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Authorization versus Regulation of Detention in Non-International Armed Conflicts

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I. INTRODUCTION

What does the law of armed conflict (LOAC) say about detention in non-international armed conflict (NIAC)? Does the legal regime do anything in the way of seriously regulating the grounds for detention—setting forth who may be confined and for what status or behavior? And does LOAC provide an affirmative source of authority that empowers belligerents to engage in detention when they otherwise could not? These questions have recently become more salient due to litigation working its way up

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through the United Kingdom's court system,¹ and due to a recent General Comment by the UN Human Rights Committee.²

The British judiciary and the UN body are now in alignment suggesting that laws of war do not regulate the grounds for detention in NIACs—though the legal implications they draw from that conclusion may be different. According to the British ruling, it will be more difficult for UK forces to conduct some military operations abroad without clear Security Council authority to engage in detention or the local government's authorization of the detention. And according to the UN human rights body, the International Covenant on Civil and Political Rights (ICCPR) should fill the legal void in regulating detention in a NIAC. As Shaheed Fatima explains, the General Comment “appears to indicate that [the UN Human Rights Committee] does not regard [International Humanitarian Law (IHL)] in NIAC as including rules regarding arbitrary detention—and, therefore, that the only source of protection against arbitrary detention in NIAC is [international human rights law].”³

Who is to say whether the British Court wanted to incentivize Her Majesty's Government to operate under the Security Council or with greater consent from local authorities, and whether the UN Human Rights Committee wanted to elevate the regulatory role of human rights in warzones? Such questions are not my concern here, and their answers may be beyond the province of any of us. That said, I do argue that both the Court's and the Committee's account of LOAC rules in NIAC are not well

1. *Mohammed v. Ministry of Defence*, [2014] EWHC (QB) 1369, [273], available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/mohammed-v-mod.pdf> [hereinafter *Mohammed*].

2. UN Human Rights Committee, General Comment No. 35: Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GC/35&Lang=en.

3. Shaheed Fatima, *UN HRC's General Comment on the Right to Liberty and Security: A Missed Opportunity? (Part Two)*, JUST SECURITY (Nov. 20, 2014), <http://justsecurity.org/17596/human-rights-committees-general-comment-no-35-security-detention/>. See also Jonathan Horowitz, *Clarity or Confusion? General Comment 35 and Security Detention*, JUST SECURITY (Nov. 21, 2014), <http://justsecurity.org/17702/clarity-confusion-general-comment-35-security-detention/> (“Committee is likely saying that IHL ‘may be’ relevant depending on what type of armed conflict you are in.”). But see Gabor Rona, *Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?*, 91 INTERNATIONAL LAW STUDIES 32, 53 (2015), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1001&context=ils> (suggesting, wrongly in my view, that “the Comment does not address NIAC detention”).

founded, and that their legal conclusions risk unintended and perverse consequences.

To get to that analysis, it is important first to interrogate the proposition that the laws of war do not regulate the grounds for detention in NIACs. In the balance of this article, I focus on the UK High Court decision in *Serdar Mohammed v. Ministry of Defense*, which has provided the most extensive analysis of the issue to date. In that case, the High Court held that the long-term detention of a suspected Taliban commander by British forces was unlawful—and, by extension, so was the general long-term detention policy of British forces in Afghanistan. That judicial opinion deservedly received accolades from international law experts for its extraordinarily informed and thoughtful analysis across a range of challenging international legal questions. I agree with a core part of the High Court's ultimate holding, but I respectfully disagree with a significant part of the rationale that the Court used as a basis for reaching that result. The judgment is now under consideration by the UK Court of Appeal.

I should note an important aside before proceeding. The British government relied on a law review article I wrote in its briefs submitted to the High Court and the Court of Appeal.⁴ I accordingly take very seriously the task in this article to explain why I believe that law review article is consistent with the High Court's holding, but contradicts a significant part of the Court's chosen rationale.

II. THE MOHAMMED FRAMEWORK

The High Court advanced two propositions:

Proposition 1: (No) Authorization

LOAC does not provide authorization (the source of legal authority) for a power to detain in non-international armed conflicts.

