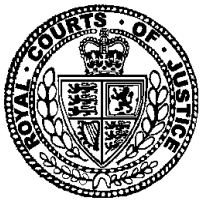

Neutral Citation Number: [2015] EWCA Civ 843

Case Nos: A2/2014/1862; A2/2014/4084; A2/2014/4086

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
THE HON MR JUSTICE LEGGATT
[2014] EWHC 1369 (QB) and [2014] EWHC 3846 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2015

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE LLOYD JONES
and
LORD JUSTICE BEATSON

- -

Between:

Serdar Mohammed & Others	**Respondents**
- and -	
Secretary of State for Defence	**Appellant**

Yunus Rahmatullah & the Iraqi Civilian Claimants	**Appellants**
-and-	
Ministry of Defence and Foreign and Commonwealth Office	**Respondent**

- -

James Eadie QC, Samuel Wordsworth QC, Karen Steyn QC, Marina Wheeler (instructed by **Treasury Solicitors**) for the **Ministry of Defence** in *Serdar Mohammed* and for the **Secretary of State for Defence** in *Qasim & others.*
Richard Hermer QC, Ben Jaffey, Nikolaus Grubeck (instructed by **Leigh Day**) for the **Respondent Serdar Mohammed**
Shaheed Fatima, Paul Luckhurst (instructed by **Public Interest Lawyers**) for the **Respondents Qasim, Nazim** and **Abdullah**
Phillippa Kaufmann QC, Edward Craven (instructed by **Leigh Day**) for the **Appellants (Rahmatullah** and **the Iraqi civilian claimants)**

James Eadie QC, Karen Steyn QC, Ben Watson, Melanie Cumberland (instructed by **Treasury Solicitors**) for the **Respondents** in *Rahmatullah* **(Ministry of Defence** and **Foreign and Commonwealth Office)**
Derek Sweeting QC, James Purnell (instructed by **Treasury Solicitors**) for the **Respondent** in the Iraqi civilian claimants' case **(Ministry of Defence)**

Hearing dates: 9 - 13 February 2015

Further Submissions: 18 and 20 February;
2, 19, 20 and 31 March; 9, 22 and 30 April
and 5 May 2015.

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Approved Judgment

List of abbreviations

APII	Additional Protocol II
ECHR	European Convention on Human Rights
GENEVA III	The Third Geneva Convention
GENEVA IV	The Fourth Geneva Convention
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ISAF	International Security Assistance Force
ISAF SOP 362	ISAF Standard Operating Procedure 362
KFOR	NATO Kosovo Force
MoD	Ministry of Defence
SM	Serdar Mohammed
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSCR	United Nations Security Council Resolution
UK SOI J3-9	UK Standing Operating Instruction J3-9

Lord Thomas of Cwmgiedd CJ, Lloyd Jones and Beatson LJJ:

I THE ISSUES AND SUMMARY

(1) The main appeal

(a) The central issue

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

2. It was common ground that proper arrangements ought to have been in place so that HM armed forces could lawfully detain or secure the detention of any person who posed such a threat. The Secretary of State contended that proper arrangements had been made under which those who posed such a threat could be lawfully detained.

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

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

(b) The two bases of SM's claim

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

   (i) As a public law claim under the Human Rights Act 1998 for breach of his rights under the European Convention on Human Rights (the ECHR). In consequence of the decision of the Supreme Court in *Smith v Ministry of Defence* [2014] AC 52 (*Smith v MoD*) applying the decision of the Strasbourg Court in *Al-Skeini v UK* (2011) 53 EHRR 18, SM, even though a Taliban commander, was entitled to the protection of the ECHR against arbitrary detention by HM armed forces in the course of their military operations in Afghanistan. SM's detention after 96 hours was arbitrary, as HM armed forces were not authorised to detain him for more than 96 hours. In any event there were no proper procedural safeguards in place in relation to his continued detention.

(ii) As a private law claim in tort. It was contended that SM's detention after 96 hours was unlawful under Afghan law which was the applicable law as he was detained in Afghanistan. SM was entitled to make a claim for damages in tort against the Secretary of State under Afghan law and could do so by bringing proceedings in England and Wales.

(c) The position of the Secretary of State

6. The position of the Secretary of State was:

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

(ii) HM armed forces, although conducting military operations in the foreign sovereign State of Afghanistan to assist the Afghan government were, in consequence of the decision in *Smith v MoD,* subject to the prohibition in Article 5 ECHR against the arbitrary detention of persons, including Afghan citizens who were fighting HM armed forces.

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

(iv) The private law claim in tort failed as under Afghan law there was authority to detain SM.

(v) Even if there was no authority under Afghan law to detain SM, the private law claim failed as SM's detention was an act of state of the UK Government as it was carried out pursuant to a policy of detention which was integral to HM Government's military operations in Afghanistan. It is accepted by the Secretary of State that the public law claim under the Human Rights Act 1998 for a breach of Article 5 ECHR could not be defeated by the defence of act of state.

7. The judge in a judgment of great clarity and erudition [2014] EWHC 1369 (QB) decided all the issues in the main appeal, save that on act of state, against the Secretary of State. The Secretary of State appeals on all of the issues save act of state. SM cross appeals the decision of the judge in relation to act of state.

(d) Summary of our conclusions in relation to the main appeal

8. It is common ground before us, in the light of the decision in *Smith v MoD,* that, although SM was detained in Afghanistan, his detention was governed by the ECHR. We explain the territorial application of the ECHR at paragraphs 82 to 106 below. Our significant reservations in respect of the correctness of the decision extending the ECHR to the battlefield as established by the decision of the Strasbourg Court in *Al-Skeini* are set out at paragraphs 93 to 97. We are, however, bound by the decision of the Supreme Court in *Smith v MoD* which applies the decision in *Al-Skeini*.

9. We have concluded that the arrangements made by the Secretary of State in relation to the deployment of HM armed forces to Afghanistan and for the detention of those engaged in attacking HM armed forces did not enable persons to be detained by HM armed forces for longer than 96 hours; such persons should then, subject to the qualifications we set out in paragraph 10, have been handed over to the Afghan authorities or released. The public law and private law claims therefore lie in principle against the Secretary of State. We have concluded that, whether brought as a public law claim or as a common law private law claim in tort, SM's claim succeeds because the Secretary of State is unable to show a lawful basis for the detention. Our reasons for that conclusion on the assumed facts in relation to SM can be summarised as follows:

(i) The actions of HM armed forces were not attributable to ISAF: see paragraphs 49 to 72. HM armed forces could not rely on the immunities of the UN and the Secretary of State was therefore responsible for any unlawful detention of SM by HM armed forces: see paragraphs 49 to 81.

(ii) There was no authority to detain SM for longer than 96 hours under any of the three bases advanced by the Secretary of State:

(a) Afghan law required any person detained by HM armed forces to be handed over to the Afghan authorities after 72/96 hours. HM armed forces had no authority under Afghan law to detain any person thereafter: see paragraphs 130 to 137.

(b) UNSCRs provided ISAF with authority to detain for the accomplishment of its mission, but the policy of ISAF, set by NATO command, limited detention to a period of 96 hours before the detainee had to be handed over to the Afghan authorities. The United Kingdom's own policy which by 2010 provided a mechanism for authorising detention for a longer period was not authorised by ISAF and therefore HM armed forces could not rely on the UNSCR as providing the authority to detain SM: see paragraphs 138 to 163. Nor was any attempt made to secure a change to Afghan law to accommodate the policy.

(c) It was common ground that the conflict in Afghanistan was to be categorised as a non-international armed conflict. International humanitarian law is developing as a system of international law that seeks to govern the way in which all types of armed conflict are conducted by striking an appropriate balance between the principles of military necessity and of humanity. International humanitarian law has not reached the stage where it confers a right to detain in a non-international armed conflict as distinct from an international armed conflict: see paragraphs 164 to 253.

These were the only bases of authority to detain SM which were advanced by the Secretary of State. He did not maintain that there was authority under English law to detain SM for longer than 96 hours, only that he had an act of state defence to the private law claim by SM based on foreign law.

(iii) Procedural safeguards appropriate under international law for a non-international armed conflict were not put in place by the Secretary of State.

What was required included periodic review by an impartial and objective authority (which did not have to be a court or a tribunal) and an opportunity to participate in the review. It is doubtful whether the authority that conducted the review of SM's detention was impartial and objective but it is clear that SM was not given an opportunity to participate in the reviews. SM's detention was in any event made unlawful as a result of the failure to provide such procedural safeguards: see paragraphs 254 to 298.

(iv) As there was no authority to detain and proper procedural safeguards were not provided, the public law claim succeeded on the basis that the detention of SM was arbitrary and therefore contrary to Article 5 ECHR.

(v) As SM's detention took place in Afghanistan, under the Private International Law (Miscellaneous Provisions) Act 1995, the applicable law for the private law claim is Afghan law. On the basis of Afghan law (as found by the judge) the detention was not lawful. Accordingly, a private law claim in tort under the law of Afghanistan could in principle be made in the courts of England and Wales: see paragraphs 299 to 309.

(vi) In the circumstances of the assumed facts of SM's case, the private law claim in tort was not defeated on grounds of public policy. The defence of act of state was inapplicable as the claim was justiciable and no rule of public policy prevented the courts of England and Wales giving effect to Afghan law as the applicable law: see paragraphs 310 to 376.

10. We should also note four matters:

(i) As we have observed, it was common ground that appropriate and lawful arrangements should have been made by the then Secretary of State and those advising him for the detention of those who posed a threat to HM armed forces and the accomplishment of ISAF's mission in Afghanistan. This task can now be seen, however, to be very complex in the light of the extension of the ECHR to military operations carried out overseas by HM armed forces: see the decision of the Strasbourg Court in *Al-Skeini* in 2011 and that of the Supreme Court in *Smith v MoD* in 2013. This case is therefore concerned with the retrospective application of those decisions to events in Afghanistan in 2010. We set out (a) our significant reservations in relation to the legal basis for the decision of the Strasbourg Court in *Al-Skeini* (see paragraphs 83 to 94 and 106) and (b) the practical difficulties that have arisen from the application of that decision to the law of England and Wales by the decision in *Smith v MoD* (see paragraphs 95 to 97).

(ii) The Secretary of State did not put proposals for legislation to the UK Parliament in 2006 or any time thereafter. It is not for us to set out what that legislation might have provided, but such legislation might have taken the form of a bar of specified claims by foreign nationals or have provided for specific authority for HM armed forces to detain in operations overseas. Both of these were accepted before us on behalf of SM to be possibilities. The latter reflects the approach taken by the United States.

(iii) It is the contention of the Secretary of State that SM was being detained after 6 May 2010 by HM armed forces on behalf of the Afghan authorities who had asked HM armed forces to continue to hold SM as they had no room in their

custody facilities; this was referred to in the judgment of the judge as "logistical detention". It could be seen as acting as agent for the host State and therefore possibly authorised or outside the 96 hour rule. Although the question as to whether there was authority to detain for this purpose was not expressly explored before the judge or before us, detention during this period was unlawful as the required procedural protections for detention were not met.

(iv) The preliminary issues do not encompass the contention by SM that HM armed forces should on 26 July 2010 not have handed SM over to the Afghan authorities in respect of which he has brought a second claim. He contends that, as handing him over to the Afghan authorities subjected him to torture or inhuman or degrading treatment or to the risk of an unfair trial, HM armed forces were in further breach of the ECHR by handing him over and not releasing him on the expiry of 96 hours. On that basis, the second claim for damages encompasses the treatment he alleges he suffered at the hands of the Afghan authorities after his transfer to them on 25 July 2010. The issues in relation to that second claim were not the subject of the hearing before the judge and do not directly arise on the appeal. However, that second claim illustrates the real and substantial difficulties that faced HM armed forces as a result of the application of the ECHR to their mission in Afghanistan; as we have noted, we refer further to these difficulties at paragraphs 95 to 97.

(2) The conjoined appeals

11. In addition to the main appeal by SM, there were before us similar issues in two other sets of litigation:

(i) At the same time as the judge heard the preliminary issues in relation to SM, he heard argument on similar issues from those instructed on behalf of Mohammed Qasim, Mohammed Nazim and Abdullah in proceedings that had been brought against the Secretary of State for Defence. These claimants were referred to as the PIL claimants (see paragraph [17] of the judgment). The PIL claimants' claim is one based on the HRA and domestic public law and not a private law claim in tort: see paragraph 365 below.

(ii) Issues of act of state, both in relation to the acts of a foreign sovereign (sometimes referred to as foreign act of state) and the actions of the United Kingdom as the domestic sovereign (sometimes referred to as Crown or domestic act of state) had arisen on claims by Yunus Rahmatullah and three others in relation to their detention in Iraq by HM armed forces. This had been determined subsequently by the judge in those other proceedings.

(a) The PIL claimants

12. Mohammed Qasim and Mohammed Nazim were detained by HM armed forces in Afghanistan in 2012/13. The Secretary of State contended that they were detained because they were suspected of involvement in funding the insurgency and therefore posed a threat to the accomplishment of the ISAF mission. Abdullah was detained on the grounds that he had been biometrically linked to an AK-47.

13. Mohammed Qasim and Mohammed Nazim continued detention after 96 hours was justified on the basis that intelligence exploitation was likely to provide significant new information about the financing of the insurgency.

14. It is said that each of these claimants was also held for a significant period of time by HM armed forces at the request of the Afghan authorities on the basis that no Afghan prison space was available to hold them (known as logistical detention). Mohammed Nazim was held on this basis between 18 October 2012 until 6 July 2013 (261 days), Mohammed Qasim from 17 November 2012 until 6 July 2013 (231 days) and Abdullah from 15 September 2012 until 6 July 2013 (290 days).

15. The judge observed at [253] of his main judgment that none of Mohammed Qasim, Mohammed Nazim or Abdullah was alleged to have posed an imminent threat which could have been met by the use of lethal force. At [423] he stated that the detention of these claimants had been for up to 290 days in each case.

16. The UNSCR which authorised ISAF at the time of their detention was UNSCR 2011 (2011) and 2069 (2012); there was no material distinction between those UNSCRs and UNSCR 1890 of 2009 which was the UNSCR in force when SM was detained.

(b) The claim by Yunus Rahmatullah, Amanatullah Ali and the Iraqi civilian claimants

17. Yunus Rahmatullah is a citizen of Pakistan who was detained in Iraq in February 2004 by HM armed forces. Shortly thereafter he was transferred to the custody of the US armed forces. Between then and the end of March 2004, he was transported to the US detention facility at Bagram Airbase Afghanistan. He remained in custody for the next 10 years. He contends that he was there subjected by the US armed forces to torture and other inhuman and degrading treatment.

18. After proceedings for *habeas corpus* against the Secretary of State (see *Rahmatullah v Secretary of State for Defence* [2012] 1 WLR 1462 and [2013] 1 AC 614) failed to secure his release, he was transferred to Pakistan in May 2013. Yunus Rahmatullah was released from custody on 17 June 2014.

19. In March 2013, he began a civil claim for damages against the Ministry of Defence (MoD) and the Foreign and Commonwealth Office in tort and under the Human Rights Act 1998. The MoD and the Foreign and Commonwealth Office applied for an order under CPR Part 11 to the effect that the court had no jurisdiction or should not exercise any jurisdiction. It was agreed that the court should determine preliminary issues relating to State immunity and both kinds of act of state (foreign act of state and domestic or Crown act of state) on assumed facts. In a full judgment of great clarity and erudition [2014] EWHC 3846 (QB), the judge set out the issues in full at [7] of his judgment.

20. Yunus Rahmatullah also brought a claim for judicial review in which Amanatullah Ali is a second claimant. He is another citizen of Pakistan who was arrested by HM armed forces in Iraq, transferred to US custody and sent to Bagram Airbase in Afghanistan where he was still in custody at the time of the hearing before the judge. The judicial review seeks an investigation into their transfer to US custody and of the failure by HM Government to prevent their transfer to Afghanistan or to seek their return.

21. Among the many hundreds of claims being brought by Iraqi civilians against the MoD arising out of the invasion of Iraq (known as the Iraqi Civilian Litigation), there are

some claims brought by civilians detained in Iraq by HM armed forces and transferred to US custody; they allege that whilst in US custody in Iraq they were subjected to torture or inhuman and degrading treatment.

22. As the preliminary issues that had arisen in the claim by Yunus Rahmatullah were identical to issues that were raised in the Iraqi Civilian Litigation in relation to those who had been arrested by HM armed forces and transferred to US custody, it was decided that three test cases would be heard at the same time on those preliminary issues. The claimants were anonymised as XYZ, ZMS and HTF and we refer to them as the Iraqi civilian claimants; the detailed allegations made by each of the Iraqi civilian claimants are set out at [13] of the judge's judgment.

(c) The issue on act of state in the claim by Yunus Rahmatullah and the Iraqi civilian claimants

23. In this appeal from the judge's judgment in the case of Yunus Rahmatullah and the Iraqi civilian claimants we are solely concerned with the issue of Crown or domestic act of state. It is only necessary to refer to that section of his judgment ([179] to [226]). As made clear by the judge at [179] of his judgment in that case, the defence of Crown or domestic act of state was relied on in answer to the claims that the claimants were unlawfully detained by HM armed forces before being transferred to the US and that the transfer to US custody was unlawful.

24. The judge held in relation to this issue that, if the MoD showed at the subsequent trial that the arrest and detention of Yunus Rahmatullah and the Iraqi civilian claimants by HM armed forces was authorised pursuant to a lawful policy for detention made by HM Government in advance, then a private law claim in tort for the arrest and detention was barred as an act of state (see [221] of the judge's judgment in that case).

25. Similarly, if the MoD showed that the transfer to US custody by HM armed forces was authorised pursuant to a lawful policy of HM Government, their private law claim was barred as an act of state.

26. As Yunus Rahmatulah and the Iraqi civilian claimants had appealed against the decision of the judge, it was agreed that as the issue in relation to Crown or domestic act of state was very similar to the issue that had arisen in the claim of SM, this one issue should be joined to the appeal of SM. We refer to the assumed facts at paragraphs 46 and following below.

(d) Our conclusion

27. The issues raised by the PIL claimants are justiciable, but, as they have not brought a private law claim in tort, the second limb of the act of state principle has no application. In the cases of Yunus Rahmatullah and the Iraqi civilian claimants the principles we identify on act of state in the appeal of SM (see paragraphs 358 to 361 below) apply. However, because the facts in their cases have not been established, we are unable to determine whether or not a defence of act of state is available to the Secretary of State in their cases: see paragraphs 366 to 368.

(3) The organisation of the judgment

28. The judgment covers the following topics:

(i) Section II: The facts, factual assumptions and legal assumptions: see paragraphs 29 to 48.

(ii) Section III: The liability of the Secretary of State on behalf of the United Kingdom; attribution and UN immunity: paragraphs 49 to 81.

(iii) Section IV: The public law claim: the scope of the ECHR and its relationship to International Humanitarian Law: paragraphs 82 to 124.

(iv) Section V: The public law claim: lawful authority to detain: see paragraphs 125 to 253.

(v) Section VI: The public law claim: procedural safeguards: paragraphs 254 to 298.

(vi) Section VII: The private law claim and the defence of act of state: paragraphs 299 to 376.

II THE FACTS, FACTUAL ASSUMPTIONS AND LEGAL ASSUMPTIONS

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

(a) The original involvement of HM armed forces in Afghanistan

29. HM armed forces first became involved in Afghanistan in October 2001 as part of the coalition forces led by the United States as part of "Operation Enduring Freedom" launched against Osama bin Laden, the Taliban and Al Qaeda in consequence of the attacks of 11 September 2001 in New York and Washington, D.C.

30. It is not necessary to set out the legal basis for that involvement, as the arrest and detention of SM occurred under a legal regime that was subsequently established in and after December 2001.

(b) The Bonn Agreement

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

> "1. The participants in the UN Talks on Afghanistan recognise that the responsibility for providing security for law and order throughout the country resides with the Afghans themselves. To this end, they pledge their commitment to do all within their means and influence to ensure such security, including for all United Nations and other personnel of international governmental and non-governmental organisations deployed in Afghanistan.
>
> 2. With this objective in mind, the participants request the assistance of the international community in helping the new Afghan authorities in the establishment and training of new Afghan security and armed forces.
>
> 3. Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in

> the UN Talks on Afghanistan request the United Nations Security Council to consider authorising the early deployment to Afghanistan of a United Nations mandated force. This force will assist in the maintenance of security for Kabul and its surrounding areas. Such a force could, if appropriate, be progressively expanded to other urban centres and other areas.
>
> 4. The participants in the UN Talks on Afghanistan pledge to withdraw all military units from Kabul and other urban centres and other areas in which the UN mandated force is deployed. It would also be desirable if such a force were to assist in the rehabilitation of Afghanistan's infrastructure."

32. It is important to note that this agreement reflected a basic norm of international law that within the territory of Afghanistan, as a sovereign State, the responsibility for the rule of law and the maintenance of public order is that of the authorities of Afghanistan; the role of the international community through its armed forces was to assist those authorities. The ISAF forces never occupied Afghanistan.

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

(c) UN Security Council Resolution 1386 of 2001; the establishment of ISAF

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

    (i) It authorised "the establishment for 6 months of [ISAF] to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment";

    (ii) Called upon Member States to contribute personnel, equipment and other resources to ISAF; and

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

35. Successive resolutions were passed in very similar terms. The one current at the date of the arrest and detention of SM was UNSCR 1890 of 2009. We consider the authorisation given to HM armed forces under the UNSCRs at paragraphs 138 to 163 below.

(d) The Military Technical Agreement of January 2002

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

    (i) Article I(2) of the Military Technical Agreement stated that the Interim Administration "understands and agrees the Mission of the ISAF is to assist it in the maintenance of security" in the geographical area of responsibility covered by the Military Technical Agreement.

    (ii) Article III(1) stated:

> "The Interim Administration recognises that the provision of security and law and order is their responsibility. This will include maintenance and support of a recognised Police Force operating in accordance with internationally recognised standards and Afghanistan law and with respect for internationally recognised

> human rights and fundamental freedoms, and by taking other measures as appropriate."

(iii) Article IV(1) of the Military Technical Agreement referred to the authorisation of ISAF by UNSCR 1386 to assist the Interim Administration in the maintenance of security.

(iv) Article IV(2) stated:

> "The Interim Administration understands and agrees that the ISAF Commander will have the authority, without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission."

(e) The command of ISAF

37. Several States contributed armed forces to ISAF. Deployment at first was relatively small, but it grew over the ensuing years, particularly after the "surge" ordered by President Obama in December 2009. In April 2013, ISAF comprised about 100,000 troops contributed by 50 nations of whom about 8,000 were members of HM armed forces.

38. Command rotated among the troop contributing nations until August 2003, when it was transferred to NATO. Under that overall command, a regional command structure was established.

39. ISAF established a policy and procedure for detention set out in ISAF Standard Operating Procedures for detention (ISAF SOP 362) to which we will refer when considering the issue of the authority to detain under the UNSCRs (see paragraphs 149 to 152 below) and the procedural safeguards required (see paragraphs 255 to 257 below). The principal feature of this policy was that it authorised detention for only 96 hours before transfer to the Afghan authorities was required. The United Kingdom, however, formulated its own policy in relation to the operations in Afghanistan in early 2006 in the circumstances we summarise in paragraph 40. Its policy was set out in Standard Operating Instruction J3-9 (UK SOI J3-9) which was amended on 6 November 2009 and 12 April 2010.

40. The formulation by the United Kingdom of its own policy occurred at the time of a major redeployment of HM armed forces. Around 3,500 troops from the United Kingdom arrived in Helmand province between January and July 2006. This led to an increased likelihood of it becoming necessary for the United Kingdom to detain persons for reasons of force protection. Prior to this the policy was to avoid detaining individuals where possible. The security environment in Helmand province where the newly deployed forces were located led to a change in policy and to UK SOI J3-9. We describe how that policy developed at paragraph 153 below. By the time of SM's detention in 2010, the policy operated by the United Kingdom provided a mechanism for approving longer periods of detention than the ISAF policy, principally to try to obtain intelligence, before handover to the Afghan authorities. We consider this detention policy and UK SOI J3-9 at paragraphs 68(i) (in relation to the attribution of SM's detention to ISAF), 153 (authority to detain) and 258 to 268 (procedural safeguards).

(f) The Memorandum of Understanding between the United Kingdom and Afghan Government made in 2006

41. On 23 April 2006, the United Kingdom concluded a Memorandum of Understanding with the Afghan Government (UK/Afghanistan Memorandum of Understanding) about the transfer by HM armed forces to the Afghan authorities of persons detained in Afghanistan. The UK/Afghanistan Memorandum of Understanding referred to:

> "the right of UK forces operating under ISAF to arrest and detain persons where necessary for force protection, self-defence, and accomplishment of mission so far as is authorised by the relevant UNSCRs".

Paragraph 3.1 stated:

> "The UK [armed forces] will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK [armed forces] in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility."

42. There was no provision in the UK/Afghanistan Memorandum of Understanding for HM armed forces to detain persons for intelligence purposes rather than transferring them, but HM armed forces were given a right to question any person transferred when in Afghan custody.

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

43. SM is a citizen of Afghanistan. On 7 April 2010, he was arrested by HM armed forces. There is a factual dispute about the circumstances and reasons for his capture (see the main judgment at [9] to [11]). It was agreed that the preliminary issues would be determined on the basis of the facts set out in paragraphs 26 to 65 of the Secretary of State's defence. They can be summarised as follows:

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

(ii) When HM armed forces attacked, they came under heavy fire. In the ensuing exchange of fire SM and another insurgent were captured.

(iii) SM was taken to Camp Bastion, Lashkar Gah, Helmand Province. He was told that he had been detained. The reasons given to him were that he posed a threat to the accomplishment of the ISAF mission and would either be released or transferred as soon as possible to the Afghan authorities.

(iv) SM was held at Camp Bastion for 7 days.

(v) On 14 April 2010, he was taken to the UK detention facilities at Kandahar Airfield. He was returned to Camp Bastion on 31 May 2010. He remained there until he was transferred to a prison controlled by the Afghan authorities on 25 July 2010.

(vi) Although SM claimed to be a farmer, the intelligence subsequently received by the MoD was to the effect that he was a senior Taliban Commander who

was involved with the large scale production of Improvised Explosive Devices and was believed to have commanded a local Taliban training camp in 2009.

(vii) SM's detention was reviewed on 8 April 2010 by the Detention Review Committee at Camp Bastion. It was thereafter reviewed every 72 hours until 4 May 2010 under the procedure examined at paragraphs 270 and following below. He had no access to a lawyer and did not receive family visits. (The procedures governing detention for a period exceeding 96 hours are set out at paragraphs 263 to 268 below.)

(viii) On 12 April 2010, a Minister at the United Kingdom MoD reviewed SM's detention and approved his short term detention on the basis that it appeared likely that questioning him would provide significant new intelligence vital for force protection purposes and significant new information on the nature of the Taliban insurgency.

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

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

(xi) He was transferred to the Afghan authorities on 25 July 2010. There was no independent evidence of what happened to him thereafter; he was visited by UK personnel on three occasions at the NDS prison at Lashkar Gah, but made no allegations of mistreatment. He made allegations of mistreatment after transfer to a prison at Kabul.

(xii) He was tried and convicted in the Afghan courts and sentenced to 10 years imprisonment. He appears to have been released in June 2014.

(3) The legal assumptions as to SM's claim

44. As we have set out at paragraph 5(i), the principal claim made by SM was a public law claim for breach of Article 5 ECHR. It was common ground before us that, on the basis of the decision of the Supreme Court in *Smith v MoD* accepting *Al-Skeini,* such a claim would lie unless it could be shown that the detention was not arbitrary. It would not be arbitrary if there was a lawful power to detain which was not arbitrary and the detention was subject to the requisite procedural safeguards.

45. As we have set out at paragraph 5(ii), a private law claim in tort would lie if there was no authority to detain according to the law of the place of detention and the claim is not barred by the defence of act of state, as the Secretary of State submitted it is (see paragraph 6(v)).

(4) The factual assumptions as to the claims by Yunus Rahmatullah and the Iraqi civilian claimants

46. It was to be assumed for the purposes of the preliminary issues in the action by Yunus Rahmatullah and the Iraqi civilian claimants that the allegations made by them were

true. We have outlined at paragraphs 17 to 26, the basic allegations made by these claimants.

47. It was asserted by the MoD that the detention of Yunus Rahmatullah and the Iraqi civilian claimants had been made pursuant to a policy devised by the MoD in advance.

48. It was alleged by the Iraqi civilian claimants that the transfer to US custody was pursuant to a policy which the United Kingdom and the USA devised at the highest levels (see [225] of the judge's judgment in that case).

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

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

(i) The actions of HM armed forces were not attributable to the United Kingdom, but either to ISAF or the United Nations.

(ii) HM armed forces were entitled to the immunities enjoyed by the United Nations.

(1) ATTRIBUTION TO ISAF/UN

50. The Secretary of State submits that no claim can be brought against him under the the ECHR in respect of the impugned acts because the conduct of the armed forces of the United Kingdom in capturing and detaining SM is attributable to the United Nations Security Council and not to the Secretary of State.

(a) The facts in relation to the control over SM's detention

51. The judge made the following findings of fact in relation to the specific case of SM:

(i) SM was captured by HM armed forces and held throughout the period of his detention at UK military bases, mainly Camp Bastion, which was under the full and exclusive *de facto* control of the United Kingdom.

(ii) SM's detention was authorised by a UK commander and, until he was transferred to the Afghan authorities, was reviewed periodically within a purely UK chain of command. Decisions to extend his detention were taken by UK Ministers or high-ranking officials within the Ministry of Defence. No authorisation was sought from the commander of ISAF.

(iii) The UK detention policy under which SM's detention was authorised differed materially from ISAF's policy (ISAF SOP 362) to which we refer in more detail at paragraphs 149 and following. The most striking difference was that under ISAF's policy SM could not have been detained for more (or much more) than 96 hours whereas pursuant to the UK policy his detention could be and was authorised for a much longer period (at [185]).

