Part II:
Detention in Non-International Armed Conflict

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Detention for Security Reasons by the Armed Forces of a State in Situations of Non-International Armed Conflict: the Quest for a Legal Basis

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A. Introduction

During times of armed conflict, individuals are detained for security reasons by the armed forces of the State or States involved. In fact, this is a central feature of such situations. While such detention may last only for some hours or days in some cases, in others it may last for a much longer period. In any case, detentions in armed conflict give rise to a situation in which detainees are immensely vulnerable to the actions and omissions of their captors, and in which the detaining authorities are responsible for safeguarding the health and dignity of those in their custody.[1] However, the international law on detention in armed conflicts for security reasons is not entirely clear. A highly-disputed point in this respect is the legal basis for detentions in situations of NIACs. The different questions relating to this problem were discussed by Single Justice *Leggatt* of the High Court of Justice of England and Wales in the judgment in the case of *Serdar Mohammed v Ministry of Defence* of 2 May 2014.[2] The case involved the detention of a person during the conflict in Afghanistan by British Armed Forces. The work by Justice *Leggatt* in the case was so remarkable that one commentator called it 'a heroic effort, with the single judge grappling with a host of complex, intertwined issues of international law and acquitting himself admirably in the process'.[3] The decision was later upheld in almost

1 See ICRC, 'Strengthening international humanitarian law protecting persons deprived of their liberty: Concluding report' (October 2015) Conf. Doc 32IC/15/19.1, 8 <http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf> accessed 13 October 2017 (hereafter ICRC, 'Concluding Report').

2 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (hereafter *Serdar Mohammed v Ministry of Defence* [2014]).

3 Marko Milanovic, 'High Court Rules that the UK Lacks IHL Detention Authority in Afghanistan' (*EJIL: Talk!*, 3 May 2014) <http://www.ejiltalk.org/high-

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every aspect by the Civil Division of the Court of Appeal for England and Wales.[4] The last judgment in the case so far was delivered by the Supreme Court of the United Kingdom in early 2017.[5]

Along the lines of the judgments in the *Serdar Mohammed* case, this contribution explores the questions relating to the legal basis for detentions for security reasons in NIACs. The analysis begins with an inquiry into IHL (II.), where it will be shown that neither treaty-based law nor customary law applicable to NIACs provide a legal basis for detentions. In a second step (III.), the relevance and role of human rights law in respect to such detentions is explored. The third step (IV.) is dedicated to the potential legislation on which detentions in NIACs could be based. The analysis is rounded off by a summary and concluding remarks (V.).

B. Does International Humanitarian Law Provide a Legal Basis for Detentions for Security Reasons?

I. The Situation under International Humanitarian Law Applicable to International Armed Conflicts

The treaty law applicable in situations of IAC provides different grounds for detention or internment. Art. 21 (1) GC III permits that 'the Detaining Power may subject prisoners of war to internment'. Furthermore, according to Art. 27 (4) GC IV, 'the parties to the conflict may take such measures of control and security as may be necessary as a result of the war'. Such measures also include the power to detain protected persons. In relation to aliens in the territory of a party to an IAC, Art. 42 GC IV provides that 'the internment or assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary' and that 'if any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be'. Moreover, Art. 43 GC IV grants several safeguards to an interned protected person. Lastly, according to Art. 78 GC IV, if, in an occupied territory, 'the

court-rules-that-the-uk-lacks-ihl-detention-authority-in-afghanistan> accessed 13 October 2017.

4 *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 (hereafter *Serdar Mohammed v Secretary of State for Defence* [2015]).

5 *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2 (hereafter *Serdar Mohammed v Ministry of Defence* [2017]).

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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'. In addition to this, the second and third paragraphs of Art. 78 GC IV provide several safeguards for the affected persons.

The legal logic behind incorporating those reasons for detention in the treaties concerning IACs is connected to the nature of such conflicts. In an IAC, a minimum of two sovereign States are pitted against each other.[6] Military operations by one or the other State take place on the territory of a foreign State and with respect to persons who are nationals of the foreign State in question. If rules to detain persons in IACs did not exist in international law, detention on foreign territory would be unlawful as States are prohibited to take such actions under general international law.[7] Therefore, only explicit provisions of international law can provide the State which is exerting military force on the territory of another State during an IAC with the legal authority to detain.[8]

II. The Situation under International Humanitarian Law Applicable to Non-International Armed Conflicts

1. Treaty-based International Humanitarian Law

In the treaty law applicable in situations of NIACs, no explicit provision can be found upon which the armed forces of a State could legally base the detention of individuals.[9] However, CA 3 as well as Art. 5 and 6 AP II contain several provisions both on the minimum treatment of individuals

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6 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 35.

7 Lawrence Hill-Cawthrone and Dapo Akande, 'Locating the Legal Basis for Detention on Non-International Armed Conflicts: A Rejoinder to Aurel Sari', (*EJIL: Talk!*, 2 June 2014) <http://www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/> accessed 13 October 2017 (hereafter Hill-Cawthrone and Akande, 'Rejoinder to Sari').

8 Ibid.

9 Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2015) 161.

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who are subject to detention or internment and on criminal proceedings against such individuals in the context of a NIAC.[10]

Therefore, the British Ministry of Defence in the *Serdar Mohammed* case as well as some commentators in academic writing have argued that CA 3 and AP II provide inherent powers to detain.[11] Indeed, CA 3 explicitly refers to 'detention' and Art. 2, 4 (1), 5 (1) and (2) as well as 6 AP II refer to those 'deprived of their liberty or whose liberty has been restricted for reasons related to the conflict', 'detention' and 'internment'. The argument goes that

> … the premise of those references and the existence of rules in Common Article 3 and AP II for the protection of those detained in non-international armed conflict [is] that there [is] an inherent power to detain provided that [it] is done in accordance with those rules.[12]

This interpretation of the law was met with opposition by Justice *Leggatt* in the *Serdar Mohammed* case for five convincing reasons:

(1) As a first reason, Justice *Leggatt* argued that, if CA 3 or AP II had been intended to provide a power to detain, the drafters of the provisions would have done so expressly, as is the case in GC III and GC IV. Justice *Leggatt* further correctly explained that it is not to be readily supposed that the parties to an international treaty have agreed to establish a power to deprive individuals of their liberty indirectly by implication and without saying so explicitly.[13] This is a reasonable argument as a power to detain is a coercive power; therefore, such powers should not too readily be read into applicable treaty rules without clear evidence of this being the collective intention of the State parties to the respective treaty.[14] Such evidence can neither be found in the *travaux préparatoires* of CA 3 nor of AP II.

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10 *Serdar Mohammed v Ministry of Defence* [2017] (n 5) para 12.

