he was a farmer. The defendant subsequently received information that the claimant was a senior Taliban commander, also known as Mullah Gulmad. Mullah Gulmad was, and is, believed to have been involved with the large-scale production of IEDs and to have commanded a local Taliban training camp in mid 2009.
>
> …
>
> 38. … On 7 April 2010, at Camp Bastion, the claimant was informed, with the aid of an interpreter, that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission and that he would either be released by ISAF or transferred to the Afghan authorities as soon as possible. He was informed that he had the right to contact the International Committee of the Red Cross ('ICRC') at any time and when asked if he wished to have someone informed of his detention, gave the name of his father."

196. Taking this account as correct, as we are required for present purposes to do, it is unsurprising that, in an initial application by BRITFOR for continued detention dated 8 April 2010 the Detention Authority said this in respect of SM in the section of the relevant form (Annex G) headed "Legal Issues":

> "The test to be applied is whether, on the balance of probabilities, Detainee 995 has done something that makes him a threat to force protection, self-defence or wider mission accomplishment. Having considered all the evidence and intelligence relating to this operation, in particular Detainee 995's actions immediately prior to capture and the assessment that he attempted to hide two RPGs, I advise that the policy test is satisfied."

The "Legal Issues" sections in the eight subsequent Annex G applications which were completed to obtain a series of 72 hour extensions of detention included similar information, but were from time to time also expanded and updated. Thus on 13 April 2010 specific mention was added of the fact that the compound from which SM had fled had been known to have links with "Obj White" (code for the local Taliban commander) and the assessment was added that SM "may be" that commander's deputy. By 16 April 2010, the assessment was expanded to say that SM "is" the commander's deputy. On 25 April 2010, there was reference to "the positive identification that he is … a TB Comd and Obj WHITE's deputy". On 28 April 2010, the addition was made that "the recent CHEMEX results have revealed a high confidence return for RDX, PETN and TNT. It is also assessed that he may be … Obj WHITE'S deputy". On 1 May 2010, the further addition appeared that he "has been positively identified by HUMINT as call sign …". (The dots represent redactions in the versions before the Supreme Court.)

197. The picture which on its face emerges is that the completion of the Annex G applications was not a mere formality or box-ticking exercise. Rather, it appears as a conscientious exercise on each occasion in reconsidering and restating the facts and in re-applying the test whether SM had done something "which makes him a threat to self-defence, force protection or wider mission accomplishment". The initial application was also completed with "No" to "Release" and "Yes" to "Transfer", "Extension to 96 hours" and "Extension beyond 96 hours". The eight subsequent applications were all completed with "No" to "Release" and "Yes" to "Transfer" and to "Extension beyond 96 hours". In these circumstances, despite the further entries to the effect that the evidence to hand made this a "weak case to hand to the NDS", the natural (and unsurprising) inference is that SM was seen throughout not only as a threat to self-defence, force protection and/or wider mission accomplishment, but also as a suspect who, once United Kingdom forces ceased to hold him and a suitable NDS facility was available, was to be handed over to the NDS rather than released.

198. Whether exceptional circumstances for extended detention in this or any other sense existed which justified or could have justified detention by United Kingdom forces for longer than 96 hours is therefore an issue which should, in my view, be left open for further consideration at trial. The judge's findings in relation

to the second and third periods of SM's detention were made on the false premises that, firstly, once someone has been captured and disarmed, there can be no imperative reasons of security for detaining him further, and, secondly, that article 5 of the ECHR applied without qualification or addition. The judge also appears to have thought that a short-term absence of capacity in the NDS Lashkar Gar detention facility would preclude a conclusion that SM was being held with a view to transfer there (see eg his para 348). That was wrong in my view, if there was a fair prospect of transfer there within a not unreasonable longer-term period. I add that the Court of Appeal was incorrect, in para 250 of its judgment, to say that Mr Devine had stated about SM "that his continued detention was not assessed to be necessary 'for force protection purposes'".

199. Likewise, if, contrary to my above conclusions, ISAF cannot be treated as having tacitly accepted the UK's changed policy in and after November 2009, it should still remain open to the UK to submit that SM's detention beyond 96 hours could and would have been authorised under ISAF's guidelines, had they been applied. That too will require factual inquiry and findings about the reasons for which SM was in fact held, as well as potentially about any other basis or bases on which he could and would have been held in any event, and in each case whether they would have constituted grounds for extended detention within the terms of the ISAF guidelines. Para 8 of the ISAF guidelines gives some limited, but not exclusive, examples of the "exigencies" which may justify extended detention. It also contemplates extended detention "where it is deemed necessary in order to effect his release or transfer in safe circumstances". Whether the situation falls within these words or not, there must be a strong argument that the relevant "exigencies" could include, for example, extended detention when necessary because the person in question represented a real danger to UK forces or ISAF's mission generally, but could not for the meanwhile be transferred to Afghan custody because the Afghan facilities were for the time being either unsatisfactory or full.

200. In these circumstances, and in common with Lord Sumption, (paras 86 and 87), I am not satisfied that Leggatt J's findings can be transposed to the present context, when the issue is now whether there were exceptional reasons which under UK policy, or alternatively, exigencies which under ISAF rules, justified SM's continuing detention during either or both of those periods. I would remit that issue for determination at the trial accordingly.

Application of ECHR

201. This brings me to consider whether and how far detention for exceptional reasons under UK policy or by reasons of exigencies under ISAF rules can be regarded as consistent or can be accommodated with article 5 of the ECHR. The Ministry of Defence relies upon article 5(1)(c) and (f) as heads expressly covering

the present circumstances, alternatively upon the accommodation between the power to detain conferred by SCR 1546 and article 5 which I have already concluded (para 164 above) should be made in the context of non-international armed conflicts such as those in Iraq and Afghanistan in which United Kingdom forces were engaged at the times relevant to these appeals.

202. To the extent that SM was held with a view to handing him over to the NDS on reasonable suspicion of having committed an offence or offences, article 5(1)(c) would constitute a basis for his detention. It would, however, be necessary to go on to consider whether the United Kingdom had complied with article 5(3). Article 5(3) is (as Lord Sumption also notes in his para 96) not easy to fit into a context where the United Kingdom was not in a position to exercise judicial authority or power, or ever going to put SM on trial itself. Applying an approach similar to that taken in *Hassan*, it may be that it can be modified in the present context to accommodate administrative procedures undertaken by United Kingdom authorities. Alternatively, if articles 5(1)(c) and 5(3) do not, even with modification, fit the present circumstances, then, to the extent that SM was held with a view to his handing over to the NDS, there is to my mind attraction in Leggatt J's view that article 5(1)(f) can be regarded as applicable to a de facto transfer of jurisdiction between armed forces of different States in Afghanistan. It would then be necessary to consider whether the United Kingdom complied with article 5(4). However, even if neither article 5(1)(c) nor article 5(1)(f) directly applies, each offers an analogy which points towards and assists in identifying a more general accommodation between the international law power to detain and article 5.

203. Under both article 5(1)(c) and (f), the Ministry of Defence faces a difficulty if its only actual motivation in continuing to detain during the second period was to interrogate. That, as I have stated, was not a legitimate basis under the SCR, any more than it is under the European Convention on Human Rights (see authorities cited by Lord Sumption in para 80). If there was in fact some other legitimate basis on which SM could and would still have been detained, then the question would arise whether, on showing this, the Ministry of Defence could bring itself directly within article 5(1)(c) or (f), or whether its relevance would simply be to the question whether SM should receive any (or what) damages. This would then merit further argument in due course before the judge.

204. If neither article 5(1)(c) nor article 5(1)(f) applies directly, the question arises whether and how far the power conferred by SCR 1546 to detain for imperative reasons of security can and should be accommodated with article 5. For reasons indicated in paras 152 to 168 above, I consider that the two can and should be read together. But this is subject always to compliance with core procedural requirements modelled on the provisions of article 5(1), (3) and (4). With regard to article 5(1) ("in accordance with a procedure prescribed by law"), I am content to adopt what Lord Sumption says in his paras 91 to 93. With regard to article 5(3), which will

arise for consideration if the circumstances prove on further consideration to make article 5(1)(c) relevant, I agree with Lord Sumption that the critical question is how far the requirements of article 5(3) can properly be adapted to the conditions of armed conflict in Afghanistan, and that this question should be left to be determined at the trial (see his paras 95 and 98 in particular). For completeness, I must address the argument raised by the First Interveners and considered by Lord Wilson in paras 136-140 that, whatever the international or Convention law position, compliance with domestic law (whether English law or the law of the place of detention or one or other is not entirely clear) is also required for any detention to be in accordance with law. This argument cannot, in my view, arise in *Al-Waheed* in the light of the limited leap-frog issue before the Supreme Court. In *SM* the argument was suggested below by Ms Fatima QC for the Interveners, but neither court found it necessary to deal with. However, the Ministry of Defence argued unsuccessfully for a reverse position, namely that it was authorised to detain SM by Afghan law, and this alone sufficed to justify SM's detention under article 5, whatever the international legal position. The Supreme Court has now decided to defer decision whether to grant permission to appeal on this issue. My own view is that Ms Fatima's argument fails for the reasons given by Lord Reed in his paras 343-345, which I understand to fit with those given by Lord Wilson in his para 139. But, if the view were to be taken that the argument does not fail for these reasons, this adds potentially to the significance of the issue on which the Court has now deferred any decision whether to grant permission to appeal (viz, whether Afghan law authorised detention in accordance with international law, and in particular in accordance with any Security Council Resolution authorising such detention).

ECHR article 5(4): right to review of the lawfulness of detention

205. Article 5(4) provides in terms that:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

In *Hassan*, para 106, the European Court of Human Rights explained how this might be understood and adapted to cater for the exigencies of an international armed conflict:

> "106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, article 5 paras 2 and 4 must also be interpreted in a manner which takes into account the context and the

> applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment 'shall be subject to periodical review, if possible every six months, by a competent body'. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent 'court' in the sense generally required by article 5 para 4 (see, in the latter context, *Reinprecht v Austria*, (2005) no 67175/01, para 31, ECHR 2005‑XII), none the less, if the Contracting State is to comply with its obligations under article 5 para 4 in this context, the 'competent body' should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. …"

206. For reasons already given, I consider that this guidance is equally relevant in relation to the NIAC in which United Kingdom forces were engaged and in the context of which SM was captured and detained. In October 2012, a wide range of 24 states together with international organisations including the UN, NATO, the African Union, the European Union and the ICRC agreed on *The Copenhagen Process: Principles and Guidelines*. These were specifically intended to reflect "generally accepted standards" (Commentary, para 16.2) applicable "to international military operations in the context of non-international armed conflicts and peace operations" (Introductory para IX). Principle and Guideline 12 reads:

> "A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention."

This is both consistent with and supports the application to detention in the course of a NIAC of principles similar to those recognised in *Hassan* as appropriate in relation to an IAC.

207. The possibility that SM could have sought habeas corpus while in United Kingdom forces' custody was not pressed by Mr Eadie QC. Even assuming that a writ of habeas corpus could (contrary to the Ministry of Defence's primary case) have lain, Mr Eadie was, as I understood him, prepared to accept that the possibility

of seeking and obtaining such a writ would not, at least in the Afghan context, satisfy the modified requirements of article 5(4). On the other hand, it is not, I understand, suggested, and in any event could not, I think, realistically be suggested, that SM should have been afforded access to any local court prior to being handed over to an NDS detention facility. The question is therefore whether the legality of SM's detention was subject to periodic review by a competent body in the sense of a body providing "sufficient guarantees of impartiality and fair procedure to protect against arbitrariness", the first such review taking place shortly after he was taken into detention, with subsequent reviews at frequent intervals thereafter. What is "frequent" must depend on the context in and basis on which a detainee is being held. But the European Court of Human Rights was, on the face of it, envisaging periodic reviews of greater regularity than "if possible every six months", the phrase it quoted earlier in para 106 from the Fourth Geneva Convention.

208. The scheme established by SOI J3-9 is detailed and clear. The reviews undertaken under it in respect of SM were very frequent, and the documentation relating to them can be seen (despite redactions for security reasons) to be impressive in its thoroughness. Criticisms are however directed in two main areas: (a) sufficiency of the guarantees of impartiality and (b) fairness of the procedure so far as concerns SM's involvement.

209. Before considering these criticisms, it is appropriate to consider the purpose, in the context of the present case, of reviews such as those contemplated by *Hassan*, para 106, and by Copenhagen principle 12. The purpose is to ensure that detention only occurs and continues when there is good cause for it. For that reason, the detainee should be told why he is being detained, and given the opportunity to give his account of events as well as to pass information to the outside world which will reach his family. But, if this has occurred and a detainee is held as an active member of the Taliban and a continuing threat, with a view to his eventual transfer to NDS custody, the frequency of review which is required may well diminish. In the present case, the actual frequency of reviews was closely linked with the process of obtaining authorisation for further interrogation, but interrogation was not itself a basis for detention. What was a potential basis for detention was the risk that SM posed to United Kingdom forces and the ISAF mission and the intention to transfer him into NDS custody with a view to further investigation and/or criminal prosecution.