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

52. In *Behrami v France, Saramati v France, Germany and Norway* (2007) 45 EHRR SE10 the Grand Chamber of the Strasbourg Court was concerned with questions of attribution in relation to the activities in Kosovo of the interim administration (UNMIK) and the international security presence (KFOR). The United Nations Security Council by UNSCR 1244 of 10 June 1999 decided on the deployment in Kosovo under UN auspices of international civil and security presences and authorised Member States, inter alia, to establish the international security presence in Kosovo "with all necessary means to fulfil its responsibilities". The resolution stipulated that the international security presence must be deployed under unified command and control. It was pursuant to this resolution that UNMIK and KFOR were established. The *Saramati* case concerned detention by UNMIK police officers acting on the orders of the commander of KFOR. Mr Saramati complained that his extra-judicial detention for a period of about six months between July 2001 and January 2002 was contrary to Article 5 ECHR and that Norway and France, the States of nationality of successive commanders of KFOR, were liable.

53. The Grand Chamber rejected that submission and held that the detention was solely attributable to the United Nations. It considered that the key question was whether the Security Council "retained ultimate authority and control so that operational command only was delegated" (at [133]). In its view the following factors established that the Security Council retained such ultimate authority and control. First, Chapter VII allowed the Security Council to delegate to Member States. Secondly, the relevant power was a delegable power. Thirdly, "that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself". Fourthly, the resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision, as it set out the objectives to be attained, the roles and responsibilities accorded, as well as the means to be employed. Fifthly, the leadership of the military presence was required by the resolution to report to the Security Council so as to allow the Security Council to exercise its overall authority and control (at [134]).

54. The Grand Chamber found that the UNSCR gave rise to a chain of command. The Security Council retained ultimate authority and control over the security mission and it delegated to NATO both the power to establish and the operational command of the international presence KFOR. NATO in turn fulfilled its command mission via a chain of command to the commander of KFOR. The court accepted that troop contributing nations retained some authority over their troops, NATO's command of operational matters was not intended to be exclusive. The essential question was whether, despite such involvement by troop contributing nations, NATO's operational command was effective. The court was not persuaded that the involvement of the troop contributing nations, either actual or structural, was incompatible with the effectiveness of NATO's operational command.

55. Significantly for present purposes, the Grand Chamber did not find any suggestion or evidence of any actual orders by troop contributing nations concerning or interference in the matter of the detention of Mr Saramati (at [135] to [139]). Having found that the conduct of the commander of KFOR in authorising Mr Saramati's detention was attributable to the United Nations, the court went on to hold that those actions could not be attributed to the respondent States. It considered that the ECHR could not be interpreted in a manner which would subject the acts and omissions of contracting parties which were covered by a UNSCR and which occurred prior to or in the course

of such missions to the scrutiny of the Strasbourg court because to do so would interfere with the fulfilment of the United Nation's key mission in this field, including the effective conduct of its operations (at [149]).

56. In *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 the claimant sought judicial review of his detention by HM armed forces in Iraq on the ground that it violated Article 5 ECHR. When the case came on appeal before the House of Lords, the Secretary of State was prompted by the decision of the Strasbourg court in the *Behrami* and *Saramati* cases to submit that the effect of the UNSCRs authorising the Multi-National Force in Iraq was that the claimant's detention was attributable to the United Nations and thus outside the scope of the ECHR. The issue was decided in favour of the claimant. However, Lord Rodger dissented on this point and Lord Brown, in a postscript, expressed his doubt as to the correctness of his conclusion on this issue.

57. In his speech, Lord Bingham (with whom Baroness Hale and Lord Carswell agreed for the reasons he gave) explained that it was common ground between the parties that the governing principle was that expressed by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organizations:

> "The conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

58. At paragraph 22 of his speech Lord Bingham identified the critical issues:

> "Against the factual backgrounds described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative."

He summarised his conclusion as follows:

> "The analogy of the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multi-national force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law calls for no less, and it is one thing to receive reports, another to exercise effective command and control"

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

since the invasion and had been recognised already by UNSCR 1483, which welcomed the willingness of Member States to contribute personnel. It continued:

> "The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States was requested to report periodically to the Security Council about the activities of the Multi-National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority." (at [80])

60. The Grand Chamber also noted that there was no indication in UNSCR 1546 that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously (at [81]). The Grand Chamber also noted that the Secretary General of the United Nations and the UN Assistance Mission for Iraq repeatedly protested at the extent to which security internment was being used by the Multi-National Force in Iraq. As a result it concluded that the role of the United Nations as regards security in Iraq in 2004 was quite different from its role regarding security in Kosovo in 1999. Referring to Article 5 of the International Law Commission draft Articles on the Responsibility of International Organizations, the Grand Chamber considered that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that, accordingly, the applicant's detention was not attributable to the UN (para 84). It then stated its conclusion as follows:

> "The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout. The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-UK representatives from the Multi-National Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom." (at [85])

(c) The judge's decision

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

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

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

Each of these matters must now be considered in turn.

(d) Did the UN Security Council exercise the requisite control over ISAF?

62. At the forefront of the submissions made on behalf of SM was the decision of the Supreme Court, not cited to the judge, reported as *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745. The report contains not only the judgments in *Al-Sirri,* but also the judgments in *DD (Afghanistan) v Secretary of State for the Home Department* which touched on the status of ISAF. DD, a citizen of Afghanistan, claimed asylum in the United Kingdom on the basis of his association with his brother, a commander who had allied with the Taliban and had subsequently been assassinated. In an attempt to save his own life DD had joined forces with those engaged in military operations against the Afghan government and ISAF. The Secretary of State rejected his claim on the ground that he was guilty of acts contrary to the purposes and principles of the United Nations within Article 1F(c) of the Refugee Convention and therefore excluded from the definition of refugee. In their joint judgment Baroness Hale and Lord Dyson MR (with whom Lord Kerr, Lord Wilson and Lord Phillips agreed) made the following observation:

> "ISAF is an armed force, but it is not a United Nations force. It has never been under direct United Nations command. It was initially under the lead command of single nations (starting with the United Kingdom). Since August 2003 it has been under the command of NATO." (at [58])

63. It was therefore submitted that in the light of this decision the actions of the MoD in detaining SM could not be attributed to the United Nations and the judge's conclusions to the contrary could not be sustained. However, the observation in *Al-Sirri* to the effect that ISAF was not under direct UN command is not inconsistent with the judge's conclusion that the Security Council had effective control or ultimate authority and control over ISAF in the sense required to enable conduct of ISAF to be attributed to the United Nations. The Supreme Court in *Al-Sirri* was not concerned with the question of attribution now under consideration, nor was it referred to any of the authorities considered above.

64. In further written submissions on behalf of SM and the PIL claimants several additional arguments were advanced:

(i) It was pointed out that whereas KFOR was deployed in Kosovo "under UN auspices", those words were not used in the UNSCRs deploying the Multi-National Force in Iraq or ISAF. This indicated that there was no intention on the part of the United Nations to exercise ultimate authority over the mission of ISAF or to establish a subsidiary organ of the United Nations. Lord Brown drew attention to this difference in his judgment in *Al-Jedda* at [145]. However, we agree with the judge in the present case that it is difficult to see why there should be any magic in the use of this particular formula. Furthermore, the Strasbourg court does not appear to have been influenced by this difference when it came to consider the case of *Al-Jedda*.

(ii) It was submitted that in establishing KFOR the Security Council fixed the limits of its mandate with some precision whereas ISAF's mandate was, if anything, less precisely defined than that of the Multi-National Force in Iraq and that of KFOR, which were expressed in terms of a broad general "authority". We have considered the different terms of the UNSCRs establishing these three international forces. However, we are unable to see that anything turns, for present purposes, on the degree of precision with which the mandate is defined.

(iii) It was submitted that whilst ISAF was technically a newly created force, international forces were already physically present in Afghanistan when the Security Council passed the relevant UNSCR. Similarly, it was said, the Multi-National Force was already operating in Iraq when it was given a mandate by the Security Council. By contrast UNSCR 1244 was adopted before the forces making up KFOR entered Kosovo. This is a matter which both Lord Bingham in the House of Lords and the Strasbourg court considered relevant in *Al-Jedda*. However, like Lord Rodger in *Al-Jedda* (at [61]) and the judge in the present case, we doubt that this is relevant to the issue under consideration. In our view what matters is whether the United Nations had ultimate authority and control over the actions of ISAF at the time of the conduct of which complaint is made.

(iv) The further point was made that in Kosovo the United Nations had effectively assumed the role of the Government and, with that, ultimate responsibility for security. As a result, KFOR directly supported the United Nations rather than any national Government in maintaining security. By contrast in Iraq and Afghanistan the Multi-National Force and ISAF respectively were authorised to support the national authorities in establishing and maintaining security. However, in our view, this undoubted difference in the factual situations would not necessarily mean that ISAF's actions are not attributable to the United Nations.

65. Much more to the point, it seems to us, is the attention paid by the Grand Chamber in the *Behrami* and *Saramati* cases to the command structure. Here we agree with the judge that the critical feature of the arrangements in Kosovo was a clear chain of command from the Security Council through NATO to the commander of KFOR who authorised the detention of the applicant. By contrast, no such clear command structure existed in Iraq linking the Multi-National Force to the Security Council. On the contrary, the unified command structure under which the Multi-National Force operated had been in place prior to the UNSCRs conferring the mandate on the Multi-National Force and was not changed as a result of those Resolutions. In the case of Afghanistan, however, we consider that there did exist a chain of command from the Security Council to ISAF which justifies the conclusion that the actions of ISAF are attributable to the United Nations. We are unable to improve on the Judge's explanation:

> "Turning to the position in Afghanistan, it is true that … UK along with US armed forces were already present in Afghanistan as part of Operation Enduring Freedom before the UN talks took place which led to a request to the United Nations to provide an international security force. However, ISAF was established pursuant to UNSCR 1386 as a newly created force. As explained by Mr Devine in evidence, the UK contribution to ISAF was distinct from its contribution to Operation Enduring Freedom. Crucially, as I see it, ISAF had its own command structure. Initially, the leadership of ISAF was provided by different nations on a rotating basis: first the UK, then Turkey, followed by Germany and the Netherlands jointly. Subsequently, on 11 August 2003 NATO took command of ISAF at the request of the UN and the Government of Afghanistan. Since then, overall operational command of ISAF has been vested in NATO, to whom the commander of ISAF … reports. It seems to me that the chain of delegation of command for ISAF is essentially similar to the chain of delegation and command for KFOR, as described in the judgment of the European Court in the *Behrami* and *Saramati* cases (para 135).

> In these circumstances, although I do not find the question easy, I consider that the UN Security Council has "effective control" ("ultimate authority and control") over ISAF in the sense required to enable conduct of ISAF to be attributed to the UN." (at [177-8])

66. Similar reasoning was employed by the US Supreme Court in *Munaf v Geren* 533 US 1 (2008). There, the US Government sought to resist petitions for *habeas corpus* by individuals detained by US troops in Iraq on the basis that the US courts lacked jurisdiction because the detaining forces were operating as part of the multi-national force pursuant to the authority of the United Nations and not the authority of the United States. In rejecting the submission the court considered decisive the fact that the petitioners were in the immediate custody of US soldiers who answered only to a US chain of command.

(e) Did ISAF authorise SM's detention?

67. The judge considered, nevertheless, that ISAF was not responsible for SM's detention. He made findings of fact that neither the commander of ISAF nor any other ISAF detention authority authorised the detention of SM. On the contrary, the judge found that SM was detained by HM armed forces pursuant to a national detention policy (UK SOI J3-9) established and operated by the United Kingdom in Afghanistan which differed in essential respects from that of ISAF (ISAF SOP 362).

68. In our view there was compelling evidence to support this conclusion. The judge referred to the following matters:

(i) The chain of command for authorising detention set out in the UK SOI J3-9 (see paragraphs 39 to 40 above and 260 and following below) shows that the "Detention Authority" is the commander of Joint Force Support (Afghanistan) who, as a chart in the document shows, reports directly to the UK Permanent Joint Headquarters which in turn reports to the MOD. The chart also shows that the relation between the UK detention authority and the ISAF chain of command is one of liaison and co-ordination only.

(ii) A military assessment report dated 24 September 2006 refers to an occasion when ISAF headquarters objected to the detention period for an individual held by HM armed forces being extended by the United Kingdom rather than through the ISAF chain of command. The report stated:

> "[Chief of Staff] ISAF has intervened personally, asserting that the ISAF SOP is binding on the UK and that there is no reason why the UKTF [Task Force] should not be operating under ISAF procedures. These procedures require that COMISAF authorise any detention of an individual beyond the 96-hour deadline. It has been explained that the UK position is that this responsibility, based as it is in international and domestic law, is legally binding and requires that decisions on this subject are taken by UK Officials, in order to ensure that the legal obligations of the UK are properly discharged. It is understood that PJHQ Officials have now made this point to NATO HQ and so it is hoped that HQ ISAF will soon be directed to accept the UK position."

The Judge inferred (at [181]) that ISAF Headquarters did accept the UK position because detention decisions continued to be taken by UK Officials without involving ISAF and there was no evidence of any further complaints.

(iii) The UK/Afghanistan Memorandum of Understanding of 2006 concerning the transfer of detainees (to which we have referred at paragraph 41 above) was concluded on a bilateral basis rather than through ISAF.

(iv) When the United Kingdom decided to change its policy on detention in Afghanistan in November 2009 as set out in the Ministerial Statement of 9 November 2009 (see paragraph 153(vi) below), NATO was simply informed of the change of policy rather than being asked to authorise it (see paragraph 153(vii) below).

(v) A UK Detention Oversight Assessment Report dated September 2011 noted that the United Kingdom's current detention regime was "TCN [Troop Contributing Nation] sovereign business" and "based upon UK national sovereignty".

69. The judge rejected the submission on behalf of the Secretary of State that, because ISAF policy on detention (ISAF SOP 362) envisaged and accommodated some variations in national practice, the United Kingdom did not operate a detention policy which was separate from ISAF policy. In particular he rejected the submission that ISAF accepted the need for the United Kingdom to depart from the ISAF 96 hour detention limit under ISAF SOP 362 in exceptional circumstances because HM armed forces were operating in an area where there was a particularly high level of insurgent activity.

> "I have accepted the evidence of Mr Devine that NATO was informed of the UK's decision to apply a "national policy caveat" to the ISAF 96 hour limit and did not object to this. But that is a very long way from showing that either UK detention operations generally or individual detentions by UK armed forces were under the command and control of ISAF. It is clear that they were not" (at [184]).

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

70. Before us, the Secretary of State submitted that the judge erred in failing to conclude that ISAF acquiesced in the UK practice in relation to detention, with the result that it should be regarded as having been carried out under the authority of ISAF. In this regard, he pointed out that the judge had accepted that ISAF Headquarters were informed on each occasion on which a detainee was held beyond 96 hours and the reasons for doing so, and that this had not resulted in a protest on the part of ISAF. Similarly there was no protest by ISAF following the Ministerial statement.

71. However, we do not consider that failure to protest in these circumstances can be considered to amount to tacit consent. As the judge explained earlier in his judgment, the "national policy caveat" to the ISAF 96-hour rule was adopted unilaterally and announced by Ministerial statements to Parliament in circumstances where it had been decided that any approach to NATO to change the policy would be unsuccessful because it would not be accepted by other troop contributing nations (see further paragraph 153 below). The situation was, rather, one of a stand-off (at [44] to [48]). Moreover, there is nothing here that could support the conclusion that UK detentions were carried out under the command and control of ISAF.

72. We consider therefore, that the judge was clearly entitled to conclude and was correct in his conclusion that it is the United Kingdom and not ISAF which is responsible for

SM's detention. In these circumstances it is not necessary to address further submissions in relation to issues of joint responsibility.

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

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

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

> "Experts … performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> …
>
> (b) In respect of … acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

Article 17, United Nations and International Court of Justice (Immunities and Privileges) Order 1974/1261 gives effect to Section 22 in this jurisdiction.

75. The Secretary of State submitted that ISAF and ISAF personnel have immunity from legal process for the acts done in the performance of ISAF's mission and that this has the effect of barring these claims as a matter of domestic law. Furthermore, he submitted that Section 22, General Convention has effect in the law of Afghanistan. Before the judge, argument on this issue appears to have been diverted into consideration of whether the expert evidence supported the contention that such an immunity had effect in the law of Afghanistan.

76. On the hearing of the appeal, we asked counsel whether the Secretary General of the United Nations had been informed that the Secretary of State was seeking to rely on this immunity, which is the immunity of the United Nations. We were told that he had not been informed. We asked that he be notified.

77. Accordingly, by letter to the Secretary General dated 27 February 2015, Sir Mark Lyall Grant, then UK Permanent Representative to the United Nations, set out an account of these proceedings and stated:

> "… [A]s a prior threshold point, the United Kingdom Government relies on the immunity given to experts on a United Nations mission by Section 22 of the General Convention, the special meaning of which is (as the Government submits) reflected in the [Military Technical Agreement] and applies to ISAF. The Government's position is that the claims of unlawful detention (made in Mr Mohammed's case by reference to both Afghan law and Article 5 of the European Convention on Human Rights) should be dismissed on that ground."

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

> "With respect to the specific legal issues raised in your letters, operations authorized by the Security Council and conducted under the control of States or regional organizations – as was the case with ISAF – are distinct and separate from the United Nations. These authorized operations are therefore different from United Nations operations, such as peacekeeping operations, that are considered to be subsidiary organs of the Security Council. The Organization's longstanding practice on the issue is reflected, for instance, in the *amicus* briefs submitted by the United Nations to the European Court of Human Rights regarding the cases *Behrami and Behrami v. France* (Application No. 71412/01) and *Saramati v. France, Norway and Germany* (Application No. 78166/01) as well as regarding the case *Atallah v. France* (Application No. 51987/07).
>
> The 1946 Convention on the Privileges and Immunities of the United Nations applies to Security Council subsidiary organs such as United Nations peacekeeping operations. It does not, however, apply to operations authorized by the Security Council and conducted under the control of States or regional organizations.
>
> Consequently, the 1946 Convention on the Privileges and Immunities of the United Nations does not apply as such to ISAF and its personnel. Accordingly, the question of waiver by the Secretary-General of any immunity enjoyed by ISAF and its personnel on the basis of the application of the 1946 Convention as such does not arise."

79. Mr Soares' letter then goes on to refer to the fact that the Military Technical Agreement between ISAF and Afghanistan governs the status and privileges and immunities of ISAF. Section 1.1 of Annex A of the Military Technical Agreement provides that the provisions of the General Convention "concerning experts on mission will apply *mutatis mutandis* to the ISAF and supporting personnel". The letter continues:

> "The United Nations is not a party to the [Military Technical Agreement]. It is therefore not for the United Nations to seek to interpret the [Military Technical Agreement]'s terms. The United Nations further does not understand the [Military Technical Agreement] to impose any obligations or confer any rights on the Organization or on the Secretary-General in particular. Consequently, whether or not, by virtue of the [Military Technical Agreement], ISAF and its personnel are entitled to immunities similar to those accorded to experts on mission under the 1946 Convention, it would not be for the Secretary-General to decide whether or not such immunities should be waived. Accordingly, the Secretary-General expresses no view as to the possible assertion or waiver of any immunity in this case."

80. No claim to immunity under the Military Technical Agreement is made in these proceedings, correctly in our view.

81. So far as the Secretary of State's claim to immunity under the General Convention is concerned, we consider that it is misconceived for the reasons given by the Under-Secretary-General for Legal Affairs. In these circumstances, it is not necessary to address other issues thrown up by the Secretary of State's attempt to invoke the immunity of the United Nations.

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

82. In examining the claim under Article 5 ECHR, it is necessary first to consider whether the ECHR applies to the actions of HM armed forces in detaining SM and if so, the extent to which the provisions of Article 5 can in principle be modified by the *lex specialis,* namely international humanitarian law, before turning in the next section (Section V) to examine each of the three grounds upon which the Secretary of State contends that there was authority to detain under Article 5.

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

83. It is of fundamental importance to the understanding of the difficulties to which the claim under Article 5 gives rise that we should explain how the rights under the ECHR came to apply when HM armed forces became engaged in support of a government of a foreign State on the territory of that State.

(a) The judge's conclusion

84. In his main judgment the judge considered at length the scope of application of the ECHR (at [113] to [152]) and concluded (at [148]) that SM was within the jurisdiction of the United Kingdom for the purposes of the ECHR from the time of his capture by HM armed forces on 7 April 2010 until the time when he ceased to be in their custody upon his transfer into the custody of the Afghan authorities on 25 July 2010. His reasoning and his conclusions are not challenged on these appeals.

85. However, it is necessary to refer to this matter both because of its central importance to the appeals before us and because of a further decision of the Strasbourg court which has been given since the judge's decision.

(b) The decision of the Strasbourg Court in Bankovic

86. The basic provision as to the extent of the scope of the ECHR is set out in Article 1:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

87. In *Bankovic v Belgium and Others*, Decision of 1 December 2001, (2007) 44 EHRR SE5, the Grand Chamber of the Strasbourg Court observed (at [65]) that the scope of Article 1 is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire ECHR system of human rights protection. In *Soering* (1989) 11 EHRR 439 the Strasbourg court earlier stated (at [86]):

> "Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States."

88. In *Bankovic* the Grand Chamber held that it lacked jurisdiction *ratione loci* over a claim by the relatives of those killed by NATO bombing during the Kosovo conflict. It explained the concept of jurisdiction under the ECHR as primarily territorial:

> "59. As to the "ordinary meaning" of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States…
>
> 60. Accordingly, for example, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence… In addition, a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects…
>
> 61. The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case…"

At [80] it summed up the matter in the following terms:

> "… In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. … The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."

89. In *Bankovic* the Grand Chamber rejected the suggestion that extra-territorial acts could bring individuals within the jurisdiction for the purposes of some ECHR rights but not others. It stated (at [75]) that Article 1 provided no support for the suggestion that the positive obligation in Article 1 could be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question. Furthermore, it made clear (at [64] to [65]) that Article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions. On the contrary the court considered that the scope of Article 1 was determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire ECHR system of human rights' protection. The Grand Chamber endorsed the view of the ECHR as a regional treaty which was not intended to confer or secure universal rights.

90. Nevertheless, the Grand Chamber in *Bankovic* accepted certain exceptions to the territorial basis of jurisdiction. These have been developed in later cases and can be summarised as follows:

(i) The acts of diplomatic or consular agents, present on foreign territory in accordance with international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others. (*X v Federal Republic of Germany*, No. 1611/62, Commission decision of 25 September 1965; *X v United Kingdom*, No. 7547/76, Commission decision of 15 December 1977; *WM v Denmark*, No. 17932/90, Commission decision of 14 October 1992.)

(ii) The responsibility of a Contracting State could, in principle, be engaged in respect of acts of its authorities which produced effects or were performed in territory outside that State, through the consent, invitation or acquiescence of the Government of that territory to the exercise of public law powers normally to be exercised by that Government. (*Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 (at [91]). See the explanation of *Drodz* in *Bankovic* at [71]. *Ocalan* (2000) 51 EHRR CD231 may also be explained on this basis: see *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2001] 1 AC 1 *per* Lord Mance at [193].)

(iii) The responsibility of a Contracting State could be engaged when, as a consequence of military action, lawful or unlawful, it exercised effective control of an area outside its national territory. (*Loizidou (Preliminary Objections)* (1995) 20 EHRR 99; *Loizidou v Turkey (Merits)* (1997) 23 EHRR 513; *Ilascu v Moldova and Russia* (2005) 49 EHRR 1030, at [382], [392] to [393].)

(iv) An application of the effective control exception might be the basis of certain decisions (*Al-Saadoon and Mufdhi v United Kingdom (Admissibility)* (2009) 49 EHRR 1040; *Medvedyev v France* [2010] ECHR 384; (2010) 51 EHRR 39, at [67]). However, other authorities seem to go further and to establish a wider exception to the general principle of territoriality: the use of force by a State's agent operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction, for example where the individual is taken into the custody of State's agents abroad (*Issa v Turkey* (2005) 41 EHRR 567; *Ocalan v Turkey).*

(c) The decision in Al-Skeini

91. In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18 the Grand Chamber, while reiterating (at [131]) that jurisdiction under Article 1 was primarily territorial and that extraterritorial acts gave rise to jurisdiction only in exceptional circumstances, endorsed the extensions of territorial scope indicated in the earlier cases. In particular, it confirmed (at [138]) that the ECHR applied where:

> "as a consequence of lawful or unlawful military action, a contracting state exercises effective control of an area outside that national territory".

Moreover, in referring to the cases cited at paragraphs 90(iii) and 90(iv) above it stated (at [136] to [137]):

> "The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.
>
> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored"."

92. In *Al-Skeini* the United Kingdom contended that, with the exception of one of the applications (that in relation to Baha Mousa who died after serious mistreatment in British military custody), the acts in question took place in southern Iraq and outside

the United Kingdom's jurisdiction. In rejecting this submission, the Grand Chamber in its judgment stated (at [149]):

> "It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."

93. *Al-Skeini* is a far-reaching decision in at least the following six respects:

(i) The acceptance by the court of an exception based on the exercise of physical power and control over the individual affected by a State's agents and its explanation of earlier cases on this ground is, at the least, a very significant departure from the territoriality principle stated in *Bankovic*.

(ii) It appears from the reasoning in *Issa* and in *Al-Skeini* that effective control over the area in question and power and control over the individual affected are alternative bases of exceptional jurisdiction. Indeed, effective control over territory is made largely redundant. The question then arises whether and, if so, how a Contracting State can secure rights under the ECHR within territory over which it has neither sovereignty nor effective control.

(iii) At no point in its discussion of jurisdiction did the Grand Chamber address the present status of *Bankovic*. In the paragraphs of its judgment setting out its analysis and conclusion, the court only referred to *Bankovic* in the footnotes. This is unfortunate because it is difficult to reconcile the exception acknowledged in *Al-Skeini* with the reasoning and the result in *Bankovic*. The consequence, however, would appear to be that, unless the Grand Chamber decides to revisit the question of jurisdiction and the relationship between territoriality and control, it is extremely doubtful that, in the light of *Al-Skeini*, *Bankovic* would be decided in the same way today.

(iv) It seems that *Issa* and *Al-Skeini* establish that the activities of a State's agents abroad may fall within the jurisdiction of the State even if that State has no effective control of the area in question. This is implicit in *Issa* and explicit in *Al-Skeini*. As Lord Collins observed in *R (Smith) v Oxfordshire Assistant Deputy Coroner* at [285] (before the decision of the Strasbourg court in *Al-Skeini*) it is impossible to see how an attack on villagers in a cross-border incursion into a non-Contracting State could make the villagers within the jurisdiction of Turkey, when a bombing raid on Belgrade did not make the victims within the jurisdiction of the NATO States involved.

(v) The acceptance of this new basis of jurisdiction – authority and control over the victim – in *Issa* and *Al-Skeini* is also inconsistent with the essentially regional nature of the ECHR which the Court had affirmed in *Bankovic*. The ECHR is now applied outside what is referred to as the *espace juridique* of the Contracting States.

(vi) It appears that in *Al-Skeini* the Court has departed from the principle of indivisibility of the rights under the ECHR stated in *Bankovic*. At [137] it accepts that a Contracting State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 ECHR which are relevant to the situation of that individual, and that in this sense, therefore, the rights under the ECHR can be "divided and tailored".

(d) The acceptance by the Supreme Court of the decision in Al-Skeini

94. In *Smith v MoD* the Supreme Court accepted by a majority the Strasbourg court's judgment in *Al-Skeini* as an authoritative statement of the law. In particular it accepted a State's authority and control over its agents as giving rise to an exercise by the State of extra-territorial jurisdiction within Article 1 ECHR. It also concluded that the Strasbourg court had departed from the indication in *Bankovic* that the package of rights in the ECHR is indivisible and cannot be divided and tailored to the particular circumstances of the extraterritorial act in question.

(e) The difficulties in complying with the ECHR in the course of military operations

95. The tacit rejection by the Grand Chamber in *Al-Skeini* of the *Bankovic* principles has major implications for Contracting States so far as the conduct of extra-territorial military operations is concerned. As Leggatt J. pointed out in *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin) at [106], it follows from *Al-Skeini* that whenever and wherever a State which is a contracting party to the ECHR purports to exercise legal authority or uses physical force abroad, it must do so in a way that does not violate ECHR rights. Indeed in *Al-Saadoon* it was held (at [294]) that the ECHR applied when an individual was shot by HM armed forces in Iraq both because such shootings occurred in the course of security operations in which HM armed forces were exercising public powers that would normally be exercised by the Iraqi Government and because shooting someone involves the exercise of physical power over that person.

96. Difficult questions, both legal and practical, will undoubtedly arise as to how the ECHR protections, designed to regulate the domestic exercise of State power, are to be applied in the very different context of extra-territorial military operations. Particular questions will arise where HM armed forces act at the behest of the lawful government of the host State and where they are part of a multi-national force whose members include States which are not parties to the ECHR. Moreover, as will appear from later sections of this judgment, the precise relationship between the ECHR and international humanitarian law in relation to extra-territorial military operations is a matter of great complexity and uncertainty (see paragraphs 116 to 124 and paragraph 210 below).

97. The full implications of the Grand Chamber's expansion of the scope of the ECHR are yet to be identified, a task made the more difficult by the failure of the Grand Chamber to acknowledge or justify the rejection of the *Bankovic* principles. However, in a further development, in *Smith v MoD* the Supreme Court loyally applied the reasoning of the Grand Chamber in *Al-Skeini* and, in what must be seen as a further major step, concluded that the United Kingdom's jurisdiction under Article 1, ECHR extends to securing the protection of the Article 2 rights to members of HM armed forces serving outside its territory.

(f) The differing position in Canada

98. In contradistinction we note that the system of human rights protection established by the Canadian Charter of Rights and Freedoms is not applied extra-territorially in such an extensive manner. In *Amnesty International Canada v Canada (Chief of the Defence Staff)* [2009] 4 FCR 149 the Federal Court of Appeal dismissed an appeal against a refusal of an application for judicial review with respect to detainees held by Canadian forces in Afghanistan and to their transfer to the Afghan authorities. The Court of Appeal considered that although Canadian forces had command and control over their detention facility it was within a facility shared by Canada and several other States participating in ISAF. The control of the detention facilities by the Canadian authorities could not be considered effective within the meaning of the Strasbourg court in *Bankovic*. The Canadian forces were not an occupying force; they were there at the request of the Afghan governing authority which had not acquiesced in the extension of Canadian law over its nationals. There was, moreover, evidence before the motions judge that the governments of Afghanistan and Canada had expressly identified international law, including international humanitarian law, as the law governing the treatment of detainees in Canadian custody, an issue to which we return at paragraph 190 below.

