Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights

Matthias Lippold[*]

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Abstract

This article analyzes two recent cases on the legality of security detentions in armed conflicts under the European Convention on Human Rights (ECHR). It will proceed as follows: First, it will identify competing interpretations of international humanitarian law and their implications for the way in which the relationship between international humanitarian law and human rights law can be approached. Second, the paper will analyze the decisions of both the High Court of Justice and the Court of Appeal in *Serdar Mohammed*, and of the European Court of Human Rights in *Hassan*. Third, the article will compare the approaches and analyze to what extent a reconciliation is possible. It will be demonstrated that the decisions in fact are to a great extent reconcilable. The article will conclude that the interpretations by the English courts and by the European Court of Human Rights are to commend, in particular because of a commonality they share: the awareness that legal orders cannot be treated as if they would stand in isola-

[*] LL.M. (NYU), Research and Teaching Fellow at the Institute of International Law and European Law, Georg-August-Universität Göttingen. I am grateful to Professor *Andreas Paulus*, *Torsten Stirner* and the anonymus reviewer for their valuable and helpful advice. I am indebted to *Andrea Hug* for her editorial service. All errors remain my own. Email: <mlippol @gwdg.de>.

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tion from each other, and that their interrelationship can be properly assessed without merging them.

I. Introduction

In May 2014, the English High Court of Justice ruled in *Serdar Mohammed* that detentions for security reasons in a non-international armed conflict (NIAC) in Afghanistan violated Afghan law, the European Convention and the UK Human Rights Act.[1] The Court of Appeal confirmed this holding recently.[2] In September 2014, the Grand Chamber of the European Court of Human Rights decided in *Hassan* that security detentions in an international armed conflict in Iraq were lawful.[3] Art. 5 was accommodated with international humanitarian law (IHL) to the effect that a violation of the provision was denied.

It seems that while the English courts' decisions took a strong stand on human rights and "humanized" IHL,[4] the Strasbourg Court demonstrated more deference to international humanitarian law and "humanitarized" human rights. Such interpretation would be based on a specific assumption regarding the meaning of humanitarization which in fact is subject to a vivid debate. According to one view, humanization and humanitarization do not stand in opposition to each other. Rather, humanization is a process which has characterized and influenced international humanitarian law since the Geneva Conventions.[5] Others however argue that international humanitarian law is intended to not only protect individuals but also to offer a legal regime for states to act in times of armed conflicts.[6] Then, humanization and

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[1] *Serdar Mohammed v. Ministry of Defence (MOD)*, judgment of 2.5.2014, High Court of Justice (*Leggatt J*), [2014] EWHC 1369 (QB). This text will follow both the English courts and the European Court of Human Rights in using the term "detention" for the deprivation of liberty. The terms "security detention", "administrative detention", and "internment" are sometimes used interchangeably in the literature, see *J. Pejic*, Procedural Pprinciples and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence, Int'l Rev. of the Red Cross 87 (2005), 375.

[2] *Serdar Mohammed and Secretary of State of Defense*, *Yunus Rahmatullah & the Iraqi Civilian Claimants and Ministry of Defence and Foreign and Commonwealth Office*, judgment of 30.7.2015, Court of Appeal (*Lloyd Jones* and *Beatson LJJ*), (2015) EWCA Civ 843.

[3] *Case of Hassan v. The United Kingdom*, judgment of 16.9.2014, App. No. 29750/09.

[4] This is the critique by *S. Aughey/A. Sari*, Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, International Law Studies 91 (2015), 60 (109).

[5] *T. Meron*, The Humanization of Humanitarian Law, AJIL 94 (2000), 239 (260).

[6] *S. Aughey/A. Sari* (note 4), 90.

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humanitarization can represent potentially opposing and competing paradigms.[7]

The question of the meaning of humanitarization stands *pars pro toto* for a debate about competing interpretations of international humanitarian law. Often, the choice between them is not made or acknowledged explicitly but nevertheless forms part of the underlying assumption in the debate on the relationship between international humanitarian law and human rights law. The cases under review reflect this debate, and the decisions have already sparkled a discussion and caused mixed first reactions. According to *Aughey* and *Sari*,[8] the English court pushed in *Serdar Mohammed* the convergence between international humanitarian law and human rights law too far, and its interpretation of the European Convention could not be maintained after *Hassan*. Likewise, the International Committee of the Red Cross (ICRC) has recently maintained that, contrary to *Serdar Mohammed*, international humanitarian law provides for a legal basis to detain both in international and in non-international armed conflicts.[9] *Hassan* received negative criticism as well. *Shaheed Fatima* who acted for a group of claimants in *Serdar Mohammed* called the consistency of the Grand Chamber's interpretation of Art. 5 of the European Convention with the provision's wording "questionable" and criticized the Strasbourg Court's recourse to international humanitarian law "where the UK could have, but did not, enter an Article 15 derogation from Article 5".[10] In its recent General Comment No. 35 on Art. 9 International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee (HRC) affirmed, just like the High Court,

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7 See *J. d'Aspremont/E. Tranchez*, The quest for a non-conflictual coexistence of international human rights law and humanitarian law: Which role for the lex specialis principle?, in: R. Kolb/G. Gaggioli (eds.), Research Handbook on Human Rights and Humanitarian Law, 2013, 223 (240). They attribute the term "humanitarization" to a discussion with *Vera Gowland-Debbas*, describing the interpretation of human rights in the light of international humanitarian law; *Y. Dinstein*, The Conduct of Hostilities under the Law of International Armed Conflict, 2nd ed. 2010, 19 (33 et seq.).

8 *S. Aughey/A. Sari* (note 4) 60.

9 International Committee of the Red Cross, Internment in Armed Conflict: Basic Rules and Challenges (Opinion Paper, Nov. 2014), <https://www.icrc.org>, 7 et seq.: "Another view, shared by the ICRC, is that both customary and treaty IHL contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in NIAC." The ICRC submits 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", for instance special agreements or domestic law.

10 *S. Fatima*, Reflections on Hassan v. UK: A Mixed Bag on the Right to Liberty (Part 2), <http://www.justsecurity.org>; see also *S. Borelli*, Jaloud v. Netherlands and Hassan v. United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad, Questions of International Law 15 (2015), 25 (39).

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the possibility of extraterritorial derogations,[11] and considered, similar to the European Court of Human Rights, security detentions complying with international humanitarian law "in principle" not to be arbitrary deprivations of liberty.[12]

This article will analyze the cases and argue that while differences as to the interpretation of international humanitarian law and of the Convention between the judgments exist, the decisions can be reconciled with each other. It is true that the courts in *Serdar Mohammed* did not qualify Art. 5 ECHR in the light of international humanitarian law. On the basis of the judgments however it remains possible for states to modify their obligations under the Convention. It is also true that *Hassan* deferred to international humanitarian law at the expense of finding a violation of Art. 5 ECHR, but at the same time the court clarified the applicability of the Convention in international armed conflicts and formulated conditions which states will have to meet. By taking recourse to Art. 31 para. 3 lit. (c) of the Vienna Convention on the Law of Treaties (VCLT)[13] the European Court of Human Rights offered a methodological approach and a reasoning to which other judicial bodies can relate when interpreting other human rights treaties and which can inspire a conversation that can go beyond the European Convention. Together, *Hassan* and *Serdar Mohammed* – the latter is pending before the UK Supreme Court[14] – strike a pragmatic balance and are worthwhile objects of study. They constitute long-awaited examples of judicial practice, dealing with a subject which has been much theorized about. They demonstrate how the legality of conduct during armed conflict is not subject to international humanitarian law only, but to a number of legal regimes which will influence courts when deciding cases.

[11] Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, 18, Fn. 185.

[12] Human Rights Committee (note 11), 19, paras. 64, 66. See already General Comment on Art. 9 No. 8, para. 4.

[13] Art. 31 of the Vienna Convention on the Law of Treaties (UNTS, 1155, 331) reads: "3. There shall be taken into account, together with the context: (...) (c) any relevant rules of international law applicable in the relations between the parties."

[14] *P. Mordaunt*, Minister of State for the Armed Forces, announced to seek "leave to appeal to the supreme court", The Guardian, British forces illegally detained Afghan suspect, court of appeal rules, 30.7.2015 <http://www.theguardian.com>.

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II. Humanization, Humanitarization and Competing Interpretations Thereof

1. From Separation Towards Mutual Engagement

International humanitarian law and human rights law used to coexist in an almost parallel fashion without much overlap.[15] As their respective scope of application expanded, both fields increasingly engaged with each other.

The rise of humanitarian law treaties started already in the second half of the 19th century. The St. Petersburg Declaration,[16] The Hague Conventions[17] and later the Geneva Conventions[18] attempted to introduce humanitarian concerns into war by regulating and prohibiting certain means of warfare and by establishing certain protections for combatants and civilians in armed conflict while no universal human rights treaty was yet in place. The fight against slavery,[19] minority protection treaties,[20] the declaration on the "Universal Rights of Man" by the Institut de droit international[21] or

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15 *R. Kolb*, The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, Int'l Rev. of the Red Cross 80 (1998), 324 (409); *H. P. Gasser*, International Humanitarian Law and Human Rights Law in Non-International Armed Conflict: Joint Venture or Mutual Exclusion?, GYIL 45 (2002), 149 (151 et seq.); see also in *H. Krieger*, A Conflict of Norms: The Relationship between International Humanitarian Law and Human Rights Law in the ICRC Customary Law Study, Journal of Conflict and Security Law 11 (2006), 265 (266).

16 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Gramm Weight, 29.11.1868.

17 A complete overview of the Hague Conventions from 1899 and 1907 can be found in the ICRC database, < https://www.icrc.org>.

18 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, all four conventions entered into force on 21.10.1950.

19 See *J. S. Martinez*, The Slave Trade and the Origins of International Human Rights Law, 2012; *P. Alston*, Does the Past Matter? On the Origins of Human Rights, Harv. L. Rev. 126 (2013), 2043 et seq.

20 See *P. Alston/R. Goodman*, International Human Rights, 2013, 113 et seq.

21 Déclaration universelle des droits de l'homme, 12.10.1929, <http://www.idi-iil.org>; *A. Mandelstam*, Der internationale Schutz der Menschenrechte und die New Yorker Erklärung des Instituts für Völkerrecht, ZaöRV 2 (1931), 335 et seq.; *H. P. Aust*, From Diplomat to Academic Activist: André Mandelstam and the History of Human Rights, EJIL 25 (2015), 1105 et seq.

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later the Universal Declaration of Human Rights[22] bespoke a growing concern for human rights, but the first universal human rights treaties entered into force no earlier than 1976, with the ICCPR[23] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[24]. The regional European Convention on Human Rights[25] had already been in force since 1953.

Beyond the respect for human dignity as common denominator, the extent to which both fields share a similar philosophical underpinning is disputed.[26] The drafting processes of the Geneva Conventions and human rights instruments did not influence each other extensively.[27] The prohibition of the use of force by the Charter of the United Nations (UNC) gave even rise to the expectation that "the regulation of [war] has ceased to be relevant"[28] and explained the reluctance of the drafters of the ICCPR to include any reference to war in the derogation provision (Art. 4 ICCPR).[29] It would be an oversimplification to say that there was no mutual influence at all. The prohibition of the use of force explained the Geneva Conventions'

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22 GA Res 217A (III), U.N. Doc A/810 at 71 (1948); see *J. von Bernstorff*, The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law, EJIL 19 (2008), 903.

23 International Covenant on Civil and Political Rights, 999 UNTS 171, entered into force 23.3.1976.

24 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3, entered into force 3.1.1976.

25 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force 3.9.1953.

26 *J. Pictet*, The Principles of International Humanitarian Law, 1966, 25; *G. I. A. D. Draper*, Humanitarian Law and Human Rights Law, Acta Juridica (1979), 193 (204); *T. Meron*, Human Rights in Internal Strife: Their International Protection, AJIL 82 (1988), 876 et seq.; *E. Crawford*, The Treatment of Combatants and Insurgents under the Law of Armed Conflict, 2010, 122; *H. P. Gasser* (note 15), 155. See *S. Sivakumaran*, The Law of Non-International Armed Conflict, 2012, 85; *T. D. Gill*, Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea For Mutual Respect and a Common-Sense Approach, Yearbook of International Humanitarian Law 16 (2013), 215 (256).