Proposition 2: (No) Regulation

LOAC has nothing to say about the grounds on which States may preventively detain particular individuals in non-international armed conflicts (e.g., whether States may lawfully detain individuals who

4. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 48 (2009), available at <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanCivilianDetentionAJIL.pdf>.

pose an imperative security threat) or what procedures should apply to detention in non-international armed conflicts.

With respect to the first proposition, the Court concluded that because LOAC does not authorize detention in NIACs, the government needed to secure authorization either from Afghan domestic law or a Security Council resolution.

Part of the basis for the first proposition, according to Mr. Justice Leggatt, was the second proposition. That is, proof that LOAC does not authorize detention in NIACs is that neither treaty law nor customary international law contain any rules setting forth who may be detained and according to what procedures. On this view, there is a complete gap in LOAC when it comes to those substantive and procedural determinations. That is, we might as well be talking about WTO law. The WTO does not authorize or prohibit detention in NIACs, and has nothing to say about the substantive and procedural basis for detention.

I agree with the first proposition. I disagree with the second. And, indeed, the second proposition is unnecessary. The first proposition can stand without it.

III. AUTHORIZATION TO DETAIN

Mr. Justice Leggatt correctly held that LOAC does not provide authorization to detain in NIACs, and thus, in this particular case, “the only potential sources of a power to detain are considered to be the host State’s own domestic law (i.e. in this case the domestic law of Afghanistan) and [UN Security Council Resolutions].”⁵

Despite the government’s reference to my 2009 law review article in its brief, that article is consistent with the *Mohammed* judgment’s first proposition. A major point in my article is that LOAC does not prohibit (it allows for) detention of civilians who pose a security threat in NIACs. And the High Court held that LOAC does not authorize (nor does it prohibit) detention in NIACs. As Lawrence Hill-Cawthorne and Dapo Akande helpfully

5. *Mohammed*, *supra* note 1, ¶ 257. Notably, if UN Security Council Resolutions suffice, one might posit that the UN Charter or the use of force regime more generally authorize detention as an incident of waging battle, but that is not a question I explore here.

ly explain, all those claims are compatible.⁶ Indeed, Hill-Cawthorne and Akande explain, correctly in my view, the relationship between the High Court's first proposition and the claims in my 2009 article:

[To] argue that IHL does not create a legal basis to intern in NIACs is not inconsistent with Professor Goodman's view. IHL does not restrict States with regard to detention in NIACs anymore than it does restrict their ability to detain in [international armed conflicts]. States are not prohibited from detaining in NIACs, and, in that sense, are therefore permitted by IHL to detain. IHL simply does not itself provide a legal basis to do so. That legal basis must be found elsewhere.

As Hill-Cawthorne and Akande explain more broadly in their excellent analysis, it is routine for areas of law to regulate a practice without providing a source of authority for that practice. By way of example, international human rights law restricts the grounds upon which a State may detain an individual and imposes procedural safeguards when a State does so. But international human rights, as a body of law, does not provide the source of authority to detain. If anything, the reverse is true. International human rights law may require a State to have a basis in domestic law or other legal authority as a predicate for detaining people.

It should be noted that Mr. Justice Leggatt goes further (*in dicta*) by asserting that LOAC *does* authorize detention in *international* armed conflict. The High Court's judgment invokes the wording of Article 21 of the Prisoners of War Convention (POW Convention)⁷ (and by implicit reference presumably similar language in Articles 41–43 and 78 of the Civilians Convention⁸).

It is not clear, however, that LOAC even provides the source of authority for States to detain in international armed conflicts. Instead, LOAC may be better understood as a generally prohibitory legal regime—consisting of rules and prohibitions. Accordingly, it is not as though States

6. Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL TALK (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

7. *Mohammed*, *supra* note 1, ¶ 242. Convention (III) Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

8. Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 41–43, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Civilians Convention*].

needed the 1949 Geneva Conventions to have the authority to detain or kill in armed conflict. Consider, for example, Derek Jinks' exposition of the general structure of the *jus in bello* regime:

IHL should not be understood as conferring authority on states in the strong sense. IHL rules, in the main, are prohibitory. As discussed at the outset of this Chapter, they establish a floor of humanitarian protection—crafted in light of the vulnerable circumstances common to organized hostilities.

....