(g) The judge's decision

99. The judge concluded (at [141]) that the facts fell squarely within one of the core examples of the control principle set out in *Al-Skeini* and not merely within its penumbra. He rejected (at [144] to [148]) a submission on behalf of the Secretary of State that the United Kingdom did not have full and exclusive control over the bases concerned. He concluded on the basis of unchallenged evidence that the bases were exclusively under their control. Whatever their legal entitlement in this regard, *de facto* control was, on the Strasbourg authorities, sufficient. More fundamentally, following *Al-Skeini* the exercise of physical power and control over the person in question is decisive, and, following *Smith v MoD,* he was bound to apply that test.

100. These conclusions have not been challenged on appeal.

101. The judge considered (at [149] to [150]) submissions on behalf of the Secretary of State, founded on the acceptance by the Grand Chamber in *Al-Skeini* that rights under the ECHR can now be divided and tailored, that there were obligations under the ECHR with which the United Kingdom could not comply. He rejected a submission in relation to Article 5(1):

> "The ability of the MoD to rely on this principle in the present case seems to me, however, to be severely limited by the fact that the claim that UK armed forces violated Convention rights arises out of the very conduct which gives rise to jurisdiction, namely, the exercise of physical control over SM through his arrest and detention. In these circumstances it seems to me to be impossible to divide or tailor the basic obligation under Article 5(1) that any deprivation of liberty must be lawful and must fall within one of the cases specified in Article 5(1)." (at [151])

102. The judge also rejected a submission that if Article 5(3) could not be interpreted sufficiently flexibly to accommodate the fact that the United Kingdom had no power to bring the claimant before an Afghan court, then it must be regarded as inapplicable. He considered (at [344]) that it had not been shown that it was impracticable either to arrange for detainees awaiting transfer to an Afghan prison to be brought before an Afghan judicial officer in liaison with the Afghan authorities or, alternatively, to arrange for detention reviews to be carried out by a British judicial officer. Furthermore, Article 5(3) could be complied with by releasing the arrested person if

he could not be transferred promptly into the custody of the Afghan authorities. The reasons which constrained the ability of HM armed forces to keep people lawfully in their custody derived from the inability to fulfil the object of the detention operation – which was to deliver those arrested to the Afghan authorities – and not from a lack of extraterritorial power.

(h) The scope of the Human Rights Act 1998

103. In *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 the House of Lords (by a majority of 4 to 1) rejected a submission that in those exceptional cases where the ECHR applies to the conduct of a State outside its territory, the presumption against the extra-territorial application of legislation resulted in the non-applicability of the Human Rights Act 1998. It considered that since the central purpose of the Act was to provide a remedial structure in domestic law for the rights guaranteed by the ECHR it would not be offensive to the sovereignty of another State to make those remedies available in respect of extra-territorial acts. In interpreting the rights under the ECHR in the Schedule to the Act, courts must take account of the territorial scope of the relevant right under the ECHR. Accordingly, section 6 of the Act should be interpreted as applying not only when a public authority acts within the United Kingdom but also when it acts within its jurisdiction for the purposes of Article 1, ECHR, but outside the territory of the United Kingdom.

104. Since that decision of the House of Lords, the Strasbourg court has, in the same litigation, considerably broadened the scope of the application of the ECHR. However, the reasoning of the Supreme Court remains intact and continues to apply in this changed situation. Section 6 of the Human Rights Act 1998 therefore applies to the detention of SM in Afghanistan.

(i) Our conclusion

105. We agree with the judge that, in the light of the decision of the majority of the Supreme Court in *Smith v MoD* accepting the decision in *Al-Skeini,* the ECHR, and in particular Article 5, applied to the detention of SM in Afghanistan.

106. We observe only that, subject to any qualification as a result of the decision of the Strasbourg court in *Hassan v United Kingdom* (Application No. 29750/09, 16 September 2014), which we discuss below at paragraphs 116 to 124, we are also bound to apply the test that the judge applied, despite the reservations which we have expressed at paragraph 93 as to the far reaching nature of the decision and as to the real difficulties that arise as a result of the decision in *Al-Skeini* which we have summarised at paragraphs 91 and following above.

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

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

108. The answer to the general question will turn upon the precise relationship of human rights systems to international humanitarian law and on the extraterritorial scope of

the particular human rights system under consideration - in the case of the United Kingdom, the ECHR. In certain circumstances international humanitarian law operates as a *lex specialis* so as to require the modification of general rules of human rights law.

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

110. It is first convenient to refer to decisions of the International Court of Justice (ICJ) in which this issue has been raised.

(a) Decisions of the International Court of Justice

111. In its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (I996 ICJ Reports 226) the ICJ observed (at [25]) that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in time of war, except to the extent that a State might derogate from certain provisions in time of national emergency. Respect for the right to life, with which the Court was concerned, was not a provision from which derogation was permitted. However, the Court made clear that the question whether loss of life, through the use of a certain weapon in warfare, was to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant fell to be determined by international humanitarian law as the applicable *lex specialis* and could not be deduced from the terms of the Covenant itself.

112. In its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004 ICJ Reports 136) the ICJ rejected a submission by Israel that the international human rights instruments to which it was a party were not applicable to occupied territory and observed (at [106]):

> "… [T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."

113. In its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v Uganda)* (2005 ICJ Reports 168) the ICJ repeated the three possibilities identified in the *Wall* Advisory Opinion and concluded that both international human rights law and international humanitarian law would have to be taken into consideration. It also reaffirmed (at [215] to [216]) the point made in the earlier case that international human rights instruments were applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

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

114. As the ICJ stated in the *Nuclear Weapons* Advisory Opinion, while systems of international human rights law may apply extra-territorially to the conduct of a State's armed forces abroad, international humanitarian law may in certain circumstances operate as a *lex specialis* so as to require the modification of general rules of human

rights law. We turn therefore to consider in more detail the submission on behalf of the Secretary of State that international humanitarian law qualifies or displaces Article 5 ECHR in its application to the case of SM.

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

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

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

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

> "Whichever version of the principle is relied on, the MOD's case that international humanitarian law as *lex specialis* displaces or qualifies Article 5 of the Convention seems to me to encounter formidable difficulties. One, insuperable difficulty derives from my conclusion that international humanitarian law does not provide a legal basis for detention in situations of non-international armed conflict. I have concluded that in its present stage of development international humanitarian law does not provide a legal power to detain nor does it specify grounds on which detention is permitted nor procedures governing detention in the context of a non-international armed conflict such as that taking place in Afghanistan. If these conclusions are correct, it follows that international humanitarian law is not intended to displace and is not capable of displacing human rights law in this context." (at [293])

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

116. Since the judge's decision, the Grand Chamber of the Strasbourg court has delivered its judgment in *Hassan v United Kingdom* (Application No. 29750/09, 16 September 2014), a case in which the Grand Chamber was forced to grapple with some of the difficulties flowing from its departure in *Al-Skeini* from the *Bankovic* principles, namely the consequences of the expansion of the ECHR into a field traditionally occupied by international humanitarian law. In *Hassan* the applicant, Khadim Hassan, alleged that his brother Tarek was arrested and detained by HM armed forces in Iraq on 23 April 2003. Tarek was cleared for release soon after his detention and physically released on 2 May 2003. Tarek was subsequently found dead in unexplained circumstances. Khadim complained, *inter alia*, under Article 5 ECHR that the arrest and detention of his brother were arbitrary and unlawful and lacking in procedural safeguards. In its judgment the Strasbourg court concluded that, despite

the lack of a formal derogation under Article 15, Article 5 required to be modified in its application to the activities of HM armed forces in Iraq. It is necessary to look in some detail at the reasons for this conclusion.

117. The court noted that it had long been established that the list of grounds of permissible detention in Article 5(1) did not include internment or preventive detention where there was no intention to bring criminal charges within a reasonable time. However, it considered that there were important differences of context and purpose between arrests carried out during peacetime and "the arrest of a combatant in the course of an armed conflict". It noted that it had not been the practice of States to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions (Geneva III and Geneva IV) during international armed conflicts. The provisions of those Conventions relating to internment were designed to protect captured combatants and civilians who posed a security threat. The court noted that the ICJ had held that the protection offered by human rights conventions and that offered by international humanitarian law co-existed in situations of armed conflict and that the court must endeavour to interpret and apply the ECHR in a manner which was consistent with this framework under international law.

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

> "104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.
>
> 105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness …"

119. In coming to this conclusion the Strasbourg court emphasised that although it did not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 would be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this was specifically pleaded by the respondent State. It distinguished *Al-Jedda* on the ground that the United Kingdom had not in that case contended that Article 5 was modified or displaced by the powers of detention provided for by the Geneva III and Geneva IV. Instead it had in that case argued that

the United Kingdom was under an obligation to the United Nations Security Council to intern the applicant and that the effect of Article 103 of the UN Charter was to give that obligation primacy. That argument had failed because the court had found that no such obligation existed.

120. The Strasbourg court in *Hassan* also addressed the question of procedural safeguards under Article 5 ECHR and how they might be modified in their application to an international armed conflict.

> "106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 …, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1(c) of Article 5."

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

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

122. The Secretary of State submitted before us that the underlying reasoning must apply equally to a non-international armed conflict and that Article 5 must be modified in the same way. He submitted that the rules of international humanitarian law play the same indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict in a non-international armed conflict as they do in an international armed conflict. While that is undoubtedly correct, it is apparent from the passages of the *Hassan* judgment set out above that the fact that in an international armed conflict international humanitarian law authorises the taking of prisoners of war and the detention of civilians who pose a threat to security was essential to the court's reasoning.

123. In our view, the reasoning in *Hassan* can be extended to a situation of a non-international armed conflict such as that with which we are concerned only if in a non-international armed conflict international humanitarian law provides a legal basis for detention. This is an issue of particular difficulty which occupied us for some time at the hearing and which we consider at paragraphs 164 and following below.

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

V THE PUBLIC LAW CLAIM: LAWFUL AUTHORITY TO DETAIN

125. As we have stated at paragraph 44, the two legal assumptions upon which the determination of this appeal proceeds is that a public law claim will lie under Article 5 ECHR, unless there is lawful authority to detain which is not arbitrary and proper procedural safeguards are in place. In this section, we consider the three alternative sources for the authority to detain:

    (i) The law of Afghanistan

    (ii) The UNSCRs

    (iii) International humanitarian law.

126. The judge (at [301]) proceeded on the assumption that it was sufficient, in order to establish the lawfulness of SM's detention, to show that there was a legal basis for it under international law, although he stated that where the detaining authority was operating on the territory of an independent sovereign State at the invitation or with the consent of the government of that State, it was arguably also necessary to comply with the applicable national law, here Afghan law. In the light of the conclusions to which we have come it is not necessary for us to determine whether that assumption was correct.

(1) POWER TO DETAIN UNDER THE LAW OF AFGHANISTAN

(a) The relevance of the law of Afghanistan

127. The first basis on which the Secretary of State contended that there was authority to detain is the law of Afghanistan. It was submitted that HM armed forces were in Afghanistan to assist the Afghan authorities, authority under the law of Afghanistan would provide the requisite power to detain SM so that the detention would not be arbitrary for the purposes of Article 5. A submission was made to us that no authority to arrest under Afghan law would suffice under Article 5 unless the authority complied with the case law applicable to Article 5. However, it would, in our view, be an extraordinary and unjustifiable extension of the jurisprudence of the Strasbourg court in *Al-Skeini,* to decide that further requirements of the ECHR prevailed in relation to the actions of HM armed forces in Afghanistan over the law of Afghanistan. We consider that if detention was authorised by the law of Afghanistan, no claim would lie under Article 5.

128. As we set out at paragraph 299 below, the law of Afghanistan is also relevant in another respect as it is the basis of SM's private law claim in tort.

(b) The judge's findings on Afghan law as regards the claim for unlawful detention

129. As foreign law has to be proved, the judge heard extensive evidence about Afghan law from Professor Lau, Mr Shafeek Seddiq, Mr Saeeq Shajjan and Mr Hartman. He set out his findings in relation to the witnesses at [56] to [61] and on his approach to Afghan law at [63] to [70].

130. In summary he found that the relevant law of Afghanistan was as follows:

    (i) The only rights of the armed forces operating under ISAF to arrest a person were those of a citizen's arrest and an arrest by the police.

(ii) The armed forces operating under ISAF could, at most, detain a suspected criminal for up to 72 hours before handing him over to the police or prosecutor. It was more likely that the Afghan Supreme Court would require an immediate handover, but that Court would probably interpret "immediately" in such a way as to take account of the practicalities of hand over. There was therefore no material difference (at [72] to [75] and [101] to [102]).

(iii) If there was power under UNSCR 1386 (and subsequent resolutions of the Security Council) or the Military Technical Agreement to detain Afghan nationals for self-defence, force protection or the accomplishment of the mission, it was not relevant under Afghan law, as under the Afghan Constitution and Afghan law, those resolutions and that agreement had no effect. There was no automatic incorporation of international treaty obligations into Afghan domestic law; implementing legislation was required. No such legislation had been enacted (at [77] to [100]).

(iv) Under the Afghan Civil Code, there was a right to damages for unlawful detention (at [103] to [109]).

131. The judge therefore found (at [110] to [112]) that it followed that on the assumed facts, HM armed forces were entitled to arrest SM as he was reasonably believed to be an imminent threat to them, but they were not entitled to detain him after 10 April 2010. Afghan law therefore did not provide a basis for SM's detention. The findings on Afghan law also provided a basis for the private law claim which we consider at paragraphs 299 and following below.

132. The judge made no findings (as no argument appears to have been addressed to him on this issue) as to whether international humanitarian law (as a source of the power to detain) was incorporated into Afghan law.

(c) The submission of the Secretary of State on the appeal

133. The Secretary of State submitted that the decision of the judge on Afghan law was not a conclusion to which the judge should have come on the evidence. There was no relevant case law and the point had never been litigated. The judge was proceeding solely on the basis of the evidence relating to the Code and the Constitution. It was said that it was self-evidently wrong that HM armed forces and the forces of other States contributing troops to ISAF had no greater powers of arrest than those of an Afghan citizen or the Afghan police. It was obvious that those fighting an insurgency had to have significantly greater powers of detention and simply could not release onto the battlefield an insurgent whom they had captured. It would be irrational for the law of a sovereign State so to provide. As the conclusion was self-evidently wrong and irrational, the judge should not have acceded to the evidence called on behalf of SM without clear and incontrovertible evidence.

134. Moreover, if the law of Afghanistan was as the judge had found it to be, the Afghan government would have put Afghanistan in breach of the obligations it had to comply with under the UNSCRs and the express obligations it had made under the Military Technical Agreement to which we have referred at paragraph 36; in that agreement it had agreed that the ISAF commander would have authority to do all judged necessary to protect the mission. The Afghan government could not have agreed to this unless there was the requisite power under Afghan law.

(d) Our conclusion

135. Although we see some force in the Secretary of State's submission, the evidence before the judge was clear and compelling. He was plainly entitled on that evidence to make the findings which he did. There is nothing irrational or self-evidently wrong in the judge determining that obligations entered into under an agreement made by the Executive government do not have the force of domestic law within the State unless and until action is taken in accordance with the constitution to give effect to that agreement under domestic law. The same applies to obligations under UNSCRs. Moreover, a national of a sovereign State (as Afghanistan was at the material time and is) can ordinarily expect to be entitled to protection against detention by its own Executive government or the authorities employed by that government to maintain law and order, unless that government acts in accordance with law made under the constitution. All the international agreements made with Afghanistan by other States relating to the provision of armed forces in Afghanistan, beginning with the Bonn agreement to which we have referred at paragraph 31 above and the UNSCRs (see the preamble to UNSCR 1890 of 2009 set out at paragraph 139 below), accepted the sovereignty of Afghanistan, that the responsibility for security was that of the authorities in Afghanistan and that the international forces were there to assist those authorities. Looked at from this perspective, it is difficult to see how it can be irrational or unreasonable for the law of a State to provide that forces invited to assist the Executive government have no greater powers of detention than the Executive government and its own authorities responsible for law and order, unless legislation made under the constitution expressly otherwise provides. There is no basis on which the decision of the judge can, in our view, be challenged.

136. In the light of the judge's findings therefore, there was no authority to detain SM for more than 96 hours.

137. On the assumptions made for the purposes of the preliminary issues, no determination has been made of the position of the Secretary of State in respect of the period after 6 May 2010 when he was held, as set out in paragraph 43(ix), by HM armed forces at the request of the Afghan authorities.

(2) THE POWER UNDER THE UNSCRS

138. The second basis on which it was contended by the Secretary of State that there was power lawfully to detain for the purposes of the public law claim under Article 5 is the authority given by UNSCR 1890 of 2009.

(a) UNSCR 1890 of 2009

139. As we have set out at paragraph 35 above, the relevant resolution was UNSCR 1890 (2009). The recitals adopted by the Security Council were:

> "i) Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of Afghanistan;
>
> ii) Recognising that the responsibility for providing security and law and order throughout the country resides with the Afghan Authorities, stressing the role of [ISAF] in assisting the Afghan Government to improve the security situation;
>
> iii) Stressing the central and impartial role that the United Nations continues to play in promoting peace and stability in Afghanistan by leading the

> efforts of the international community, noting, in this context, the synergies in the objectives of the United Nations Assistance Mission in Afghanistan (UNAMA) and of ISAF;
>
> iv) Expressing its strong concern about the security situation in Afghanistan, in particular the increased violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups, criminals and those involved in the narcotics trade;
>
> v) Expressing also its concern over the harmful consequences of violent and terrorist activities by the Taliban, Al-Qaida and other extremist groups on the capacity of the Afghan Government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the full enjoyment of their human rights and fundamental freedoms;
>
> vi) Condemning in the strongest terms all attacks including Improvised Explosive Device (IED) attacks, suicide attacks and abductions, targeting civilians and Afghan and international forces …;
>
> vii) Expressing its serious concern with the high number of civilian casualties and calling for compliance with international humanitarian and human rights law and for all appropriate measures to be taken to ensure the protection of civilians;
>
> viii) Determining that the situation in Afghanistan still constitutes a threat to international peace and security; and
>
> ix) Determining to ensure the full implementation of the mandate of ISAF, in coordination with the Afghan Government."

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

141. Under Article 25 of the UN Charter, all members of the UN agreed to accept and carry out the decisions of the Security Council in accordance with the Charter.

(b) The contention of the Secretary of State

142. It was the submission of the Secretary of State that the UNSCR like all the other UNSCRs conferred power to take all necessary measures to enable the mandate given by the UNSCR to be fulfilled. That provided not only a legal basis for HM armed forces to be present in Afghanistan, but a power to detain for the purposes of fulfilling the mission entrusted to HM armed forces and thus to detain a person who posed a threat to HM armed forces, as on the assumed facts, SM plainly did.

(c) The judge's decision

143. The judge accepted (at [219]) that the UNSCRs were plainly intended to authorise the use of lethal force by ISAF in self-defence and to take the less serious step of apprehending those who posed an imminent threat to ISAF or the civilian population. It did not authorise detention outside the Afghan criminal justice system after persons had been arrested and therefore ceased to be an imminent threat.

144. However, following the decision of the Strasbourg Court in *Al-Jedda v United Kingdom*, he considered that the UNSCR did not authorise detention that would violate international human rights law and thus the obligations under Article 5 (at [221] to [223]).

145. He held that ISAF's policy which only permitted detention up to 96 hours was within UNSCR 1890. However, the policy of the United Kingdom which went beyond this was not authorised by the UNSCR (at [224] to [225]).

(d) The scope of the authorisation to ISAF

146. We agree with the judge that the terms of the UNSCR were plainly wide enough to authorise armed forces operating under ISAF to detain those who posed a threat to ISAF fulfilling its mandate. This authority would include detention necessary to protect the ISAF force against attack and to protect the civilian population.

147. We do not, however, agree with the view of the judge that an insurgent ceases to be an imminent threat after he has been detained. If an insurgent was detained but had to be released after 96 hours because he could not be handed over to the Afghan authorities, he should generally be regarded as posing an imminent threat, albeit one subject to a contingency; we return to this question at paragraphs 212 and 249 below.

148. Nor do we agree with the view that the terms of the UNSCR precluded detention for a greater period than 96 hours. On its language, it authorised the use of lethal force to enable ISAF to fulfil its mission or mandate. It is difficult to see why therefore it did not authorise detention as long as was necessary in all the circumstances to enable ISAF to fulfil its mission. The question of whether the authority under the UNSCR was limited or qualified by a system of human rights law is a separate question. 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. That is a separate question as that will depend on the terms of the particular system of human rights law (if any) which may be applicable to the armed forces of the particular State. The issue of construction must apply to all operating under the UNSCR and cannot be influenced by the terms of a particular system of human rights law. We consider the separate question at paragraphs 158 and following after we have considered the issue of construction.

(e) ISAF's detention policy

149. As we have said we see nothing in the wording of the UNSCR which specifically restricted the period of detention further than what was necessary in all the circumstances. However as, under the UNSCR, the authority had been granted to ISAF, it was, in our judgment, for ISAF to determine the conditions under which forces participating in ISAF could detain in Afghanistan. ISAF set out those conditions in its detention policy, ISAF SOP 362, to which we have already briefly referred at paragraphs 39 and 51(iii) above.

150. Relevant provisions of ISAF SOP 362 are as follows:

> *"Authority to Detain*
>
> 4. The only grounds upon which a person may be detained under current ISAF Rules of Engagement (ROE) are: if the detention is necessary for ISAF force protection; for the self-defence of ISAF or its personnel; for accomplishment of the ISAF Mission.
>
> *Detention*

> 5. … The current policy for ISAF is that detention is permitted for a maximum of 96 hours after which time an individual is either to be released or handed into the custody of the ANSF [i.e. Afghan National Security Forces]/GOA [i.e. Government of Afghanistan]
>
> A footnote to paragraph 5 stated that:
>
> "It is accepted that detention will take place under National guidelines. However, the standards outlined within this SOP are to be considered the minimum necessary to meet international norms and are to be applied.
>
> ….
>
> *The Powers of the Detention Authority*
>
> 7. A Detention Authority [defined as an individual authorised to make detention decisions] may authorise detention for up to 96 hours following initial detention. Should the Detention Authority believe that continued detention beyond 96 hours is necessary then, prior to the expiration of the 96-hour period, the Detention Authority shall refer the matter by the chain of command to HQ ISAF.
>
> *Authority for Continued Detention*
>
> 8. The authority to continue to detain an individual beyond the 96 hour point is vested in COMISAF (or his delegated subordinate). A detainee may be held for more than 96 hours where it has been necessary in order to effect his release or transfer in safe circumstances. This exception is not authority for longer term detention but is intended to meet exigencies such as that caused by local logistical conditions e.g. difficulties involving poor communication, transport or weather conditions or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him."

151. The procedure which had to be followed was also set out in Annexes A and C to ISAF SOP 362; we summarise these and consider them at paragraphs 255 and following below.

152. It was therefore not seriously disputed that in accordance with ISAF policy there was authority under the UNSCR to detain a person for up to 96 hours before release or hand over to the Afghan authorities if detention was necessary for the protection of ISAF, for self-defence of ISAF or its personnel or for the accomplishment of the ISAF mission.

(f) The policy under which HM armed forces operated

153. However, the policy put in place by HM armed forces after the deployment to Helmand Province in early 2006 (UK SOI J3-9) went further than this (as we have stated at paragraphs 39 and 40 above). As set out by the judge at [38] to [53], the development of UK policy by the MoD was as follows:

(i) The reasons for the United Kingdom's policy were outlined in a memorandum of 1 March 2006 set out at length by the judge at [40]. Although the general policy was to hand over after 96 hours, the memorandum made clear at paragraph 7:

> "However it is also likely that there will be a need to detain others who, as in Iraq, are judged to pose a substantial and imminent threat to UK forces but may not have committed a criminal act. In such cases assessments may be

> taken on the basis of sensitive intelligence which we are unable to share with the Afghans. We may also have a strong interest in interrogating them to further develop our intelligence picture. Legal advice has confirmed that there is currently no basis upon which we can legitimately intern such individuals."

(ii) This memorandum recognised that:

(a) the ECHR would apply unless those detained were immediately handed over to the Afghan authority on arrest (paragraph 8);

(b) the legal basis for the presence of HM armed forces in Afghanistan was such that available powers might fall short of what military commanders on the ground might wish (paragraph 16).

(iii) In April 2006, the UK/Afghanistan Memorandum of Understanding was concluded, as we have set out at paragraph 41 above. Although this dealt with transfer, it did not in any way affect the authorisation given by ISAF. On the contrary, it appeared to be based on the ISAF policy.

(iv) By 2007, the MoD came to the view that the limit of detention to 96 hours was detrimental to the campaign in Afghanistan. In a memorandum dated June 2008 (set out by the judge at [44]), the MoD noted that there was a difficulty in using in Afghanistan the detention policy in Iraq which had proved useful for intelligence gathering as ISAF's policy was limited to detention for 96 hours before handover to the Afghan authorities. When handed over, the Afghan authorities then released those detained for lack of evidence. As a result those who might have valuable intelligence and/or who posed significant threats were often free to recommence their insurgent activity on the battlefield.

(v) In 2009, two options were considered – persuading the NATO command of ISAF to alter the 96 hour policy or to apply a separate national policy. The MoD view was that because only four States detained significant numbers of insurgents, the majority would not agree to a change of policy as they did not use detention for gathering intelligence and regarded any change as politically sensitive. The MoD decided that the only course open to it was to apply its own policy.

(vi) The separate UK policy was explained in a Ministerial Statement made by the Minister for the Armed Forces to Parliament dated 9 November 2009. It stated:

> "In the light of the evolving threat to our forces, we have continued to keep our approach to these [detention] operations under review. Under NATO guidelines individuals detained by ISAF are either transferred to the Afghan authorities within 96 hours for further action through the Afghan judicial process or released. And in the majority of cases, the UK armed forces will operate in this manner. However, in exceptional circumstances, detaining individuals beyond 96 hours can yield vital intelligence that would help protect our forces and the local population – potentially saving lives, particularly when detainees are suspected of holding information on the placement of improvised explosive devices.
>
> Given the ongoing threat faced by our forces and the local Afghan population, this information is critical, and in some cases 96 hours will not be long enough to gain that information from the detainees. Indeed, many insurgents are aware of the 96 hours policy and simply say nothing for that entire period. In these circumstances the Government have concluded that Ministers should

> be able to authorise detention beyond 96 hours, in British detention facilities to which the ICRC has access. Each case will be thoroughly scrutinised against the relevant legal and policy considerations; we will do this only where it is legal to do so and when it is necessary to support the operation and protect our troops.
>
> Following a Ministerial decision to authorise extended detention, each case will be thoroughly and regularly monitored by in-theatre military commanders and civilian advisors. Individuals will not remain in UK detention if there is no further intelligence to be gained. We will then either release the detainee or transfer the detainee to the Afghan authorities."

(vii) NATO was informed of this policy in a letter dated 5 November 2009 (set out at [48] of the judge's judgment). The letter explained that some detainees had valuable intelligence which would save lives. That intelligence might be lost if the person was released early; the United Kingdom had decided that UK Ministers might therefore agree to a longer period of detention than 96 hours, but would only do so in exceptional circumstances or *in extremis*. The letter accepted that other States had different views. NATO made no objection to this policy.

(viii) No attempt was made by the United Kingdom to alter the UK/Afghanistan Memorandum of Understanding of 2006 or to seek a change to the law of Afghanistan to accommodate this policy.

(ix) There were two broad categories of persons detained beyond 96 hours – those detained for intelligence purposes and those held at the request of the Afghan authorities when the Afghan authorities had no space in their detention facilities – known as logistical detention to which we have referred at paragraphs 14 and 43(x) above and to which we return at paragraph 248(i) below.

(x) In addition as a result of the moratorium considered by the Divisional Court after the decision in *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), some may have been detained as a result of what we describe as a "Catch 22" issue where HM armed forces were unable to hand them over to the Afghan authorities given the risk of torture or other degrading and inhuman treatment and had to consider releasing them to carry on their campaign aimed at killing and injuring HM armed forces – see further paragraph 213 below.

154. The policy we have described was set out in UK SOI J3-9 to which we have referred at paragraphs 39, 40 and 68(i) above. By the time of SM's arrest and detention the policy was reflected in two consecutive versions, the second of which came into force at about the time of SM's detention. We refer to UK SOI J3-9 in more detail at paragraphs 258 and following below in connection with the issue of procedural safeguards.

155. It was submitted that ISAF SOP 362 was merely a guideline and it was open to the United Kingdom to adopt its own policy under the terms of UNSCR 1890 of 2009. We do not agree. The UNSCR gave authority to ISAF. ISAF SOP 362 was a clear policy for detention. No express authority was set out in that policy which permitted States to depart from it nor could one be implied. The reference to guidelines in the

footnote to paragraph 5 to ISAF SOP 362 (see paragraph 150 above) did not permit departure from the 96 hour time limit.

156. There can be no doubt that the policy under which HM armed forces were operating at the time of SM's detention went beyond that authorised by ISAF under ISAF SOP 362. As the authority under the UNSCR was granted to ISAF, any extension of periods of detention beyond that had to be authorised by ISAF.

(g) Did ISAF agree to that policy by acquiescence?

157. It was submitted by the Secretary of State that even if the policy adopted by HM armed forces went beyond that which was expressly authorised by the ISAF policy, ISAF had agreed to the policy of HM armed forces by acquiescence. We have considered the issue of acquiescence in connection with the issue of attribution to ISAF at paragraphs 70 to 71 above and concluded that ISAF did not consent to the United Kingdom's policy by acquiescence.

(h) Would the UK policy, if authorised by UNSCR 1890 of 2009, be a lawful derogation from Article 5 ECHR?

