Chapter 8
The ECtHR's *Al-Jedda* Judgment: Implications for IHL

Jelena Pejic

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8.1 Introduction

In July 2011, the European Court of Human Rights (ECtHR) handed down two long-awaited and momentous judgments involving the conduct of the United Kingdom's armed forces during the occupation and armed conflict in Iraq.[1] In both cases, the Court found against the UK government. The first decision, in the *Al-Skeini* case,[2] essentially clarified and revised the Court's position on the extraterritorial application of the European Convention on Human Rights (ECHR)

This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

[1] Both cases were decided by the Grand Chamber of the European Court of Human Rights and were almost unanimous.

[2] *Al Skeini v. UK,* Grand Chamber, Judgment of 7 July 2011, no.55721/07 ECHR 2011.

J. Pejic (✉)
Legal Division, International Committee of the Red Cross (ICRC), Geneva, Switzerland
e-mail: jdpejic@gmail.com

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and attracted the most attention. The second case, *Al-Jedda*,[3] received less focus even though its legal and practical consequences are just as significant. The purpose of this note is to outline some of the ramifications of the *Al-Jedda* case that have not been picked up in other commentaries, in particular its implications for detention operations carried out by ECHR member states abroad. As will be argued, the Court's approach to and interpretation of international humanitarian law (IHL) do not comport with the spirit or letter of this body of rules.

8.2 The Facts of the Case

The case was lodged by a dual Iraqi/British national, Mr. Hilal Abdul-Razzaq Ali Al-Jedda, who had been interned for imperative reasons of security by UK forces at the Sha'aibah Divisional Temporary Detention Facility in Basrah City between October 2004 and December 2007. Al-Jedda was believed by the British authorities to have been "personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces."[4] Al-Jedda's internment was subject to a review process that was conducted by UK forces and later involved Iraqi representatives as well. The Court's description of the review process is provided below:

1. The applicant's internment was initially authorised by the senior officer in the detention facility. Reviews were conducted seven days and twenty-eight days later by the Divisional Internment Review Committee ("the DIRC"). This comprised the senior officer in the detention facility and Army legal and military personnel. Owing to the sensitivity of the intelligence material upon which the applicant's arrest and detention had been based, only two members of the DIRC were permitted to examine it. Their recommendations were passed to the Commander of the Coalition's Multinational Division (South East) ("the Commander"), who himself examined the intelligence file on the applicant and took the decision to continue the internment. Between January and July 2005 a monthly review was carried out by the Commander, on the basis of the recommendations of the DIRC. Between July 2005 and December 2007 the decision to intern was taken by the DIRC itself, which during this period included as members the Commander together with members of the legal, intelligence and other staffs. There was no procedure for disclosure of evidence nor for an oral hearing, but representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for

[3] *Al Jedda v. UK,* Grand Chamber, Judgment of 7 July 2011, no.27021/08 ECHR 2011. (Hereinafter '*Al-Jedda* Judgment').

[4] *Al-Jedda* Judgment, *supra* n. 3, para 11.

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consideration. The two Commanders who authorised the applicant's internment in 2005 and 2006 gave evidence to the domestic courts that there was a substantial weight of intelligence material indicating that there were reasonable grounds for suspecting the applicant of the matters alleged against him.

2. When the applicant had been detained 18 months, the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the Multi-National Force, the Iraqi Interim Government and the Ambassador for the United Kingdom. It met once and thereafter delegated powers to a Joint Detention Review Committee, which comprised Iraqi representatives and officers from the Multi-National Force.[5]

Al-Jedda was released from internment on December 30, 2007. He lost an appeal against an order depriving him of British citizenship in 2009. The Special Immigrations Appeal Commission held—for reasons set out in detail in a closed judgment—that on the balance of probabilities the Secretary of State [for Defence] had proved that Al-Jedda had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad.[6] Al-Jedda did not appeal against that judgment.

8.3 The Legal Proceedings and the Grand Chamber's Decision

Al-Jedda's complaint before the European Court of Human Rights alleged that his internment by UK forces in Iraq was in breach of Article 5(1) of the European Convention on Human Rights. The relevant paragraph guarantees the right to liberty and security of person, and exhaustively lists six permitted reasons based on which a deprivation of liberty may lawfully occur.[7] Needless

[5] *Al-Jedda* Judgment, *supra* n. 3, paras 12 and 13.