27 *R. Kolb* (note 15), 409; *R. Kolb*, Human Rights Law and International Humanitarian Law Between 1945 and the Aftermath of the Teheran Conference of 1968, in: R. Kolb/G. Gaggioli (note 7), 35 (42 et seq.); *H. P. Gasser* (note 15), 151 et seq.; *C. Droege*, Elective Affinities? Human Rights and Humanitarian Law, Int'l Rev. of the Red Cross 90 (2008), 501 (504); *H. J. Heintze*, Theories on the Relationship Between International Humanitarian Law and Human Rights Law, in: R. Kolb/G. Gaggioli (note 7), 53 (54).

28 Yearbook of the International Law Commission, 1949, UN Doc.A/CN.4/SER.A/1949, 281.

29 *M. J. Bossuyt*, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights, 1987, 86: "[T]he convention should not envisage, even by implication, the possibility of war." Art. 15 ECHR excludes "lawful acts of war" from the non-derogable part of Art. 2.

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very use of the term "armed conflict" rather than "war", and the rise of the term "international humanitarian law"[30] instead of "laws of war", precisely because the notion of war was more open to divergent interpretations than "armed conflict" and more subject to contestation.[31] Although the question of the relationship between both bodies of law was raised during the drafting of the Geneva Conventions, for instance by a Danish delegate, who emphasized "that common article 3 could not be interpreted in such a way as to deprive persons, not covered by the provisions of article 3, of their human rights or their right to self-defense",[32] the interplay between both bodies of law was not contemplated in detail.[33] Derogation articles in human rights instruments allow states to derogate from obligations in times of war or public emergency to some extent and indicate that the instruments were envisioned to apply in times of war and emergency in principle.[34] However, the way in which they would apply and the interplay with international humanitarian law was not contemplated either.[35]

Eventually, the coexistence of separated epistemic communities changed to mutual engagement.[36] The UN General Assembly declared that human rights would play a role in armed conflicts.[37] Human rights considerations influenced the drafting of the Additional Protocols[38] to the Geneva Con-

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30 *W. M. Reisman*, Editorial Comment: Holding the Center of the Law of Armed Conflict, AJIL 100 (2006), 852 (856); *Y. Dinstein* (note 7), 18 et seq.

31 *J. Pictet* (ed.), Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1952, 32.

32 Final Record of The Diplomatic Conference of Geneva of 1949, 1949, Vol. II B, 268 (*Georg Cohn*). To which *Sir Robert Craigie* from the UK replied: "The purpose of Art. 3 is not to deprive anybody of anything but to define what persons are to have the protection of the Convention under Art. 3."

33 *R. Kolb*, Human Rights … (note 27), 35 (40).

34 Art. 15 (1) ECHR reads: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

35 *M. Milanovic*, Extraterritorial Derogations from Human Rights Treaties in Armed Conflict, in: N. Bhuta (ed.), Collected Courses of the Academy of European Law, forthcoming, available at <http://papers.ssrn.com>, 24.

36 See *G. I. A. D. Draper*, The Relationship between the Human Rights Regime and the Law of Armed Conflict, Isr. Y.B. Hum. Rts. 1 (1971), 191 (207). *R. Kolb*, Human Rights … (note 27), 44.

37 GA Res. 2444 (XXIII), 19.12.1968, Respect for Human Rights in Armed Conflict; *C. Droege* (note 27), 506.

38 Protocol Additional to the Geneva Conventions of 12.8.1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12.8.1949, and Relating to the Protection of Victims

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ventions which extended the international regulation of armed conflicts.[39] Moreover, human rights lawyers took recourse to rules of international humanitarian law as arguments when interpreting human rights, as the debate on the prohibition of the juvenile death penalty exemplifies.[40] Further interpretations which expanded each field's scope have resulted in an increasing interest in the relationship.[41] This concerned in particular non-international armed conflicts and the application of human rights extraterritorially in armed conflicts.

The Geneva Conventions distinguish according to common Arts. 2 and 3 between international and non-international armed conflicts. The former were regulated by the conventions more extensively than the latter, since states were less willing to regulate internationally what they considered to be an internal matter in the late 1940s.[42] As the law of armed conflict would apply to both parties to a conflict, states did not want to confer any authority on their counterpart in a non-international armed conflict. A proposed paragraph 4 to common Art. 2, which would have made the whole convention applicable to any armed conflict, was dropped at the drafting conference. Instead, the states adopted common Art. 3 and established minimum

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in Non-International Armed Conflicts (Protocol II), 1125 UNTS 609. Both protocols entered into force on 7.12.1978.

[39] *H. P. Gasser* (note 15), 154; *M. Milanovic/V. Hadzi-Vidanovic*, A Taxonomy of Armed Conflict, in: N. White/C. Henderson (eds.), Research Handbook on International Conflict and Security Law, 2012, 256 et seq.; *D. Schindler*, The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols, RdC 163 (1979), 117 et seq.

[40] The Inter-American Commission on Human Rights could not "identify no appropriate justification for applying a more restrictive standard for the application of the death penalty to juveniles in times of occupation than in times of peace, relating as this protection does to the most basic and non-derogable protections for human life and dignity of adolescents that are common to both regimes of international law.", *Domingues v. United States*, Inter-American Commission on Human Rights, Case No. 12.285, Report No. 62/02, (22.10.2002), at para. 67; *W. Schabas*, Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum, Is. L. R. 40 (2007), 592 (600).

[41] For an overview *M. Milanovic*, The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law, in: J. D. Ohlin et al. (eds.) Theoretical Boundaries of Armed Conflict and Human Rights, forthcoming 2016, available at <http://www.papers.ssrn.com>.

[42] Final Record of the Diplomatic Conference of Geneva, 1949, Vol. II B, at 9 et seq.; *F. Kalshoven/L. Zegveld*, Constraints on the Waging of War: An Introduction to International Humanitarian Law, 2001, 38; *S. Sivakumaran* (note 26), 40 et seq.; *E. Crawford*, Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflict, LJIL 20 (2007), 441 (445).

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standards which each Party to the conflict is bound to apply.[43] Internal situations did not remain unregulated internationally when states started to ratify human rights treaties. During the 1990s, the number of parties to the ICCPR almost doubled. Furthermore, internal, non-international armed conflicts came more into focus of international humanitarian law as well.[44] During the last decades, the number of non-international armed conflicts increased: As others have pointed out,

> "of the 225 armed conflicts that had taken place between 1946 and 2001, 163 were internal armed conflicts. Only forty-two were qualified as inter-state or international armed conflicts. The remaining twenty-one were categorized as 'extra-state', defined as a conflict involving a State and a non-state group, the non-state group acting from the territory of a third state."[45]

Thus, common Art. 3 received more attention,[46] international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia[47] held more humanitarian constraints stemming from the law governing international armed conflicts applicable to non-international armed conflicts. The ICRC study on customary international humanitarian law applied 138 of 161 rules to armed conflicts irrespective of their classification as international or non-international.[48] In the light of these developments the viability of a distinction between both types of conflict was called into question.[49]

Furthermore, the application of human rights law was no longer thought to be confined to a state's own territory.[50] It has been gradually accepted that a state should not be allowed to do outside of its territory what it may

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43 *J. Pictet* (ed.), Commentary on the Geneva Conventions of 12.8.1949, Vol. III: Geneva Convention Relative to the Treatment of Prisoners of War, 1960, 31; *E. Crawford* (note 42), 444 et seq.; *S. Sivakumaran* (note 26), 53.

44 *S. Sivakumaran*, Re-Envisaging the International Law of Internal Armed Conflict, EJIL 22 (2011), 219.

45 *N. P. Gleditsch/P. Wallensteen/M. Ericsson/M. Sollenberg/H. Strand*, Armed Conflict 1946-2001: A New Dataset, Journal of Peace Research 39 (2002), 615 et seq.

46 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, 14, para. 218.

47 *Tadić*, Case No. IT-94-1-AR72 (Appeals Chamber) (2.10.1995), para. 119: "[W]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."

48 *E. Crawford* (note 26), 31 et seq.

49 *E. Crawford* (note 26), 40 et seq., 170.

50 On this "conflictualization of human rights law", see *V. Gowlland-Debbas/G. Gaggioli*, The Relationship Between International Human Rights and Humanitarian Law: An Overview, in: R. Kolb/G. Gaggioli (note 7), 77 (79).

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not do inside of it,[51] which seemed to be less controversial with respect to human rights as matter of custom,[52] than it was with respect to human rights treaties.[53] Thus, while international humanitarian law started to reach an area governed by human rights law, human rights law was held applicable also in international armed conflicts and extra-state non-international armed conflicts. In the light of these developments, the relationship between both regimes became pressing questions and the debate about the following two approaches to humanitarian law gained relevance.

2. Competing Understandings of International Humanitarian Law

The analysis of the relationship of both regimes depends on the interpretation of international humanitarian law.[54] In the following, the article will identify two approaches to international humanitarian law which can be seen against the background of the debate about the general structure and function of international law. The approaches represent different understandings of the function of international humanitarian law and have implications for the discussion of the relationship between international humanitarian law and human rights law.

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51 Human Rights Committee, *Lopez Burgos v. Uruguay*, UN Doc. CCPR/C/13/D/52/1979, 29.7.1981, para. 12.3.

52 See for instance the US military Operational Handbook of 2015, 53 et seq. (available at <http://www.loc.gov>). The Handbook distinguishes between customary IHRL that is considered ius cogens ("fundamental human rights") and customary IHRL that is not considered to be ius cogens ("non-fundamental human rights"). While the former would bind a State's forces during all operations, both inside and outside the State's territory, the latter would bind States only if it was customarily applied to such situations.

53 The ICCPR obliges states "to respect and to ensure to all individuals within its territory and subject to its jurisdiction" (Art. 1). According to the Human Rights Committee a state will have jurisdiction over an individual if the latter is "within the power or effective control of that state party", General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev1/Add.13, 26.5.2004, para. 10. Art. 1 ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The United States of America does not accept the extraterritorial application of the ICCPR, but is "mindful" and "aware" of the contrary positions by the Human Rights Committee and the ICJ, see Human Rights Committee, Fourth Periodic Report, UN Doc CCPR/C/USA/4, 2012, para. 505. In July 2013, the US referred to the fourth report, see UN Doc CCPR/C/USA/Q/4/Add.1, 2013, para. 2.

54 *N. Lubell*, Extraterritorial Use of Force Against Non-State Actors, 2010, 246 et seq. (arguing that the complexity of the relationship between international humanitarian law and human rights law stems from "long-standing debates" within international humanitarian law).

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The debate on the structure of international law is often linked to the Lotus decision of the Permanent Court of International Justice. According to the so-called Lotus presumption, restrictions on the independence of states cannot be presumed.[55] This Lotus presumption can imply not only a freedom to act for states but also a dual or dichotomous structure of international law: what is not prohibited, is therefore permitted. Thus, according to the majority of the International Court of Justice in the Kosovo Advisory Opinion, it would suffice for the declaration of independence under review not to violate international law in order to be "in accordance with international law".[56] The Lotus principle as interpreted in this way has at least as many supporters as critics.[57] The opposing view does not accept a dichotomous framework of "legal-illegal". International law could "be deliberately neutral or silent on a certain issue",[58] rather than always conferring a legal entitlement to act or indicating approval by the use of permissive language when a prohibition is missing. As *Fastenrath* has argued, a legal "freedom to act" for states by virtue of their sovereignty can become "irresponsible": the lack of a prohibition to commit genocide could not mean that states "may" commit one.[59] Furthermore, it has been suggested that international law performs two functions simultaneously, namely to authorize and to oblige states; and where no rule exists, states would have the power to act.[60] A similar debate can be observed with respect to international humanitarian law and has repercussions on the relationship with human rights law.

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[55] *Case of the S.S. "Lotus"*, Judgment No. 9 of 7.9.1927, Series A No. 10, 18.

[56] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, 403 (425 et seq.), para. 56.

[57] For an overview of this principle see *J. Crawford*, Change, Order, Change: The Course of International Law, RdC 365 (2013), 51 et seq., esp. 71-73.

[58] *Simma* raised the question whether "international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of toleration, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options", Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (note 56), Declaration *Simma*, 478 et seq. regarding this terminology see also *I. Tammelo*, On the Logical Openness of Legal Orders, Am. J. Comp. L. 8 (1959), 195.

[59] *U. Fastenrath*, Lücken im Völkerrecht, Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktion des Völkerrechts, 1988, 239 et seq.; see also the discussion in *K. Engisch*, Der rechtsfreie Raum, Zeitschrift für die gesamte Staatswissenschaft 108 (1952), 385 (411 et seq.).

