Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2007

Part Three. Judicial decisions on questions relating the United Nations and related intergovernmental organizations

Chapter VIII. Decisions of national tribunals

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Chapter VIII

DECISIONS OF NATIONAL TRIBUNALS

A. The Netherlands

1. *Judgment of the Court of Appeal of The Hague, LJN: BA 2778 (15 March 2007)*[*]

(Extracts)

Privileges and immunities of international organizations—Organization for the Prohibition of Chemical Weapons (OPCW)—Immunity of jurisdiction and from execution granted to OPCW—Headquarter Agreement—Respect of property of OPCW intended to ensure the performance of its official activities—Legal consequences of notification given in breach of the State's obligations under international law—Prevalence of State's interests to perform its obligations under international law over an individual's interests to execute a judgment in his favour

The Facts: X entered the employment of the Organisation for the Prohibition of Chemical Weapons (OPCW) in The Hague as a security guard under a fixed-term contract on 1 March 2001. From 28 May 2005 onwards, however, he no longer performed any work for OPCW. He then served a writ of summons on OPCW before the subdistrict court in The Hague demanding continued payment of his salary. By letter of 31 October 2005 OPCW wrote as follows to the subdistrict court judge: '(. . .) OPCW would like to inform the Court that according to the Headquarters Agreement. Article 4, the OPCW enjoys immunity from any form of legal process in the Netherlands. The OPCW would highly appreciate it if the necessary steps are taken to dismiss this case'. In his default judgment the subdistrict court judge responded as follows: 'The court agrees with what the plaintiff has said about the OPCW's immunity status and its claim to immunity. Taking into account, among other things, the case law cited by the plaintiff, the OPCW has not made clear—or not made sufficiently clear—why it claims immunity in this dispute, which specifically concerns Dutch employment law and in which no diplomatic or similar interests are involved.' The subdistrict court judge then directed the OPCW by default judgment of 7 November 2005, among other things, to continue paying the salary. The judgment was served by a bailiff on the OPCW on 5 December 2005. On 5 January 2006 the Minister of Justice notified the bailiff that the service of the writ and judgment was in conflict with the obligations of the State of the Netherlands under international law and that the performance of such official acts (in so far as not yet performed) should be refused. X then applied to the District Court of The Hague for an interim injunction against the State of the Netherlands ordering it to negate the consequences of the notification of 5 January

[*] Source: *Netherlands Yearbook of International Law* (2008) case law survey No. 3.2113.

2006 by the Minister of Justice. He argued that the notification had been wrongly given. He claimed that the OPCW was not entitled to immunity in so far as these acts were juristic acts under private law. As the subdistrict court judge had held that the OPCW was not entitled to immunity from jurisdiction, it was also not entitled to immunity from execution of the judgment. According to the interim relief judge, there was no need to answer the question of whether service of the writ of summons was in conflict with international law obligations. Only the question of whether service of the judgment was in conflict with these obligations was relevant. According to the interim relief judge, this was the case and he therefore dismissed X's application (judgment of 23 August 2006).[1] X appealed against this judgment to the Court of Appeal of The Hague.

Held: ". . . . 3. X's ground of appeal is that the interim relief judge either wrongly held that the OPCW has immunity from execution of the judgment of the subdistrict court or failed to provide arguments for this. X submits that the interim relief judge wrongly supposed that he (X) was appointed to perform the official activities of the OPCW and that the interim relief judge assumed in the light of the case law of the Supreme Court—albeit wrongly—that the OPCW has immunity from execution.

4. The Court of Appeal notes at the outset that immunity under international law from execution in respect of property (things and patrimonial rights) is intended to ensure that it remains available for the purpose for which it is held, namely the performance of official activities by the State or international organisation concerned. This immunity from execution is, in principle, separate from any immunity from jurisdiction. Under Article 4 (2) of the Headquarters Agreement the OPCW has such immunity from execution in respect of all property and possessions of the OPCW.