210. In the present case, SM was arrested during armed operations and extracted under heavy and sustained small arms and RPG fire in a process which took ten hours. He must have known that he was being arrested as an insurgent, and he responded to questioning by saying that he was a farmer: see para 195 above. He was then taken to Camp Bastion where he was interviewed through an interpreter, told that he had been detained as a threat to the ISAF mission and further told that he would be either released or transferred to the Afghan authorities as soon as

possible. He was then given the opportunity of making a statement about his detention. Form Annex A "Rights of a detainee", which was (on the currently assumed facts) accurately translated to him and signed by SM by thumbprint, records SM's response and information which he was given, in the following terms:

> "I was working in the field 9-12. Helicopter came so I layed down in my Field, they let the dog attack me and then arrested me". Likewise, he was informed of his right to contact the ICRC by letter 'at any time during your detention here'."

211. No subsequent information came to light to change the United Kingdom forces' assessment of SM's role and involvement with the Taliban in any way which could have militated in favour of his release, rather than his detention and transfer in due course into NDS hands. On the contrary, such further information as came to light merely strengthened the grounds for considering that he was an insurgent: see para 196 above. In fact, SM was also interrogated over a period during which he "maintained an obstructive approach to questioning and persisted in his denial of involvement in the insurgency and specifically Obj WHITE", as recorded in Annex G relating to the eighth successive 72 hour review. So it is clear that he did have further opportunities to give his account and to provide any information which might put a different complexion on his involvement.

212. Against this background, I turn more specifically to the two areas of criticism. As to (a), sufficiency of the guarantees of impartiality, the Court of Appeal dealt with this at some length, on the assumption that (although it took place on 9-10 April 2010) the initial review as well as all the subsequent reviews were all conducted in accordance with the revised Detention Authority regime set out in Amendment 2 of SOI J3-9 dated 12 April 2010. The Court of Appeal noted that under Amendment 2 the Detention Authority was the Commander of Joint Force Support (Afghanistan), and went on (para 288):

> "Amendment 2, para 12 states that his continuing duty as the Detention Authority to ensure that each detention is justified provided an independent level of review for all detention operations, and that the Legal Advisor is a member of the Detention Review Committee. We note that it is also stated that the core members of the Detention Review Committee 'must remain outside the chain of command for targeting and tactical legal issues', although they are not wholly outside the chain of command in the Theatre."

213. The Court of Appeal went on to point out (para 289) that the judge had made "no detailed findings about the nature of this relationship" (because he did not need to in the light of his view that strict compliance with article 5 was necessary and because he was only dealing with preliminary issues), and continued:

> "This, together with the fact that this issue was only explored in the Secretary of State's post-hearing note on outstanding issues, means that we have limited information as to the precise relationship of the chain of command which has the Commander of Joint Force Support (Afghanistan) at its pinnacle and those responsible for detaining a person. The court lacks the factual context required to reach a decision about the independence of the reviewing body. That would include details of the precise chain of command in Afghanistan, and the meaning of the statement … that the core membership must remain outside the chain of command for targeting and tactical reasons."

214. However, the Court of Appeal went on to give some guidance, stating:

> "291. … We doubt whether a Detention Authority squarely within the chain of command in the relevant theatre, advised by a committee consisting of members who are either the subordinates of the Detention Authority or otherwise within the chain of command under him meets the requirement of independence and impartiality."

and

> "292. … As to whether that regime satisfied the requirements of independence and impartiality, we know that the core membership included the Commanding Officer of the Intelligence Exploitation Force and the Force Provost Marshal. The relationship of the legal adviser who was also a core member of the Detention Review Committee and those responsible for 'tactical legal issues', who it was stated should not be core members, was not explained. We, however, note that the legal and political Advisers and the Force Provost Marshal provided advice to the Detention Authority as to whether to release, transfer or detain in the first 48 hours. The Force Provost Marshal was stated to be the subject-matter specialist for detention issues. This does not sit easily with, and

> might even be thought to be contrary to the requirement that all members of the Committee should be able to present cases 'cold' to the Detention Authority. Moreover, the Detention Authority reported to military superiors, and MoD civil servants advised a government minister who made the decision about whether to authorise further detention. For these reasons, we also doubt that the new regime was sufficiently independent, although our doubts are of a lesser order than those concerning the former Detention Authority regime."

215. During the hearing before the Supreme Court, Mr Eadie produced a list giving the full composition of the Detention Review Committee as well as explaining some of the acronyms used in Amendment 2. But for my part I do not think that the picture is materially clearer than it was before the Court of Appeal. Both the Court of Appeal and Lord Sumption in para 105 of his judgment also adopt the concept of "independence" as an element of the appropriate test. To my mind, that risks introducing too formal an aspect into an essentially military review. It is notable that the European Court of Human Rights in *Hassan*, para 106, used only the word "impartial", while Copenhagen principle 12 spoke only of review by an "impartial and objective authority". I am not confident that the Supreme Court knows enough about the relationships between the various ranks and posts identified in the list that the Court has been given or the way in which the military operates to be able to condemn the review system introduced by Amendment 2 as inadequate. Appellate judges with no military experience sitting thousands of miles from the theatre of armed conflict should, I think, be very cautious to assess the impartiality of a group of officers from or about whom, or of a process about which, they have heard no oral evidence. This should be left to the judge who will at trial have had the opportunity of hearing evidence and making findings about these matters. On this, I see no reason for us, sitting in the Supreme Court, to disagree with the Court of Appeal.

216. Up to this point, I have focused on the process before the Detention Authority and Detention Review Committee. I have done so, because the material available suggests to me that it was only at this level that the existence and level of any threat presented by SM were assessed. So far as appears, and subject to anything that may emerge at trial, it appears that the matter only went to a higher level (that is to Permanent Joint Headquarters ("PJHQ") and ultimately to ministerial level) in the context of the 14 day reviews which were undertaken under Amendment 2 Part II paragraph 29 using Annex H, to gain permission for further detention for further interrogation. Annex H does not appear to have included information directed at enabling either PJHQ or ministers themselves to form any view on whether SM presented a threat which itself justified further detention pending transfer into NDS hands. Both paragraph 27 of Part II of Amendment 2 to SOI J3-9 and the way in which Annex H was itself completed focus on the value of the intelligence which

any extension of detention might provide for force protection and/or (more generally) for a better understanding of the nature of the insurgency.

217. I would add that in the light of what I have said in paras 209-211 above, I find it difficult to see that the circumstances of SM's detention called for reviews every 72 hours or even every 14 days directed to the question whether he was a threat to United Kingdom forces or the ISAF mission. If he was a threat on capture, as he clearly was on the assumed facts, there was nothing to make that threat go away. Rather, as I have said, the only information becoming available simply strengthened the case for regarding him as a threat. There was no change in the general situation in Afghanistan to affect this. The reason for the regular reviews which actually occurred was the repeated need to authorise further interrogation. But that was not by itself a justified reason for detention (and one might add that, if it had been, it could hardly be expected that SM would be offered the opportunity to make observations on the course of interrogation so far or the merits or otherwise of further interrogation).

218. I turn to (b), the fairness of the procedure as regards SM. For the reasons I have already given, he was in my view given and in possession of sufficient information about the case against him at the outset, and had an appropriate opportunity of responding to it. He must have known that this was part of a process of considering the appropriateness of his continuing detention. Likewise, to the extent that he was held thereafter because he would if released have been a threat and was being held pending transfer to the NDS, I cannot see what any further opportunity or opportunities to comment could have offered him in practical terms.

219. However, I accept that - in order to avoid leaving a suspect in SM's position in silent limbo, and in some contexts perhaps also to minimise the risks of ill-treatment - there is an intrinsic value in having a suspect's case reviewed at regular intervals and informing him of the opportunity to make representations. This is so, even if such reviews appear unlikely to lead to any change in his treatment or detention. Here, SM was not, so far as appears, informed about any review process or offered any opportunity of making representations in that connection (although he was offered the opportunity at any time of contacting the ICRC). On the face of it, the United Kingdom fell short in this respect of providing him with the appropriate procedural guarantees. However, the claimant is seeking damages, expressly including just satisfaction. In this context, it seems highly unlikely - indeed contrary to all the evidence presently available - to suggest that there would have been any prospect that informing SM about any review process, or offering him any opportunity of making representations in respect of it, would have made any difference to actual events.

220. There is of course a question whether SM's handing over to the NDS was delayed, or (putting the point the other way around) whether his detention in United Kingdom hands was extended, by the fact that the United Kingdom regarded him as a potential source of information material to the success of the ISAF mission, and repeated extensions of his detention were sought and obtained on that ground. He was not notified of the reviews which led to such extensions. Had he been notified, he might, at least in theory, have objected to any extensions with that purpose in mind. Had that objection (however implausible it may seem) been given weight, the question would at once have arisen whether there was any other basis for United Kingdom forces continuing to detain him. The United Kingdom authorities would then have had to consider, earlier than it appears they did, the question whether there was any NDS detention facility with spare capacity to which they could properly transfer SM. Again, however, so far as one can presently see, such a process may well have led to no more than SM remaining in United Kingdom custody pending transfer to NDS or his slightly earlier transfer from United Kingdom to NDS custody. Either way, a claim for substantial damages might be optimistic.

221. In the light of the above, I, for my part, would limit myself to the views expressed, and remit the whole case to the judge for trial on that basis.

Conclusions

222. The appeal in *Al-Waheed* is not concerned with the question whether minimum procedural standards were established and applied in relation to the relevant detention. I agree with its disposition as Lord Sumption proposes.

223. As to SM, whether the United Kingdom was or would have been entitled to detain him after the expiry of a 96-hour period, that is after 11 April 2010, depends upon whether it can show, firstly, that detention was required for imperative reasons of security, and, secondly, that exceptional circumstances under the UK policy (or alternatively exigencies under ISAF guidelines) existed justifying United Kingdom forces in continuing to act as the detaining authority, rather than handing the detainee over to Afghan authorities. This and the further issue whether failure to provide SM with an appropriate review process in any respect led to any extended detention or other loss should be remitted for determination at the trial.

LORD HUGHES: (with whom Lord Neuberger agrees)

224. The ground in this case has been comprehensively covered by the judgments above. It would not help to repeat the valuable analysis offered. Subject to what

follows, I agree with the judgments of Lord Mance, Lord Wilson and Lord Sumption.

225. It is necessary to address three points on which these judgments do not agree, and one further point which is considered by Lord Wilson at paras 136-140.

226. The first difference is whether the UN Security Council resolutions concerning Afghanistan conferred authority to detain (and to lay down rules about detention) upon ISAF as an entity (as Lord Mance says) or upon the troop-contributing member nations through the medium of ISAF (as Lord Sumption and Lord Wilson say). This difference has no impact on the outcome of the appeal in the case of Serdar Mohammed because, as Lord Mance concludes, ISAF in any event endorsed the decision of the United Kingdom to adopt its own detention policy, as was also the position in relation to the USA and Canada. I therefore doubt if it is necessary to express a concluded view on this topic, but, subject only to observing that the authority to troop-contributing member nations is clearly premised on mutual co-operation although not on precise identity of polices, I presently prefer the analysis of Lords Sumption and Wilson.

227. The second difference relates to whether there has been established an infringement of article 5(4) ECHR on the grounds that the United Kingdom system of internal review in Afghanistan failed to achieve sufficient impartiality. On this topic I agree with Lord Mance, for the reasons he gives, that that suggested shortcoming has not been established, and accordingly do not agree with the contrary conclusion of Lords Sumption and Wilson. I particularly support Lord Mance's observations in the last four sentences of para 215. I also agree with both Lord Mance and Lord Sumption that it is very questionable that any further opportunity to state his case could have made any difference to Serdar Mohammed.

228. The third difference concerns the possible application of article 5(1)(f). On this topic I agree with Lord Mance at paras 202-203. My primary conclusion is, like Lords Mance, Sumption and Wilson, that the very terms of article 5(1)(f), as well as those of other subparagraphs, demonstrate that in the context of armed conflict the article must be interpreted on the principle explained in *Hassan*. If, however, that were to be wrong, then it seems to me that subparagraph (f) is capable of including situations in armed conflict when one State detains for the purpose of handing over the detainee to another.

229. I should add that I doubt if there is a difference between Lord Mance and Lord Sumption as to the possible application of article 5(1)(c). On the findings of fact made by the judge at para 333 it cannot apply to the second period of Serdar Mohammed's detention but if he could have been detained in that period for the

purpose of producing him to the Afghan authorities, this goes to the question whether he is entitled to any, or if so what, award of damages.

230. The additional point considered by Lord Wilson at paras 136-140 concerns the relevance of the domestic law of the country concerned. As to that, I agree with the conclusions of Lord Mance at para 204, for the reasons which he gives and in the light of the observations of the ECtHR in *Őcalan v Turkey* (2005) 41 EHRR 45, cited by Lord Reed at para 345.

LORD TOULSON:

231. My involvement in this appeal has been in relation to all issues except the procedural requirements of articles 5(1), 5(3) and 5(4) of the Convention in relation to the detention of Serdar Mohammed. On all those issues I agree, subject to one point, with the judgments of Lord Mance, Lord Wilson and Lord Sumption. The one point is that discussed in para 226 of Lord Hughes' judgment with which I agree.