[60] *J. A. Vos*, The Function of Public International Law, 2013, 16 et seq. See also the *Lotus* interpretation by *J. Kammerhofer*, Gaps, The Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice, BYIL 80 (2009), 333 (343): "If there is no law, there is no law."

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According to one interpretation, international humanitarian law does not "authorize" states to engage in conduct otherwise prohibited.[61] Rather, international humanitarian law was intended to respond to normative "underapplication", meaning the lack of any applicable law, by establishing certain humanitarian protections without indicating that no greater protections should be accorded to individuals. It focuses on the regulation of conduct occurring in armed conflicts and places limits on the way in which states will act as matter of fact or by virtue of their sovereignty, regardless of a legal authorization. The very indifference of international humanitarian law to a legal basis would manifest itself in the separation of *ius in bello* and *ius ad bellum*: it should not be relevant which party originally had a right to take recourse to force. Even those provisions that could be read as authorizing the internment of civilians and combatants would be only declaratory of states' powers and should be read as prohibition of close confinement. Therefore, "the [Geneva] Conventions simply are not an instrument that purports to confer authority where none exists."[62]

Another view emphasizes that international humanitarian law not only establishes protective guarantees but strikes a balance between this humanitarian purpose and the necessity for states to act differently in armed conflicts than in peacetime.[63] From a lack of prohibition and from the legal regulation of certain situations could be inferred a permission. *Pejic* and *Droege* for instance argue that "there is no doubt that internment is a lawful incidence of armed conflict, as reflected in the considerable number of rules devoted to this form of deprivation of liberty".[64] According to them, "[the

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[61] See *D. Jinks*, International Human Rights Law in Time of Armed Conflict, in: A. Clapham/P. Gaeta (eds.), The Oxford Handbook of International Law in Armed Conflict, 2014, 656 et seq.; see also *R. Goodman*, Authorization versus Regulation of Detention in Non-International Armed Conflicts, International Law Studies 91 (2015), 155 (159); *C. Greenwood*, Scope of Application of Humanitarian Law, in: D. Fleck, The Handbook of International Humanitarian Law, 2nd ed. 2008, 57 et seq.; *K. Ipsen*, International Law Preventing Armed Conflicts and International Law of Armed Conflict – A Combined Functional Approach, in: C. Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, 1984, 350 ("international emergency law"); *W. Heintschel von Heinegg,* Seekriegsrecht und Neutralität im Seekrieg, 1994, 128 et seq.

[62] *D. Jinks* (note 61), 666.

[63] See *S. Sivakumaran* (note 26), 85; *M. N. Schmitt*, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, Va. J. Int'l L. 50 (2010), 796 et seq.; *R. Mahnad*, Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict, Yearbook of International Humanitarian Law 16 (2013), 35 et seq. *S. Aughey/A. Sari* (note 4), 90 (93).

[64] *J. Pejic/C. Droege*, The Legal Regime Governing Treatment and Procedural Guarantees for Persons Detained in the Fight against Terrorism, in: L. van den Herik/N. Schrijver (eds.), Counter-Terrorism Strategies in a Fragmented International Legal Order Meeting the Challenges, 2013, 527 (548).

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ICRC's view is] that both customary and treaty IHL contain an inherent power to intern and thus may be said to provide a legal basis for internment in NIAC".[65]

These approaches impact the analysis of whether a conflict between international humanitarian law and human rights exists and how or whether it can be resolved in the course of interpretation. A conflict would first presuppose different legal evaluations.[66] Under human rights law, killing a person can only be an exceptional means to save life, but never a lawful end in itself, and has furthermore to meet a strict proportionality test in each individual case.[67] In international humanitarian law, combatants, contrary to civilians, are said to be targetable based on their status, killing them would not be a prohibited end.[68] The first approach would see no conflict between both legal evaluations. They would constitute different layers of prohibitions. On the basis of the second approach, one can conclude that the lack of a prohibition of killing combatants entails a permissive element. In fact, one can observe that permissive vocabulary is used. Rule 1 of the ICRC study on custom according to which "[a]ttacks may only be directed against combatants"[69] can be read as authorization or permission.

Another example is the legality of detentions and internments. Under the European Convention of Human Rights, the deprivation of one's personal liberty is only in certain prescribed circumstances lawful which do not include the detention on security grounds unless for the purpose of bringing the person before the competent judicial authority.[70] Furthermore, the de-

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[65] *J. Pejic/C. Droege* (note 64), 552. See also International Committee of the Red Cross (note 9). See also *Serdar Mohammed*, Court of Appeal (note 2), paras. 195 et seq., engaging with "the absence of prohibition equals (legal) authority approach" and rejecting it.

[66] See also *C. Droege* (note 27), 525.

[67] *P. Alston*, The CIA and Targeted Killings Beyond Borders, Harvard National Security Journal 2 (2011), 283 (303 et seq.); *R. Otto*, Targeted Killings and International Law, 2012, 199.

[68] *Y. Dinstein* (note 7), 34, 103; *G. D. Solis*, The Law of Armed Conflict: International Humanitarian Law in War, 2010, 188. It is debated whether killing will be only permissible if least restrictive uses of force are not feasible, *R. Goodman*, The Power to Kill or Capture Enemy Combatants, EJIL 24 (2013), 819; *M. N. Schmitt*, Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants", EJIL 24 (2013), 855. See also *N. Melzer*, Targeted Killing in International Law, 2008, 419: "(…) even in the exceptional circumstances prevailing during the conduct of hostilities, no person can lawfully be 'liquidated' without further consideration." The legality of killings would require for instance a concrete and direct military advantage and must be proportionate.

[69] *J. M. Henckaerts/L. Doswald-Beck*, Customary International Humanitarian Law Volume 1: Rules, 2005, 3.

[70] Art. 5 para. 1 lit. c ECHR: "(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

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tained person must be given a hearing before a judge of a court.[71] Under international humanitarian law, the internment of prisoners of war and of civilians for security reasons is not prohibited, as one can see in Art. 21 of the Third Geneva Convention, and Art. 42 and Art. 78 of the Fourth Geneva Convention,[72] and probably pursues objectives and incentives which, it can be argued, can be put in jeopardy by applying human rights law too broadly.[73]

Analogies [74] from rules on international armed conflicts to non-international armed conflicts are another area with respect to which the competing approaches are relevant. *Claus Kreß* recently contrasted a "Tadić dynamic" with an "Al-Quaida dynamic". While the former describes the application of protective, humanitarian guarantees to non-international armed conflicts, the latter aims at the recognition of a "Kampfführungsrecht", a legal regime on the conduct of hostilities.[75] One example in this

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."

[71] Art. 5 para. 3 ECHR: "(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. (…)" Art. 5 para. 4 ECHR: "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."

[72] Art. 42 of the Fourth Geneva Convention: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary."; Art. 78 of the Fourth Geneva Convention: "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." Art. 21 of the Third Geneva Convention: "The Detaining Power may subject prisoners of war to internment (…)."

[73] On the Geneva Conventions' objectives regarding detention and internment see *L. M. Olson*, Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict, Case Western Reserve University's Journal of International Law 40 (2009), 437 (454); *R. Goodman*, The Detention of Civilians in Armed Conflict, AJIL 103 (2009), 48 (70).

[74] For a critique of analogizing the non-international armed conflict with the international armed conflict, see *K. J. Heller*, The Use and Abuse of Analogy in International Humanitarian Law, in: J. Ohlin (ed.), Theoretical Boundaries of Armed Conflict & Human Rights, forthcoming 2016.

[75] *C. Kreß*, Der Bürgerkrieg und das Völkerrecht Zwei Entwicklungen und eine Zukunftsfrage, JZ 69 (2014), 365 et seq. (stating on p. 368 that whether this "Kampfführungsrecht" would entail a legal authority to kill in a non-international armed conflict would still need to be answered); see also *C. Kreß*, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, Journal of Conflict and Security Law 15

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regard is the question of whether it is possible to apply concepts from international armed conflicts in order to define membership of individuals to an armed group for targeting purposes.[76] Depending on the approach, applying by analogy rules from international armed conflicts to non-international armed conflicts would either merely limit states' options or introduce a new legal evaluation consisting of both restrictive and permissive elements.

The debate on the applicability of human rights law added an additional layer of complexity and impacted the assessment as to whether the application of international humanitarian law directly or by analogy should be considered beneficial. If human rights law applies, the application of international humanitarian law can, depending on one's conceptualization thereof, reduce the level of protection.[77] Assuming however that human rights law would not apply in a given situation, the position not to apply international humanitarian law directly or by analogy could seriously impair the protection of civilians and other individuals.[78] The position that neither may

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(2010), 245 (260): "in light of the (perceived) threat posed by violent non-State actors, States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non- international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations."

[76] See the discussions in the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Christof Heyns*, A/68/382, 13.9.2013, 13 et seq., and Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Ben Emmerson*, A/68/389, 18.9.2013, 19 (both discussing and rejecting co-belligerency); according to the ICRC, only those individuals are members of an armed group who assume a continuous combat function, see Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 2009, 33; for a critical evaluation of the study see *N. Lubell* (note 54), 153, and *S. Sivakumaran* (note 26), 360.

[77] See *W. M. Reisman*, Application of Humanitarian Law in Non-International Armed Conflicts: Remarks, ASIL Proc. 85 (1991), 85 (90); *D. Kretzmer*, Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts, Is. L. R. 42 (2009), 8 (39) (arguing that the categorization of a situation as an armed conflict "may serve to weaken the protection offered to potential victims rather than to strengthen it".); *M. Sassòli*, The Role of Human Rights and International Humanitarian Law in New Type of Armed Conflicts, in: O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, 2011, 34 (52) (describing that IHL was often intended to apply as broadly as possible, while now others fear "overapplication" of IHL).

[78] *T. Meron*, Remarks, ASIL Proc. (1991), 83 (arguing that human rights might not apply because of derogations, or because non-state actors are not bound by them). See also *J. Pictet* (ed.), IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (reprint 1994), 36 (arguing that common Art. 3 should be applied as broad as possible).

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apply in a conflict with terrorist groups was famously rejected by the US Supreme Court.[79]

One could see how participants in the academic discourse struggled. As *Goodman*[80] has pointed out, academics responded incoherently to the question of whether or not the United States of America was in an armed conflict with Al-Quaida, an incoherence which probably can be explained by the motivation to increase the level of protections for individuals, and by the incoherence of the government's arguments ("cherry-picking"[81]) as well. Without acknowledging explicitly however that and how this debate is connected with the debate on the scope of application of human rights law, such incoherence might raise doubts as to the quality of the law itself. It also unduly reduces the complexities relating to the law(s) applicable to and in armed conflicts, when said complexities would require discussion and analyzing that is informed by more than just one branch of international law.

3. The Challenge of Accommodation

It is a challenging endeavor to treat the different branches as parts of one system[82] and to recognize the interrelationship without sacrificing however each regime's normative logic and peculiarities. According to *Schabas*, attempts to achieve a convergence between international humanitarian law and human rights law would have to fail because of structural differences between both of them. He argues that international humanitarian law's indifference towards *jus ad bellum* violations would run counter to a human right to peace.[83] A human rights analysis can adopt a broad perspective when evaluating the legality of conduct, as the two following cases may demonstrate. In the *McCann* case[84] the UK violated the Convention not

[79] US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 S.Ct. 2749, 2797 (2006), 67 (holding that common Art. 3 would be applicable).

[80] *R. Goodman*, Flip Flops?: The Conflict with Al Qaeda Is (Not) a War, Just Security, 23.9.2013, <http://www.justsecurity.org>.

[81] See *G. Rona*, Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?, International Law Studies 91 (2015), 32 (44).

[82] "International Law is a system.", International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, in: Report of the International Law Commission, 58th Session (2006), UN Doc A/61/10 (2006), ch. XII, 400 et seq., at 407.

[83] *W. Schabas* (note 40), 606.

[84] *McCann and Others v. United Kingdom*, ECtHR, Series A No. 324, judgment of 27.9.1995, paras. 156 et seq.

