

CASE NOTE

R (ON THE APPLICATION OF AL-JEDDA) v SECRETARY OF STATE FOR DEFENCE*

HUMAN RIGHTS IN A MULTI-LEVEL SYSTEM OF GOVERNANCE AND THE INTERNMENT OF SUSPECTED TERRORISTS

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I INTRODUCTION

The process of globalisation has seen not only traditional actors bearing responsibility for the conduct of foreign relations, but also, increasingly, the judiciary. To a growing extent, domestic judges in all parts of the world are called upon to adjudicate disputes with transnational implications, some of which require the exercise of extraterritorial jurisdiction and determinations upon matters which have occurred in other countries. However, difficulties continue to plague such decisions¹ as, inevitably, the factual and legal issues addressed in these cases will be more removed from the daily practice of domestic judges, leaving greater potential for poorly decided and unsatisfactory judicial decisions.

The application of the *Alien Tort Claims Act 1789*² by the courts of the United States provides an example: in proceedings under this Act, the conduct of foreign state authorities is regularly scrutinised with a fair degree of self-righteousness while US courts are generally considerably more reluctant to assess acts of US

* [2008] 1 AC 332 (‘*Al-Jedda*’).

¹ See Christian Tomuschat, ‘Foreign Policy Issues before Domestic Courts: The Rule of Law under Challenge’ in Hanspeter Neuhold, August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations — Liber Amicorum Hanspeter Neuhold* (2007) 415.

² 28 USC § 1350 (2006).

authorities by the same yardstick.³ But even when the courts of a particular country have to assess the conduct of their own state organs acting abroad they can encounter serious difficulties. Such was the case in the House of Lords' decision of *Al-Jedda*, in which the applicant — a dual national with both British and Iraqi citizenship — had been detained in Iraq by British armed forces. The applicant, Hilal Abdul-Razzaq Ali Al-Jedda, was arrested by US soldiers on 10 October 2004 and immediately handed over to British forces, who detained him without charge or trial.⁴ Subsequently, Mr Al-Jedda brought a claim under art 5(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*').⁵ The Secretary of State for Defence argued that the *European Convention on Human Rights* obligations were qualified by Security Council *Resolution 1546*⁶ which authorised the UK's presence in Iraq.⁷

Although the century of the great wars lies behind us, military interventions on foreign territory have not ceased, as the situation in *Al-Jedda* and the war in Iraq more generally demonstrate. Indeed, within the system of collective security established by the United Nations and regional organisations, member states are, with increasing frequency, requested to contribute military forces and civil personnel to peace and security operations in countries where public order has broken down or which are otherwise in dire need of outside assistance. The critical question that arises from such situations — and the key question faced by the House of Lords in *Al-Jedda* — is by which legal rules peacekeeping forces are bound. If an operation has been planned well ahead of its actual commencement, and if the host state is willing, a status of forces agreement may be concluded. In other circumstances, such as in the latest Iraq conflict, sufficient time for careful appraisal and the consent of the host state may be lacking. In any event, several questions may arise: first, whether principles of national constitutional law are required to be observed abroad; second, to what extent ordinary national laws operate extraterritorially; third, whether international conventions are binding solely on the state party's national territory or whether their obligations pursue state organs wherever they may be acting; and fourth, where several international obligations conflict, which obligation should prevail.

In the case commented upon here, the House of Lords confined itself to the third and fourth questions and only examined the legal requirements deriving from art 5(1) of the *European Convention on Human Rights*⁸ and from art 103 of the *Charter of the United Nations*. The first and second questions could be avoided as the British constitutional system has not developed any general rules

³ See *Sosa v Alvarez-Machain*, 542 US 692 (2004) ('*Alvarez-Machain*'), where the Supreme Court controversially interpreted the *Federal Tort Claims Act*, 28 USC § 1346 (2006) to exclude liability of US authorities for actions or injuries which took place in a foreign country.

⁴ *Al-Jedda* [2008] 1 AC 332, 374.

⁵ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 2 June 1952). The appellant claimed his detention violated the *Human Rights Act 1998* (incorporating art 5(1) of the *European Convention on Human Rights*), and also his rights under the English common law: *ibid* 337.

⁶ SC Res 1546, UN SCOR, 59th sess, 4987th mtg, UN Doc S/RES/1546 (8 June 2004).

⁷ *Al-Jedda* [2008] 1 AC 332, 337–8.