LORD HODGE:

232. My only involvement in this appeal has been the hearing on 26 October 2016, following the retirement of Lord Toulson, at which the court considered the procedural requirements of articles 5(1), 5(3) and 5(4) of the Convention in relation to the detention of Serdar Mohammed. On those matters I agree with the judgment of Lord Sumption at paras 68 and 90-110 and with the declarations which he proposes at para 111(4), (5) and (6).

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

233. I agree in part with the conclusions reached by Lord Sumption, in which the majority of the court concur. In particular, I agree that Mr Mohammed's detention by HM Forces after 11 April 2010 did not fall within article 5(1)(f) of the European Convention on Human Rights, and that his detention between 11 April and 4 May 2010 did not fall within article 5(1)(c). I also agree that the arrangements for his detention did not fall within article 5(4), and that the question whether they complied with article 5(3) should be considered after trial. I also agree that the Ministry of Defence is in principle liable to pay compensation to Mr Mohammed if and in so far as his detention was prolonged by his detention by HM Forces between 11 April and 4 May 2010 for intelligence exploitation purposes.

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 Al-Waheed and 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, an issue on which Lord Sumption does not (and does not require to) reach a concluded view. 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).

235. Given the importance of the issues, and the potential influence of this court's decision, I have thought it right to prepare a reasoned judgment. As it is a long judgment which discusses many issues and arguments, I shall summarise my main conclusions at the outset, with references to the sections of the judgment containing the relevant discussion:

(i) Conventional (ie treaty-based) international humanitarian law provides no authority for detention in a non-international armed conflict (paras 243-270 and 274).

(ii) Customary international humanitarian law, in its present state of development, provides no authority for detention in a non-international armed conflict (paras 256-257, 271-273 and 275-276).

(iii) For the purpose of applying the European Convention on Human Rights, UN Security Council Resolutions should be interpreted on the basis that there is a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights; that, in the event of ambiguity, the court must choose the interpretation which is most in harmony with the requirements of the Convention; and that it is to be expected that clear and explicit language will be used if the Security Council intends states to take measures which would conflict with their obligations under international human rights law (paras 277-289).

(iv) The judgment of the Grand Chamber of the European Court of Human Rights in the case of *Hassan v United Kingdom* [2014] BHRC 358 should not be interpreted as entailing a departure from that approach (paras 290-300).

(v) The court should depart from the decision of the House of Lords in *Al-Jedda v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58; [2008] 1 AC 332, that SCR 1546 imposed an obligation to detain in circumstances other than those listed in sub-paras (a) to (f) of article 5(1) of the Convention, which prevailed over the obligation to comply with the Convention by virtue of article 103 of the Charter of the United Nations (paras 304-305).

(vi) *Hassan* should not be interpreted as warranting the modification of article 5(1) so as to permit detention in circumstances not falling within sub-paras (a) to (f), in relation to the detention authorised in Iraq by SCR 1546 (2004), as extended by SCRs 1637 (2005) and 1723 (2006) (paras 292-297 and 307-315).

(vii) Interpreting SCR 1546 consistently with the Convention, Mr Al-Waheed's detention by HM Forces was compatible with article 5(1) of the Convention only if he was detained in circumstances falling within sub-paras (a) to (f) (para 316).

(viii) *Hassan* should not be interpreted as warranting the modification of article 5(1) so as to permit detention in circumstances not falling within sub-paras (a) to (f), in relation to the detention authorised in Afghanistan by SCR 1386 (2001), as extended by SCR 1890 (2009) (para 324).

(ix) Interpreting SCRs 1386 and 1890 consistently with article 5(1), HM Forces had authority to detain Mr Mohammed under the SCRs for more than 96 hours only in circumstances falling within sub-paras (a) to (f) of article 5(1) (paras 322-334).

(x) Mr Mohammed's detention by HM Forces between 11 April 2010 (ie the end of the initial period of 96 hours) and 4 May 2010 was for the purpose of obtaining intelligence. It did not fall within sub-paras (a) to (f) of article 5(1) (paras 335-346 and 351).

(xi) Mr Mohammed's detention during that period was in any event for a purpose falling outside the scope of the authority granted by SCR 1890, and was therefore for that reason also incompatible with article 5(1) (paras 343 and 352-353).

(xii) Mr Mohammed's detention by HM Forces after 4 May 2010 fell within the scope of article 5(1)(c) of the Convention, and was not incompatible with article 5(1) (paras 347-350 and 354-357).

(xiii) The arrangements for Mr Mohammed's detention were not compatible with article 5(4), since he did not have any effective means of challenging the lawfulness of his detention (para 359).

(xiv) Whether there was a violation of article 5(3) of the Convention should be considered after trial (para 359).

Article 5 of the European Convention on Human Rights

236. Article 5(1) of the Convention defines the circumstances in which persons may be detained. It begins:

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

In relation to the question whether a procedure "prescribed by law" has been followed, "the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law": *Medvedyev v France* (2010) 51 EHRR 39, para 79. *Medvedyev* itself provides an example of a situation where the legal basis of detention was assessed by reference to international law, since the detention took place on the high seas.

237. There follows in sub-paragraphs (a) to (f) a list of circumstances in which detention is permissible. They do not include detention for reasons of security, or for the gathering of intelligence. The only ones which are relevant to these appeals are those set out in sub-paragraphs (c) and (f):

> "(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

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

238. The remaining paragraphs of article 5 are concerned with procedural protections against arbitrary detention:

“2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

239. Although the conflicts in Iraq and Afghanistan with which these appeals are concerned took place outside Europe, the European Court of Human Rights has held that a contracting state which detains persons in a situation of armed conflict, outside its own territory, has those persons within its jurisdiction for the purposes of article 1 of the Convention, so that the Convention is applicable. That approach has been applied in particular to the detention of persons by HM Forces operating in Iraq during both the international and the non-international phases of the armed conflict there (the distinction between the international and non-international phases will be explained shortly): see *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, *Al-Jedda v United Kingdom* (2011) 53 EHRR 23 and *Hassan v United Kingdom* (2014) 38 BHRC 358.

240. The substantive guarantees set out in the Convention have been given effect in the domestic law of the United Kingdom by the Human Rights Act 1998. In so far as HM Forces operating in conflicts overseas may have been acting in circumstances which engaged the United Kingdom's responsibilities under the Convention, and in so far as the Human Rights Act is applicable to those overseas operations, any breach of the Convention rights by those forces falls within the jurisdiction of British courts.

241. The central question which has to be determined at this stage of these appeals is how article 5 applied in the context of the phases of the armed conflicts in Iraq and Afghanistan during which Mr Al-Waheed and Mr Mohammed were respectively interned by HM Forces. It is contended on behalf of the Secretary of State that detention in these non-international armed conflicts was authorised under international law by one or more of (1) treaty-based international humanitarian law, (2) customary non-international law, or (3) the relevant SCRs. It is further contended that article 5(1) is modified in its application to these conflicts so as to accommodate the authorisation of detention under international humanitarian law or the relevant SCRs, with the consequence that the list of permissible grounds of detention set out in sub-paras (a) to (f) is not to be regarded as exhaustive. It is also contended that detention in these conflicts satisfied the requirement in article 5(1) that any deprivation of liberty must be "in accordance with a procedure prescribed by law".

242. In considering these contentions, it is necessary to consider the relationship between the Convention, international humanitarian law, and SCRs. It is also necessary to consider the extent to which the application of international humanitarian law and international human rights law depends on the nature of the armed conflict in question: whether, in particular, it is classified under international humanitarian law as an international or a non-international armed conflict. It may be helpful at the outset to consider the meaning of these terms.

International and non-international armed conflict

243. "Non-international armed conflict" is an expression which has no universally agreed definition, but can be understood for present purposes as referring, in the language of article 3 of all four of the Geneva Conventions of 1949 ("common article 3"), to "armed conflict not of an international character", as opposed to international armed conflict, which can be understood as referring, in the language of common article 2, to "cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties". So understood, non-international armed conflict includes conflict in which organised armed groups engage in hostilities against a state. Such conflict may be purely internal to the state concerned, or it may not. It may include situations where a foreign state intervenes in an internal armed conflict in support of the government of the state concerned, at

its invitation or with its consent. Such conflict is to be distinguished from conflict in which one state engages in hostilities against another, which falls into the category of international armed conflict.

244. Examples of non-international armed conflict involving the intervention of foreign armed forces include certain phases of the recent conflicts in Iraq and Afghanistan. Although the conflict in Iraq began as an international armed conflict conducted by coalition forces against the Iraqi armed forces, a multi-national force, to which about 40 states contributed, remained there after that war had concluded and a new Iraqi Government had been established, so as to assist the Iraqi Government in combating insurgents. That phase of the conflict was a non-international armed conflict. Similarly, when an international security assistance force, to which about 50 states contributed, assisted the Government of Afghanistan in its struggle against the Taliban, that also was a non-international armed conflict.

Detention and the Geneva Conventions

245. It is necessary next to consider the significance of the distinction between international and non-international armed conflicts in relation to the authorisation of detention under international humanitarian law. In that regard, it is helpful to begin by considering the relevant provisions of the Geneva Conventions.

246. Traditionally, international humanitarian law, like other international law, was concerned almost entirely with the reciprocal relationships between states, and therefore with conflicts between states rather than internal conflicts between a state and its subjects (subject to exceptions under customary law where internal conflicts affected relationships with other states). It was therefore concerned only with international armed conflict (subject, as I have explained, to limited exceptions).

247. Atrocities committed in civil wars led however to the adoption, as part of the Geneva Conventions, of a limited measure of treaty-based regulation of non-international armed conflict under common article 3. That article provides for the humane treatment of those who may have been involved in "armed conflict not of an international character occurring in the territory of one of the high contracting parties". It states in para 1:

> "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, shall in all circumstances be treated humanely ..."

It goes on to prohibit specific acts, such as torture and rape.

248. Common article 3 was later supplemented by Additional Protocol II to the Geneva Conventions (1977). This is narrower in scope than common article 3 in two important respects. First, it is only applicable in armed conflicts taking place on the territory of a state that has ratified it. Those states do not include several states in which non-international armed conflicts have recently taken place, including Iraq and, until November 2009, Afghanistan. It also applies to a more limited category of armed conflicts than common article 3: namely, those that "take place in the territory of a contracting party between its armed forces and dissident armed forces which, under responsible command, exercise such control over a part of its territory as to be enable them to carry out sustained and concerted military operations and to implement [the obligations imposed by the Protocol]". Certain categories of armed conflict are excluded: first, "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", and secondly "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature". The Protocol spells out rules of humane treatment in greater detail than common article 3, and lays down minimum standards in relation to the prosecution and punishment, under domestic law, of criminal offences related to the armed conflict.

249. By comparison, the Geneva Conventions deal much more fully with the treatment of those involved in international armed conflict. In relation to the present appeals, it is relevant to note in particular the provisions concerned with the detention of prisoners of war and civilians. In relation to the first of these categories, article 21 of the Third Geneva Convention authorises the detention of prisoners of war:

> "The Detaining Power may subject prisoners of war to internment."

The persons who may be detained under this power are defined in detail by article 4(A). They include members of armed forces of a party to the international armed conflict (article 4(A)(1)), members of other armed forces who profess allegiance to a party to the conflict (article 4(A)(3)), members of militias fulfilling certain conditions (article 4(A)(2)), and persons who accompany the armed forces, such as civilian contractors and war correspondents (article 4(A)(4)). The treatment of prisoners of war during their internment is also the subject of detailed regulation. Under article 118 of the Third Geneva Convention, they must be released and repatriated without delay after the cessation of active hostilities in the international armed conflict.

250. So far as civilians are concerned, the Fourth Geneva Convention is concerned with "protected persons", defined by article 4 as "those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". That general definition is then subject to a number of exclusions, such as "nationals of a neutral state who find themselves in the territory of a belligerent State ... while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are". In the section of the Convention dealing with aliens in the territory of a party to the conflict, article 41 prohibits measures of control of protected persons more severe than assigned residence or internment. Article 42 sets out the permitted grounds of internment, and provides that "the internment ... of protected persons may be ordered only if the security of the detaining power makes it absolutely necessary". The International Criminal Tribunal for the former Yugoslavia has interpreted article 42 as permitting internment only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the detaining power by means such as sabotage or espionage: *Prosecutor v Zejnil Delalić*, Case No: IT-96-21-T, Trial Chamber, 16 November 1998, para 1132. Article 43 lays down procedures governing internment:

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

Article 46 requires that restrictive measures taken regarding protected persons, in so far as they have not previously been withdrawn, must be cancelled as soon as possible after the close of hostilities in the international armed conflict.

251. Further provision for the detention of civilians is made in the section of the Fourth Geneva Convention dealing with occupied territories. Article 68 is concerned with protected persons who commit an offence which is solely intended to harm the occupying power. In the case of certain specified types of offence, such persons are liable to internment, provided its duration is proportionate to the offence committed. A further power of internment is provided by article 78:

> "If the occupying power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned

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

252. Article 79 of the Fourth Geneva Convention prohibits the internment of protected persons other than in accordance with articles 41, 42, 43, 68 and 78. Detailed provision is made elsewhere in the Fourth Geneva Convention in relation to the treatment of internees. Article 132 requires that each interned person shall be released as soon as the reasons which necessitated his internment no longer exist, and article 133 provides that internment shall cease as soon as possible after the close of hostilities, subject to specified exceptions.

