Case Note

"All Necessary Measures" to Avoid Fragmentation: Reflections on the UK Supreme Court's 2017 *Al-Waheed* Decision

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Abstract

This case note argues that the decision of the United Kingdom Supreme Court in *Al-Waheed v Ministry of Defence* [2017] AC 821 ('*Al-Waheed*') underscores the uncertainty that plagues the interaction between United Nations ('UN') Security Council resolutions ('SCRs') and international human rights law. It is argued that the *Al-Waheed* majority's interpretation of the relevant SCRs with respect to Iraq and Afghanistan is correct, but would have benefited from more integration of fundamental principles of human rights law and a clearer interpretative framework. Similarly, while the majority took a pragmatic approach in adapting art 5 of the *European Convention on Human Rights* ('*ECHR*') to the circumstances of armed conflict, they avoided the pivotal significance of *UN Charter* art 103 and thereby missed an opportunity to strengthen the Court's analysis of the interaction between the SCRs and the *ECHR*. The decision in *Al-Waheed* prompts consideration of new possibilities for coherent, practical interpretations of international legal instruments: interpretations of SCRs that take account of fundamental, universal principles of human rights law; and interpretations of human rights treaties which recognise the primacy afforded to the Security Council in maintaining international peace and security.

I Introduction

The United Kingdom ('UK') Supreme Court commenced 2017 by delivering a trio of judgments in a set of appeals arising from actions brought by several hundred claimants, who alleged that they were wrongfully detained or mistreated by British forces during military operations in Iraq and Afghanistan.[1] This case note is concerned with the second of the three judgments, *Al-Waheed*, and argues that the decision in *Al-Waheed* underscores the uncertainty that plagues the interaction between United Nations ('UN') Security Council resolutions ('SCRs') and international human rights law. The Court's reasoning with respect to this interaction in *Al-Waheed* has critical implications for any State deploying troops to the armed

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1 *Mohammed (Serdar) v Ministry of Defence* [2017] AC 649; *Al-Waheed v Ministry of Defence* [2017] AC 821 ('*Al-Waheed*'); *Belhaj v Straw* [2017] AC 964.

conflicts in Iraq and Afghanistan, and indeed to other theatres of operation, under Security Council mandates.[2]

After discussing the background to *Al-Waheed* in Part II, this case note examines the Court's reasoning with respect to the crucial questions that arose for determination, as follows:

(i) whether UK forces had legal power to detain the claimants pursuant to the relevant SCRs with respect to Iraq and Afghanistan; and

(ii) if so, whether art 5 of the *European Convention on Human Rights* ('*ECHR*')[3] should be read so as to accommodate, as permissible grounds, detention pursuant to such a power.[4]

The first question turns on the interpretation of the relevant SCRs. Part III of this case note argues that the approach of the European Court of Human Rights ('ECtHR') to interpreting SCRs, exemplified by that Court's 2011 decision in *Al-Jedda v United Kingdom*[5] and applied by the minority in *Al-Waheed*, is unsound and lacks a basis in general international law. The majority in *Al-Waheed* were correct to depart implicitly from that approach, although they should have done so expressly. However, the majority missed an important opportunity to clarify the role of international human rights law in the interpretation of SCRs. They took an ad hoc, confused approach to interpreting the operative resolutions, whereas a clearer, more principled approach would have provided a more persuasive route to the same conclusion.

In addressing the second question, the majority in *Al-Waheed* pushed the boundaries of systemic integration to their outer limit. They held that the ECtHR's reasoning in its 2014 decision in *Hassan v United Kingdom*[6] should be extended to non-international armed conflicts where SCRs, rather than international humanitarian law, conferred powers of detention. This is a logical extension of *Hassan*, and is preferable to the minority's more restrictive reading of that decision. It represents a practical outcome that pursues integration, rather than fragmentation, of international law and permits human rights protections to continue in armed conflict. However, the modified interpretation of *ECHR* art 5 endorsed in both *Hassan* and *Al-Waheed* comes close to rewriting, rather than interpreting, that article. Part IV of this case note argues that the *Al-Waheed* majority could have relied on art 103 of the *Charter of the United Nations* ('*UN Charter*') to strengthen their analysis, either to justify their interpretation of *ECHR* art 5 more persuasively or to displace that article to the extent of its inconsistency with the SCRs.

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2 See *Al-Waheed* [2017] AC 821, 842–3 [4] (Lord Sumption).

3 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 5 (entered into force 3 September 1953), as amended by *Protocols Nos 11 and 14*.

4 *Al-Waheed* [2017] AC 821, 843 [5] (Lord Sumption).

5 [2011] IV Eur Court HR 305 ('*Al-Jedda*').

6 [2014] VI Eur Court HR 1 ('*Hassan*').

II The Background to *Al-Waheed*

The appeals in *Al-Waheed* arose out of actions for damages brought against the UK Government by two detainees, Mr Abd Ali Hameed Ali Al-Waheed ('AW') and Mr Serdar Mohammed ('SM'). Both claimants alleged that they were unlawfully detained and mistreated by UK forces, relying on *ECHR* art 5.

A *AW's Case*

British forces captured AW in Basrah, Iraq on 11 February 2007, during a search at his wife's home.[7] The UK Ministry of Defence alleged that components for improvised explosive devices ('IEDs'), explosive charges, and other weaponry were found on the premises.[8] AW was held at a British military detention centre for six-and-a-half weeks, but was released after an internal review concluded that successful prosecution was unlikely.[9]

The case came before Leggatt J for pre-trial review,[10] where it was clear that insofar as the claim was based on *ECHR* art 5, both the primary judge and the Court of Appeal would be bound by the 2007 House of Lords decision in *R (Al-Jedda) v Secretary of State for Defence*[11] to dismiss it.[12] Justice Leggatt dismissed the *ECHR* art 5 claim by consent and granted a certificate for appeal direct to the Supreme Court.[13]

In AW's case, a majority of the Supreme Court held that UK forces had legal power to detain AW pursuant to *SCR 1546 (2004)*[14] where necessary for imperative reasons of security and that *ECHR* art 5.1 should be read so as to permit detention pursuant to that power.[15]

Following the Supreme Court decision in *Al-Waheed*, AW's case was remitted for trial on the questions of whether AW's detention was justified by imperative reasons of security and whether the treatment of AW violated *ECHR* standards. In judgment delivered on 14 December 2017, Leggatt J applied the Supreme Court's conclusions as to *SCR 1546 (2004)*, but found that AW was detained without any legal basis for a period of 33 days, in violation of *ECHR* art 5.[16]

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7 *Al-Waheed* [2017] AC 821, 842 [3] (Lord Sumption).
8 Ibid.
9 Ibid.
10 *Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB) (31 July 2014).
11 [2008] AC 332 ('*Al-Jedda (HL)*').
12 *Al-Waheed* [2017] AC 821, 842 [3] (Lord Sumption).
13 Ibid.
14 SC Res 1546, UN SCOR, 4987th mtg, UN Doc S/RES/1546 (8 June 2004) ('*SCR 1546 (2004)*').
15 *Al-Waheed* [2017] AC 821, 887 [112] (Lord Sumption), 896 [140] (Lord Wilson), 923 [222] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).
16 *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB) (14 December 2017), [17](iii).

