CASE NO: UKSC 2014/0219

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BETWEEN:

ABD ALI HAMEED ALI AL-WAHEED

APPELLANT

-AND-

MINISTRY OF DEFENCE

RESPONDENT

AND

ON APPEAL FROM THE COURT OF APPEAL **CASE NO: UKSC 2015/0218**

BETWEEN:

MINISTRY OF DEFENCE

APPELLANT

-AND-

SERDAR MOHAMMED

RESPONDENT

-WITH-

QASIM, NAZIM & ABDULLAH

FIRST INTERVENER

-AND-

OPEN SOCIETY JUSTICE INITIATIVE

HUMAN RIGHTS WATCH

AMNESTY INTERNATIONAL

INTERNATIONAL COMMISSION OF JURISTS

SECOND INTERVENER

WRITTEN SUBMISSIONS ON BEHALF OF THE SECOND INTERVENER

A INTRODUCTION AND SUMMARY

1. The International Commission of Jurists, Human Rights Watch, Amnesty International and Open Society Justice Initiative (the "**Second Interveners**") are grateful for the Court's permission to intervene in these proceedings.

2. These submissions address the following topics:

   2.1. The complementary application of international humanitarian law ("**IHL**") and international human rights law ("**IHRL**") in situations of armed conflict.

   2.2. The lack of authority under IHL, whether treaty or customary law for internment in situations of non-international armed conflict ("**NIAC**"), including consideration of the inapplicability in NIAC of internment rules that govern situations of international armed conflict ("**IAC**").

   2.3. The requirement that detention in NIACs is compliant with IHRL, the implications of this and the key means by which NIAC internment can be lawful while also responsive to the exigencies of the situation.

3. The Second Interveners note that the Secretary of State for Defence (the "**S/S**") does not seek to argue that a power to detain should be implied in the case of a purely internal, 'traditional', NIAC.[1] Rather, the S/S argues that an authority to detain persons for imperative reasons of security derives in the context of an 'internationalised' or 'extra-territorial' NIAC (see below) either from an implied authority under treaty IHL or from customary IHL. For the reasons developed throughout this submission, the Second Interveners are of the view that any distinction between 'traditional' and 'internationalised' NIACs is one of fact rather than law and could not justify such an approach.

B TERMINOLOGY

4. IHL concerns itself with two types of conflict only, each with rules that significantly affect the scope of the powers and obligations of the parties:[2] IACs and NIACs. IACs typically concern a conflict between two or more opposing States.[3]

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1 *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, as recorded at §215.

2 Andrew Clapham, Paola Gaeta and Marco Sassòli (Eds), *The 1949 Geneva Conventions. A Commentary* (Oxford: Oxford University Press, 2015), p.24.

3 *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* ICRC Opinion Paper, March 2008, p.1. It should be noted, also to be considered as IACs are: (i) cases of partial or total occupation of the territory of a High Contracting Party (Common Article 2 to the Conventions); and (ii) that Article 1(4) of Additional Protocol I includes "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".

5. NIACs are described as conflicts between State forces and armed non-State actors, or between non-State actors only.[4] An armed conflict between a State and an armed non-State actor operating within the State's territory is generally described as a 'purely internal' or 'traditional' NIAC.[5]

6. The S/S refers in his submissions to 'internationalised' NIACs. An alternative expression for such a conflict, used by the International Committee of the Red Cross ("**ICRC**"), is a '*NIAC with an extraterritorial element*', namely, a conflict in which "the armed forces of one or more State, or of an international or regional organization, fight alongside the armed forces of a host State, in its territory, against one or more organized non-State armed groups".[6]

7. An IAC may become a NIAC. For example, the US-led military intervention in Iraq in 2003 began as an IAC with subsequent belligerent occupation. It then became a NIAC with the eruption of an insurgency during the subsequent transitional process.[7] The termination of the IAC phase and the commencement of the NIAC phase of an armed conflict will not in all cases be as clear, depending on what is happening on the ground. The Second Interveners explain below how detention in a NIAC can be carried out lawfully, including in a way compliant with IHRL, while at the same time being responsive to the exigencies of the situation. (Section G below).

C APPLICABLE LAW

(1) Complementary application of IHL and IHRL

8. IHL provides no authority, grounds or procedures for internment in NIACs, whether 'traditional' or 'internationalised' (see Sections D and E below). Accordingly, IHRL is applicable to the question of the authority for and scope of NIAC internment (see Section F below), without the need to consider any modification flowing from the simultaneous application of relevant rules of IHL.[8]

9. Even if IHL is treated as containing rules specifically applicable to the authority, grounds and procedures for NIAC internment, it is now well established that the application of IHL does not displace the application of IHRL.[9] Reference to the dual and complementary application of IHL and IHRL has become standard practice in resolutions of the Security Council, General

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4 ICRC Opinion Paper 2008, ibid.
5 *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC Opinion Paper, November 2014, p.7.
6 ICRC Opinion Paper 2014, p.7.
7 *The 1949 Geneva Conventions. A Commentary*, p.33.
8 *Mohammed v MoD* (2014) ECWH 1369, §293.
9 As early as 1970, the UN General Assembly affirmed that: "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict": General Assembly resolution 2675(XXV) (1970), §1.

Assembly, Human Rights Commission and the latter's successor, the Human Rights Council.[10] This position has also been affirmed in numerous judgments of the International Court of Justice, as well as by the UN Human Rights Committee.[11]

10. Accordingly, the principle of *lex specialis derogat lex generali*, which requires that the provisions from the body of law that is more specialized or specific to the situation be taken to qualify provisions from the more general body of law,[12] is not relevant since not only does IHL not grant a power to intern in NIACs, even if IHL was in any respect applicable to such internment, it would be subject to the complementary application of IHRL.

11. It should further be noted that certain fundamental guarantees, relating to humane treatment and non-discrimination, many of which are also to be found in IHRL, are expressly recognised as applicable in both IACs (under Article 75(3) of Additional Protocol I ("**API**")) and NIACs (under Article 4 of Additional Protocol II ("**APII**")).

(2) Extraterritorial application of IHRL

12. The jurisdictional provisions of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment have been interpreted to mean that the rights and guarantees conferred by those treaties must be provided to anyone within the "power or effective control" of a relevant State party, even when that State is operating outside of its territory, including through its military forces.[13] The International Court of Justice has likewise repeatedly affirmed the extraterritorial application of human rights treaties,[14] as has the European Court of Human Rights ("**ECtHR**"), and the Inter-American Commission on Human Rights.[15]

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10 A recent study identifies 330 resolutions from these bodies between 2000 and 2010 affirming the applicability of IHRL in situations of armed conflict: see Ilia Siatistsa and Maia Titberidze, 'Human rights in armed conflict from the perspective of the contemporary State practice in the United Nations: Factual answers to certain hypothetical challenges', at URL: http://www.geneva-academy.ch/RULAC/pdf/Human-Rights-Law-in-Armed-Conflict.pdf (p.34).