5. Article 3a, paragraph 2, of the Bailiffs Act gives the Minister the power to notify a bailiff that an official act which he has been or will be instructed to perform or which he has already performed is in conflict with the obligations of the State under public international law. The State has submitted that one of the legal consequences of such a notification is that official acts already performed are void. The Court of Appeal does not agree with this submission for the time being. The legal consequences of the notification are regulated in paragraphs 5 and 6 of this article. Paragraph 6 concerns official acts already performed at the time of the notification. It is exclusively provided in this connection that if the official act involves service of a writ of seizure, the bailiff should immediately serve the notification, end the seizure and negate the consequences thereof. This in itself means, in the provisional opinion of the Court of Appeal, that the official act is not void. Paragraph 5 concerns official acts that have not yet been performed. It provides that in such circumstances the bailiff is no longer competent to perform the act and that an official act performed in breach of this prohibition is void.

6. As there had still been no seizure at the moment of notification, the Court of Appeal is merely required as interim relief judge to determine whether the prohibition on further execution measures as a consequence of the notification should be lifted. For the time being the Court of Appeal is of the opinion that the further execution of the

[1] *LJN* No. BB1261, NIPR (2007) No. 300. The interim relief judge held, finally, that although the Minister had exercised his power under Article 3a at the request of the OPCW this did not mean that this power had been abused. After all, the Minister had himself assessed the case and come to the conclusion that the notification should be given.

judgment of the subdistrict court would be in conflict with the obligation under international law entered into by the State in the headquarters agreement, which extends to all property and possessions of the OPCW. Unlike X, the Court of Appeal is of the opinion that the notification is not premature because it is not clear how X wishes to proceed with the execution. Under Article 4 (2) of the Headquarters Agreement the State is, after all, obliged to guarantee that the OPCW can make use of its property and possessions without being constrained by any measure of execution. In the provisional opinion of the Court of Appeal, the interests of the State in being able to perform this obligation under international law are so great as to take precedence over X's interest in being able to execute the judgment given in his favour.

7. In view of the above, the ground of appeal fails and the appealed judgment should be upheld. X will therefore be ordered to bear the costs of the State in the appeal proceedings. . . . '

2. Judgment of the Court of Appeal of The Hague, LJN: BC 1757 (17 December 2007)[*]

Prosecution of crime of genocide—Referral by the International Criminal Tribunal for Rwanda (ICTR) to the authorities of the Netherlands—Differentiation between referral of prosecution and referral of execution—Question of original and secondary jurisdiction of national courts—Charter of the United Nations—State's obligations under resolutions of the Security Council—Statute and Rules of Procedure of ICTR—Form of international convention—Interpretation of international treaty—National implementation of international treaty—Retroactivity

Hearings

1. This judgement is rendered as a result of the hearings in the Court of first instance and the hearing on appeal in this Court of Appeal on 3 December 2007.

The Court of Appeal has taken cognizance of the demand of the Advocate-General and of that which has been brought forward by and on behalf of the suspect.

The Advocate-General has moved that the judgement be set aside insofar as it concerns barring the public prosecutor from prosecution of the suspect on count 1 in the summons with case number 09/750007–07.

Charges

2. The charges against the suspect are contained in the initiatory writs of summons and a further description of one of them is laid down in Section 314a of the Code of Criminal Procedure. A copy is attached to this judgement.[**] This Court of Appeal derives the following summary description of the charges which the public prosecutor's office brought against the suspect from the judgement of the Court of first instance.

[*] Translation provided by the Government of the Netherlands and edited by the Secretariat of the United Nations.

[**] Not published herein.

1. The suspect is on trial for involvement in a number of serious offences allegedly committed in Rwanda in April 1994. The charges against the suspect are contained in two writs of summons which will be handled in a joint action.

2. The suspect was summoned for the first time on 21 November 2006 for a pro forma session for case number 09/750009–06. This case was again handled pro forma on 12 February 2007 and 5 March 2007, and also in the session of 11 May 2007, which was continued on 16 and 21 May 2007. This summons contains the following complex of facts:

I. Ambulance murders, namely, the killing of a number of women and children who were being transported in an ambulance;

II. Seventh Day Adventists buildings Mugonero, that is, the killing and/or inflicting (grievous) bodily and/or mental injury on a large group of people who had fled to these buildings;

III. Taking of hostages/ humiliating/ threatening their families [A].

3. The suspect was summoned for the first time on 11 May 2007 for a hearing on case number 09/750007–07 (continued on 16 and 21 May 2007). This second summons contains the following complex of facts:

IV. Rape and attempts on the lives of a number of women;

V. Taking of the grandchildren from their family and their murder [B].

4. The whole of this complex of facts has been charged as the principal charge of war crimes (section 8 of the Act on laws governing war crimes) and as the alternative charge of torture (sections 1 and 2 of the Convention against Torture Implementations Act).