B *SM's Case*

According to the UK Ministry of Defence, SM was captured on 7 April 2010 in the course of a ten-hour firefight in Afghanistan, during which he was seen to flee, discarding a rocket-propelled grenade launcher and ammunition.[17] After he was taken to the base in Helmand province, military intelligence identified SM as a senior Taliban commander who had been involved in large-scale production of IEDs and had commanded a Taliban training camp.[18] SM was detained for three-and-a-half months in a British military facility, before being transferred to the Afghan authorities.[19]

In SM's case, Leggatt J ordered the determination of three preliminary issues, on the assumption that the Ministry's account of SM's capture and detention was true.[20] One of those issues concerned the relationship between *ECHR* art 5 and the international law governing detention in the course of armed conflict.[21] Ultimately, both Leggatt J and then the Court of Appeal[22] concluded that British forces in Afghanistan had no power to detain SM for any longer than was required to transfer him to Afghan authorities and, in any event, for no longer than 96 hours (as prescribed in the detention policy of the International Security Assistance Force ('ISAF')), and that the UK had therefore breached *ECHR* arts 5.1 and 5.4.[23] The Ministry of Defence appealed to the Supreme Court.

A majority of the Court allowed the Ministry's appeal in certain respects, holding that UK forces had legal power to detain SM in excess of 96 hours pursuant to *SCR 1386 (2001)*,[24] *SCR 1510 (2003)*[25] and *SCR 1890 (2009)*[26] where necessary for imperative reasons of security.[27] As in AW's case, the majority held that *ECHR* art 5.1 should be read so as to permit detention pursuant to that power.[28]

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17 Ibid 842 [4] (Lord Sumption).
18 Ibid.
19 Ibid.
20 *Mohammed (Serdar) v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014).
21 *Al-Waheed* [2017] AC 821, 842 [4] (Lord Sumption).
22 *Mohammed (Serdar) v Ministry of Defence* [2017] AC 649, 659–773.
23 *Al-Waheed* [2017] AC 821, 842 [4] (Lord Sumption).
24 SC Res 1386, UN SCOR, 4443rd mtg, UN Doc S/RES/1386 (20 December 2001) ('*SCR 1386 (2001)*').
25 SC Res 1510, UN SCOR, 4840th mtg, UN Doc S/RES/1510 (13 October 2003) ('*SCR 1510 (2003)*').
26 SC Res 1890, UN SCOR, 6198th mtg, UN Doc S/RES/1890 (8 October 2009) ('*SCR 1890 (2009)*').
27 *Al-Waheed* [2017] AC 821, 886–7 [111] (Lord Sumption), 896 [140] (Lord Wilson), 916 [200] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).
28 Ibid 886–7 [111] (Lord Sumption), 896 [140] (Lord Wilson), 916–17 [201]–[202] (Lord Mance), 923 [224] (Lord Hughes), 924–5 [231] (Lord Toulson).

C *Relevant Law*

1 *UN Security Council Resolutions with respect to Iraq*

The operative resolution at the time of AW's detention was *SCR 1723 (2006)*.[29] In that Resolution, the Security Council '*reaffirms* the authorization for the multinational force as set forth in resolution 1546 (2004)' and extends the mandate of the force to the end of 2007.[30] This directs attention to the authorisation in *SCR 1546 (2004)*,[31] where the Security Council:

> 9. ... *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;
>
> 10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism …

The letters annexed to *SCR 1546 (2004)* include a letter dated 5 June 2004 from the United States Secretary of State, which gives as an example of the force's tasks, 'internment where this is necessary for imperative reasons of security'.[32] The preamble to *SCR 1723 (2006)* expressly recognises the tasks set out in those annexed letters.[33]

In both resolutions, the Security Council states that it is acting under ch VII of the *UN Charter*.[34]

2 *UN Security Council Resolutions with respect to Afghanistan*

The operative resolution in Afghanistan at the time of SM's detention was *SCR 1890 (2009)*.[35] At [1]–[2], the Security Council '*[d]ecides* to extend the authorization of the International Security Assistance Force, as defined in resolution 1386 (2001) and 1510 (2003)' and '*[a]uthorizes* the Member States participating in ISAF to take all necessary measures to fulfil its mandate'.[36]

SCR 1386 (2001) defined ISAF's mandate, being '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

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29 SC Res 1723, UN SCOR, 5574th mtg, UN Doc S/RES/1723 (28 November 2006) ('*SCR 1723 (2006)*').
30 Ibid [1].
31 *SCR 1546 (2004)*, UN Doc S/RES/1546, [9]–[10].
32 Ibid annex, 11.
33 *SCR 1723 (2006)*, UN Doc S/RES/1723, Preamble [15].
34 Ibid Preamble [23]; *SCR 1546 (2004)*, UN Doc S/RES/1546, Preamble [21].
35 *SCR 1890 (2009)*, UN Doc S/RES/1890.
36 Ibid [1]–[2].

can operate in a secure environment'.[37] *SCR 1510 (2003)* authorised expansion of that mandate to 'maintenance of security in areas of Afghanistan outside of Kabul'.[38]

The preamble to *SCR 1890 (2009)* expresses 'strong concern about the security situation in Afghanistan' and notes increased violent and terrorist activities by the Taliban, Al-Qaida, and other extremist groups, resulting in 'threats to the local population, including children, national security forces and international military and civilian personnel'.[39] The Security Council condemns 'in the strongest terms all attacks', including IED attacks, suicide attacks and abductions, and the use of civilians as human shields.[40] The preamble reiterates support for the endeavours of ISAF 'to improve the security situation and to continue to address the threat posed by the Taliban, Al-Qaida and other extremist groups'.[41]

None of the Resolutions with respect to Afghanistan refer, in their text or annexes, to detention.

As with the SCRs relating to Iraq, the Security Council indicates in all of these resolutions that it is acting under ch VII of the *UN Charter*.[42]

3 *Article 5 of the* European Convention on Human Rights

Article 5.1 of the *ECHR* provides:

> 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 …

The article then specifies, in sub-paragraphs (a)–(f), six situations in which deprivation of liberty is permitted. In *Al-Waheed*, it was assumed that AW's detention did not fall within any of these sub-paragraphs and, after some consideration of sub-paragraphs (c) and (f), the Court reached the same conclusion with respect to SM's detention.[43]

Article 5.4 provides further procedural safeguards that apply where a person is deprived of their liberty by arrest or detention. This provision was only relevant in SM's case, where the Court unanimously held that the UK had breached art 5.4 (although disagreeing on the extent of that breach).[44] The issues relating to art 5.1(c) and (f) and art 5.4 are not addressed in this case note.

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37 *SCR 1386 (2001)*, UN Doc S/RES/1386, [1].
38 *SCR 1510 (2003)*, UN Doc S/RES/1510, [1].
39 *SCR 1890 (2009)*, UN Doc S/RES/1890, Preamble [9].
40 Ibid Preamble [13].
41 Ibid Preamble [12].
42 Ibid Preamble [26]; *SCR 1510 (2003)*, UN Doc S/RES/1510, Preamble [12]; *SCR 1386 (2001)*, UN Doc S/RES/1386, Preamble [13].
43 *Al-Waheed* [2017] AC 821, 875–7 [77]–[83] (Lord Sumption), 887 [113] (Lord Wilson), 924–5 [231] (Lord Toulson), 925 [233], 960–1 [351] (Lord Reed).
44 Ibid 882–6 [99]–[109] (Lord Sumption), 897–8 [144] (Lord Wilson), 918–23 [205]–[219] (Lord Mance), 924 [227] (Lord Hughes), 925 [232] (Lord Hodge), 925 [233], 962–3 [359] (Lord Reed).

III Interpreting UN Security Council Resolutions: What Role for Human Rights?