158. We have considered at section IV (2) (paragraphs 107 and following) the relationship between the ECHR as the system of human rights law extending to the operations of HM armed forces in Afghanistan and international humanitarian law. We turn now to the corresponding issue of the relationship between the ECHR as the system of human rights law extending to the operations of HM armed forces in Afghanistan and international law arising from the rights and obligations under the charter of the UN and the UNSCRs.

159. In *Al-Jedda v Secretary of State for Defence* (to which we have referred at paragraph 56 above in connection with the issue of attribution) the House of Lords decided that the obligations of Member States of the UN under paragraph 25 of the UN Charter to carry out their obligations under UNSCRs in relation to Iraq prevailed by reason of Article 103 of that Charter over other international agreements including the ECHR. Lord Bingham said at [33] in support of the contention that Article 103 should be construed widely.

> "The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it."

The House of Lords concluded that UK armed forces operating as part of the Multi-National Force under the UNSCRs relating to Iraq were therefore entitled to detain persons under the powers under the UNSCRs where it was necessary for imperative reasons of security, provided that the detainee's rights under Article 5 were not infringed to any greater extent than was inherent in such detention.

160. However, the Grand Chamber of the Strasbourg court in its judgment in *Al-Jedda v UK* (to which we have also referred in connection with the issue of attribution - see paragraphs 59 and 60 above) took a different view. The court decided (at [105]) under the relevant UNSCRs, the Security Council had not placed those States contributing to the Multi-National Forces under an obligation to use measures of detention that derogated from their obligations under the ECHR. The obligations under the ECHR therefore prevailed.

161. *Hassan v UK,* to which we have referred at paragraph 116 to 124 addressed the question whether the procedural safeguards under Article 5 could be modified in an international armed conflict and concluded that they can. In connection with the relationship between international humanitarian law and the ECHR, the Grand Chamber of the Strasbourg court observed that the United Kingdom had not advanced any argument in *Al-Jedda* that the rights and obligations under the Geneva Conventions and international humanitarian law could co-exist with the obligations under Article 5 ECHR and provide a lawful basis for detention under Article 5.

162. In our view, by parity of reasoning, if detention under the Geneva Conventions in an international armed conflict can be a ground for detention that is compatible with Article 5 ECHR, it is difficult to see why detention under the UN Charter and UNSCRs cannot also be a ground that is compatible with Article 5.

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

(3) POWER UNDER INTERNATIONAL HUMANITARIAN LAW

(a) Introduction

(i) The purpose of international humanitarian law

164. As we have explained at paragraph 9(ii)(c) above, international humanitarian law governs the way that armed conflict is conducted. It seeks to strike a balance between the principles of military necessity and those of humanity and the need to protect the wounded, the sick, detainees and the civilian population from what the Strasbourg Court has described as "the savagery and inhumanity" of armed conflict and thus to mitigate the horrors of war: International Committee of the Red Cross (ICRC), *Commentary on the Additional Protocols of the 1977 Geneva Convention* (1987 edn), pg 1345; Application 29750/09 *Hassan v United Kingdom* at [102].

(ii) Two sources of international humanitarian law

165. There are, as the judge stated (at [228] and [233]) two sources of international humanitarian law; treaty and customary international law. In the case of non-international armed conflicts, the potential treaty sources are Article 3 common to the four Geneva Conventions (Common Article 3) and the 1977 Additional Protocol II to the Conventions (APII).

(iii) Our approach to the Secretary of State's case

166. There are three stages to the analysis of the Secretary of State's defence to SM's claim based on his contention that there was power or authority to detain under international humanitarian law. The first and second are to consider whether international humanitarian law conferred power or authority on HM armed forces to detain him, and, if it did, on what grounds. These questions are closely linked to the third stage of the analysis, the procedural safeguards required by international human rights law in order for detention to be lawful, whether under the ECHR or other systems of international human rights law or otherwise. This is because it was accepted that the legality of such detention depends on identifying and meeting certain procedural safeguards. Analytically, however, the questions of power or authority and grounds are prior questions. We deal with these questions in this section of our judgment. We deal with procedural safeguards in Section VI at 254 to 298 below.

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

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

167. There is a fundamental difference between the parties about international humanitarian law. SM and the PIL claimants contended and the judge held that legally there was still a binary distinction between the legal rules governing an international armed conflict (involving belligerency not only between States but also between a State and a national liberation movement) and those governing a non-international armed conflict (involving insurgency within a State).

168. The Secretary of State contended that the legal position now reflected a more complex factual position. His position was that a purely internal conflict between the forces of a government of a State and organised armed groups within its territory (e.g. an uprising or sufficiently intensive hostile activities) lay at one end of a spectrum, and a classical armed conflict between two States lay at the other end.

169. At the material times for these proceedings, the conflict in Afghanistan involved multinational armed forces fighting alongside the forces of the Afghan host State in its territory and with its consent against organised armed groups of an international nature. It was common ground that the conflict was not to be classified as an international armed conflict but was a non-international armed conflict: see §§24 and 98 of the Secretary of State's amended defence in these proceedings. See also the position taken in *R v Gul* [2012] EWCA Crim 280 at [20], affirmed [2013] UKSC 64, where this assumption was made at [49] to [51], and the view of the US Supreme Court in *Hamdan v Rumsfeld* 126 SCt 2749 (2006). The ICRC classified the conflict as a non-international armed conflict from June 2002 when the new Afghan government was established.

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

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

171. There was support for the Secretary of State's position from a number of commentators including Dr Dieter Fleck, a former Director for International Agreements and Policy in the German Federal Ministry of Defence: see Fleck (ed.) *The Handbook of International Humanitarian Law* (3rd edn, 2013), Ch. 12, pg 582.

Significantly, this support included the ICRC, the body whose commentaries have been recognised as particularly valuable in this area. Although not authoritative in the sense of being binding, the views of the ICRC have been very influential, given its role in the development of international humanitarian law and the initiatives it has taken: see e.g. *R (Hussein) v Secretary of State for Defence* [2013] EWHC 95 (Admin) at [33], and [2014] EWCA Civ 1087 at [36] to [40]; *Prosecutor v Tadič* ICTY 2 October 1995 at [109]; *Prosecutor v Simič and others* ICTY 27 July 1999 at [46]; and *Hamdan v Rumsfeld* 126 SCt 2749 (2006), footnote 48. The institutional views of the ICRC also qualify as "the teachings of the most highly qualified publicists of the various nations", so that they qualify as a subsidiary source for the determination of rules of international law: ICJ Statute, Article 38(1)(d).

172. It is generally recognised that there are some conflicts that are non-international armed conflicts in the sense of not being between States or between a State and a national liberation movement, but which are not purely internal conflicts. For example, the conflicts in the former Yugoslavia had both internal and international aspects (see *Tadič* at [77]). Jelena Pejic, a Legal Adviser in the ICRC's Legal Division, has identified seven types of non-international armed conflicts: see Pejic in Wilmshurst (ed.) *International Law and the Classification of Conflicts* (2012) Ch. 4, pg 82. See also Knut Dörmann, (2012) 88 Int. L. Stud. 347-349. In an opinion paper issued since the judgment below, the ICRC referred to a purely internal conflict as a "traditional" non-international armed conflict: *Internment in Armed Conflict: Basic Rules and Challenges* November 2014 at 7.

173. The conflict in Afghanistan was clearly not a "traditional" non-international armed conflict. The question is whether the typology of non-international armed conflicts which distinguished "traditional" non-international armed conflicts which were purely internal from those which were "internationalised" is purely descriptive or whether the identification of a non-international armed conflict as "internationalised" affects the legal rules governing it. Are the treaty provisions dealing with non-international armed conflicts solely describing or prescribing minimum standards? If so, no assistance can be derived from them in determining whether there is a legal basis or authority for detention. If not, they may be of assistance in the identification of a legal basis. A closely related question is whether, despite the absence of express provisions in the treaties conferring authority to detain in a non-international armed conflict, any assistance in identifying a rule of customary international law can be derived from the treaty provisions dealing with international armed conflicts. Those provisions include the power in Articles 21 and 118 of Geneva III to intern prisoners of war, and in Article 42 of Geneva IV to detain civilians where "the security of the Detaining Power makes it [this] absolutely necessary".

(iii) The Secretary of State's case

174. The Secretary of State's case was that it was clear from the purposes of international humanitarian law and the structure and terms of Common Article 3 and APII that power to detain for reasons related to the conflict or for imperative reasons of security was necessarily implicit in situations to which those provisions applied. The Secretary of State also pointed to the language of APII, Article 2(2) and Article 78 of Geneva IV. His alternative case was that such a power was established on such grounds as a matter of customary international law. Absent a power to detain, an individual captured during an armed engagement would have to be released in effect "back onto the battlefield". This was referred to as a "Catch-22" position. It was also the Secretary of State's case that there were procedural safeguards for non-

international armed conflicts in substance similar to the principles expressly provided for international armed conflicts in Geneva III and IV, which could be derived from the nature of international humanitarian law and customary international law, taking account of instruments of international human rights law.

(iv) The claimants' case

175. At the core of the position of the claimants was the proposition that Common Article 3 and APII described minimum standards of treatment for those who were in fact detained in "an armed conflict not of an international character" (see the opening words of Common Article 3). They contended that the question whether such *de facto* detention was authorised by law depended not on international humanitarian law, but on either domestic law or the provisions of the relevant UNSCR. They maintained that the humanitarian purpose of Common Article 3 and the relevant provisions of APII were inconsistent with the proposition that they were intended to provide a legal power to detain. The judge accepted that argument (see [243] to [244] and [251]) but also gave other reasons for his conclusion that Common Article 3 and APII did not confer a legal power to detain (see [242], [245] to [250]) which we discuss at paragraphs 200 to 219 below.

(v) The sources for the determination of the content of international humanitarian law

176. Both parties relied on a number of sources, including commentary by the ICRC, commentators closely associated with the ICRC, scholars, and practitioners, for example in evidence in other proceedings, such as the Canadian *Amnesty International* case, to which we have referred at paragraph 98 above and which we consider in this context at paragraph 190 below. Some of the commentary, including commentary by the ICRC, consists of an evaluation of the judge's analysis and conclusions in this case rather than an *ex ante* analysis of the principles. Given the nature of a rule of customary international law, in considering whether an act is authorised by customary international law particular care needs to be taken with such contributions. What needs to be done is to test the force and rigour of the arguments presented against the background of what in fact is shown to be State practice.

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

(c) Considerations supporting the judge's conclusions

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

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

179. The Secretary of State argues that it is possible to find that a State's armed forces are authorised to detain during a non-international armed conflict without also finding that insurgents are granted the same power. Whether or not this is the case as a matter of logic, the fact is that, as seen in the ICRC's commentary, concerns about reciprocity were an influential factor in the formation of the treaties. This also provides an explanation for the decision not to include the Convention provisions authorising detention in Common Article 3 and APII, and of the terms of paragraph 4 of Common Article 3, which provides that it does not "affect the legal status of the parties to the conflict".

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

181. Whatever the position as a matter of logic, the fact is that, as seen in the ICRC's commentary, this reason was an influential factor in the formation of the treaties. It also provides an explanation for the decision not to include the Convention provisions authorising detention in Common Article 3 and APII, and of the terms of paragraph 4 of Common Article 3, which provides that it does not "affect the legal status of the parties to the conflict". In the judge's words (at [245]), an entitlement conferred on insurgents to detain would have been anathema to most States which faced internal armed conflict on their territory and did not wish to confer legitimacy on rebels and insurgents. States have traditionally regarded attempts to regulate internal armed conflicts as contrary to the principle of the preservation of State sovereignty and an intrusion into their domestic jurisdiction, in particular their criminal jurisdiction. Such considerations militate against the implication of a power to detain.

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

182. Secondly, there is a sound reason for not implying an international humanitarian law power to detain in a purely internal conflict. If a power to detain is implied in a purely internal conflict, the government involved might be entitled (or claim to be entitled) in international law to detain even where it had no power to do so under its own domestic law. Although lethal force may be used by a State in a non-international armed conflict, it is subject to its domestic law and the rules of international humanitarian law. This is shown in ***R v Blackman,*** where a Royal Marine Sergeant was convicted of murdering an insurgent in Afghanistan after capturing him: see the sentencing remarks of HHJ Blackett, the Judge Advocate-General, 6 December 2013, conviction affirmed [2014] EWCA Crim 1029, and see Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013* (2014) 103 and 104.

(iii) Academic commentaries

183. Thirdly, the dominant approach in the international humanitarian law literature put before us (see paragraph 241 below) is that power to detain in a non-international armed conflict is to be determined by the domestic law of the place at which detention took place or of the detaining power. Alternatively, it can be found in an appropriately drafted UNSCR. Moreover, the rules of international humanitarian law are principally prohibitory rather than facilitative. This is seen in the approach in

Customary International Humanitarian Law (2005) by Henckaerts and Dodswald-Beck undertaken for the ICRC (*Customary International Humanitarian Law* (2005)).

(iv) The UK Joint Service Manual

184. Fourthly, and significantly, support for the judge's approach can be found in the 2004 edition of the United Kingdom's *Joint Service Manual of the Law of Armed Conflict* promulgated by the UK Chiefs of Staff. The foreword to the *Manual* states it is a step "in stating publicly the UK's interpretation of what the law of armed conflict requires". In chapter 15 on internal armed conflict, it is stated (at §15.5) that it is not easy to determine the exact content of customary international law applicable to non-international armed conflicts, but (§15.30.3) that the treatment of detainees in a non-international armed conflict is governed by the domestic law of the country concerned, any human rights treaties binding on that State in times of armed conflict, and the basic humanitarian principles of international humanitarian law mentioned in §15.30.

185. The Manual thus reflects the position that prisoner of war status does not arise in a non-international armed conflict unless the parties to a conflict agree, or decide unilaterally as a matter of policy to accord this status to detainees. It is noteworthy that suggestions that the rules governing international armed conflicts are being applied to non-international armed conflicts (see, for example, E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010) to which we refer at paragraphs 188 and 236 below) rely in part on such agreements or unilateral decisions.

186. Significantly, the *Manual* also states (see its commentary on APII at §50.40.2) that internal armed conflicts are "principally governed by domestic law and because of this will inevitably lead to an increase in detention and other restrictions being imposed by that law for security reasons relating to the conflict". Notwithstanding the reference to "treatment" in §15.30.3, the *Manual* proceeds on the basis that authority for detention is principally to be found in national law.

187. It was accepted on behalf of SM that there is nothing inherently unlawful in detaining in a non-international armed conflict. It was, however, submitted that in the case of detention in Afghanistan, the problem was that no adequate legislative or policy legal structure was put in place by the United Kingdom to provide for a period of detention the MoD and the military commanders of HM armed forces considered was essential for the accomplishment of their mission.

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

(i) A convergence of legal regimes in respect of international armed conflicts and non-international armed conflicts

188. The first of the considerations which favour the Secretary of State's critique of the judgment below is that it is broadly accepted that most modern conflicts are non-international armed conflicts, and that there has been a convergence of the regimes governing international armed conflicts and non-international armed conflicts by extending the protection formerly only available in an international armed conflict to individuals involved in a non-international armed conflict. The proliferation of "internationalised" non-international armed conflicts where not all the parties to the conflicts are sovereign States, has led some to state that, notwithstanding the

categorisation of a conflict such as that in Afghanistan as a non-international armed conflict, the legal regime governing it differs from that in a purely internal armed conflict, a "traditional" non-international armed conflict. The introduction by Jakob Kellenberger, then President of the ICRC, to *Customary International Humanitarian Law* (2005) xvi states that State practice concerning non-international armed conflicts

> "goes beyond what those same States have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to *all* armed conflicts, international and non-international".

See also the thesis advanced by E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010) 2, 37.

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

189. Secondly, where the armed forces in question are operating outside their own State, their own domestic law may be inapplicable because it does not have extra-territorial effect. Moreover, where it has, or purports to have, such effect, the principles of sovereignty and non-intervention will prevent action without the host State's consent. Where the host State's own law does not authorise detention, or does so for only a limited period, even if it gives consent to the armed force to detain or detain beyond that period (as happened in the Military Technical Agreement made by the Afghan government and ISAF and in the UK/Afghanistan Memorandum of Understanding), there is a further problem in locating the source to detain in the domestic law of the State of the armed forces in question.

(iii) The fragmentation of legal regimes

190. Thirdly, it is also suggested that, if the powers of States in an internationalised non-international armed conflict are determined by the domestic law of the State of the armed forces in question, they could vary dramatically from one conflict to another. In the case of an internationalised non-international armed conflict where there are forces from several States in the host State, they could also depend on which State's forces in fact detain a person in the course of combat. We have referred at paragraphs 98 and 176 to the decision of the Canadian Federal Court in *Amnesty International Canada v Canada (Chief of the Defence Staff)* [2008] 4 FCR 546, affirmed [2009] 4 FCR 149. The context of that case is very different because it was concerned with the applicability of the Canadian Charter of Rights to individuals detained by Canadian forces in Afghanistan but Mactavish J's judgment is instructive. He stated (see [274] to [275]) that a jurisdictional regime based on the laws of the States of members of a multinational military force would result:

> "in a patchwork of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan on a purely random-chance basis",

and thus:

> "the result would be a hodgepodge of different foreign legal systems being imposed within the territory of a state whose sovereignty the international community has pledged to uphold".

191. Mactavish J also stated ([276], [277] and [280]) that, in the context of a United Nations sanctioned multinational military effort:

> "the appropriate legal regime to govern the military activities…underway in Afghanistan is the law governing armed conflict – namely international humanitarian law"

and that

> "the application of international humanitarian law to the situation of detainees in Afghanistan would not only give certainty to the situation, but would also provide a coherent legal regime governing the actions of the international community in Afghanistan".

192. The inference is that, in respect of those whose participation means they forfeit such protection, there are greater powers than in respect of protected persons.

(iv) The logic of international humanitarian law

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

(e) The overarching question

194. In the light of those submissions and considerations, we turn to the question whether at the material time international humanitarian law authorised or conferred the power of detention in the case of an "internationalised" non-international armed conflict. This is a question which overlaps substantially with the question of whether, if in principle international humanitarian law provides authority, on what grounds would detention be lawful. The overlap is reflected in our discussion, but we set out our conclusions on the issue of grounds for detention at paragraphs 245 to 250 below.

(f) Is it necessary to show a positive power to detain, or does an absence of prohibition suffice?

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

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

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

> "[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would

> only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at the present. Far from laying down a general prohibition that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."

The "absence of prohibition equals authority" approach has, however, been much criticised and is considered to be outdated: see for example Sir Hersch Lauterpacht, *The Development of International Law by the International Court,* (1958) 357 and following and *Brownlie's Principles of Public International Law* 8th edn 2012, J. Crawford (ed.), 458. In the context of detention (the question with which we are concerned), see to the same effect Els Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013) 388 and Sari, *EJIL Talk*, 9 May 2014, §2. Sir Robert Jennings and Sir Arthur Watts tellingly sum up the modern view in their 9th edition of *Oppenheim's International Law* (1992), as follows:

> "There is … increasing acceptance that the rules of international law are the foundation upon which the rights of states rest, and no longer merely limitations upon states' rights which, in the absence of a rule of law to the contrary, are unlimited. Although there are extensive areas in which international law accords to states a large degree of freedom of action (for example in matters of domestic jurisdiction), it is important that the freedom is derived from a legal right and not from an assertion of unlimited will, and is subject ultimately to regulation within the legal framework of the international community." (at 12)

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

198. Brownlie also states (at 27) that while authority (the *North Sea Continental Shelf* case (1969) ICJ Reports 3):

> "is not incompatible with the view that existing general practice raises a presumption of *opinio iuris* [for the purposes of the development of a rule of customary international law] … the tenor of the judgment is hostile to such a presumption".

However, a comment on the same page of the book is more positive. It states that, where practice is largely treaty-based, *opinio juris* may be sufficient to expand application of treaty norms as custom. That might have given some purchase to the Secretary of State's argument, but, in view of our conclusions in relation to the Geneva Conventions, it does not. We consider this further at paragraphs 222 and following below.

(g) The distinction between international humanitarian law derived from treaties and international humanitarian law derived from customary international law

199. There was overlap between the arguments deployed under the two limbs of the Secretary of State's argument based on international humanitarian law - that based on the treaties and that based on customary international law. The Secretary of State's written submissions, which did not distinguish the two limbs, have support in the

reasoning in *Tadič* and in some of the literature. In *Tadič*, the International Criminal Tribunal for former Yugoslavia (Judge Cassese) stated that:

> "… two bodies of rules have … crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other."

and

> "… the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law": at [98], and see also [109], [119] and [126] and [127].

Some commentators, including the ICRC and Pejic, also run the two together: see ICRC November 2014 Opinion Paper pg 2 and 7 and Pejic, in Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 94. For this reason, there is also some overlap in the analysis in the next two sections, although we have sought to keep the two limbs separate.

(h) Implicit authority to detain derived from treaties: Common Article 3 and APII

(i) Implications from the language

200. The first limb of the Secretary of State's argument was that Common Article 3 and APII implicitly authorised detention in a non-international armed conflict, and were thus the source of the power to detain. The Secretary of State relied on the express references in Common Article 3 to "detention" and in APII, Articles 2, 4(1), 5(1) and (2), and 6 to those "deprived of their liberty or whose liberty has been restricted for reasons related to the conflict" and to "detention" and "internment". He submitted that the premise of those references and the existence of rules in Common Article 3 and APII for the protection of those detained in a non-international armed conflict was that there was an inherent power to detain provided that was done in accordance with those rules. His argument has the support of a number of commentators, some of whom were cited by the judge at [240].

201. Gill and Fleck (eds) *The Handbook of International Military Operations* (2010) 471 states:

> "The law of non-international armed conflict is less explicit in stipulating the legal basis for operational detention than the law of international armed conflicts. However, a generic power to that effect is implicit in Common Article 3, in as much as it identifies as one category of persons taking no active part in hostilities 'those placed *hors de combat* by …detention'".

See also Pejic (2005) 87 (858) International Review of the Red Cross 375, 377 and in Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) Ch.4 "Conflict Certification and the Law applicable to Detention and the Use of Force", pg 94. The view of Pejic who (as we have said at paragraph 172 above) is a Legal Adviser to the ICRC's Legal Division was adopted by the ICRC by 2007; see the ICRC's Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2007), Annex 1, and (2011) pg 15 and 18, and Knut Dörmann, then Head of the ICRC's Legal Division, (2012) 88 Int. L. Stud. 347 at 349, 356 (and note 52).

202. The ICRC reiterated its view in *Internment in Armed Conflict*, an "Opinion Paper" published in November 2014, i.e. after the judgment below. That paper states that the

absence of express reference in Common Article 3 to internment or permissible grounds or process has become a source of different positions on the legal basis for internment by States in "an extra-territorial non-international armed conflict". It states that one view, including that of the judge, is that, in the absence of an explicit rule, international humanitarian law cannot provide it implicitly. The ICRC states that the other view:

> "shared by the ICRC, is that both customary and treaty international humanitarian law contain an inherent power to intern and may in this respect be said to provide a legal basis for internment in non-international armed conflict. This position is based on the fact that internment is a form of deprivation of liberty, which is a common occurrence in armed conflict, not prohibited by Common Article 3, and that Additional Protocol II – which has been ratified by 167 States – refers explicitly to internment."

We observe that, in this statement, the ICRC derives a positive power to intern from an absence of prohibition.

203. We have stated (at paragraph 171 above) that the institutional views of the ICRC on the requirements of international humanitarian law and the interpretation of the Geneva Conventions command considerable respect. It should, however, be noted that, despite the ICRC's view that there is at present power to detain and intern in a non-international armed conflict, it also stated in 2014 that:

> "in the absence of specific provisions in Common Article 3 or Additional Protocol II, additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality".

204. It envisages an international agreement between international forces and the host State, the adoption of the host State's domestic law, or provisions for grounds and process in the standard operating procedures of the international forces. The position of Knut Dörmann is also nuanced. He stated ((2012) 88 Int. L. Stud. 347, at 358) that the ICRC's study *Strengthening Legal Protection for Victims of Armed Conflicts,* concluded that "international humanitarian law, in its current state, provides a suitable legal framework … [and] in almost all cases what is required is stricter compliance with that framework rather than adoption of new rules", but also (at 348 and 358) that there is a need to strengthen the law in the light of humanitarian problems and related normative "weaknesses" and "gaps".

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

205. The Secretary of State's response to the argument that implying a power to detain is inconsistent with the express decision in 1949 to make no provision for detention in non-international armed conflicts in Common Article 3 and the similar decision in 1977 in respect of APII was to submit that some implication must be possible because it was clear that there was power to use lethal force against armed groups. For the first stage of this submission (namely that there was power to attack and use lethal force on insurgents who participate in the conflict) the Secretary of State relied on the ICRC's *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009). This states:

> "Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common

> to the Geneva Conventions, the notion of taking a direct or active part in hostilities is found in many provisions of international humanitarian law. …" (at 12)

206. This view is shared by a number of commentators. In *The Handbook of International Military Operations* (2010) Gill and Fleck state:

> "Despite the prohibition on attacking civilians, those who directly participate in hostilities may be attacked for such times as they do so. Codified in Article 51(3) of API and Article 13(3) of APII, this principle reflects customary international humanitarian law in both international and non-international armed conflict." (§16.02. See also §25.03)

In *The Law of Non-International Armed Conflict* (2012) Sivakumaran states that members of an armed group may be targeted whether or not they are taking a direct part in the hostilities at the time they are targeted.

207. The next stage of the Secretary of State's submission was that, if there was an implied power or licence to kill, that "logically encompassed operational detention" and *a fortiori* must include an implied power or licence to detain. It was said that this reflected the balance required between military necessity and the requirements of humanity that underpin all the rules of international humanitarian law. One requirement of humanity is to give quarter rather than using lethal force. Rule 46 of *Customary International Humanitarian Law* (2005) states "ordering that no quarter will be given…is prohibited". The corollary of that position in the case of a person who is taking a direct part in hostilities and represents an imminent threat is to permit the detention of that person so as to render him or her *hors de combat*. The Secretary of State submitted that was the only way of encouraging armed forces to take a lesser step than exercising lethal force and, in this way, to promote the humanitarian side of international humanitarian law. He argued that it would be legally incoherent not to recognise a power to detain those posing an imperative security threat to whom quarter has been given in battle. Although he did not expressly refer to Rule 46 of the ICRC's study, it supports his submission.

208. A number of commentators take this position. For a recent example, see Ryan Goodman (2009) 103 AJIL 48, who states (at 55 to 56) that:

> "it would be absurd to accept an interpretation of international humanitarian law that results in a state's possessing the legal authority to kill actor X on purpose but lacking the legal authority to detain actor X. States would otherwise have a perverse incentive to kill individuals who pose a military threat if the alternative were to let them go free".

It is to be noted that this is also an *a priori* argument based on the structure of international humanitarian law rather than one resting on the provisions of Common Article 3 and APII, doctrinal authority, or State practice. Goodman's analysis also proceeds on the basis that (cf. the discussion at 195 to 198 above) what is not prohibited is permitted. In a web comment on the judgment below, he stated:

> "I agree with Mr Justice Leggatt's holding that [international humanitarian law] does not provide authorisation to detain in a [non-international armed conflict], and thus 'the only potential sources of a power to detain are considered to be the host state's own domestic law…and [UN Security Council Resolutions]" but also that "international humanitarian law does not prohibit (it allows for) detention of civilians who pose a security threat in non international armed conflict." *Just Security* (an online blog), 5 February 2015.

209. Goodman's position is very delicately balanced to remove any suggestion that the two statements quoted above are not consistent. It is that "the very structure of [international humanitarian law] provides an answer to the outer boundaries of permissible state actions in [non-international armed conflicts]" and that "state actions which are permitted by [international humanitarian law] in international armed conflict are permitted by [international humanitarian law] in [non-international armed conflicts]" (*Just Security*, 5 February 2015). He states that this is not reasoning by analogy, but reasoning by structure, because States have accepted more exacting obligations under international humanitarian law in international armed conflicts than in non-international armed conflicts. He argues (at (2009) 103 AJIL 48 at 50) that, since international humanitarian law is less restrictive in non-international armed conflicts than in international armed conflicts, "if states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess the authority to undertake those practices in non-international conflict."

210. We have referred (see paragraphs 116 to 124 above) to the decision of the Grand Chamber of the Strasbourg Court in *Hassan v United Kingdom*, delivered four months after the judge's decision in this case. Statements made in the majority judgment in that case were also deployed by the Secretary of State in support of the *a fortiori* argument. The Secretary of State relied in particular on the statement (at [102]) that the provisions in Geneva III and Geneva IV relating to internment during international armed conflicts that were at issue in that case "enjoy universal ratification" and "were designed to protect captured combatants and civilians who pose a security threat". The Grand Chamber cited its decision in *Varnava & others v Turkey* (2010) 50 EHRR 21 stating that the ECHR should be interpreted so far as possible in the light of general principles of international law, including the rules of international humanitarian law.

211. The judge rejected the *a fortiori* argument on the ground that it did not go further than justifying the capture of a person who may lawfully be killed. He did so because "as soon as [the person] had been detained and the use of lethal force against him could not be justified, the argument no longer provides a basis for his detention": at [253], and see also [219]. He gave a similar reason (at [343]) for rejecting the argument that the requirement in Article 5(3) to bring a detainee promptly before a judicial officer should be regarded as inapplicable or interpreted sufficiently flexibly to accommodate the fact that the UK authorities had no power to bring SM before an Afghan court. He stated that it was only if they chose to keep him in custody that Article 5(3) required him to be brought before a court and that they could comply with it by releasing him if he could not be transferred promptly. Both in relation to authority to detain and in relation to the procedural safeguards required, the judge essentially accepted the argument of Debuf, *Captured in War: Lawful Internment in Armed Conflict* (2013) 389.

212. However, neither the judgment nor Debuf address the "Catch-22" position identified at paragraph 174 above. A person may not pose an imminent threat while he is in fact detained. Assume, however, that he will do so immediately on release and that he cannot be transferred safely or lawfully to Afghan control. In this scenario if, as the judge held, he cannot lawfully be detained beyond 72 or 96 hours, he would have to be released. As we have stated at paragraph 147, we consider that a person who is detained but who has to be released after such a short time should generally be regarded as posing an imminent threat, albeit one subject to a contingency.