11 See, for example: *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict*, Advisory Opinion (1996) ICJ Reports, §24; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports, especially §106. For the Human Rights Committee, see General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), §11.

12 As observed by Mr Justice Leggatt in *Mohammed v MoD* (2014) ECWH 1369, §270, the rationale is that "because special rules are designed for and targeted at the situation at hand, they are likely to regulate it better and more effectively than more general rules". See also §§288-292.

13 General Comment No 31, ibid, §10; and Committee against Torture, General Comment No 2, UN Doc CAT/C/GC/2 (2008), §§ 7 and 16. See further See Alex Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) *Journal of Conflict & Security Law*, pp.3-9.

14 For example, see: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, §109; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Merits (2005) ICJ Reports, §216.

15 See, for example, *Victor Saldano v Argentina*, Report No. 38/99, Inter-American Commission on Human Rights, OEA/Ser.1/V/II 95 Doc.7 Rev, §§ 17 and 19.

13. The extra-territorial application of jurisdiction is long established in the context of detention. A State detaining a person, whether or not in a situation of armed conflict, by definition has that person within its effective authority and control, and thus within its jurisdiction. This has repeatedly been stated by the **ECtHR**, including in its recent rejection of contrary claims in which it held that the European Convention on Human Rights ("**ECHR**") applied to an arrest and detention by British forces of a suspected combatant during the IAC phase of the armed conflict in Iraq[16] and during the later NIAC phase of the armed conflict in Iraq. The British forces had effective control over the operation of the detention facility in Basrah, and thus, over persons held at that facility.[17]

14. This is further stated in Principle 16 of the UN Working Group on Arbitrary Detention's recent Basic Principles and Guidelines on *habeas corpus* ("**Basic Principles and Guidelines**"), which provides that: "A State that detains a person in a situation of armed conflict as properly characterized under international humanitarian law… has by definition that person within its effective control, and thus within its jurisdiction…".[18]

D LACK OF IHL AUTHORITY TO INTERN IN NIACS

(1) IHL does not authorise or regulate the internment of persons in NIACs

15. By contrast to the position in an IAC, where IHL provides explicit and extensive rules regarding the authority, grounds and procedures for detention, as well as for reviews and appeals of detention, IHL in relation to a NIAC contains no such provisions for internment. In particular, IHL provides no explicit authority, grounds or procedures for internment in a NIAC.

16. As to the rules applicable in an IAC, the Third Geneva Convention ("**GC3**"), contains over 120 substantive articles that provide a wide array of rules that authorize detention of prisoners of war ("**POW**") (Article 21) and set out grounds for POW detention (Article 4); what to do if a captured individual challenges his or her POW status (Article 5); and additional rules concerning release and repatriation (Articles 118 and 119) and transfer (Article 12).

17. Further, the Fourth Geneva Convention ("**GC4**") provides for the detention of civilians in an IAC by way of internment or placing in an assigned residence. This is authorized in two contexts. First, the internment of alien civilians in the territory of a party to the IAC is permitted but "only if the security of the Detaining Power makes [this] absolutely necessary", if the civilian voluntarily demands this and his or her situation "renders this step necessary"

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16 *Hassan v United Kingdom* (2014) ECHR 1162, §80.

17 *Al-Jedda v United Kingdom* (2011) ECHR 1092, §86. See also *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18, §88; *Al Saadoon and Mufdhi v United Kingdom* (2010) ECHR 285, §142.

18 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 A/HRC/30/37 (2015), Principle 16, §29.

(Article 42). Secondly, the internment of civilians in an occupied territory "if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons" (Article 78). The ICRC Commentary on Articles 42 and 78 emphasizes that internment and assigned residence are of an exceptional character and represent the most severe measures that a Detaining or Occupying Power can resort to with respect to protected persons.[19]

18. The internment of civilians in an IAC must cease "as soon as possible after the close of hostilities" (Article 133(1) GC4) or "as soon as the reasons which necessitated his internment no longer exist" (Article 132(1) GC4), reinforced by the right under Article 75(3) API to be released "as soon as the circumstances justifying the arrest, detention or internment have ceased to exist". IHL also sets out procedures under Articles 43 and 78 to review the internment or assigned residence of protected persons in an IAC.[20]

(2) No authority to detain persons in a NIAC can be implied from IHL treaty law

19. Not only does IHL contain no explicit authority to detain in the context of a NIAC, but further, no such authority can be implied. In this regard, the Interveners recognise that it has been argued, including in the ICRC's Opinion Paper on internment in armed conflict, that Common Article 3 to the Geneva Conventions ("**CA3**") and Articles 5 and 6 of APII 'govern' the deprivation of liberty in NIACs. It has been said that a generic authority to detain in a NIAC is implicit in CA3 because it identifies as one category of persons taking no active part in hostilities "those placed hors de combat by… detention".[21] Because APII – which relates exclusively to NIACs – explicitly mentions internment, it has been suggested that internment "is a form of deprivation of liberty inherent to NIAC", whilst at the same time acknowledging that APII does not refer to the grounds for internment or applicable procedural rights.[22]

20. Presumably based on the same approach, Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent speaks of a State's power to detain "in all forms of armed conflict", although it does not purport to define grounds and procedures for detention.[23]

21. These documents do not however, represent a definitive view on the issue of authority for NIAC internment. The position amongst IHL experts, including former ICRC legal advisers, is

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19 *Commentary on the Geneva Conventions of 12 August 1949. Volume IV* (ICRC, 1958), pp. 257, 260-261 and 368.

20 Those procedures, as complemented by IHRL, are reflected in Principle 16 and Guideline 17 of the Basic Principles and Guidelines. See further the International Commission of Jurists' *Legal Commentary on the Rights to Challenge the Lawfulness of Detention in Armed Conflict*, September 2015, pp.8-11.