The first crucial question for the Court's determination in *Al-Waheed* was whether UK forces could legally detain the claimants in circumstances beyond those specified in *ECHR* art 5.1(a)–(f), pursuant to the operative SCRs in Iraq and Afghanistan. As this was a question of interpretation, the Court's reasons can only be understood against the background of the approach to interpreting SCRs adopted by the ECtHR in a 'clear and constant'[45] body of jurisprudence including, in particular, the ECtHR's 2011 *Al-Jedda* decision.[46] This Part first outlines that approach, which the minority in *Al-Waheed* applied. Second, this Part addresses the *Al-Waheed* majority's unacknowledged departure from *Al-Jedda*, which permitted their conclusion that the operative SCRs authorised the UK to detain individuals where necessary for imperative reasons of security, in circumstances outside the six cases in *ECHR* art 5.1. It is argued that the majority were correct to depart from the *Al-Jedda* approach, however they should have more strongly anchored their interpretation of the SCRs to international law, particularly the principle of systemic integration and the established rules of treaty interpretation.[47] That approach would have provided a more persuasive pathway to the same outcome, while facilitating a clearer conception of the role of international human rights law in interpreting SCRs.

A *The Minority's Approach: The* Al-Jedda *Presumptions*

In the minority in *Al-Waheed*, Lord Reed (with whom Lord Kerr agreed) held that any authority to detain pursuant to the SCRs was limited to the circumstances exhaustively listed in *ECHR* art 5.1(a)–(f).[48] Lord Reed expressly relied on the ECtHR's *Al-Jedda* decision and applied the interpretative presumptions therein articulated.

In *Al-Jedda*, the ECtHR had to determine whether the UK had violated *ECHR* art 5 by detaining Mr Al-Jedda for over three years in Iraq.[49] The same SCRs (*SCR 1546 (2004)* and *SCR 1723 (2006)*) were under consideration as in *Al-Waheed*, at least with respect to Iraq.

The Court noted that in interpreting *SCR 1546 (2004)*, it must have regard to the purposes and principles of the UN, including promoting respect for human rights.[50] Against that background, the Court held:

> [I]n interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the

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45 Ibid 945 [296] (Lord Reed).

46 [2011] IV Eur Court HR 305.

47 See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–2 ('*VCLT*').

48 *Al-Waheed* [2017] AC 821, 925–7 [234]–[235], 939–43 [277]–[289], 950 [316], 955–6 [332]–[334] (Lord Reed).

49 *Al-Jedda* [2011] IV Eur Court HR 305, 315 [9]–[10].

50 Ibid 373–4 [102], citing *UN Charter* arts 1.3, 24.2.

> terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the [European] Convention and which avoids any conflict of obligations. In the light of the United Nations' important 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 which would conflict with their obligations under international human rights law.[51]

Applying that presumption, the Court noted that internment was not expressly referred to in *SCR 1546 (2004)*, and that the Resolution's preamble recorded the commitment of all forces to act in accordance with international law.[52] The Court concluded that, absent any clear provision in the Resolution authorising detention outside the circumstances exhaustively prescribed by *ECHR* art 5, Mr Al-Jedda's detention violated that article.[53]

In *Al-Waheed*, Lord Reed applied the interpretative principles articulated in *Al-Jedda* and adopted the ECtHR's conclusion that *SCR 1546 (2004)* did not clearly authorise detention in circumstances falling outside *ECHR* art 5.1(a)–(f).[54] Lord Reed reached the same conclusion with respect to the SCRs operative in Afghanistan.[55]

B *The* Al-Waheed *Majority's Departure from* Al-Jedda

The majority in *Al-Waheed* departed from the ECtHR's approach without expressly acknowledging that they were doing so, distinguishing *Al-Jedda* on narrow grounds while omitting to address the ECtHR's substantive reasoning.

Lord Sumption (with whom Baroness Hale agreed) and Lord Mance distinguished *Al-Jedda* as solely decided on the 'relatively narrow'[56] question of whether *SCR 1546 (2004)* imposed an obligation to detain, as distinct from an authorisation, for the purposes of *UN Charter* art 103.[57] Lord Wilson did expressly note the *Al-Jedda* principles, but rather than critiquing them in order to justify departing therefrom, his Lordship merely distinguished *Al-Jedda* on the same basis as Lords Sumption and Mance.[58] That narrow point of distinction, however, does not adequately explain why the interpretive principles in *Al-Jedda*, which were broadly applicable, were glossed over by the majority.

Similarly, the majority did not grapple with the fact that in both *Nada v Switzerland*[59] and *Al-Dulimi v Switzerland*[60] the ECtHR had strongly reiterated the

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51 *Al-Jedda* [2011] IV Eur Court HR 305, 374 [102].
52 Ibid 374–5 [104]–[105].
53 Ibid.
54 *Al-Waheed* [2017] AC 821, 941–2 [284]–[285], 945 [296], 948 [306], 950 [314] (Lord Reed).
55 Ibid 955–6 [332]–[334] (Lord Reed).
56 Ibid 863 [50] (Lord Sumption).
57 Ibid 848–9 [20], 861–3 [47]–[50] (Lord Sumption), 900–1 [153]–[154] (Lord Mance).
58 Ibid 887–8 [114]–[117] (Lord Wilson).
59 [2012] V Eur Court HR 213, 272–3 [171]–[172].
60 (European Court of Human Rights, Grand Chamber, Application No 5809/08, 21 June 2016) [139]–[140] ('*Al-Dulimi*').

Al-Jedda presumptions. Lord Sumption stated only that in both of those decisions, the ECtHR had held *UN Charter* art 103 to be inapplicable.[61] Lord Mance distinguished *Al-Dulimi* as concerned with general international human rights law,[62] despite the fact that in *Al-Dulimi*, the ECtHR expressly confirmed that SCRs should be read so as to ensure compatibility with the *ECHR*.[63]

The majority's reluctance to depart expressly from the ECtHR's reasoning in *Al-Jedda* is not explicable by any superiority of the latter in terms of precedent — the UK Supreme Court is not bound by ECtHR decisions. In this author's view, it would have been far more conducive to principled decision-making and to the development of international law in both courts had the majority directly questioned the flawed reasoning in *Al-Jedda*.[64] Although a more open interrogation of the *Al-Jedda* approach would have been preferable, nonetheless it is clear that in substance the *Al-Waheed* majority did depart from *Al-Jedda*, and they were undoubtedly correct to do so. The *Al-Jedda* approach to interpreting SCRs comprises two core components:

> (i) a presumption that the Security Council does not intend to impose any obligation on States to breach fundamental principles of human rights; and
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> (ii) a requirement that, in the event of any ambiguity in the terms of a resolution, the Court must choose the interpretation most in harmony with the *ECHR*, thereby avoiding any conflict of obligations.[65]

While the first component has a convincing basis in general international law, explored in Part IIIC below, the same cannot be said for the second component. Assuming, for present purposes, that the presumption in (i) can be supported, the *Al-Waheed* majority were nevertheless correct not to apply the requirement articulated in (ii).

In the ECtHR's reasoning, (ii) is presented as a necessary corollary of (i). That reasoning is logically flawed. It operates on the false assumption that the *ECHR*, a regional human rights treaty, can be entirely equated to fundamental principles of human rights as expressed in general, universally applicable, international law. SCRs are addressed to all the world, and are universally binding.[66]

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61 *Al-Waheed* [2017] AC 821, 861 [47] (Lord Sumption).

62 Ibid 902–3 [159]–[160] (Lord Mance).

63 *Al-Dulimi* (European Court of Human Rights, Grand Chamber, Application No 5809/08, 21 June 2016) [140].