⁸ Above n 5. Article 5(1) provides that everybody has the right to liberty and security of person.

determining whether and to what extent the rights and freedoms existing under British law must be observed by British authorities when they act outside the United Kingdom.⁹

This case note is divided into two parts. First, it compares the House of Lords' reasoning in *Al-Jedda* on the question of the legal responsibility for the acts of the British armed forces with earlier jurisprudence on this issue in the context of Kosovo, and finds that the majority of the Law Lords were correct in establishing that the UK bore responsibility for Mr Al-Jedda's detention. The second part discusses the more pivotal issue — the Law Lords' decision to absolve the British Government of responsibility on the grounds that the UK was merely following UN Security Council resolutions which, by virtue of art 103 of the *UN Charter* (providing that obligations under the *UN Charter* prevail over other international agreements), take priority over the *European Convention on Human Rights*. The House of Lords' decision not only fails to make out an inconsistency between the *European Convention on Human Rights* and the Security Council resolutions in this case (as required to enliven art 103), but also adopts an interpretation of art 103 that runs counter to the underlying philosophy of the human rights system — a point made clear by considering the decision's consequences for European Union law.¹⁰

II THE LAW OF INTERNATIONAL LEGAL RESPONSIBILITY

A *Effective Control*

The first hurdle to Al-Jedda's claim was the British Government's argument that it held no responsibility in international law for the actions of its personnel in Iraq. In the Government's view, those personnel were in fact acting under the auspices and direction of the UN.

When discussing the issue of international responsibility raised by *Al-Jedda*, the *Draft Articles on Responsibility of International Organizations* of the International Law Commission ('ILC') are a good point of departure.¹¹ Lord Bingham of Cornhill refers to the *Draft Articles* at the beginning of his opinion.¹² In the ILC's most recent report, when a state places one of its organisational units at the disposal of an international organisation, the acts of that unit shall be considered acts of the relevant organisation if the latter 'exercises effective control over that conduct'.¹³ This test of 'effective control' is a reformulation of the test used in instances where a state cooperates in a similar fashion with another state.¹⁴ However self-evident this formula may seem at first glance, it

⁹ The only related issue to be addressed was whether the *Human Rights Act 1998* (UK) has the same extraterritorial effect as the *European Convention on Human Rights* itself.

¹⁰ See below Part IV.

¹¹ As contained in International Law Commission ('ILC'), *Report of the International Law Commission Sixtieth Session*, UN Doc A/63/10 (8 August 2008) 249 ('*Draft Articles*').

¹² *Al-Jedda* [2008] 1 AC 332, 338–9.

¹³ *Draft Articles*, above n 11, 264.

¹⁴ See the ILC articles on *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 6th Comm, 56th sess, 85th plen mtg, Agenda Item 162, UN Doc A/RES/56/83 (28 January 2002) art 6, where emphasis is placed on the organ 'acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed'.

has evinced certain weaknesses in relation to operations where the Security Council exercises its powers under Chapter VII of the *UN Charter*. Since agreements provided for in art 43 of the *UN Charter* between the Security Council and UN Member States for the maintenance of international peace and security have never been concluded, the Security Council has needed to appeal directly to the members of the international community whenever it has wished to take action under Chapter VII. Therefore, one can rarely, if ever, draw any watertight conclusion as to the degree of ‘effective control’ vested in the Security Council. As a general proposition, when the Security Council confines itself to ‘authorising’ an armed operation undertaken by national armed forces acting collectively, without reserving to itself any function of direction, that ‘effective control’ is lacking.¹⁵ Conversely, the Security Council may be so tightly involved in the activities endorsed by it that the operation concerned may become legally attributable to the UN.¹⁶

B The ‘Authorisation’ or ‘Delegation’ Test

The judgment in *Al-Jedda* revolves partly around this test of ‘effective control’ and the case law developed on this question by the European Court of Human Rights in the *Behrami and Saramati* case.¹⁷ Reliance on European Court of Human Rights jurisprudence was necessary since in the House of Lords’ earlier decision in the *Al-Skeini* case¹⁸ the possible impact of the Security Council resolutions in absolving the UK of responsibility did not arise.¹⁹ The *Behrami* and *Saramati* cases both concerned Kosovan applicants in the context of NATO’s intervention in the former Yugoslavia in 1999. In the former case, Mr Agir Behrami was the father of two children who came across an unexploded cluster munition. When the bomb subsequently detonated, one of his children was killed and the other was wounded. In the latter case, Mr Ruzhdi Saramati was detained by UN Mission in Kosovo (‘UNMIK’) police officers. The applicants claimed breaches of arts 2 and 5 of the *European Convention on Human Rights* respectively.²⁰ The relevant determination by the Security Council in these claims, *Resolution 1244* of 10 June 1999,²¹ did not sufficiently specify where responsibility lay for acts performed by the Kosovo Force (‘KFOR’), the ‘military presence’ and one of the two entities established to run the public affairs of Kosovo for an interim period. Accordingly, inferences had to be drawn from general peacekeeping and state-building structures established in Kosovo.²² According to the European Court of Human Rights, ‘ultimate authority and control’ in Kosovo was held neither by KFOR, NATO (which was invested only

¹⁵ A prominent example is provided by *Resolution 687* which authorised the nations assisting Kuwait to take all necessary measures for the liberation of that country: SC Res 687, UN SCOR, 46th sess, 2981st mtg, UN Doc S/RES/687 (3 April 1991).