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. It will be necessary to return to the latter possibility.

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. For example, during the "Troubles" in Northern Ireland, participants in the violence, other than the forces of the Crown, were treated as criminals under

domestic law rather than as prisoners of war. 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 have argued that international humanitarian law impliedly authorises the detention of persons in a non-international armed conflict: see, for example, *Gill and Fleck, The Handbook of the International Law of Military Operations* (2010), p 471, and Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence" (2005) 87 International Review of the Red Cross 375, 377. In summary, such arguments place reliance on the reference to detention in common article 3, and the reference to persons "interned or detained" in Additional Protocol II. They 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

258. As a matter of policy, there is much to be said for the view that international humanitarian law should recognise a right to intern in non-international armed conflicts with an extra-territorial element. As statements of the current state of the law, however, these contentions are controversial. Many scholars take a different

view: to give only a few recent examples, see Conte, "The legality of detention in armed conflict", in *The War Report 2014* (2015), ed Casey-Maslen; *Dinstein, Non-International Armed Conflicts in International Law* (2014), para 274; *Debuf, Captured in War: Lawful Internment in Armed Conflict* (2013), p 465; Goldman, "Extraterritorial Application of the Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict", in *Research Handbook on Human Rights and Humanitarian Law* (2013), eds Kolb and Gaggioli, p 121; *Hill-Cawthorne, Detention in Non-International Armed Conflict* (2016), Chapter 3; Milanovic, "The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts", in *The 1949 Geneva Conventions: A Commentary* (2015), Clapham, Gaeta and Sassòli (eds), pp 46-47; Rona, "Is there a Way Out of the Non-International Armed Conflict Dilemma?" (2015) 91 International Law Studies 32; Rowe, "Is there a right to detain civilians by foreign armed forces during a non-international armed conflict?" (2012) 61 ICLQ 697, 702; and *Sivakumaran, The Law of International Armed Conflict* (2012), p 71. The contentions set out in paras 256 and 257 above have also been rejected by the International Commission of Jurists in its *Legal Commentary on the Right to Challenge the Lawfulness of Detention in Armed Conflict* (2015), pp 16-23.

259. Considering first the contention that the Geneva Conventions and their Protocols impliedly authorise detention in non-international armed conflicts, the arguments against that view can be summarised as follows.

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 also argued that there are cogent reasons why the states negotiating the Conventions and their Additional Protocols are unlikely to have intended to confer any such authorisation. It is apparent from the *travaux préparatoires* that states regarded it as important to maintain their sovereignty over internal matters. Common article 3 was a controversial measure, the British delegate, for example, objecting that it would "strike at the root of national sovereignty" (Final Record of the Diplomatic Conference of Geneva of 1949: Vol II, Section B (1963), p 10). It has to be remembered that it was only in the aftermath of the Second World War that the scope of international law was widely extended to matters internal to sovereign states. In that regard, common article 3 was connected to other developments, including the emergence of international human rights law, with the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights ("ICCPR") (1966), together with regional instruments such as the European Convention on Human Rights (1950). Similar concerns about sovereignty were also expressed by numerous states during the diplomatic conference which led to Additional Protocol II (see Hill-Cawthorne, op cit, pp 23-24).

263. A further concern was to avoid giving the appearance of a legitimate status to those who rebel against their government (ibid, pp 25-26). The British delegate in 1949 commented, for example, that "the application of the Conventions [to internal conflicts] would appear to give the status of belligerents to insurgents, whose right to wage war could not be recognised" (Final Record, Vol II, Section B, p 10). In so far as common article 3 raised that concern, it was addressed by common article 3(4), which makes clear that the legal status of the parties to the conflict is not altered. It is argued that it is unlikely, given those concerns, that the parties intended to depart from the position that the detention of captured insurgents was governed by domestic law, subject to guarantees of humane treatment. Furthermore, since international humanitarian law is generally understood as being reciprocal in its operation (unlike international human rights law, which is directly binding only on states), the authorisation of detention in non-international armed conflicts would have entailed that states recognised the legitimacy of detention by dissident armed groups (for example, the legitimacy of the detention of British and American troops in Afghanistan by the Taliban): something which would be anathema to most states.

Arguments against inferential reasoning

264. Fourthly, in so far as the contentions are based on an inference, from the fact that common article 3 and Additional Protocol II require a minimum level of humanitarian treatment for people who are detained during non-international armed conflict, that detention is therefore authorised by those instruments, it is argued that the reasoning rests on a non sequitur: that the regulation of conduct by international humanitarian law entails that the conduct in question is authorised by international humanitarian law. 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. As the *International Committee of the Red Cross Commentary on the Geneva Conventions* (1952), ed Pictet, states in relation to common article 3, "it merely ensures respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and in all circumstances" (p 60).

265. Fifthly, it is argued that a similar fallacy - that the absence of a prohibition is equivalent to the presence of an authorisation - vitiates the contention that, since international humanitarian law does not prohibit the use of lethal force in non-international armed conflict, therefore it must impliedly provide lawful authority for the use of the lesser alternative of detention. In the first place, it is argued, the contention is based on a false dichotomy: that either international humanitarian law confers lawful authority for the detention of prisoners, or they must be killed or released. As explained above, however, lawful authority for detention (and, indeed, for killing) in a non-international armed conflict is normally conferred not by international humanitarian law but by the domestic law of the state in which the conflict occurs. It may also be conferred by other sources of law, such as the domestic law of the detaining state, or SCRs. Detention may be authorised by any of these sources of law only for defined purposes, such as criminal investigation and prosecution, and it may be rendered subject to judicial control (just as domestic or international law may authorise killing only in specified circumstances, and render soldiers who kill in other circumstances liable to prosecution and punishment). The idea that, in the absence of authority under international humanitarian law, soldiers have no lawful option in a non-international armed conflict but to release captured prisoners is therefore mistaken.

266. Furthermore, it is argued, the contention that authority to kill impliedly carries with it authority to detain, even if well-founded, would only result in

authority to detain those who might otherwise be lawfully killed: a limited category of persons which would not, for example, include Mr Al-Waheed, who on the assumed facts was an unarmed man who offered no violence towards the members of HM Forces who detained him. The argument would not, therefore, support the existence of a power of detention of the width for which the Secretary of State argues in the present proceedings.

267. In short, it is argued that it is not germane to the question here in issue to demonstrate that the killing of insurgents in non-international armed conflict is not prohibited by international humanitarian law. It does not follow from the absence of such a prohibition that international humanitarian law therefore confers lawful authority for detention. In international armed conflict, such authority can be found in article 21 of the Third Geneva Convention and articles 42, 68 and 78 of the Fourth Geneva Convention, but those provisions do not apply to non-international armed conflict. In a situation of the latter kind, lawful authority must be sought elsewhere. Normally, it will arise under domestic law, but it may also arise out of other branches of international law, as for example where it is conferred by an SCR.

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. That is a requirement which the ICRC maintains is implicit in the obligation, imposed by common article 3 and Additional Protocol II, that detainees should be treated "humanely", and it is in any event imposed by article 9(1) of the ICCPR, which provides that "no one shall be subjected to arbitrary arrest or detention" and that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Similar provisions exist in the regional human rights treaties: article 6 of the African Charter on Human and Peoples' Rights, article 7 of the American Convention on Human Rights, article 14 of the Arab Charter on Human Rights, and article 5 of the European Convention on Human Rights.

269. Any law authorising detention must therefore define the circumstances in which it applies "with sufficient precision to avoid overly broad or arbitrary interpretation or application" (see the Human Rights Committee's General Comment No 35, "Article 9 (Liberty and security of the person)", UN Doc CCPR/C/GC/35 (2014), para 22: the Human Rights Committee is the UN body established to monitor the implementation of the ICCPR, and has included among its members present and former judges of the European Court of Human Rights). This requirement is illustrated by several reports in which the Human Rights Committee has considered grounds for detention to be insufficiently precise (eg

Concluding Observations: Initial Report of Honduras, UN Doc CCPR/C/HND/CO/1 (2006), para 13). The concept of arbitrariness is, however, of broader scope: it "is not to be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law": *Mukong v Cameroon,* UN Doc CCPR/C/51/D/458/1991 (1994). International humanitarian law, however, contains no definition of the permitted grounds of detention in non-international armed conflict, nor any mention of procedural protections.

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

271. Considering next the contention that detention in a non-international armed conflict is authorised by customary international humanitarian law, the arguments against that view can be summarised as follows. It is argued that the contention lacks sufficient support in either *opinio juris* or state practice. So far as the former is concerned, the contention is disputed by many experts in this area of the law, as explained in para 258 above. It is argued that it is also unsupported by the ICRC's major international study into state practice, *Henckaerts and Doswald-Beck, Customary International Humanitarian Law* (2005). That study concludes that the arbitrary deprivation of liberty is prohibited (pp 347-349), but not that there are grounds on which the deprivation of liberty is authorised under customary international humanitarian law. The ICRC's catalogue of the rules of customary international humanitarian law is also said to give no support to the idea that they include an authority to detain: ICRC, *Customary IHL,* www.icrc.org/customary-ihl/eng/docs/v1.

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). Reference was made by counsel for the Secretary of State to a recital forming part of the preamble to Resolution 1 of the 32nd International Conference of the ICRC and Red Crescent in December 2015, which refers to states having "in all forms of armed conflict, the power to detain", but commentators have argued that those words are not conclusive evidence of state practice, and that the resolution was not in any event concerned with the authorisation of detention. Reference was also made to *The Copenhagen Process: Principles and Guidelines,* but commentators have pointed out that the official commentary to principle 16 states that "the mere inclusion of a practice in *The Copenhagen Process Principles and Guidelines* should not be taken as evidence that states regard the practice as required out of a sense of legal obligation". As the Court of Appeal noted at para 231 of its judgment in the case of Mr Mohammed, the only example of a state which has placed reliance on international humanitarian law as a basis for detention in a non-international armed conflict, other than the Ministry of Defence in the present proceedings, appears to be the Netherlands, in a letter dated 21 July 2006, headed "Combating international terrorism", sent by the Foreign Minister, the Minister of Defence and the Minister for Development Cooperation to the President of the House of Representatives (KST 99753, 27 225 Nr 221). That approach can be contrasted with the practice of the UK and other states in Iraq and Afghanistan (see paras 311-312, 336-337 and 341 below).

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, established by state practice in the form of military manuals, national legislation and official statements, and also international human rights law. The arguments discussed in paras 268-270 above are therefore also relevant in this context.

Conclusions

274. As the foregoing discussion makes clear, there are substantial arguments both for and against the contention that the Geneva Conventions or their Protocols implicitly confer authority under international law for detention in non-international armed conflicts. My current view, based on the submissions in the present case, is that the arguments against that contention - the textual arguments discussed in paras 260-261 above, the contextual arguments discussed in paras 262-263, the arguments against inferential reasoning discussed in paras 264-267, and the arguments based

on the absence of adequate protection against arbitrary detention discussed in paras 268-270 - 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. The contention that authority for detention in non-international armed conflicts is conferred by customary international humanitarian law is controversial as a matter of expert opinion. There appears to be a paucity of state practice which is supportive of the contention, as explained at para 272. In those circumstances, I have not been persuaded that there exists at present either sufficient *opinio juris* or a sufficiently extensive and uniform practice to establish the suggested rule of customary international law.

276. In short, it appears to me that international humanitarian law sets out a detailed regime for detention in international armed conflict, conferring authority for such detention, specifying the grounds on which detention is authorised, laying down the procedures by which it is regulated, and limiting its duration, in accordance with the requirements of article 9 of the ICCPR and analogous regional provisions. 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 Al-Waheed and Mr Mohammed was authorised by conventional or customary international humanitarian law should be rejected.

Detention in the non-international conflicts in Iraq and Afghanistan under the SCRs

277. It is necessary next to consider the Ministry of Defence's contention that authority for detention, in circumstances falling outside article 5(1)(a) to (f) of the Convention, was conferred on HM Forces, in the non-international conflicts in Iraq and Afghanistan, by the relevant SCRs. For the purpose of considering that contention, the SCRs have to be interpreted in accordance with principles laid down by the European Court of Human Rights in a number of its judgments. It is therefore necessary to begin by considering the most significant of these judgments.

(1) Al-Jedda v United Kingdom

278. In the case of *Al-Jedda v United Kingdom* the Grand Chamber concluded that there had been a violation of article 5(1) in respect of the detention by HM Forces of a suspected insurgent during the non-international armed conflict in Iraq. Mr Al-Jedda's detention occurred between October 2004 and December 2007, after an Iraqi Government had been established with sovereign authority. It overlapped with that of Mr Al-Waheed, which occurred during February and March 2007. The Multi-National Force was at that time fighting against insurgents with the consent of the Iraqi Government, under a mandate established by SCR 1546 (2004), as extended by SCRs 1637 (2005) and 1723 (2006).

279. SCR 1546 had been preceded by letters to the President of the Security Council from the Prime Minister of Iraq and the US Secretary of State. In his letter, the Prime Minister requested the Security Council to make a new resolution authorising the Multi-National Force, which had previously been in occupation of Iraq following the defeat of Iraqi forces, to remain on Iraqi territory and to contribute to maintaining security there, "including through the tasks and arrangements" set out in the accompanying letter from the US Secretary of State. In his letter, the Secretary of State confirmed that the Multi-National Force was prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism. He added that, under the agreed arrangement, the Multi-National Force stood

> "ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security."