(iii) Other "Catch-22" issues

213. The "Catch-22" point has another strand referable to two other situations. The first is where transfer was not possible because of concern that the host State (here Afghanistan) would mistreat the detainee contrary to Article 3. The second is where the Afghan authorities asked HM armed forces which were assisting it to hold a person on its behalf because it had no room in an appropriate detention facility. In both situations, the judge's conclusion that the detainee must be released after 96 hours puts the UK authorities in a "Catch-22" position. *R (Maya Evans) v Secretary of State for Defence* illustrates the problem in the first situation. In the second situation, to state that there is no authority to detain beyond 96 hours does not recognise that detention by HM armed forces pursuant to such a request is, in a sense, as agent for the host State rather than on behalf of the UK authorities.

(iv) Conclusion: no authority or power to detain under international humanitarian law derived from treaties

214. The *a fortiori* argument based on the lawfulness of the use of lethal force is undoubtedly a powerful one but for a number of reasons, we consider that it is insufficient to provide a basis for implying a power or authority to detain into Common Article 3 and APII, i.e. a treaty basis for authority to detain.

215. First, it is not suggested that such a power should be implied in the case of a purely internal armed conflict, i.e. a "traditional" non-international armed conflict. Indeed, there are good reasons for not doing so (see paragraphs 178 to 182 above). In the light of the number of different types of non-international armed conflicts, it would be necessary to decide which of them qualified for the implication, and no criteria were suggested on behalf of the Secretary of State, beyond the presence of some internationalised element to the non-international armed conflict.

216. Secondly, the background of refusal by the States which are signatories to Common Article 3 and APII to include express words to this effect, and the reiteration in APII, Article 3, of the sovereignty of a State and its responsibility to maintain or re-establish law and order and to defend its national unity and territorial integrity are also of significance. These factors show an intention to reject the expansion of the law in the treaties governing international armed conflicts to all types of non-international armed conflicts.

217. Thirdly, finding a treaty basis for such authority or power to detain has to overcome the fact (as the judge stated at [246]) that it is not possible to deduce the scope of the power, i.e. the grounds of detention, and the procedural safeguards from Common Article 3 and APII themselves. The proposition that the provisions in Geneva III and Geneva IV can be applied by analogy to do this is highly controversial. Those who state that it cannot include Debuf at 473 to 477, Rona (2015) 91 Int L. Stud. 32, at 44 to 45 and Rowe (2012) 61 ICLQ 697, at 701 to 702. The proposition also glosses over the fact that the safeguards in the Geneva Conventions do not apply and that the UK/Afghanistan Memorandum of Understanding (to which we have referred at paragraph 41 above), unlike, for example, the agreement between Canada and Afghanistan, does not provide for detainees to be treated as Prisoners of War. On the Canadian position, see *Amnesty International Canada v Canada (Chief of the Defence Staff)* to which we have referred at paragraphs 98 and 190 above at [47] and [170].

218. The proponents of a power to detain in a non-international armed conflict recognise these problems: see, for example, the position of the ICRC and Knut Dörmann discussed at paragraphs 203 to 204 above, the ICRC's *Commentary on the Additional Protocols to the Geneva Conventions* (1987) 1386 at §4568 and Gill and Fleck at §25.03. They seek to find the scope of the power and the safeguards in other rules of international humanitarian law, including international human rights law. There is, however, a certain artificiality in basing the authority to detain in a non-international armed conflict on Common Article 3 and APII, but basing its scope and the safeguards on a different legal source. Finally, as the judge stated (at [244]), the purpose of Common Article 3 and APII is to protect individuals rather than to establish a legal framework: see the ICRC's *Commentary on APII* (1987) at 1384 to 1386 and Debuf, *op. cit.* 467 and 468.

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

(i) Authority to detain derived from customary international law

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

220. The two requirements for the establishment of a rule of customary international law are: general practice by States, and the conviction that such practice reflects or amounts to law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessitatis*): see ICJ Statute, Art. 38; Cassese, *International Law* (2nd edn 2004) 157. In the *North Sea Continental Shelf* cases ICJ Reports (1969) 3 the ICJ stated (at [74]) that "State practice … should … [be] both extensive and virtually uniform …" and "that the practice must "… have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved".

221. The establishment of such a customary rule of law might be the result only of the operation of the requirements, or it might be the result of their operation aided by such treaty rules as have become part of customary law in the way described by the ICJ in the *North Sea Continental Shelf* cases (at [37], [69] and [70]) and by the International Criminal Tribunal for the former Yugoslavia in *Tadič*'s case (see paragraph 199 above). There is also some suggestion (see e.g. Cassese, 161) that the requirements of practice may not be as high or as stringent when it comes to the emergence of a principle or a rule reflecting the laws of humanity, i.e. international humanitarian law.

(ii) State practice and opinio juris

222. The Secretary of State's argument about State practice proceeded as follows. States involved in armed conflict, and particularly internationalised non-international armed conflicts do detain, and have done so for many years. This is acknowledged in treaties concerning non-international armed conflicts: see the references to "detention" in Common Article 3 and APII, and to "internment" in APII. States have detained individuals in such circumstances without derogating from international human rights conventions such as the ECHR. The Secretary of State relied heavily on *Hassan*, although (as we have discussed at paragraphs 121 to 124 above) that case was concerned with an international armed conflict not a non-international armed conflict. While there may also be authority for detention in domestic law, he argued that did not detract from the fact that States detain in non-international armed

conflicts as of right. It is at this stage that the suggestion in Brownlie's text (see paragraph 198 above) that, where practice is largely treaty-based, *opinio juris* may be sufficient to expand application of treaty norms as custom and that of Cassese (see paragraph 199 above) that the requirements may be less stringent in the case of the emergence of a customary rule of international humanitarian law, become relevant. The Secretary of State relied on the statement by Thirlway in *The Sources of International Law* (2014) at 78 that "what is generally regarded as required is the existence of an *opinio* [*juris*] as to the law, that the law is, or is becoming, such as to require or authorise a given action" and that the phrase "*opinio juris sive necessitatis*", "in its entirety signifies that it is or may be sufficient if there is an *opinio* to the effect that the action (or refraining from it, as the case may be) is required as being, in some sense, necessary".

(iii) The Copenhagen principles

223. The Secretary of State's submissions on State practice next placed significant weight on the principles and guidelines agreed in 2012 after deliberations over a five year period in *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (the Copenhagen Principles). The Copenhagen Process involved 24 States as participants, as well as representatives of the African Union, the European Union, NATO, the UN and the ICRC as observers. It was the first step taken as a result of the ICRC's desire to provide minimum standards and the institutional guidelines *"Procedural Principles and Safeguards for internment/administrative detention in Armed Conflict and other situations of violence"* (the ICRC's Procedural Principles). The ICRC's Procedural Principles were issued in 2007 as an annexe to the 2007 ICRC's report on "International Humanitarian Law" submitted to the 30th Conference of the Red Cross and Red Crescent, but were first published in 2005 in the form of an article by Pejic (2005) 87 IRRC 375.

224. The Copenhagen Principles apply to those who (see Copenhagen Principle 1) have been "deprived of their liberty for reasons related to an international military operation". The preamble (especially §§IV and VII) recognises the challenges of agreeing a precise description of the interaction between international humanitarian law and international human rights law and of handling detainees in non-international armed conflicts. The Secretary of State relied in particular on §III of the Preamble, which states that the participants "recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations", a term which (see §IX) referred to non-international armed conflicts. Principles 12 and 13 envisage deprivation of liberty "for security reasons" and "on suspicion of having committed a criminal offence". The former are to have a "prompt initial review" and "the decision to detain reconsidered by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of detention". The latter are to be transferred to or have proceedings initiated against them by an appropriate authority "as soon as circumstances permit". Principle 7 requires persons detained to be promptly informed of the reasons for their detention, and Principle 9 provides that detaining authorities are responsible for providing detainees with adequate conditions of detention. Principles 13 and 15 recognise the possibility that a transfer of a detainee may be delayed to protect the detainee from serious mistreatment.

225. Principle 16 states that nothing in the Copenhagen Principles "affects the applicability of international law to international military operations conducted by the States or

international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors".

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

> "[T]his savings clause…recognises that the Copenhagen Process Principles and Guidelines is not a text of a legally binding nature and thus does not create new obligations or commitments. Furthermore, the Copenhagen Process Principles and Guidelines cannot constitute a legal basis for detention. Although some language, e.g. Principle 2, may reflect legal obligations in customary and treaty law, the Copenhagen Process Principles and Guidelines are intended to reflect generally accepted standards. In such instances, the applicability and binding nature of those obligations is established by treaty law or customary international law, and not by the Copenhagen Process Principles and Guidelines. 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."

227. The Secretary of State's submissions about State practice before and during the hearing before us were based on the Copenhagen Principles and the approach of the International Tribunal for the former Yugoslavia in *Tadič*'s case, which we have discussed at paragraph 199 above. The consequence of Principle 16 is that, if a customary international law basis is to be found for detention of SM, it must be found independently of and prior to the agreement of the Copenhagen Principles. The judge was not shown evidence in the form of particular examples of practice by States involved in non-international armed conflicts relying on or showing recognition by them that international humanitarian law provides a legal basis for detention: see his judgment at [257].

(iv) Post-hearing material about State practice

228. Until we received the Secretary of State's note on outstanding issues dated 31 March 2015, there was no evidence of such reliance before us. The Secretary of State's post-hearing note on outstanding issues *inter alia* addressed a question by the court about whether there were examples of procedural safeguards such as those identified as sufficient by the Secretary of State which met the requirements of procedural safeguards after the 96 hour period of detention in a non-international armed conflict. It gave examples relating to three other "internationalised" non-international armed conflicts; those in Kosovo, Somalia, and Bosnia, and the position of other members of ISAF in Afghanistan. We consider whether the examples in fact support the Secretary of State's position as to what procedural safeguards are required at paragraph 294 when dealing with that issue. In view of the previous state of the evidence we have also considered whether the examples are of State practice relying on authority based on international humanitarian law to detain in an internationalised non-international armed conflict.

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

(i) That from Kosovo relies on the factual scenario in *Saramati v France,* the facts of which we have summarised at paragraph 52 to 55 above, and which the Grand Chamber of the Strasbourg court ruled was inadmissible. It was

submitted on behalf of the Secretary of State in his note on outstanding issues that it was clear from that case that KFOR had authority to detain for long periods without judicial authorisation or any recourse to judicial review. But the facts of *Saramati* are not an example of State practice relying on international humanitarian law authority to detain in a non-international armed conflict. As we have explained, KFOR acted under a mandate given by UNSCR 1244 of 10 June 1999, which the Strasbourg court held (see [124]) included a power to detain, and a Detention Directive made in October 2001. The Strasbourg court was not dealing with a period of detention that fell outside the UNSCR or the Detention Directive. It held (see [134] and [141]) that the detention throughout the period was in the exercise of lawfully delegated Chapter VII powers of the UN Security Council and so was attributable to the UN.

(ii) The Somalia example is also one in which authority to detain was based on a UNSCR, not international humanitarian law. UNSCR 1744 (2007) gave a mandate to the African Union Mission in Somalia, a regional peacekeeping mission, which included authority to detain. That mandate was renewed with the authority of a UNSCR at six-monthly intervals.

(iii) The Bosnia example is taken from the facts of the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Mucić,* 16 November 1998. That case was concerned *inter alia* with legality of the internment by *Mucić* of protected persons, i.e. civilians, and the scope of Article 42 of Geneva IV. Although the Tribunal stated (at [192]) that international humanitarian law applied whether the conflict was an international armed conflict or a non-international armed conflict, it did not state that the rules of international humanitarian law are the same in both cases. Moreover, as it concluded (see [214] and [234]) that the conflict was an international armed conflict, the discussion (at [564] and following) of when protected status is lost is of very limited assistance in these proceedings.

230. As to the practices of Australia, Canada, the Netherlands and the United States of America in Afghanistan, the four other members of ISAF relied on in the Secretary of State's note on outstanding issues, we observe that until our request during the hearing the Secretary of State had not relied on these practices to show an international humanitarian law authority to detain. We consider that State practice, confined to one non-international armed conflict situation where because, as we have explained at paragraph 153(v) above, some ISAF members would not alter the 96 hour ISAF policy other States chose to go beyond it, is of limited assistance. Lord Bingham stated in *Jones v Saudi Arabia* [2006] UKHL 26 at [22] that "one swallow does not make a rule of international law". Five swallows under a single eave are similarly very unlikely to make a customary rule of international law in the light of the requirement (see paragraph 220 above) that the State practice be "extensive". Moreover, save for the case of the Netherlands, the practice relied on does not provide unequivocal support for an international humanitarian law basis for authority to detain in a non-international armed conflict. Nor is it virtually uniform. A number of other ISAF troop contributing nations considered their powers of detention to be limited to a maximum of 96 hours under ISAF policy.

231. From the information recorded in the Secretary of State's note, only the Netherlands appears to rely explicitly on international humanitarian law as providing authority to detain in a non-international armed conflict. The Ministers' communication to the

House of Representatives stated that there will be such authority where "an internee is a threat that necessitates internment" (unofficial translation), reasoning that has an element of circularity about it.

232. In the case of Canada, reliance is placed on the statements of Mactavish J in *Amnesty International Canada v Canada (Chief of the Defence Staff)* to which we referred at paragraphs 98 and 190 above. Those statements, as we acknowledge, support the Secretary of State's general approach. However, in relation to establishing a rule of customary international law, what is needed is State practice rather than the views expressed in a judgment of a national court in that State: see the statement of Lord Hoffmann in *Jones v Saudi Arabia* at [63] set out at paragraph 253 below. The focus of *Amnesty International Canada* was on whether the Canadian Charter applied extraterritorially rather than the content of international humanitarian law, another legal regime. There is also the fact that the Canadian Military Technical Agreement with Afghanistan is different from the United Kingdom's. It is more explicit on powers of detention and contains an agreement by Canada to treat detainees as if they were Prisoners of War and thus to apply Geneva III. While Mactavish J claims (at [276]) that international humanitarian law would provide "coherence", he recognised that in the case of a non-international armed conflict, international humanitarian law applies "with some modifications" [279] but did not analyse the modifications at all.

233. In the case of Australia**,** because the Secretary of State's note focuses on procedure there is nothing on the basis upon which the Australians claimed to detain for more than 96 hours after November 2011. The Minister's statement does not refer to international law, let alone international humanitarian law. It simply states that on the advice of the Chief of the Defence Staff he decided to authorise longer detention.

234. In the case of the USA there is also nothing in the note about the basis upon which the USA claimed to detain for more than 96 hours. It, however, appears to have been on the basis of US legislation such as the Authorisation of Military Force Act 2001 and the Military Commissions Act 2006 which provide for the extraterritoriality of its domestic legal structures. Although Goodman ((2009) 103 AJIL 48 at 49) states that the international humanitarian law regime constitutes the legal background against which US detention policies have been enacted, he also states that the lawmakers and some courts "misconstrued and misappropriated" aspects of that regime.

(v) Academic commentaries

235. Turning from State practice to commentary, *Customary International Humanitarian Law* (2005) states (Introduction at xxxv) that "common sense would suggest that [the rules of international humanitarian law], and the limits they impose on the way war is waged, should be applicable in international and non-international armed conflicts". It is stated that the study provides evidence "that many rules of customary international law apply in both international and non-international armed conflicts, and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts". In particular:

> "the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts."

236. A similar approach is taken by E. Crawford in *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (2010) to which we have referred at

paragraphs 185 and 188 above. She states (at pg 37) that, as well as the customary status of certain fundamental principles of international humanitarian law, "there is evidence of a general trend towards the application of the rules and principles regarding international armed conflict to non-international armed conflict". She also states (at pg 97 to 98) that the nature of modern armed conflict has essentially rendered the legal distinction between types of armed conflict irrelevant. However, her examples (see pg 37 to 39) of State practice are of practice which supports the acceptance in particular situations of the international humanitarian law obligations that apply to an international armed conflict to a non-international armed conflict rather than practice supporting a general authority in a non-international armed conflict to take particular action. The examples concerned establishing prisoner of war camps and allowing the ICRC to visit detainees in internal armed conflicts in Yemen and Nigeria in the early 1960s, and the limitation of military action to military objectives in the civil war in the Democratic Republic of Congo. Even this practice is equivocal because, as E. Crawford accepts, the statements made by the participants may have been made for policy rather than legal reasons, although she submits (at pg 39) that the fact that they were made at all is conducive to the "increased blurring of the laws of armed conflict, and demonstrative of an acceptance of the universality of the fundamental rules of [international humanitarian law]". See also *Tadič* at [97], [100], [111] and [119] to [127].

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

237. Part of the Secretary of State's argument under this heading was, in effect, the *a fortiori* argument we considered at paragraphs 207 to 219 above but without tying it to provisions in Common Article 3 and APII or the analogical application of provisions about international armed conflicts in the Geneva Conventions. The argument was that the principle of distinction means that States are authorised to target non-State actors participating in a non-international armed conflict: see ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under* IHR (2009) 12 and 73; *Customary International Humanitarian Law* (2005), Rule 1, which is stated to apply in a non-international armed conflict as well as an international armed conflict; Schmidt in Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010) 16.02; *Abella v Argentina*, 18 November 1997, Inter-American Commission of Human Rights, OEA/Ser.L.V. ii.95 Doc. 7 Rev at [177] to [179]. The balance required between military necessity and the requirements of humanity that underpin international humanitarian law meant that there was authority to detain in a non-international armed conflict. The Secretary of State submitted that it would be very odd to say that there was no authority to do so when there was such authority in an international armed conflict. The conclusion that there was such authority flows from the structure and nature of international humanitarian law, which is to temper the savagery of war with humanitarian concerns.

238. Does this mean there is general recognition by States of a rule of law conferring a power to detain for security reasons in a non-international armed conflict? We have stated at paragraph 171 that the views of the ICRC are particularly influential, although not authoritative in the sense of being binding. The ICRC considers that there is such a rule. So do a number of commentators, in particular commentators such as Pejic, Knut Dörmann, and Meltzer, who are or have been legal advisers to the ICRC.

239. Jelena Pejic (2005) 87 IRRC 375 at 377 states that "internment is…clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of

Additional Protocol II, which mentions internment in Articles 5 and 6 respectively…". She also states that the principles and rules of Geneva IV may "in practice, serve as guidance in non-international armed conflicts in resolving some of the procedural issues".

240. Knut Dörmann, (2012) 88 Int. L. Stud. 347 at 349 states that "deprivation of liberty is an inevitable and lawful occurrence in armed conflict, including in non-international armed conflict". He also states (at 356 to 357) that, while international humanitarian law applicable in non-international armed conflicts does not specify grounds for internment, the ICRC's institutional guidelines and operational dialogue rely on "imperative reasons of security", a high standard, as the minimum legal standard, and that those who directly participate in hostilities and thus lose the protection from direct attack that civilians have, may "*a priori*, also be subject to internment". See also the Chatham House and ICRC, *Expert Meeting on Procedural Safeguards for Security Detention in Non International Armed Conflict,* September 2008, (1999) 91 IRRC 2126, 2129; Gill and Fleck (eds), *The Handbook of the International Law of Military Operations* (2010) at 471, and the ICRC's November 2014 Opinion Paper, *Internment in Armed Conflict: Basic Rules and Challenges* pg 2, 6 and 7.

241. Others take the view that there is no such rule. The team instructed on behalf of SM has produced a table summarising the views in 14 academic contributions which conclude that authorisation to detain in a non-international armed conflict cannot be found in international humanitarian law but must rest elsewhere, principally in domestic law, either of the State which detains or the State on the territory of which the detention occurs: see in particular Debuf, at 465; Rona (2007) 10 *Yearbook of International Humanitarian Law* 232, 240 and (2015) 91 Int. L. Stud. 32 at 37; Diecks (2007 – 2009) 40 *Case Western Reserve Journal of International Law* 403, 404 to 405; Hampson in Schmidt (ed.) *The War in Afghanistan: A Legal Analysis* (International Law Studies – the Blue Book) (2009) 85 Naval War College 485 at 497; and Hill-Cawthorne & Akande EJIL Talk 7 May and 2 June 2014. Moreover, *Customary International Humanitarian Law* (2005), the comprehensive study of customary international humanitarian law undertaken for the ICRC by Henckaerts and Dodswald-Beck, does not give any positive support for a power to detain in a non-international armed conflict based on international humanitarian law. All it does is to describe the minimum conditions international humanitarian law requires for those who are detained, reflecting the principally prohibitory nature of international humanitarian law.

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

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

243. The support for the Secretary of State's submissions from the decision of the International Criminal Tribunal for the former Yugoslavia in *Tadič* is, moreover, limited. First, the court stated (at [126]):

> "The emergence of…general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."

Secondly, the International Criminal Tribunal for the former Yugoslavia stated (at [127]) that the customary rules which have been developed to govern internal strife cover areas such as protection of civilians from hostilities, in particular indiscriminate attacks, the protection of those who do not or no longer take active part in hostilities, and the prohibition of means of warfare and methods which are proscribed in international armed conflicts. It is significant that the rules identified are primarily prohibitive and the discussion as to how rules and principles concerning international armed conflicts might be extended to non-international armed conflicts focuses on extending what is prohibited in the former to the latter on the ground that "what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife".

244. Finally, the Secretary of State's submission that the position was clear is also not reflected by what is stated in the 2004 edition of the United Kingdom's *Joint Service Manual of the Law of Armed Conflict* to which we referred at paragraph 184 above. The Secretary of State submitted that the *Joint Service Manual* is concerned with the treatment of individuals rather than the source of power to detain. §15.30.3 is concerned with treatment but elsewhere the *Manual* does not address this distinction. Standing back, although it refers to the basic principle of humanity, the *Manual* thus appears to proceed on the basis that authority for detention is to be found in national law and that it is that law which governs the position. (The significance of this is that Lord Kerr in *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, [2013] 1 AC 614 at [34] stated that it is not open to the Secretary of State to depart from a position of the UK government as evidenced by the *Joint Service Manual*.) There are other documents which record views within the MoD that there was no basis upon which HM armed forces could legitimately detain individuals in Afghanistan beyond 96 hours. These include Ministerial Briefs dated 1 March 2006 (see paragraph 153(i)) and June 2008 (see paragraph 153(iv)), and a briefing on detention by HM armed forces in Iraq and Afghanistan in about June 2009 (see paragraph 153(v)).

(j) Grounds of detention

245. We have referred to the ICRC's view that, in order to justify detention, there must be "imperative reasons of security". The grounds for detention specified by ISAF were ISAF force protection, self-defence of ISAF or its personnel, and for the accomplishment of the ISAF mission: see paragraph 4 of ISAF SOP 362 (to which we have referred at paragraph 150), and the UK SOI J3-9 (to which we have referred at paragraphs 39, 68(i) and 153 above) amendment 2 (2010) §19.

246. The difficulties in identifying authority under international humanitarian law to detain in an internationalised non-international armed conflict in either treaty or customary international law also apply to the identification of grounds on which such detention is permitted. We agree with the judge's conclusion that in its present stage of development international humanitarian law does not specify grounds on which

detention is permitted in a non-international armed conflict: see the judgment at [291], [293], [246], [258], [260] and [261].

247. If, contrary to our conclusion, international humanitarian law does in principle provide authority and a legal basis for detaining in a non-international armed conflict either by reasoning by analogy from the position in an international armed conflict and the provisions of the Geneva Conventions, or on the basis of customary international law in the way submitted by the Secretary of State, we consider that the grounds for detention in the ISAF and UK detention policies in this case are likely to have complied with the requirements of international humanitarian law.

(i) As to detention within the initial 96 hour period, the judge's decision (at [302]) that it was lawful must mean that there were lawful grounds for the detention. We agree with the judge.

(ii) We also agree with him (at [305]) that UK SOI J3-9 defined the conditions for deprivation of liberty with sufficient clarity and precision to meet the requirement of legal certainty.

248. As to detention beyond the initial 96 hour period, the evidence of Mr Devine, Director of Operational Policy at the MoD, in his statement dated 7 June 2013, was that almost all individuals held by HM armed forces beyond that period fell into two categories.

(i) The first was a logistical category. Paragraph 8 of ISAF SOP 362 authorised detention beyond the 96 hour point where this was necessary to effect release or transfer in safe circumstances in order to meet exigencies "such as that caused by local logistical difficulties … or where the detainee is held in ISAF medical facilities and it would be medically imprudent to move him …". The reason for an extension in paragraph 24 of the UK SOI J-3 is pending transfer to the Afghan authorities because of lack of capacity in Afghan detention facilities. We consider that a delay of the order of three months for this reason, such as that in this case, would comply with the requirements of international humanitarian law.

(ii) The second category was an extension for the purposes of intelligence exploitation. It is common ground that detention solely for the purpose of interrogation was not lawful but it was submitted on behalf of the Secretary of State that the judge erred in finding that at any stage in his detention SM ceased to be an imperative threat to security and was detained solely for intelligence exploitation. It was argued that it was not illegitimate for intelligence gathering to be one of a number of overlapping grounds so that it was not illegitimate for a person who could be detained on lawful grounds also to be detained for the purpose of interrogation. It was contended, the other purpose for SM's detention was in order to transfer him to Afghan custody with a view to investigation and prosecution. That intention existed at the outset, and, it was submitted that it continued throughout his detention.

249. We have criticised (see paragraph 212 above) the judge's statement at [219] and [253] that after arrest an individual "therefore" ceased to be an imminent threat. We did so because it appeared to overlook the position that would arise if SM could not be transferred safely to Afghan control within 96 hours or held beyond that period and, as the judge held, had to be released. The section containing the detailed justification for the extensions has been redacted from the review documents, but the Secretary of

State relied on the statements in those documents between 8 and 25 April 2010 that the detention criteria were met to show that there was a legitimate purpose for detention. It is, however, clear from the documents that Ministerial approval was given on 12 April 2010 in order "to gain further valuable intelligence" and subsequent reviews on 19 and 25 April 2010 respectively stated that, if SM was not detained, an opportunity to gain intelligence on a key Improvised Explosive Device facilitation network would be lost. Those for 24 April and 18 June 2010 stated that his was a "weak case to hand to the NDS … [U]nless there is corroboration of his identity or a signed statement then the likelihood of prosecution will be limited".

250. It is necessary to consider all the evidence before the judge. Mr Devine's evidence at §91 was that "the transfer of detainees to the Afghan authorities for investigation and prosecution is the intended aim of all UK detention operations". This, however, is a statement about the position in general and not about SM. What Mr Devine stated about SM was that initially he was held beyond 96 hours "for the purposes of intelligence exploitation" and that his continued detention was not assessed to be necessary "for force protection purposes". Moreover, as the judge stated at [333], the sole purpose for extending detention alleged in the Defence of the Secretary of State was interrogation with the aim of obtaining valuable intelligence and there was no other criterion set out in the UK policy guidance UK SOI J3-9 which Ministers could have used at that time to approve an extension of detention. In the light of these matters, we do not consider that, on the evidence and material before him, the judge erred in his conclusion.

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

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

252. Debuf stated (at 465) that the arguments, particularly the *a fortiori* argument based on the acceptance that there is a power to use lethal force in a non-international armed conflict, make sense and

> "as a matter of logic, international humanitarian law should allow parties to the conflict to intern persons who pose a direct military threat and cannot otherwise be prevented from engaging in hostilities against the interning power, and thus should provide the parties to the conflict with a valid legal basis to do so".

We agree. But we also agree with her statement that this is not the position under customary international law because it is well-known "to the frustration of many an international lawyer – that the fact that law *should* do something does not always mean that it actually *does*."

253. We conclude by stating our respectful agreement with Lord Hoffmann's observations in *Jones v Saudi Arabia* at [63] about the differences between the judicial function when considering a question of domestic law and when considering one of public international law. In domestic law the identification and development of principle is a basic technique of common law adjudication:

> "[b]ut the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states."

VI THE PUBLIC LAW CLAIM: PROCEDURAL SAFEGUARDS

(1) Introduction

254. The judge held that the procedural safeguards required were those in Article 5 ECHR, that they could not be modified to reflect the fact that the detention took place in the course of an internationalised non-international armed conflict, and that they were not met: see our summary at paragraphs 272 to 273 below. Before turning to the judgment, it is necessary first to summarise the procedural safeguards set out in the detention policies of ISAF and the United Kingdom; ISAF SOP 362, and UK SOI J3-9 as amended (see the judgment at [35] to [36]), and then to summarise how the policies were applied to SM.

(2) The procedures in the Detention Policies

(a) ISAF policy as set out in ISAF SOP 362

255. We have referred at paragraphs 39 and 150 to 152 to ISAF SOP 362 in connection with the period for which detention was authorised. Procedural protections were set out in Annexes A and C. Annex A to ISAF SOP 362 dealt with immediate actions at the scene of arrest. §1(f) stated that detainees must be informed in a language that they understand of the reasons for detention and given an information sheet detailing their rights as a detainee on arrest or at the earliest opportunity.

256. Annex C (at §§6 to 12) set out the rights of detainees. These included (§6) being informed on arrival at an ISAF holding facility of their rights, being given a document with these in their native language, and informed of their right to file a grievance concerning the reasons for detention, length of detention, or conditions or treatment. Detained persons must (see §7) be permitted access to legal counsel or a representative "subject to operational security concerns" and, unless inconsistent with operational security, be allowed to notify family members of their status as soon as practicable after their arrival at a holding facility.

257. The review procedure was dealt with at §17 of Annex C. It stated that the obligation upon an ISAF Detention Authority to review the conditions for detention was continuous, that once the circumstances supporting any of the justifying grounds for detention were no longer present the detainee had to be released, and the fact that a person might have information of intelligence value was not by itself a basis for ISAF detention. Paragraph 6 of ISAF SOP 362 listed the persons who might act as an ISAF Detention Authority. They were the Commander of ISAF, a Regional Commander, a National Contingent Commander, and others including a Battalion Commander and a

Base Commander. They were all in ISAF's military chain of command. Paragraph 7 of ISAF SOP 362 stated that, if the Detention Authority believed detention beyond 96 hours was necessary, it must refer the matter via the chain of command to ISAF Headquarters.