¹⁶ See the discussion of the UN Mission in Kosovo, below Part III(A).

¹⁷ *Behrami v France and Saramati v France, Germany and Norway* (2007) 45 EHRR SE10, [83] (‘*Behrami and Saramati*’).

¹⁸ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (‘*Al-Skeini*’).

¹⁹ *Behrami and Saramati* (2007) 45 EHRR SE10.

²⁰ Above n 5. Article 2 guarantees a person’s right to life and art 5 guarantees a person’s right to liberty and security.

²¹ SC Res 1244, UN SCOR, 54th sess, 4011th mtg, UN Doc S/RES/1244 (10 June 1999).

²² *Behrami and Saramati* (2007) 45 EHRR SE10, [134].

with ‘operational command’), nor by the troop-contributing countries, but by the UN Security Council itself.²³ The Court relied to a large extent on the distinction between a simple ‘authorisation’, which would not impose legal responsibility on the UN, and a ‘delegation’ of powers, for which the UN would retain responsibility for the acts of the military forces.²⁴ In the Court’s view, such a ‘delegation’ had occurred in Kosovo, notwithstanding that this term did not appear in *Resolution 1244* itself.²⁵ As a corollary, the acts of the states exercising this delegation of powers could be directly attributable to the UN itself.²⁶

The result reached by the European Court of Human Rights in *Behrami and Saramati* is laudable. In principle, it acknowledges the rule that a state or international organisation cannot simply absolve itself of accountability by delegating sovereign powers to an international or supranational organisation.²⁷ However, the test also acknowledges the time-honoured maxim *impossibilia nulla obligatio*, that no subject of international law can be required to perform duties which, on factual or legal grounds, it cannot fulfil. Such a situation can often arise in a multi-level system of governance that has been brought about by military intervention.²⁸ This is due to the limitations and delineation of powers between the host state and the peacekeeping or occupying forces and between nations contributing forces under the banner of an international organisation.

Furthermore, the test in *Behrami and Saramati* reconciles this admission with an understanding that an entity that has transferred powers to an international or supranational organisation should be held legally responsible for consenting to such restrictions of its original sovereign rights. This is consistent with existing European jurisprudence such as the *Solange* decisions of the German Constitutional Court²⁹ and the judgment of the European Court of Human Rights in the *Bosphorus* case,³⁰ both of which clarified that a European system to which states cede powers must guarantee at least *some* basic and enforceable standards of legal protection.³¹ Ceding power to the UN, however, as arguably occurred in Iraq, is more complex, as enforceable remedies against the UN are more difficult to determine. This is partly because the *UN Charter* was shaped by political forces and not by concepts like the rule of law;³² nor was it envisaged in 1945

²³ Ibid [140]–[141].

²⁴ Ibid [43], [129]–[130].

²⁵ Ibid [43], [129].

²⁶ Ibid [29], [121], [141].

²⁷ Ibid [141].

²⁸ Ibid.

²⁹ *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1974] BVerfGE 37, 271 (*‘Solange I’*); *Wünsche Handelsgesellschaft* [1987] 73 BVerfGE 73, 339 (*‘Solange II’*). The first decision allowed German courts to review all European Communities (‘EC’) law; the second concluded that German courts only needed to review EC laws which did not guarantee the same human rights as the *Grundgesetz für die Bundesrepublik Deutschland* (1949) (*Basic Law for the Federal Republic of Germany* (1949)).

³⁰ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1 (*‘Bosphorus’*).

³¹ Ibid [122]–[127].

³² But see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* [1998] ICJ Rep 9.

that individuals would one day directly target the UN instead of relying on its members' governmental powers.³³

No matter how desirable it may be to introduce a stricter UN-based human rights enforcement mechanism, such efforts are unlikely to materialise in the short term. In some instances, compromise solutions must be accepted, but the point remains that domestic courts should be reluctant to readily exclude domestic or regional human rights remedies.

Thus, the distinction between 'delegation' and 'authorisation' in determining legal responsibility is consistent with existing jurisprudence. The underlying reasoning in *Behrami and Saramati*, however, is unfortunate in that it fails to identify any criteria that explain the distinction between 'delegation' and 'authorisation'.³⁴

C International Responsibility in *Behrami* and *Saramati*

It was of course tempting to apply the new classification of 'delegation', as opposed to 'authorisation', in the *Al-Jedda* case, and indeed the Secretary of State for Defence argued this point vigorously. In the absence of specific guidance in the text of *Resolution 1546*,³⁵ which was couched in similar terms to *Resolution 1244* authorising the intervention in Kosovo,³⁶ the House of Lords' inquiry extended to a broad view of operations in Iraq, including examining the objectives pursued by the UN in Iraq as compared to Kosovo.