11 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) paras 232; Jelena Pejic, 'Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 IRRC 375, 377.

12 *Serdar Mohammed v Secretary of State for Defence* [2015] (n 4) para 200.

13 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 242.

14 Lawrence Hill-Cawthorne and Dapo Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?' (*EJIL: Talk!*, 7 May 2014) <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts> accessed 13 October 2017 (hereafter Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC').

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This position is not inconsistent with the view taken, for instance, in an often-referred-to article of *Goodman*, who notes that the logical structure of IHL is such that what is permitted in IACs should, *a fortiori*, also be considered permitted in NIACs as States would never have intended to restrict them more in the latter than in the former.[15] It needs to be taken into account that IHL does not restrict States with regard to detention in NIACs any more than it restricts their ability to detain in IACs. Detention is nothing that is prohibited for States in NIACs, as States may detain individuals in such conflicts; however, IHL simply does not provide a legal basis for such detentions.[16]

(2) Justice *Leggatt's* second argument was that CA 3 and AP II recognise the fact that people are detained during NIACs, but, aside that, the law remains silent. Such detentions may be lawful under the law of the State on whose territory the armed conflict is taking place, or under another applicable law, otherwise the detention may be entirely unlawful. Nothing in the language in CA 3 and AP II suggests that those provisions are intended to authorise or confer legality on any such detention.[17] This argument is convincing, as it is largely recognised that the regulation of a specific conduct by international law does not imply authorisation or acceptance of the legality of that conduct.[18] Commentators *Hill-Cawthorne* and *Akande* underline this finding with a good example from the sphere of IHL itself: They put forward that the distinction between recognition and regulation of conduct, on the one hand, and authorisation or acceptance of the legality of that conduct on the other hand, constitute a key feature of IHL as a legal regime. This is due to the fact that IHL regulates the use of force by States in situations of armed conflict. However, IHL remains silent on the legality of the use of force under the *jus ad bellum*. The use of force that IHL recognises and regulates is not rendered lawful simply by virtue of

15 Ryan Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 AJIL 48.

16 Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14); for an examination of the permissive/restrictive nature of IHL see Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59 (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?').

17 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 243.

18 Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14).

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the fact that it is regulated by IHL. Rather, IHL simply accepts that armed conflicts exist and seeks to regulate various aspects of such conflicts.[19]

(3) In his third argument, Justice *Leggatt* explored the *telos* of CA 3 and Art. 5 AP II. He argued that the aim of the two provisions was to guarantee certain minimum standards of treatment to all individuals who are deprived of their liberty for reasons relating to the respective armed conflict. The need to observe those minimum standards is equally relevant to all people who are detained, and does not depend on whether or not their detention is legally justified. *Leggatt* therefore concluded that the clear purpose of CA 3 and Art. 5 AP II was inconsistent with the notion that these provisions provide a legal power to detain.[20]

(4) The fourth reason Justice *Leggatt* brought forward to support his argument follows from the fundamental principle that IHL applies without distinction to all parties to an armed conflict, both State and non-State actors alike. He argued that States subscribing to the four Geneva Conventions and the two Additional Protocols hereto would not have agreed by treaty to establish a power to detain in the circumstances of a NIAC. Given that CA 3 applies to 'each Party to the conflict' and AP II applies to organised armed groups who are able to implement it,[21] providing a power to detain would have meant authorising detention by dissident and rebel armed groups. That would be an anathema to most States dealing with a NIAC on their territory and who do not wish to confer any legitimacy to rebels and insurgents or accept that such groups have any right to exercise a function which is a core aspect of State sovereignty. This conclusion is backed by the *travaux préparatoires* of CA 3 and AP II as they contain plentiful references to this concern by the various delegates.[22]

(5) The fifth and last argument of Justice *Leggatt* related to the content of the power to detain.[23] He argued that he did not see how CA 3 or AP II could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it were possible to identify the scope of such a power. Justice *Leggatt* further correctly observed that neither CA 3 nor AP II specify who may be detained, on what grounds, in accordance with which procedures, or for how long. This

19 Ibid.
20 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 244.
21 Ibid, para 245.
22 See Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14).
23 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 246.

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argument is also convincing. From a rule of law perspective, clarity, predictability, transparency and authority are important attributes when the State's interest interferes with the position of the individual.[24] An explicit legal basis for detentions in situations of NIACs would undoubtedly serve those attributes.

A further argument that was presented by the British Ministry of Defence in the *Serdar Mohammed* case was that the ability to detain insurgents whilst hostilities are ongoing would be an essential corollary of the authorisation to kill them. Those engaged in military operation must be able to both accept the surrender of somebody who poses a threat to them and their mission and must be able to engage an adversary without necessarily having to use lethal force. Furthermore, the Ministry of Defence pointed out that it would be a serious violation of IHL to deny quarter.[25] Justice *Leggatt* convincingly responded to this argument by stating that it would justify the capture of a person who may lawfully be killed; however, the argument would not go further than that. As soon as an individual had been detained, the use of lethal force against him would have no longer provided a basis for the detention of this individual.[26]

2. Customary International Humanitarian Law

If no legal basis for detention can be found in treaty-based IHL applicable to NIACs, such a legal basis may be found in the applicable customary IHL. Art. 38 (1) (b) ICJ-Statute describes customary law as 'a general practice accepted as law'. In this respect, the existence of a rule of customary international law requires the presence of two elements.[27] The first of these elements is the existence of a general State practice. There is no requirement regarding any particular duration; however, the practice must be extensive, representative and virtually uniform.[28] The second requirement is the *opinio*

24 ICRC, 'Concluding Report' (n 1) 29.
25 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 252.
26 Ibid, para 253.
27 On the formation of customary international law in general, see James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 23.
28 North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) (Judgment) [1969] ICJ Rep 43, para 74.