[6] *Al-Jedda* Judgment, para 15.

[7] Article 5(1) of the Convention provides:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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to say, detention/internment for imperative reasons of security, a quintessentially war-time ground for detention is not among them. It should be noted that Al-Jedda did not complain of a violation of Article 5(4) of the European Convention concerning the lack of judicial review of the detention, as proceedings on this issue were still pending before UK courts at the time his application was lodged.

The domestic proceedings will not be mentioned here except to note that, for different reasons, the three instances that examined the case, ending with the House of Lords, ruled in the Government's favour. In its submissions to the European Court, the UK posited two arguments: first, that the internment was attributable to the United Nations and not to the United Kingdom, and that Al-Jedda was therefore not within UK jurisdiction under Article 1 of the European Convention. Second, and in the alternative, the Government argued that Al-Jedda's internment was carried out pursuant to United Nations Security Council Resolution 1546 which created an obligation on the UK to detain him and which, pursuant to Article 103 of the United Nations Charter, overrode obligations under the European Convention on Human Rights.[8]

The first contention was rejected by the European Court, as it had been by the House of Lords before it. The Court determined that Al-Jedda's detention could not be attributable to the United Nations after, *inter alia*, analyzing relevant UN Security Council resolutions which authorized the multinational force of which the UK was a part. The Court considered that the UN Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that Al-Jedda's detention was therefore not attributable to the United Nations.[9]

The Government's second argument was essentially that the relevant UN Security Council resolutions authorized the Multinational Force to take "all necessary measures" to contribute to the maintenance of security and stability in Iraq, and that such measures comprised the use of preventive detention "where necessary for imperative reasons of security". The latter wording—on detention—was not included in UN Security Council resolution 1546 itself,[10] but was provided for in letters exchanged between the then Iraqi Prime Minister and the then US Secretary of State that were annexed to the resolution and were believed to constitute its integral part. In the Government's view, the UK's obligations under

[8] *Al-Jedda* Judgment, *supra* n. 3, para 60.

[9] *Al-Jedda* Judgment, *supra* n. 3, para 84.

[10] S/RES/1546 (2004), 8 June 2004.

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Article 5 of the European Convention were displaced by the legal regime established by resolution 1546 due to the operation of Articles 25 and 103 of the UN Charter. Pursuant to the latter, states' obligations under the Charter prevail over their obligations under any other international agreement in the event of a conflict. The Government argued, based on practice and prevailing international law doctrine, that the language of Article 103 cannot be limited to Security Council resolutions *obliging* states to act in a particular way, but also to decisions *authorizing* them to do so (as resolution 1546 and the appended letters had done).

The European Court did not explicitly opine on this issue, but addressed it indirectly by positing that the "key question" was "whether resolution 1546 placed the UK under an obligation to hold the applicant in internment."[11] The Court then adopted an interpretive "presumption" that the UN Security Council does not intend to impose "any obligation" on member states to breach fundamental human rights, and that in the event of ambiguity in the text of a resolution the Court must choose the interpretation most in harmony with the European Convention.[12] The Court added that, in light of the UN's role in promoting and encouraging respect for human rights, it is to be expected that "clear and explicit language would be used were the Security Council to intend States to take particular measures that would conflict with their obligations under human rights law". The Court concluded that due to the ambiguity of resolution 1546 (it rejected the legal significance of the appended letters mentioned above),[13] it could not be held that the Security Council intended to oblige the Multinational Force to resort to internment in breach of international human rights instruments, including the European Convention.

The most relevant part of the *Al-Jedda* Judgment for the purposes of this note is the section in which the Court examines IHL. It is of particular significance, as it would appear to be a first in terms of the Court's direct interpretation of specific IHL treaties, the Fourth Geneva Convention in particular, some

[11] *Al-Jedda* Judgment, *supra* n. 3, para 101.

[12] *Al-Jedda* Judgment, *supra* n. 3, para 102.