No doubts could be entertained as far as Kosovo is concerned as to whether the UN mandate constituted a delegation. KFOR did not arrive in Kosovo before *Resolution 1244*, but rather pursuant to this Resolution. The forces were entrusted with implementing a carefully conceived and deliberate line of policy devised by the Security Council. *Resolution 1244* reflects a will to assume full responsibility for the Serbian province, leaving Serbia only an abstract, naked right of sovereignty.³⁷ From the very outset, the option of separating Kosovo from Serbia was on the table, and yet no democratic entity stood ready to assume governmental power. A Kosovar people could not exist since Kosovo was still formally a Serbian province. Kosovo was therefore in a state of limbo. Accordingly, alongside KFOR, UNMIK was entrusted with discharging governmental functions. It was thus understandable that the Court in *Behrami and Saramati* found that the administration of Kosovo became a genuine UN project, notwithstanding the relative degree of autonomy enjoyed by KFOR under the Security Council's delegation of power.³⁸

³³ See, eg, *Behrami and Saramati* (2007) 45 EHRR SE10.

³⁴ *Ibid* [129].

³⁵ Above n 6.

³⁶ Above n 21.

³⁷ *Ibid* [10], Annex 1 (*Statement by the Chairman on the Conclusion of the Meeting of the G-8 Foreign Ministers Held at the Petersberg Centre on 6 May 1999*).

³⁸ This general context was insufficiently examined by the European Court of Human Rights in *Behrami and Saramati* (2007) 45 EHRR SE10, [142]–[143].

III INTERNATIONAL RESPONSIBILITY IN IRAQ

A *Comparing the Texts of the Resolutions*

The British presence in Iraq relevant to *Al-Jedda* has a different history, one which does not at all support the British Government's suggestion that the UN had delegated its responsibility and thus had 'effective control' over the occupying forces. First, and most importantly, it is a matter of public knowledge that the invasion by the coalition forces on 20 March 2003 had no support from the Security Council.³⁹ Second, there is near unanimity amongst international legal scholars that the invasion amounted to a violation of art 2(4) of the *UN Charter*.⁴⁰ The UN only recognised the occupation once the coalition forces decided that it would be politically useful to obtain legal backing, or at least international legitimacy, for their occupation of Iraq.⁴¹

Yet it is difficult to establish how any of the UN's actions in recognising the situation in Iraq could amount to a 'delegation' of its authority; nor is there any evidence that these actions resulted in UN control over the coalition forces. *Resolution 1483* of 22 May 2003⁴² recognised the coalition force as an occupying power and called upon it to respect its obligations under international law.⁴³ It also provided for the appointment of a Special Representative who was not entrusted with any power of supervision regarding the coalition forces. The UN Assistance Mission in Iraq ('UNAMI'), set up by *Resolution 1500* of 14 August 2003,⁴⁴ was to operate alongside the coalition force, but had no power of command or direction. A decisive further step was taken by the adoption of *Resolution 1511* of 16 October 2003,⁴⁵ which 'authorize[d] a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq'.⁴⁶ Yet it remained the case that no effective mechanism of control and supervision was established; the Resolution confined itself to simply requesting the US, on behalf of the multinational force, to 'report to the Security Council on the efforts and progress of this force as appropriate'.⁴⁷

The last of the pertinent determinations of the Security Council was *Resolution 1546* of 8 June 2004, which defined the legal regime in force at the time when the appellant, Mr Al-Jedda, was arrested.⁴⁸ This resolution explicitly

³⁹ In February 2003, Secretary of State Colin Powell made the case for an invasion of Iraq at the UN. However, due to a lack of support for the proposed invasion, the US withdrew its resolution: Associated Press, 'US, Britain and Spain Withdraw UN Resolution on Iraq', *The Seattle Times* (Seattle, US) 17 March 2003 <<http://community.seattletimes.nwsource.com/archive/?date=20030317&slug=webiraq17>> at 23 September 2008.

⁴⁰ See, eg, International Commission of Jurists, 'This Illegal War Must Be Conducted Lawfully' (Press Release, 20 March 2003) <<http://www.icj.org/IMG/pdf/doc-80.pdf>> at 23 September 2008.

⁴¹ *Resolution 1483*, SC Res 1483, UN SCOR, 58th sess, 4761st mtg, UN Doc S/RES/1483 (22 May 2003) 2.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ SC Res 1500, UN SCOR, 58th sess, 4808th mtg, UN Doc S/RES/1500 (14 August 2003).