The words "internment when this is necessary for imperative reasons of security" reflected the terms of article 78 of the Fourth Geneva Convention, which had applied prior to the establishment of the Iraqi Government, when Iraq had been an occupied territory.

280. These letters were annexed to SCR 1546. The preamble to the resolution recognised the request of the Iraqi Prime Minister in the annexed letter to retain the presence of the Multi-National Force, welcomed the willingness of the Multi-

National Force to continue efforts to contribute to the maintenance of security and stability in Iraq, and noted "the commitment of all forces ... to act in accordance with international law". In para 9 of the resolution the Security Council noted that the Multi-National Force remained in Iraq at the request of the incoming government, and reaffirmed the authorisation for the Multi-National Force first established under SCR 1511, "having regard to letters annexed to this resolution". In para 10 it stated that the Multi-National Force:

> "shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the Multi-National Force and setting out its tasks, including by preventing and deterring terrorism."

281. Procedures were laid down for the review of detention, under the domestic law of Iraq, by Coalition Provisional Authority (CPA) Memorandum No 3 (Revised), which provided:

> "(1) Any person · who is detained by a national contingent of the MNF [Multi-National Force] for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter 'security internee') shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.
>
> (2) The review must take place with the least possible delay and in any case must be held no later than seven days after the date of induction into an internment facility.
>
> (3) Further reviews of the continued detention of any security internee shall be conducted on a regular basis but in any case no/later than six months from the date of induction into an internment facility.
>
> (4) The operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention ..."

It has been held by a majority of the Court of Appeal that detention in accordance with these procedures was lawful under the law of Iraq: *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] QB 773.

282. Mr Al-Jedda was detained in a British military facility for over three years. His continuing internment was authorised and reviewed in accordance with the CPA Memorandum, initially by British military personnel and subsequently also by representatives of the Iraqi and British Governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. His internment was authorised "for imperative reasons of security". There was no intention at any point to bring criminal charges against him. In these circumstances, his detention did not fall within any of sub-paragraphs (a) to (f) of article 5(1) of the Convention.

283. In domestic proceedings, the majority of the House of Lords considered that it could be inferred from the text of SCR 1546, and from the context in which it was adopted, that states contributing to the Multi-National Force were authorised to intern individuals where necessary for imperative reasons of security; that the authorisation should be regarded as an obligation for the purposes of article 103 of the UN Charter ("In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"); and that, to the extent that such internment was unavoidably incompatible with article 5(1) of the European Convention, the UK's obligations under article 5(1) were therefore qualified: *R (Al-Jedda) v Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58; [2008] 1 AC 332. In a speech which anticipated some of the points later to be made by the European court, Baroness Hale of Richmond agreed only to the extent that competing commitments under the UN Charter and the Convention could be reconciled by adopting a qualification of the Convention rights.

284. The European court rejected the idea that the SCR should be interpreted as impliedly imposing an obligation which would contravene obligations under international human rights law:

> "[T]he court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of article 1 of the UN Charter, the third sub-paragraph provides that the United Nations was established to 'achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental

> freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations'. Against this background, the court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council resolution, the court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations ... [I]t is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law." (para 102)

285. The principles of interpretation of SCRs which can be taken from that passage are the following: (1) there is a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights; (2) in the event of ambiguity, the court must choose the interpretation which is most in harmony with the requirements of the European Convention; and (3) it is to be expected that clear and explicit language will be used if the Security Council intends states to take measures which would conflict with their obligations under international human rights law.

286. On that basis, the European court interpreted SCR 1546 as leaving unaffected the obligation of the member states within the Multi-National Force to comply with their obligations under international human rights law:

> "Internment is not explicitly referred to in the resolution. In para 10 the Security Council decides that the Multi-National Force shall have authority 'to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed', which inter alia set out the Multi-National Force's tasks. Internment is listed in Secretary of State Powell's letter, as an example of the 'broad range of tasks' which the Multi-National Force stood ready to undertake. In the court's view, the terminology of the resolution appears to leave the choice of the means to achieve this end to the member states within the Multi-National Force. Moreover, in the preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the

> Convention forms part of international law ... In the absence of clear provision to the contrary, the presumption must be that the Security Council intended states within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law." (para 105)

287. The court rejected the Government's alternative contention that a legal basis for the applicant's detention could be found in international humanitarian law. The argument was that SCR 1546 had maintained in place the position under international humanitarian law which had existed during the occupation of Iraq, when the Fourth Geneva Convention applied. The court noted that para 2 of SCR 1546 recorded the end of the occupation, and that the Fourth Geneva Convention did not in any event authorise indefinite internment (para 107). The court also considered whether a basis for detention which could operate to disapply the requirements of article 5(1) was provided by the agreement between the Iraqi Government and the US Government, set out in the letters annexed to SCR 1546, but concluded that such an agreement could not override the obligations under the Convention (para 108). The court therefore concluded that there was no conflict between the United Kingdom's obligations under the UN Charter and its obligations under article 5(1) of the Convention (para 109). It followed that the applicant's detention constituted a violation of article 5(1) (para 110).

(2) Nada v Switzerland

288. Shortly after *Al-Jedda,* the Grand Chamber decided the case of *Nada v Switzerland* (2012) 56 EHRR 18, which concerned a Swiss law implementing an SCR requiring sanctions to be imposed on individuals listed as being associated with Al-Qaeda. The sanctions imposed were incompatible with the applicant's rights under article 8 of the Convention. The court confirmed the principles laid down in para 102 of *Al-Jedda,* set out in para 284 above, but distinguished that case on the basis that the SCR in issue in *Nada* clearly and explicitly imposed an obligation to take measures capable of breaching human rights, whereas in *Al-Jedda* "the wording of the resolution at issue did not specifically mention internment without trial" (para 172). However, the court also found that Switzerland "enjoyed some latitude, which was admittedly limited but nevertheless real", in implementing the SCR (para 180). On the basis of that finding, it took the view that Switzerland could not confine itself to relying on the binding nature of SCRs, but should have persuaded the court that it had taken - or at least had attempted to take - all possible measures to safeguard the applicant's rights under the Convention within the constraints set by the SCR. On that basis, the court found it unnecessary to determine the relative priority of the two instruments (paras 196-197).

(3) Al-Dulimi v Switzerland

289. The case of *Al-Dulimi and Montana Management Inc v Switzerland* (Application No 5809/08) (unreported) given 21 June 2016 also concerned the implementation of sanctions required by an SCR. The Grand Chamber repeated what it had said in para 102 of *Al-Jedda* (para 140). It gave effect to that approach by holding that, since the SCR in question did not contain any clear or explicit wording excluding the possibility of judicial supervision of the listing of persons on whom sanctions were to be imposed, it must be understood as authorising national courts to exercise sufficient scrutiny so that any arbitrariness could be avoided (para 146).

(4) Hassan v United Kingdom

290. Between *Nada* and *Al-Dulimi,* the Grand Chamber decided the case of *Hassan v United Kingdom,* which concerned an earlier phase of the Iraq conflict than *Al-Jedda* or the present appeal of Mr Al-Waheed. Mr Hassan was captured by HM Forces in Iraq during 2003, at a time when the situation there constituted either international armed conflict or occupation, and the Third and Fourth Geneva Conventions applied. He was detained for about nine days. He complained of a violation of his rights under article 5 of the Convention. In response, the British Government submitted that his detention had been authorised under article 21 of the Third Geneva Convention, as a prisoner of war, or by articles 42 and 78 of the Fourth Geneva Convention, as a civilian whose internment was necessary for imperative reasons of security. In those circumstances, it argued, article 5 of the Convention was displaced, or had to be modified so as to be compatible with the applicable *lex specialis*, namely international humanitarian law.

291. In deciding how article 5 was to be interpreted in the light of the provisions of the Third and Fourth Geneva Conventions, the court applied article 31 of the Vienna Convention on the Law of Treaties (para 100). Under article 31(3)(b), account was to be taken of any subsequent practice in the application of the treaty in question which established the agreement of the parties regarding its interpretation. The practice of the contracting parties to the European Convention was not to derogate from their obligations under article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflict. That practice was contrasted with the practice of the contracting states in relation to non-international armed conflict, such as the "Troubles" in Northern Ireland and the Kurdish conflict in Turkey, and their practice in relation to terrorist threats (para 101).

292. Under article 31(3)(c) of the Vienna Convention, account was to be taken of any relevant rules of international law applicable in the relations between the parties. The provisions in the Third and Fourth Geneva Conventions relating to internment were designed to protect captured combatants and civilians who posed a security threat. The International Court of Justice had held that the protection offered by human rights conventions and that offered by international humanitarian law co-existed in situations of armed conflict. The court must therefore endeavour to interpret and apply the European Convention in a manner which was consistent with the framework under international law delineated by the International Court of Justice (para 102). Accordingly:

> "By reason of the co-existence 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 sub-paras (a) to (f) of [article 5(1)] 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. The court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by article 5 of the Convention without the exercise of the power of derogation under article 15. It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that article 5 could be interpreted as permitting the exercise of such broad powers." (para 104)

293. The court added that deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of article 5(1). This meant that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of article 5(1), which was to protect the individual from arbitrariness (para 105). In that regard, the court cited its case law concerning the necessary safeguards against arbitrary detention.

294. Applying this approach to the facts, the court found that the applicant was captured in circumstances giving reason to believe that he might be either a person who could be detained as a prisoner of war or someone whose internment was necessary for imperative reasons of security, both of which provided a legitimate basis for detention under international humanitarian law (under article 21 of the Third Geneva Convention and articles 42 and 78 of the Fourth Geneva Convention). He was subject almost immediately to a screening process which led to his being cleared for release. He was released shortly afterwards (para 109). In these

circumstances, his detention was consistent with the powers available to the UK under the Third and Fourth Geneva Conventions, and was not arbitrary. In these circumstances, the court held that there had been no breach of article 5(1) of the European Convention.

The relevance of Hassan to the present appeals

295. In the present appeals, the majority of the court accept the Ministry of Defence's argument that the reasoning in *Hassan* leads to the conclusion that, where an SCR authorises detention in a non-international armed conflict in circumstances other than those contemplated by sub-paragraphs (a) to (f) of article 5(1), the latter provision must be modified so as to be consistent with the SCR. On that basis, the majority accept that article 5(1) is modified so as to permit the detention which is said to have been authorised by the SCRs in question in these appeals.

296. The argument takes as its starting point an interpretation of the SCRs as authorising detention in circumstances falling outside the terms of article 5(1)(a) to (f). It is because of that interpretation that it can be argued that article 5(1) then requires to be modified so as to accommodate the detention authorised by the SCRs. The terms of SCR 1546, which applied in the case of Mr Al-Waheed, have already been considered. They did not clearly or explicitly authorise detention in circumstances falling outside article 5(1)(a) to (f), as the court held in *Al-Jedda.* Nor did SCR 1890, which applied in the case of Mr Mohammed, and will be considered later. Applying the approach to the interpretation of SCRs established by the court in its case law both prior and subsequent to *Hassan,* and summarised in para 285 above, it follows that the SCRs cannot be interpreted as authorising detention falling outside article 5(1)(a) to (f). The premise on which the Ministry of Defence's argument is based is therefore inconsistent with the clear and constant jurisprudence of the Grand Chamber concerning the interpretation of SCRs.

297. The answer put forward by the majority of the court is that, following *Hassan,* article 5(1) must be interpreted as permitting detention during armed conflicts which falls outside the categories listed in sub-paragraphs (a) to (f) but is authorised by an SCR. On that basis, the interpretation of the SCRs as authorising detention which falls outside article 5(1)(a) to (f) is not incompatible with the Convention. There are a number of reasons why the judgment in *Hassan* does not appear to me to be applicable to detention in the non-international conflicts with which these appeals are concerned, which are explained below at paras 307-315 and 324. But a point which should be made at the outset is that the reasoning of the majority appears to me to be circular. The proposition which the majority seek to establish - that article 5(1) is modified so as to permit detention falling outside sub-paragraphs (a) to (f), where such detention is authorised by an SCR - is actually assumed for the purposes of its premise, that the SCRs should be interpreted as authorising such detention.

298. The case of *Hassan* was not concerned with the interpretation of an SCR. The court did not, therefore, cite or consider, let alone depart from, the approach to the interpretation of SCRs which it had set out in *Al-Jedda* and repeated in later cases. On the contrary, at para 99 it pointed out that its judgment in *Al-Jedda* had concerned the SCR there in question, and that no issue had been raised in relation to the powers of detention provided for in the Third and Fourth Geneva Conventions. The only issue in the case of *Hassan* was the interpretation of article 5 of the Convention in a context where detention was authorised by international humanitarian law - in particular, by the provisions of the Geneva Conventions authorising the detention of prisoners of war and civilians during international armed conflicts. Those provisions did not apply in the situations with which the present appeals are concerned. Nor was the detention of Mr Al-Waheed or Mr Mohammed authorised by any other rules of international humanitarian law, for the reasons summarised in paras 274-276 above. The case of *Hassan* does not therefore appear to me to be in point when deciding whether the detention of Mr Al-Waheed or Mr Mohammed was authorised by the relevant SCRs. The answer to that question depends on the interpretation of the SCRs; and the principles governing their interpretation, for the purpose of establishing whether there has been a breach of the Convention, are those laid down in *Al-Jedda, Nada and Al-Dulimi,* and summarised in para 285 above.