[13] "However, such an agreement could not override the binding obligations under the Convention. In this respect, the Court recalls its case-law to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States subsequent to the entry into force of the Convention"[…]. *Al-Jedda* Judgment, *supra* n. 3, para 108.

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articles of which are included in the Judgment's section on relevant law.[14] The paragraph of the Judgment dealing with IHL is reproduced in full[15]:

[14] These are laid out in paras 42–44 of the Judgment entitled "Relevant provisions of international humanitarian law". Fourth Geneva Convention, Article 27: Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

Fourth Geneva Convention, Article 41: Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

Fourth Geneva Convention, Article 42: Article 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Fourth Geneva Convention, Article 43: Article 43. Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

Fourth Geneva Convention, Article 78: Article 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

[15] Only references to other paragraphs in the Judgment have been omitted.

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> 107. The Court has considered whether, in the absence of express provision in Resolution 1546, there was *any other legal basis for the applicant's detention which could operate to disapply the requirements of Article 5 § 1* [emphasis added]. The Government have argued that the effect of the authorisations in paras 9 and 10 of Resolution 1546 was that the Multi-National Force continued to exercise the "specific authorities, responsibilities and obligations" that had vested in the United States and the United Kingdom as Occupying Powers under international humanitarian law and that these "obligations" included the obligation to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence. Some support for this submission can be derived from the findings of the domestic courts (…). The Court notes in this respect that para 2 of the Resolution clearly stated that the occupation was to end by 30 June 2004. However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the Coalition Provisional Authority to the Interim Government of Iraq, the position under international humanitarian law which had previously applied, *the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial.* [emphasis added.] Article 43 of the Hague Regulations requires an Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (…). While the International Court of Justice in its judgment *Armed Activities on the Territory of the Congo* interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law, including the provisions of the International Covenant for the Protection of Civil and Political Rights, to which it was a signatory (…). *In the Court's view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see para 43 above)*[16] [emphasis added.]

The Court holding in the case, based on the reasoning outlined above, was that there was no conflict between the UK's obligations under the UN Charter and its obligations under the European Convention. It held that Al-Jedda's detention was in breach of ECHR Article 5(1) as its provisions were not displaced and none of the permissible grounds for detention exhaustively listed in the article applied.

8.4 Implications of the *Al-Jedda* Case

As may be deducted from the above, a principal consequence of the Court's decision is that ECHR member states will in future have to secure "clear and explicit language" on detention/internment in a Chapter VII UN Security Council resolution in order to avoid a conflict with the European Convention. The Court did not indicate what level of specificity would be desired. An appropriate resolution would presumably need to provide both the grounds for internment, as well as outline the process that must be followed. Leaving aside whether the Security

[16] *Al-Jedda* Judgment, *supra* n. 3, para 107.

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Council could reach a political agreement on the requisite standards, the more important question is whether the Council is the right body to legislate on detention matters, a task implicitly put to it by the European Court. It is not clear why the Council, composed of 15 member states, should be better placed to regulate detention in armed conflict than the 194 States parties to the Geneva Conventions, each of which have already agreed to be bound by the provisions regulating internment.

If the Security Council were to rely on the relevant provisions of the 1949 Conventions the main result would be one of duplication, in which case the question is why duplication is necessary. If, on the other hand, the Council chose to draft new rules on detention in armed conflict, i.e. provisions that departed from IHL, it would introduce unwelcome uncertainty into the conduct of military operations and effectively create two sets of rules for states taking part in multinational forces, whether under UN auspices or otherwise. One set would presumably apply when detention is regulated by a binding Security Council resolution, while another would apply in situations of armed conflict in which the Council has not opined on detention under Chapter VII. The resulting fragmentation of the law would be of great concern from both a legal and protection point of view.[17]

The second consequence of the European Court's ruling in *Al-Jedda* is a dismissal of the Fourth Geneva Convention as a legal basis that "could operate to disapply" the requirements of Article 5(1) of the European Convention on Human Rights.[18] The Court explained this conclusion by stating that it "did not find established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial".[19] It further added that, in its view, "it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort".[20] In between these two statements is included a brief reference to the Judgment of the International Court of Justice in the *DRC v. Uganda* Case. Each point will be

[17] It should also be noted that the *Al-Jedda* Judgment only determined that the relevant article of the European Convention on Human Rights was not displaced by UN Security Council resolution 1546 because the language of the latter was not sufficiently clear and precise. The Court did not pronounce on whether the resolution could have prevailed over the ECHR even if those requirements had been met, which is by no means a given. As already mentioned, the Court also did not explicitly opine on whether Article 103 of the UN Charter is triggered only when a state's conflicting *obligations* under another international instrument are in conflict with its obligations under the Charter (i.e. a Chapter VII resolution), or whether *authorizations* are also covered by the operation of Article 103. See Milanovic 2012.