⁴⁵ SC Res 1511, UN SCOR, 58th sess, 4844th mtg, UN Doc S/RES/1511 (16 October 2003).

⁴⁶ *Ibid* 3 (emphasis added).

⁴⁷ *Ibid* 4.

⁴⁸ *Resolution 1546*, above n 6, 2–7.

assigned the multinational force, in addition to the duties of maintaining security and stability in Iraq, with responsibility to prevent and deter terrorism.⁴⁹ Little, however, can be gleaned from the text of the Resolution on the relationship between the multinational force and the Security Council to determine whether this relationship was one of ‘delegation’ or ‘control’. The emphasis of *Resolution 1546* is instead on the democratic rights of the Iraqi people to freely determine their political future, a point underlined by the Resolution’s insistence that the continuing presence of the multinational force was at the request of the incoming Interim Government of Iraq.⁵⁰ Finally, the status of UNAMI was clarified by the Resolution as purely accessory,⁵¹ so that the UN force never attained the powers assigned to UNMIK. Accordingly, in contradistinction to what had earlier happened in Kosovo, the UN did not purport to assume overall responsibility over Iraq. The multinational force was placed under its own command centre, the Coalition Provisional Authority (‘CPA’), and the Security Council never gave orders or instructions to the multinational force.

B *An Examination of Governance Structures in Iraq*

The Security Council Resolutions shed little light on the question of whether the UN had ‘effective control’ over the multinational force in Iraq. However, even if one disagrees with this assessment of the Security Council Resolutions outlined above, the differences between the *Behrami and Saramati* case and the *Al-Jedda* case are clear simply from their respective factual backgrounds. Mr Al-Jedda was continually in the custody of British troops: no other troop contingent or member of such a contingent had anything to do with his fate. In this regard, the *Al-Jedda* case is more akin to the *Al-Skeini* case regarding Baha Mousa,⁵² who died from mistreatment while being held a prisoner in a British military detention unit, than to Mr Saramati’s situation, in which his arrest had been ordered by KFOR High Command.⁵³ In the latter case, the Commander of KFOR at the relevant time was a Norwegian General but the arrest had been carried out either by members of a French unit or, as the applicant had originally contended, by soldiers of German nationality. In any event, since KFOR had acted as an integrated whole in its arrest of Mr Saramati, any attempt to single out one state’s personnel as legally responsible for his arrest would have seemed arbitrary and artificial. It would have been almost absurd to make Norway accountable for the detention of Mr Saramati, given that the Norwegian Commander of KFOR did not exercise the sovereign authority of his country but rather discharged specific organisational duties within KFOR. Thus, the conduct of KFOR could not possibly be perceived as a conglomerate of individual sovereign acts with particularised and segmented responsibility. Rather, one can only conclude that the UN was responsible.

In conclusion, although the wording of *Resolutions 1244* and *1546* concerning the military component of the operation is largely similar, a broad examination of governmental structures — the inquiry which the European Court of Human

⁴⁹ Ibid 4.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *Al-Skeini* [2008] 1 AC 153, 178.

⁵³ *Behrami and Saramati* (2007) 45 EHRR SE10, [9].

Rights adopted in the Kosovo case — suggests the decision in *Behrami and Saramati* regarding the UN's responsibility for the military forces in Kosovo should not be followed in the Iraqi situation. Kosovo was indeed a genuine project of the international community,⁵⁴ while Iraq was placed under UN authority only to a limited extent, primarily with a view to conferring a degree of legitimacy and credibility on the multinational force. No doubt was left as to the determinative authority of the US in all military matters.⁵⁵ Consequently, there are few, if any, elements that might be deemed to indicate that the UN ever held 'effective control' over the multinational force deployed in Iraq.

C Responsibility in Multi-Level Systems of Governance

It is extremely difficult to make a general statement on the specific factors demonstrating where the 'control' of a collective military operation lies. There ought to be a high threshold for excluding the jurisdiction of states, which are more likely to have a comprehensive human rights system than international organisations; sufferers of human rights abuses should not be denied a remedy merely because of the number of actors bearing potential responsibility for a particular situation. Multi-level systems of governance generally tend to dilute the distinct framework of accountability which normally prevails in a state governed by the rule of law, as the relevant actors are quite naturally tempted to point their fingers at the other actors involved. If accountability can be shifted from the state of nationality of the wrongdoer to an international organisation too readily, many victims will be denied reparation simply because of the lack of appropriate remedies available. The UN enjoys legal immunity under the *Convention on the Privileges and Immunities of the United Nations*;⁵⁶ likewise, NATO has no comprehensive system of reparations for individuals suffering injury from its operations.⁵⁷ More generally, status of forces agreements also often frustrate attempts to obtain a remedy for human rights violations. Thus, where a fully-fledged system guaranteeing human rights and fundamental freedoms — such as the *European Convention on Human Rights* — does exist, its applicability should not be set aside lightly; the threshold for determining that

⁵⁴ KFOR was initially composed of approximately 50 000 personnel from NATO member countries, partner countries and non-NATO countries under unified command and control. Currently, KFOR is composed of 15 900 personnel from 34 NATO and non-NATO countries: NATO, *KFOR Contributing Nations and Troop Numbers* (2008) <http://www.nato.int/kfor/structur/nations/placemap/kfor_placemap.pdf> at 23 September 2008.