64 For a recent consideration of the relationship between the ECtHR and the UK Supreme Court (taking into account the dynamics surrounding the June 2016 'Brexit' vote in favour of the United Kingdom withdrawal from the European Union), see, eg, Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28(3) *European Journal of International Law* 763. See also, Roger Masterman, 'Supreme, Submissive or Symbiotic? The United Kingdom Courts and the European Court of Human Rights' (The Constitution Unit, School of Public Policy, University College of London, October 2015).

65 *Al-Jedda* [2011] IV Eur Court HR 305, 373–4 [102].

66 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 54 [116] ('*Namibia Opinion*').

They should not be construed by reference to particular regional codes of human rights protection. Article 31.3(c) of the *Vienna Convention on the Law of Treaties* ('*VCLT*') offers a useful analogy here: it requires treaties to be interpreted by reference to 'relevant rules of international law applicable in the relations between the parties'. Of course, there are no 'parties' to SCRs. But, just as it would make no sense to construe a large multilateral treaty by reference to a rule of international law operative between only two parties, it is illogical to construe a universally applicable resolution by reference to a regional treaty of limited application.

Upon consideration of the specific provision at issue in *Al-Jedda* and *Al-Waheed*, the problems with the ECtHR's approach become more apparent. Article 5.1 of the *ECHR* differs from general international law. It is unique in, apparently exhaustively, prescribing six circumstances in which detention is permissible.[67] The paradigm prohibition of arbitrary deprivation of liberty, art 9.1 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[68] contains no such qualification. It provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[69]

The ECtHR emphasised in *Al-Jedda* that *ECHR* art 5.1 'enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty'.[70] However, in limiting deprivation of liberty to the six cases in sub-paragraphs (a)–(f), art 5.1 goes beyond the core, fundamental right, which is freedom from arbitrary deprivation of liberty. This illustrates that not every part of every *ECHR* article protects a fundamental principle of universal human rights law. That is a further reason why the requirement to choose the interpretation most in harmony with the *ECHR* does not follow from the presumption that the Security Council does not intend to impose any obligations to breach fundamental principles of human rights. Lords Sumption and Mance in *Al-Waheed* touched on arguments to this effect,[71] although without acknowledging that such arguments contradict the reasoning in *Al-Jedda*. Lord Reed, in the minority, expressly noted the force of such an argument and, in response, merely reiterated reliance on the authority of the ECtHR.[72]

Therefore, the *Al-Waheed* majority were correct to depart from *Al-Jedda*, although they should have done so expressly rather than distinguishing the decision by adopting an overly narrow interpretation of its import.

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67 *Al-Waheed* [2017] AC 821, 858 [42] (Lord Sumption), 896–7 [142] (Lord Wilson), 902–3 [160] (Lord Mance).

68 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

69 Ibid art 9.1.

70 *Al-Jedda* [2011] IV Eur Court HR 305, 372–3 [99].

71 *Al-Waheed* [2017] AC 821, 857–8 [41]–[42] (Lord Sumption), 902–3 [159]–[161] (Lord Mance).

72 Ibid 946 [300] (Lord Reed).

C *Pursuing Systemic Integration: A Principled Framework for the Interpretation of UN Security Council Resolutions*

Having thus, at least implicitly, departed from the *Al-Jedda* approach, the majority in *Al-Waheed* did not expressly articulate a principled replacement for it. The majority judgments lack a clear analysis of the role of international human rights law in interpreting SCRs and adopt an ad hoc medley of interpretive principles. This Part argues that existing international law, particularly the principle of systemic integration, supports an approach to the interpretation of SCRs which takes account of fundamental, universal principles of human rights law. Further, it is argued that the *VCLT* rules would have provided a more coherent framework for the majority's interpretation of the relevant SCRs.

1 *Avoiding Fragmentation: Interpreting UN Security Council Resolutions by Reference to Fundamental Human Rights*

The majority judgments leave unresolved the role of general international human rights law when interpreting SCRs. Lords Sumption and Wilson did not discuss the question. Lord Mance stated that it is 'tenable' to treat a resolution as intended to comply with general principles of international law, absent clear and specific language to the contrary,[73] but did not state a view as to whether this approach is preferable, nor explain the basis for any such presumption. This omission is a consequence of the majority's failure to address the reasoning in *Al-Jedda* squarely, and also flows from the absence in the majority judgments of a principled framework for interpreting SCRs.

As adverted to above, the *Al-Jedda* approach to interpreting SCRs has two components, and, in my view, the second component is unsound. However, the broader first component entails a presumption that the Security Council does not intend to impose any obligations on States to breach fundamental principles of human rights. Three related considerations, all linked to the principle of systemic integration, support the adoption of that presumption.

First, in its 2006 report on the fragmentation of international law, the International Law Commission concluded that international law includes a strong presumption against normative conflict, often referred to as the norm of systemic integration.[74] That principle is not limited to treaty interpretation,[75] but is widely accepted as a general interpretive rule to the effect that 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[76] The basis for this presumption is essentially

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[73] Ibid 903 [161] (Lord Mance).

[74] Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) 25 [37] ('*ILC Fragmentation Report*').

[75] Ibid 26 [38].

[76] International Law Commission, *Report of the International Law Commission: Fifty-eighth session: (1 May-9 June and 3 July–11 August 2006)*, UN GAOR 61st sess, UN Doc A/61/10 (2006) 408 [251] ((4) 'The principle of harmonization') ('*ILC Fragmentation Conclusions*'). See also, Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9th ed, 1992) vol 1, 1275; Johann Ruben Leiæ and Andreas Paulus, 'Ch. XVI Miscellaneous Provisions, Article 103' in

normative: it reflects a generally shared systemic objective of pursuing 'some coherent and meaningful whole'[77] in international law.[78] That concern must be understood against the background of the horizontality of the international legal system, its lack of a developed hierarchy, and the consequent risk of fragmentation as norms proliferate.[79] A further justification for the presumption flows from good faith and the principle of *pacta sunt servanda*: pursuing interpretations that avoid normative conflict ensures that the effectiveness of existing treaties or customs is maximised, rather than undermined.[80]

This strong presumption against normative conflict supports interpreting SCRs within the context of general international law, including international human rights law. In its *Kosovo Opinion*, the International Court of Justice ('ICJ') held that the SCR there under consideration must be understood and applied against the background of general international law.[81] That statement accords with a consistent approach to systemic integration in ICJ jurisprudence, reflected for example in the early *Right of Passage over Indian Territory* decision where the Court articulated the principle that a text 'must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law'.[82] The first component of the *Al-Jedda* approach may therefore be seen as a specific manifestation of a well-established broader presumption against normative conflict.

Second, situating SCRs within the *UN Charter* framework provides further support for the first component of *Al-Jedda*. This is one means of pursuing systemic integration. Article 24 of the *UN Charter* provides that in discharging its 'primary responsibility for the maintenance of international peace and security', the Security Council must act in accordance with the purposes and principles of the UN. This logically supports interpreting SCRs by reference to the purposes set out in *UN Charter* art 1, including, in art 1.3, 'promoting and encouraging respect for human rights and for fundamental freedoms'.[83] Admittedly, there are different views on the implications of *UN Charter* art 24 for interpreting SCRs.[84] As discussed above, contrary to the ECtHR's reasoning in *Al-Jedda*, arts 1.3 and 24.2 of the *UN Charter*

Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary, Volume II* (Oxford University Press, 3rd ed, 2012) 2118 [17].

77 *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 208 [414].

78 Ibid 207 [412], 208 [414], 209 [416], 211 [419]; Dame Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 2nd ed, 2000) 1, 8.