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juris sive necessitatis, the belief that the practice is a matter of right or obligation.[29]

It seems that in the law of NIACs, no customary basis for detentions has been formed as yet in the way described above. In the *Serdar Mohammed* case, Justice *Leggatt* found that no evidence of any recognition by States involved in NIACs as providing a legal basis for detention was produced by the British Ministry of Defence.[30] Furthermore, the Justice correctly concluded that

> … to demonstrate general practice of detention in non-international armed conflict recognised as a matter of legal right, it would need to be possible to identify with reasonable certainty the scope of the alleged rule of law in terms of who may be detained, on what ground, subject to what procedure and for how long.[31]

Important work in the field of IHL on the international scene has so far been unhelpful in the demonstration of the existence of such a rule containing all the features described above. For instance, the ICRC's Customary International Humanitarian Law Study identifies 161 rules of customary nature in IHL.[32] Rule 99 is dedicated to the deprivation of liberty and reads very clearly: 'Arbitrary deprivation of liberty is prohibited'. While these rules are merely the result of an academic study and are therefore in no way binding, it is clear that, if a rule like Rule 99 exists, it cannot serve as a legal basis for detention as the rule is prohibitive and therefore requires States to abstain from the conduct regulated in the rule and in no way allow it. The Copenhagen Process on the Handling of Detainees in International Military Operations is another international forum which dealt with detention in the context of NIACs. It enjoys a certain degree of legitimacy as it was initiated by the government of Denmark and 24 States participated in it with the African Union, NATO, the European Union, the UN and the ICRC as observers. In October 2012, the Copenhagen Process was concluded with the publication of principles and guidelines which are intended to apply to international military operations in the context of NIACs and peace operations.[33] Principle 1 of the Copenhagen Process Principles applies to 'the detention of persons who are being deprived of their liberty for reasons related to an international military operation'. According to this principle,

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29 Ibid, 44, para 77.
30 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 257.
31 Ibid, para 258.
32 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I: Rules (CUP 2005) 344.
33 The Copenhagen Process on the Handling of Detainees in International Military Operations (The Process): Principles and Guidelines (19 October 2012).

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'detention of persons must be conducted in accordance with applicable international law'; furthermore, several conditions for detentions are laid down in the principle, but there are no conditions mentioned under which an individual can actually be detained. In fact, according to Principle 16:

> … nothing in The Copenhagen Process Principles and Guidelines affects the applicability of international law to international military operations conducted by the states or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-state actors.

The official commentary to this principle clarifies it, as it reads:

> … the saving clause … recognise[s] that The Copenhagen Principles and Guidelines is not a text of legally binding nature and thus, does not create new obligations or commitments. Furthermore, The Copenhagen Process Principles and Guidelines cannot constitute a legal basis for detention. … Since The Copenhagen Process Principles and Guidelines were not written as a restatement of customary international law, the mere inclusion of a practice in The Copenhagen Process Principles and Guidelines should not be taken as evidence that states regard the practice as required out of a sense of legal obligation.

Lastly, the problem of identifying a legal basis for detentions in NIACs was discussed at the 32nd International Conference of the Red Cross and Red Crescent, held in Geneva from 8 to 10 December 2015, which was dedicated to the strengthening of IHL protecting persons deprived of their liberty. The results of the conference confirmed that, currently, no customary IHL applicable to situations of NIACs exists upon which detentions for security reasons might be legally based. In the concluding report it was held that 'neither existing treaties nor customary law' applicable to NIACs 'expressly provide grounds or procedures for carrying out' detentions, and that

> … although States had divergent views on the relevance of the principle of legality to IHL, the ICRC has understood them to believe that the specific grounds and procedures for internment should be set down in a source, or combination of sources, that is capable of safeguarding arbitrary internment.[34]

III. Conclusion

In consequence, the legal basis for the authority to detain individuals for security reasons in NIACs lies neither in treaty-based IHL nor in customary

34 ICRC, 'Concluding Report' (n 1) 15, 29.

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IHL.[35] This, however, does not imply that detention is prohibited or not allowed in situations of NIACs; it simply means that a legal basis for detentions must be identified in another corpus of law.[36] State practice supports this result, as States often rely on domestic law to provide the legal basis for detention practices in situations of NIACs. Examples include the 'Terrorism and Disruptive Activities Act and Ordinance',[37] which was applied in the conflict between the Nepalese Government and communist insurgents, or the 'Prevention of Terrorism Act'[38], which was applied in the conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam.[39]

The divergent approaches to the problem of detention (and other fields of application) in IHL applicable to IACs and to NIACs are rooted in the differences between the regulated types of conflict. While the former type of conflict, as explained above, involves military operations of two or more sovereign States, NIACs (mainly) take place in an environment of intra-State relations. Therefore, firstly, the rights of other States will, on a regular basis, not be engaged by NIACs and, secondly, the intra-State nature of NIACs entails that they take place within a pre-existing legal system, namely domestic law, which is applicable to the situation of the conflict.[40]

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35 Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14).

36 For a different assessment, see Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?' (n 16).

37 Nepalese Ministry of Law, Justice and Parliamentary Affairs, 'Ordinance No. 1 of the year 2058 (2001)' *Nepal Gazette* (Kathmandu, 26 November 2001) <http://nepalconflictreport.ohchr.org/files/docs/2001-11-26_legal_govt-of-nepal_eng.pdf> accessed 13 October 2017.

38 Parliament of the Democratic Socialist Republic of Sri Lanka, 'Prevention of Terrorism' (20 July 1979) Act No 48 of 1979 <http://www.satp.org/satporgtp/countries/shrilanka/document/actsandordinance/prevention_of_terrorism.htm> accessed 13 October 2017.

39 Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14).

40 Hill-Cawthrone and Akande, 'Rejoinder to Sari' (n 7).

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C. Human Rights Law Applicable to Detention in Non-International Armed Conflicts

I. Rules on the Deprivation of Liberty in Human Rights Law

In the sphere of human rights law, detentions are in conflict with the right to liberty. The term liberty refers to the physical liberty of an individual as opposed to a mere restriction of the freedom of movement.[41] Confinement to a certain limited place for a not negligible length of time without valid consent constitutes a deprivation of the physical liberty of an individual.[42] Rules regulating the deprivation of liberty can be found in several universally and regionally applicable human rights treaties. According to Art. 9 (1) ICCPR, Art. 5 (1) ECHR, Art. 7 (2) ACHR, and Art. 6 ACHPR, a person may be deprived of his or her liberty only 'on such grounds and in accordance with such procedure as are established by law'[43].

The most detailed and restrictive of the aforementioned provisions is Art. 5 (1) ECHR, which allows the deprivation of liberty of an individual only in six cases. Three of those cases are of interest in situations of NIACs, namely:

> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person affected by the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

Therefore, under human rights law, a legal basis for detention is required. If such a legal basis to deprive a person of his or her physical liberty is not in place, the detention is unlawful. Furthermore, human rights treaties provide for a number of legal safeguards for the affected individual whose liberty has been deprived. These safeguards include, for instance, the right

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41 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd edn, CUP 2016) 369 (hereafter Bantekas and Oette, *Human Rights Law*).

42 Ibid.

43 This is the wording used in Art. 9 (1) ICCPR. The rules on the deprivation of liberty in regional human rights treaties display a slightly different wording; however, the content is identical.