299. Put shortly, in *Al-Jedda* the court required greater precision of international law, when it comes to authorising military detention in situations of armed conflict, than was afforded by SCR 1546. Nothing in *Hassan* appears to me to cast any doubt on that decision. *Hassan* was concerned with powers of detention under the Geneva Conventions which are explicit and detailed, as explained at paras 249-252 above.

300. A different argument is put forward by Lord Mance at para 163: that to start from the premise that SCR 1546 should be interpreted consistently with article 5(1) is unsustainable, since article 5(1) does not reflect general international law, but is unique in stating an ostensibly exhaustive list of circumstances in which detention is permissible (unlike article 9 of the ICCPR), whereas SCR 1546 was not directed only to states party to the Convention but to all member states of the United Nations. I recognise the force of that argument, but it appears to me to be inconsistent with the approach to the interpretation of SCRs which the European court has adopted in a “clear and constant” line of decisions at Grand Chamber level.

301. Having considered the Strasbourg authorities, I can next consider the appeals.

The case of Mr Al-Waheed

302. Mr Al-Waheed is an Iraqi citizen. He was detained by HM Forces in Iraq for about six weeks during February and March 2007, when the relevant legal regime

was identical to that considered in *Al-Jedda* and explained at paras 278-281 above. The relevant facts in relation to his detention have not yet been established, but it is assumed for the purposes of this appeal that he was detained on 11 February 2007 at a house where arms, ammunition, components for improvised explosive devices ("IEDs"), and explosive charges, were found. Two days later an ad hoc British Divisional Internment Review Committee decided that he should be interned for imperative reasons of security. On 22 February the committee decided that, if it were confirmed that he could not be proved to have handled any of the recovered material, it was unlikely that he could be successfully prosecuted, and he should be released. His case was reviewed again on 12 or 13 March, and again on 21 March, when a decision on his release was deferred while forensic evidence was obtained. On 28 March he was released.

303. Mr Al-Waheed accepts that SCR 1546, as extended by SCR 1723, authorised detention. He complains, however, that his detention violated article 5(1) of the Convention. It is conceded on behalf of the Secretary of State that his detention was attributable to the UK, and that he fell within the jurisdiction of the UK during his internment for the purposes of article 1 of the Convention (which governs its applicability). It is maintained on behalf of the Secretary of State that his detention was justified under article 5(1)(c), but that issue is not before the court in this appeal. The only issue raised in the appeal, as a preliminary point, is whether it was legally necessary for his detention to fall within any of sub-paragraphs (a) to (f) of article 5(1). In relation to that issue, the judge, Leggatt J, was bound by the decision of the House of Lords in *Al-Jedda* that article 5(1) did not apply to detention under SCR 1546 for imperative reasons of security, since SCR 1546 should be construed as imposing an obligation to detain, and such an obligation prevailed over the inconsistent obligation imposed by article 5(1) of the Convention, by reason of article 103 of the UN Charter. Since the Court of Appeal would have been equally bound by that decision, the appeal has come directly to this court.

Discussion

304. In my opinion this court should depart from the reasoning of the House of Lords in relation to this point, summarised in para 283 above. It did not approach the interpretation of SCR 1546 on the basis subsequently laid down by the Grand Chamber and summarised in para 285 above. That approach, subsequently applied in relation to other SCRs in the cases of *Nada* and *Al-Dulimi,* represented a development in the court's case law, based on a fuller consideration of international law than appears in the speeches in the House of Lords. Its interpretation of SCR 1546 was also based on a fuller consideration of the scope of the authority conferred than appears to have been canvassed in argument before the House of Lords.

305. Although it is of course open to this court to adopt a different approach to the relationship between the Convention and other international instruments from that adopted by the Grand Chamber, such a course would run contrary to the general intention that the Human Rights Act 1998 should "bring rights home", and would require some compelling justification. It does not seem to me that such a justification has been made out. In particular, the Ministry of Defence's argument that the issue is a question of interpretation of the UN Charter and the SCR, on which the European court has no particular authority, seems to me to be an over-simplification. The interpretation and application of the Convention depend on its interaction with other international instruments, and a uniform approach to these issues is desirable if the Convention system of guaranteeing a minimum level of human rights protection by all the contracting parties is to be preserved. In my view, this court should therefore proceed on the basis that article 103 of the UN Charter is not applicable.

306. Consistently with that conclusion, the Grand Chamber held in *Al-Jedda* that there was a presumption that the Security Council intended states within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law. In its view, nothing in SCR 1546 displaced that presumption. Article 5(1) of the Convention therefore continued to apply. Since Mr Al-Jedda's detention did not fall within any of sub-paragraphs (a) to (f), it followed that there was a violation of article 5(1).

307. As I have explained, it is now argued that the reasoning in *Hassan* supersedes that in *Al-Jedda.* I reject that argument, firstly for the reasons explained in paras 295-300 above, and also for the following additional reasons.

308. In addressing the problem which arose in *Hassan,* the court's starting point was article 31(3)(b) of the Vienna Convention, and the need to take account of subsequent practice in the application of the treaty in question. In that regard, the court noted the absence of any practice of derogating from article 5 of the Convention in relation to detention during international armed conflicts, notwithstanding the practice of exercising powers of detention under the Third and Fourth Geneva Conventions in circumstances not falling within any of sub-paragraphs (a) to (f) of article 5(1). The court expressly contrasted that position with the practice of derogating from article 5 in relation to non-international armed conflicts, citing cases concerned with internal conflicts in Northern Ireland and Turkey as examples.

309. In order to answer that point, counsel for the Secretary of State argue that a distinction should be drawn between purely internal conflicts, and those which are "extraterritorial", in the sense that they involve armed forces from outside the host state. They point out that, although there have been a number of military missions

involving contracting states participating in non-international armed conflicts outside their own territory since their ratification of the Convention, no state has ever made a derogation in respect of these.

310. But that is not in itself enough to meet the requirements of article 31(3)(b) of the Vienna Convention (assuming, for the sake of the argument, the validity of the distinction drawn between extraterritorial and other non-international armed conflicts: a distinction which is controversial and has not as yet been drawn by the European court in its case law). In the first place, it has to be borne in mind that until the case of *Al-Skeini* it might not have occurred to contracting states participating in military operations overseas that they remained bound by their obligations under the Convention. More importantly, however, a practice of non-derogation is significant only if (1) it has been the practice of contracting states to detain persons during non-international armed conflicts in circumstances not falling within sub-paragraphs (a) to (f) of article 5(1) of the Convention, and (2) if so, that practice has been sufficiently accepted by other contracting states to justify imputing to all of them an intention to modify the obligations undertaken under article 5.

311. It appears to me that neither of these conditions is met. The practice of other contracting states in relation to non-international armed conflicts does not establish a common intention to modify the obligations arising under article 5 in the context of extraterritorial non-international armed conflicts. On the contrary, statements by a number of contracting states confirm, without qualification, the continuing relevance of international human rights law and, in particular, of the Convention. The German government, for example, made explicit in 2007, in a statement to the Bundestag, its view that its obligations under the Convention continued to apply in relation to persons detained by its forces operating in Afghanistan as part of the International Security Assistance Force ("ISAF") (*ICRC, Customary IHL Database: Practice Relating to Rule 99 - Deprivation of Liberty* (www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99)). Switzerland has questioned the United Kingdom's claim that the provisions of the Convention need to be qualified, in the context of military operations overseas, in order to take SCRs into account, and recommended that the United Kingdom should consider that any person detained by armed forces is under the jurisdiction of that state, which should respect its obligations concerning the human rights of such individuals (UN Human Rights Council, Report of the Working Group on UPR: United Kingdom, UN Doc A/HRC/8/25 (2008), para 33). The Netherlands has expressed the view that international human rights law, in the absence of derogation, continues to apply without restriction during armed conflicts, and that detainees therefore cannot be held indefinitely or without due process (Hill-Cawthorne, op cit, p 178).

312. The argument now put forward by the Ministry of Defence is also a recent departure from the previous practice of the United Kingdom. In *Al-Jedda,* for example, the government did not suggest that the nature of the situation in Iraq at

the material time, as an "extraterritorial" non-international armed conflict, affected the application of article 5. Its view of the law at the time of its operations during the non-international armed conflict in Afghanistan is discussed below (see paras 336-337).

313. In addressing the problem which arose in *Hassan,* the court also based its reasoning on the requirement under article 31(3)(c) of the Vienna Convention to take account of other relevant rules of international law applicable in the relations between the parties when interpreting the European Convention. The relevant rules in *Hassan* were the provisions in the Third and Fourth Geneva Conventions conferring powers of internment on specified grounds during an international armed conflict, subject to specified procedural safeguards. In Mr Al-Waheed's case the Secretary of State argues, by analogy, that the European Convention must also be interpreted compatibly with the exercise of the powers of internment conferred by SCR 1546.

314. As explained in para 285 above, the European court construed SCR 1546 in *Al-Jedda* on the basis that there is a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights; that, in the event of ambiguity, the court must choose the interpretation which is most in harmony with the requirements of the European Convention; and that it is to be expected that clear and explicit language will be used if the Security Council intends states to take measures which would conflict with their obligations under international human rights law. On that basis, the court interpreted the SCR as meaning that the Security Council intended states within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying fully with their obligations under the Convention. Article 5(1)(a) to (f) therefore applied, so as to limit the circumstances in which SCR 1546 was to be understood as authorising detention. As explained in paras 288-289 above, the court has followed the same approach to the interpretation of SCRs in more recent cases. On that basis, there is no need to modify article 5 in order for it to be interpreted harmoniously with SCR 1546.

315. Accordingly, whereas in *Hassan* the court identified an inconsistency between the terms of article 5 of the Convention and the provisions of international humanitarian law regulating detention in an international armed conflict, and resolved that inconsistency by concluding that a substantial body of state practice, together with the need to reconcile the Third and Fourth Geneva Conventions with the European Convention, justified reading article 5 so as to accommodate the relevant provisions of those Conventions, there is no such inconsistency between article 5 and SCR 1546; and there exists, in any event, no comparable body of state practice.

316. It follows that it was necessary for Mr Al-Waheed's detention to fall within one or more of the categories listed in sub-paragraphs (a) to (f) of article 5(1), in order for it to be compatible with article 5 of the Convention.

The case of Mr Mohammed

317. Mr Mohammed is an Afghan national who was detained by HM Forces in Afghanistan for about 15 weeks during 2010. It is assumed, for the purposes of this appeal, that he was captured by HM Forces on 7 April 2010 during a military operation which targeted a senior Taliban commander and the vehicle in which he was travelling. After an exchange of fire, during which two insurgents were killed, Mr Mohammed and another insurgent were captured. They were extracted after an operation lasting ten hours, during which British troops were under heavy and sustained fire. Three British soldiers were wounded.

318. Following his capture, Mr Mohammed was taken to Camp Bastion in Helmand Province. HM Forces received information that he was a senior Taliban commander involved in the large-scale production of IEDs. He was said to have commanded a Taliban training camp. On 8 April, an application for the extension of his detention beyond 96 hours for intelligence purposes was submitted to UK Permanent Joint Headquarters ("PJHQ"), in accordance with BRITFOR Standard Operating Instructions J3-9 ("J3-9"), discussed at paras 339-340 below. It stated that there was no information to confirm Mr Mohammed's identity, and that information suggested that he might be a senior Taliban commander with an extensive knowledge of the structure of the Taliban and of IED networks. On 9 April, an application was submitted to the Ministry of Defence to extend the 96 hour limit in order to gain intelligence from Mr Mohammed. On 12 April, a minister authorised Mr Mohammed's continued detention "to gain further valuable intelligence". The Afghan authorities were not asked whether they wanted Mr Mohammed transferred to them for investigation and possible prosecution. The view had been formed by this time that it would be a weak case to pass to the Afghan authorities for prosecution, given the available evidence.

319. On 4 May it was decided that there was no more intelligence to be obtained from Mr Mohammed. The Afghan authorities were then asked whether they wished to have Mr Mohammed transferred into their custody for criminal investigation and possible prosecution. They responded that they did, as soon as space became available. As they had insufficient capacity at the Lashkar Gah detention facility to which he was to be transferred, he continued to be held by UK armed forces until capacity became available. He was transferred to the Afghan authorities on 25 July 2010. He was subsequently prosecuted and convicted by the Afghan courts of offences relating to the insurgency. He was sentenced to ten years' imprisonment.