5. On the second summons, all five of the complex of facts were jointly charged (in count 1) as genocide (section 1 of the Genocide Convention Implementation Act). The prosecution was taken over by the public prosecutor from the Prosecutor of the International Tribunal for the prosecution of persons responsible for genocide and other serious violations of the international humanitarian law, committed on the territory of Rwanda or neighbouring countries of Rwanda during the period in time between 1 January 1994 and 31 December 1994 (to be referred to as: Rwanda-Tribunal).

Proceedings

3. In the Court of first instance, the public prosecutor was barred from prosecuting the charge of genocide, formulated in the second summons as count 1(case number 09–750007–07) on the grounds of lack of jurisdiction for this count. The public prosecutor filed an appeal against the judgement on 1 August 2007. The objections to the judgement of the Court of first instance were laid down in a document of Appeal dated 17 August 2007 and a Further Appeal dated 28 September 2007.

The scope of the appeal

4. The Court of Appeal establishes that the decision of the Court of first instance exclusively refers to (preliminary questions with respect to) the fact charged under count 1 of the second summons. The Court of Appeal assumes that the Court of first instance (after joining the facts of the first and second summons on 11 May 2007) has substantively separated this fact from the other facts as laid down in section 285 of the Code of Criminal Procedure.

Permissibility of the appeal of the public prosecutor's office

5. During the hearing in the Court of Appeal on 3 December 2007, counsel for the defence pleaded that the appeal of the public prosecutor's office should be dismissed. Counsel for the defence argued, in essence, that the decision of the Court of first instance is an intermediary decision not open to appeal. The Court of Appeal already ruled on this defence during the hearing on appeal. The Court of Appeal, with reference to the judgement of the Supreme Court of 13 January 2004 (LJN: AN 9235), judges that in view of the wording and the description of the decision in the judgement of the Court of first instance, it concerns a final judgement as defined by section 138 of the Code of Criminal Procedure against which, on the grounds of section 404, first subsection, of the Code of Criminal Procedure, an appeal may be lodged. Hence, the Court of Appeal rejected this defence. Furthermore, during counsel's speech for the defence it was argued that the public prosecutor's appeal should be dismissed on the ground that the document of appeal had not been submitted within the required time frame as laid down in section 410 of the Code of Criminal Procedure. The Court of Appeal considers that section 410 of the Code of Criminal Procedure gives the Court of Appeal the possibility to decide for dismissal of the appeal. However, this section does in no way contain an obligation for that and the Court of Appeal sees no reason whatsoever in the underlying matter to decide for a dismissal. Therefore, the Court of Appeal rejects this defence.

Permissibility of the public prosecutor's office to prosecute

6. Counsel for the defence has pleaded, consistent with his plea in the first instance, that the public prosecutor's office should also be barred from prosecuting the suspect on other grounds than those in connection with the jurisdiction. The Court of Appeal rejects this defence. Insofar as the Court of Appeal thinks to be able to fathom the underlying grounds for the argument, the motivation for this decision will be omitted for the sake of efficiency. After all, the public prosecutor's office is barred from prosecuting the suspect in the matter of genocide for reasons connected to jurisdiction, as will hereafter be considered and decided.