⁵⁵ The CPA governed Iraq from April 2003 until it became a sovereign nation on 30 June 2004. The CPA had responsibility for security, essential services, economy and governance: CPA, *The Coalition Provisional Authority* (2006) <<http://www.cpa-iraq.org>> at 23 September 2008.

⁵⁶ Opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946). Rightly, this immunity was respected by the judgment of the Rechtbank Den Haag in its judgment of 10 July 2008, regarding the genocide perpetrated by Bosnian Serb forces in July 1995, *The Association of Citizens Mothers of Srebrenica v The Netherlands and the UN (Incidental Proceedings)* Case No (Zaaknummer) 295247/HA ZA 07-2973 (District Court in the Hague, Netherlands, 10 July 2008) [5.16]–[5.27], available from <<http://zoeken.rechtspraak.nl/default.aspx>> at 23 September 2008.

⁵⁷ But see *Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces*, opened for signature 19 June 1951, 199 UNTS 67, art VIII (entered into force 23 August 1953).

an international organisation has ‘effective control’ over an operation ought to be high. Indeed, a clear assessment is often possible only in a negative sense — when it is clear from the very outset (as it was in the *Al-Jedda* case) that the international organisation involved did not even *purport* to exercise control over the military operations.

IV CONFLICT BETWEEN SECURITY COUNCIL RESOLUTIONS AND HUMAN RIGHTS OBLIGATIONS?

It is hardly surprising that four of the five Law Lords did not accept the analogy between the Kosovo situation and the circumstances prevailing in Iraq. Lord Bingham of Cornhill persuasively argued that the purported analogy broke down ‘at almost every point’.⁵⁸ By contrast, the tremendous effort by Lord Rodger of Earlsferry to show that the situations in Kosovo and in Iraq were essentially similar appears unconvincing, above all because his Lordship focuses almost exclusively on the applicable legal texts without taking into consideration the different factual contexts.⁵⁹ For Lord Rodger, the coincidence of wording between *Resolution 1244*, on the one hand, and *Resolution 1511*, on the other, was the decisive factor.⁶⁰

Although four of the five Law Lords rightly found that the arrest and detention of Mr Al-Jedda could not possibly be imputed to the UN,⁶¹ contrary to what the Strasbourg Court had determined in the *Behrami and Saramati* decision, the House of Lords nonetheless spared the British Government a finding that it had breached art 5(1) of the *European Convention on Human Rights*.⁶² The Law Lords, led by Lord Bingham of Cornhill, relied upon the argument that the multinational force, and hence also the British forces, were obliged to ensure security and order in Iraq under the relevant resolutions of the Security Council.⁶³ Internment was one of the authorised measures.⁶⁴ Given the precedence which the *UN Charter* has over all other conventional international obligations,⁶⁵ the House of Lords held that Security Council resolutions must prevail over the *European Convention on Human Rights*.⁶⁶ Notwithstanding the artful discussion of this assumed conflict between two international commitments of different rank, it appears that the main concern of the Law Lords was to circumvent the stumbling block posed by the absence of a provision allowing for administrative detention of a person suspected of being involved in terrorist activities in the limitation clause of art 5 of the *European Convention on Human Rights*.

It is quite difficult to follow the reasoning of Lord Bingham of Cornhill in explaining this ‘conflict’ between the Security Council resolutions and the UK’s

⁵⁸ *Al-Jedda* [2008] 1 AC 332, 349.

⁵⁹ *Ibid* 355–74.

⁶⁰ *Ibid* 366–7.

⁶¹ *Ibid* 334.

⁶² *Ibid* 355.

⁶³ *Ibid* 342–5.

⁶⁴ *Ibid* 351. Of course, in the *Al-Skeini* case it could not be maintained that to put a person to death was a measure enjoined by the Security Council.

⁶⁵ *UN Charter* art 103.