79 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the *Vienna Convention*' (2005) 54(2) *International and Comparative Law Quarterly* 279, 282, 285, 287; Dinah Shelton, 'International Law and "Relative Normativity"' in Malcolm Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 137–8; Leiæ and Paulus, above n 76, 2118 [17].

80 See *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 207 [411]; Leiæ and Paulus, above n 76, 2118 [17].

81 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 436 [78] ('*Kosovo Opinion*').

82 *(Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125, 142.

83 See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep 325, 440–1 [100]–[102] (Judge Lauterpacht) '*Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*'; Leiæ and Paulus, above n 76, 2120 [24].

84 Compare *Al-Jedda* [2011] IV Eur Court HR 305, 373–4 [102]; *Nada v Switzerland* [2012] V Eur Court HR 213, 272–3 [171]–[172]; Dame Rosalyn Higgins et al (eds), *Oppenheim's International Law: United Nations* (Oxford University Press, 2017) 421–2 [12.18]–[12.20], 423 [12.22].

do not provide convincing support for imposing a presumption that SCRs will conform to regional human rights treaties. It is, however, relatively well-established that the Security Council may not violate *jus cogens* norms.[85] In my view, the human rights principles to be taken into account should be fundamental and universal principles of human rights, proclaimed in instruments adopted within the UN.[86]

Third, the *VCLT* rules on treaty interpretation support the adoption of this presumption. Article 31.3(c) of the *VCLT* directs attention to '[a]ny relevant rules of international law applicable in the relations between the parties'. Evidently, a SCR is not a treaty, and there are important differences between SCRs and treaties, particularly as regards the processes for drafting, voting upon, and adopting SCRs. However, SCRs are adopted within the framework of a treaty, the *UN Charter*, and through its provisions, they may impose obligations under international law. The ICJ has interpreted and applied SCRs on multiple occasions, and has held that the *VCLT* rules may provide guidance.[87] Articles 31 and 32 of the *VCLT* cannot simply be applied wholesale to SCRs, however as the most authoritative international rules of interpretation, they are an obvious starting-point. In addition to the ICJ, many other international courts and tribunals have interpreted SCRs in accordance with or analogously to the *VCLT* interpretation rules.[88] It is therefore appropriate to apply *VCLT* art 31.3(c) to SCRs, modified as necessary to reflect the absence of parties to a resolution. As resolutions are addressed to all the world, the principle of systemic integration in art 31.3(c) should only apply to those rules which are themselves universal.

As to where this leaves the *Al-Waheed* majority's conclusion that the operative SCRs authorised detention where necessary for imperative reasons of security, the majority were correct to avoid circumscribing the SCRs by reference to sub-paragraphs (a)–(f) of *ECHR* art 5.1. However, insofar as *ECHR* art 5.1 reflects general international law, articulated in this area by *ICCPR* art 9, that should have been expressly taken into account. Had the majority done so, the same conclusion would still follow. This is because it is possible to interpret the relevant SCRs consistently with fundamental, universal human rights principles, as authorising detention where necessary for imperative reasons of security, provided that detention is non-arbitrary and conforms to basic procedural safeguards. This is implicit in some parts of the

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85 Higgins et al, above n 84, 421–2 [12.19]; *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1993] ICJ Rep 325, 440–1 [100]–[102] (Judge Lauterpacht); *Kadi v Council of the European Union* (T-315/01) [2005] ECR II-3649 II-3725 [230].

86 Higgins et al, above n 84, 421–2 [12.19]. See also, Human Rights Committee, *Views: Communication No 1472/2006* (*Sayadi v Belgium*), UN Doc CCPR/C/94/D/1472/2006 (29 December 2008), Concurring Opinion Sir Nigel Rodley.

87 *Kosovo Opinion* [2010] ICJ Rep 403, 442 [94]. See also *Namibia Opinion* [1971] ICJ Rep 16, 53 [114].

88 See, eg, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (Special Tribunal for Lebanon, Appeals Chamber, STL-11-01/1, 16 February 2011) [26]; *Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court)* (International Criminal Court, Pre-Trial Chamber II, ICC-02/05-01/09-195, 9 April 2014) [29]; *Prosecutor v Milošević (Decision on Preliminary Motions)* (International Criminal Tribunal for Yugoslavia, Trial Chamber, IT-02-54, 8 November 2001) [47]. See also, UN Office of Legal Affairs [2003] *UN Juridical Yearbook* 539, cited in Higgins et al (eds), above n 84, [26.87] n 289; Sir Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20(1) *Max Planck Yearbook of United Nations Law* 3; *ILC Fragmentation Conclusions*, UN Doc A/61/10, 409 [251] ((3) 'The *VCLT*').

majority's reasoning, but the finding that the SCRs authorised detention could have explicitly included an interpretation of the authorisations as subject to the fundamental right to freedom from arbitrary, unlawful deprivation of liberty.

2 *A Useful Analogy: Applying Principles of Treaty Interpretation to Security Council Resolutions*

Turning to the more general question of the majority's interpretive approach to the SCRs, none of the majority judgments referred to the *VCLT* rules at all when interpreting the relevant resolutions. However, this part argues that all of the interpretive factors which the majority in fact considered can be justified by reference to *VCLT* arts 31–2. While the majority's interpretation of the SCRs yielded a practical and sensible result, applying an interpretation framework built upon the *VCLT* rules would have structured the inquiry and firmly anchored the approach to international law, thereby enabling the majority to articulate a more persuasive counterpoint to the minority's approach.

Article 31.1 of the *VCLT* requires a treaty to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

First, this provision clearly encompasses the aspects of the majority's approach that centred on the SCRs' terms. Lord Wilson prioritised the ordinary meaning of the words 'all necessary measures', explaining that there is no doubt that the phrase conferred powers of detention, because 'all' measures were included if 'necessary'.[89] Likewise, Lord Mance found *SCR 1546 (2004)* clear 'on its face' in authorising detention, because the annexed letters expressly referred to internment where 'necessary for imperative reasons of security'.[90] By analogy to *VCLT* art 31.2, the text of a resolution may be considered to include its annexes.

Second, in accordance with *VCLT* art 31.1, the majority pursued good faith interpretation and had regard to the Resolutions' objects and purposes. For example, Lord Wilson stated that '[a]n authority to assist in the maintenance of security which did not include a power to intern would not have been a worthwhile authority at all.'[91] Lords Sumption and Mance adopted similar reasoning.[92] Throughout their reasons, the majority displayed awareness of the need to adopt interpretations that would facilitate the effective fulfilment of the aims of maintaining peace and security in Iraq and Afghanistan.

Moreover, while the definition of 'context' in *VCLT* art 31.2 is somewhat restrictive, art 32 permits reference to the 'preparatory work of the treaty and the circumstances of its conclusion … to confirm the meaning resulting from the application of article 31'. Lord Sumption referred to discussions preceding the SCRs, the *UN Charter* provisions invoked, and 'in general, all circumstances that might assist

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89 *Al-Waheed* [2017] AC 821, 889 [119] (Lord Wilson).
90 Ibid 900 [153] (Lord Mance).
91 Ibid 889 [119] (Lord Wilson).
92 Ibid 856 [38] (Lord Sumption), 904 [164] (Lord Mance).

in determining the legal consequences of the resolution',[93] all of which can be understood within this framework. All of the majority judgments took into account 'the context of the extreme circumstances of violence'[94] in Iraq and Afghanistan, recounted in the SCRs' preambles, and the need to interpret the SCRs 'in the light of the realities of forming a multinational force and deploying it in a situation of armed conflict'.[95] This pragmatic regard for the circumstances that formed the background to the SCRs could have been situated within *VCLT* arts 31–2.