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to be informed about the reasons for the deprivation of liberty,[44] or the right to take proceedings before a court in order for the court to decide without delay on the lawfulness of the detention and order release if the detention is not lawful.[45]

II. The Applicability of Human Rights Law in Situations of Armed Conflict

Only if human rights law applies in situations of armed conflict, its rules on the deprivation of liberty may have an influence on the problem of detention in NIACs. While it is clear that IHL is the body of international law that regulates armed conflict, it was disputed whether human rights law also applies in the context of such situations. The main argument was that IHL is designed especially to regulate times of war, while human rights law protects the individual in times of peace.[46] However, international legal practice has not followed this line of argumentation. For example, in 1996, the ICJ stated in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons that

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of live, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[47]

Later, in the advisory opinion of the Court concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), it was stated:

> As regards the relationship between international humanitarian law and human rights law, 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

44 Art. 9 (2) ICCPR, Art. 5 (2) ECHR, Art. 7 (4) ACHR.

45 Art. 9 (4) ICCPR, Art. 5 (4) ECHR, Art. 7 (5) ACHR.

46 For approaches to the relationship between IHL and human rights law, see Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (AIL-Pocket 2011) 125.

47 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 240, para 25.

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> consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[48]

Furthermore, the UN GA – already in its 25th session – stated in the resolution of 9 December 1970 on the 'Basic principles for the protection of civilian population in armed conflicts' that '[f]undamental human rights, as accepted in international law, and laid down in international instruments, continue to apply fully in situations of armed conflict.'[49] These quotes demonstrate that both bodies of law generally continue to apply in armed conflicts as such, while the exact details of the relationship between IHL and human rights law must be determined according to the specific rules governing a particular situation. Therefore, the rules on the deprivation of liberty, as laid down in human rights treaties, also continue to apply to situations of detention in NIACs. As the law of NIACs does not provide for a legal basis for detentions which are carried out for security reasons, the only applicable rules here are the ones of human rights law. Therefore, in the context of NIACs, a legal basis is required in order to make such a detention lawful under international law.[50]

III. The Extraterritorial Application of Human Rights Law

While it is clear that the guarantees enshrined in a specific human rights treaty apply to the persons on the territory of a State that is a party to the respective treaty,[51] the question arises whether this is also true for States which act on the territory of another State. In the context of a NIAC, this is of importance in cases of 'internationalised' internal armed conflicts when the government of a State is aided by foreign armed forces to suppress the activities of non-State armed groups. The extraterritorial applicability of human rights treaties has, in general, been affirmed by the ICJ,[52] regional

48 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 2004, 178, para 106 (hereafter *Wall Advisory Opinion*).

49 UN GA Res 2675 (XXV) (9 December 1970) UN Doc A/RES/2675 (XXV), para 1 of the operative part of the resolution.

50 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 293.

51 Bantekas and Oette, *Human Rights Law* (n 41) 82.

52 *Wall Advisory Opinion* (n 48) 178, paras 107.

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human rights courts,[53] and UN institutions[54]. However, the details are debated extensively. The focal point of the problem is the interpretation of the term 'jurisdiction' as it can be found for instance in Art. 1 ECHR. Under this provision, the parties to the Convention guarantee the rights and freedoms enshrined in the treaty to all persons under their jurisdiction. Therefore, only if troops were to exercise 'jurisdiction' when detaining a person in a NIAC abroad, the relevant provisions of human rights law would become applicable.

One can understand the term 'jurisdiction' as relating primarily to the territory over which a State has sovereign authority.[55] This was the position taken for instance by the Grand Chamber of the ECtHR in the case of *Bankovic et al v Belgium et al* in 2001.[56] The Court took the position that Art. 1 ECHR reflects an essentially territorial notion of 'jurisdiction' and that an extraterritorial application is an exception.[57] However, the Court indicated that extraterritorial jurisdiction under the ECHR can be established if a State has established 'effective control' over an area of foreign territory and its inhabitants. In the words of the Court, this requires that a State, 'as a consequence of military occupation or through consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that government'.[58] With this argumentation, the Court appeared to reject the notion that 'jurisdiction' can be based on effective control over an individual as this would render the scope of application of the ECHR limitless and jurisdiction would arise whenever an act imputable to a contracting State of the Convention had an adverse effect on anyone anywhere in the world.[59] Furthermore, the Court rejected the contention that a State's obligation under the ECHR could be 'divided and tailored in accordance with the particular circumstances of the extraterritorial act in question'.[60] The Court therefore took the position that the rights enshrined

53 *Loizidou v Turkey,* App no 15318/89, 18 December 1996, para 52.
54 UN HRC, *Sergio Ruben Lopez Burgos v Uruguay* in 'Communication no 52/1979' UN Doc CCPR/C/13/D/52/1979 (1981) para 12.
55 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 120.
56 *Bankovic et al v Belgium et al,* App no 52207/99, 12 December 2001 (hereafter *Bankovic et al v Belgium et al*).
57 Ibid, para 57.
58 Ibid, para 69.
59 Ibid, para 71.
60 Ibid, para 73.

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in the ECHR constitute 'a single, indivisible package'.[61] It further emphasised the regional nature of the Convention and indicated that its extraterritorial application is limited to acts executed on the territory of a State which is, or would, 'but for the specific circumstances' be covered by the Convention.[62] The Court also seemed to limit the scope for a more extensive and progressive interpretation of 'jurisdiction' in future cases by implying that Art. 1, unlike the provisions of the ECHR defining substantive rights, cannot be interpreted as a 'living instrument' in accordance with changing conditions.[63]

The narrow reading and interpretation of Art. 1 ECHR by the ECtHR in the *Bancovic* case was, however, not upheld in later cases before the Court. In its judgment in the case of *Al-Skeini and Others v the United Kingdom* in 2011, the Court set out a comprehensive restatement of the general principles, which determine when a State's jurisdiction under Art. 1 ECHR extends to actions outside its own territory.[64] While the Court in this judgment repeated its earlier position that jurisdiction under Art. 1 ECHR is primarily territorial in nature and that extraterritorial acts can give rise to jurisdiction only in exceptional cases,[65] it went on to explain that such an exceptional case is a situation where a contracting State of the Convention, 'as a consequence of lawful or unlawful military action exercises "effective control" of an area' outside of its own territory. Jurisdiction in such a case 'derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed force, or through a subordinate local administration'. Where the requisite degree of control exists

> … the controlling state has the responsibility under Art. 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.[66]

However, in the *Al-Skeini* case, the Court recognised that, where a contracting State does not have effective control over an area of territory such that the State is required to secure to the inhabitants of that territory all

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61 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 122.
62 *Bankovic et al v Belgium et al* (n 56) para 80.
63 Ibid, paras 62.
64 *Al-Skeini and Others v the United Kingdom*, App no 55721/07, 7 July 2011 (hereafter *Al-Skeini v UK*); see *Mohammed v Ministry of Defence* [2014] (n 2) para 129.
65 Ibid, para 131.
66 *Al-Skeini v UK* (n 64) para 138.