[18] *Al-Jedda* Judgment, *supra* n. 3, para 107. Even though Al-Jedda was in fact interned when the armed conflict in Iraq was non-international in character, the legal regime applied to his detention by the UK as a result of UN Security Council Resolution 1546 was that prescribed by the Fourth Geneva Convention, an issue which the Court did not contest in para 107.

[19] Idem.

[20] Idem.

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addressed in turn. Before that a brief reminder of the relevant IHL provisions on detention and internment seems to be warranted. Both the Fourth Geneva Convention on the protection of civilians and of the Third Geneva Convention on prisoner of war will be summarized as the reasons for the Court's disavowal of IHL as a legal basis for internment would equally apply. Based on the Court's arguments it would appear irrelevant whether Al-Jedda was detained as a civilian (which was the case), or as a prisoner of war (POW), as explained below.

In international armed conflict, IHL permits the internment of prisoners of war and, under certain conditions, of civilians.

8.4.1 POW Internment

POWs[21] are essentially combatants captured by the adverse party in an international armed conflict. As a term of art, "combatant" denotes a legal status that, as such, exists only in this type of conflict. Under IHL rules on the conduct of hostilities, a combatant is a member of the armed forces of a party to an international armed conflict who has "the right to participate directly in hostilities".[22] This means that he or she may use force against, i.e. target and kill or injure other persons taking a direct part in hostilities and destroy other enemy military objectives. Because such activity is obviously prejudicial to the security of the adverse party, the Third Geneva Convention provides that a detaining State "may subject prisoners of war to internment".[23] It is not obliged to provide review, judicial or otherwise, of the lawfulness of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat.[24] However, a POW may not be prosecuted by the detaining state for lawful acts of violence committed in the course of hostilities ("combatant privilege"), but only for violations of IHL, in particular war crimes, or other crimes under international law such as genocide or crimes against humanity.

In case of doubt about the entitlement to POW status of a captured belligerent, Article 5 of the Third Convention provides that such person shall be protected by the Convention until his or her status has been determined by a competent tribunal.[25] This provision is often misunderstood as requiring judicial review.

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[21] Third Geneva Convention, Article 4.

[22] AP I, Article 43 (2).

[23] Third Geneva Convention, Article 21.

[24] Judicial review under the domestic law of the detaining State could be sought to obtain the release of a POW who is detained despite the end of active hostilities. As mentioned further below, that is a grave breach of IHL.

[25] Third Geneva Convention, Article 5.

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That is not the case, as Article 5 tribunals are meant to operate in or near the zone of combat; they only determine status, not criminal or any other responsibility.[26]

POW internment must end and POWs must be released at the cessation of active hostilities,[27] unless they are subject to criminal proceedings or are serving a criminal sentence.[28] They may also be released earlier on medical grounds[29] or on their own cognizance.[30] Unjustifiable delay in the repatriation of prisoners of war at the close of active hostilities is a grave breach of Additional Protocol I.[31]

8.4.2 Internment of Civilians

Under the Fourth Geneva Convention, internment—and assigned residence—are the most severe "measures of control"[32] that may be taken by a state with respect to civilians whose activity is deemed to pose a serious threat to its security. It is uncontroversial that civilian direct participation in hostilities falls into that category. Despite the fact that only combatants are explicitly authorized under IHL to participate directly in hostilities,[33] the reality is that civilians often do so as well, in both international and non-international armed conflicts. (In such cases they are colloquially referred to as "unprivileged belligerents" or, wrongly referred to as "unlawful combatants"). Civilian direct participation in hostilities modifies the basic IHL rules under which civilians are entitled to protection against the dangers arising from military operations[34] and may not be made the object of attack.[35] IHL expressly provides that civilians are protected from direct attack "unless and for such time as they take a direct part in hostilities".[36]

Apart from direct participation in hostilities other civilian behaviour may also meet the threshold of posing a serious security threat to the detaining power[37] (Al-Jedda's alleged activity being a case in point). The Fourth Convention provides

[26] See commentary to Article 45 (1) of AP I on the nature of a 'competent tribunal' under Article 5 of the Third Geneva Convention in: Sandoz, Swinarski and Zimmermann 1987, para 1745.