An important feature of the IHL regime makes clear that it does not provide affirmative authorization to kill, capture, or detain. IHL is, in one important respect, a second-order legal regime—governing only the conduct of hostilities.⁹

Other commentators have also explained exceedingly well why LOAC does not authorize the power to detain, though they restrict their claim to the power as manifested in NIACs.¹⁰

IV. REGULATION OF (SECURITY-BASED) DETENTION

The High Court may have derived its understanding that LOAC fails to regulate detention in NIACs from the petitioners in the case. The Claimants represented by Public Interest Lawyers (PIL) told the Court that in NIACs “IHL does not supply *any* answers” to substantive questions of who can be detained and procedural questions of what safeguards should apply.¹¹ The Claimants also stated:

[F]or an implicit legal basis to detain or intern to exist . . . it should at least be possible to deduce from it the grounds and procedures in accordance with which a person can be deprived of his or her liberty. However,

9. Derek Jinks, *International Human Rights Law in Time of Armed Conflict*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 656, 666–69 (Andrew Clapham & Paola Gaeta eds., 2014). See also Derek Jinks, *Does IHL Authorize Detention in NIACs?*, JUST SECURITY (May 5, 2014), <http://justsecurity.org/10144/ihl-authorize-detention-niacs/>.

10. See, e.g., Hill-Cawthorne & Akande, *supra* note 6.

11. PIL Claimants' Memorial, ¶ 12, Annex A, Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369, [273] [hereinafter PIL Claimants' Memorial] (emphasis added).

neither [Common Article 3 (CA3)] nor [Additional Protocol II (AP2)] defines *who can be interned or detained in [NIAC], for what reasons, in accordance with what procedures, and for how long*.¹²

In other words, LOAC is as good as WTO or space law. That is, LOAC (like WTO and like space law) includes no authority to detain as clearly evidenced by this area of law's purported silence on the conditions under which detention in NIAC can be exercised.

The Court accepted this argument. As for treaty law, Mr. Justice Leggatt stated in language that closely tracks the above text from the Claimant:

I do not see how CA3 or AP2 could possibly have been intended to provide a power to detain, nor how they could reasonably be interpreted as doing so, unless it was possible to identify the scope of the power. However, neither CA3 nor AP2 specifies *who may be detained, on what grounds, in accordance with what procedures, or for how long*.¹³

Mr. Justice Leggatt extended that reasoning to his analysis of customary international law,¹⁴ and ended with the two propositions: "I have concluded that in its present stage of development IHL does not provide a legal power to detain *nor does it specify grounds on which detention is permitted nor procedures governing detention*."¹⁵

The second proposition—especially in its absolutist form that LOAC essentially provides "no answers" to grounds and procedures for detention—is not well supported.

First, the very structure of LOAC provides an answer to the outer boundaries of permissible State actions in NIAC. That was a major claim in my 2009 law review article, namely, the proposition that State actions, which are permitted by LOAC in international armed conflicts, are generally permitted by LOAC in NIACs. At a fundamental level, LOAC in

international armed conflict—and the Fourth Geneva Convention in particular—is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in non-international armed conflicts. That is,

12. *Id.*, ¶ 8, Annex A (quoting ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNATIONAL IN ARMED CONFLICT (2013) (emphasis added).

13. *Mobammed*, *supra* note 1, ¶ 246 (emphasis added).

14. *Id.*, ¶¶ 258, 261.

15. *Id.*, ¶ 293 (emphasis added).

IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if [S]tates [are lawfully able] to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori [can lawfully] undertake those practices in non-international conflict. Simply put, whatever is permitted in international armed conflict is permitted in non-international armed conflict.¹⁶

In short, LOAC rules regulating international armed conflict are, with only few or no exceptions,¹⁷ more restrictive across the board than those regulating States in fighting an internal conflict (where States' sovereignty is at its zenith). It is difficult to conceive of an action that a State would not be permitted to take in a NIAC that would suddenly become permissible if the conflict were transformed into an international armed conflict. Put another way: what victim of armed conflict would prefer Common Article 3 and Additional Protocol II rather than the full protections of the Geneva Conventions and Additional Protocol I? As a further illustration, consider how the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, dating back to its first judgment in *Tadic*, rests on this basic logic. Prosecutors in The Hague have fought mightily for the rules of *international* armed conflict rather than NIAC to apply to the behavior of defendants, because the former body of rules imposes a greater set of prohibitions. There was essentially never a thought that a more permissive regime would apply in international armed conflict.