Request for adjournment of the proceedings

7. Counsel for the defence, after an earlier request to that effect at the beginning of the hearing in appeal, which was rejected by the Court of Appeal, repeated his request for an adjournment of the proceedings during his speech. Counsel for the defence argues to that end that he wishes to have a number of witnesses heard with respect to the actual procedure around the prosecution referral by the Prosecutor of the Rwanda Tribunal to the Dutch Judicial Authorities. Moreover, according to counsel's argument, the opinions of experts issued recently by the public prosecutor and introduced at the hearing, only raises new questions. These require study, for which the defence should be awarded time. Counsel would also like to have more time to respond to the position taken by the Advocate-General. With respect to that, the Court of Appeal takes the following stand. The legal questions under discussion during the appeals trial are in essence the same as those of the trial in the first instance. Therefore, Counsel has had ample time to (also further) consider these questions. Counsel had moreover already known for a month that the Court of Appeal had asked the Advocate-General to issue an expert's report on the aspects of the practices in conventional

law connected to the contacts maintained between the Prosecutor and the Dutch judicial authorities. To that extent the admittedly short notice before the hearing and issued expert's reports cannot have constituted a surprise for him. Also in view of the small size of the last report of the Prosecutor, one side with an annex of five pages, and the circumstance that the trial on appeal was interrupted for an hour in order to study the new report, the Court of Appeal once again rejects counsel's request. That same fate was shared by the request to hear a number of witnesses since the Court of Appeal considers itself to be sufficiently informed about the contacts between the Prosecutor of the Rwanda Tribunal and the Dutch justice authorities. The need to hear these witnesses has consequently not been demonstrated.

The procedure with respect to the prosecution

8. The suspect, who applied for political asylum in the Netherlands in 1998, was arrested on 7 August 2006 in Amsterdam on suspicion of war crimes. His prosecution was initially founded on that (cf. the first summons, see 2 under 2). By means of a letter dated 11 August 2006 the Public Prosecutor informed the Prosecutor of the Rwanda Tribunal of the arrest of the suspect. On 29 September 2006 the Prosecutor of the Rwanda Tribunal subsequently submitted a written request to take the prosecution over in the matter of genocide, committed during two of the described incidents in the request (defined in the first initiatory summons under 1. and 2.) and similar facts on other dates between 6 April 1994 and 17 July 1994 in the territory of Rwanda. This request was made through the Dutch Ambassador in Tanzania to the Minister of Justice, who authorized the public prosecutor's office by means of a letter dated 27 November 2006 to take over the criminal prosecution from the Tribunal. On 5 January 2007 the public prosecutor demanded (for the second time) that a judicial inquiry be initiated, also related to the suspicion of genocide (cf. 2 under 5 above). In response to a written request from the Advocate-General dated 23 November 2007, the Prosecutor of the Rwanda Tribunal notified by email of 30 November 2007 among other things, that he had come to an understanding with the Dutch authorities with regards to the referral of the prosecution of the suspect with respect to genocide.

9. As already indicated above (2), in the initiatory writs of summons the suspect has been accused of a set of five serious offences which allegedly were committed by him as a Rwandan in Rwanda in the year 1994. Each of these charges have, on the one hand, been worded as war crime (or torture), and on the other hand as genocide. The Court came to the conclusion that there was no jurisdiction for the facts formulated as genocide and consequently barred the public prosecutor's office from prosecuting those facts.

Assessment of the judgement

10. The Court of Appeal reached the same decision as the Court of first instance, though in part on somewhat different grounds. Partly with respect to that, the Court of Appeal will reverse the judgement that was appealed. With some regularity hereafter, the Court of Appeal will adopt the considerations of the Court of first instance by referring to the latter's considerations in its judgement. The judgement of the Court of first instance has been published on www.rechtspraak.nl under LJN-number BB8462.

Original jurisdiction

11. Original jurisdiction can, according to the Court of first instance, (grounds for judgement 15 through 27), be derived from the provisions in the sections 2 through 4 and 5 through 7 of the Criminal Code, or from section 5 of the Genocide Convention Implementation Act or section 3 of the War Crimes Act. The appellate Court, just as the Court, the public prosecutor and the defence, finds that the regulations with respect to the charge of genocide lack applicability and so no jurisdiction can be derived from them. In that respect the appellate Court refers to the above-mentioned considerations of the Court of first instance. In the appellate trial the Advocate-General took the position that section 3 sub 2 of the War Crimes Act can constitute the basis for jurisdiction for this case, now that a Dutch interest is at issue. According to the Advocate-General's opinion, maintaining the international legal order can and must be regarded as a national interest. The Advocate-General points out, *inter alia,* that international arbitration of disputes in large part takes place in the Netherlands. In addition to the above-mentioned considerations of the Court, especially grounds for judgement 22 through 25, the appellate Court would like to point out that should the Advocate-General's point of view with respect to section 3 sub 2 of the War Crimes Act be followed, this could lead to creating universal jurisdiction. In the view of the appellate Court, this broadening of jurisdiction and the many jurisdictional conflicts which would ensue from such an interpretation of the term Dutch interest could not reasonably have been the intention of the legislator.