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the rights set out in the ECHR, extraterritorial jurisdiction may still arise on a principle of responsibility for acts of the State's agents operating outside of its territory.[67] Such a case can *inter alia* be given in situations where, through the 'consent, invitation or acquiescence' of the government of the territory, a State 'exercises all or some of the public powers normally exercised by that government'[68]; this case can also be given 'in certain circumstance[s]' in which 'the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's art. 1 jurisdiction'. To underline the application of the principle, the Court cited four post-*Bankovic* cases of its case law 'where an individual is taken into the custody of state agents abroad'[69]. Firstly, in the case of *Öcalan v Turkey* (2005), jurisdiction of Turkey arose when its officials took custody of the applicant from Kenyan officials on the territory of Kenya.[70] Secondly, in *Issa and Others v Turkey* (2004), where it had been established – which in the facts of the case it was not – that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, brought them to a nearby cave and killed them; the deceased would have therefore been within Turkish jurisdiction 'by virtue of the soldiers' authority and control over them'.[71] Thirdly, in *Al-Sadoon and Mufdhi v the United Kingdom* (2009), where two individuals detained in military prisons in Iraq which were under British control fell within the jurisdiction of the United Kingdom, since it 'exercised total and exclusive control over the prisons and the individuals detained in them'.[72] Lastly, in *Medvedyev v France* (2010), French naval forces exercised 'full and effective control' over a ship and its crew, which was intercepted in international waters.[73] The Court went on to explain in the *Al-Skeini* case that the decisive element which led to jurisdiction in the aforementioned cases 'is the exercise of physical power and control over the person in question'[74]. Furthermore, it explained that

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67 Ibid, para 133.
68 Ibid, para 135.
69 Ibid, para 136.
70 *Öcalan v Turkey*, App no 46221/99, 12 May 2005.
71 *Issa and Others v Turkey*, App no 31821/96, 16 November 2004 (hereafter *Issa and Others v Turkey*).
72 *Al-Sadoon and Mufhdi v the United Kingdom,* App no 61498/08, Decision on admissibility of 3 July 2009.
73 *Medvedyev and Others v France*, App no 3394/03, 29 March 2010.
74 *Al-Skeini v UK* (n 64) para 136.

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> … it is clear that, whenever the state through its agents exercises control or authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'.[75]

While the *Al-Skeini* case leaves several important questions relating to the application of the ECHR in extraterritorial settings unanswered,[76] it is now at least clear that jurisdiction can be established in cases in which 'an individual is taken into the custody of state agents abroad'.[77] This argumentation was later reaffirmed by the ECtHR for instance in the *Chagos Islanders v the United Kingdom* case (2013), in which the Court deemed that the circumstances in which 'state agents authority' gives rise to extraterritorial jurisdiction include 'using force to take a person into custody or exerting full physical control over a person through apprehension or detention'.[78]

The recent case law of the ECtHR shows that human rights law is applicable in extraterritorial situations in which a contracting party exercises control or authority over an individual abroad. The decisive element, according to the Court, is the 'exercise of physical power and control' over an individual; in general, detentions by the armed forces of States party to the ECHR in situations in which these forces are acting on the territory of another State to aid the government during a NIAC are covered by the Convention. Moreover, Art. 5 ECHR must be observed. The possibility to 'divide and tailor' the Convention rights does not alter this observation. When the conduct of a State gives rise to jurisdiction, in this case namely the exercise of physical control over an individual through arrest and detention, it is not possible to divide and tailor the basic obligation under Art. 5 (1) ECHR that any deprivation of liberty must be lawful and fall within one of the cases specified in Art. 5 (1).[79]

IV. Conclusion

All major human rights treaties in which civil and political rights are enshrined contain specific rules on the deprivation of liberty of an individual. All of these rules require a legal basis for such deprivations and,

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75 Ibid, para 137.
76 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 141.
77 *Al-Skeini v UK* (n 64), para 136.
78 *Chagos Islanders v the United Kingdom*, App no 35622/04, 11 December 2012.
79 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 151.

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therefore, for detentions; this also applies in situations of NIACs. While this is certainly true for 'traditional' NIACs, in which the government of a State is fighting against one or more non-State armed actors, States which are party to one of the human rights treaties mentioned above are equally bound by the rights laid down in those treaties when troops are acting abroad, as those instruments also apply extraterritorially.

D. Potential Legal Bases for Detentions for Security Reasons in Situations of Non-International Armed Conflict

While, on the one hand, IHL does not provide States with a legal basis for detention in NIACs, human rights law, on the other hand, requires one. This leads to the question of where such a legal basis might be found, how it can be implemented and if human rights rules may be displaced in specific circumstances. Depending on the context, domestic law and international law have a potential role to play in the prevention of arbitrary or unlawful detention.[80]

I. Domestic Law

The domestic law of the State on whose territory a NIAC is fought provides an important source of law for the detention of individuals. Legal grounds for such detentions may be found in domestic criminal and criminal procedure statutes, general statutes concerning the use of military forces, the police or other security forces or in special legislation concerning situations of large-scale violence. If no provision which suits the needs of the forces in respect to detentions in NIACs is in place in the domestic legal system or if the existing rules do not suffice, the national legislator is not hindered in introducing such rules or altering the existing rules. However, such legal reforms may be restricted by the constitutional law of the respective State. Restrictions might include time limits or the exclusion of specific grounds for detentions in the constitutional regulations providing the right to liberty. The requirements of the relevant provisions might also be altered on a constitutional basis if a state of emergency is declared in the respective State in case of large-scale internal violence amounting to a

80 ICRC, 'Concluding Report' (n 1) 29.

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NIAC.[81] In these cases, the fundamental rights and freedoms laid down in the constitution of the respective State might be restricted much more easily than in times of non-emergency. Furthermore, the national legislation on detention in times of war must comply with the requirements of the human rights instruments which the respective State is a party to.[82]

In situations of 'internationalised' armed conflicts, a legal basis for detentions could also be established in the domestic legislation of the State who sends troops aborad. However, in order to fulfil the validity requirements established by the ECtHR, this legislation must meet several conditions: the text of the respective piece of legislation must expressly provide for its applicability to situations of NIAC as well as its extraterritorial applicability; furthermore, the procedural safeguards provided must be sufficiently comprehensive.[83]

II. Application of Rules on Derogation/Suspension in Human Rights Treaties

While domestic constitutional law might allow the derogation of fundamental rights and freedoms laid down in the constitution in the context of a national emergency, several human rights treaties also allow for derogation or suspension of several rights enshrined in those instruments. These are, for instance, Art. 4 (1) ICCPR: 'in time of public emergency which threatens the life of the nation'; Art. 15 (1) ECHR: 'in time of war or other public emergency threatening the life of the nation', or Art. 27 (1) ACHR: 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'.