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because of the killing itself, but because of the failure to take precautionary measures beforehand in order to prevent that killing would become necessary. Another example is the *Al-Jedda* case before the House of Lords in which *Lord Bingham* held that derogations from the European Convention would be invalid if they were not necessary, for instance because a state "had chosen to conduct an overseas peacekeeping operation (...) from which it could withdraw".[85] This broad perspective on assessing whether a derogation was "necessary" might even imply that *ius ad bellum* violations would influence the applicable law in an armed conflict by determining the lawfulness of derogations.[86]

Another difference concerns the respective *modus operandi*: While international humanitarian law works on a trigger-basis, depending on whether or not an armed conflict exists, human rights law rather works like a dimmer-switch. It applies all the time, and possible modifications of the obligations by way of derogations remain subject to a necessity-test and are "no complete disclaimer".[87] Furthermore, derogations remain a choice of a state and do not apply automatically, in contrast to the automatic applicability of international humanitarian law. It would depend on one's conceptualization of international humanitarian law whether "IHL intends to derogate from human rights standards".[88]

Since the application of one body of law at the exclusion of the other one would not adequately reflect the structural differences, so-called interpretative approaches were developed in the light of the case-law of the International Court of Justice (ICJ). The Court dealt with the relationship between human rights law and international humanitarian law in two Advisory Opinions and one contentious judgment.

The Court held in its Nuclear Weapons Opinion that international humanitarian law determines as *lex specialis* the arbitrariness of a killing under Art. 6 ICCPR.[89] In the Wall-Opinion the Court elaborated on the relationship:

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[85] *Al-Jedda v. Secretary of State for Defence* (2007) UKHL 58, para. 38.

[86] See *R. Goodman*, Controlling the Recourse to War By Modifying Ius in Bello, Yearbook of International Humanitarian Law 12 (2009), 53 (62).

[87] *H. Krieger*, After Al-Jedda: Detention, Derogation, and an Enduring Dilemma, Military Law and the Law of War Review 50 (2011), 419 (439).

[88] *A. L. Graf-Brugere*, A Lex Favorabilis? Resolving Norm Conflicts between Human Rights Law and Humanitarian Law, in: Research Handbook on Human Rights and Humanitarian Law, 2013, 251 (252).

[89] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226 (240), para. 25.

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> "(…) there are thus three possible solutions: 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."[90]

In the *Armed Activities on the Territory of Congo* case, the Court invoked the same formula, however dropped the term "*lex specialis*".[91]

The interpretation of this guidance by the Court differs according to one's conception of international humanitarian law. On the basis of the first approach, one would ask why international humanitarian law should exclusively determine the arbitrariness of a killing under human rights law.[92] Taking up *Schabas'* point, one could argue that human rights law should adopt a broader perspective, not confined to the *ius in bello* but including as well the circumstances that have led to the killing, for instance violations of the *ius ad bellum*. On the basis of the second approach, the passages by the Court can be seen as an attempt to reconcile both fields' legal evaluations of what should be considered permitted or prohibited. The principle of *lex specialis* according to which the special law prevails over the general law (*lex specialis derogat legi generali*) would operate as an interpretative principle, leading not to the "exclusion of the normative environment, but [to the] modification of certain rules to the extent provided by the specific rule",[93] while both *lex specialis* and *lex generalis* are to be interpreted in the light of each other.[94] The aim would be "conciliatory interpretation",[95] with the *lex specialis* doctrine deciding "whether IHL or HRL is the standard of reference for its conciliatory interpretation".[96]

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[90] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I.C.J. Reports 2004, 136, at para. 106.

[91] *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, I.C.J. Reports 2005, 168 (243), at para. 216.

[92] *D. Jinks* (note 61), 669.

[93] *A. Lindroos*, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis, Nord. J. Int'l L. 74 (2005), 43 (65).

[94] Report of the International Law Commission (ILC), Fifty-sixth session, UN Doc A/59/10, 2004, 286 et seq. para. 308, and 311; *M. Koskenniemi*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 2006, 22, para. 31; *M. Sassòli/L. M. Olson*, The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts, Int'l Rev. of the Red Cross 90 (2008), 599 (605).

[95] *J. d'Aspremont/E. Tranchez* (note 7), 239.

[96] *J. d'Aspremont/E. Tranchez* (note 7), 239.

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Questions would remain, however. Designating one rule, or even regime, to be the "interpretative yardstick"[97] by way of *lex specialis* will create the impression of a one-way-road, only one norm would be modified, while the other one would remain unaffected. While it is said that international humanitarian law and human rights law "complement each other and ultimately remain distinct"[98] one should not overlook the mutual influence the process of interaction can entail. The very debate on whether international humanitarian law authorizes states to conduct forceful measures is already a response to human rights law requiring a legal basis. Another question which would become relevant in the cases under review turns on whether the extent to which international humanitarian law can be taken into account would depend on the provision in question.[99] With respect to the deprivation of liberty, the European Convention differs in a significant manner from the ICCPR. While Art. 9 ICCPR prohibits "arbitrary arrest or detention", Art. 5 ECHR does not include phrases such as arbitrariness, it enumerates the grounds for detention. The question therefore arises whether international humanitarian law can be taken into account in the interpretation not only of the terms but also of the scope, object and purpose of the treaty and its provisions. This more holistic approach would be to some extent independent of the specific provisions' text and attempt to accommodate two different regimes. As noted above, the interpretative approach has not prevented the ICJ from concluding that human rights were violated. But how to accommodate when the evaluations of both fields do not align in a case? So far, the European Court of Human Right has dealt with more internal non-international armed conflicts[100] than external non-

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[97] *V. Gowlland-Debbas/G. Gaggioli* (note 50), 85.

[98] *H. J. Heintze* (note 27), 57.

[99] *M. Milanovic*, Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy, 2011, 232 et seq.

[100] See *W. Abresch*, A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, EJIL 16 (2005), 741 et seq.; *V. Gowlland-Debbas/G. Gaggioli* (note 50), 89 et seq.; *D. Steiger*, Enforcing International Humanitarian Law Through Human Rights Bodies, in: H. Krieger (ed.), Inducing Compliance with International Humanitarian Law Lessons from the African Great Lakes Region, 2015, 263 et seq. The *Al-Jedda* case turned on the legality of security detentions in Iraq according to Security Council resolutions by virtue of which the Geneva Conventions applied. The European Court of Human Rights denied a conflict between IHL in such situation and the obligation to respect the ECHR: "[U]nder international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort", Case of *Al-Jedda v. The United Kingdom*, App. No. 27021/08, para. 107. The European Commission of Human Rights did not find it necessary to examine a breach of Art. 5 with regard to persons accorded the status of prisoners of war, *Cyprus v. Turkey*, 10.7.1976, App. Nos. 6780/74 and 6950/75, para. 313.

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international armed conflicts or international armed conflicts[101]. The analysis of the judgments under review can shed light on important aspects of how the Convention and international humanitarian law interrelate with each other.

III. Humanization? The English Courts and the Detention in Non-International Armed Conflicts

The case concerned the legality of prolonged detentions for security reasons in Afghanistan. The military of the United Kingdom held the main claimant who was suspected of being a Taliban commander for 110 days[102] in a detention camp in Afghanistan without according him the opportunity to address a judge or to seek judicial assistance. According to the government, his detention was reviewed every 72 hours. The High Court held, confirmed by the Court of Appeal, that the detention beyond 96 hours violated Afghan law, the Human Rights Act and the European Convention on Human Rights. Neither Afghan law nor international law, including international humanitarian law, would have conferred any authority for conducting such prolonged detentions.

The United Kingdom has been an active part of the International Security Assistance Force (ISAF) in Afghanistan since the mission's beginning which was established by the United Nations Security Council (UNSC) in order to assist rebuilding Afghanistan and promoting security. Resolution 1386 of the UNSC authorized states to take all measures necessary to fulfil the mandate.[103] The ISAF Standard Operating Procedures for Detention limited the detention period to 96 hours, assuming that a longer detention period would not be in accordance with international law.[104] A detention might go beyond this period exceptionally only in order to ensure safe transfer to

[101] *K. Oellers-Frahm*, Menschenrechte und humanitäres Völkerrecht: Umfang und Grenzen der Zuständigkeit des Europäischen Gerichtshofs für Menschenrechte, in: G. Jochum/W. Fritzemeyer/M. Kau (eds.), Grenzüberschreitendes Recht – Crossing Frontiers, Festschrift für Kay Hailbronner, 2013, 491 (503) (calling the application of human rights law in an international armed conflict the "hard case").

[102] *Serdar Mohammed*, High Court of Justice (note 1), para. 6 et seq. He was interrogated for over 25 days and kept in detention for additional 81 days because of the insufficient capacity of Afghan prisons. The case was joined with cases brought by other plaintiffs who had been detained for respectively 261, 231 and 290 days, paras. 17, 52.

[103] United Nations Security Council Resolution 1386 (2001), para. 3: "Authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil the mandate."

[104] *Serdar Mohammed,* High Court of Justice (note 1), para. 4.

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Afghan authorities or a safe release. An early legal memorandum of the British Ministry of Defense (MOD) recognized a need for detentions beyond 96 hours and for the purpose of interrogation but concluded that "[l]egal advice has confirmed that there is currently no basis upon which we can legitimately intern such individuals."[105] A later MOD report recommended against opening a debate and characterized the ISAF Standards as guidelines from which national law could derogate. On 5.11.2009, the UK informed the NATO of the change of its detention policy which no longer limited the detention period to 96 hours. According to the UK, the detainee would be "subject to UK law" and his detention would be regularly reviewed by a detention committee. None of the NATO members objected.[106] The position that the detention period is a matter of policy or solely of UK law was rejected by the courts.

The very question whether an authority to detain existed was raised by both applicable Afghan law and the European Convention. According to the court, the plaintiff could rely on two causes of action: the detention was held illegal under both Afghan law and international law. Both aspects are linked as legality under Afghan law could have determined the lawfulness of the detention under international law; whereas an illegality under Afghan law raises the question whether international law provides for an authorization separately and whether therefore compliance with the Afghan law would no longer be necessary. Since no legal basis was found in international law, the High Court could leave the last question open, while indicating however its preference for that domestic law would have to be complied with as well.[107]

Assessing the detention's legality under Afghan law made it necessary for the High Court to interpret Afghan constitutional law. Several provisions protect individual freedoms and liberties (Art. 24,[108] Art. 25,[109] Art. 27,[110]

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[105] *Serdar Mohammed,* High Court of Justice (note 1), para. 40.

[106] *Serdar Mohammed,* High Court of Justice (note 1), para. 48.

[107] *Serdar Mohammed,* High Court of Justice (note 1) para. 301. The Court of Appeal left this question open, *Serdar Mohammed*, Court of Appeal (note 2), para. 126.

[108] *Serdar Mohammed*, High Court of Justice (note 1), para. 72 et seq.; Art. 24 reads: "Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity."

[109] Art. 25 reads: "Innocence is the original state. The accused shall be innocent until proven guilty by the order of an authoritative court."

[110] Art. 27 reads: "No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offence. No one shall be pursued, arrested or detained without due process of law. No one shall be punished without the decision of an authoritative court

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Art. 31[111]), all of which can be restricted by "law". While the experts of both parties before the court agreed that the reference to "law" would include legislation enacted by the Afghan parliament according to Art. 94[112] of the constitution, they disagreed on whether international law, in particular UNSC resolutions, would be included as well. The incorporation of international law in the Afghan legal order is governed by Art. 7[113] of the Afghan constitution. The court followed one expert opinion in that the wording of Art. 7, namely "shall observe", would not make international law and Security Council resolutions directly applicable in *foro domestico*. Thus, an authority to detain under international law would not have any effect in the Afghan legal order without legislative implementation. Furthermore, the constitution's primacy over domestic law and international law according to its Art. 121[114] would prevent the legislative implementation of Security Council resolutions that clearly infringe constitutional provisions. The High Court did not accept the argument that any constitutional review of Security Council resolutions would be precluded by international agreements such as the Bonn agreement which had been ratified before the present constitution entered into force in 2004. Such argument would violate the idea of separation of powers by according too much power to the executive, and furthermore disregard the then applicable Afghan constitution of 1964 which also would have required domestic implementation of international law.[115] Furthermore, both the Bonn agreement and applicable UNSC resolutions would recognize and affirm Afghan sovereignty.[116] Since the constitution did not confer to troops or foreign countries greater authority than to Afghan organs, the court found the detention to be contrary to Afghan law, and accepted that the claimant is entitled to compensation

taken in accordance with the provisions of the law, promulgated prior to commitment of the offence."

[111] Art. 31 reads: "Upon arrest, or to prove truth, every individual can appoint defence attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defence attorney for the indigent. ..." (English translation)

[112] Art. 94 reads: "Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise."

[113] Art. 7 reads: "The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights."

[114] Art. 121 reads: "At the request of the Government, or courts, the Supreme Court shall review laws, legislative decrees, international treaties, as well international covenants for their compliance with the Constitution and their interpretation in accordance with the law."