⁶⁶ *Al-Jedda* [2008] 1 AC 332, 374.

obligations deriving from the *European Convention on Human Rights*, a conflict also discerned by his colleagues.⁶⁷ To be sure, the multinational force was mandated under *Resolution 1546* to ‘contribute to the maintenance of security and stability in Iraq’.⁶⁸ But no specific instructions had been imparted by the Security Council as to the manner in which that responsibility had to be implemented. Thus, although the UK was certainly *authorised* to take action for such purpose, it is hardly convincing that detention was legally *required*. The resolutions issued by the Security Council on the situation in Iraq merely set out general objectives,⁶⁹ leaving enough leeway for action in conformity with human rights standards. To be sure, the word ‘internment’ is mentioned as a necessary security measure in the letter of 5 June 2004 written by US Secretary of State Colin Powell,⁷⁰ which was attached to *Resolution 1546*. However, this term must not be taken as a blanket authorisation. The Resolution itself does not explicitly refer to internment in the relevant clause.⁷¹ Accordingly, the Security Council was far from enjoining the multinational force to rely on internment as one of its security devices. At most, the specific mentioning of ‘internment’ in the letter of Secretary of State Powell may be interpreted as a hint that internment is an available option to be weighed against human rights obligations. In any event, the alleged conflict between a duty to intern, on the one hand, and respect for the guarantee contained in art 5(1) of the *European Convention on Human Rights*, on the other, has not even been made plausible.

Therefore, one remains utterly unconvinced that in this case art 103 of the *UN Charter* pushes aside the freedom protected under art 5(1) of the *European Convention on Human Rights*. Obviously, British forces had a large measure of discretion. Above all, because Mr Al-Jedda is a British citizen, he could have been repatriated to the UK where he would not have constituted a threat to the security of Iraq. Unfortunately, no details emerge from the judgment explaining why there was an imperative need to hold Mr Al-Jedda in detention for three years without trial. Lord Bingham of Cornhill simply repeated numerous times that the internment was necessary for ‘imperative reasons of security’.⁷² Only one of the Law Lords, Baroness Hale of Richmond, addressed this line of

⁶⁷ Ibid 350.

⁶⁸ Above n 6, 4.

⁶⁹ *Resolution 1511*, above n 45, 2–4; *Resolution 1546*, above n 6, 2–7; *Resolution 1637*, SC Res 1637, UN SCOR, 60th sess, 5300th mtg, UN Doc S/RES/1637 (11 November 2005) 3; *Resolution 1723*, SC Res 1723, UN SCOR, 61st sess, 5574th mtg, UN Doc S/RES/1723 (28 November 2006) 3.

⁷⁰ *Resolution 1546*, SC Res 1546, UN SCOR, 59th sess, 4987th mtg, UN Doc S/RES/1546 (8 June 2004), annex (*Text of Letters from the Prime Minister of the Interim Government of Iraq Dr Ayad Allawi and United States Secretary of State Colin L Powell to the President of the Council*) 11.

⁷¹ *Resolution 1546*, above n 6, [10].

⁷² *Al-Jedda* [2008] 1 AC 332, 353–5.

reasoning. She stated:

it is not immediately obvious why the prolonged detention of this person in Iraq is necessary, given that any problem he presents in Iraq could be solved by repatriating him to this country ... We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case.⁷³

Nonetheless, her Ladyship joined her colleagues in dismissing the appeal, without explaining why she forwent this line of reasoning. Thus, her opinion remains somewhat enigmatic.

One cannot help feeling discomfited by the opinions expressed by the Law Lords. On the one hand, it is a general principle of international law that states must take responsibility for peace and security within their territories. On the other hand, the famous 'responsibility to protect' doctrine, articulated by the General Assembly in the *2005 World Summit Outcome*,⁷⁴ can be traced back to the *UN Charter* with its general recognition of human rights and fundamental freedoms.⁷⁵ To raise any act performed in the discharge of these responsibilities above the level of other more specific human rights obligations perverts the concept of human rights and the responsibility to protect. The clause enunciated in art 103 of the *UN Charter* was surely not created with a view to subverting obligations with which states are generally burdened under customary international law as well as under the numerous human rights treaties at universal or regional level.

For this reason, the *Al-Jedda* decision sets an undesirable precedent within the field of EC and EU law. It is a basic principle of that law, established by the European Court of Justice many decades ago in *Costa v ENEL*,⁷⁶ that EC and EU law enjoys primacy over domestic law. The logic adopted by the House of Lords in *Al-Jedda* suggests that human rights considerations can play no role in the pursuit of a specific aim set by EC or EU law, either by treaty or by an act of secondary legislation, in particular a directive. Yet this conclusion is clearly incorrect. States cannot divest themselves of their obligations under the *European Convention on Human Rights* by joining the EU. When discharging their duties within the EU, they must at the same time comply with their obligations under the *European Convention on Human Rights*.⁷⁷ Admittedly, there may be rare instances where a conflict between two contradictory requirements must be acknowledged. *Yusuf and Al Barakaat International Foundation v Council and Commission*⁷⁸ and *Kadi v Council and Commission*,⁷⁹

⁷³ Ibid 377.