(b) The United Kingdom's Detention policy as set out in UK SOI J3-9

258. We have set out at paragraphs 39, 40 and 153 above the way in which UK detention policy was developed and then set out by the time of SM's arrest and detention 2010 in UK SOI J3-9. There were two relevant versions of UK SOI J3-9. The first, "Amendment 1", issued on 6 November 2009, was replaced by "Amendment 2", which was issued on 12 April 2010, five days after SM was detained.

259. UK SOI J3-9 provided (Amendment 1 §4, Amendment 2, §6) that HM armed forces were authorised to stop, search, question and detain for up to 96 hours for reasons of force protection, self-defence, or for the accomplishment of the mission. Detainees were to be transported to the temporary holding facility as soon as practicable and no later than 72 hours from capture (Amendment 1, §20), and on arrival to be informed of the reason for their detention and told of their rights, including to have their family notified and to contact the ICRC and the Afghanistan Independent Human Rights Commission: Amendment 1 Part 2, §3 and Annex A. The ICRC was to be notified of any detention as soon as practicable and the Afghanistan Independent Human Rights Commission was to be kept informed: Amendment 2 Part 2, §§7 and 57. Within 48 hours detention was to be reviewed by the Detention Authority, who needed to be satisfied on the balance of probabilities that it was necessary for the authorised reasons: Amendment 1, §19, Amendment 2, Part 2, §19.

260. Prior to 12 April 2010, the Detention Authority was "Comd TFH", the Commander of Task Force Helmand, with day to day authority delegated to the Commander of the Camp Bastion Joint Operating Base: Amendment 1, §5. It was there stated that when the Headquarters of Joint Forces Support (HQ JF Sp) relocated to Camp Bastion (which was said to be imminent), the Commander of Joint Force Support (Afghanistan) would become the Detention Authority for all UK detention facilities in Afghanistan.

261. It appears from Amendment 2 to UK SOI J3-9 that, by 12 April 2010, when it was issued, the relocation of Headquarters of Joint Forces Support (HQ JF Sp) had occurred. Its precise date was not stated in Amendment 2 or in the Secretary of State's submissions on procedural safeguards, which proceeded on the basis that the Arrangements in Amendment 2 applied to SM's case. It is possible that, contrary to that assumption, the first application to extend SM's detention beyond 96 hours made on 9 April 2010, was made when the Detention Authority was still the Commander of Task Force Helmand. Redactions in the document before us mean it is not possible to say who the Detention Authority was when that application was made. Since in November 2009 it was said that the move of the Joint Force Support (Afghanistan) headquarters was "imminent", for present purposes, we are, however, content to assume that the new Detention Authority regime was in place on 10 April 2010.

262. In §12 of the Introduction to Amendment 2 it was stated that the detention responsibilities of the National Component Commander were wholly delegated to the UK Detention Authority, a position held for the whole theatre by the Commander of Joint Force Support (Afghanistan). It also stated that "[t]he Detention Authority

provides an independent level of review for all detention operations and is under a continuing duty to ensure that each detention is justified".

263. If at any time a detainee no longer met the detention criteria he or she had to be released: Amendment 1, §11. The process (both before and after 96 hours) involved the Detention Authority considering the evidence and receiving advice from the Force Provost Marshal and the Legal and Policy advisors: Amendment 2 part 2 §25.

264. Where it was wished to detain persons for longer than 96 hours for medical reasons, UK SOI J3-9 Amendment 2 Part 2 §17 stated that the Detention Authority must seek permission from ISAF. Where it was wished to do so for logistical reasons it had to seek permission from ISAF and Ministers in the United Kingdom: Amendment 2 Part 2 §24. Apart from those circumstances, the Detention Authority's relationship with ISAF was one of liaison only. UK SOI J3-9 stated that "our detention regime … is sovereign business".

265. Extensions beyond 96 hours could only be made where "exceptional circumstances" justified doing so: Amendment 2 Part 2 §27. Where it was believed that such circumstances justified detention beyond 96 hours, the Detention Authority had to apply for an extension through the Detention Review Committee to Permanent Joint Headquarters within 72 hours of detention: Amendment 2 Part 2 §28.

266. The Detention Review Committee was chaired by the Detention Authority, i.e. the Commander of Joint Force Support (Afghanistan). The policy contained the following statement: The Detention Review Committee and its members "provide expert advice to [him] to assist in decision making": Amendment 2 Part 2 §26. The Committee had a flexible membership, but, as a minimum, "should include" the following members of Joint Force Support (Afghanistan): the Chief of Staff, the Legal and Political Advisors, and the Task Force Helmand Liaison Officer. The minimum should also include: the Commanding Officer of the Intelligence Exploitation Force, the Force Provost Marshal (the head of UK military policing and custody in theatre), and a staff officer with the rank of Lieutenant Commander or above. Subject matter expert advice could be sought from a number of individuals listed**.** "The core membership [of the Detention Review Committee] must remain outside the chain of command for targeting and tactical legal issues, with the aim of being able to present cases to the Detention Authority 'cold'": Amendment 2 Part 2 §26.

267. Applications for an extension beyond 96 hours had to be considered at the Permanent Joint Headquarters and at official and Ministerial level in both MoD and the FCO: Amendment 2 Part 2 §28. The decision was made by Ministers. The criteria used in deciding were (see Amendment 2 Part 2 §27) whether the extension will provide (a) "significant new intelligence vital for force protection", (b) "significant new information on the nature of the insurgency", and (c) the length of the extension required.

268. Where detention beyond 96 hours had been authorised, it had to be reviewed by the Detention Authority in Theatre every 72 hours, and by the Permanent Joint Headquarters and at Ministerial level every 14 days: Amendment 1 Part 2 §27.

(3) The procedures used in SM's case

269. We have set out at paragraph 43 above, the circumstances of SM's arrest. On arrival at Camp Bastion, SM was informed with the aid of an interpreter of the reasons for

his detention. He was told that he had been detained because he was considered to pose a threat to the accomplishment of the ISAF mission and would either be released or transferred to the Afghan authorities as soon as possible: judgment, at [10(vii)] and [351]. He was invited to give contact details for family, and the ICRC was informed of his detention.

270. Specific authorisation was sought and obtained from the Detention Authority on 9 April 2010 to continue to detain him beyond the ordinary 96 hour period. The decision of the UK Minister for the Armed Forces agreeing to this was communicated on 12 April 2010, as set out at paragraph 43(viii) above. For the reasons we give at paragraphs 260 to 261 above, we assume that at the material time the Detention Authority was that specified in Amendment 2, i.e. the Commander of Joint Force Support (Afghanistan) advised by the Detention Review Committee**.** His extended detention was reviewed by the Detention Authority in accordance with the procedure set out above and described in summary at paragraphs 264 to 268 above: see judgment [10(xi)]. The reviews on 13, 16, 19, 25 and 28 April, 1 and 4 May 2010 involved the Detention Review Committee. Those on 19 April 2010 and thereafter involved Ministers: see judgment [10(xi)].

271. From 6 May 2010, when the Afghan authorities stated they wished to take custody of SM but did not have the capacity to do so, as we have set out at paragraph 43(x) above, he was held under what was known as a "logistical extension" awaiting transfer to the Afghan authorities and was not interrogated. This required further reviews, which took place about every 14 days. The fact of SM's detention, the results of the reviews, and his ultimate transfer on 25 July 2010, were notified to ISAF's regional command.

(4) The judge's decision

272. The judge's conclusions as to the required procedures and his view that they were not met were made after he concluded that neither UNSCRs nor international humanitarian law provided a legal basis for SM's detention. He accepted (at [288] to [290]) that the *lex specialis* principle was a principle of interpretation so that the rights in international human rights law, for example in the International Covenant on Civil and Political Rights needed to be interpreted as far as possible in harmony with other principles of international law. Accordingly, in principle, the question what amounted to an arbitrary arrest or detention would fall to be determined by the applicable *lex specialis*, namely the law applicable in a non-international armed conflict. He considered it more difficult to do this in respect of Article 5 ECHR, which is much more specific than Article 9(1) of the International Covenant on Civil and Political Rights, because it prohibited detention "save in the following cases" which were then defined (in Article 5(1)(a)-(f)). He stated that the specificity of Article 5 left little scope for *lex specialis* to operate as a principle of interpretation. Moreover, his conclusion that, in a non-international armed conflict, international humanitarian law did not specify procedures to be followed, meant that there were no relevant rules of international humanitarian law with which to try to harmonise the interpretation of Article 5. Understandably, he therefore did not go into detail as to what they might be. The result was that he held that the requirements of Article 5 had to be satisfied and they were not.

273. Whilst SM's detention in the initial 96 hours was not arbitrary and met the requirements of legal certainty, thereafter it had no lawful basis either under the national law of Afghanistan or under international law ([302] to [303] and [305] to

[306]) and thus was in breach of the requirement in Article 5(1) that detention be "lawful". He stated that SM's detention also violated other requirements of Article 5:

(i) It was not within Article 5(1)(b), which permits detention "in order to secure the fulfilment of any obligation prescribed by law" because ([312] to [314]) the Strasbourg jurisprudence made it clear that the "obligation" was one incumbent on the detainee, SM, and not the detaining authority, and because the United Kingdom was not under "an obligation" to detain him beyond the 96 hours permitted by the ISAF policy.

(ii) It was not justified by Article 5(1)(c) because, although SM was arrested and initially detained for the purpose of bringing him before the Afghan authorities, he was not "brought promptly before a judge or other officer authorised by law to exercise judicial power (see [330]). Thus, although detention for the first 96 hours complied with Article 5(3) and was therefore within Article 5(1)(c) (see [331]), detention beyond that period did not comply with the requirement to bring the detainee "promptly" before a "judicial officer" who, although (see [318]) not a court, had the requisite independence and impartiality. SM's detention for 110 days without doing so was (see [332]) a stark violation of Article 5(3). The fact that the Afghan authorities lacked sufficient prison capacity to accommodate detainees was not (see [337]) by itself a justification for not bringing them before a "judicial officer".

(iii) The detention reviews did not comply with Article 5(3) (see [342]) because (i) they were carried out by the Executive, and not by a judicial officer independent of the Executive, and (ii) SM was not brought before and heard by the detaining authority and was given no opportunity to make representations.

(iv) The detention did not fall within the permission in Article 5(1)(f), action taken with a view to "deportation or extradition". On the assumed facts (see [348]), it could not be said that any action was taken with a view to his deportation or extradition before 6 May 2010, when the Afghan authorities stated they wished to accept him into their custody, and because there was no evidence of action being taken after that time. In any event (see [349]), it is a requirement of detention under Article 5(1)(f) that the detention be lawful which, after 96 hours, it was not.

(v) The requirement of Article 5(4), that the detainee should be entitled to take proceedings by which the lawfulness of detention should be decided speedily by a court, was not satisfied. Although the "court" did not have to be a court of law, it had to be a body which was independent of the Executive and the parties. The reviewing bodies were not so independent. The reviews were conducted by ministers, senior government officials or the military Detention Review Committee. Secondly, not only was there no hearing, but SM was given no opportunity to make representations of any kind to the Review Committee, either himself or through a representative: see [354] to [355].

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

(a) The Secretary of State's case

274. It was not submitted by the Secretary of State that the judge erred in concluding that the strict requirements of Article 5 had not been complied with. It was accepted that his decision as to that was clearly correct. The Secretary of State's case was that the judge erred in deciding that the requirements of Article 5 applied without any modification to reflect the fact that the situation was one of armed conflict. It was accepted by the Secretary of State that arbitrary detention was unlawful and that, to be lawful under international humanitarian law, detention had be subject to procedural safeguards. It was also accepted that, in general, guidance as to those safeguards is to be found from international human rights law in the way that we have discussed in the section of our judgment on the relationship of international humanitarian law and international human rights law at paragraphs 82 to 124 above.

275. The Secretary of State relied on the decision of the Grand Chamber of the Strasbourg Court in *Hassan v United Kingdom* (referred to at paragraphs 116 to 124, 161 and 162 above) and on the Copenhagen Principles (referred to at paragraphs 223 and following above) to show that strict compliance with the precise procedural requirements in Article 5 ECHR was not required for detention in a non-international armed conflict pursuant to authority to detain conferred by an UNSCR or international humanitarian law. He argued that the procedures required had to be modified to reflect the fact that the circumstances were those of armed conflict in an internationalised non-international armed conflict. He submitted that *Hassan* held that a deprivation of liberty which did not fall within any of the express grounds set out in Article 5(1)(a)-(f) was nevertheless compatible with Article 5(1), and that the other requirements could be modified. He also argued that, in the circumstances of this case, the modifications required were as to the period before which a person was required to be brought before a "judge or other officer authorised by law", the nature of the officer, and the participation by the detainee in the review process.

276. It was accepted on behalf of the Secretary of State that "there is room for debate about the full extent of the procedural safeguards that apply" in an internationalised non-international armed conflict. While it was accepted that there is some uncertainty as to "the full panoply" of safeguards required, it was submitted that it was not difficult to find the core safeguards required. The Secretary of State identified the following four:

(i) the basic legal principle underpinning any form of detention in armed conflict was humane treatment (see Common Article 3 and Copenhagen Principles 2);

(ii) the entitlement of detainees to be informed promptly of the reasons for their detention in a language they understand (Copenhagen Principle 7);

(iii) periodical review by an impartial and objective authority to ensure that if, prior to the cessation of hostilities, there ceased to be imperative reasons of security to detain a person, he or she should be released (*Hassan* [106] and Copenhagen Principle 12); and

(iv) detention must end as soon as the reasons justifying it ceased to exist in an individual case, with a backstop that it must cease at the end of hostilities (*Hassan* [106]).

It was maintained that provision for these was made in the detention policies of both ISAF and the United Kingdom and that the sufficiency of these core safeguards was

shown in the State practice relied on in the Secretary of State's post-hearing note on outstanding issues to which we referred at paragraph 228 above.

(b) The case of SM and the PIL claimants

277. The position of those representing SM and the PIL claimants was that the procedural requirements required by international humanitarian law and international human rights law were, in the case of the United Kingdom, those in Article 5 ECHR. They submitted that *Hassan* was not of assistance in the context of a non-international armed conflict, and that any "dividing and tailoring" of the safeguards in Article 5 in the way done in that case to reflect the fact that the detention took place in an international armed conflict could not be undertaken in a non-international armed conflict. This, it was said, was because, even if international humanitarian law in principle provided a legal basis for detention in an internationalised non-international armed conflict, it was not possible to determine the procedural rules of international humanitarian law which would apply and be capable of modifying Article 5 in the way that the treaty provisions in the Geneva Conventions governing an international armed conflict did. Putting it another way, it was not possible to identify procedural rules of international humanitarian law which would render procedural breaches of Article 5 ECHR in a non-international armed conflict lawful. This, it was submitted, was recognised by the ICRC which, in view of the paucity of international humanitarian law treaty and customary rules on procedural safeguards in non-international armed conflicts, considered it was necessary to try and bridge the uncertainty by means of the institutional guidelines to which we have referred at paragraph 223 above.

278. If such procedural safeguards could be identified from custom aided by the ICRC's institutional guidelines and the Copenhagen Principles, their alternative position was that, in SM's case, the minimum procedural safeguards for the lawful exercise of a power to detain imposed by customary international humanitarian law were not satisfied. It was submitted on behalf of SM that there were three safeguards. They were the obligations to:

(i) inform the person who is detained of the reasons for the detention,

(ii) bring a person arrested on a criminal charge promptly before a judge, and

(iii) provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (see *Customary International Humanitarian Law* (2005), 349 to 351).

While the first might have been met, the second and third were not.

279. The institutional guidelines in the ICRC's *Procedural Principles* were meant to be implemented in a manner that took into account the specific circumstances at hand. They provided that a person must be informed promptly in a language he or she understood of the reasons for internment, that internees had the right to challenge, with the least possible delay, the lawfulness of their detention, and that the review of lawfulness had to be carried out by an independent and impartial body: Pejic, (2005) 87 IRRC 375, 384, (2011) 93 IRRC 189, 206 to 210. Those acting on behalf of SM also relied on the ICRC's November 2014 opinion paper, *Internment in Armed Conflict: Basic Rules and Challenges,* which stated that, in practice, mounting an effective challenge presupposed the fulfilment of a number of procedural and

practical steps, including providing detainees with evidence supporting the allegations against them, ensuring there were procedures enabling detainees to seek and obtain additional evidence, and making sure that detainees understood the various stages of the internment review process and the process as a whole. The paper emphasised that where review was administrative rather than judicial in nature, particular attention would be required to ensure "the requisite independence and impartiality of the review body".

(6) Our conclusions

(a) Introduction: the premise on which our conclusion is based

280. We summarised the procedural requirements set out in the Copenhagen Principles at paragraphs 223 to 227 above. We have set out the material parts of the majority judgment in *Hassan* at paragraphs 116 to 120 above; it is sufficient therefore to summarise what was said on procedure. The Grand Chamber stated (at [105]) that the detention must comply with the rules of international humanitarian law and "most importantly … that it should be in keeping with the fundamental purpose of Article 5(1), which is to protect the individual from arbitrariness …". It also stated (at [106]), by reference to Articles 43 and 78 of Geneva IV, that detention "shall be subject to periodical review, if possible every six months, by a competent body". The first review should take place shortly after a person is taken into detention, and subsequent reviews should be 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". While it might not be practicable for the review of the legality of detention in the course of an international armed conflict to be determined by a court in the sense generally required by Article 5(4), the "competent body" should "provide sufficient guarantees of impartiality and fair procedures to protect against arbitrariness" (see [106]).

281. We concluded at paragraphs 123, 161 and 162 above that the reasoning in *Hassan,* which concerned an international armed conflict, could only be extended to an internationalised non-international armed conflict such as that with which we are concerned, if international humanitarian law provided a legal basis for detention in such a conflict. Despite the force of the *a fortiori* argument advanced by the Secretary of State, we also concluded (at paragraphs 251 to 253 above) that in the current state of development of international humanitarian law, it does not do so. In view of those conclusions, it is not strictly necessary to consider what procedural safeguards international humanitarian law would require in an internationalised non-international armed conflict. Nor, for the reason given by Lord Hoffmann in the passage from *Jones v Saudi Arabia* set out at paragraph 253 above do we consider it appropriate for a domestic court to seek to identify them.

282. However, as this important and difficult issue occupied us for some time at the hearing and it has a material bearing on the decision on what is known as logistical detention of SM after 6 May 2010, we think it appropriate to consider whether the irreducible core procedural requirements which the Secretary of State accepted are required to meet the international human rights law requirements recognised by international humanitarian law were in fact met in SM's case. The analysis in this section of our judgment accordingly proceeds on the assumption, contrary to our earlier conclusions, that international humanitarian law does provide authority and a legal basis for detaining in an internationalised non-international armed conflict, and identifies the grounds for detention, either by reasoning by analogy from the position

in an international armed conflict and the provisions of the Geneva Conventions, or on the basis of customary international law.

(b) The possible procedural safeguards

283. As to what the procedural safeguards might be, we have referred to Article 9 of the International Covenant on Civil and Political Rights at paragraph 272 above. While the grounds upon which a person may be detained are not stated as specifically and prescriptively as in Article 5 ECHR, there are only marginal differences between the procedural obligations in Article 9(2) to 9(4) and those in Article 5(2) to 5(4). Article 9(2) does not expressly provide that a detainee is to be told the reason for his detention in a language he understands, and, whereas Article 9(4) provides that detainees shall be entitled to take proceedings before a court, in order that that court may decide "without delay" on the lawfulness of their detention, Article 5(4) ECHR uses the term "speedily".

(c) Humane treatment and the right to be informed of the reason for detention

284. On the assumption (to which we have referred at paragraph 43) for the purpose of the preliminary issues that the facts set out in the amended defence are true and without prejudice to SM's right to challenge the factual basis of his arrest and detention at any further trial, the first of what the Secretary of State described as the "core" requirements, to treat detainees humanely, was satisfied in this case. The second "core" requirement is the entitlement of detainees to be informed promptly in a language which they understand of the reason for their detention. For the reason given by the judge (at [351]) in the context of his consideration of Article 5(2) ECHR, we consider this requirement was also satisfied.

(d) The safeguard of a review of SM's detention by an impartial and objective authority

285. The position is, however, different in relation to the third of the core safeguards, a periodical review by "an impartial and objective authority". There are two issues.

(i) The first is whether the Detention Authority either in the form of the Commander of Joint Force Support (Afghanistan) or, at an earlier stage, the Commander of Task Force Helmand, who delegated day to day authority to the Commander of the Camp Bastion Joint Operating Base, qualifies as an "impartial and objective authority".

(ii) The second concerns the effect of the absence of any opportunity being given to the detainee to participate in the reviews of his or her detention in any way.

286. We first consider each on the basis of the policy in UK SOI J3-9, and then consider the State practice as to procedure identified in the Secretary of State's post-hearing note on outstanding issues, which we considered in the context of whether there was authority under international humanitarian law to detain in an internationalised non-international armed conflict (see paragraphs 228 to 234 above).

(e) Review of detention by an impartial and objective authority

287. As to impartiality and objectivity, both *Hassan* and Copenhagen Principle 12 accept that the review does not have to be by a court or a tribunal. However, as the ICRC's November 2014 opinion paper stated, where the review is administrative rather than judicial, particular attention is required to ensure the requisite independence and

impartiality of the reviewing body. The commentary to Copenhagen Principle 12, in 12.2, states that the "authority" conducting the review need "not necessarily [be] outside the military" or "a judge or lawyer", but should be supported by a legal adviser. The commentary also states that "the authority must have sufficient freedom to make a good faith judgment without any outside interference".

288. We have referred at paragraphs 260 and 261 above to the change to the Detention Authority introduced when the headquarters of Joint Forces Support (HQ JF Sp) relocated to Camp Bastion. After that time it appears that the arrangements set out in Amendment 2 to UK SOI J3-9 applied so that the Detention Authority was the Commander of Joint Force Support (Afghanistan). Amendment 2, §12 states that his continuing duty as the Detention Authority to ensure that each detention is justified provided an independent level of review for all detention operations, and that the Legal Advisor is a member of the Detention Review Committee. We note that it is also stated that the core members of the Detention Review Committee "must remain outside the chain of command for targeting and tactical legal issues", although they are not wholly outside the chain of command in the theatre.

289. For the reasons we have given, the judge made no detailed finding about the nature of this relationship. He did not need to. First, if strict compliance with the requirements in Article 5 is necessary, he did not have to. There was clearly no such compliance. Secondly, the judge was only considering preliminary issues. He made no factual determinations. This, together with the fact that this issue was only explored in the Secretary of State's post-hearing note on outstanding issues, means that we have limited information as to the precise relationship of the chain of command which has the Commander of Joint Force Support (Afghanistan) at its pinnacle and those responsible for detaining a person. The court lacks the factual context required to reach a decision about the independence of the reviewing body. That would include details of the precise chain of command in Afghanistan, and the meaning of the statement we quoted at 266 above that the core membership must remain outside the chain of command for targeting and tactical reasons.

290. We can, however, give guidance. We doubt whether a Detention Authority squarely within the chain of command in the relevant theatre, advised by a committee consisting of members who are either the subordinates of the Detention Authority or otherwise within the chain of command under him meets the requirement of independence and impartiality.

291. We have referred to the possibility that, contrary to the assumption upon which the Secretary of State's submissions proceeded, at the time SM was captured, the Detention Authority was not the Commander of Joint Force Support (Afghanistan), but the Commander of Task Force Helmand. If so, we doubt that the reviewer was sufficiently independent. There is, for example, no reference in Amendment 1, §5 to the need for independence in the Detention Authority and day to day authority was in fact delegated to the Commander of the Camp Bastion Joint Operating Base where SM was detained.

292. For the reasons we have given (at paragraph 261 above) we are, however, content to assume that the new Detention Authority regime set out in Amendment 2 was in place. As to whether that regime satisfied the requirements of independence and impartiality, we know that the core membership included the Commanding Officer of the Intelligence Exploitation Force and the Force Provost Marshal. The relationship of the Legal Adviser who was also a core member of the Detention Review

Committee and those responsible for "tactical legal issues", who it was stated should not be core members, was not explained. We, however, note that the Legal and Political Advisers and the Force Provost Marshal provided advice to the Detention Authority as to whether to release, transfer or detain in the first 48 hours. The Force Provost Marshal was stated to be the subject-matter specialist for detention issues. This does not sit easily with, and might even be thought to be contrary to the requirement that all members of the Committee should be able to present cases "cold" to the Detention Authority. Moreover, the Detention Authority reported to military superiors, and MoD civil servants advised a government minister who made the decision about whether to authorise further detention. For these reasons, we also doubt that the new regime was sufficiently independent, although our doubts are of a lesser order than those concerning the former Detention Authority regime.

(f) The opportunity of the detainee to participate in the reviews of his detention

293. The Secretary of State's statement of core safeguards did not include affording the detainee an opportunity to participate in any way in the reviews of his detention or to challenge its lawfulness. However, that is one of the three safeguards identified in *Customary International Humanitarian Law (2005)*, and reflects the views set out in the ICRC's November 2014 opinion paper referred to at paragraph 279 above. The ICRC stated that, in practice, mounting an effective challenge to legality presupposes the fulfilment of a number of practical steps, including providing detainees with evidence of the allegations against them and making sure that they understand the various stages of the process. No such opportunity was afforded to SM.

(g) State practice as to reviews of detention

294. We turn to the State practice identified in the Secretary of State's post-hearing note on outstanding issues.

(i) We observed at paragraph 229 above that the example from practice by the international forces in Kosovo, referred to by the Strasbourg Court in *Saramati v France*, is of limited assistance because it is not an example of State practice relying on international humanitarian law authority to detain, but on authority based on a UNSCR and periods of detention within that UNSCR and a Detention Directive made pursuant to it.

(ii) The example from practice in Bosnia as shown by the decision of the Strasbourg Court in *Mucič* is also not of real assistance because the court proceeded on the basis that the conflict was an international armed conflict, not a non-international armed conflict. It is, however, correct to record, that there appears, on the information derived from the decision in *Saramati v France*, to have been no provision for judicial oversight. The oversight was provided by the commanding officer of KFOR with the advice of a committee chaired by KFOR's legal adviser. That is an example of oversight within, and indeed at the top of, the chain of command.

(iii) As to the practice of the four other members of ISAF relied on by the Secretary of State, we have stated that it does not provide unequivocal or virtually uniform support for an international humanitarian law basis for authority to detain in a non-international armed conflict. No or very limited information is given as to the nature of the reviews of detention conducted. The note refers to the Netherlands, but only to the fact that authority to detain

in Afghanistan is justified on the basis of international humanitarian law. No material on the Netherlands' detention procedures has been provided. In the case of Australia, the statement of the Minister of Defence relied on states only that the reviews were conducted after every five day period, and that the outcomes of these reviews were communicated to the Chief of Defence Force and the Minister.

(iv) In the case of the United States, the Detention Review Boards are not judicial bodies. However, it is stated that they are composed of "three neutral field-grade officers, and will be assisted by a legal adviser" and, of significance in relation to the second issue to which we have referred, that "detainees will be assisted by a personal representative". The Somalia example is also of no assistance to the Secretary of State because it concerned a review by a detention review board consisting of three members of the African Union Mission in Somalia, who are not under the direct chain of command of the sector headquarters responsible for the original decision to detain.

(v) In the case of Canada, it appears from the decision of Mactavish J in *Amnesty International Canada v Canada (Chief of the Defence Staff)*, to which we have referred at paragraphs 98 and 190 above, that detainees were not provided with access to legal counsel during their detention and not afforded an opportunity to make representations prior to being handed over to the Afghan authorities. Decisions on detainees were said to be within "the sole discretion" of the Commander of Joint Task Force Afghanistan: see [2008] 4 FCR 546 at [56] and [62]. Mactavish J also stated (at [63]) that, in the exercise of the discretion to determine whether a detainee shall be retained in custody, transferred to the Afghan national security forces, or released, determinations are made on a case-by-case basis by the Canadian Commander of Task Force Afghanistan at "regular review meetings". The reviews were thus also by a non-judicial body and not outside the chain of command. As the reviews were made by the Canadian Commander of Task Force Afghanistan and not by someone outside the direct chain of command, it is difficult to see how they complied with the third of the core procedural safeguards identified by the Secretary of State; periodical review "by an impartial and objective authority".

(h) The overall failure to meet the requisite procedural requirements

295. The procedural practices of some other members of ISAF provide some support for the broad proposition that reviews may be carried out by a military person within the chain of command and that there is no need for the detainee to be afforded an opportunity to provide input to such reviews. The United States' practice, however, is that an opportunity to provide input and assistance in doing so is provided. The practice of the other States relied on does not seem to comply with what the ICRC's *Procedural Principles* state are the procedural requirements in a non-international armed conflict. Moreover, the provision of an opportunity for a detainee to participate in some way in reviews of detention, and to challenge its lawfulness, which are part of the necessary safeguards identified in *Customary International Humanitarian Law* and in the ICRC's November 2014 opinion paper, were not met in this case. Additionally, other States whose troops served in ISAF considered their detention powers to be limited to the 96 hour period.

296. The Secretary of State relied on *Hassan,* the Copenhagen Principles, and the stance of the ICRC, but his submissions on procedure involve an element of "cherry-picking".

It is clear from Copenhagen Principle 12 that there is a right to "have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention". Even if, notwithstanding our provisional view, the structure established in UK SOI J3-9 is sufficiently "objective" and "impartial", although it is authorised to determine the "appropriateness" of continued detention, there must be a real doubt that it is authorised to determine "the lawfulness" of continued detention.

297. What has led us to the clear view that the procedural safeguards required for this type of armed conflict were not met in this case is the absence of any opportunity to participate in the reviews or any of the procedural steps which the ICRC's November 2014 opinion paper to which we have referred (at paragraph 279 above) regarded as preconditions to mounting an effective challenge.