[115] *Serdar Mohammed*, High Court of Justice (note 1), paras. 92 et seq.

[116] *Serdar Mohammed*, High Court of Justice (note 1), paras. 23, 31, 288

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under Afghan civil procedure law against the United Kingdom (UK).[117] In spite of the claim under Afghan law, the violation of Art. 5 ECHR was decisive in the judgment of the High Court. The court held that the act of state doctrine would bar the enforcement of the claim under Afghan law because "it is not the business of English courts to enforce against the UK state [Afghan law] for acts done on the authority of the UK government abroad."[118] Claims under the human rights act however would not be precluded.[119] The Court of Appeal differed from the High Court on this point, holding that it would be for the parliament to introduce such a bar to enforcement of foreign law and that absent any such legislation the claim would be enforceable as well.[120]

With respect to Art. 5 ECHR, many preliminary questions were raised which had been controversially discussed in the previous years: Is the Convention applicable extraterritorially in Afghanistan? Is the conduct in question attributable to the UK, when acting on the basis of a UNSC Resolution? What is the relationship between the Convention and humanitarian law? Concerning the territorial reach of the Convention, the court could rely on the *Al-Skeini* decision. In this case the European Court accepted that jurisdiction can be exercised extraterritorially,[121] making the Convention applicable, if "the State, through its agents, exercises control and authority over an individual, and thus jurisdiction",[122] or "exercises effective control of an area outside that national territory".[123] Since the UK Supreme Court had already decided that the *Al-Skeini* decision is an authentic interpretation of the term "jurisdiction" of the ECHR and the UK Human Rights Act,[124] the English court concluded that in the present case extraterritorial jurisdiction could be established. The detention in question was also found attributable to the UK, since the UK's introduction of an own detention policy broke the chain of delegations established by the Security Council.[125]

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[117] *Serdar Mohammed*, High Court of Justice (note 1), para 110. Note that according to Afghan law the UK could have held the claimant only for 72 hours.

[118] *Serdar Mohammed*, High Court of Justice (note 1), para. 395.

[119] *Serdar Mohammed*, High Court of Justice (note 1), para. 416.

[120] *Serdar Mohammed*, Court of Appeal (note 2), para. 364.

[121] *Al-Skeini and others v. The United Kingdom*, judgment of 7.7.2011, App. No. 55721/07, para. 131.

[122] *Serdar Mohammed*, High Court of Justice (note 1), para. 137.

[123] *Serdar Mohammed*, High Court of Justice (note 1), para. 138.

[124] *Smith v. Ministry of Defence* (2014) AC 52.

[125] *Serdar Mohammed*, High Court of Justice (note 1), para. 141 et seq. (on de facto control over the detention facility); para. 181 (on attribution). Confirmed by the *Serdar Mohammed*, Court of Appeal (note 2) in para. 72 (leaving the question of "joint responsibility"

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The court then addressed the question of whether Art. 5 ECHR was in any way qualified in its application. Art. 5 requires a legal basis for the detention. Furthermore, it limits the grounds on which a person can be lawfully detained, and prescribes that the person shall be brought promptly before a judge.[126] Since no legal basis could be found in Afghan law, it was relevant whether international law, namely UNSC resolutions and international humanitarian law, provided for such a legal basis. The MOD had argued that Art. 5 ECHR specifically, or the Convention generally, was displaced or qualified by international humanitarian law as *lex specialis* or by UNSC resolutions which would prevail in a conflict with the Convention according to Art. 103 UNC.[127] Hence, international humanitarian law and the UNSC resolutions were used as arguments in a twofold way before the court: namely to qualify the application of Art. 5 ECHR which does not allow for security detentions, and to provide for a legal basis as required by the Convention.

The interpretation of the UNSC resolutions was approached differently by the High Court and the Court of Appeal. Both courts identified as leading case *Al-Jedda*: in this case the UK government had argued that Resolution 1546, by authorizing states "to take all necessary measures to contribute to the maintenance of security and stability in Iraq",[128] would have displaced Art. 5 ECHR. The House of Lords held that the authorization by the Security Council resolution prevailed by virtue of Art. 103 of the UN Charter over the Convention, yet the government should not infringe rights granted by the Convention more than necessary.[129] According to the Strasbourg Court however, Art. 5 ECHR was violated: One object and purpose of the UN Charter is the promotion of the respect for human rights, from which the rebuttable presumption would arise that UNSC resolutions do not intend to impose any obligation on states to breach "fundamental principles of human rights law".[130] Since then, neither the House of Lords nor

open). Furthermore, the Court of Appeal held that ISAF did not consent by acquiescence to the UK's detention practice, para. 71.

[126] For the text of the provision, see notes 70 and 71.

[127] Art. 103 UN-Charter reads: "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."

[128] Security Council Resolution 1546, para. 10.

[129] *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, House of Lords, (2007) UKHL 58.

[130] *Al-Jedda v. The United Kingdom* (note 100), para 102. When the presumption was rebutted, the European Court determined in a different case that the European Convention had not been given sufficient effect by Switzerland when exercising its discretion regarding the implementation of the resolution. Therefore, the court found itself dispensed from determin-

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its successor, the UK Supreme Court, has declared this interpretation binding in the UK. Thus, the High Court saw itself still bound by the House of Lords precedent.[131] This situation could have created a tension, insofar as the English court would have had to follow a domestic precedent which was modified in substance by the European Court. By way of distinguishing the court escaped such tension. The High Court accepted, in line with the House of Lords, that UNSC resolutions would prevail over the Convention in a conflict. The court denied a conflict since the presumption of compatibility was not rebutted in the present case. The applicable resolution on Afghanistan, in particular its provision "to take all necessary means", would cover the use of lethal force for self-defense and the acceptance of surrender of individuals, but it would not imply a "power to continue to hold individuals in detention outside the Afghan criminal justice system after they had been arrested and therefore ceased to be an imminent threat."[132] Unlike the resolutions on Iraq, the resolutions on Afghanistan had no annex which explicitly mentioned internment.[133] This factual distinction was important: domestically the court was still bound by the House of Lords interpretation of the UNSC resolutions on Iraq in spite of a contrary interpretation by the European Court. The High Court concluded that the UNSC resolution would not provide a power to detain beyond the ISAF detention policy.[134]

The Appeal Court, while accepting the conclusion,[135] challenged the reasoning. It held that the resolution's text was capable of authorizing prolonged detention, in particular since, contrary to the High Court, a detainee would not necessarily always cease to be an imminent threat. Furthermore, it suggested a two-step analysis when interpreting UNSC resolutions:

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ing the hierarchy between obligations under the Convention and under the Charter and left this question to the state, see *Nada v. Switzerland*, judgment of 12.9.2012, App. No. 10593/08, paras. 194 et seq., 213. A chamber of the Court did not accept the hierarchy of UN law over the Convention in a case where according to the chamber the presumption of compatibility was rebutted, no implementation discretion was left to the state and no equivalent protection of human rights was offered by the UN. The chamber did not examine whether the resolution itself was in accordance with the Charter, see *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 26.11.2013, App. No. 5809/08, paras. 111 et seq. (pending before the Grand Chamber).

131 *Serdar Mohammed*, High Court of Justice (note 1), para. 208.

132 *Serdar Mohammed*, High Court of Justice (note 1), para. 219. The justice furthermore noted that applicable UNSC resolutions affirm the sovereignty of Afghanistan.

133 UN Security Council Resolution 1546 (2004), Annex Letter by US Secretary of Defense *Colin Powell*: "[The activities covered by the resolution] 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."

134 *Serdar Mohammed*, High Court of Justice (note 1), para. 227.

135 *Serdar Mohammed*, Court of Appeal (note 2), paras. 147 et seq., 162.

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"The first question to be addressed is a question of interpretation of the UNSCRs. The second question is whether there is any qualification to the authority given under the UNSCR by a system of international human rights law."[136]

However, since the authority to determine the necessary measures had been granted to ISAF, detentions outside of the ISAF guidelines would not be considered authorized by the resolution.[137]

This two-step analysis differs from the interpretative presumption the European Court had adopted. It is questionable whether the interpretation of the resolution's terms can and should be separated from legal obligations of states. Taking legal obligations into account when interpreting UNSC resolutions can help to prevent the unity of international law and the implementation of resolutions from being jeopardized.[138] The presumption of compatibility reminds one that the maintenance of peace and security and human rights are not mutually exclusive, while at the same time enabling states to make adjustments. According to the European Court of Human Rights, the phrase "all necessary measures" would not suffice to rebut this presumption.[139]

Both courts agreed on the interpretation of international humanitarian law. The High Court adopted the position that international humanitarian law itself would not provide any authority to detain in non-international armed conflicts.[140] One could not infer such authority from the mere prac-

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136 *Serdar Mohammed*, Court of Appeal (note 2), para. 148.

137 *Serdar Mohammed*, Court of Appeal (note 2), para. 149. The court also held that ISAF did not approve by acquiescence, para. 157.

138 See *A. Peters*, Art. 25, in: B. Simma/D. E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 3rd ed. 2012, 787 (799), para. 28, 852, para. 206. *A. Paulus/J. Leiss*, Art. 103, in: B. Simma/D. E. Khan/G. Nolte/A. Paulus (note 138), 2012 (2114), para. 3; *M. C. Wood*, The Interpretation of Security Council Resolutions, Max Planck Yearbook of International Law 2 (1998), 73 (92) (existing legal obligations and a resolution's text shall be read together).

139 Case of *Al-Jedda* (note 100), para. 104 et seq. *Aughey* and *Sari* nevertheless argued that "the use of the phrase 'all necessary measures' must be understood to satisfy the European Court's requirement for 'explicit' language", *S. Aughey/A. Sari* (note 4), 79, without explaining why this should be the case given that this formula did not rebut the presumption in *Al-Jedda*.

140 For the different positions see *R. K. Goldman*, Extraterritorial Application of Human Rights to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict, in: R. Kolb/G. Gaggioli (note 7), 104 (121); *E. Debuf*, Captured in War: Lawful Internment in Armed Conflict, 2013, 469 et seq.; *R. Goodman* (note 61); *P. Rowe*, Is There a Right to Detain Civilians by Foreign Armed Forces During a Non-International Armed Conflict?, ICLQ 61 (2012), 697 et seq. (all rejecting an authorization based on custom); but see *J. Pejic*, (note 1), 377; *S. Aughey/A. Sari* (note 4), 60 et seq.; *J. Kleffner*, Operational Detention, in: T. Gill/D. Fleck, The Handbook of the International Law of Military Operations, 2010, 465 (471).

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tice of detentions or its regulation. The regulation of detention by common Art. 3, the second additional protocol to the Geneva Conventions or by customary international law would not be sufficiently precise and clear to infer an authorization therefrom.[141] In particular, neither rule 99 of the ICRC Customary Study nor the Copenhagen Principles on the regulation of detention in military operations[142] would support a customary power to detain in non-international armed conflicts.[143] After having determined that international humanitarian law would not constitute a legal basis for the detention beyond 96 hours as required by Art. 5 ECHR, the court discussed whether international humanitarian law replaced or qualified Art. 5 ECHR by way of *lex specialis*. The court identified three *modi operandi* of the *lex specialis* argument, and categorically rejected the first two ones, according to which the Convention, or Art. 5 ECHR, would have been "displaced". Even if international humanitarian law applicable to non-international armed conflicts had contained a provision such as Art. 21 Third Geneva Convention, authorizing the detention of combatants, Art. 15 ECHR would have solely and exclusively governed the extent to which obligations under the Convention can be modified.[144] The court saw no room for a *lex specialis* approach via interpretation either, given the clear wording of Art. 5 ECHR. In addition, international humanitarian law would not specify the grounds for detention in a non-international armed conflict or contain relevant rules for altering the interpretation of Art. 5.[145] The detention therefore violated Art. 5 paras. 1, 3 and 4: there was no legal basis, the detainee was not brought promptly before competent legal authorities and was denied the *habeas corpus* rights. Furthermore, detentions for the purpose of interrogation are not permitted by the Convention.[146] Before the Court of Appeal, the UK government argued that the detention complied with international humanitarian law applicable to non-international armed conflicts. The Court of Appeal rejected this contention: The detention system lacked sufficient procedural safeguards ensuring the independence of

[141] *Serdar Mohammed*, High Court of Justice (note 1), para. 257; confirmed by the *Serdar Mohammed*, Court of Appeal (note 2), paras. 251 et seq.