21 ICRC Opinion Paper 2014, p.6.

22 ICRC Opinion Paper 2014, p.7.

23 Resolution 32IC/15/R1 (2015), preambular §1.

highly contested.[24] In his statement delivered during the Foreign Office's Annual Lecture in International Law in May 2014, the President of the ICRC himself acknowledged that "IHL is far less precise" concerning detention in NIACs and "human rights law is more clearly applicable". He spoke of a lack of certainty created by the assumption that internment will occur in NIACs, but in circumstances where IHL "fails to clarify the permissible grounds and required procedural safeguards". He therefore concluded that: "This absence of specificity leaves detaining authorities without pre-determined rules that they can point to as accepted protections against arbitrary detention".[25] It should similarly be noted that the ICRC's catalogue of rules of customary IHL omits from the ambit of customary IHL any rules on the authority to detain in NIACs.[26]

22. By contrast, many experts, including the Second Interveners for the reasons set out below, consider that IHL treaty law contains no implied authority to detain persons in NIACs.[27]

(a) <u>IHL in a NIAC is concerned with the protection of those detained, whether lawfully or unlawfully</u>

23. While CA3 and Articles 5 and 6 of APII relate to persons who are as a matter of fact interned in a NIAC, it does not follow that they confer a legal authority to detain in a NIAC or that any such power can be implied. The detention to which they refer may be lawful or unlawful.[28] As noted by the Court of Appeal in the case of Mr Serdar Mohammed: "Regulation is not the same as authorisation".[29] It should be recalled that the Vienna Convention on the Law of Treaties ("**VCLT**") requires treaties to be "interpreted in good faith".[30] A strained interpretation, such as equating regulation with authority, should not be adopted.

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24 See, for example, Gabor Rona (former ICRC Legal Adviser), 'Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?' (2015) 91 *International Law Studies* 32, p.37.

25 'War, protection and the law', statement of ICRC President Peter Maurer delivered at the UK Foreign Office's 2nd Annual Lecture in International Law, 19 May 2014, at URL: https://www.icrc.org/eng/resources/documents/statement/05-23-war-protection-and-the-law-icrc-approach-fco-2nd-international-law-lecture-19-may-2014.htm.

26 ICRC, 'Customary IHL' database, at URL: https://www.icrc.org/customary-ihl/eng/docs/home.

27 See, for example: Alex Conte, 'The legality of detention in armed conflict', in Casey-Maslen (Ed.), *The War Report 2014* (Oxford: Oxford University Press, 2015) especially pp.492-499; Gabor Rona; and *Legal Commentary on the Rights to Challenge the Lawfulness of Detention in Armed Conflict*, pp.16-26; Jonathan Horowitz and Chris Roger, 'Does IHL Need Human Rights Law?: The Curious Case of NIAC Detention', *Just Security*, 5 May 2014, URL: https://www.justsecurity.org/10134/guest-post-ihl-human-rights-law-curious-case-niac-detention-serdar-mohammed/. See also Principle 16, §31, of the Basic Principles and Guidelines, in which the UN Working Group on Arbitrary Detention declares that: "Administrative detention or internment in the context of a non-international armed conflict may only be permitted in times of public emergency threatening the life of the nation and the existence of which is officially proclaimed…", assuming that a derogation from the right to liberty is required because there is no express or implied authority under applicable rules of IHL authorizing the detention of persons in a NIAC. See also Guideline 17, §96(a).

28 *Mohammed v MoD* (2014) ECWH 1369, §243.

29 *Mohammed and others v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §180.

30 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 31(1).

(b) Purpose of CA3 and Articles 5 and 6 of APII

24. The purpose of these provisions is to guarantee a minimum level of humanitarian treatment regardless of whether detention is lawful. CA3 and Articles 5 and 6 of APII require that any detained persons be treated humanely (CA3), that they enjoy certain generally applicable rights and safeguards (such as the benefit of medical examinations under Article 5(2)(d), APII) and that they enjoy certain procedural safeguards pertaining to the prosecution and punishment of criminal offences (Article 6, APII). As noted in the ICRC Commentary: "Like common Article 3, Protocol II has a *purely humanitarian purpose* and is aimed at securing fundamental guarantees for individuals in all circumstances" (emphasis added).[31] It should here be recalled that Article 31(1) of the VCLT requires a treaty to be interpreted "in light of its object and purpose".

(c) Exclusion by interpretation

25. Article 31(1) of the VCLT provides that a treaty be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*" (emphasis added). Where certain matters have been explicitly set out in a legal instrument, the lack of similar explicit reference elsewhere in the instrument calls for a conclusion that such matters are excluded (*expressio unius est exclusio alterius*). As explained above, the authority, grounds and procedures to detain in an IAC are set out in great detail in IHL treaty law. Further, the treatment of persons in armed conflict is "one of the most highly regulated areas of international relations".[32] In that context, the notable lack of any authorisation, grounds and procedures for NIAC internment necessarily implies that a power to intern in a NIAC was intentionally excluded from IHL treaty law.[33]

(d) Intention of the negotiating States

26. Indeed, this is confirmed by the original ICRC draft of Geneva Conventions not finally adopted. Reflecting one of the cornerstones of IHL, that of the equality of belligerents (the same rules for all parties to the conflict), the original ICRC draft of the Geneva Conventions had provided for the application of the Conventions in their entirety to NIACs.[34] One of the

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31 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.* (ICRC, 1987), p.1344.

32 *The 1949 Geneva Conventions. A Commentary*, p.4.

33 This was the approach taken by Mr Justice Leggatt in *Mohammed v MoD* (2014) ECWH 1369, §242, where he stated: "I think it reasonable to assume that if CA3 and/or AP2 had been intended to provide a power to detain they would have done so expressly – in the same way as, for example, Article 21 of the Third Geneva Convention provides a power to intern prisoners of war. It is not readily to be supposed that the parties to an international convention have agreed to establish a power to deprive people of their liberty indirectly by implication and without saying so in terms".

34 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949. Volume I* (Geneva: ICRC, 1952), p.48.

implications of this approach would have been to authorise detention by armed non-State actors, which, as recognised by the High Court in the case of Mr Serdar Mohammed, "would be anathema to most states which face a non-international armed conflict on their territory and do not wish to confer any legitimacy on rebels and insurgents or accept that such groups have any right to exercise a function which is a core aspect of state sovereignty". The rejection of the ICRC's draft and the consequent differences in the text that exist today, reflect an intention by the negotiating States to the Geneva Conventions and their Additional Protocols not to authorise detention in NIACs.[35] Article 32 VCLT in this regard identifies "the circumstances of [a treaty's] conclusion" as supplementary means of interpretation.

(e) Loss of protection does not equate to authority to detain

27. The Secretary of State refers to the proposition by Goodman that: "it would be absurd to accept an interpretation of IHL that results in a state's possessing the legal authority to kill actor X on purpose but lacking the legal authority to detain actor X".[36] This proposition is, however, a misrepresentation of how IHL works and is also premised on a false assumption that an authorisation to kill exists.