Further, *VCLT* arts 31.3(b) and 32 permit consideration of subsequent practice in the application of a treaty.[96] Lord Sumption stated that the expression 'all necessary measures' in the SCRs has 'acquired a meaning sanctioned by established practice' as authorising 'the full range of measures open to the [UN] itself for the purpose of maintaining or restoring international peace and security under Chapter VII of the Charter', which will normally involve the use of force subject only to the requirement of necessity.[97] His Lordship referred to surveys of past Security Council practice,[98] an approach that is consistent with the ICJ's approach to interpreting SCRs by reference to contemporaneous Security Council practice.[99]

Therefore, the majority's general approach to interpreting the SCRs fits within the *VCLT* rules, and they could have built a coherent interpretive framework upon those rules, in order to justify their methods of interpretation more thoroughly.

Overall, it could be said that on the first crucial question in *Al-Waheed*, the minority's approach had the advantage of clarity. Lord Reed comprehensively outlined the *Al-Jedda* approach, and applied it to conclude that the SCRs only authorised detention falling within the six sub-paragraphs of *ECHR* art 5.1. The majority, on the other hand, did not squarely address *Al-Jedda* and missed the opportunity to articulate a principled replacement for it. Nonetheless, the majority's conclusion that the operative SCRs authorised detention where necessary for imperative reasons of security should be preferred. The *Al-Jedda* presumption that SCRs will conform to the *ECHR*, regardless of discrepancies between this regional human rights treaty and general international human rights law, lacks a convincing foundation. Situating the majority's interpretive approach within the principled framework offered by systemic integration and the *VCLT* rules supports the conclusion that the SCRs considered in *Al-Waheed* authorised detention where necessary for imperative reasons of security, provided that detention is non-arbitrary and complies with basic procedural safeguards. Part IV of this case note considers the implications of that interpretation of the SCRs for the UK's obligations under *ECHR* art 5.

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93 Ibid 851–2 [25] (Lord Sumption), quoting *Namibia Opinion* [1971] ICJ Rep 16, 53 [114]. See also ibid 904 [164] (Lord Mance).

94 *Al-Waheed* [2017] AC 821, 851–2 [25], 905 [168] (Lord Mance).

95 Ibid 851–2 [25], 856 [38] (Lord Sumption).

96 As to *VCLT* art 32, see International Law Commission, *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 68th sess, UN Doc A/CN.4/L.874 (6 June 2016) Draft conclusion 2 [4].

97 *Al-Waheed* [2017] AC 821, 852 [26] (Lord Sumption).

98 Ibid 852 [27] (Lord Sumption).

99 *Kosovo Opinion* [2010] ICJ Rep 403, 442 [94], 449 [114].

IV Interpreting *ECHR* Article 5: The Limits of Systemic Integration

As noted above, *ECHR* art 5 is ostensibly exhaustive in prescribing six circumstances in which detention is permitted. On the view of the majority in *Al-Waheed*, the SCRs authorised what art 5 purportedly prohibited. The majority's conclusion that the SCRs authorised detention where necessary for imperative reasons of security therefore raised the question of how best to reconcile two conflicting instruments.

The majority held that *ECHR* art 5 should be read so as to accommodate, as permissible grounds, detention pursuant to the power to detain conferred by the SCRs. They relied on the ECtHR's 2014 decision in *Hassan*,[100] in which the Court held that art 5 should be read non-exhaustively, to allow for detention pursuant to powers available under international humanitarian law. While the majority found that the reasoning in *Hassan* could be extended to detention pursuant to SCRs, the minority took a much more restrictive view of the scope of *Hassan*.

This Part of the case note argues first that the majority's application of *Hassan* was a logical extension of the ECtHR's reasoning. By extending *Hassan*, the majority treated the conflict between the SCRs and *ECHR* as merely an ostensible conflict, which could be resolved by recourse to treaty interpretation, in particular relying on the principle of systemic integration embodied in *VCLT* art 31.3(c). Although this is a pragmatic outcome, both *Hassan* and *Al-Waheed* push systemic integration to its outer limit and arguably go too far — rewriting, rather than interpreting, *ECHR* art 5. This Part therefore goes on to consider the possibility of strengthening the majority's analysis by reference to *UN Charter* art 103. On a narrow interpretation of art 103, given that the SCRs only entail authorisations to detain, rather than mandatory obligations to do so, there is no conflict of obligations in the strict sense and art 103 has no application. That view should not be preferred. A broader interpretation of the scope of art 103 supports its engagement in the circumstances at issue in *Al-Waheed*, either to bolster the majority's expansive reading of *ECHR* art 5 or to displace *ECHR* art 5 to the extent of its inconsistency with the SCRs. The latter approach avoids an interpretation that, in effect, disregards the plain words of *ECHR* art 5, but essentially yields the same pragmatic result. That result permits effective fulfilment of Security Council mandates while enabling human rights protections to continue in armed conflict.

A *A Logical Extension of* Hassan

Hassan concerned the arrest and detention of the applicant's brother, Tarek Hassan, by British forces in Iraq in April 2003 (at a time when the armed conflict was international in character).[101] Following his release from detention, Tarek Hassan was found dead in unexplained circumstances.[102] His brother brought proceedings

[100] [2014] VI Eur Court HR 1.
[101] Ibid 9–10 [3], 12 [12].
[102] Ibid 9–10 [3].

in the ECtHR with respect to Tarek's arrest, detention, and death. Relevantly, one of the applicant's claims was that Tarek's arrest and detention were arbitrary, unlawful, and lacking in procedural safeguards, in violation of *ECHR* art 5.[103] In response, the UK argued that the Court should interpret the obligations under *ECHR* art 5 in light of the powers of detention available under international humanitarian law.[104] The ECtHR accepted that argument, holding that

> the grounds of permitted deprivation of liberty set out in sub-paragraphs (a) to (f) of [art 5] … 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.[105]

In *Al-Waheed*, the majority applied the reasoning in *Hassan* to detention pursuant to powers conferred by SCRs. The minority, by contrast, held that *Hassan* was confined to powers of detention in international armed conflict, conferred by international humanitarian law, and could not be extended to the non-international armed conflicts in Iraq and Afghanistan which were under consideration in *Al-Waheed.* The better view is that *Hassan* can be extended to the circumstances in *Al-Waheed*, because both limbs of the ECtHR's reasoning in *Hassan* are equally applicable to non-international armed conflicts where powers of detention are conferred by SCRs.