[142] Rule 99 of the ICRC Customary Law Study (note 69) reads: "Arbitrary deprivation of liberty is prohibited."; The Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process), <http://www.um.dk>.

[143] *Serdar Mohammed*, High Court of Justice (note 1), para. 268.

[144] *Serdar Mohammed*, High Court of Justice (note 1), para. 291.

[145] *Serdar Mohammed*, High Court of Justice (note 1), paras. 289 et seq.

[146] *Serdar Mohammed*, High Court of Justice (note 1), para. 356. See *Serdar Mohammed*, Court of Appeal (note 2), para. 272.

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the review process and failed to give to the detainee the opportunity to participate in the review process.[147]

The following conclusions and implications emerge from the courts' decisions: First, detentions in non-international armed conflicts require an authorization which has to derive from UNSC resolutions or the law of the state in which the detentions are taking place. It cannot be found in international humanitarian law. Second, such authorization cannot derive from the law or policies of the detaining state in extraterritorial situations alone.[148] The sovereignty of the state where the detentions take place has to be taken seriously. It is possible to infer that a government could not circumvent domestic detention restrictions by inviting a foreign power to operate on its territory. Third, the High Court's take was strongly influenced by its allegiance to the Convention: Art. 5 ECHR raised the question whether an authorization to detain exists. Furthermore, the High Court noted in an *obiter dictum* that even provisions applicable to international armed conflicts, such as Art. 21 of the Third Geneva Convention,[149] could not by itself modify the obligations under the Convention without derogation.[150]

The courts also commented on possibilities to accommodate the needs of the government. The High Court accepted the possibility of derogations in chosen extraterritorial conflicts, since the extraterritorial application of the Convention would call for an extensive interpretation of Art. 15.[151] Furthermore, the court held that detentions according to the ISAF guidelines for 96 hours were covered by the relevant UNSC resolutions and thus lawful.[152] Only the detention beyond this time period was held illegal.[153] In another *obiter dictum*, the High Court addressed the argument that the authority to kill includes *a maiore ad minus* the authority to detain: The court argued that this argument would justify only the capture of a person "who

[147] *Serdar Mohammed*, Court of Appeal (note 2), paras. 274, 292 et seq., 298; Customary International Humanitarian Law Study (note 69), 349 et seq. In particular, the Court of Appeal doubted that a detention authority, advised by a committee of members who were "either the subordinates of the Detention Authority or otherwise within the chain of command under him meets the requirement of independence and impartiality", (para. 290).

[148] The United States of America relied as legal basis for detentions abroad on a US domestic statute, the 2001 Authorization for the Use of Military Force, together with Security Council resolutions, see *H. H. Koh*, Legal Adviser, U.S. Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (2010), <http://www.state.gov>.

[149] *Serdar Mohammed*, High Court of Justice (note 1), para. 242.

[150] *Serdar Mohammed*, High Court of Justice (note 1), para. 284.

[151] The possibility of extraterritorial derogations has been affirmed by the General Comment No. 35 (note 11), 18, fn. 185.

[152] *Serdar Mohammed*, High Court of Justice (note 1), paras. 301, 356.

[153] *Serdar Mohammed*, High Court of Justice (note 1), para. 356.

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may lawfully be killed",[154] without explaining however where such authority to kill would come from in a non-international armed conflict. Since the captured person would no longer constitute an imminent threat, the argument would no longer provide a basis for the detention. The Court of Appeal noted in an *obiter* that even a prolonged detention could be considered justified under applicable UNSC resolutions if the detainee continued to constitute a threat after release.[155]

IV. Humanitarization? The European Court of Human Rights and Detentions in International Armed Conflict

The case before the European Court of Human Rights concerned the death of the applicant's brother, *Tarek Hassan*, in unexplained circumstances after his release from British internment. The brother had been captured and interned by the British Forces in Iraq as a suspected combatant or a civilian posing a threat to security in April 2003. The legal basis for such internment would be either Art. 21 Third Geneva Convention or Arts. 43 and 78 Fourth Geneva Convention.[156] He was cleared for release after it had been established that he was neither a combatant nor a civilian posing a threat to security.[157] In total, he was held for 38 hours in the camp. The court rejected a violation of obligations to investigate under Arts. 2 and 3 ECHR. Furthermore, it rejected a violation of Art. 5 ECHR since it regarded security detentions as an "accepted feature" in international armed conflicts. For the first time in its case-law, the European Court applied international humanitarian law directly to the effect that a violation of the Convention was denied. One judge wrote a dissent which was joined by three other judges.

The Strasbourg Court was divided on whether the jurisprudence of the ICJ on the ICCPR can and should be taken into account: Unlike Art. 9 ICCPR, Art. 5 ECHR does not contain expressions such as arbitrariness which could work as entrance door for international humanitarian law. The dissenting minority put much emphasis on the specificities of the Convention and criticized the majority's joint analysis of the states' subsequent

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154 *Serdar Mohammed*, High Court of Justice (note 1), para. 253.
155 *Serdar Mohammed*, Court of Appeal (note 2), paras. 147, 212.
156 The provisions are printed in footnote 72.
157 *Hassan v. The United Kingdom* (note 3), paras. 53 et seq.

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practice (Art. 31 para. 3 lit. (b) VCLT)[158] on derogations under both the ECHR and the ICCPR. The majority observed that the states did not derogate from Art. 5 ECHR or from the ICCPR when they detain persons on the basis of the Geneva Convention. According to the dissent however, subsequent practice, in order to be a means of authentic interpretation under Art. 31 para. 3 lit. (b) VCLT would have to be "common, concordant and consistent",[159] otherwise it could only serve as a supplementary means of interpretations under Art. 32 VCLT. Furthermore, the majority was criticized for not having sufficiently taken account of the object and purpose of the Convention when analyzing subsequent practice that could reduce the scope of the Convention. Finally, the majority's analysis of subsequent practice under the ICCPR would be "inapposite"[160] given that Art. 5 ECHR is more specific and exhaustive than Art. 9 ICCPR.

The critique is arguable but not fully compelling. In particular, the rigidity of the "common, concordant and consistent"-requirement is questionable. This formula has been subject to different interpretations. It was introduced by the World Trade Organization (WTO) Appellate Body[161] which traced this formula back to a book written by *Ian Sinclair* and to a Hague course given by *Mustafa Yasseen*[162]. *Sinclair* himself wrote that "the *value and significance* of subsequent practice *will naturally depend on the extent to which* it is concordant, common and consistent"[163] with reference to *Yasseen*. For *Yasseen* however, common and concordant are indispensable characteristics for an agreement, while consistency is a necessary condition for practice. Hence, while in *Sinclair's* interpretation of *Yasseen* the formula determines the weight that should be attributed to subsequent practice, *Yasseen's* actual text can be read as requiring a practice to be common/concordant, and consistent. It is noteworthy that the International Law Commission did not adopt the formula as requirement for subsequent practice in its 2014 report, and instead proposed on the basis of an analysis

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158 Art. 31 para. 3 lit. a and b reads: "3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." See *Hassan v. The United Kingdom* (note 3), 51 et seq.

159 Partly Dissenting Opinion of Judge *Spano*, Joined by Judges *Nicolaou*, *Bianku* and *Kalaydjieva*, *Hassan v. The United Kingdom* (note 3) 63.

160 *Hassan v. The United Kingdom* (note 3), 63.

161 Japan - Taxes on Alcoholic Beverages - AB-1996-2 - Report of the Appellate Body, 13.

162 *M. K. Yasseen*, L'Interprétation des Traites d'Après La Convention de Vienne Sur le Droit Des Traites, III RdC (1976), 48.

163 *I. Sinclair*, The Vienna Convention on the Law of Treaties, 2nd ed. 1984, 137 (emphasis added).

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of international case-law other indicators for determining the weight of subsequent practice in the process of interpretation, regardless of whether it is used under Art. 31 or 32 VCLT.[164] Furthermore, taking account of treaties like the ICCPR that are "close in substance"[165] is not necessarily inapposite, in particular when the UK is party to both treaties. Arguably, this might be even required by the Convention: Art. 15 refers to the consistency of a derogation with a State's other obligations under international law which is why Art. 4 ICCPR can be "decisive for the interpretation of article 15 ECHR."[166] The majority's approach can be problematic for a different reason. Art. 31 para. 3 lit. (b) VCLT requires subsequent practice to contain an agreement on the interpretation of the treaty. Since the extraterritorial application of the Convention was in doubt, it is not self-evident that the lack of derogations implied an interpretative agreement.[167] Yet, a different reading of the majority is submitted here: namely that subsequent practice did not indicate that Art. 15 ECHR should operate as *lex specialis* and exclude the general rules of treaty interpretation. Rather, the Convention must be interpreted "in harmony with other rules of international law", including international humanitarian law, according to the principle of interpretation contained in Art. 31 para. 3 lit. (c) VCLT.[168] The European Court emphasized that the Geneva Conventions of 1949 enjoy "universal ratification" and were "designed to protect captured combatants and civilians who pose a security threat" and "to mitigate the horrors of war".[169]

The court continued:

> "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

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[164] International Law Commission, Report on the Work of its Sixty-sixth Session Official Records Sixty-ninth Session Supplement No. 10 (A/69/10), 194 et seq., para. 7 et seq.

[165] See *Case concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment of 30.11.2010, para. 68, taking into account the European Convention of Human Rights and the American Convention of Human Rights when interpreting the African Convention of Human Rights and the ICCPR.

[166] *H. Krieger* (note 87), 438.

[167] Similar *M. Milanovic* (note 35), 3; see also *L. Crema*, Subsequent Practice in Hassan v. United Kingdom: When Things Seem to Go Wrong in the Life of a Living Instrument, Questions of International Law 15 (2015), 3 (10); *E. Bjorge*, What Is Living and What Is Dead in the European Convention on Human Rights? A Comment on Hassan v. United Kingdom, Questions of International Law 15 (2015), 25 (35).

[168] *Hassan v. The United Kingdom* (note 3), para. 102.

[169] *Hassan v. The United Kingdom* (note 3), para. 102.

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> 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."[170]

The taking of prisoners of war and the detention of civilians was elevated to an "accepted feature", a rule to be taken into account (Art. 31 para. 3 lit. (c)) and accommodated when interpreting the Convention. The lawfulness of the detention would be determined according to international humanitarian law and under consideration of the "fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness".[171] The European Court furthermore relaxed the procedural safeguards of Art. 5 paras. 2 and 4, "in a manner which takes into account the context and the applicable rules of international humanitarian law." Thus, the "competent body" periodically reviewing the detention according to Arts. 43 and 78 of the Fourth Geneva Convention would not need to be a "court in the sense generally required by Article 5 § 4" since this "might not be practicable in an international armed conflict". However, 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."[172]

The European Court emphasized that a state would have to claim that a provision is to be interpreted in accordance with international humanitarian law, since "[i]t is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention".[173] Usually an interpretation does not have to be pleaded. Since a choice between rules of different fields of international law "cannot be solved per se through a juridical technique"[174] due to its political nature, it is understand-

170 *Hassan v. The United Kingdom* (note 3), para. 104.
171 *Hassan v. The United Kingdom* (note 3), para. 105.
172 *Hassan v. The United Kingdom* (note 3), para. 106.
173 *Hassan v. The United Kingdom* (note 3), para. 107.
174 *A. Lindroos* (note 93), 66.

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able that the Strasbourg Court left the question of whether to modify to states,[175] while the court would determine the limits. The European Court not only deferred to international humanitarian law but also shaped the law applicable to armed conflicts. The European Court adopted a restrained interpretation of Art. 5 ECHR the purpose of which would consist in the protection from arbitrariness. The court emphasized that such detention is an accepted feature "only (...) in cases of international armed conflict",[176] indicating that its decision should not be understood as precedent for non-international armed conflicts. At the same time, the court strengthened protections that international humanitarian law intends to provide, albeit not to the extent now required by the European Court. Art. 43 of the Fourth Geneva Convention requires to conduct a periodic review "as soon as possible" and then at least twice a year. The European Court's additional requirement that the first review should be conducted "shortly" supports the objective of international humanitarian law that no civilian shall be interned longer than necessary.[177] While the impartiality of the review body cannot be explicitly found in Art. 43 or 78 of the Fourth Geneva Convention but only in the commentary,[178] it is now a clear requirement by the European Court. It bears emphasis that the court established these procedural safeguard as matter of human rights law which the court has the mandate to interpret and apply in future cases. It is conceivable that the court will then examine whether reviews were conducted shortly, whether an applicant was released without "undue delay" and whether "adequate safeguards" against arbitrary detention existed, questions which did not become relevant in the case at hand. In its application to the facts, the court concluded that the detention was in accordance with international humanitarian law, in particular that the detained was screened and finally released. Because of the prompt release the court did not examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention.