As none of the lists of non-derogable rights in the second paragraphs of the quoted articles contain the right to liberty, it is clear that this right can be made subject to derogation/suspension.[84] Therefore, the possibility of derogating/suspending from the obligations concerning the right to liberty

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81 See David Dyzenhaus, 'States of Emergency' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 442.

82 Hill-Cawthorne and Akande, 'Legal Basis for Detention in NIAC' (n 14).

83 Claire Landais and Léa Bass, 'Reconciling the rules of international humanitarian law with the rules of European human rights law' (2015) 97 IRRC 1295, 1307 (hereafter Landais and Bass, 'Reconciling').

84 Bantekas and Oette, *Human Rights Law* (n 41) 81.

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under the respective human rights treaties may both provide a solution to the problem of complying with the obligations under these human rights instruments and, at the same time, allow for the use of detention in situations of NIAC.[85]

However, such a solution encounters several obstacles. The first of these obstacles lies in the applicability of the derogation/suspension rules to situations of NIAC. It is not entirely clear whether the term 'war' used in Art. 15 (1) ECHR and Art. 27 (1) ACHR only applies to situations of IACs or also to NIACs; the latter may also be understood as public emergencies or public dangers. Yet, the situation must also 'threaten the life of the nation' or 'the independence or security of a State Party'. For instance, in 1961, the ECtHR already defined a situation which threatenes the life of a nation in the case of *Lawless v Ireland* as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.'[86] While this requirement may be met by a State in which a NIAC is actually taking place, the situation is different for a State which intervenes in an 'internationalised' NIAC abroad with its armed forces on behalf of a foreign government. It was rightly observed that, in this regard, 'it would appear that recent armed conflicts involving ECtHR countries in the territory of a third "host" State could not be deemed to have reached the requisite threat level to them'.[87] Indeed, it is, for instance, not easy to imagine that a NIAC in Central Asia, in which some forces from Western European States are fighting, might constitute a threat to organised life in the respective European States.

However, the ECtHR made reference to Art. 15 ECHR in the cases of *Al-Jedda v the United Kingdom* (2011) and *Hassan v the United Kingdom* (2014).[88] Both cases concerned human rights violations during the British military presence in Iraq. This could be read as an indication that the Court does not rule out the validity of a derogation in cases which concern a situation of an extraterritorial 'internationalised' NIAC. However, it is obvious that the Court must then move away from the case law it had

85 Landais and Bass, 'Reconciling' (n 83) 1302.

86 *Lawless v Ireland*, App no 332/57, 1 July 1961, para 28.

87 Jelena Pejic, 'The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law' (2011) 93 IRRC 837, 850.

88 *Al-Jedda v the United Kingdom,* App no 27021/08, 7 July 2011, para 40 (hereafter *Al-Jedda v UK*); *Hassan v the United Kingdom*, App no 29750/09, 16 September 2014, para 101 (hereafter *Hassan v UK*).

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previously established regarding the criteria relating to 'the whole population' being affected and the 'threat to the organised life of the community' as those criteria could not be met *a priori*.[89]

Another problem arises with regard to the issue discussed above concerning extraterritorial 'jurisdiction'. In the case of *Issa and Others v Turkey* (2004), the ECtHR stated that 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory'.[90] Under this case law of the ECtHR, it does not seem possible for a State to derogate from its obligations under the ECHR only for an extraterritorial situation: If a State wants to derogate, it must also do so for its own territory.[91] However, it is politically unlikely that a State which sends a contingent of its armed forces into another country will derogate from certain human rights laid down in the ECHR for the people living on its own territory only for the benefit of human rights compliance in faraway places.

Furthermore, even if a State could derogate from its obligations under Art. 5 ECHR in a situation of extraterritorial NIACs, the application of Art. 15 ECHR would not release this State completely from various safeguards. The first of these safeguards is the duty to notify the Secretary-General of the Council of Europe of the measures which are taken and the reasons thereof.[92] The Grand Chamber of the ECtHR interpreted Art. 15 ECHR in the case of *A and Others v the United Kingdom* (1998) in the way that it allows States 'a wide margin of appreciation to decide on the nature and scope of the derogating measures necessary to avert the emergency.' At the same time, the Court stated that 'it is ultimately for the Court to rule whether the measures were "strictly required"'. It further declared that,

> where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to

89 Landais and Bass, 'Reconciling' (n 83) 1303.
90 *Issa and Others v Turkey* (n 71).
91 Landais and Bass, 'Reconciling' (n 83) 1303.
92 A similar duty to notify of derogation measures is enshrined in Art. 4 (3) ICCPR with respect to the Secretary-General of the United Nations and in Art. 27 (3) ACHR with respect to the Secretary-General of the Organization of American States.

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> the emergency situation, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.[93]

This leads to the situation that, assuming that Art. 15 ECHR allows States to derogate from the provisions of Art. 5 ECHR only in relation to detentions for security reasons which are carried out on the territory of a State that is not a party to the Convention, the ECtHR could nevertheless verify that the measures taken by that State are strictly required by the exigencies of the situation in question.[94]

Furthermore, the safeguards which are installed to the benefit of a person that is detained by the agents of a State party to the ECHR are decisive in a situation of derogation. The ECtHR has already treated such cases brought before it. For instance, in the cases of *Brannigan and McBride v the United Kingdom* (1993), which dealt with derogations at the domestic level providing measures which authorised the detention of individuals suspected of terrorist activities, the Court accepted a lack of judicial control for a maximum period of seven days. On the other hand, the Court did not accept a similar derogation in relation to a fourteen-day detention in the case of *Aksoy v Turkey* (1996). Other safeguards were discussed in those cases as well. For instance, in the cases of *Brannigan and McBride v the United Kingdom*, it was stated by the Court that 'the remedy of *habeas corpus* was available to test the lawfulness of the original arrest and detention' and that there is 'an absolute and enforceable right to consult a solicitor forty-eight hours after the time of the arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor'[95]. Furthermore, in the case of *Aksoy v Turkey*, the Court stated that

> … the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.[96]

In sum, it seems that, under the ECHR with the relevant case law established by the ECtHR, Art. 15 does not provide a sufficient solution to entirely overcome the lack of a legal basis with regard to detentions for security reasons in NIACs, especially in extraterritorial ones.

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93 *A and Others v the United Kingdom*, App no 3455/05, 23 September 1998, para 184.