28. IHL governs protection and loss of protection in both IACs and NIACs. It is wrong therefore to suggest that IHL contains any power or authority to kill; rather it covers the extent to which protection from killing is conferred. Article 13(3) of APII explains that: "Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities". This therefore regulates when persons lose protected status as a result of their direct participation in hostilities but does not provide an authority to the parties to kill. Regulation of authority to kill in a NIAC would come from domestic law. Furthermore, scholars have disputed the suggestion that IHL provides an implied legal basis for killing in a NIAC,[37] not least because, as a matter of the equality of belligerents (a fundamental tenet of IHL) this would confer legal authority on armed non-State actors to kill, which self-evidently could never have been contemplated.

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35 *Mohammed v MoD* (2014) ECWH 1369, §245. See also Jonathan Horowitz, 'IHL Doesn't Regulate NIAC Internment – A Drafting History Perspective', *Opinio Juris*, 9 February 2015, URL: http://opiniojuris.org/2015/02/09/guest-post-ihl-doesnt-regulate-niac-internment-drafting-history-perspective/.

36 Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 *American Journal of International Law* 48, p.55.

37 Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?', *EJIL: Talk!*, 7 May 2014, at URL: http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.

(f) Implied authority to detain is irreconcilable with the requirement of legality and in particular, the prohibition of arbitrary detention

29. Rule 99 of the ICRC's catalogue of rules of customary IHL prohibits arbitrary deprivation of liberty, the explanatory note to which explicitly reaffirms that the prohibition of arbitrary deprivation of liberty applies to NIACs as a matter "established by State practice in the form of military manuals, national legislation and official statements, as well as on the basis of international human rights law".[38] Rule 99, together with Rule 87, also notes that the arbitrary deprivation of liberty is incompatible with the requirement that detainees be treated humanely, reflected in CA3 as well as APs I and II.[39] Rules 87 and 99, CA3 and APs I and II in this respect reinforce the general prohibition against arbitrary detention.

30. In its detailed report defining the notion of "arbitrary" detention and its constituent elements under customary international law, the UN Working Group on Arbitrary Detention explained that this "includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law *and procedure* and that it is *proportional to the aim sought, reasonable and necessary*" (emphasis added).[40] The Working Group continued by stating that: "The legal basis justifying the detention must be accessible, understandable, non-retroactive and applied in a consistent and predictable way to everyone equally".[41] The law authorising detention must be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.[42] Any detention that lacks such legal basis is both unlawful and arbitrary.[43] Taking the view that arbitrary detention can never be a necessary or proportionate measure, the Working Group concluded that: "a State can never claim that illegal, unjust, or unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end."[44]

31. To ensure compliance with the prohibition of arbitrary detention, there must be an express or implied *authority* to intern. In addition, the *scope of such authority* (grounds and procedures) must be properly defined. This is essential in order to guarantee a consistent and predictable legal basis for internment, sufficient to avoid arbitrary application, including compliance with necessity, reasonableness and proportionality. As noted above, there are no provisions within the Geneva Conventions or their Additional Protocols that provide for detention and satisfy the

38 ICRC, *Customary IHL*, Rule 99: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99.
39 Ibid; and Rule 87: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule87.
40 *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, Part III in UN Doc A/HRC/22/44 (2012), §61.
41 Deliberation No 9, ibid, §62.
42 UN Human Rights Committee, General Comment No 35, UN Doc CCPR/C/GC/35 (2014), §22.
43 General Comment No 35, ibid, §11.
44 Deliberation No 9, §48.

constituent elements of the prohibition of arbitrary detention. As explained, GCs 3 and 4 specify who may be detained in IACs, on what grounds, in accordance with what procedures and for how long. By contrast, in the context of a NIAC it is not possible to point to any regulation of the existence or scope of such authority.[45] The ICRC Opinion Paper concludes that "…additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality".[46]

(3) Customary IHL does not authorise the detention of persons in NIACs

32. In the words of the International Court of Justice: "The existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*".[47] Thus, while the act of detaining in the context of a NIAC may contribute to analyses of a 'settled practice', without the accompanying *opinio juris* this practice does not provide sufficient evidence of a customary IHL rule authorizing detention. Analysing State practice and *opinio juris*[48] is all the more important because the authority of States to detain in NIACs may derive from a body of law other than IHL and, as such, the act of detention will not reflect a rule of customary IHL. Based on these fundamental rules and considerations, the practice of internment during a NIAC is not a sufficient basis on which to find that customary IHL includes an authority to intern in NIACs, whether internal or extraterritorial. This was true before, during, and after the UK detained Mr Al-Waheed in 2007 and Mr Serdar Mohammed in 2010.

(a) ICRC study on customary IHL found no authority to detain

33. The ICRC's study on customary IHL, which is treated as an authoritative guide to customary IHL, does not find an authority for NIAC internment.[49] Moreover, extensive updates to the ICRC study have not revealed a change in the customary rules regarding detention in either internal NIACs or NIACs with an extraterritorial element.[50]

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45 A conclusion also arrived at by Mr Justice Leggatt in *Mohammed v MoD*, §246.

46 ICRC Opinion Paper 2014, p.8.

47 *Jurisdictional Immunities of the State (Germany v Italy)*, Merits (2012) ICJ Reports, §55. The International Law Commission's Drafting Committee report of 14 July 2015 also concludes that the practice must be accepted as law (*opinio juris*) and be "distinguished from mere usage or habit": International Law Commission, 'Identification of customary international law', UN Doc A/CN.4/L.869 (2015), Draft Conclusion 9(2).

48 See 'Identification of customary international law', ibid, Draft Conclusion 3(2).

49 As emphasised by the High Court and the Court of Appeal in the case of Mr Serdar Mohammed: *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §241; *Mohammed v MoD* [2014] EWHC 1369, §§260-261 (where it was noted that Rule 99 of the "influential study" of customary IHL that was carried out by the ICRC: "does not itself provide a legal basis for detention. It requires that there be such a basis provided by law; but it does not itself authorise or establish grounds for detention during an armed conflict.")