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[175] *M. J. Matheson*, The Fifty-eighth Session of the International Law Commission, AJIL 101 (2007), 407 (427): "Decision makers or adjudicators must consider all aspects of the context of the specific situation, including the apparent intent of the parties and the overall object and purpose of the regimes in question."

[176] *Hassan v. The United Kingdom* (note 3), para. 104.

[177] See Art. 132 IV Geneva Convention: "Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist." See also Art. 75 III Additional Protocol I: "(...) persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

[178] See *J. Pictet* (note 78), 260.

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V. Evaluation

At first sight, the decisions appear to go into different directions: While the English High Court of Justice held that the modification of Art. 5 ECHR by international humanitarian law is governed solely by Art. 15 ECHR, the European Court engaged in a harmonious interpretation under the principle embodied in Art. 31 para. 3 lit. (c) VCLT. It has been suggested that the European Court overruled the High Court of Justice in this regard, leaving no room for an application of Art. 15 ECHR for the future.[179]

Yet, the decisions are to a great extent reconcilable with each other. In both cases the courts recognized the very possibility of modifications. This applies also to the English courts, not accepting however the unilateral departure by the UK from the ISAF guidelines. The Court of Appeal was right in distinguishing *Hassan* from *Serdar Mohammed* by the fact that the former concerned an international armed conflict. The *Hassan* reasoning was held to be inapplicable since international humanitarian law relating to non-international armed conflicts does not provide for a legal basis for detention.[180] The European Court itself explicitly confined its reasoning to international armed conflicts.

It is unclear whether the High Court's *obiter* according to which the internment of prisoners of war would require a derogation can be reconciled with *Hassan*. It has been suggested that it would be far less likely that the European Court "would allow a State to rely on the Third Geneva Convention to justify the absence of any form of review of combatant internment outside the context of derogation".[181] One could argue that the objective of combatant internment, namely to keep combatants away from the battlefield until the end of active hostilities, would make a periodic review unnecessary.[182] The European Court regarded the taking of prisoners of war as an "accepted feature", without requiring a derogation. However, the "competent tribunal" which determines the combatant status[183] will likely be re-

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[179] *S. Aughey/A. Sari* (note 4), 113.

[180] *Serdar Mohammed*, Court of Appeal (note 2), para. 123.

[181] *Serdar Mohammed*, High Court of Justice (note 1), para. 284; *L. Hill-Cawthorne*, The Grand Chamber Judgment in Hassan v. UK, <http://www.ejiltalk.org>.

[182] *L. M. Olson* (note 73). Contra: *L. Doswald-Beck*, Human Rights in Times of Conflict and Terrorism, 2011, 279.

[183] Art. 5 of the Third Geneva Convention reads: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Art. 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

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quired to provide sufficient guarantees of impartiality and fair procedure.[184] Whether and when its decision must be subject to review by a court cannot be decided here. However, it is submitted that some procedural safeguards for the protection of non-derogable rights in internment might be required, consisting for instance in a court or an organ enjoying independence, competent to receive complaints and provide a remedy.[185]

Both judgments are instructive in the way in which they addressed and handled the complexities resulting from the applicability of different legal regimes. The European Court attempted to accommodate different treaties to achieve what reminds one of *praktische Konkordanz*.[186] Such accommodation of different legal regimes requires a pragmatic "give and take"[187] which is probably neither fully nor solely predetermined by legal norms. It is to be determined how much one side is willing to give and which core principle(s) it seeks to protect. The European Court identified as core principle the prohibition of arbitrariness which is also common to international humanitarian law.[188] It is debatable whether this operation can be based on Art. 31 para. 3 lit. (c) VCLT which does not explicitly state how other rules of international law should be taken into account, and to what effect.[189] But

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184 See *Hassan v. The United Kingdom* (note 3), para. 110.

185 Art. 78 of the Third Geneva Convention entitles the prisoner of war to issue requests to the Detaining Power regarding the conditions of captivity or to complain to his or her state (Protecting Power). See *S. Sanna*, Treatment of Prisoners of War, in: A. Clapham/P. Gaeta/M. Sassòli (eds.), The 1949 Geneva Conventions, A Commentary, 2015, 977 (1002, 1010) (recognizing the possibility of human rights courts to contribute to an enhanced protection of Prisoners of War); *B. Oswald/L. Iapichino*, Treatment of Internees, in: A. Clapham/P. Gaeta/M. Sassòli (note 185), 1349 (1371) (on the role of human rights law in relation to the internment of civilians according to the Fourth Geneva Convention); see General Comment No. 35 (note 11), para. 67, see also the UN Basic Principles and Guidelines (2015) proposed by the *Working Group on Arbitrary Detention*, A/HRC/30/37, 20-22; but see *L. M. Olson*, Admissibility of and Procedures for Internment, in: A. Clapham/P. Gaeta/M. Sassòli (note 185), 1327 (1337) et seq. (in favor of a *lex specialis* approach).

186 *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. 1999, 28, 148. The dissenting opinion criticized the majority for "attempting to reconcile the irreconcilable" (*Hassan v. The United Kingdom* (note 3) Dissent, para 19).

187 *A. Paulus*, Zusammenspiel der Rechtsquellen aus völkerrechtlicher Perspektive, in: Internationales, nationales und privates Recht: Hybridisierung der Rechtsordnungen? Immunität, 2014, 7 (31, 46).

188 Rule 99 (note 142).

189 *A. van Aaken*, Defragmentation of Public International Law Through Interpretation: A Methodological Proposal, Ind. J. Global Legal Stud. 16 (2009), 483 (501) (arguing that Art. 31 (3)(c) allows for striking a "praktische Konkordanz"); *B. Simma/T. Kill*, Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology, in: C. Binder/U. Kriebaum/A. Reinisch/S. Wittich (eds.), International Investment Law For The 21st Century Essays in Honor of Christoph Schreuer, 2009, 678 (692 et seq.) (emphasizing the difference between interpretation and modification). The European Court did not

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it is noteworthy that the European Court did not engage in a mere balancing which could have blurred both regimes and raised legitimacy concerns, and instead adopted a restrained interpretation of the Convention which the court is mandated to interpret. In focusing on the Convention's fundamental purpose, the prohibition of arbitrariness,[190] the European Court adopted a legal reasoning to which other human rights treaty organs can relate as well.[191] In the end, this judgment might better accomplish the effective protection of human rights on the ground than a judgment which would have applied Art. 5 ECHR without any qualification and then risked the non-implementation by states. Judge *Nußberger's*[192] warning to beware of the risk of non-implementation brings the recent debates in the UK to mind. Critics accused British courts and the Strasbourg Court of "judicial imperialism" by developing an expansive human rights interpretation, leading to a "retreat of international humanitarian law". In particular, *Hassan* was criticized for "not (…) accepting IHL primacy".[193]

It is commendable that the judgment does not emphasize one at the expense of the other. The UK won the Hassan case, and the European Court applied the Convention, but not to the detriment of international humanitarian law. By referring to the widely ratified Geneva Conventions and the "accepted features" of international humanitarian law applicable in international armed conflict, the European Court of Human Rights showed re-

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refer to Art. 31 (1) VCLT which could have been an additional argument for a restrained interpretation, similar to a "teleologische Reduktion".

[190] The court has already previously stressed that "(…) Art. 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty.", *Al-Jedda v. The United Kingdom* (note 100), para. 99.

[191] Note that arbitrary arrest is prohibited by Art. 7(3) of the American Convention on Human Rights, Art. 6 sentence 3 of the African Charter on Human and Peoples Rights, Art. 9 ICCPR. See also Human Rights Committee General Comment No. 35 (note 11), para. 64; see *Coard et al. v. The United States of America*, Inter-American Commission on Human Rights, Report No. 109/99 (29.9.1999), para. 60: The prohibition of arbitrariness would require a review procedure which enables a civilian who is interned for security reasons to be heard and to appeal the decision with "the least possible delay". For a review of this case and the further development see *S. Tabak*, Armed Conflict and the Inter-American Human Rights System: Application or Interpretation of International Humanitarian Law?, in: D. Jinks/J. N. Maogoto/S. Solomon, Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies, 2014, 219 (235 et seq.).

[192] *A. Nußberger*, The Concept of "Jurisdiction" in the Jurisprudence of the European Court of Human Rights, Current Legal Problems 65 (2012), 214 (254): "If the Court were to interpret its jurisdiction in a way not accepted by the Member States, it would risk that the relevant judgments remain on paper and are not implemented."

[193] See for example *R. Ekins/J. Morgan/T. Tugendhat*, Clearing the Fog of War Saving Our Armed Forces from Defeat by Judicial Diktat, Policy Exchange 2015, available at <http://www.policyexchange.org.uk>, at 17.

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spect for this regime and its experience with the regulation of armed conflicts. It accepted the Geneva Conventions' legal evaluations instead of frustrating or overriding them, while at the same time requiring respect for the European Convention as well.

The question can be certainly asked whether the European Court should have required more procedural safeguards or whether the court should have adopted a restrained interpretation of the Convention absent any derogation at all. In other words, the court can be criticized for its choices. Yet, Art. 15 does not preclude one from taking recourse to the general rules of treaty interpretation. The opposite argument could be made, since Art. 15 imposes procedural obligations on states who want to modify their obligations. It requires a state to inform the Council of Europe of the derogation measures. This requirement shall enable an international examination of the derogation and prevent automatic or *ex post facto* derogations at the stage of the proceedings before the European Court.[194] However, the detailed and familiar rules of the Geneva Conventions applicable in international armed conflicts arguably alleviate concerns which exist with regard to national derogation measures and to which the notification requirement responds. Furthermore, by requiring the state to plead a modification, the European Court precluded any "automatic" modification of the obligations by international humanitarian law. This call for explicitness is in line with the European Court's approach to the interpretation of Security Council Resolutions which was developed in *Al-Jedda*: Absent any explicit language to the contrary, the European Court will not assume that a conflict of obligations exists or that states have modified their commitments under the Convention.[195]

Derogations will remain a possibility for states, in particular in non-international armed conflicts. Derogations cannot fall below the threshold established in *Hassan*. According to the Human Rights Committee, security detentions outside of international armed conflicts must be constantly reviewed by a "court" "which should ordinarily be a court within the judiciary". Exceptionally a specialized tribunal can be established which "either must be independent (...) or enjoy independence in deciding legal matters". Review by a "court" cannot be subject to derogation.[196]

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[194] *H. Krieger*, Notstand, in: O. Dörr/R. Grote/T. Marauhn (eds.), EMRK/GG Konkordanzkommentar, 2nd ed. 2013, 417 (440).

[195] See *Al-Jedda v. The United Kingdom* (note 100), para. 102; *Hassan v. The United Kingdom* (note 3), para 107.

[196] General Comment No. 35 (note 11), paras. 45, 66 et seq.

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The conceptual difference between international and non-international armed conflicts which both cases reaffirm is a consequence of the historical choices regarding regulation. When negotiating the Geneva Conventions, states wanted to keep the power to detain as matter of their sovereignty and their domestic laws.[197] By undertaking human rights obligations, states qualified their authority to pass laws which would have to conform to human rights law or lawfully derogate therefrom.[198] So far, it has not been convincingly demonstrated that a new customary international law on transnational armed conflicts has emerged and the English decisions, should they be upheld, would be an important example of state practice against such proposition.[199]

The English courts were mindful of further legal orders that were at stake as well. In particular, the emphasis of foreign domestic law reinforces the respect for the sovereignty of the state on which territory the operations will be conducted.[200] It has been argued though that the High Court mistakenly held that international humanitarian law would not regulate detention in non-international armed conflicts.[201] One should indeed not disregard the progressive development of international humanitarian law relating to non-international armed conflicts. However, the High Court's statements on regulations must be seen in their context: The court analyzed whether it would be possible to infer any authority to detain from the regulations. The court concluded that the regulations were not sufficiently clear enough for this very purpose, and argued that international humanitarian law would become relevant in a non-international armed conflict only when a state

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197 *G. Rona* (note 81), 32, 34, noting "the irony" that states would later claim to rely on an authority to detain in non-international armed conflicts based on international humanitarian law.