94 Landais and Bass, 'Reconciling' (n 83) 1304.

95 *Brannigan and McBride v the United Kingdom*, Apps no 14553/89 and 14554/89, 26 May 1993, paras 62.

96 *Aksoy v Turkey*, App no 21987/93, 18 December 1996, para 83.

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III. Resolutions of the United Nations Security Council

A legal basis for detention for security reasons in NIACs might also be found in a resolution by the UN SC. Under Art. 24 UN Charter, the UN SC has the 'primary responsibility for the maintenance of international peace and security'. Furthermore, under Art. 25 UN Charter, the Member States of the UN have a duty to carry out the decisions of the UN SC in accordance with the Charter. When the UN SC is acting under Chapter VII of the Charter (Art. 39 *et seq*), it possesses immense powers. The most prominent power is the authorisation of the use of force by Member States. Measures taken by the UN SC under Chapter VII are a cornerstone of the present international legal order.[97] While a resolution adopted by the UN SC is neither a treaty nor is it legislation, it is well established that such a resolution may constitute an authority binding in international law to do that which would otherwise be illegal in international law.[98]

A UN SC resolution which allows for the use of 'all necessary measures/means' is best suited to serve as a basis for detention in a NIAC; an example of this is Resolution 1386 of 20 December 2001,[99] which authorised the Member States of the UN participating in the International Security Assistance Force in Afghanistan in the post-9/11 conflict to take all necessary measures to fulfil its mandate. This is due to the fact that it authorises the use of the full range of measures available to the UN itself to maintain or restore international peace and security under Chapter VII of the UN Charter. Normally this involves the use of force under Art. 42 UN Charter. This is, however, subject to the requirement that such measures are necessary. The necessity of a measure depends primarily on the specific mandate as well as on the general context and any conditions or limitations laid down in the resolution.[100] While a resolution of the UN SC might not expressly allow for detention, the 'all necessary measures/means' formula can be interpreted in a way that it encompasses operational detention as one of such means, if necessary and might therefore constitute a legal basis for such detentions.[101] However, it is not clear what kind of detention is allowed under such a UN SC resolution. This point was disputed in the *Serdar*

97 *Serdar Mohammed v Ministry of Defence* [2017] (n 5) para 23.
98 Ibid, para 25.
99 UN SC Res 1386 UN Doc S/RES/1386 (2001) para 3 of the operative part of the resolution.
100 *Serdar Mohammed v Ministry of Defence* [2017] (n 5) para 26.
101 Ibid, para 27.

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Mohammed case. On the one hand, Justice *Leggatt* argued in the first instance that a UN SC resolution which authorises the use for 'all necessary measures/means' only allows for detention for a very short period of time. He argued that once a prisoner was captured and disarmed, he no longer represented an imminent threat to security; he exemplified this through the role of the British Armed Forces and the civilian population in the case before him. Detention thereafter could not be justified under a UN SC resolution.[102] This argument was not followed by Lord *Sumption* of the UK Supreme Court on the other hand. He argued that if a person constituted a sufficient threat to the British Armed Forces and the civilian population to warrant detention in the first place, he would be likely to present a sufficient threat to warrant his continued detention after being disarmed. Unless the armed forces (of the UK) were in a position to transfer the detainee to the civil authorities for possible prosecution or further detention, the only alternative would be to release him and allow him to present the same threat to the armed forces or the civilian population as he did before, if one follows the argument of Justice *Leggatt*. Lord *Sumption* concluded his argument with the statement that this would undermine the missions, which constitute the whole purpose of the armed forces.[103] It cannot be denied that the argument of Lord *Sumption* seem to better reflect the realities of the fight against insurgencies and asymmetric warfare. However, which of the two views will prevail in future cases remains to be seen.

Furthermore, it needs to be considered that human rights law may also interact with UN SC resolutions. It may be a possibility that a resolution by the UN SC might have the effect of displacing provisions which protect human rights. This follows from Art. 25 and 103 UN Charter. Pursuant to these provisions, decisions by the UN SC are binding on Member States of the UN and override any other conflicting obligations the Member States might carry under other treaties; this also includes treaties protecting human rights.[104] However, in the recent decision of the Grand Chamber of the ECtHR in the case of *Al Dulimi and Montana Management Inc. v Switzerland* (2016) it was observed that

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102 *Serdar Mohammed v Ministry of Defence* [2014] (n 2) paras 218.

103 *Serdar Mohammed v Ministry of Defence* [2017] (n 5) para 27.

104 However, this raises multiple problems from an international law perspective that cannot be discussed in the scope of this paper; for a detailed discussion, see Kjetil Mujrezionic Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (CUP 2012) 314.

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> … where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights …, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systematic harmonization, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Art. 103 of the UN Charter.[105]

This confirms the presumption the Court had previously established in the judgment in the case of *Al-Jedda v the United Kingdom* (2011).[106] It follows from this case law that the inclusion of a simple reference to detention in a resolution of the UN SC, without an explicit exclusion of Art. 5 ECHR, is not sufficient to displace this provision.[107] Furthermore, in the judgment in the case of *Hassan v the United Kingdom* (2014), the ECtHR established that a resolution of the UN SC would have to provide certain legal safeguards in order to be deemed constitutive as a legal basis for administrative detention; this could be 'accommodated' with the list of permitted grounds for deprivation of liberty laid down in Art. 5 (1) ECHR, which, however, does not include detentions that are solely carried out for security reasons.[108]

If these standards are applied to the resolutions of the UN SC, it is very unlikely that such a resolution might serve as a legal basis for detention. This is because the drafting of resolutions in the UN SC can be and regularly is subject to a highly delicate political negotiating process. As a result, precise language, as would be necessary to fulfil the standards laid down in the aforementioned case law of the ECtHR, is likely to be missing in the respective resolutions.[109] Furthermore, such a solution must be activated in every occurrence of a NIAC. This would bear two disadvantages: First, it is by no way guaranteed that the UN SC would adopt a resolution with the desired content for every conflict and, second, a resolution that needs to be activated prior to each operation is highly problematic from the perspective of the principle of legal certainty.[110]

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105 *Al Dulimi and Montana Management v Switzerland*, App no 5809/08, 21 June 2016, para 140.
106 *Al-Jedda v UK* (n 88) paras 101.
107 Landais and Bass, 'Reconciling' (n 83) 1305.
108 *Hassan v UK* (n 88) para 104.
109 Landais and Bass, 'Reconciling' (n 83) 1305.
110 Ibid, 1306.