⁷⁴ GA Res 60/1, UN GAOR, 60th sess, 8th plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/1 (16 September 2005) 30.

⁷⁵ *UN Charter* arts 1(3), 55, 56, 68, 76.

⁷⁶ *Flaminio Costa v Ente Nazionale per l'Energia Elettrica* [1964] ECR 585, 593 ('*Costa v ENEL*').

⁷⁷ EU states have an obligation to respect the *European Convention on Human Rights* in implementing EU law, which has been further reinforced by the accession of the EU to the *European Convention on Human Rights*: Council of Europe, *EU Accession to the European Convention on Human Rights* (2008) <http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp> at 23 September 2008.

⁷⁸ (T-306/01) [2005] ECR II-3533.

adjudicated by the Court of First Instance of the European Communities and, at August 2008, still pending before the Court itself (although Advocate-General Maduro delivered his opinion in January 2008) provide an illustrative example of such a conflict. The persons concerned had been identified by name through a decision of the Security Council Sanctions Committee.⁸⁰ It was clear in the circumstances that the Security Council wished to target those individuals who figured on the lists attached to the relevant resolutions.⁸¹ Yet even so, the Court of First Instance held that the Security Council was bound to respect the minimum applicable rules of *jus cogens*.⁸² Going further, Advocate General Maduro took the view that the entire array of human rights guarantees applicable within the European legal order was to be upheld by the judicial bodies of the EC, without bowing to the superior authority of the Security Council.⁸³ No trace of such considerations can be found in the judgment in *Al-Jedda*.

V CONCLUSION

The judgment in *Al-Jedda* is, to put it mildly, problematic. The Law Lords noted an apparent inconsistency between the Security Council's authorisation for the UK to prevent terrorism in Iraq and the *European Convention on Human Rights* obligations, and relied on art 103 of the *UN Charter* to determine that the Security Council resolutions prevailed.⁸⁴ Yet there was no evidence that the permanent internment of the appellant was 'imperative' for reasons of security.⁸⁵ Is it legally conceivable that a suspect can remain in custody for years without ever being charged with a criminal offence simply because intelligence refers to him as 'dangerous'?⁸⁶ Indeed, within domestic law, the House of Lords had earlier shown a much greater awareness of the lethal threat to human rights posed by administrative internment.⁸⁷ Finally, the House of Lords' interpretation of art 103 of the *UN Charter* to allow the UK to escape its human rights obligations is clearly erroneous and would have disastrous results for international human rights law if applied in the future.

Thus, the judgment is unsatisfying. Lawyers for the appellant would be well-advised to take the case to the European Court of Human Rights. According to the almost unanimous opinion of the Law Lords, which the European Court of

⁷⁹ (T-315/01) [2005] ECR II-3649.

⁸⁰ Sanctions Committee, *Security Council Committee, Established by Resolution 1267 (1999) concerning Afghanistan, Issues Consolidated List* (Press Release, 8 March 2001) UN Doc AFG/131-SC/7028. This list was made pursuant to *Resolution 1267*, SC Res 1267, UN SCOR, 54th sess, 4051st mtg, UN Doc S/RES/1267 (15 October 1999).

⁸¹ Sanctions Committee, above n 80.

⁸² *Yusuf and Al Barakaat International Foundation v Council and Commission* (T-306/01) [2005] ECR II-3533, [281]; *Kadi v Council and Commission* (T-315/01) [2005] ECR II-3649, [230].

⁸³ In a combined judgment on the *Kadi* and *Al Barakaat* cases, the Court essentially followed Advocate Maduro's view, not heeding the supremacy clause of art 103 of the *UN Charter*: *Yassin Abdullah Kadi and Al Barakaat International Foundation* (C-402/05 P, C-415/05 P) (Unreported, Court of Justice of European Communities, 3 September 2008).

⁸⁴ See above Part III(A).

⁸⁵ *Al-Jedda* [2008] 1 AC 332, 377.

⁸⁶ For an extensive discussion, see Alfred de Zayas, 'Human Rights and Indefinite Detention' (2005) 87(857) *International Review of the Red Cross* 15.

⁸⁷ See, eg, *A v Secretary of State for the Home Department* [2005] 2 AC 68.

Human Rights will almost certainly share, Mr Al-Jedda was placed under the jurisdiction of the UK in the sense contemplated by art 1 of the *European Convention on Human Rights*. In *Behrami and Saramati*, the European Court of Human Rights had to assess a totally different factual and legal configuration.

The decision in that case augurs well for Mr Al-Jedda, should he bring a proceeding in Strasbourg.

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