198 *A. Paulus/M. Vashakmadze*, Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization, Int'l Rev. of the Red Cross 91 (2009), 95 (119). Note that the ICRC commentary on deprivation of liberty in non-international armed conflicts strongly relies on derogation practice under human rights treaties, Customary International Humanitarian Law (note 69), 349 et seq.

199 The Court of Appeal devoted a long part of its judgment to assessing the government's custom claim, and finally concluded that there is no power to detain in a non-international armed conflict as matter of customary international law, *Serdar Mohammed*, Court of Appeal (note 2), paras. 220 et seq. For different positions in literature see note 140.

200 See also the Srebrenica litigation, in the course of which the Hague Court of Appeals ruled that the claimants were entitled to compensation against the Dutch state on the basis of tort law of Bosnia Herzegovina, *The State of the Netherlands v. Hasan Nuhanović*, Supreme Court of the Netherlands, Case No. 12/03324, 6.9.2013, para. 3.15.5 et seq.

201 *R. Goodman* (note 61).

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derogated from Art. 5 ECHR.[202] It is welcome that the Court of Appeal clarified that the detention, had it been authorized, would not have met the conditions of international humanitarian law applicable in non-international armed conflicts.[203]

Both cases demonstrate that military operations are subject to multiple legal regimes. On the basis of *Serdar Mohammed* and *Hassan* the following implications would emerge: If a state which has ratified the ICCPR invites another state which is party to the ICCPR and the ECHR to intervene, the inviting state will not be allowed to circumvent existing domestic law and limitations by the invitation to intervene. Furthermore, it would not be unrealistic to require the territorial state to provide for the legal basis for the conduct of the intervening state. The UK Court of Appeal rejected the argument that Afghan law would have to comply with requirements of the Convention and the Strasbourg jurisprudence. The court held without any qualification that Afghan law would suffice.[204] It is here submitted that the law should at least meet the requirements of the applicable human rights treaty, for instance the ICCPR, or lawfully derogate from it. The *Solange* approach ("so long as") comes here to mind: *Solange* is based on the assumption of equivalence, albeit not identity, of different legal orders as "conditions for their reciprocal acceptance".[205] So long as the law complies with the ICCPR, the European Court might accept the law without requiring the law to comply with Strasbourg jurisprudence.

If the intervening state is acting on the basis of an UNSC resolution, the resolution will have to be explicit enough in order to modify the obligations under Art. 5 ECHR. This will not necessarily lead to a lawfulness of the detention under the domestic law of the territorial state. A claim might still arise if the UNSC resolutions are not implemented or made directly applicable. It would be up to other legal systems to decide whether they would

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202 *Serdar Mohammed*, High Court of Justice (note 1), paras. 246, 258, 261, 292. The sentence in para. 291 is indeed open to misinterpretation as it might misleadingly imply that there is no international humanitarian law on detention in non-international armed conflict.

203 *Serdar Mohammed*, Court of Appeal (note 2), paras. 292 et seq., 298; see note 142.

204 *Serdar Mohammed*, Court of Appeal (note 2), para. 127: "We consider that if detention was authorised by the law of Afghanistan, no claim would lie under Article 5."

205 *A. Paulus* (note 187); BVerfGE 37, 271 (285) – *Solange* I; BVerfGE 73, 339 (387) – *Solange* II; BVerfGE 89, 155 (175) – *Maastricht*; BVerfGE 102, 147 (163) – *Bananenmarktordnung*; BVerfGE 123, 267 (335) – *Lissabon*; see also for similar approaches: Polish constitutional court, decision of 16.11.2011, SK 45/09; Court of Justice of the European Union, *European Commission and United Kingdom v. Kadi*, C-584/10 et al., judgment of 18.7.2013, para. 133; European Court of Human Rights, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30.6.2005, App. No. 45036/98; *Al-Dulimi and Montana Management Inc. v. Switzerland* (note 130), para. 114 et seq.

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recognize and enforce such a claim.[206] If the territorial state asked for Security Council authorization, it might not be too demanding to require legislative implementation.[207] If the intervention was authorized by the Security Council without the consent of the territorial state, a claim under that state's law would arguably not be enforced by other legal systems. Furthermore, an international armed conflict would likely exist. In such case, the reasoning of *Hassan* would apply, an additional domestic legal basis would not be necessary.

Violations of the *ius ad bellum* were not examined in the cases under review.

The questions of who will have to derogate, the intervening state, the territorial state, or both, and of whether the domestic law of the intervening state can provide a legal basis exceptionally are complex and merit further research.[208] The complexities might even increase when an international and a non-international armed conflict will occur at the same time.[209] Yet, these complexities would not be irresolvable. The insistence on proper legal bases reminds all participants of existing obligations under international law. In fact, establishing a domestic legal basis is also what the ICRC recommends.[210] As *Krieger* has argued, this process might raise the political costs of military operations but could also strengthen democratic control over the military and the rule of law.[211]

Thus, it seems that the two approaches to international humanitarian law would correspond to the two types of conflicts and the two cases. In non-

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206 See *Serdar Mohammed*, Court of Appeal (note 2), para. 368, indicating its preference not to enforce claims in situations when international legal obligations or authorizations have not been implemented domestically: "This would, in our view, be a highly relevant consideration, notwithstanding that the relevant obligations in international law have not been given effect in domestic law within the United Kingdom."

207 The High Court indicated its preference that compliance with local law would be necessary in such situation, *Serdar Mohammed*, High Court of Justice (note 1), para. 301. Since it was not argued, the High Court did not need to determine whether the detention time which was covered by the UNSC resolution (up to 96 hours) but exceeded the detention period under Afghan law (75 hours) would have given rise to a claim.

208 *M. Milanovic* (note 35), 19, doubting that an intervening state should be "at the mercy" of the territorial state when it comes to derogations.

209 *A. Paulus/M. Vashakmadze* (note 198), 115; *M. Milanovic*, The Applicability of the Conventions to "Transnational" and "Mixed" Conflicts, in: A. Clapham/P. Gaeta/M. Sassòli (note 185), 27, esp. 31 et seq. Furthermore, it can be difficult to assess whether a non-state armed group is sufficiently organized for being considered a party in a non-international armed conflict, see *C. von der Groeben*, Transnational Conflicts and International Law, 2014, 61 et seq., 160 et seq.

210 *J. Pejic/C. Droege* (note 64), 552; International Committee of the Red Cross (note 9), 7 et seq.

211 *H. Krieger* (note 87), 434.

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international armed conflict international humanitarian law is only protective, while in international armed conflicts international humanitarian law can provide for a legal basis for internment. However, this legal evaluation would not replace the European Convention. International humanitarian law does not exclusively govern armed conflicts, and whether human rights law could and should do so is debatable.[212] One sentence in an article that was used by both sides in the *Serdar Mohammed* case, namely "what it permitted in international armed conflict, is permitted in non-international armed conflict"[213] can be true from an international humanitarian law perspective, or, as its author said, as matter of reasoning by structure:[214] Since international armed conflicts are more strictly regulated than non-international ones by international humanitarian law, everything not prohibited in international armed conflict would be not prohibited in non-international armed conflicts according to humanitarian law. But the sentence's permissive, approving language is susceptible to misinterpretation. Neither does the absence of a prohibition in international humanitarian law necessarily entail an authorization or a permission, nor would such legal evaluation in international humanitarian law automatically displace other fields of international law.[215]

The accommodation of different legal evaluations articulated in different fields of international law with each other will remain relevant. Recent developments indicate a trend to apply the Convention to the deprivation of life in military missions abroad. So far, the *Banković* case in which the European Court declined the applicability of the Convention to bombings has not been officially overruled.[216] In *Al-Skeini*, the Strasbourg Court held that the Convention applied extraterritorially because the UK assumed "public powers normally to be exercised by a sovereign government".[217] In the recent *Jaloud* case the Netherlands' jurisdiction was not based on the act of shooting, but on the Netherlands' "asserting authority and control over persons passing through the checkpoint".[218] The Netherlands violated Art. 2 of the Convention because of the failure to properly investigate the circumstances of the death, a procedural obligation under Art. 2. According to Justice *Leggatt* however, the subsequent Strasbourg jurisprudence de facto

[212] Critical in this regard *N. Melzer* (note 68), 383 et seq.
[213] *R. Goodman* (note 73), 50.
[214] *R. Goodman* (note 61), 161 et seq.
[215] This is also the quoted author's opinion, see *R. Goodman* (note 73), 50, fn. 9.
[216] *M. Milanovic*, Al-Skeini and Al-Jedda in Strasbourg, EJIL 23 (2012), 121 (131).
[217] *Al-Skeini and others v. The United Kingdom* (note 121), para. 149.
[218] *Jaloud v. The Netherlands*, Grand Chamber Judgment, 20.11.2014, App. No. 47708/08, para. 152.

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overruled *Banković* so that the use of lethal force would in principle constitute jurisdiction in the sense of Art. 1 ECHR.[219] The UK Court of Appeal concurred, albeit not without expressing its "reservations".[220]

This development, the two cases under review and the impressive number[221] of further claims before English courts manifestly reveal the transformative effects of the European Convention.[222] Individuals were given a remedy for reviewing the legality of actions directed against them or their relatives, imposing on states a burden of justification which requires and furthers transparency regarding actions on the battlefield.

International humanitarian law will continue to play an important role, not only in situations where the applicability of human rights law is, rightly or wrongly, denied. It can inform, directly or by analogy, the interpretation of the Convention.[223] Building on international humanitarian law can be a way to benefit from its detailed rules and avoid the risk of non-compliance which too demanding interpretations of the Convention might bear. At the same time, the Convention is an instrument with its own normative content and ambition. What it requires includes, but is not limited to, compliance with international humanitarian law. *Hassan* is a good example of how the Convention's normative content strengthened protections of international humanitarian law without interfering with the latter's core principles or objectives. Whether the Convention should require more, for instance compliance with *ius ad bellum*, and whether an individual application procedure before the European Court would be the appropriate forum to adjudicate *ius ad bellum* questions, will be an important discussion to have.

As illustrated in the first part of this article, the question of the relationship between international humanitarian law and human rights law arose because of interpretive developments within both regimes which were, in

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[219] *Al-Saadoon and others v. The Secretary of State for Defence*, judgment of 17.3.2015, High Court of Justice, (2015) EWHC 715, paras. 95, 106.

[220] *Serdar Mohammed*, Court of Appeal (note 2), paras. 95, 106.

[221] Justice *Leggatt* refered to over 1200 individual claims, seeking orders from the court to require the Secretary of Defense to investigate alleged human rights violations in Iraq. Furthermore, there are over 1000 claims seeking compensation from the Ministry of Defense, *Al-Sadoon and others v. The Secretary of State for Defence* (note 219), paras. 2 et seq.

[222] On the debate whether international humanitarian law itself creates direct rights for individuals, see *A. Peters*, Jenseits der Menschenrechte Die Rechtsstellung des Individuums im Völkerrecht, 2014, 179 et seq.; *K. Parlett*, The Individual in the International Legal System, 2011, 228. The Bundesverfassungsgericht held that neither under general international law nor under international humanitarian law an individual would be entitled to compensation for violations of international humanitarian law, Bundesverfassungsgericht, Order of 13.8.2013, First Chamber of the Second Senate, 2 BvR 2660/06, paras. 40 et seq.

[223] As *Krieger* has stated, "in case of an analogy there is no automatic priority of international humanitarian law over human rights law", *H. Krieger* (note 87), 427.

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the words of *Kolb*, "not in any sense natural or necessary (…) [but] the result of forces and interests, as well as profound ideological shifts."[224] The second part described how the different understandings of the role of international humanitarian law influenced and were influenced by the relationship discourse. Analyzing the interrelationship between international humanitarian law and human rights law thus should not go at the expense of studying each field on its own terms. Since fields of international law interrelate with each other, both implications for and legal evaluations of other fields should be considered. The challenge lies in recognizing when an informed interpretation is feasible and when it would conflict with core principles of one field. Rather than seeking such conflict, it is submitted to proceed with great care and to consider the risks that such conflicts can entail for the authority of international law.

The interrelationship between legal orders and regimes cannot be clarified in a final way. Within each regime interpretative developments will continue to take place, possibly both influenced by and influencing the relationship to other regimes. In the cases under review the courts interpreted the law in a way that leaves room for further developments. They did not end but inspire a conversation which hopefully continues to be guided by respect to the applicable legal regimes without losing sight of what humanization and humanitarization have in common.

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224 *R. Kolb*, Human Rights and Humanitarian Law, <www.mpepil.com>, para. 3.

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