320. Mr Mohammed complains that his detention, beyond the initial period of 96 hours, violated his rights under articles 3, 5, 6 and 8 of the Convention, as given effect by the Human Rights Act 1998. A number of preliminary issues were identified and decided by Leggatt J. In particular, he found that for the first 96 hours after his capture, Mr Mohammed was detained for the purpose of bringing him before the competent legal authorities on reasonable suspicion of having committed an offence. His detention during that period was authorised, in the judge's view, by SCR 1890 and the Memorandum of Understanding concluded between the British and Afghan Governments, as explained at paras 322-326 and 329-334 below. During the period of 24 days between 11 April and 4 May 2010, on the other hand, Mr Mohammed was detained by HM Forces for the sole purpose of obtaining intelligence. During the 82 days between 5 May and 25 July 2010, he was detained for "logistical" reasons, as they were described, because of the shortage of space in Afghan detention facilities. The judge concluded that Mr Mohammed's detention after the initial period of 96 hours was contrary to article 5 of the Convention, the effect of which was not, in his view, displaced or qualified by SCRs or international humanitarian law. He also held that Mr Mohammed's detention after an initial period of a few days (as explained at para 329 below) was unlawful under Afghan law. On appeal, those conclusions were upheld by the Court of Appeal.

321. The Secretary of State has appealed to this court on a number of grounds. Those which are being considered at this stage of the proceedings are:

> (1) whether HM armed forces had the legal power to detain Mr Mohammed in excess of 96 hours pursuant to the relevant SCRs or international humanitarian law;
>
> (2) if so, whether article 5(1) of the Convention should be read so as to accommodate detention pursuant to such a power;
>
> (3) whether Mr Mohammed's detention was in any event compatible with article 5(1) on the basis that it fell within para (c) (detention for the purpose of bringing a suspect before a competent judicial authority) or (f) (detention pending extradition); and
>
> (4) whether the circumstances of his detention were compatible with article 5(4) (if necessary, as modified).

So far as (1) is concerned, the contention based on international humanitarian law has already been rejected at paras 274-277 above. It is also unnecessary to consider ground (4), as to which I agree with Lord Sumption. That leaves the contention

under ground (1) based on the SCRs, any issue then arising under ground (2), and the issues arising under ground (3).

The interpretation of SCR 1890

322. It is common ground that, at the time when Mr Mohammed was detained, HM Forces were engaged in a non-international armed conflict. They were operating as part of ISAF, whose establishment had initially been authorised by SCR 1386 (2001), following the establishment of the Afghan Interim Authority by the Bonn Agreement of 5 December 2001 and its agreement to the deployment of such a force. SCR 1386 authorised the establishment of ISAF "to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas", and authorised the member states participating in ISAF "to take all necessary measures to fulfil its mandate". The mandate was subsequently extended to the whole of Afghanistan. At the time of Mr Mohammed's capture, the SCR in force was SCR 1890 (2009). In its preamble, it reaffirmed the Security Council's "strong commitment to the sovereignty ... of Afghanistan", recognised that "the responsibility for providing security and law and order throughout the country resides with the Afghan authorities", and stressed "the role of [ISAF] in assisting the Afghan Government to improve the security situation". It also called for "compliance with international humanitarian and human rights law". It again authorised "the member states participating in ISAF to take all necessary measures to fulfil its mandate".

323. Whereas the letters annexed to SCR 1546 referred explicitly to internment for imperative reasons of security, SCR 1890 said nothing about internment or detention. It was, however, apparent at the time when SCR 1890 was adopted that the accomplishment of ISAF's mission would involve engaging in combat operations against armed and organised insurgents, in the course of which it was inevitable that insurgents and suspected insurgents would be taken prisoner. In that context, construing the SCR in accordance with the principle of interpretation in good faith, ut res magis valeat quam pereat, the words "all necessary measures" should be understood as encompassing the detention of insurgents. At the same time, since SCR 1890 said nothing about the procedures to be followed, but conferred a mandate on a basis which recognised the sovereignty of Afghanistan and envisaged ISAF's role as being to assist the Afghan authorities in the maintenance of security, it must have been intended that detention would be in accordance with procedures agreed with the Afghan Government. As explained at paras 329-334 below, a Memorandum of Understanding covering these matters was indeed agreed with the Afghan Government.

324. It is argued on behalf of the Ministry of Defence, as in the case of Mr Al-Waheed, that in the light of the *Hassan* judgment, article 5(1) of the Convention is

modified by SCR 1890, or in any event by customary international humanitarian law, so as to permit detention falling outside the scope of sub-paras (a) to (f). I reject that argument, in agreement with the judge and the Court of Appeal, for the reasons explained at paras 276-277 above in relation to customary international law, and at paras 296-300 and 307-315 in relation to *Hassan.*

325. Construed on that basis, SCR 1890 can be understood as having conferred on the states participating in ISAF authority under international law to take prisoner persons who posed an imminent threat to ISAF forces or the civilian population, and to detain them for the purpose of transferring them to the Afghan authorities, so that those authorities could then undertake criminal investigations and proceedings. It is accepted, for reasons explained below at para 331, that a period of 96 hours could reasonably be required for that purpose, and it is apparent that there could be circumstances where a longer period was necessary (eg where a detainee was medically unfit to be transferred, or where the Afghan authorities did not have accommodation immediately available).

326. So construed, SCR 1890 is consistent with the principles established by the case law of the European court and summarised in para 285 above. As explained there, the European court considers there to be a presumption that, unless it uses clear and unambiguous language to the contrary, the Security Council does not intend states to take measures which would conflict with their obligations under international human rights law. Interpreting SCR 1890 on that basis, there is nothing which demonstrates, in clear and unambiguous terms, an intention to require or authorise detention contrary to international human rights law. That construction of SCR 1890 is also consistent with the traditional approach to non-international armed conflicts, including the approach of the Ministry of Defence, under which the treatment of insurgents is regulated primarily by the law, including the criminal law, of the state where the conflict occurs: see paras 253-255 above.

Behrami v France; Saramati v France, Germany and Norway

327. I am not persuaded that the admissibility decision in *Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR SE10 supports a different conclusion. The relevant part of that decision concerned the criminal justice system operating in Kosovo at the time when the territory was governed by the United Nations Interim Administration in Kosovo (UNMIK), established by SCR 1244. UNMIK was assisted by the UN security presence in Kosovo, Kosovo Force (KFOR), also established by SCR 1244. Para 7 of the SCR authorised member states to establish KFOR "with all necessary means to fulfil its responsibilities under para 9". Its responsibilities under para 9 included "supporting, as appropriate ... the work of [UNMIK]". UNMIK's responsibilities, as set out in para 11, included "maintaining civil law and order, including ... through the deployment of

international police personnel". The UNMIK police force was commanded by the commander of KFOR (COMKFOR). Mr Saramati was arrested by UNMIK police officers on suspicion of attempted murder, by order of COMKFOR, and detained on the orders of COMKFOR until his trial. The admissibility decision concerned the question whether Mr Saramati's detention was the responsibility of the contracting states which had contributed the individuals holding the position of COMKFOR during the relevant period, or was attributable to the UN.

328. In the course of considering that question, the European court stated that KFOR's security mandate included issuing detention orders. It stated (para 124) that it based that finding on two considerations. The first was the terms of the agreement under which the government of the Federal Republic of Yugoslavia (FRY) withdrew its own forces from Kosovo in favour of UNMIK and KFOR, which provided that KFOR would operate with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo. As the court stated, UNMIK and KFOR "exercised the public powers normally exercised by the government of the FRY" (para 70). The second consideration was para 9 of SCR 1244, as well as para 4 of Annex 2, which repeated the relevant wording of the agreement with FRY, as confirmed by later documents describing the procedures governing detention authorised by COMKFOR. This was a very different context from that of SCR 1890: as has been explained, that SCR was premised on a recognition of the sovereignty of Afghanistan, and of the Afghan authorities' responsibility for security.

The Memorandum of Understanding

329. SCR 1890 did not itself specify the procedures required to comply with the requirement in article 5(1) of the Convention that detention should be "in accordance with a procedure prescribed by law". It was however supplemented by agreements between the Afghan Government and the states participating in ISAF.

330. The relevant agreement between the UK and Afghanistan at the time of Mr Mohammed's detention was a Memorandum of Understanding dated 23 April 2006. Para 3 provided:

> "3.1 The UK AF will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK AF in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in

> existence, the detainee will either be released or transferred to an ISAF approved holding facility.
>
> 3.2 The Afghan authorities will accept the transfer of persons arrested and detained by the UK AF for investigation and possible criminal proceedings ...”

In relation to para 3.1, “applicable provisions of international human rights law” were recognised at the time to include the European Convention on Human Rights: see para 332 below. The Memorandum of Understanding made no provision for HM Forces to detain persons for intelligence purposes rather than transferring them to Afghan custody, but it provided for British personnel to have full access to question persons who had been transferred to Afghan custody.

331. In relation to para 3.1 of the Memorandum of Understanding, detention was permitted under ISAF rules of engagement, at the relevant time, in the circumstances set out in ISAF’s Standard Operating Procedures 362 (“the SOP”). Para 1 of that document stated that “commanders at all levels are to ensure that detention operations are conducted in accordance with applicable international law and human rights standards”. Para 4 stated that the only grounds upon which a person could be detained under current ISAF Rules of Engagement were if the detention was necessary for ISAF force protection, for the self-defence of ISAF or its personnel, or for accomplishment of the ISAF mission. Para 5 stated that the current policy for ISAF was that detention was permitted for a maximum of 96 hours, after which time an individual was either to be released or handed into the custody of the Afghan National Security Forces or the Government of Afghanistan. According to internal United Kingdom correspondence, 96 hours reflected the time it might take to transport someone from a battlefield to an Afghan detention facility.

332. Para 6 of the SOP stated that, as soon as practicable after a detention had taken place, the decision to continue to detain must be considered by an appropriate authority. Certain senior ranks were specified as being permitted to act as an ISAF Detention Authority. That authority must be able to support the grounds of detention by a reasonable belief in facts. Para 7 permitted a Detention Authority to authorise detention for up to 96 hours. Authority for detention beyond that period could only be granted by the commanding officer of ISAF (“COMISAF”) or his delegated subordinate. In that regard, para 8 stated:

> “A detainee may be held for more than 96 hours where it is deemed necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer-term detentions but is intended to meet exigencies such as that

> caused by local logistical conditions eg difficulties involving poor communications, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him. Where this exigency applies, COMISAF must be notified. Where, in the opinion of COMISAF (or his delegated subordinate), continuation of detention is warranted, COMISAF (or his delegated subordinate) may authorize continued detention." (Emphasis supplied)

A footnote stated that "the standards outlined within this SOP are to be considered the minimum necessary to meet international norms and are to be applied." In relation to international norms, the document identified two sources of international human rights law: the ICCPR and the European Convention on Human Rights.

333. It was therefore envisaged under the Memorandum of Understanding, read with the SOP, that persons would only be detained by HM Forces on specified grounds, would be screened as soon as practicable, and would be transferred to the Afghan authorities at the earliest opportunity, for investigation and possible criminal proceedings. Detention by HM Forces would normally be for a maximum of 96 hours, although that period could be extended by a decision taken at a senior level where necessary in order to effect the detainee's release or transfer in safety.

334. The detention which this agreement permitted fell within the authorisation conferred by SCR 1890. It reflected the traditional treatment of insurgents in a non-international armed conflict as having committed offences under domestic criminal law, and ISAF's mandate to assist the sovereign Afghan authorities. It was compatible with article 5(1)(c) of the Convention: that is to say, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". A procedure was prescribed which protected detainees against arbitrary detention.

The new United Kingdom policy: detention beyond 96 hours in order to obtain intelligence

335. In the event, powers of detention which were limited to holding persons for up to 96 hours, before transferring them to the Afghan criminal system if they might have committed a criminal act, were found by the states principally involved in detaining insurgents, including the United Kingdom, to be unsatisfactory from a military perspective. Particularly after they undertook operations in Helmand

Province, HM Forces wished to be able to hold detainees for longer periods for the purpose of questioning them in order to obtain intelligence, for example about the whereabouts of IEDs.

336. Ministers were advised that "legal advice has confirmed that there is currently no basis upon which we can legitimately intern such individuals" (briefing paper for the Armed Forces Minister on Detention Policy in Afghanistan, dated 1 March 2006). They were told that the considered advice was that the European Convention would apply unless those detained were immediately handed over to the Afghan authorities, and that "the possibility of amending the 96-hour policy to permit longer periods of detention ... would not be lawful because the UNSCR does not authorise extended detention" (ibid). The advice concluded that

> "The reality of the legal basis for our presence in Afghanistan is such that available powers may fall short of that which military commanders on the ground might wish" (ibid).

It was felt that the UK was unlikely to succeed in having the SCR revised to provide "some kind of specific authorisation to detain", and that, so far as ISAF was concerned, "even with the added authority of a UNSCR, the reservations of some of our allies in becoming involved or associated with detention or internment are likely to remain" (internal correspondence concerning UNSCR renewal in Afghanistan, dated 25 June 2007). A further memorandum stated:

> "There is no power for any ISAF forces to intern individuals in Afghanistan. This would require an express UNSCR authorisation and preferably a power in Afghan law as well, neither of which currently exist. Therefore, if UK forces were to intern people, we would probably be acting unlawfully." (Ministry of Defence briefing note, 'Detention by UK Forces on Overseas Operations - Iraq and Afghanistan', sent on 12 September 2007)

337. A later briefing for the Secretary of State explained that, although in Iraq a significant proportion of operations had been triggered by intelligence from detainees:

> "In Afghanistan, however, we cannot replicate Iraq arrangements because UK forces have no power to intern under the extant UNSCR (only a power to temporarily detain is inferred)." (Ministerial Brief on Afghanistan: Intelligence Exploitation

> Capability, dated June 2008: NATO was in effective command of ISAF)

Later correspondence dated 10, 21 and 24 August 2010 considered the possibility that the ISAF rules of detention might be altered, but concluded that any approach to NATO would be unsuccessful, and that the United Kingdom would have to adopt its own policy if it wished to detain individuals for more than 96 hours.