50 ICRC, *Customary IHL: 2. Practice*, at URL https://www.icrc.org/customary-ihl/eng/docs/v2#refFn4.

(b) Copenhagen Process and its Principles and Guidelines

34. The Copenhagen Process and its Principles and Guidelines[51] do not, as sometimes claimed, reflect a customary IHL authority to detain[52] and indeed refute such a position. First, the main premise of the Copenhagen Process was that there was little clarity or consensus on how international law regulates detention in NIACs, especially NIACs with an extraterritorial element.[53] The need for such a process, which began in 2007, therefore implicitly endorses the ICRC's study: namely that, at that time, existing customary rules were non-existent or unclear. Secondly, when the Copenhagen Process concluded in 2012, no operative paragraph stated that customary IHL contained such an authority. This provides another, more recent, indication that there is insufficient evidence of general State practice with accompanying *opinio juris*. Thirdly, while at the Process "[p]articipants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations",[54] Principle 4 makes it clear that detention is only lawful when undertaken in accordance with international law.[55] Principle 4 is, however, purposefully ambiguous as to which body of international law applies. Fourthly, States did not intend the Copenhagen Process and its Principles and Guidelines to alter international law on detention,[56] and thus they cannot be said to create, or contribute to the creation of, a customary norm.[57] In any event, the Copenhagen Principles and Guidelines were created for application to situations in which IHL is not always applicable[58] and, as such, they are a poor source for reflecting or establishing customary IHL.

(c) International Conference resolution is insufficient to claim that a customary rule exists

35. Nor can it be said that Resolution 1 of the 32nd International Conference, noted in paragraph 20 above provides any strong indication that a (new or existing) customary IHL power to detain exists in a NIAC. As the International Law Commission has noted, "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law".[59] This will only be the case if it is established that "the

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51 *Copenhagen Process on the Handling of Detainees in International Military Operations – The Copenhagen Process: Principles and Guidelines* (2012).

52 *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §223.

53 Thomas Winkler (Acting Legal Adviser, Danish Ministry of Foreign Affairs), 'The Copenhagen Process on the Handling of Detainees in International Military Operations' (presented at XXXIst Round Table on Current Issues of International Humanitarian Law International Humanitarian Law, Human Rights and Peace Operations Theme III: Working Group 2: Peace operations and detention, 5 September 2008), p.246.

54 The Copenhagen Process: Principles and Guidelines, preambular § III.

55 The Copenhagen Process: Principles and Guidelines, §4 of which states: "Detention of persons must be conducted in accordance with applicable international law".

56 The Copenhagen Process: Principles and Guidelines, preambular § II and § 16.

57 *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §§ 226 and 227.

58 The Copenhagen Process: Principles and Guidelines, preambular §§ VII and IX, § 11, and the Chairman's Commentary at 1.2.

59 'Identification of customary international law', Draft Conclusion 12(1).

provision [of the resolution] corresponds to a general practice that is accepted as law (*opinio juris*).[60] Moreover, Resolution 1 provides that only States, and not armed non-State actors, have a power to detain; thus failing to explain how IHL's well-accepted and foundational premise that every IHL rule must equally apply to both sides of the armed conflict can be avoided.

(d) Inconsistent formulations of a customary norm

36. Amongst the limited sources suggesting that customary IHL authorises NIAC detention, it is striking that many are inconsistent in their formulations of their view of the position; a further indication that no norm exists. For example, Resolution 1 claims that IHL provides an authority to *States* to detain in *all forms of armed conflict*. By contrast, the UK claims that such an authority exists only with respect to 'internationalised' NIACs. The ICRC Opinion Paper appears to set out a further articulation of the rule, namely that customary IHL provides an authority to detain to *all parties* in *all types of NIAC*.[61]

(e) Fundamental departures from IHL

37. The Second Interveners submit that the formulations mentioned above should all be rejected. Each would entail a fundamental departure from the basic structure of IHL, whether by holding that armed non-State actors had a power to detain in NIACs or by carving out special rules for 'extra-territorial' or an 'internationalised' NIAC, neither of which was contemplated or intended by IHL and is nowhere to be found in international law. Accordingly, the Supreme Court would be making a fundamental departure from established principles.

(f) Views of eminent IHL scholars

38. Noting that the "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law",[62] several eminent IHL scholars agree that there is no customary IHL rule granting a power to detain in NIACs, whether purely internal or with an extraterritorial element. Professor Sassòli, writing in September 2015, takes the position that: "many States involved in NIACs have actually created domestic law providing for a legal basis to intern (and they have foreseen procedures to decide upon such internment). Therefore, there is no general practice, and therefore no customary law."[63] Professor Rona, also writing in 2015, takes a similar view.[64] Dr

60 'Identification of customary international law', Draft Conclusion 12(3).
61 ICRC Opinion Paper 2014, p.7.
62 'Identification of customary international law', Draft Conclusion 14.
63 Marco Sassòli 'Detention in non-international armed conflicts: Can the legal framework applicable to internment in international armed conflicts be replicated?' (paper presented at the 38th Round Table of the International Institute of Humanitarian Law, *The Distinction between International and Non-International Armed Conflicts:*

Debuf's comprehensive analysis of internment in armed conflict also provides a three-pronged rejection of the notion that customary IHL provides a legal basis for NIAC detention.[65] Professor Hampson, writing in 2014, points out that the UK, tellingly, did not rely on such a rule in its arguments in *Al-Jedda* or in *Al-Skeini* and that "there is no reference to it in the Joint Doctrine Publication (JDP) 1-102 which contains the UK doctrine on detention", despite its discussion of the legal basis for interment.[66] Professor Hampson adds: "[i]t would help if there were some evidence that the UK has somewhere thought it could rely on a customary power to intern".[67] Notably, the Joint Doctrine Publication is in its third edition, published in January 2015.[68] Although other scholars may take the opposite view, this further exposes a lack of consensus, supporting the view that a customary rule has not crystalized.

(g) <u>No grounds or procedures for NIAC internment under customary IHL</u>

39. Just as there is no authority to detain under customary IHL, there are also no grounds and procedures for internment under customary IHL. This is demonstrated by the ICRC's study, which relied almost exclusively on a combination of domestic law and IHRL to describe the grounds and procedures afforded to NIAC internees.[69] This is further demonstrated in the ICRC's 2014 Opinion Paper, as noted in paragraph 29 above.

E NO REASONABLE BASIS FOR EXTENDING IHL RULES PERTAINING TO IACS

40. It has been suggested, including by the Secretary of State, that the gap in regulating the scope of the power to detain in NIACs may be filled, by analogy, by the rules governing IAC internment. As a result, it has been said that the reasoning of the ECtHR in *Hassan v UK*, focused on IAC internment, is equally applicable to internment in 'internationalised' NIACs.

(1) IAC rules require extension by law, not as a matter of policy

41. It is important to recall that the ECtHR's reasoning in *Hassan* was based on the existence of clear and detailed rules of IHL in IACs with which, in conformity with the rule of interpretation set out in Article 31(3)(c) of the VCLT, Article 5 of the ECHR was to be read

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Challenges for IHL?, Sanremo, 3-5 September 2015), p.4, where he added: "Some would object that the practice is different in transnational NIACs (such as Afghanistan), in which outside intervening States cannot apply their domestic law. Even in such conflicts, however, there is no general practice. First, there are only 50 States, as a maximum, involved in transnational NIACs. And second, out of those 50, to the best of my knowledge, the great majority do not detain, or in case they do, they release/transfer people within 3-4 days. They therefore do not even claim that there is customary basis allowing them to intern enemies."