Additional evidence that LOAC permits the detention of security threats in NIACs is found in State practice and, indirectly, through standard setting procedures. As the ICRC reported in 2014, “imperative reasons of security’ as the minimum legal standard . . . is already in wide use when States resort to non-criminal detention for security reasons.”¹⁸ Several important States through the Copenhagen Process on the Handling of De-

16. Goodman, *supra* note 4. I have altered the wording, as indicated by square brackets, to use the same terminology in our present discussion.

17. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 68–69 (2012).

18. International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges* (Opinion Paper, Nov. 2014), available at <https://www.icrc.org/en/download/file/1980/security-detention-position-paper-icrc-11-2014.pdf>. See also Knut Dörmann, *Detention in Non-International Armed Conflicts*, in *NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY* 347, 356 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies).

tainees in International Military Operations—including “specially affected” States, a significant category for customary international law purposes—accepted such delimitations on detention in NIACs.¹⁹ Of course, the Copenhagen Principles and Guidelines state explicitly that they “should not be taken as evidence that States regard the practice as required out of a sense of legal obligation.” Our focus, for the moment, however, is not on what is required by international law, but what is permitted. The Copenhagen Process demonstrates that these States all presumably accept that security-based detention in NIACs is legally permissible. It is no wonder that a 2008 Report by a group of experts convened by the ICRC and Chatham House “quite easily” reached a consensus that in NIACs “parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat.”²⁰

So far we have discussed the permissive boundaries of detention in NIACs but what about limitations on States in these contexts? LOAC also imposes a set of important constraints on the grounds for detention in internal armed conflict. On one extreme, some commentators suggest that LOAC has no limitations whatsoever on detention in NIACs, including no rules prohibiting arbitrary confinement.²¹ That proposition is difficult to sustain (and the correct answer must be, at least, more complicated).

Consider first the text of Common Article 3 to the Geneva Conventions. Under the framework set forth in Common Article 3, the power to detain is subject to a number of substantive constraints. First, individuals cannot be detained on discriminatory grounds such as “race, color, religion or faith, sex, birth or wealth, or any other similar criteria.”²² Second, parties

19. *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (2012), reprinted in 51 INTERNATIONAL LEGAL MATERIALS 1368 (2012), available at <http://um.dk/en/~media/UM/English-site/Documents/Politicsand-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>.

20. Chatham House & International Committee of the Red Cross, *Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict*, 91 INTERNATIONAL REVIEW OF THE RED CROSS 859, 863 (2009), available at <https://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf> [hereinafter Chatham House & ICRC Expert Meeting Report].

21. DEBUF, *supra* note 12, at 451 (claiming that LOAC is “utterly silent” on this topic); Kevin Jon Heller, *Responding to Ryan Goodman About Serdar Mohammed*, OPINIO JURIS (Feb. 5, 2015), available at <http://opiniojuris.org/2015/02/05/goodman-serdar-mohammed-part/>; Kevin Jon Heller, *The Use and Abuse of Analogy in IHL*, in THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens Ohlin, ed., forthcoming 2015).

22. Civilians Convention, *supra* note 8, art. 3(1).

to a conflict are prohibited from taking hostages. According to the ICRC *Commentary*, that prohibition is based on a fundamental principle of justice:

The taking of hostages, like reprisals, to which it is often the prelude, is contrary to the modern idea of justice in that it is based on the principle of collective responsibility for crime. Both strike at persons who are innocent of the crime which it is intended to prevent or punish.²³

In other words, if a person does not bear individual responsibility for a security threat to the State, he should not be deprived of his liberty, even if confining him could prevent the threat from materializing. Third, Common Article 3 prohibits the passing of a sentence without affording fundamental judicial guarantees, and that provision implicitly restricts the use of administrative detention for punitive purposes.