338. The policy then adopted, as announced to Parliament on 9 November 2009, was that while HM Forces would adhere to NATO guidelines (ie, the SOP) in the majority of cases, Ministers in the United Kingdom would in some cases authorise detention for more than 96 hours in order to obtain intelligence:

> "[I]n exceptional circumstances, detaining individuals beyond 96 hours can yield vital intelligence that would help protect our forces and the local population - potentially saving lives, particularly when detainees are suspected of holding information on the placement of improvised explosive devices.
>
> Given the ongoing threat faced by our forces and the local Afghan population, this information is critical, and in some cases 96 hours will not be long enough to gain that information from the detainee. Indeed, many insurgents are aware of the 96 hours policy and simply say nothing for that entire period. In these circumstances, the Government have concluded that Ministers should be able to authorise detention beyond 96 hours, in British detention facilities to which the ICRC has access. Each case will be thoroughly scrutinised against the relevant legal and policy considerations; we will do this only where it is legal to do so and when it is necessary to support the operation and protect our troops.
>
> Following a Ministerial decision to authorise extended detention, each case will be thoroughly and regularly monitored by in-theatre military commanders and civilian advisers. Individuals will not remain in UK detention if there is no further intelligence to be gained. We will then either release the detainee or transfer the detainee to the Afghan authorities." (Hansard (HL (Written Statements), 9 November 2009, cols WS 31-32)

339. The policy announced to Parliament was reflected in J3-9. The version of J3-9 which was in force during most of Mr Mohammed's detention was Amendment 2. Part 1 dealt with the initial stages of detention. It stated in para 9 that a person could be detained by British forces only if he was a threat to force protection or mission accomplishment, or if it was necessary for reasons of self-defence.

340. Part II dealt with the processing of detainees, and required the detaining authority to decide within 48 hours whether to release, transfer or further detain the detainee. To authorise continued detention, the Detention Authority had to be satisfied that it was necessary for self-defence or that the detainee had done something that made him a threat to force protection or mission accomplishment (para 19). Para 25 stated that the Detention Authority did not have the authority to hold a detainee for longer than 96 hours from the point of detention, and that authority for any further detention must be sought from Ministers through the Detention Review Committee ("DRC"). Para 27 stated that the criteria used to assist Ministers in deciding whether or not to approve applications for extension of detention were

> "a. Will the extension of this individual provide significant new intelligence vital for force protection?
>
> b. Will the extension of this individual provide significant new information on the nature of the insurgency?
>
> c. How long a period of extension has been requested - [redacted]"

Para 29 set out the procedure to be followed following an extension. This involved fortnightly reviews, internally and at Ministerial level.

341. The only other nations whose forces were detaining significant numbers of insurgents by that stage of ISAF operations were the USA and Canada (the Netherlands having been the fourth nation in that category at an earlier stage). They also departed from the ISAF policy limiting detention to a maximum of 96 hours, but on a different basis from the United Kingdom. The USA authorised its conduct by domestic legislation. Canada entered into an agreement with the Afghan Government providing for it to treat detainees as if they were prisoners of war, and thus to apply the Third Geneva Convention.

342. An internal assessment dated 18 September 2011 described the United Kingdom's current detention regime in Afghanistan as being "based upon United

Kingdom national sovereignty". Afghanistan was however a sovereign state at the relevant time; and it was inconsistent with Afghan sovereignty for the United Kingdom to carry out detention in Afghanistan without the permission of the government of that country. The judge found that the United Kingdom policy was not agreed with the Afghan Government, and that there was no evidence that any attempt was made to amend the Memorandum of Understanding between the British and Afghan Governments to reflect the new policy.

The legal basis of detention for intelligence purposes

343. The judge concluded that the United Kingdom policy announced in November 2009 had no legal basis under Afghan, international or English law. In relation to Afghan law, he considered that, since the United Kingdom Government was operating on the territory of an independent sovereign state at the invitation of, or at least with the consent of, that state, it was arguable that it was necessary under article 5(1) for the detention to comply with the law of that state. On the basis that there had been no argument on the point, however, he proceeded on the assumption that it was sufficient that there was a basis for the detention under the SCR (para 301). The Court of Appeal considered it unnecessary to decide the point (para 126). The point has however been pursued before this court on behalf of the first interveners, who had also raised it in their skeleton argument before the judge.

344. As they point out, the European court has said many times that, where the lawfulness of detention is in issue, including the question whether a procedure "prescribed by law" has been followed, the Convention refers essentially to national law and lays down an obligation to conform to the substantive and procedural rules of national law. The same approach has been followed by the UN Human Rights Committee in relation to article 9 of the ICCPR. They also point out that that approach has been adopted, specifically in relation to detention in a non-international armed conflict, in the Report of the UN Working Group on Arbitrary Detention, "Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court", UN Doc WGAD/CRP.1/2015 (2015), Guideline 17, para 115(a)(ii) ("With regard to detention in relation to a non-international armed conflict: (a) ... the detaining State must show that: ... (ii) administrative detention is on the basis of grounds and procedures prescribed by law of the State in which the detention occurs and consistent with international law").

345. I am not persuaded that that is the correct approach to adopt to the application of the Convention in the present context. Guidance is provided by the judgment in *Ocalan v Turkey* (2005) 41 EHRR 45, which concerned the arrest of a Turkish citizen in Kenya by Turkish officials who then transferred him to Turkey. The court considered it irrelevant to examine whether the conduct of the officials had been

unlawful under Kenyan law: what mattered was whether their conduct had been authorised by the Kenyan Government, so as to provide a basis in international law for an extra-territorial arrest, and had a legal basis under Turkish law. The court stated:

> "Irrespective of whether the arrest amounts to a violation of the law of the state in which the fugitive has taken refuge - *a question which only falls to be examined by the court if the host state is a party to the Convention* - the court requires proof in the form of concordant inferences that the authorities of the state to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host state and therefore contrary to international law. Only then will the burden of proving that the sovereignty of the host state and international law have been complied with shift to the respondent Government." (para 60; emphasis supplied)

346. So far as international law and English law are concerned, I agree with the judge's conclusion, which is consistent with the legal advice given to the British Government at the time. The practice of detaining persons for more than 96 hours for intelligence purposes, rather than transferring them to the Afghan authorities for the purpose of criminal investigations and proceedings, was not authorised by SCR 1890, interpreted as explained in para 325 above. The grounds for the person's being detained by HM Forces, rather than being transferred to the Afghan authorities for criminal investigation and prosecution, did not fall within any of those listed in sub-paras (a) to (f) of article 5(1) of the Convention. Indeed, even leaving article 5(1) out of account, the phrase "necessary for imperative reasons of security" in the SCR did not authorise detention for the purpose of obtaining intelligence from the detainee. In addition, the policy did not respect Afghan sovereignty, having been introduced without the agreement of the Afghan Government, and without any amendment of the Memorandum of Understanding. Since the detention during that period was not authorised by SCR 1890, it was, on that basis also, not lawful for the purposes of article 5(1).

Detention pending the availability of space in Afghan facilities

347. As explained at para 332 above, the Memorandum of Understanding, read with the SOP, permitted detention to be extended beyond 96 hours where necessary to enable the detainee to be transferred in safe circumstances. Provision for "logistical extensions" was also made by para 24 of J3-9:

> "On some occasions, practical, logistic reasons will entail a requirement to retain a UK detainee for longer than the 96 hours. Such occasions would normally involve the short-notice non-availability of pre-planned transport assets or NDS [Afghan National Security Directorate] facilities to receive transferred detainees reaching full capacity. These occasions may lead to a temporary delay until the physical means to transfer or release correctly can be reinstated. Where this is the case, authority to extend the detention for logistic reasons is to be sought from both HQ ISAF and from Ministers in the UK through the Detention Authority."

348. In the event, HM Forces held people for substantial periods when the Afghan authorities wished to accept their transfer but the detention facilities were full, or when the only accommodation available was in facilities which were considered unsuitable. This situation arose as a result of three factors. One was the fact that Afghanistan remained a state under reconstruction, with limited detention facilities. The second was the large number of insurgents captured by HM Forces, particularly during operations in Helmand. The third was the fact that the treatment of detainees in some Afghan detention facilities did not meet Convention standards. It was indeed held by the Divisional Court, during the period when Mr Mohammed was detained pending the availability of space in the Afghan detention facility at Lashkar Gah, that it would be unlawful for HM Forces to transfer detainees to the Afghan detention facility in Kabul: *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

349. The judge accepted, in relation to Mr Mohammed, that his detention in these circumstances was for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence. The implication is that such detention fell in principle within the scope of article 5(1)(c) of the Convention. That conclusion has not been challenged: as the Court of Appeal noted, the question has not been explored at any stage of the proceedings. I am inclined to agree with the judge, and to regard such detention as in principle authorised by SCR 1890, but in the absence of any argument on the point it would be inappropriate to consider the issue in detail.

350. There are, however, other aspects of article 5 which are also relevant to detention in these circumstances: notably, the requirement in article 5(1) that detention be "in accordance with a procedure prescribed by law", and the procedural requirements of article 5(3) and (4). It will be necessary to return to these.

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), for the reasons explained by Lord Sumption at para 79.

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). Furthermore, as the Court of Appeal noted at para 250 of its judgment, according to the evidence given on behalf of the Ministry of Defence, Mr Mohammed's continued detention beyond 96 hours was "for the purposes of intelligence exploitation" and "was not assessed to be necessary for force protection purposes".

354. In relation to the period of detention between 5 May and 25 July 2010, the judge found that, although the circumstances of the detention fell within the scope of article 5(1)(c) of the Convention, there was a violation of the requirement in

article 5(1) that the detention should be in accordance with a procedure prescribed by law. In that regard, he held (para 309) that detention for lengthy periods (82 days in the case of Mr Mohammed, and between 231 and 290 days in the cases of the interveners) was not authorised by para 24 of J3-9. Alternatively, he held that if that para 24 did authorise detention for such protracted periods, then it failed to meet the test of legal certainty implicit in the requirement that detention be in accordance with a procedure prescribed by law, since it failed to provide standards which were clearly defined and whose application was reasonably foreseeable.

355. I recognise the force of that reasoning. I also recognise the importance of legal certainty, especially in this context. The European court referred in *Hassan* to "the fundamental purpose of article 5(1), which is to protect the individual from arbitrariness" (para 105). In *Medvedyev v France*, the court stated:

> "... where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of 'lawfulness' set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness ..." (para 80)

356. Nevertheless, it is also necessary to recognise the practical exigencies of the situation which confronted HM Forces at the time, and to endeavour to apply the Convention in a manner which is feasible in the real world. The terms of para 24 of J3-9 suggest that it was originally envisaged as a basis for accommodating occasional logistical problems, normally arising at short notice and leading to a temporary delay. It did however provide a procedure for extending detention which could be used when more serious and long-term problems emerged in relation to the capacity of the Afghan authorities to deal satisfactorily with large numbers of insurgents and suspected insurgents, in the context of a state undergoing reconstruction. In principle, the provision by a member of ISAF of detention facilities on behalf of the Afghan authorities, when they were unable to cope, was within its mandate under SCR 1890. In the nature of things, the duration of such detention in individual cases could not be predicted, particularly when it depended on contingencies, such as the willingness of the Afghan authorities to treat detainees humanely, and the outcome of legal proceedings in the English courts, which lay wholly outside the control of HM Forces and the Ministry of Defence. It is also relevant to note that para 24 of J3-9 required the detention to be authorised by HQ ISAF as well as by UK Ministers. It was therefore consistent with para 8 of the SOP, and hence with the Memorandum of Understanding.

357. In these circumstances, it appears to me that the basic requirement that there should be a procedure prescribed by law was satisfied by J3-9.

358. I agree with Lord Mance that, in considering Mr Mohammed's claim for damages for wrongful detention, it is highly material to consider whether, but for any failures on the part of the United Kingdom authorities, he would have been any better off - in other words, would have spent less time in custody. That is an important question both in relation to the period during which Mr Mohammed was held by HM Forces for the purpose of obtaining intelligence, and in relation to the period during which he was held because of the unavailability of suitable accommodation in an Afghan detention facility. Further, as Lord Mance observes, if the answer is that he would have been in the custody of the Afghan authorities, it will be material to consider whether this would have involved him in any form of detriment.

359. Finally, in relation to article 5(3) and (4) of the Convention, I agree with Lord Sumption's conclusions, and with the core of his reasoning at paras 94-109. Whether there was a breach of article 5(3) should be considered after trial. It is however apparent from the material already before the court that the arrangements for Mr Mohammed's detention were not compatible with article 5(4), since he did not have any effective means of challenging the lawfulness of his detention.

Conclusions

360. For these reasons, I would have allowed Mr Al-Waheed's appeal and declared that it was legally necessary for his detention to fall within one or more of sub-paragraphs (a) to (f) of article 5(1). 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, so far as based on the grounds considered at this stage.