64 Gabor Rona, p.41.

65 Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Hart Publishing, 2012), p.470.

66 Françoise Hampson, 'The Legal Basis for Detention in Extraterritorial NIACs – The Mohammed Serdar Case', (proceedings of the 15th Bruges Colloquium, *Detention in Armed Conflicts*, 16-17 October 2014)**,** p.97.

67 Ibid.

68 UK Ministry of Defense, *Joint Doctrine Publication 1-10 Captured Persons* (3rd Ed, January 2015).

69 ICRC, *Customary IHL*, Rule 99: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99. See also *Mohammed v MoD* (2014) ECWH 1369, §§ 260 and 261.

harmoniously.[70] The ECtHR referred to the "universal ratification" of the four Geneva Conventions, their "universally accepted role" in mitigating the consequences of armed conflict, and the status of relevant internment rules as "accepted features" of IHL.[71]

42. In order for the reasoning in *Hassan* to apply in the context of a NIAC, it is not enough that the rules governing internment in IACs could or should be applied by analogy and/or as a matter of policy. They must be shown to apply as a matter of law. If this is not the case – in other words, if the rules of IHL applicable in NIACs do not include clear and detailed rules governing internment, which they do not – then the reasoning applied in *Hassan* is not applicable.

43. This view is supported by eminent IHL scholars including Professor Sassòli, who recently described it as "doubtful" that "a human rights court would accept to interpret clear and hard rules of [IHRL] in light of an analogy with a rule that actually applies in a different situation".[72] It is also reflected in the Court of Appeal's statement, in the case of Mr Serdar Mohammed, that: "the reasoning in *Hassan* can be extended to a [NIAC]… *only if* in a non-international armed conflict international humanitarian law provides a legal basis for detention" (emphasis added).[73]

(2) No extension of IAC rules as a matter of either treaty or customary law

44. The rules of IHL that govern internment in IACs can only apply to NIACs where that is so as a matter of either: (a) the proper interpretation of CA3 and/or APII; or (b) the operation of customary international law. As explained above, neither is the case.

45. As to treaty interpretation, for the reasons set out at paragraphs 19-31 above, CA3 and APII cannot be read as conferring an implied power to detain. Still less do they implicitly import such authority from the GC3 and/or GC4 provisions regulating the scope of such a power. Any such application by analogy was expressly disclaimed during the drafting of API and APII.[74] Furthermore, there is no contemporary State practice pointing clearly to a contrary interpretation, whether in 'traditional' or 'internationalised' NIACs. This precludes any argument under Article 31(3)(b) of the VCLT that the High Contracting Parties agreed to a

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70 *Hassan v United Kingdom* (2014) ECHR 1162, §102.

71 *Hassan v United Kingdom* (2014) ECHR 1162, §§ 102 and 104.

72 Marco Sassòli, p.4.

73 (*Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §123.

74 For example, the ICRC delegate at the drafting of Protocol II explained that "a non-international armed conflict differed from an international armed conflict because of the legal status of the subjects of law involved: in non-international armed conflicts the legal status of the parties was fundamentally unequal, since part of the population would be fighting against the Government in power, acting in the exercise of its original public authority": Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Vol. VIII (1978), p.203.

contrary interpretation of the Geneva Conventions and their Protocols. It cannot therefore be said as a matter of treaty law that IHL rules governing IAC internment apply equally in NIACs.

46. A similar conclusion applies with respect to customary international law. Paragraphs 32-39 above discuss the absence under customary law of any inherent power to detain in a NIAC. Evidence of State practice and *opinio juris* is still more inadequate in respect of rules regulating grounds and procedures for detention. This may be contrasted with the position in respect of the rules governing, for example, the conduct of hostilities in IACs, most of which are now widely accepted as having been extended to NIACs as a matter of customary law.[75]

47. Even the ICRC does not suggest that the scope of this power is delineated by the analogous application of IAC rules. Jelena Pejic's much-discussed article, for example, refers expressly to the "absence of rules" for the internment of individuals in NIACs and treats the internment provisions of GC4 as a source of "guidance" only.[76] Similarly, the ICRC Background Paper on strengthening the protection of persons deprived of their liberty in NIACs notes that the "stark contrast" between IAC internment rules and "the sparse rules applicable in NIAC begs the question of whether some or all of the norms reflected in the Geneva Conventions should be applied to NIAC detention".[77] This is clearly predicated on the conclusion that this is not presently the case.

48. As a matter of law, IHL rules governing internment in IACs clearly do not apply by analogy to NIACs, including NIACs with an extraterritorial element. There are no rules of IHL sufficiently clear and detailed to render the reasoning in *Hassan* applicable in this context.

49. As recognised by the Court of Appeal in the case of Mr Serdar Mohammed,[78] this conclusion finds support in the language used by the ECtHR itself: "*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" (emphasis added).[79]

(3) Difficulties in extension of IAC rules, even as a matter of policy

50. Even viewed as a matter of policy or *lex ferenda*, the application by analogy of IAC rules of internment to NIACs raises a number of problematic questions.

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75 *Prosecutor v Tadic*, ICTY Case IT-94-1, Appeals Chamber, decision on jurisdiction (2 October 1995), §126.

76 Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87(858) *International Review of the Red Cross* 375, pp.377-378.

77 ICRC, 'Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict', Background Paper: Regional Consultations 2012-13, p.9.

78 *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, §118.

79 *Hassan v United Kingdom* (2014) ECHR 1162, §104.

51. One, identified at paragraph 26 above, concerns the difficulty of finding a principled basis on which to depart from the fundamental IHL principle of the equality of belligerents.

52. Another arises from the risk of a discrepancy between the (fairly minimal) procedural guarantees required in respect of internment under GC4 and the laws of the State on whose territory a NIAC is being fought. In the case of a NIAC with an extraterritorial element, the potential result is that an intervening State could, in reliance on IHL, claim an entitlement to intern nationals of the territorial State while providing them with fewer procedural protections than the laws of that State require. This directly conflicts with concerns voiced by States that sought to protect their sovereignty in situations of NIAC, not only from armed non-State actors but also from other governments.[80]

53. The Court of Appeal, in the case of Mr Serdar Mohammed, also considered that there would be "artificiality in basing the authority to detain in a non-international armed conflict on Common Article 3 and APII, but basing its scope and the safeguards on a different legal source".[81]

54. In the absence of clear existing rules governing internment in NIACs, application of the rules of IAC by analogy would amount to an attempt to fill significant gaps in existing IHL without the opportunity to undertake full consideration of such complex questions. This issue is currently the subject of an extensive consultation process coordinated by the ICRC.[82] In the Second Interveners' respectful submission, the Court should therefore be extremely reluctant to embark on such a course, particularly since, for the reasons given below (especially in Section G), it is unnecessary for it to do so.