Fourth, unlawful confinement is prohibited by a broad-based obligation under Common Article 3, namely, that those placed *hors de combat* “shall in all circumstances be treated humanely.”²⁴ Would it be humane to remove an individual from her family, physically seclude her, and hold her in long-term confinement even though she represents no direct security threat to a belligerent? That deprivation of liberty and variations of it would surely constitute inhumane treatment. And, indeed, the ICRC’s analysis of customary international humanitarian law concludes that, as a matter of treaty law, “arbitrary deprivation of liberty is not compatible” with humane treatment under Common Article 3.²⁵ In other words, like fair trial rights under Common Article 3, this is another domain in which abstract legal protections in LOAC are defined, in part, by directly relevant human rights standards.

International authorities also suggest that unlawful confinement is prohibited in non-international armed conflict as a matter of customary international law. In considering the practices of armed opposition groups in

23. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE TREATMENT OF CIVILIANS IN TIME OF WAR 39 (Jean S. Pictet ed., 1958).

24. Civilians Convention, *supra* note 8, art. 3(1).

25. [1] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 99 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99. Cf. Joanna Dingwall, *Unlawful Confinement as a War Crime*, 9 JOURNAL OF CONFLICT AND SECURITY LAW 133 (2004) (arguing that Common Article 3 prohibits unlawful confinement as a form of “cruel treatment”). The overriding obligation of humane treatment is arguably even more clearly and more directly relevant to the sources that Dingwall invokes.

Colombia's civil war, the Inter-American Commission on Human Rights stated: "International humanitarian law also prohibits the detention or internment of civilians except where necessary for imperative reasons of security."²⁶ Liesbeth Zegveld also reports that the UN Commission on Human Rights drew from LOAC applicable to international armed conflicts in demanding armed opposition groups refrain from arbitrary detention in Afghanistan (1993) and in the Sudan (1995).²⁷ In addition, Article 3 of the Turku Declaration of Minimum Humanitarian Standards proscribes the disappearance of individuals, "including their abduction or unacknowledged detention."²⁸ And Article 11 of the Turku Declaration includes an implicit restriction on substantive grounds for detention: "If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law"²⁹ Similarly, the ICRC, in a 2012–13 Background Paper on detention, reported: "In terms of grounds for internment, the ICRC, along with a growing international consensus of experts considers that 'imperative reasons of security' is an appropriate standard for internment in NIAC."³⁰

On what theory did the High Court base its notion that LOAC includes no regulation whatsoever of grounds for detention? The theory of

26. Inter-American Commission on Human Rights, Third Special Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9, rev. I, ¶ 122 (1999); *id.*, ¶¶ 128–29 ("The Commission notes that the vast majority of these detentions relating to the election boycott constituted breaches of international humanitarian law. The armed dissident groups repeatedly captured and held civilians, although they did not pose any direct threat to the military operations of the guerrillas Armed dissident groups are also responsible for arbitrary deprivations of liberty carried out against civilians, outside of the context of the elections.").

27. See LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 65–66 (2002).

28. Declaration of Minimum Humanitarian Standards (Turku Declaration), art. 3, U.N. Doc. f/CN.4/Sub.2/1991/55 (1990).

29. *Id.*, art. 11.

30. International Committee for the Red Cross, Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict, Regional Consultations 2012–13 Background Paper 3 (2013), available at <https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf>. See also Chatham House & ICRC Expert Meeting Report, *supra* note 20, at 864 ("The most recurrent ground invoked for internment in NIAC—and probably the only permissible ground—is that of 'imperative reasons of security'"). Cf. Jelena Pejic, *Procedural Principles and Safeguards for Internment / Administrative Detention in Armed Conflict and Other Situations of Violence*, 87, 91 *INTERNATIONAL REVIEW OF THE RED CROSS* 375 (2005).

the High Court (and the Claimants) is that States wanted to avoid recognizing the authority of non-State actors such as insurgents to detain. But as Hill-Cawthorne and Akande describe so well: “There is good authority for the view that regulation of conduct by international law does not imply authorization of that conduct or acceptance of the legality of that conduct.”³¹ Indeed, the High Court (and the Claimants themselves) accepted this logic. That is, the Court (and Claimants) applied that logic in reasoning why LOAC’s regulation of the *conditions* of confinement should not be equated with an authority to detain. In short, it is clear that regulation of an action (especially a practically inevitable action in war) does not translate into recognition of the right or authority to engage in that act.