[27] Third Geneva Convention, Article 118.

[28] Third Geneva Convention, Article 119.

[29] Third Geneva Convention, Articles 109 (1) and 110.

[30] Third Geneva Convention, Article 21.

[31] AP I, Article 85 (4) (b).

[32] Fourth Geneva Convention, Article 27; Articles 41 and 78.

[33] The only exception is the relatively rare occurrence of a *levée en masse*, provided for in Article 4 (6) of the Third Geneva Convention.

[34] AP I, Article 51 (1). Given the consequences of civilian direct participation in hostilities it is clearly crucial to avoid broad interpretations. The ICRC's view on this issue is outlined in Melzer 2009.

[35] AP I, Article 51 (2).

[36] AP I, Article 51 (3) and AP II, Article 13 (3).

[37] Examples of activities that are not direct participation in hostilities but would constitute a serious security threat are the financing of combat operations, general recruitment for combat etc.

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different wording in terms of permissible grounds for internment depending on whether an internee is detained in a state party's own territory ("if the security of the Detaining Power makes it absolutely necessary")[38] or is held in occupied territory ("imperative reasons of security").[39] It has been suggested that the difference in language is irrelevant and aims to indicate that internment in occupied territory should in practice be more exceptional than in the territory of a party to the conflict.[40]

The internment review process in a state party's territory would also appear to differ somewhat from that in occupied territory. In a state's own territory internment review is to be carried out by an "appropriate court or administrative board",[41] while in occupied territory, the Convention refers to a "regular procedure" that is to be administered by a "competent body".[42] Despite these and other textual differences the rules are in essence the same. A person interned in IAC has the right to submit a request for review of the decision on internment (to challenge it), the review must be expeditiously[43] conducted either by a court or an administrative board, and periodic review is thereafter to be automatic, at least on a six-monthly basis.[44] The Fourth Convention does not specify the right to legal assistance, but does not bar it either.

It is sometimes asked why IHL provides procedural safeguards for civilians interned in international armed conflict and not to POWs.[45] The simple answer is that, in reality, there is far less certainty as to the threat a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary's armed forces. In contemporary warfare civilians are, for example, often detained not in combat, but on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person's activity meets the high legal standard that would justify internment.

Unlike combatants, who may not be prosecuted by a capturing state for direct participation in hostilities (combatant privilege), civilians who do so can be prosecuted for having taken up arms and for all acts of violence committed during such participation, as well as for war crimes or other crimes under international law that might have been committed. This rule is the same in international and non-international armed conflict. Contrary to certain assertions,[46] civilian direct

[38] Fourth Geneva Convention, Article 42 (1).

[39] Fourth Geneva Convention, Article 78 (1).

[40] Pictet 1958, p. 367.

[41] Fourth Geneva Convention, Article 43 (1).

[42] Fourth Geneva Convention, Article 78 (2).

[43] Fourth Geneva Convention, Articles 41 and 78.

[44] Pictet 1958, p. 261 and pp. 368–369.

[45] See Garraway 2007, at p. 330.

[46] See, for example, Office of the Judge Advocate General (Canada), *Law of Armed Conflict at the Operational and Tactical Levels*, National Defence Joint Doctrine Manual, B-GJ-005-104/FP-021, 13 August 2001, pp. 16-4, para 1609 (3)(g), available at: http://www.forces.gc.ca/jag/training-formation/index-eng.asp.