First, the ECtHR in *Hassan* relied on *VCLT* art 31.3(b), noting that consistent subsequent state practice could be taken as establishing agreement not only as regards interpretation, but even to modify the text of the *ECHR*.[106] In the minority in *Al-Waheed*, Lord Reed interpreted that analysis as limited to international armed conflict, and stated that the Court in *Hassan* 'expressly contrasted' the absence of derogations from *ECHR* art 5 in relation to detention during international armed conflicts with the practice of derogating from art 5 in relation to non-international armed conflicts.[107] However, the ECtHR's reasons in this respect are more ambiguous than Lord Reed suggested. While the Court did refer to the absence of derogations in relation to detention 'on the basis of the Third and Fourth Geneva Conventions during international armed conflicts', the express contrast drawn was between 'extraterritorial' and 'internal' conflicts, rather than between international and non-international armed conflicts.[108]

Lord Reed placed considerable reliance on the ECtHR's statement in *Hassan* that it 'can only be in cases of international armed conflict …'.[109] However, that statement must be read in the context of the sentence that precedes it, as a contrast to 'internment in peacetime'.[110] While the Court referred to international armed conflict in *Hassan*, because that was the specific issue raised before it, that does not mean that its reasoning depended on the international character of the armed conflict

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103 Ibid.
104 Ibid 53–5 [87]–[89], 59–60 [99].
105 Ibid 62 [104].
106 Ibid 60–1 [101], citing *Soering v United Kingdom* (1989) 161 Eur Court HR (ser A), [102]–[103]; *Al-Saadoon v United Kingdom* [2010] II Eur Court HR 61, 125–6 [120].
107 *Al-Waheed* [2017] AC 821, 948 [308] (Lord Reed).
108 *Hassan* [2014] VI Eur Court HR 1, 60–1 [101].
109 Ibid 62 [104].
110 Ibid.

in question. In the majority in *Al-Waheed*, Lord Wilson correctly pointed out that the 'essential distinction' that the Court drew in *Hassan*[111] was between detention during international armed conflicts, on the one hand, and detention during peacetime (not non-international armed conflicts) on the other.[112] Similarly, Lord Sumption noted that the Court in *Hassan* cited both the ICJ judgment in *Armed Activities on the Territory of the Congo*[113] and the ICJ opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[114] and then drew 'the same distinction as the [ICJ] had made between peacetime norms … and detention in the course of an armed conflict'.[115] In *Al-Waheed*, Lords Sumption and Mance both emphasised that the subsequent state practice as regards derogations from *ECHR* art 5 is the same in international and non-international armed conflict, in that no European State 'has ever derogated from the European Convention with respect to military action of whatever kind taken abroad'.[116] On that basis, the ECtHR's reasoning with respect to subsequent state practice is equally applicable to the non-international armed conflicts at issue in *Al-Waheed.*

Second, the ECtHR's reasoning in *Hassan* also relied on the application of *VCLT* art 31.3(c) to take into account rules of international humanitarian law in the interpretation of *ECHR* art 5.1.[117] Resolutions adopted by the Security Council form part of the framework of international obligations, as the ICJ held in its *Kosovo Opinion*.[118] The SCRs at issue in *Al-Waheed* derive their force from the *UN Charter* (particularly ch VII) and are thereby binding on all of the parties to the *ECHR*. Therefore, just like the rules of international humanitarian law considered in *Hassan*, the SCRs constitute 'relevant rules of international law'[119] to be taken into account in interpreting *ECHR* art 5.1. Lord Sumption articulated these arguments:

> [R]esolutions under Chapter VII are a cornerstone of the international legal order. Their status as a source of international law powers of coercion is as significant as the Geneva Conventions, and is just as relevant where the [*ECHR*] falls to be interpreted in the light of the rules of international law.[120]

There is no reason in principle not to apply systemic integration to SCRs. The ICJ acknowledged the pivotal significance of *VCLT* art 31.3(c) in its *Oil Platforms* decision, using it to import an extensive body of general international law, including

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111 [2014] VI Eur Court HR 1, 58–9 [97], 62 [104].

112 *Al-Waheed* [2017] AC 821, 893 [130] (Lord Wilson).

113 *(Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 242–3 [215]–[216].

114 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 178 [106]. See also, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25].

115 *Al-Waheed* [2017] AC 821, 868 [61] (Lord Sumption), citing *Hassan* [2014] VI Eur Court HR 1, 61–2 [102]–[104]. See also *Hassan* [2014] VI Eur Court HR 1, 26–8 [35]–[37].

116 *Al-Waheed* [2017] AC 821, 868 [61] (Lord Sumption). See also at 903–4 [163] (Lord Mance).

117 *Hassan* [2014] VI Eur Court HR 1, 61 [102].

118 *Kosovo Opinion* [2010] ICJ Rep 403, 439 [85], citing *Namibia Opinion* [1971] ICJ Rep 16; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Provisional Measures)* [1992] ICJ Rep 3, 15 [39]–[40] ('*Lockerbie*').

119 *VCLT* art 31.3(c).

120 *Al-Waheed* [2017] AC 821, 868 [60] (Lord Sumption). See also at 893 [132] (Lord Wilson), 902 [158] (Lord Mance).

the *UN Charter*, into its analysis of a bilateral treaty.[121] Similarly, in *Loizidou v Turkey*, the ECtHR used art 31.3(c) to justify reference to SCRs when interpreting the *ECHR*.[122] That was consistent with the ECtHR's repeated statements that the *ECHR* 'cannot be interpreted in a vacuum' and must 'so far as possible be interpreted in harmony with other rules of international law of which it forms a part'.[123] This second limb of the reasoning in *Hassan* is therefore also equally applicable to powers of detention conferred by SCRs.

Therefore, the majority's approach in *Al-Waheed* was a logical extension of the reasoning in *Hassan*, and is preferable to the minority's restrictive reading of the decision. However, neither the majority nor minority doubted the correctness of *Hassan*: the difference of opinion lay in the preferable construction of the ECtHR's reasons. The fact that *Hassan* and, consequently, *Al-Waheed*, went so far beyond the ordinary meaning of *ECHR* art 5 leaves the decisions open to the criticism of rewriting, rather than interpreting, the provision. Part IVB of this case note argues that the majority in *Al-Waheed* could have relied on *UN Charter* art 103 in two alternative ways to bolster its reasoning.

B *An Alternative Route: Article 103 of the* UN Charter

Article 103 of the *UN Charter* provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The Court in *Al-Waheed* did not rely on art 103 and simply argued by analogy from *Hassan*. Perhaps this was a cautious route, given the ECtHR's tendency to take an excessively narrow view of the article's scope.[124] However, by sidestepping the relevance of art 103, the Court in *Al-Waheed* avoided the heart of the issue. *Al-Waheed* raised the difficult question of how to navigate the interface between SCRs and human rights instruments, a topic of sharp disagreement between the courts of the UK and Strasbourg, and the UK Supreme Court missed the opportunity to fully address that controversy.

The scope of art 103 remains unclear and is subject to heated debates.[125] The facts of *Al-Waheed* engage one aspect of those debates, namely, whether the article's scope is limited to contradictory 'obligations' strictly so called, or extends to incompatibilities between obligations and permissions.[126] This Part first explains why the latter view should be preferred. If that broader view had been applied in

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121 *(Islamic Republic of Iran v United States of America) (Judgment)* [2003] ICJ Rep 161, 182 [41].

122 *Loizidou v Turkey* (European Court of Human Rights, Grand Chamber, Application No 15318/89, 18 December 1996) [43]–[44].

123 See, eg, *McElhinney v Ireland* (European Court of Human Rights, Grand Chamber, Application No 31253/96, 21 November 2001) [36]; *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 100 [55]; *Banković v Belgium* (European Court of Human Rights, Grand Chamber, Application No 52207/99, 12 December 2011) [57].

124 See *Al-Jedda* [2011] IV Eur Court HR 305, 373 [101].

125 See Higgins et al, above n 84, 427 [12.31].

126 This question is noted, but not resolved, in Higgins et al, above n 84, 427 [12.31]. One comprehensive recent consideration appears in: Leiæ and Paulus, above n 76, 2122–6.

Al-Waheed, the potential engagement of art 103 would have been clear. Having established that art 103 was potentially at play, the Court in *Al-Waheed* could have relied on the article to strengthen its analysis in two possible ways: either to provide a more persuasive justification for its expansive interpretation of *ECHR* art 5, or to enable the authorisations in the SCRs to prevail over *ECHR* art 5. The second section of this Part addresses those alternatives.