By way of another example, consider trials in NIACs. If the High Court were correct about bestowing legitimacy or legality on the actions of non-State actors, LOAC would not recognize the prospect of such parties holding a trial and imposing criminal sentences. Yet Common Article 3 does just that. Like detention, the legal system recognizes the fact that non-State actors will engage in such actions and LOAC thus creates a set of legal rules to regulate such procedures. As Sandesh Sivakumaran, one of the leading legal authorities on NIACs, wrote:

[I]t is not so much about a right to intern as it is about the need to regulate the existing practice of parties to non-international armed conflicts. . . . Indeed, a number of armed groups have enacted rules on offences, arrest, and trial, and these could and should be developed to include the modalities of internment.³²

It is unclear, but the High Court’s theory for Proposition 2 may also rest on a notion that the LOAC detention scheme in international conflicts includes only status-based detention with corresponding privileges such as for POWs. The PIL Claimants stated: “Perhaps the most important reason for this is that . . . the internment powers in the Geneva Conventions are based on status (e.g., prisoners of war) and those categories (with their corresponding privileges) have no equivalence in NIAC-IHL.”³³ However, LOAC in international armed conflict also includes detention without such status categories or privileges under the Civilians Convention (covering

31. Hill-Cawthorne & Akande, *supra* note 6.

32. SIVAKUMARAN, *supra* note 17.

33. See also PIL Claimants’ Memorial, *supra* note 11, ¶ 10, Annex A; *Mohammed*, *supra* note 1, ¶ 230.

individuals who pose a security threat, saboteurs, and the like). And, it is now widely recognized that LOAC in NIACs does include status-based categories such as combatants and civilians, which are potentially relevant for detention.³⁴

The explanation that States avoided the application of LOAC to detention in NIACs because they wanted to avoid recognizing the rights of non-State actors also suffers a problem with respect to contemporary practice. If it were true that regulation of detention in NIACs implies recognition of non-State actors' authority to detain, what is the explanation for why so many States have since then explicitly endorsed such regulations (such as the Copenhagen Process)? Have powerful military States suddenly agreed to recognize non-State actors' authority to detain? Have these governments decided to wipe out their ability to pass domestic legislation to prohibit forcible abduction and detention by insurgents? Of course not. It is because the connection between acceptance of restrictions on detention and recognition of the authority to detain does not exist in the way the High Court believed.

At bottom, the most important point is that these debates about proposition 2 are irrelevant for the decision at hand in *Mohammed*. Proposition 1 is sufficient and well-established without it. There may also be a middle ground here that avoids some of these debates. One might conclude that the rules regulating detention in NIACs, although they do exist, are relatively rudimentary. The British courts could conclude that an authority to detain cannot exist with such a limited set of rules to define its scope. But the notion that no such rules exist is mistaken, and, as I aim to demonstrate in the following Part, that notion is also dangerous. It can produce unintended negative consequences for the scheme of humanitarian protections in wartime.

V. PERVERSE EFFECTS AND UNINTENDED CONSEQUENCES

In this Part, I consider some of the consequences of accepting the *Mohammed* framework.

First, the logic of the Court's analysis potentially undercuts the LOAC regime. It introduces incoherence into the system by suggesting that LOAC

34. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETATIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

can bestow an affirmative authority absent domestic law. And it flips the relationship between States' freedom of action in internal conflicts (where sovereignty is at its zenith) with States' freedom of action in international armed conflicts. That is, States would be authorized to carry out certain actions in international armed conflicts but not internal armed conflicts.

Second, the Court's reasoning is based on a premise that detention is, in fact, authorized by LOAC, albeit in international armed conflicts. For example, the opinion finds authorization in Article 21 of the POW Convention and presumably in the internment provisions of the Civilians Convention. Surely many human rights advocates and organizations would argue that even in an international conflict, LOAC does not provide the source of authority for detention, and that authority must be found in domestic law (or perhaps Security Council resolutions). The *Mohammed* judgment now stands in their way.

Third, as part of its reasoning, the Court suggests that no LOAC procedural protections apply to detention in NIAC.³⁵ On that view, one would have to convince warfighters that they should respect the ICCPR and the like, not the Geneva Conventions or laws of warfare.³⁶ In many cases that would be a difficult proposition (to say the least), and victims of armed conflict would pay a price. As a corollary, it would also mean there is no *war crime* of unlawful confinement in NIAC (now or presumably as a matter of *lex lata* in the foreseeable future).