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participation is not a violation of IHL and is not a war crime *per se* under either treaty or customary IHL.[47]

Civilian internment must cease as soon as the reasons which necessitated it no longer exist.[48] It must in any event end "as soon as possible after the close of hostilities".[49] Unjustifiable delay in the repatriation of civilians is also a grave breach of Additional Protocol I.[50]

The European Court's implicit finding in relation to IHL in the *Al-Jedda* case was that the provisions of the Fourth Geneva Convention did not constitute an independent legal basis for detention. It is not clear from the Judgment why this conclusion was reached given that, according to the principle of legality, a deprivation of liberty is permissible when it transpires on grounds and in accordance with procedures that are established by law (a statute in the case of domestic law,[51] a treaty or customary law in the case of IHL). As has been explained above, the Fourth Geneva Convention provides both the grounds for the internment of civilians in a state party's own territory, as well as in occupied territory, and in each case outlines the procedure to be followed. The level of detail of the relevant provisions, when read in conjunction with Article 75 (3) of Additional Protocol I, is no less than the provisions of general human rights law related to non-criminal detention, i.e. Article 9 (1) and (4) of the International Covenant on Civil and Political Rights, to which the Court also referred.

Furthermore, it is almost uniformly recognized and accepted in state practice, that IHL governing international armed conflict provides a sufficient legal basis for detention. There is, admittedly, some debate among legal scholars as to whether the Fourth Geneva Convention must be accompanied by domestic legislation. It is unclear why this question, where posed, is posed only in relation to the Fourth Convention and not the Third, for there is no indication that the treaties differ in the legal authority provided or in the level of elaboration of rights granted. It is submitted that the Fourth Convention constitutes, on its own, a sufficient legal basis for internment.

The Court's expressed argument as to why the Fourth Convention does not provide a legal basis for detention was that there is no "obligation" on the detaining state/Occupying Power, "to use indefinite internment" "without trial".[52] It must be said that that the Court's approach to and understanding of IHL merits review in relation to all the elements put forward.

First, as demonstrated by the language of the Fourth Convention summarized above, the notion of internment as an *obligation* on the parties to an international armed conflict is absent from IHL. Under the Convention, states are authorized to

[47] See, for example, the list of War Crimes under Article 8 of the ICC Statute.

[48] Fourth Geneva Convention Article 132; AP I, Article 75 (3).

[49] Fourth Geneva Convention, Article 46 and 133 (1).

[50] AP I, Article 85 (4) (b).

[51] Nowak 2005, para 27.

[52] *Al-Jedda* Judgment, *supra* n. 3, para 107.

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("may") intern a person whose activity represents a serious security threat, whether to their forces and/or to the security of others, such as civilians. However, parties to an armed conflict are also free not to intern a person—despite an obvious potential security risk to themselves or the accomplishment of their mission—based on other considerations inherent to succeeding in an armed conflict (e.g. the prevailing military circumstances, logistical impediments, the need to foster trust, or win the hearts and minds of the local population, etc.). The logic of armed conflict differs in this respect from the logic of peace-time, as a result of which the respective rules on detention in the relevant bodies of law also diverge. It would thus be not only legally incorrect, but also operationally counterproductive if IHL were read to oblige states to intern in military operations, rather than authorize them to do so. By leaving states no possibility but to apply internment, a disservice would also be done to persons who would as a result "have to be" interned, but could be released if it were not for the legal obligation, hardly a human rights-friendly outcome.

Second, it is unfortunate that the European Court used the term "indefinite detention". Its recent adoption in some of the legal literature, as well as in the media, may serve to create a perception of acceptability where none should exist. As already noted, IHL is clear on the duration of internment for imperative reasons of security: it must end as soon as the reasons justifying it cease to exist.[53] The initial and periodic review processes described above were designed precisely because there is no assumption that a person will automatically constitute an imperative security threat until the end of an armed conflict. Each case has to be examined initially on the merits, and periodically thereafter, to assess whether the threat level posed remains the same. In view of the rapid progression of events in armed conflict, the assessment may, and in most cases does, change. The outer temporal limit of internment, according to which it must in all cases end at the close of active hostilities, may thus be called the "default" position. The close of hostilities is a factual matter that is also determined on a case-by-case basis.