F THE NEED FOR NIAC INTERNMENT TO BE COMPATIBLE WITH IHRL

55. Since neither treaty nor customary IHL provide authority to detain persons in NIACs, for such detention to be lawful, a legal source for such a power must be identified, which must be compatible with IHRL. This brings to bear the following key consequences:

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80 For example, Romania's delegate to the drafting process of the two Additional Protocols made a general remark that was illustrative of other State interventions: "States must refrain from all action designed to overthrow another State's system and must not intervene in the internal conflicts or domestic or foreign affairs of another State. The automatic application to internal conflicts of regulations applicable in international conflicts might have negative results and entail violation of international law and national sovereignty. Any future international regulations relating to non-international armed conflicts must be based on recognition of, and respect for, the sovereign rights of each State within its boundaries." Yugoslavia's delegate similarly remarked: "When preparing the final version of draft Protocol II, account must be taken of the general principles of international law including those of non-interference in the domestic affairs of States and respect of the sovereignty and territorial integrity of States." See Official Records of the Diplomatic Conference: "Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) Vol. V (1978), pp. 103 and 105." pp. 103 and 105.

81 *Mohammed v SSD, Rahmatullah v MoD* (2015) EWCA Civ 843, para 218.

82 See ICRC webpage, 'Detention in non-international armed conflict: The ICRC's work on strengthening legal protection', at URL: https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0.

(1) NIAC internment must be pursuant to law and must not be arbitrary

56. As noted in paragraphs 30-31 above, customary international law prohibits arbitrary detention, a prohibition also codified within international human rights treaties to which the UK is party. Any deprivation of liberty must accordingly be pursuant to a prescription by law that is "accessible, understandable, non-retroactive and applied in a consistent and predictable way" accompanied by procedures establishing the scope of such authority.[83]

57. As noted, the ICRC Opinion Paper also takes the view that: "additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality".[84] Two options for establishing such additional authority are: (a) through the domestic law of the host State; or (b) through the domestic law of the State to which the international force belongs. These options are considered in Section G below.

(2) Detention authorised by a Chapter VII Security Council resolution

58. In theory, a resolution of the Security Council ("**SC**") adopted under Chapter VII of the United Nations Charter ("**UNC**") may also provide a legal basis for NIAC internment.[85] However:

59. First, the language of the resolution must be sufficiently clear and precise to meet the principle of legality. It would not suffice for such authority to be drawn from a resolution authorising 'all necessary means' to accomplish a mission.[86] Specificity as to the authorisation, grounds and procedures is required in order to comply with the prohibition of arbitrary detention and its constituent elements. Lack of specificity on the part of the SC prompted the ECtHR to find, in *Al-Jedda v United Kingdom*, that British forces had unlawfully detained Mr Hilal Al-Jedda in a situation where the UK had not derogated from Article 5(1) of the ECHR.[87]

60. Secondly, even if sufficiently specific authorisation, grounds and procedures for internment in a NIAC are provided under a SC resolution, the resolution must be acted upon in a manner consistent with IHRL. States are obliged to comply with Chapter VII decisions: Articles 25 and 48 UNC. Accordingly, States have argued that the Charter effectively displaces any human rights obligations they might have, on the basis that Article 103 UNC requires any conflict of obligations to be resolved in favour of the Charter. However, the ECtHR and UN Human Rights Committee have rejected such claims, concluding that SC resolutions must be

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83 Deliberation No. 9, especially §§61-62; General Comment No 35, §§ 11 and 22.

84 ICRC Opinion Paper 2014, p.8.

85 Ibid.

86 The ICRC Opinion Paper itself recommends that specificity as to the authorization for internment is to be preferred: ICRC Opinion Paper 2014, p.8.

87 *Al-Jedda v United Kingdom* (2011) ECHR 1092.

interpreted and implemented in a way most in harmony with the provisions of IHRL.[88] In this regard, they have noted that the SC's competence is qualified by its obligation to discharge its duties in accordance with the purposes and principles of the UN (Article 24(2)), which include the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms (Articles 1(3), 55(c) and 56). The Court and Committee in the cases referred to in footnote 88 considered Article 103 UNC inapplicable because it was possible to achieve a human rights-compliant interpretation and implementation. However, even where a direct and irreconcilable conflict arises and notwithstanding Article 103, the ECtHR has held that a State remains liable under the ECHR for all acts and omissions of its organs arising from the need to observe international legal obligations (in that case as a result of the UNC), resulting in full responsibility of the State for any violation of rights under the ECHR in its implementation of SC resolution 1483.[89]

61. Thirdly, as is the case with the implementation of sanctions under Chapter VII UNC, any authorisation, grounds and procedures to intern in a NIAC provided for under a SC resolution requires implementation not only in practice but also in (domestic) law. Noting the need for SC decisions to be acted upon in compliance with IHRL, this is also a feature of the prohibition of arbitrary detention, under which States are obliged to ensure that any deprivation of liberty is pursuant to a prescription by law (as explained in paragraphs 30-31). This emphasises the importance of the options identified by the Second Interveners in Section G below.

(3) NIAC internment must be accompanied by a derogation from Article 5(1) ECHR

62. The precise and limited language of Article 5(1) ECHR does not envisage internment for security reasons. Any legal prescription authorising and regulating NIAC internment, whether initiated by a host or sending State or as a result of legislation implementing a SC resolution, must therefore be accompanied by an express and limited derogation from Article 5 in accordance with Article 15 ECHR. For the reasons set out in Section E above, this position is not changed by *Hassan*'s finding of an implied derogation in the context of IAC internment.

63. Principle 16 of the UN Basic Principles and Guidelines confirms that administrative detention or internment in a NIAC "may only be permitted in times of public emergency threatening the life of the nation and the existence of which is officially proclaimed". This is supplemented by

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88 *Al-Jedda v United Kingdom* (2011) ECHR 1092, §102; *Nada v Switzerland* (2012) ECHR 1691, §176; and *Sayadi and Vinck v Belgium*, UN Doc CCPR/C/94/D/1472/2006 (2008), Annex B, Individual opinion of Committee member Sir Nigel Rodley (concurring), un-numbered §§4-5.