298. For those reasons, we consider that, whatever the position in relation to reviews carried out by a military person within the chain of command, the fact that SM was not offered an opportunity to provide input to any of the reviews concerning him means that, even if the Secretary of State's submissions on international humanitarian law providing a basis for detention in a non-international armed conflict are correct, the minimum core legal safeguards required by international humanitarian law and international human rights law would not have been satisfied in his case. Accordingly, even if Article 5 had to be modified to reflect the fact that this detention was in the course of a non-international armed conflict, the minimum procedural safeguards required by international law in such a conflict would not have been met.

VII THE CLAIMS IN TORT AND THE DEFENCE OF ACT OF STATE

(1) The claims in tort

299. The question whether depriving a person of his liberty by detaining him in another country gives rise to a cause of action depends on what law governs the conduct. The applicable law is determined by the English rules of private international law which are set out in Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"). The 1995 Act applies to claims against the Crown. However, it does not affect any rule of law as to whether proceedings of any description may be brought against the Crown (see section 15(3)).

300. In the case of SM, the possible systems of applicable law are (i) Afghan law, (ii) English law and (iii) international law. Before considering the application of the rules under the 1995 Act for determining the applicable law, we note that we have considered Afghan law and international law and concluded that (i) for the reasons given at paragraphs 135 to 137 above HM armed forces had no authority under Afghan law to detain a person after 96 hours and (ii) for the reasons given at paragraphs 138 and following and paragraphs 164 and following (summarised at paragraphs 251 to 253 above) HM armed forces had no authority respectively under the UNSCRs or international humanitarian law to detain after that period.

301. As to English law, detaining someone is *prima facie* the tort of false imprisonment. It is a longstanding and fundamental principle of the common law that any interference with personal liberty by imprisonment is unlawful and gives rise to a claim in tort unless the person responsible for the imprisonment can show that it is justified: see

Lord Dyson in *Lumba*'s case [2012] 1 AC 245 at [65]. Accordingly, in each of the cases now before us it is for the Secretary of State to justify the lawfulness of the detention. Other than by the announcement of the change of policy and the amendment to UK SOI J3-9 no legal framework authorising extended detention was put in place. No one suggested that the detention was legal or justified under English law save by operation of the act of state doctrine. Had SM been detained in the United Kingdom, it is clear for reasons explained below that the act of state doctrine would not apply: see Lord Wilberforce in *Nissan v Attorney General* [1970] AC 179 at pg 231 D-F cited at paragraph 311 below.

302. SM was detained in Afghanistan pursuant to a UK government policy decision to detain beyond 96 hours "when it is necessary to protect the operation and protect our troops" (see paragraph 153(vi) above) which was announced in a ministerial statement (see paragraph 153(vi) and 153(vii) above). The reason for the adoption of a detention policy going beyond the ISAF detention policy authorised by the UNSCRs was the need to interrogate those who were assessed to pose a "substantial and imminent threat to" HM armed forces who would otherwise have to be released or handed over to the Afghan authorities, who would then release them (see paragraph 153(i) and 153(iv) above). This policy was, however, not enacted or authorised in either primary or secondary legislation. The particular decision to detain SM beyond 96 hours was made by UK government ministers (see paragraphs 43(viii) and 270 above).

303. The Secretary of State's position is that even if (contrary to his primary position) SM's detention was not legal under Afghan or international law, and would not have been legal had he been detained in England because the decision to detain him was made pursuant to the policy summarised in the last paragraph, it was justified and thus gave rise to the act of state defence to a claim in tort.

304. With that introduction, we can turn to the rules under the 1995 Act for determining the applicable law. Where the events which are alleged to give rise to a claim in tort occur in another country, section 11 of the 1995 Act establishes the general rule. Section 11(1) provides that "[t]he general rule is that the applicable law is the law of the country in which the events constituting the tort ... in question occur"; it is the *lex loci delicti*. Where elements of the events constituting the tort occur in different countries, section 11(2) of the 1995 Act provides for that law to be displaced and for the applicable law to be the law of the country in which the most significant element or elements of those events occurred: see section 11(2)(c) of the 1995 Act. Section 12 makes provision for the displacement of the general rule where it is substantially more appropriate for the applicable law to be the law of a country other than that which would be applicable under section 11(1) or 11(2).

305. There was no suggestion in any of the cases before us that the rule in section 11(1) should be displaced by the operation of section 11(2) or 12. No argument was addressed to us that that rule should be displaced on grounds of the public policy of the law of England and Wales pursuant to section 14(3)(a) of the 1995 Act or otherwise.

306. In the case of SM it is clear that the most significant elements of the events giving rise to SM's private law claim in tort occurred in Afghanistan and therefore it is Afghan law that governs the claim, although some of the decisions about extending his detention were taken in London.

307. The PIL claimants do not bring a private law claim in tort: see paragraph 365 below.

308. Yunus Rahmatullah and the Iraqi civilian claimants all bring claims in tort but it is common ground that these claims are governed by the *lex loci delicti*: see paragraph 366 below.

309. In these proceedings the Secretary of State seeks to rely on the act of state defence to resist the claims in tort in respect of the detention of Yunus Rahmatullah and in respect of the claims by the Iraqi civilian claimants arising out of their transfer to the US authorities. In addition, we were told that it may be relied on, in due course, in response to Yunus Rahmatullah's claims in respect of his transfer to the US authorities. We note that the Secretary of State does not rely on act of state in response to any allegations of ill-treatment at the hands of HM armed forces.

(2) The nature of act of state: domestic or Crown act of state

310. "Act of state" is a term which is used in different contexts with different meanings. The principle of act of state which is invoked in these proceedings is concerned with the acts of the domestic sovereign; it can conveniently be referred to as either Crown act of state (the terminology used before the judge) or domestic act of state. It is distinct from that, also referred to as "act of state" or "foreign act of state", which relates to the extent to which courts in this jurisdiction may rule upon the acts of a foreign sovereign and which has been considered recently by this court in *Yukos Capital Sarl v OJSC Rosneft Oil Co. (No. 2)* [2014] QB 458 and *Belhaj v Straw* [2014] EWCA Civ 1394; [2015] 2 WLR 1105. In this judgment "act of state" is used to refer to the former principle.

311. In *Nissan v Attorney General* [1970] AC 179, the leading modern authority in this field, Lord Wilberforce (at pg 231 B) drew attention to the following definition of act of state provided by Professor E.C.S. Wade (*British Yearbook of International Law* (1934), vol. XV, pg 103, adopted by *Halsbury's Laws of England,* 3rd edn (1954), vol. VII, pg 279, n. (i)), while cautioning that it is less a definition than a construction put together from what had been decided in various cases:

> "…an act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown".

Lord Wilberforce then observed (at pg 231 D-F) that act of state includes within itself two different conceptions or rules.

> "The first rule is one which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorised or subsequently ratified by the Crown. It is established that this defence may be pleaded against an alien, if done abroad, but not against a friendly alien if the act was done in Her Majesty's Dominions. It is supported in its positive aspect by the well-known case of *Buron v. Denman* (1848) 2 Exch. 167 and in its negative aspect by *Johnstone v. Pedlar* [1921] 2 A.C. 262.
>
> The second rule is one of justiciability: it prevents British municipal courts from taking cognisance of certain acts. The class of acts so protected has not been accurately defined: one formulation is "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs" (*Wade and Phillips's Constitutional Law,* 7th ed. (1956), p. 263). As regards such acts it is certainly the law that the injured person, if an alien, cannot sue in a British court and can only have resort to diplomatic protest. How far this rule goes and how far it prevents

> resort to the courts by British subjects is not a matter on which clear authority exists."

(3) The decisions of the judge

312. In his judgment in the main action, the judge (at [374] to [376]) identified the general principle underlying act of state as the constitutional principle that the conduct of foreign affairs is the province of the Executive arm of the State and that the judiciary should not involve itself in or bring into jeopardy the conduct of such affairs. In this regard he noted that, although the decision of the House of Lords in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 established that the mere fact that a power derives from the prerogative does not exclude it from the scope of judicial review, the House of Lords accepted that the subject matter of certain powers made their exercise unsuitable for judicial review. Lord Fraser (at pg 398) had referred, by way of example, to the prerogative powers concerned with control of the armed forces and with foreign policy. In subsequent cases the courts had asserted a willingness in principle to review the exercise of prerogative powers even in these areas (e.g. *R (Bancoult) v Secretary of State for Foreign Affairs* [2009] 1 AC 453). Nevertheless the courts had continued to exercise considerable restraint when invited to review Executive decisions involving matters of foreign policy. In the judge's view, however, such restraint no longer rests on a rule that certain areas of decision making by the Executive such as foreign policy are "no-go" areas for the courts but on a consideration of whether or to what extent the particular decision of the Executive with which the case is concerned is or is not justiciable.

313. The judge (at [379] to [383]) considered that although act of state operates in the field of private law to preclude a claim in tort as opposed to barring a claim for judicial review in the field of public law, it was similar if not identical to the rule that acts of the Crown which are done under the prerogative in the sphere of foreign affairs are unreviewable. Once it was accepted that the act in question was justiciable in the sense that it is cognisable and capable of being reviewed by the courts, the justiciability limb of act of state could not apply. In his view the question whether HM armed forces acted lawfully under Afghan law in detaining SM was plainly justiciable as it did not require determination of any matter which a court is unsuited to deal with.

314. Turning to act of state as a defence to a claim in tort, the judge considered (at [394] to [397]) that the rationale for this aspect of act of state was to be found in the principle that the Executive and the judiciary must speak with one voice in the field of foreign relations (see *Government of the Republic of Spain v SS "Arantzazu Mendi"* [1939] AC 256 per Lord Atkin at pg 264; *British Airways Board v Laker Airways Ltd.* [1984] QB 142, per Lord Donaldson MR at pg 193). The judge observed that the UK Government had taken considered decisions to authorise the detention of suspected insurgents including the decision to detain them beyond 96 hours. He continued (at [395]):

> "This and other aspects of UK detention policy and practice in Afghanistan can be reviewed by the English courts in accordance with established principles of public law. But if and insofar as acts done in Afghanistan by agents of the UK state in carrying out its policy infringe Afghan domestic law, that in my opinion is a matter for which redress must be sought in the courts of Afghanistan. It is not the business of the English courts to enforce against the UK state rights of foreign nationals arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations."

In his view, this aspect of act of state is analogous to the conflict of laws rule that English courts will not enforce a right arising under the law of a foreign country if to do so would be contrary to English public policy and to the rule that they will not enforce the penal, revenue or other public law of a foreign State. Accordingly, act of state operates as an exception to the general principle that proceedings may be brought in this country founded on a tort which is actionable under the law of a foreign country where the law of that country is the applicable law. The judge emphasised that this limb of act of state is narrow in its application. It applies only to acts which are directly authorised or ratified by the UK Government. It applies only to Executive acts done abroad pursuant to deliberate UK foreign policy and may well be confined to acts involving the use of military force. It was, he said, unnecessary for him to decide if it could be relied on by a British citizen although he found it difficult to see how the nationality of the claimant could in principle be relevant. Furthermore, he considered (at [401]) that the availability of a defence under this limb of act of state does not depend on whether the UK Government was or was not purporting to comply with Afghan law in operating its detention policy. In summary, (at [406]), act of state does not prevent a person detained by agents of the United Kingdom abroad from bringing a claim alleging that his detention is unlawful but it may prevent such a person from asserting such a claim in so far as it is based on foreign law.

315. The judge (at [408]) rejected a submission that SM's claim falls within a human rights exception to this limb of act of state. He did not consider that there was a true analogy between act of state and foreign act of state where an exception had developed in cases of grave or gross infringements of human rights (see *Kuwait Airways Corp. v Iraqi Airways Co. (Nos. 4 & 5)* [2002] 2 AC 883). Furthermore, most tort claims could be characterised as involving an infringement of human rights and he could not see a coherent basis for allowing some such claims to be enforced and not others. It was far from clear that the present claim could be described as a grave or gross violation of human rights. In any event, it was unnecessary to fashion a human rights exception at common law given the protection afforded by the Human Rights Act 1998.

316. In a further section of his judgment ([409] to [416]), the judge rejected a submission on behalf of the Secretary of State that act of state barred SM's claim under Article 5 ECHR. This submission was untenable because of the express provision in section 7(1) Human Rights Act 1998 permitting a person who alleged that his ECHR rights had been infringed to bring proceedings under the Act in the appropriate court or tribunal.

317. In *Rahmatullah v Ministry of Defence* the judge addressed three further submissions on act of state. First (at [202] to [209]) he rejected the submission that, properly understood, *Buron v Denman* (1848) 2 Exch 167, was merely an expression of the non-justiciability rule in a case where the defendant was an agent of the Crown rather than the Crown itself and was not authority for the existence of an act of state defence to claims in tort. Secondly (at [210] to [215]) he rejected a submission that even if a second limb of act of state as a defence to a claim in tort had once existed, it had been extinguished by the Crown Proceedings Act 1947. Thirdly (at [216] to [222]) he rejected a submission that an act of state defence to a claim in tort was incompatible with the right of access to a court conferred by Article 6 ECHR. In his view the defence served the legitimate aim of protecting the interests of the nation abroad, in particular where military action is considered necessary by the Executive in the national interest, and was proportionate.

(4) Non-justiciability and act of state

318. That limb of the act of state rule which involves the application of principles of non-justiciability forms the basis of a series of decisions concerning the annexation or transfer of territory (e.g. *Forester v Secretary of State for India in Council* (1872) L. R. Ind. App. Supp. 10; *West Rand Central Gold Mining Co. Ltd. v The King* [1905] 2 KB 391; *Salaman v Secretary of State in Council of India* [1906] 1 KB 613). A striking example is provided by the decision of the Judicial Committee of the Privy Council in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moore 22. The East India Company seized the Raj of Tanjore and the whole of the property of the deceased Rajah following his death without a male heir. In proceedings brought by his widow, the Supreme Court of Judicature at Madras declared that his private estate, real and personal, was held by the Company on trust for the widow. On appeal to the Privy Council, it was argued that in the exercise of sovereign power the Company had seized all the property the subject of the suit and that over an act so done, whether rightfully or wrongfully, no municipal court has any jurisdiction. Lord Kingsdown considered that the applicable legal principle was beyond dispute:

> "The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." (at pg 75)

The Privy Council held that as the seizure was made by the Company acting in the exercise of sovereignty on behalf of the British Government, it was an act of state and no municipal court had jurisdiction to inquire into its propriety.

319. In *Nissan v Attorney-General* Lord Wilberforce (at pg 231G to 232D) referred to *Kamachee Boye Sahaba* and this line of authority as establishing that, once the character of an act as an act of state is decided by the court, cognisance cannot be taken of it by a municipal court. In *Nissan* British troops, operating in Cyprus as part of a truce force under an agreement between the United Kingdom and Cyprus, took possession of the plaintiff's hotel near Nicosia for use as headquarters of the British command. Subsequently HM armed forces became part of a UN peace-keeping force. The plaintiff began an action in the High Court claiming declarations against the Crown that he was entitled to compensation for the occupation and alleged damage to the hotel and its contents. The House of Lords unanimously rejected a plea of act of state which, it appears, was advanced by the Crown on the basis of the justiciability limb (see Lord Wilberforce at pg 231F-G). Lord Reid decided the case on the basis that act of state could not be successfully raised against a British subject. The other members of the appellate committee left open that question but held that the conduct in question did not constitute an act of state. They considered that while the making of the treaty between the United Kingdom and Cyprus was an act of state and some acts done pursuant to the treaty might be acts of state, the occupation of the hotel and conduct which was alleged to have caused damage were not sufficiently closely connected with the treaty to constitute acts of state (Lord Morris at pg 216E to 217D, 218F-G; Lord Pearce pg 227A-C; Lord Wilberforce pg 235F to 236A; Lord Pearson pg 239G to 240D).

320. The nature of non-justiciability has recently been addressed by Lord Neuberger PSC, Lord Sumption and Lord Hodge JJSC, with whom Lord Mance and Lord Clarke JJSC agreed, in *Shergill v Khaira* [2014] UKSC 33; [2015] AC 359, a case concerning the trusteeship and administration of two Sikh temples, at [41] to [43]. They identified a

number of rules of English law which may result in an English court being unable to decide a disputed issue on its merits including State immunity and the act of state doctrine. They described the latter as conferring immunity from liability on certain persons in respect of certain acts. It is not clear whether this reference is to domestic act of state, foreign act of state or to both. However, they considered that the term "non-justiciability" refers to something different, namely a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. Such cases, they considered, generally fall into one of two categories. The first comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. They observed that cases in this category are rare for they may result in a denial of justice which could only exceptionally be justified either at common law or under Article 6 ECHR. Certain transactions of foreign States and proceedings in Parliament were identified as the paradigm cases. "The distinctive feature of all these cases is that once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable." The second category comprises claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. However, the court will adjudicate "if a justiciable legitimate expectation or an ECHR right depends on it" or "if a private law liability was asserted which depended on such a matter".

321. The question whether detention by HM armed forces forming part of a multi-national force acting in Iraq under UNSCR 1546 was justiciable arose for consideration in *Al-Jedda v Secretary of State for Defence*. At first instance ([2009] EWHC 397 (QB)) Underhill J (at [74]) approached the matter on the basis that he was concerned with the non-justiciability limb of act of state. He took as his starting point the position that the decision to contribute British forces to the multi-national force was plainly an act of state, as it was quintessentially a policy decision in the field of foreign affairs. Following the approach of the House of Lords in *Nissan*, he then considered whether the claimant's detention had a sufficiently close link to that act. He considered that internment was a specific part of the task which the multi-national force was invited by the Government of Iraq and mandated by the Security Council to undertake. In his view, therefore, the detention was done in performance of the original decision to contribute forces. He observed that although the act of state rule might apply even in the absence of such an obligation, its justification was clearer where an obligation to detain existed.

322. On appeal to this court [2010] EWCA Civ 758; [2011] Q 773 the majority agreed with Underhill J that the claimant's detention was lawful and, as a result, did not need to decide the issue of act of state. Arden LJ, dissenting, agreed with the conclusions and reasoning of Underhill J on this point (at [107] to [110]). However, this conclusion rested on and was carefully limited to the overriding force of UNSCR 1546. In her view the United Kingdom was entitled and bound, under Article 103 of the UN Charter, to intern persons where this was necessary for the internal security of Iraq and internment for this purpose would, therefore, clearly qualify as an act of state. There could be no challenge to a review of detention carried out under those powers in any manner permitted by Geneva IV or to the legality of a decision to detain made in exercise of the powers conferred by the UNSCR. Elias LJ, while noting that this complex issue had not been fully argued and while doubting whether it was legitimate for the Secretary of State to rely on act of state when it had not been raised in the earlier proceedings, expressed the view (at [195]) that the detention was

an act of state, essentially for the reasons given by Underhill J and Arden LJ. Lord Dyson JSC did not express a view on this point.

323. We consider that the claims brought by SM and the PIL claimants challenging whether HM armed forces acted lawfully under the local law in detaining the claimants are clearly justiciable for the reasons given by the judge (at [381] to [384]). There is here no requirement to adjudicate on questions of policy in the absence of "judicial or manageable standards" suitable for application by the courts. There is nothing constitutionally inappropriate in a court in this jurisdiction applying the local law to determine the lawfulness of the claimants' detention. Indeed, in section 11 of the 1995 Act, Parliament enacted that as the "general rule". The court will not be required to rule on the legality or otherwise of high level policy decisions such as whether to participate in the multi-national force, issues from which the complaints made in these proceedings are remote. On the contrary, the court is well equipped to deal with such issues, albeit arising under the law of a foreign State. As the judge observed, determining whether an individual has been unlawfully deprived of his liberty is quintessentially a matter for a court. In our view, precisely the same reasoning applies to the claims relating to the delivery of the claimants to the Afghan authorities.

324. We also note that, in the context of proceedings for judicial review, courts in this jurisdiction have ruled on the legality of the transfer to the Afghan authorities of detainees arrested by HM armed forces in Afghanistan, apparently without any point having been taken on the justiciability of the claim. In *R (Maya Evans) v Secretary of State for Defence* the Queen's Bench Divisional Court reviewed UK policy and practice in transferring suspected insurgents. In our view, whether issues are justiciable cannot depend on the nature of the proceedings. On the contrary, what is suitable for adjudication by a court must be determined by the court on the basis of the subject matter in dispute. Accordingly, what is justiciable in public law proceedings is also justiciable in private law proceedings.

325. At first sight, the same conclusion would appear to follow with regard to the claims by Yunus Rahmatullah and the Iraqi civilian claimants. However, one possible point of distinction is that in at least some of the Iraqi claims with which we are concerned the United Kingdom may have been under an obligation in international law to exercise its power of detention in Iraq where necessary for imperative reasons of security.

326. The detentions in these cases took place under three different legal regimes. XYZ was detained between approximately July 2003 and January 2004. Until 28 June 2004, the United Kingdom was an occupying force but it is not clear from the papers before us under what power or authority XYZ was initially detained. Yunus Rahmatullah who was detained from February to March 2004, was detained under powers granted by UNSCR 1511. ZMS and HTF were detained under powers granted by UNSCR 1790 which extended the authority found in UNSCR 1546.

327. Article 25, UN Charter binds Member States of the United Nations to carry out decisions of the Security Council. Moreover, Article 103 provides that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. In *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 the House of Lords decided that Security Council Resolution 1546 obliged the United Kingdom to exercise its power of detention in

Iraq where necessary for imperative reasons of security. Lord Bingham said that those nations which contributed to the multinational force:

> "became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it." (at [34])

Accordingly, this obligation prevailed.

328. Subsequently, the Strasbourg court in *Al-Jedda v United Kingdom* concluded that Security Council Resolution 1546 authorised the United Kingdom to intern where necessary but did not impose a binding obligation to do so. However, we are bound to follow the decision of the House of Lords on this point (*Kay v Lambeth LBC* [2006] 2 AC 465 at [40] to [45]). (We note that in *Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB) Leggatt J considered that the decision of the House of Lords in *Al-Jedda* was binding on the High Court but granted a certificate under section 12 of the Administration of Justice Act 1969 allowing an appeal direct to the Supreme Court. The Supreme Court granted permission to appeal on 8 December 2014 but the appeal has yet to be heard.)

329. In his judgment in the main action, the judge (at [371]) distinguished the observations of Underhill J, Arden and Elias LJJ in *Al-Jedda* on the ground that it was integral to their reasoning that such internment, where necessary for imperative reasons of security, was a positive obligation undertaken by the United Kingdom under international law when it agreed to contribute British forces to the multi-national force in Iraq. In his judgment in *Rahmatullah*, however, the judge returned to this issue and on further consideration questioned whether the opinion that the claim in *Al-Jedda* was barred by the doctrine of act of state might not be better explained on the basis of the other limb which provides a defence to a claim in tort (at [194] to [197]). He questioned why, on the assumption that the policy decision to contribute British forces to the multi-national force in Iraq was not justiciable, it should follow that a decision taken by British forces participating in the multi-national force to intern a particular individual was not justiciable. In his view, the characterisation of the decision to intern Mr Al-Jedda as a non-justiciable act of state was evidently driven by the view that the United Kingdom was under a positive obligation imposed by UNSCR 1546 to intern people who were believed to be a threat to security. However, such an approach was hard to reconcile with the principle that obligations undertaken by the United Kingdom under treaties have no domestic legal effect except in so far as they are enacted by the legislature into domestic law.

330. We see great force in the judge's reasoning on this point in *Rahmatullah*. First, policy decisions as to detention or internment are far removed from what Lord Morris in *Nissan* described as "the category of transactions which by reason of being a part of or in performance of an agreement between States are withdrawn from the jurisdiction of the municipal courts" (at pg 217). Secondly, the fact that an obligation to detain or intern arises under a treaty which has not been implemented into domestic law cannot without more render non-justiciable what is otherwise justiciable. Accordingly, we consider that the observations in *Al-Jedda* on the applicability of the act of state principle cannot be justified on grounds of non-justiciability.

331. For these reasons, we consider that the non-justiciability limb of the act of state principle does not bar the private law claims in tort with which we are concerned.

(5) Act of state as a defence to claims in tort

(a) Is act of state limited to cases of non-justiciability?

332. In submissions on behalf of Yunus Rahmatullah and the Iraqi civilian claimants it was contended that act of state exists solely as a narrow rule of justiciability that precludes the courts from adjudicating upon a limited category of sovereign, inter-State acts and that it does not operate additionally as a separate, broader private law defence or bar to tort claims which lie outside the non-justiciability principle.

333. In support of this submission it was contended that the true explanation of *Buron v Denman* (1848) 2 Ex. 167 is that the subject matter of the claim was not justiciable. In October 1840 Commander Denman, an officer in the Royal Navy on the Sierra Leone station, received a request from the Governor of Sierra Leone requesting him to take measures for the liberation of Fry Norman and her daughter, both British subjects, who were detained as slaves at the Gallinas by Prince Manna, the son of King Siacca, the sovereign of that country. He entered the Gallinas River with an armed force, liberated some slaves held by Spaniards and took possession of the barracoons belonging to the plaintiff, a Spanish national. At Commander Denman's request Fry Norman and her daughter were delivered up to him. He then concluded a treaty with Prince Manna, acting on behalf of King Siacca and the chiefs of the country for the abolition of the slave trade there. The report states that "[o]n the 23rd November, the defendant, in the execution of this treaty, commenced burning the plaintiff's barracoons" (1848) 2 Ex. 167 at 176. The plaintiff's barracoons were destroyed. The slave dealers deserted the factories and let loose the slaves, great numbers of whom were subsequently carried by the defendant to Sierra Leone where they were emancipated. The goods stored were claimed by King Siacca as forfeit to him by reason of defiance of his law. Commander Denman "continued to fire the barracoons" (1848) 2 Ex. 167 at 176. He then sailed to Sierra Leone, having liberated 841 slaves. The plaintiff brought proceedings in trespass in England against Commander Denman. When notified of these proceedings the Admiralty and the Secretaries of State for the foreign and colonial departments adopted and ratified the acts of Commander Denman. In his direction to the jury, Parke B. concentrated on the effect of the ratification of the conduct of Commander Denman, directing them that the ratification was equivalent to a prior command and rendered it an act of state for which the Crown was alone responsible. No explanation was provided as to why the conduct would be regarded as an act of state.

334. It was submitted further on behalf of Yunus Rahmatullah and the Iraqi civilian claimants that the claim was only barred because such acts were understood at the time by the court to be in the nature of "acts of state if done on the prior command of the Crown" and that subsequent ratification was therefore capable of elevating it to the international plane, transforming the act of the servant into a non-justiciable sovereign act, the legality of which could not be examined by the municipal courts. In particular, the defendant's conduct was, following ratification, to be regarded as sovereign conduct at the international level in implementation of a treaty. In support of this submission that the "defence" was never intended to transform any act by an agent of the Crown into an act of state, reference was made to *Secretary of State in Council for India v Kamachee Boye Sahaba* (to which we have referred at paragraph 318 above) where the Privy Council held that the acts in question were acts of state

because they were "a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law" (at pg 77). This, it was submitted, confirmed that act of state applied only to acts of an inherently sovereign character which were formally adopted by the Crown.

335. In support of this reading of *Buron v Denman*, the submissions made on behalf of Yunus Rahmatullah and the Iraqi civilian claimants relied on certain academic commentaries, most notably the following statement by the authors of *Winfield and Jolowicz on Tort* (19th edn, 2014), para. 25-005:

> "Certainly an injury inflicted upon a foreigner abroad which is done pursuant to a policy which is not justiciable by the courts and which is either authorised or ratified by the Crown is for this purpose an "act of state" and cannot be made the subject of an action in the English courts, but it is doubtful whether, as an answer to a claim in tort, act of state goes any further than that."

336. While we would accept that *Buron v Denman* may be explicable on the basis that it concerned non-justiciable sovereign conduct at the international level, the submission made on behalf of Yunus Rahmatullah and the Iraqi civilian claimants encountered two substantial difficulties. The first is that the case has long been accepted as establishing a wider principle, not limited to cases of non-justiciability. The second is that the defence and the rule of non-justiciability are applicable in different circumstances.

337. In *Nissan*, as we have seen, a distinction was drawn between these two aspects of act of state. Lord Wilberforce distinguished between a rule of non-justiciability and a rule "which provides a defendant, normally a servant of the Crown, with a defence to an act otherwise tortious or criminal, committed abroad, provided that the act was authorised or subsequently ratified by the Crown" (at pg 231D). Similarly, Lord Reid observed (at pg 207):

> "The other case which is, I think, clear is where the act complained of was done against an alien outside her Majesty's dominion. Since *Buron v. Denman* (1848) 2 Ex. 167, it has been accepted that if the act was ordered or has been ratified by the British Government the English courts cannot give redress to that alien. He may enlist the support of his own government but he has no remedy in England."

and Lord Morris observed (at pg 220B-C):

> "But the situation in the present case and the claims as formulated differ fundamentally from those in *Buron v. Denman*. Though the conception of an act of state as illustrated in *Buron v. Denman* has been so recognised that it cannot now be overthrown, I would hope that occasions for dependence on it as a defence will become increasingly rare."

338. In *Nissan,* the *Buron v Denman* defence of act of state to a claim in tort where the act is justiciable was dealt with as a secondary matter. *Buron v Denman* was not mentioned by Lord Pearce or Lord Pearson. Lord Reid and Lord Wilberforce appear to have based the defence on the simple principle that it could be invoked when sued for any act authorised by the Executive done overseas against an alien: see Lord Reid in the passage set out above and at pg 209E, and Lord Wilberforce at pg 231. Lord Morris (at pg 218 to 220), however, appears to have elided the rule of non-justiciability with the defence to a justiciable claim.

339. In *Shergill v Khaira* (to which we have referred at paragraph 320 above) the Supreme Court (at [41] to [42]) distinguished the principle of non-justiciability from certain other rules which may result in an English court being unable to decide a disputed issue on its merits. The latter category was said to include "the act of state doctrine". Whether this was intended to refer to the domestic or Crown act of state rule with which we are concerned in this case or the foreign act of state doctrine, nothing in the reasoning in *Shergill* suggests that domestic act of state is restricted to cases where the subject matter is non-justiciable. On the contrary, it is entirely consistent with the analysis of Lord Wilberforce in *Nissan* which identified a principle of act of state with two distinct limbs, only one of which is a manifestation of non-justiciability.