1 *The Scope of Article 103*

It is beyond question that the reference in art 103 to obligations 'under the present Charter' extends to obligations that result from a binding Security Council decision.[127] Strictly speaking, this extension occurs by means of *UN Charter* art 25, which enforces the obligations under SCRs and is in turn enforced by art 103.[128]

However, it is far less clear whether the 'conflict between obligations' to which art 103 refers is confined to a strict contradiction between mandatory obligations that leave no room for discretion (such as may be imposed in a sanctions resolution). When *Al-Jedda* came before the ECtHR, this narrow view carried the day. The alternative, broader view is that art 103 can also apply to incompatibilities between obligations and Security Council authorisations, such as those typically granted when the Security Council acts under ch VII (and, in particular, under art 42). While the narrow view has some support, the authors of Simma's commentary to the *UN Charter* conclude that the broad view represents the currently prevailing opinion.[129]

A purposive interpretation of art 103 supports the broad view. Article 103 is intended to protect the efficacy of the *UN Charter* system and remove obstacles in other treaties for the implementation of obligations under that system.[130] The *UN Charter* system affords primacy to the Security Council in maintaining international peace and security, and empowers it to authorise forcible measures. If art 103 only applied to obligations, many ch VII resolutions would not be covered, leaving States at risk of violating other treaty obligations while complying with their obligation under *UN Charter* art 25 to carry out Security Council decisions, and discouraging enforcement of SCRs.[131] Moreover, this view reflects the practice of the UN and its

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127 Higgins et al, above n 84, 427 [12.31]; Leiæ and Paulus, above n 76, 2116 [10], 2124 [38]. This view is expressly supported by the *travaux*, the ICJ, the ILC, and the Security Council, see: United Nations Conference on International Organization ('UNCIO') *Documents: Vol XIII* (1945) 686 ('*UNCIO XIII*'); *Lockerbie* [1992] ICJ Rep 3, 15 [39]–[40]; *Namibia Opinion* [1971] ICJ Rep 16, 99 [18] (Vice-President Ammoun); *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [1993] ICJ Rep 325, 439–40 [99]–[100] (Judge Lauterpacht); *ILC Fragmentation Conclusions*, UN Doc A/61/10, 420 [251] ((35) 'The scope of Article 103 of the Charter'); *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 168–9 [331]; SC Res 670, UN SCOR, 2943rd mtg, UN Doc S/RES/670 (25 September 1990) Preamble [12].

128 Leiæ and Paulus, above n 76, 2124 [38].

129 Ibid 2122–6.

130 Ibid 2123 [35]. See also the *travaux* to the *UN Charter*, especially *UNCIO XIII*, 602, 686.

131 See *Al-Jedda (HL)* [2008] AC 332, 351–5 [31]–[39] (Lord Bingham).

Member States, as is indicated in the surveys of practice by Lord Bingham in the House of Lords' *Al-Jedda* decision and by Simma et al.[132]

2 *Two Possible Applications of Article 103 in* Al-Waheed

Applying the prevailing, broader view of art 103, there is an apparent 'conflict' between the authorisations in the relevant SCRs to detain where necessary for imperative reasons of security and the ordinary meaning of *ECHR* art 5.1. That gives rise to two options, either of which would have yielded effectively the same result in *Al-Waheed* by a more persuasive route.

First, having acknowledged that art 103 might be engaged, the Court in *Al-Waheed* could have interpreted *ECHR* art 5 in light of that possibility. That is, the majority could have strengthened their existing interpretation of *ECHR* art 5, which relied solely on extending *Hassan*, by reference to the stronger interpretive imperative that operates once art 103 has the potential to apply. That imperative is simply a specific manifestation of the principle of systemic integration: where there is potential conflict between a 'hierarchically superior norm' and another norm of international law, all efforts must be made to interpret the *latter* in accordance with the former, to preserve the latter's effectiveness if at all possible.[133] Article 103, as a provision of last resort, thus only applies if no interpretation of the latter, which would harmonise it with the former, is possible.[134] Here, the superior norms are the Security Council authorisations, pursuant to *UN Charter* arts 25 and 103, and the 'latter' norm is *ECHR* art 5.

Second, and in the alternative, the Court in *Al-Waheed* could simply have accepted that there was a genuine conflict, which could not be resolved by interpretation and harmonisation, and applied art 103.[135] Applying art 103 would only displace or suspend *ECHR* art 5.1 to the extent of the inconsistency:[136] that is, the requirements that the detention be lawful, non-arbitrary, and conform to procedural safeguards could all still apply, with the only displacement being the restriction of permissible detention to one of the six circumstances in sub-paragraphs (a)–(f). Essentially, that is the same result as the majority in *Al-Waheed* reached by applying *Hassan*. However, the outcome has a much stronger justification because it does not rely on an interpretation of *ECHR* art 5 that arguably pushes the boundaries of systemic integration beyond their limit.

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[132] Ibid; Leiæ and Paulus, above n 76, 2125–6. See also the discussion of the first instance *Al-Jedda* judgment (*R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) (12 August 2005)) in *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 171–2 [336]–[338].

[133] *ILC Fragmentation Conclusions*, UN Doc A/61/10, 423 [251] ((41) 'The operation and effect of jus cogens norms and Article 103 of the Charter').

[134] Leiæ and Paulus, above n 76, 2114 [3], 2120 [21].

[135] See Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37(3) *George Washington International Law Review* 573, 640. See also *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 27 [42].

[136] Higgins et al, above n 84, 427–8 [12.32], citing the *travaux* to the *UN Charter* (*UNCIO XIII*, 602, 685); *ILC Fragmentation Conclusions*, UN Doc A/61/10, 423 [251] ((41) 'The operation and effect of *jus cogens* norms and Article 103 of the Charter'); *ILC Fragmentation Report*, UN Doc A/CN.4/L.682, 170 [333].

Therefore, by squarely addressing the eminent relevance of *UN Charter* art 103 in *Al-Waheed*, the Court could either have used the threat of the article to strengthen an otherwise relatively implausible interpretation of *ECHR* art 5, or could have displaced *ECHR* art 5 to the extent of its inconsistency with the operative SCRs. Irrespective of which of those paths the Court took, it would have thereby reaffirmed the unity and coherence of the *UN Charter* system of international law, clarified the uncertain scope of art 103, and more fully justified the outcome of the case.

V Conclusion

The UK Supreme Court's decision in *Al-Waheed* underlines the uncertainty surrounding the interaction between SCRs and international human rights law. Located at the interface between potentially conflicting international instruments, the decision compels consideration of how best to resolve interpretive conflicts in an increasingly fragmented 'system' of international law.

This case note has argued that the *Al-Waheed* majority's interpretation of the SCRs with respect to Iraq and Afghanistan is correct, but would have benefited from more integration of fundamental principles of human rights law and a clearer interpretive framework. Similarly, while the majority pragmatically adapted *ECHR* art 5 to the circumstances of armed conflict, they cautiously avoided the pivotal significance of *UN Charter* art 103. The majority thereby missed the opportunity to reassert the preferable, broad view of art 103 and strengthen their analysis of the interaction between the SCRs and *ECHR*.

The two crucial questions for the Court in *Al-Waheed* both turned ultimately on the power of, and limits to, the principle of systemic integration. The potential applications of systemic integration in relation to SCRs are rarely considered. More frequently, SCRs are seen as giving rise to relationships of conflict, rather than of interpretation. The decision in *Al-Waheed* suggests new possibilities for coherent, practical interpretations of international legal instruments: interpretations of SCRs that take account of fundamental, universal principles of human rights law; and interpretations of human rights treaties that recognise the primacy afforded to the Security Council in maintaining international peace and security.