Third, by implying that criminal trial is the only lawful and desired outcome of detention the Court is overlooking the fact that IHL rules on detention differ from human rights provisions, under which criminal trial is the norm. The former are specific to the reality they govern, which is armed conflict, not peace-time. By way of reminder the ultimate aim of military operations is to prevail over the enemy's armed forces. IHL attempts to humanize war by providing rules regulating the conduct of hostilities, and rules permitting the detention of persons—either because they take a direct part in hostilities or because of other activity that represents a serious security threat. If parties to a conflict are allowed to use force, i.e. to target and kill persons who constitute military objectives because they take a direct part in hostilities, then they are clearly also authorized to detain persons who fall into their power while doing so.

[53] Fourth Geneva Convention, Article 132, and AP I, Article 75 (3).

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Internment is not conceived as a punishment, but a measure aimed at removing combatants, as well as other persons seriously harmful to the detaining authority, off the "battlefield" for such time as they pose a security threat.[54] The notion of a criminal trial for persons who have merely taken up arms and inflicted violence against the adversary is not part of the "fabric" of IHL because such activity is not a war crime *per se* under this body of rules. Rather, it is up to the domestic law of the detaining state to determine whether a captured person (the exception being POWs, as explained above) will be prosecuted for unprivileged belligerency. In the vast majority of cases, and unless they are tried for war crimes, internees are spared prosecution under domestic law in international armed conflict and are simply released when they no longer pose a security threat, and in any case must be released when hostilities cease. In this context, strange as it may sound, internment can actually be preferable to criminal trial from an internee's standpoint. It is likely to last for a shorter duration than if the activity that led to internment was the subject of domestic criminal proceedings. The release of Al-Jedda is a case in point. Had he been criminally tried under UK or Iraqi law, it is quite possible that he would still be in prison today.

The European Court's other express argument for rejecting IHL as basis for Al-Jedda's deprivation of liberty is that "internment is to be viewed not" as an "obligation" on the detaining state, but as a "measure of last resort". The fact that IHL does not provide an obligation to intern, which the Court would have seemingly required to find that Al-Jedda could be detained under IHL, has been explained above. Two brief remarks may be made as regard its conclusion that it must be a measure of last resort.

The first is that the Court did not rely on the wording of IHL, for reasons that remain unclear. The language of the relevant articles of the Fourth Convention are different[55] and do not convey that precise meaning. Rather, they indicate that internment is the most "severe" measure of control that a state may apply with respect to a person who represents a serious security threat. It is submitted that the quality of a measure, suggested by the word "severe", does not necessarily imply sequence, i.e. that other options must be exhausted before it is undertaken. Moreover, given that this standard is not generally part of human rights rules or jurisprudence governing detention, but is relevant to the use of force, it is likewise unclear why the Court chose to introduce this concept in relation to deprivation of liberty in armed conflict. The second remark is that, despite enunciating the requirement, the Court did not opine on whether Al-Jedda's internment could, under the circumstances, have been a justified as "a measure of last resort".

Finally, as regards the IHL-related aspects of the *Al-Jedda* Judgment, it may be noted that the way in which the European Court relied on the ICJ's

[54] Because internment is not akin to trial-related detention, internment conditions, as well as other aspects of internment provided for in the Fourth Convention, are not modelled on the rules governing detention for criminal purposes.

[55] Fourth Geneva Convention, Articles 41 and 78.

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DRC v. Uganda case is curious. It was cited in order to illustrate that IHL does not contain an obligation to intern (dealt with above), and to indicate that an Occupying Power has a duty to secure respect for the applicable provisions of human rights law, including the ICCPR.[56] This is certainly a well-established proposition. However, beyond the general statement on the parallel application of IHL and human rights law, the ICJ made no comment in that case on the specific interplay of the two legal frameworks, as a result of which no conclusion can be drawn with respect to the detention issue examined in *Al-Jedda*. In addition, there are other cases in which the ICJ outlined its views in more detail, not referred to in the European Court's Judgment. For example, the ICJ stated in the 1996 Nuclear Weapons Advisory Opinion that what constituted an arbitrary deprivation of life in armed conflict was to be determined by the applicable *lex specialis*, namely IHL.[57] Given that this conclusion was reached in relation to the non-derogable right to life under human rights law, there would seem to be room to believe that a similar conclusion could be reached when a derogable right, such as liberty, is involved.[58]