340. This view is also supported by a considerable weight of academic commentary. Thus, we note the following analysis by Lord McNair which seems to have been highly influential before the House of Lords in *Nissan*. He distinguishes between "the plea or defence called "act of state"" and "the rule excluding certain acts of the Crown from justiciability". Of the plea or defence he writes:

> "It may be pleaded against an alien in respect of an act done abroad, but not in any circumstances against a British subject, nor may it be pleaded against a friendly alien resident in the United Kingdom, at any rate when the wrongful act was committed within British jurisdiction. Its scope of operation is the whole field of governmental or official activity in relation to the Crown's dealings with foreign States, and the form assumed by it is for the defendant, if so authorized by the appropriate Government Department, to plead "act of State", i.e. that in doing the act, or making the omission, complained of by the plaintiff he (the defendant) was acting in an official capacity." (McNair, *International Law Opinions*, (1956), Vol. 1, at pg 111.)

Lord McNair then describes the rule excluding certain acts of the Crown from justiciability as follows:

> "The term "act of State" is used, not only narrowly to describe the defence explained above, but also, perhaps somewhat loosely, to denote a rule which is wider and more fundamental, namely, that "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs" (sometimes called "acts of State" or "matters of State"); for instance, the making of peace and war, the annexation or abandonment of territory, the recognition of a new State or the new Government of an old State, etc., cannot form the basis of an action brought against the Crown, or its agents or servants, by any person, *British or alien*, or by any foreign State, in British municipal tribunals. Such acts are not justiciable in British courts, at the suit either of British subjects or of aliens; they may form the subject of political action in Parliament or, when the interests of foreign States or their nationals are involved, of diplomatic protest or of any international judicial process that may be available." (at pg 112)

He observes:

> "Much confusion has resulted from the failure to perceive the distinction between the two meanings. It must, however, be confessed that the scope both of the defence of "act of State" and of the rule of the non-justiciability of certain "acts" or "matters of State", is still obscure, as is he relation between the defence and the rule."

and adds:

> "It seems, however, to be clear that the plea of "act of state" and the rule of the non-justiciability of certain matters are not the same thing, because the former is not valid against a British subject, whereas the latter is." (at pg 116)

341. A similar distinction is drawn by the authors of Dicey, Morris and Collins, *The Conflict of Laws* (15th edn) at 5-043 and 5-044:

> "It has been held that the courts will not investigate the propriety of an act of the Crown performed in the course of its relations with a foreign State, or enforce any right alleged to have been created by such an act unless that right has been incorporated into English domestic law.
>
> …
>
> The expression "act of state" is also used to describe executive acts which are authorised or ratified by the Crown in the exercise of sovereign power. The victim of such an act is in some circumstances denied any redress against the actor because the act, once it has been identified as an act of state, is one which the court has no jurisdiction to examine. The defence can be raised in regard to an act performed outside the United Kingdom and its colonies against the person or property of an alien and is also available in regard to the deportation or internment of an alien of enemy nationality. The defence is probably not available in regard to acts affecting the property in the United Kingdom of a non-resident alien. It is an open question whether the defence can apply to acts performed outside the United Kingdom and its colonies against the person or property of a British citizen. The defence is inapplicable to an act performed within the United Kingdom and its colonies against the person or property of a British citizen or of a non-enemy alien present here."

We consider, therefore, that *Buron v Denman* is authority for a wider principle, not limited to non-justiciability, under which Executive acts which are authorised or ratified by the Crown in the exercise of sovereign power are capable of barring a claim in tort. Nevertheless, the submission is well made on behalf of Yunus Rahmatullah and the Iraqi civilian claimants that they have been unable to identify any modern authority, other than the decisions which are now appealed to this court, where this act of state "defence" has been successfully invoked to prevent the court from hearing a justiciable tort claim against the Government of the United Kingdom. Moreover, it will be necessary to return to the question whether such a bar to the bringing of a private law claim can be justified today.

(b) The Crown Proceedings Act 1947

342. It was submitted on behalf of Yunus Rahmatullah and the Iraqi civilian claimants that, even if there was once a distinct limb of act of state which provided a defence to claims in tort, it was extinguished by section 2(1), Crown Proceedings Act 1947 which provides in relevant part:

> "2. Liability of the Crown in tort.
>
> (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-
>
> (a) in respect of torts committed by its servants or agents;
>
> …
>
> Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart form the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate."

343. On behalf of Yunus Rahmatullah and the Iraqi civilian claimants, it is submitted that the proviso to section 2(1) must be read as part of a statutory framework which

abrogated all existing Crown privileges and immunities from civil liability save those expressly preserved by the Act. It is submitted that it is only those immunities which are expressly provided for that survive the passage of the Act and that this is so whether the immunity is that of the Crown or a Crown servant or agent. Counsel submitted that had Parliament intended to preserve an existing immunity or common law defence for act of state it could easily and logically have done so and would be expected to have done so by enacting a statutory immunity similar to those in sections 2(5), 5, 7, 9, and 10, a provision expressly preserving certain common law rules similar to the preservation of certain statutory rules in section 2(4), an express procedural provision preserving an existing rule of law similar to section 28 or an explicit saving provision in section 40.

344. Professor Glanville Williams, in a contemporaneous commentary stated in relation to the proviso to section 2(1):

> "It is thought that this proviso was inserted in order to make it plain that the Crown was to participate in the defence of "act of state" that is open to the servant under the rule in *Buron v. Denman*. But if this was the intention, the proviso used a bludgeon to kill a fly – and the fly was already dead, because where the servant has the defence of "act of state" it cannot be said that he has committed a tort within the words of section 2(1)(a), and thus there is nothing for which the Crown could in any event be liable." (Glanville Williams, *Crown Proceedings* (1948) at pg 44)

Similarly, Lord McNair, writing in 1956 stated:

> "It is suggested that if the Crown itself were now sued by a foreign State, for instance, for a tort committed abroad by one of its agents or servants in an official capacity and authorized, or approved later, by the appropriate Department as in *Buron v. Denman*, the Crown could defeat the action by pleading the *defence* of "act of State"; further, that if the act or omission complained of fell within the sphere of "acts of State" or "matters of State" as defined above, the Crown could invoke the rule of law, referred to above, that such matters were not justiciable before British municipal tribunals." (McNair, *International Law Opinions*, (1956), Vol. 1, at pg116.)

By contrast, Professor Campbell McLachlan, observes:

> "Glanville Williams appears to have thought that the purpose of this proviso was to ensure that the defence of act of state was preserved following the 1947 Act. But, if that is so, it is a very curious mechanism by which to achieve this objective. True it is that the Court accepted in *Buron v. Denman* that the effect of the Crown's plea of act of state was to extinguish the liability of the Crown's agent and to substitute the liability of the Crown. But, as has been seen, that was the necessary consequence of a state of affairs that prevailed prior to the 1947 Act in which the primary object of liability was the agent himself, and the Crown had no liability unless it had taken the extraordinary step of pleading act of state. The 1947 Act reverses the rule as regards the liability of the Crown as principal. If the Crown is still to be allowed the option of pleading act of state in relation to its acts abroad, it would be a very curious – indeed circular – means of achieving this by means of a proviso focusing on the effect of the plea on the liability of the agent. There is no record of the proviso being utilised in this way." (Campbell McLachlan, *Foreign Relations Law*, (2014), para. 7.70)

345. The 1947 Act employs a number of means to delimit the scope of the new liabilities of the Crown. However, given that the purpose of section 2(1)(a) was to end the Crown's general immunity from tort in circumstances where a person of full age and capacity would be vicariously liable, we do not find it at all surprising that it should make express provision limiting its effect by reference to the position of an agent

who, but for the provisions of that Act, would not have been liable. In any event, we find ourselves in total agreement with the judge's conclusion (at [210] to [215]) that the Crown Proceedings Act 1947 had neither the object nor the effect of abolishing act of state as a defence to claims in tort, for the reasons he gave which may be summarised as follows:

(1) The Crown Proceedings Act 1947 was intended to end the Crown's general immunity from liability in tort. However, the "defence" of act of state is not merely an aspect of the Crown's general immunity from liability in tort. This is evident from important differences in the availability and effect of these two rules. Act of state, unlike the general immunity in tort, is not available in respect of an act done within British territory (*Walker v Baird* [1892] AC 491; *Johnstone v Pedlar* [1921] 2 AC 262). Furthermore, in an ordinary case of Crown immunity an agent of the Crown who committed a tort could still be sued personally, whereas act of state protects both the Crown and its agent (*Buron v Denman*).

(2) This aspect of act of state is a distinct rule with a different rationale. The judge expressed it in this way (at [214]):

> "The reason for the inability to sue the agent is that the character of the act is such that, when done on behalf of the Crown, it is not an act for which the court will give redress. The need to prevent a claimant from circumventing the doctrine by formulating a claim against the agent therefore did not disappear with the abolition of the Crown's general immunity."

(3) The proviso to section 2(1) makes clear that the Act does not make any change to any rule of law which prevents a servant or agent of the Crown from being held liable in tort. Where a plea of act of state succeeds there is no liability in the agent which could give rise to the vicarious liability of the Crown.

(c) Is the plea available in response to a claim under the Human Rights Act 1998?

346. In his judgment the judge (at [409] to [416]) rejected as untenable a submission on behalf of the Secretary of State that the act of state doctrine was a bar not only to the claim under Afghan law but also precluded SM's public claim under the Human Rights Act 1998 for breach of Article 5 ECHR. In this appeal, the Secretary of State has not sought to challenge this conclusion. Given the importance of this issue to the outcome of the proceedings, we propose to set out briefly our reasons for agreeing with the judge.

347. First, to the extent that the act of state rule turns on the non-justiciability of the subject matter it can have no application because Parliament in enacting the Human Rights Act 1998 has made issues arising under the ECHR, as implemented by that Act, justiciable before courts in this jurisdiction. Thus, section 6(1) provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

and section 7(1) provides:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may –

> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal …"

As Baroness Hale observed in *R (Gentle) v Prime Minister* [2008] 1 AC 1536 at [60]:

> "It is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate we must."

348. Secondly, to the extent that the act of state rule is a bar to a claim in tort notwithstanding that the claim is justiciable, it is a rule of common law which is expressly overruled by the provisions of the Human Rights Act 1998 set out above. Furthermore, if we are correct in our view that this aspect of the act of state rule is a rule of private international law by which courts in this jurisdiction will not enforce rights arising under the law of a foreign country if to do so would be inconsistent with the fundamental public policy of the United Kingdom, it cannot operate to exclude reliance on the provisions of the Human Rights Act which is part of our domestic law.

(d) Is the wider aspect of the act of state rule justified?

(i) The general principles

349. We agree with the judge that the rationale of the limb of act of state which operates as a bar to a claim in tort is to be found in domestic public policy. It is a procedural rule of the *lex fori* which confers an immunity from suit. It is reflected in section 14(3)(a) of the 1995 Act. Notwithstanding the fact that the subject matter may be justiciable, there will be circumstances in which it will be essential that our courts should have a residual power to bar claims founded on foreign law on grounds of public policy. Thus, for example, if *Buron v Denman* fell for decision today, the claim for compensation for loss of the claimant's slaves and damage to his slaving activities would unhesitatingly be rejected, if on no other ground, on the basis that property rights in slaves arising in foreign law should not be recognised and that to afford such a remedy in such circumstances would be offensive to the public policy of this country. However, we would expect that, in circumstances in which the claim is justiciable, such a bar on grounds of act of state would be infrequently applied, and the absence of decided cases supports this view.

350. There is here a further analogy with other immunities at common law such as those formerly enjoyed by barristers (*Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co.* [1980] AC 198; *Hall v Simons* [2002] 1 AC 615) or formerly enjoyed by expert witnesses in respect of their evidence in court (*Jones v Kaney* [2011] 2 AC 398). However, as was emphasised in *Jones v Kaney* by Lord Dyson (at [113]), the general rule is that where there is a wrong there should be a remedy. To deny a remedy to the victim of a wrong should always be regarded as exceptional and any exception must be necessary and requires strict and cogent justification.

> "… [E]ven if there is such a long established rule, it is based on policy grounds and cannot survive if the policy grounds on which it is based no longer justify the rule. The mere fact that the immunity is long established is not a sufficient reason for blessing it with eternal life. Circumstances change as do attitudes to the policy reasons which underpin the immunity. The common law develops in response to these changes. The history of the rise and fall of the immunity of advocates provides a vivid illustration of the point. As Lord Reid observed in *Rondel v. Worsley* [1969] 1 AC 191, 227C, public policy is not immutable and any rule of immunity requires to be considered in the light of present day conditions." (at [112])

351. We respectfully disagree with the observation of Lord Morris in *Nissan* (at pg 220 B-C) that "the conception of an act of state as illustrated in *Buron v Denman* has been so recognised that it cannot now be overthrown". On the contrary it seems to us, for the reasons given by Lord Dyson in *Jones v Kaney*, that it is imperative that the justification for such a bar on access to the court be kept under review. We would add that the need for such continuing review of the common law remains as important as ever, notwithstanding the enactment in the Human Rights Act 1998. The continuing importance of the common law, which continues to develop in parallel to the system of ECHR rights introduced by the Human Rights Act 1998, has been recognised since soon after that statute came into force: see, for example, the approach in *McCartan Turkington Green v Times Newspapers Ltd.* [2001] 2 AC 277 at 297 and *R v Shayler* [2003] 1 AC 247 at [21], and see the clear recent statements by Lord Toulson and Lord Mance in *Kennedy v Charity Commission* [2015] AC 455, at [133] and [46].

352. It therefore becomes necessary to identify, in the case of this limb of act of state, the public policy interest which justifies denying access to the courts in this way. We do not consider that, in circumstances where the subject matter of a claim is justiciable, the fact that the conduct giving rise to the claim is a sovereign act done abroad pursuant to deliberate UK foreign policy should necessarily in all cases require that the claim be barred on grounds of public policy. It seems to us that a closer examination of the public policy considerations is required.

353. The judge found the overriding public policy interest in the principle that the Executive and the judiciary should "speak with the same voice" in matters concerning the conduct of foreign relations. This expression, which implies the precedence of the Executive in such matters because it is the Executive which conducts foreign affairs, has frequently been referred to in the case-law (see F.A. Mann, *Foreign Affairs in English Courts* (1986) pp 11, 23 and 24). In *Government of the Republic of Spain v SS "Arantzazu Mendi"* [1939] AC 256 Lord Atkin stated (at pg 264):

> "Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another."

See also, for example, *The Fagernes* [1927] P 311; *In re Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket No. 235 (Nos. 2 and 3)* [1978] AC 547, at pg 616 and 617, 650 and 651. Similarly, in *Al-Jedda v Secretary of State for Defence*, Elias LJ observed (at [212]) in a context close to those of the present appeals:

> "Why does the court defer to the executive even in areas where the issue in dispute would be amenable to judicial review? The basis for this appears to be a recognition that where the state through the executive government asserts that its actions are intended to protect interests of state, and the court accepts that this is so, the courts ought not thereafter to undermine that executive action by questioning further its legality. Court and Crown should speak with one voice."

354. Clearly, it is for the Executive to conduct the foreign relations of the United Kingdom; the judiciary has no role. However, it is difficult to justify such an act of state restriction on private law claims on the basis of a requirement that the Executive and the judiciary must speak with one voice when it is established that there is no bar to similar claims in public law, provided they are justiciable. In the case of justiciable claims, judicial review is available. Pronouncements and declarations may be made by the court in such proceedings as to the legality of the conduct of the Executive, notwithstanding the fact that these are inconsistent with the stance of the Executive. (That they are made even in relation to its conduct of foreign affairs is seen, for

example, from *Burmah Oil Co. v Lord Advocate* [1965] AC 75; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd.* [1995] 1 WLR 386.) Similarly, on the judge's analysis in the main judgment, he acknowledged (at [406]) that this limb of act of state does not prevent a person detained by agents of the United Kingdom abroad from bringing a claim alleging that his detention is unlawful, only that it may prevent him from asserting such a claim insofar as it is based on foreign law. Furthermore, the judge held - and it has not been challenged on this appeal, rightly in our view - that Parliament by enacting the Human Rights Act 1998 requires the adjudication of justiciable claims under the ECHR, notwithstanding that they arise out of the conduct of foreign relations.

355. As a result, the court will, in cases such as the present, have to hear and rule upon claims for breach of rights under the ECHR and common law public law claims by way of judicial review arising from the same facts which are alleged to give rise to claims in tort at common law. In these situations there is no rule requiring a uniform stance by Executive and judiciary. There are, therefore, many instances in which the courts are no longer required to defer to the Executive in this regard. Accordingly, we do not consider that the requirement contended for in relation to private law claims can be justified on this basis.

356. Such authorities as exist on this second limb of act of state appear to rest on the simple principle that the common law defence of act of state can be invoked by the Crown whenever it is sued for any act authorised by the Executive done overseas against an alien. Even where the conduct is justiciable, the defence would thus operate as a simple bar, an automatic defence. This would be similar to the position before the decision in *Conway v Rimmer* [1968] AC 910 removed the simple bar precluding the court from questioning the certificate of a minister that evidence was subject to "Crown privilege" and that to disclose it would be contrary to the public interest.

357. It was, however, not contended on behalf of the Secretary of State that the defence of act of state operates as an automatic defence or could be so justified today. Rather, he submitted that the rationale of this limb is that certain claims in tort are required to be barred to prevent the obstruction by the judiciary of the conduct of foreign relations or its implementation. The Secretary of State did not assert that claims for torture by HM armed forces brought by foreign nationals would be barred by the defence of act of state. This, he submitted, is because such an act would not be authorised conduct or it would not properly be considered a Crown act or it would amount to a grave violation of rights. The act of state defence is sufficiently flexible to allow the court to strike a balance as to when it should apply. He accepted that it may be difficult to draw the line but stated that where it is to be drawn is a matter for incremental decisions.

358. The rationale advanced by the Secretary of State and the development of the modern common law show that a simple bar constituting an automatic defence against all claims is no longer sustainable. It has therefore become necessary to identify the rationale for the defence and the basis on which certain situations in which the defence operates can be distinguished from those in which it cannot. We have explained (at paragraphs 353 and 354) why the rationale cannot be found in a notion that the Executive and the judiciary should "speak with the same voice". We consider that the defence should be available where the conduct challenged is the implementation of certain policy decisions of the Executive in its conduct of foreign relations for which there is a rationale for barring the claims.

359. There has been no decision since *Buron v Denman* in 1848, over 150 years ago, which provides guidance to assist us. We consider that the rationale of this limb of act of state and consequently the scope of its operation, must be found in considerations of public policy. In *Conway v Rimmer* a simple bar was also replaced by a more nuanced rule based on public policy. In our view in the present context it is necessary to consider whether, in the particular factual circumstances of each case, there are any compelling considerations of public policy which would require the court to deny a claim in tort founded on an act of the Executive performed abroad. We agree with the judge (at [396]) that it is analogous to a rule of conflict of laws under which effect is denied to foreign law on grounds of public policy.

360. We do not consider that the limit of the availability of the defence of act of state lies at the point where the tortious conduct alleged infringes the claimant's rights under the ECHR: see paragraphs 374 to 375. We note, in relation to the point about claims for torture accepted by the Secretary of State, that the first basis upon which the House of Lords in *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221 held that public policy required our courts not to receive evidence which has or may have been procured by torture, was that this was forbidden by a longstanding rule of the common law.

(ii) The position in SM's case

361. The question is whether, in the circumstances of a particular case, there is some overriding public interest or policy which cannot be disregarded. In the case of SM there are two public interests which clash. The first is the public interest that harm shall not be done to the nation by precluding HM armed forces from detaining a commander in the Taliban for more than 96 hours because it appeared that questioning him would provide significant new intelligence vital for force protection purposes. The second is the public interest in allowing SM access to the courts in circumstances where it appeared that there was no legal basis for his detention under any of the possible applicable legal systems.

362. In the course of this appeal we have been taken to the factual circumstances of SM's claim in some detail. In particular:

(i) His detention took place under detention policies adopted by the UK government which were decisions of the Executive taken in its conduct of foreign relations.

(ii) As we stated at paragraph 302 above, the UK government announced the policy and amended HM armed forces' standard operating procedures UK SOI J3-9 but did not otherwise put a legal framework in place.

(iii) The decision of the Minister to authorise the continued detention of SM was the application of a specific policy on detention to the facts of a specific case.

363. There are four further factors to which we must have regard:

(i) The arrangements for the deployment of HM armed forces to Afghanistan were established by UNSCRs. The authority to determine detention policies was delegated to ISAF (see paragraphs 146 to 148 above). The Secretary of State decided to authorise a policy for detention that was outside and

contrary to the authority granted under the UNSCRs (see paragraphs 153 to 157 above).

(ii) HM armed forces were deployed to Afghanistan to assist the Afghan government. The Bonn agreement made clear that the responsibility for law and order rested with the Afghans (see paragraph 31 above). The policy authorised by the Secretary of State was nonetheless contrary to Afghan law. He did not seek to alter the provisions of the UK/Afghanistan Memorandum of Understanding (see paragraphs 41 and 42 above) or seek to secure a change to the law of Afghanistan to accommodate the new policy.

(iii) Although the fact that it was contrary to Afghan law, the applicable law, is primarily of relevance and a prerequisite to establishing the claim in tort, it is also of relevance in relation to the defence of act of state and whether there is a public policy justification for it in the circumstances of this case.

(iv) The Secretary of State did not put proposals for legislation to the UK Parliament in 2006 or any time thereafter. It is not for us to set out what that legislation might have provided, but such legislation might have taken the form of a bar of specified claims by foreign nationals or have provided for specific authority for HM armed forces to detain in operations overseas. Both of these were accepted before us on behalf of SM to be possibilities. The latter reflects the approach taken by the United States.

364. It is in those circumstances that we must apply the common law and the 1995 Act. It is, as we have stated, a longstanding fundamental principle of common law that interference with personal liberty is unlawful unless the person responsible (here the Secretary of State) can show it is justified. In the particular circumstances of SM's case, there was no authority to detain either under the legal regime established by the United Nations or under the law of Afghanistan or under UK legislation. We can therefore see no compelling considerations of public policy which should prevent reliance on Afghan law as the basis of the claims in tort brought in these proceedings; it must be for Parliament to consider whether it should provide for such a bar.

(iii) The position in the case of the PIL claimants

365. So far as the other Afghan claimants (the PIL claimants) are concerned, they do not bring any claim in tort founded on Afghan law. This is made clear in paragraph 55 of their Memorial dated 9 December 2013 which states:

> " The [Secretary of State] contends that Afghan law is the controlling law for the purposes of a claim in tort or delict, citing section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995. This, however, is not a tort claim. It is a claim based on the HRA and domestic public law. … The 1995 Act is a red herring."

Accordingly, this limb of act of state cannot apply**.**

(iv) The position in the case of Yunus Rahmatullah and the Iraqi civilian claimants

366. The claims by Yunus Rahmatullah and the Iraqi civilian claimants all include claims in tort. Although all of these claims were pleaded in English law in the statements of case, it now seems to be common ground that the claims are governed by the *lex loci delicti*. Yunus Rahmatullah accepts that the claims relating to his detention, alleged ill-treatment and transfer in Iraq to US forces are all governed by Iraqi law. To the

extent that his claims are founded on his subsequent detention and alleged ill-treatment in Afghanistan, neither party has suggested that Afghan law is displaced. The Iraqi civilian claimants have accepted that the law governing their claims in tort is the law of Iraq.

367. As in the case of SM, the cases of Yunus Rahmatullah and the Iraqi civilian claimants come before us for the determination of preliminary issues. In these cases the judge did not come to any final conclusion as to whether act of state was a defence in the particular circumstances of each claim. He noted that the Secretary of State had not yet pleaded nor adduced any evidence to show that the arrest and detention of Yunus Rahmatullah and the three Iraqi civilian claimants was in accordance with the United Kingdom's detention policy. However, he concluded that provided that this is demonstrated, the claims to recover damages in tort based on the contention that their detention by British forces was unlawful under the law of Iraq will be barred by the act of state doctrine. This is reflected in the orders made below (see Rahmatullah Order of 21 November 2014, paragraph 3; Iraqi civilian claimants, Order of 21 November 2014, paragraph 2).

368. We have taken a different view from the judge as to the scope of the defence of act of state. In due course it will be necessary for a tribunal of first instance to apply such principles as are finally determined to govern this difficult question. On that occasion it will, in our view, also be necessary for that tribunal to consider whether the United Kingdom was under an obligation to detain or intern "for imperative reasons of security" arising from the Security Council resolutions. The existence of such an obligation would, at the very least, be support for the view that the court is here concerned with policy in the conduct of foreign relations. Moreover, 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. Furthermore, it is to be hoped that the appeal in *Al-Waheed* pending before the Supreme Court will cast further light on the issue as to the effect of the relevant Security Council resolutions.

(e) Article 6

369. Approaching the issue within the context of the ECHR and the Human Rights Act 1998 we come to the same result.

370. Access to the courts is a pre-condition to the enjoyment of the procedural guarantees provided by Article 6 ECHR and, accordingly, the Strasbourg court has established the principle that Article 6(1) secures a right to have any claim relating to a person's civil rights and obligations brought before an independent and impartial tribunal (*Golder v United Kingdom* (1975) EHRR 524, at [28] to [36]). The effect of act of state is, of course, to deny such access in the cases where it applies and, as a result, Article 6 ECHR is engaged. The Strasbourg case law recognises that the right is not absolute but is subject to limitations. Contracting States enjoy a margin of appreciation in this regard. However, national courts must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Moreover, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved. In addressing what is the legitimate aim which act of state is intended to achieve it is necessary to consider the two limbs of the principle in turn.

371. The non-justiciability limb of the rule (which we have discussed at paragraphs 318 to 331) is intended, quite simply, to reflect limitations on the role of the judicial function which are inherent in the allocation of powers under our constitution. The first category of non-justiciability which the Supreme Court identified in *Shergill v Khaira* ([2014] UKSC 33 at [42]), comprises cases where the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers. In these circumstances the limitation on access to the courts created by this limb of act of state is clearly intended to achieve a legitimate aim and employs proportionate means. We are not concerned in this case with the second category of non-justiciability identified by the Supreme Court in *Shergill v Khaira*, as the claimants seek to invoke private law rights. For reasons set out earlier in this judgment, we consider that the principle of non-justiciability does not bar the claims in these proceedings.

372. Applying the same principles to the other limb of act of state, we come to the same conclusions as on the application of common law principles. First, we are unpersuaded that barring private law claims in tort could be justified on the ground that it is necessary for the judiciary and the Executive to speak with one voice, when public law claims and claims based on rights under the ECHR arising from precisely the same facts are not barred on this ground. Even if this were to be considered a legitimate objective, the means proposed are not suitable for its achievement. Secondly, to the extent that it is said that claims in tort are required to be barred to prevent the obstruction by the judiciary of the conduct of foreign relations or its implementation, we do not accept that such an objective requires the courts to decline to entertain all private law claims founded on an Executive act done abroad pursuant to deliberate UK policy.

373. In view of our conclusion in the case of SM that act of state does not avail the Secretary of State, no Article 6 point arises there.

(f) An exception to act of state in cases of grave breaches of international law or human rights law

374. It is necessary to refer to a further submission on behalf of the claimants that the court should, by analogy with foreign act of state, recognise an exception to act of state in cases concerning a grave breach of international law or human rights law (see *Kuwait Airways Corp. v Iraqi Airways Co. (Nos. 4 & 5)* [2002] 2 AC 883; *Belhaj v Straw* [2014] EWCA Civ 1394). The judge rejected this submission in his judgment in SM's case (at [407] to [408]): see paragraph 315 above.

375. It does not necessarily follow that the emerging human rights exception to foreign act of state should have a counterpart in domestic/Crown act of state. The two principles are distinct and, in our view, have different rationales. In particular, the foreign act of state doctrine, as it has developed in this jurisdiction, is founded essentially on the sovereign equality of States (see *Belhaj v Straw* at [64] to [68]). There may therefore be dangers in reasoning by analogy from one to the other. If, however, we are correct in our conclusion that the limb of act of state which operates as a defence to claims in tort is essentially a principle of public policy, we have difficulty in seeing how it could be successfully invoked if the conduct in issue constituted a grave breach of international law or human rights law. In any event, we note that act of state does not defeat a claim under the Human Rights Act 1998.

(6) Conclusion on act of state

376. We conclude, therefore, as follows:

(1) On the facts alleged by the Secretary of State the claim by SM is not barred by the act of state principle.

(2) The issues raised by the PIL claimants are justiciable. As there is no claim in tort the second limb of the act of state principle has no application.

(3) In relation to the claims by Yunus Rahmatullah and the Iraqi civilian claimants, the orders of Leggatt J of 21 November 2014 and 10 December 2014 will be amended to reflect the test set out in paragraphs 356 to 361 above. In order to determine whether or not a defence of act of state is available to the Secretary of State, the court below will need to apply this test once the facts in each case have been established.

VIII CONCLUSION

377. For the reasons set out above:

(1) The appeal in relation to SM is allowed on the issue of act of state.

(2) The order of Leggatt J dated 10 December 2014 in *Rahmatullah v Ministry of Defence* is varied as follows:

> (i) The first sentence of paragraph 3 is varied to read: 'The claims in tort in *Rahmatullah* (HQ13X01841) in relation to the legality of the claimant's arrest and detention by the UK armed forces will be barred by the doctrine of act of state only if the defendant is able to establish that there are compelling grounds of public policy to refuse to give effect to Iraqi law.'
> (ii) The second sentence, namely the decision that 'the defendant's application under CPR Part 11 and/or CPR 3.1(2) insofar as it relies on the doctrine of Crown act of state is granted' is set aside.

(4) Paragraph 2 of the order of Leggatt J dated 21 November 2014 in *Iraqi Civilians v Ministry of Defence* is varied to read:

> 'Claims in tort in respect of (i) the arrest and detention of the claimant by UK armed forces and (ii) the transfer of the claimant to the custody of the armed forces of the United States of America will be barred by the doctrine of act of state in each case only if the defendant is able to establish that there are compelling grounds of public policy to refuse to give effect to Iraqi law.'

(4) The appeals are dismissed in all other respects.