89 *Al-Dulimi and Montana Management Inc. v Switzerland* (2013) ECHR 1173, §§118-120.

Guideline 17, which explains what a derogating State must show when adopting measures of administrative detention.[90]

(4) NIAC internment must be accompanied by *habeas corpus*

64. To be consistent with the prohibition of arbitrary detention, requiring necessity and proportionality, meaningful judicial review of the legality and factual basis of each individual detention must be available. The UN Basic Principles and Guidelines in this respect reaffirm that all detained persons in a situation of armed conflict are guaranteed the exercise of the right to bring proceedings before a court or judicial body to challenge the arbitrariness and lawfulness of their deprivation of liberty and to receive without delay appropriate and accessible remedies (*habeas corpus*).[91] With regard to detention in a NIAC, Guideline 17 explains the key elements required to allow full compliance with the right to bring proceedings before a court.[92]

65. The Principles and Guidelines also affirm that *habeas corpus* "is not to be suspended, rendered impracticable, restricted or abolished under any circumstances, even in times of war, armed conflict or public emergency that threatens the life of the nation and the existence of which is officially proclaimed".[93] The Human Rights Committee has similarly stated that, in order to protect non-derogable rights such as the right to life and the prohibition of torture and ill-treatment, the right to *habeas corpus* must not be diminished by measures of derogation.[94]

66. It should be noted that *habeas corpus* is just one of the rights drawn to the Court's attention. The Second Interveners do so without prejudice to other IHRL obligations that would apply to all NIAC internment.

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90 Namely, that: "The emergency has risen to a level justifying derogation; Administrative detention is required on the basis of the grounds and procedures prescribed by law of the State in which the detention occurs and is consistent with international law; The administrative detention of the person is necessary, proportionate and non-discriminatory, and the threat posed by that individual cannot be addressed by alternative measures short of administrative detention" (see UN Principles and Guidelines, Guideline 17, §96(a)).

91 UN Principles and Guidelines, Principle 16, §27.

92 Namely, that: "(b) A person subject to administrative detention has the right to bring proceedings before a court that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards, including disclosure of the reasons for the detention and the right to defend oneself, including by means of legal counsel; (c) Where a decision to detain a person subject to administrative detention is maintained, the necessity of the detention must be periodically reviewed by a court or administrative board that offers the necessary guarantees of independence and impartiality, and the processes of which include and respect fundamental procedural safeguards; (d) Where an internment regime is established, it shall be consistent with international human rights law and international humanitarian law applicable to non-international armed conflict to allow full compliance with the right to bring proceedings before a court." (see UN Principles and Guidelines, Guideline 17, §96).

93 UN Principles and Guidelines, Principle 16, §5.

94 Human Rights Committee, General Comment No 29, 'States of Emergency (Article 4)', UN Doc CCPR/C/21/Rev.1/Add.11 (2001), §16; General Comment No 35, §67.

G IHL AUTHORISATION OF DETENTION IN NIACS IS NOT NECESSARY

67. Lack of authority under IHL to detain in NIACs does not make internment in NIACs impossible; internment may be authorised by another legal source, provided it is compatible with IHRL. The Second Interveners point to two key means by which such detention can be lawful and at the same time responsive to the exigencies of the situation as well as compliant with IHRL:

(1) NIAC internment through application of the domestic law of the host State

68. In the vast majority of cases where the UK takes part in an extra-territorial NIAC with the possibility of persons being detained by its forces, it will be doing so in effective alliance with the national government, even if (as in Iraq) it was initially engaged in an IAC against the incumbent government. The authority to detain, the procedures, rights, obligations, duties and functions of all relevant parties could and should in such situations be set out in a Memorandum of Understanding ("**MoU**") or equivalent agreement entered into between the UK and a host State and given effect through the application of the domestic law of the host State in question.

69. In accordance with the position as set out by the ECtHR in its decision in *Al-Saadon and Mufdhi v UK*, the UK would take steps to ensure that such laws and regulations, including the MoU, meet its human rights obligations (including those highlighted in Section F above concerning legality, *habeas corpus* and the need to derogate; as well as the need to prevent any transfer that would put an individual at real risk of torture, the death penalty or other serious abuses).[95]

(2) NIAC internment through application of UK domestic law

70. The exigencies of armed conflict may mean that time does not allow for the establishment of an agreement with a host State in the terms just explained, including inclusion of appropriate safeguards. The situation may be exacerbated by the lack of a functional government, or the functional operation of domestic law, in the host State. An alternative, interim, solution would be for the UK to apply pre-established legal provisions for NIAC internment.

71. To this end, the UK could enact legislation providing authority, grounds and procedures to detain persons for security reasons in NIACs, subject to activation of those provisions through a derogation from Article 5 ECHR in each particular case. This legislation would need to comply with all aspects of IHRL, including *habeas corpus* and other IHRL obligations, including appropriate provisions concerning the transfer of persons and the release of detained

95 *Al Saadoon and Mufdhi v United Kingdom* (2010) ECHR 285, §142.

persons. This pre-established authority could then be activated by the UK through a derogation from Article 5(1) ECHR in each particular case, in which case the formal and procedural requirements of Article 15 ECHR would need to be considered and satisfied. British forces engaged in a NIAC would thereby be able to rely on precise legal prescriptions for the internment of persons. This would provide the UK with a practical and effective solution that could be acted on without delay and would be capable of ensuring human rights compliance.

72. This alternative is described as an interim one because of the general principle of international law that a State cannot apply its domestic laws in the territory of another State without the host State's consent,[96] a position implicitly recognized in the UK Joint Service Manual of the Law of Armed Conflict.[97] This is presumably why the ICRC Opinion Paper speaks of providing authority for internment under the domestic law of the State to which the military force belongs as an option to be pursued only "in exceptional circumstances".[98] Such exceptional circumstances would reasonably apply where, due to the exigencies of the situation or the lack of functioning authorities and/or law in the host State, the conclusion of an appropriate MoU or other agreement with the host State has not been possible.

H CONCLUSION

73. For these reasons, the Second Interveners invite the Court to find that in the context of a NIAC, whether 'traditional' or with an extraterritorial element, Article 5(1) of the ECHR cannot be read so as to accommodate, as a permissible ground, internment pursuant to a power to detain given by IHL. No such power exists as a matter of treaty or customary IHL.

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96 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th Edition, 2012), pp.478-479.

97 *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004), including at 15.6.1, 15.6.3, 15.30.1, 15.30.3 and 15.40.2.

98 ICRC Opinion Paper 2014, p.8.

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