According to the *Al-Jedda* Judgment—aside from securing a Chapter VII Security Council resolution—the only other way in which ECHR member states could possibly intern in an armed conflict without falling afoul of their obligations under the European Convention would be to lawfully derogate under Article 15 of that treaty. It is interesting to note that the Court devotes a mere half a sentence to this option.[59] Under Article 15 states may take measures, "in time of war or other public emergency threatening the life of the nation", derogating from some of their obligations under the Convention—including Article 5—"to the extent strictly required by the exigencies of the situation".[60]

It is unclear, however, whether an ECHR member state could successfully invoke Article 15 based on the plain language of the text. First, the wording requires that the war in which the state might be involved "threaten the life of the nation". It would appear that recent armed conflicts involving ECHR countries in the territory of a third "host" state could not be deemed to have reached the requisite threat level to them. A second and overlapping issue is which country should in fact derogate: the intervening or the "host" state? It has on occasion been posited in expert debates that the host country should derogate from its obligations under the international human rights law treaties to which it is a

[56] *Al-Jedda* Judgment, *supra* n. 3, para 107.

[57] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) I.C.J. Rep. 9, para 25.

[58] In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory the Court made a broader statement about the interplay of human rights law and IHL, reiterating that IHL is the lex specialis to the general law of human rights. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Rep. 136, para 106.

[59] *Al-Jedda* Judgment, *supra* n. 3, para 99.

[60] ECHR, Article 15.

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party.[61] But in cases where internees in a multinational military operation are under the effective control of an intervening ECHR state, it remains unclear how a "host" state's derogation of its own obligations could suffice.

Given that no ECHR country has ever derogated with respect to military action taken abroad, these and other legal issues have never been tested. The reasons are presumably not only legal, as it must be acknowledged that there would likely be formidable political obstacles as well. An alternative would be for states to base arguments in detention-related cases on the *lex specialis* nature of IHL governing international armed conflict, which the UK Government did not do in *Al-Jedda*. It is to be hoped that this course of action, which should be considered preferable, might be attempted in the future.

8.5 Concluding Remarks

The importance of the *Al-Jedda* Judgment for detention operations carried out by ECHR member states abroad can hardly be overstated. The import of the Court's decision is that states parties to the European Convention may not intern civilians—even though non-criminal detention for imperative reasons of security may be necessary and is allowed under IHL in international armed conflict—unless there is a binding and explicit UN Security Council mandate or a derogation to Article 5 has been entered.

By implying that a Chapter VII UN Security Council resolution could possibly displace the operation of the relevant detention provisions of the ECHR, the Court has effectively invited the Security Council to legislate on matters of detention. The wisdom or feasibility of the Court's suggestion to this effect may be deemed questionable.

The Court also reminded ECHR member states, however briefly, that derogation is another avenue by which they could avoid a conflict with their obligations under the European Convention when engaged in detention abroad. Whether this option will be resorted to by member states in the future remains to be seen.

What the Court did not do is accept that IHL constitutes a valid legal basis for detention in international armed conflict, based on its conclusion that the Fourth Geneva Convention does not impose an obligation of internment on parties to such conflicts. In so doing, the Court seems not to have grasped the logic of IHL, and thus, it is submitted, erroneously interpreted the plain language of that treaty. Importantly, the Court's conclusion about why the Fourth Geneva Convention could not be a basis for civilian internment may be read to equally apply to POW internment (like the Fourth, the POW Convention only authorizes, but does not explicitly "oblige" internment). This may be deemed a potential and serious revision of a legal regime—IHL—agreed to by all states in the world and one

[61] See Chatham House and ICRC 2008.

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generally considered to constitute the applicable *lex specialis* in international armed conflicts.

It is thus also submitted that ECHR member states should seriously consider arguing similar cases in the future, where they arise, on the IHL *lex specialis* ground.

Whatever course is chosen, it is clear that, for the moment, *Al-Jedda* casts a chilling shadow on the current and future lawfulness of detention operations carried out by ECHR states abroad. In addition, their ability to engage with other non-ECHR countries in multination military forces with a detention mandate currently remains, at best, uncertain.

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