Fourth, the Court suggests because LOAC does not provide lawful grounds for detention of enemy fighters in NIACs, such detention would not be permitted through derogation under international human rights law either. The Court reasons that a derogation might be acceptable only in the case of an express "obligation" for detaining POWs in international armed conflict.³⁷ And the Court suggests that any outcome that provides for security detentions in NIACs may be anathema to rule-of-law values.³⁸ Thus not only would States be unable to detain enemy fighters when invited by a host State to help stop a genocidal armed group, but that legal incapacity to detain would seemingly apply across all NIACs. Indeed, the Court's statements suggest that the European Convention on Human Rights would

35. *Mohammed*, *supra* note 1, at ¶¶ 261, 293.

36. The LOAC prohibition on detention for the purpose of interrogation would also not apply in NIACs and the relevant norms would therefore have to be found in IHRL, or elsewhere.

37. *Mohammed*, *supra* note 1, at ¶ 284.

38. *Id.*, ¶¶ 247–48.

preclude such detentions even if domestic law authorized them. Surely States would not accept or respect such an international legal regime.

Finally, the Court's limited acceptance of the government's logic that the power to kill includes the power to detain is problematic.³⁹ That logic—imagine two concentric circles of the power to kill and to detain—applies only to members of armed forces and civilians who directly participate in hostilities.⁴⁰ It does not apply to civilians who indirectly participate in hostilities—such as security threats under articles 5, 27, 41–43, and 78 of the Civilians Convention. Those individuals are not lawful targets unless they directly participate in hostilities. The notion that the greater power includes the lesser power thus does not apply to those individuals' situation. And, in *Mohammed* in particular, it is notable that the PIL Claimants included individuals who fall into that category.⁴¹ I thus do not see the logic in the notion of coextensive detention and targeting authority set forth by Sean Aughey and Aurel Sari in the current volume of *International Law Studies*.⁴²

We should also worry about potential perverse incentives flowing from the logic that the power to kill includes the power to detain. It could encourage belligerents to excessively expand the definitional scope of lawful targets to justify detention policies. For example, a belligerent might be incented to argue that individuals who are *indirect* participants in hostilities (e.g., financiers) are lawful targets, because that would lawfully permit their detention. It is remarkable, for example, that the United Kingdom's brief advances the idea that the power to kill includes the power to detain as though that resolves the case, but the government's own description of at least two of the PIL Claimants would surely fall outside those concentric

39. *Mohammed*, *supra* note 1, at ¶¶ 252–53.

40. Ryan Goodman, *The Limits of the Logic that the Power to Kill Includes the Power to Detain*, JUST SECURITY (Feb. 25, 2015), <http://justsecurity.org/10485/power-kill-includes-power-detain-limits/>. See also Goodman, *supra* note 4.

41. According to the brief on behalf of Public Interest Lawyers, the British Secretary of State “stated in correspondence that Mr Nazim was ‘suspected of financial facilitation for the insurgency’ [and] that Mr Qasim was ‘suspected of financial crimes and narcotic and lethal aid facilitation.’” PIL Claimants’ Memorial, *supra* note 11, at ¶ 16.

42. Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence*, 91 INTERNATIONAL LAW STUDIES 60, 104 (2015), available at <http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1002&context=ils> (“The logic of this argument is impeccable. If the authority to detain derives from the authority to kill—on the basis that the right to deprive a person of his life must imply the right to inflict the lesser evil to detain him: *a maiore ad minus*—it follows that detention cannot be permissible in broader circumstances than those governing killing.”).

circles. The UK government's brief states: "There was strong evidence that each of the other Claimants had engaged in the insurgency. . . . In the case of Messrs Qasim and Nasim, there was strong evidence of substantial involvement in *financing* the insurgency."⁴³ Financiers are arguably detainable as indirect participants in hostilities, but they are not lawful targets.

* * *

Fundamentally, the important point is that these missteps were avoidable and, more importantly, unnecessary. The Court's holding in *Mohammed* affirming the First Proposition is decidedly correct and independently justified.

43. Sec. of State for Defence Skeleton Argument, at ¶ 78, *Mohammed v. Ministry of Defence*, [2014] EWHC (QB) 1369, [273].