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IV. International Agreements or Treaties

Other possibilities from the sphere of international law that might provide a legal basis for detention in situations of extraterritorial 'internationalised' NIACs are international agreements or treaties.[111] An example of this is a Status-of-Forces Agreement (SOFA), which is signed between the government of a State which is about to send its troops to the territory of another State and the government of the host State at the beginning of the military operations. In such an agreement, an explicit reference to the power of the sending State to use detention for security reasons whilst guaranteeing the required safeguards is possible. Only the sending State would need to undertake it to provide all the safeguards guaranteed to a detained individual, but not the host State. The host State would only undertake it to refrain from subjecting individuals transferred to it by the sending State to treatment that would violate basic human rights, for instance the right to life, enshrined in Art. 2 ECHR, and the prohibition of torture, enshrined in Art. 3 ECHR.[112] An example of a SOFA regulation in which such guarantees can be found in international practice is Art. 10 of the SOFA signed between France and Mali in 2013 relating to the military operation 'Serval', which was initiated to oust militants from the north of Mali:[113]

> La Partie française traite les personnes qu'elle pourrait retenir et dont elle assurerait la garde et la sécurité conformément aux règles applicables du droit international humanitaire et du droit international des droits de l'homme, notamment le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II) adopté le 8 juin 1977, et la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984.
>
> La Partie malienne, en assurant la garde et la sécurité des personnes remises par la Partie française, se conforme aux règles applicables du droit international humanitaire et du droit international des droits de l'homme, notamment le Protocole

111 *Medvedyev and Others v France*, App no 3394/03, 29 March 2010, paras 82 (hereafter *Medvedyev v France*).

112 Landais and Bass, 'Reconciling' (n 83) 1306.

113 Décret n° 2013-364 du 29 avril 2013 portant publication de l'accord sous forme d'échange de lettres entre le Gouvernement de la République française et le Gouvernement du Mali déterminant le statut de la force 'Serval', signées à Bamako le 7 mars 2013 et à Koulouba le 8 mars 2013 (1), Journal officiel de la République Française no 0101 du 30 avril 2013 (1), 7426 <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027376103> accessed 13 October 2017.

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> additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II) adopté le 8 juin 1977, et la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants du 10 décembre 1984.
>
> Compte tenu des engagements conventionnels et constitutionnels de la France, la Partie malienne s'engage à ce que, dans le cas où la peine de mort ou une peine constitutive d'un traitement cruel, inhumain ou dégradant serait encourue, elle ne soit ni requise ni prononcée à l'égard d'une personne remise, et à ce que, dans l'hypothèse où de telles peines auraient été prononcées, elles ne soient pas exécutées.
>
> Aucune personne remise aux autorités maliennes en application du présent article ne peut être transférée à une tierce partie sans accord préalable des autorités françaises. La Partie française, le Comité international de la Croix-Rouge (CICR), ou, après approbation de la Partie malienne, tout autre organisme compétent en matière de droits de l'homme, dispose d'un droit d'accès permanent aux personnes remises.
>
> Les représentants de la Partie française, du Comité international de la Croix-Rouge et, le cas échéant, d'un autre organisme mentionné à l'alinéa précédent, sont autorisés à se rendre dans tous les lieux où se trouvent les personnes remises; ils auront accès à tous les locaux utilisés par les personnes remises. Ils seront également autorisés à se rendre dans les lieux de départ, de passage ou d'arrivée des personnes remises. Ils pourront s'entretenir sans témoin avec les personnes remises, par l'entremise d'un interprète si cela est nécessaire.
>
> Toute liberté sera laissée aux représentants susmentionnés quant au choix des endroits qu'ils désirent visiter ; la durée et la fréquence de ces visites ne seront pas limitées. Elles ne sauraient être interdites qu'en raison d'impérieuses nécessités militaires et seulement à titre exceptionnel et temporaire.
>
> La Partie malienne s'engage à tenir un registre sur lequel elle consigne les informations relatives à chaque personne remise (identité de la personne remise, date du transfert, lieu de détention, état de santé de la personne remise).
>
> Ce registre peut être consulté à leur requête par les Parties au présent accord, par le CICR ou, le cas échéant, par tout autre organisme compétent en matière de droits de l'homme mentionné au cinquième alinéa du présent article.
>
> Les dispositions précédentes sont sans préjudice de l'accès du Comité international de la Croix-Rouge aux personnes remises. Les visites du CICR aux personnes remises s'effectueront en conformité avec ses modalités de travail institutionnelles.

However, such a solution might face problems regarding the necessary foreseeability and accessibility requirements for constituting a legal basis for detention in conformity with human rights law.[114] The ECtHR considers legal certainty as particularly important in cases where deprivation of

114 Landais and Bass, 'Reconciling' (n 83) 1306.

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liberty is concerned; therefore, the conditions for deprivation of liberty must be clearly defined under domestic law or under international law. Moreover, the law itself must be foreseeable in its application to meet the standard of 'lawfulness' set by the advice in order to foresee, to a degree that is reasonable in the circumstance of a given case, the consequences which a given action may entail.[115] The quoted provision from the Agreement between France and Mali for instance does not fulfil this standard, as it does not lay down the reasons under which a person may be detained. Therefore, it is not foreseeable for the affected person at which point he or she can be made subject to detention for security reasons by the external power.

IV. Conclusion

It is possible to base detentions in NIACs either on domestic legislation or international legislation; moreover, one can also set aside the relevant human rights provisions on grounds of derogation/suspension or a resolution by the UN SC. However, in cases of States bound by the ECHR in light of the text of the Convention and the presented relevant case law of the ECtHR, the manoeuvring space for such legislation is extremely limited, especially as Art. 5 (1) ECHR does not explicitly mention detention for security reasons as a reason for lawful detention.

E. Summary and Conclusions

IHL applicable to situations of NIACs does not, at the present stage of its development, provide a legal basis for the armed forces of a State to detain individuals for security reasons.[116] This, however, does not mean that detention is prohibited or illegal in NIACs; one must merely look for the legal basis either in international or domestic law. Furthermore, a legal basis for detention is required by the rules enshrined in universal und regional human rights instruments, as the right to liberty of the individual is affected. Nevertheless, the implementation of adequate legislation faces several obstacles in the light of human rights law. The situation is especially complex regarding States bound by the EHCR, as the wording of this human

115 *Medvedyev v France* (n 111) paras 80; see also Landais and Bass, 'Reconciling' (n 83) 1306.

116 See also *Serdar Mohammed v Ministry of Defence* [2014] (n 2) para 293.

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rights instrument does not allow a detention for security reasons. Additionally, the case law of the ECtHR is very strict with regard to the legal requirements of domestic and international legislation in relation to detention. It remains to be seen how the future human rights jurisprudence will both handle and solve the various problems involved.

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