12. Just as the Court did, (grounds for judgement 29 through 32), the appellate Court finds that also no additional jurisdiction can be derived from conduct charged before the International Crimes Act came into force (which in section 3 creates a secondary universal jurisdiction with respect to genocide). In connection with legal certainty, the legislator explicitly did not want a retroactive effect (*ex post facto*).

13. Just as the Court did, (grounds for judgement 33 through 44), the appellate Court finds that a basis for jurisdiction cannot be found in international law either.

Secondary jurisdiction on the basis of section 4 Criminal Code

14. Finally jurisdiction could be derived, in secondary or alternative form, from the provisions of section 4a of the Criminal Code. The Court of first instance came to the conclusion that this section is not applicable in the current case.

15. Section 4a, first subsection, of the Criminal Code (in force since 19 July 1985) reads:

> "The Dutch Criminal Code is applicable to anyone against whom prosecution was referred to The Netherlands from a foreign State on the basis of a convention from which the competence to prosecute ensues for The Netherlands."

In order to have secondary jurisdiction on the grounds of this provision, it would consequently be required that:

a) mention be made of a State

b) the State have original jurisdiction

c) authorized prosecution had been referred by that State to the Netherlands and

d) a convention be designated from which competence for prosecution by the Netherlands ensues.

16. With respect to the requirement of point a), the appellate Court judges, as does the Court, that taking into consideration the status of the Rwanda Tribunal itself, there is much to be said for a favourable, functional explanation of this requirement which leads to regarding this Tribunal as a State within the meaning of section 4a Criminal Code. On the other hand, there are opposing considerations which bring the appellate Court, diverging from the position of the Court, to conclude that such a functional explanation may not be accepted, so that on that ground alone this section loses its applicability. First of all, the Court took the nature of the requirement at issue into consideration. In the opinion of the appellate Court, a jurisdictional regulation can be compared (to a certain extent) to a penalization and a penalty standard; that is why such a regulation must meet the requirements of recognizability. To equate a body of the United Nations with a State in the meaning of section 4a of the Criminal Code does not meet that requirement for recognizability. Just like the Court (grounds for judgement 39) the appellate Court points towards the grounds for cassation developed by N. Keijzer, Master in Law, at the time Advocate-General, for the Supreme Court's judgement of 18 September 2001 on the December Murders. Moreover, legal assistance between States is based on reciprocity, and it is exactly this mutuality in the relationship between the Tribunal and the Netherlands which is largely absent, given the vertical character of that relation. The appellate Court furthermore points out that the institutional legislations of tribunals (see hereafter 25 under c, the regulation in the Institutional Act for the Yugoslavia Tribunal has also been declared to be applicable to the Rwanda Tribunal) with respect to different rules of competence in the framework of international legal assistance, stipulate that they are applicable *mutatis mutandis,* because, according to the appellate Court, they lack direct applicability in relation to the Tribunal. In the Memorandum to the Act of the bill which led to this Act, the following is mentioned in this respect:

> "Furthermore the Statute of the Tribunal obligates States to judicial and police cooperation with the Tribunal, in the scope of collecting evidence and transferring suspects to the Tribunal (article 29 Statute)."

Specific legislation is required in order to fully comply with these obligations. The existing legal regulations with respect to international criminal cooperation are tailored to cooperation between States and not to cooperation where one of the parties is an international Tribunal. This pertains to extradition and so-called small legal assistance as well as carrying out sentences from other judges than the Dutch. The present bill intends to offer an addition to the existing legislation.

Also, with respect to transfer to the Rwanda Tribunal, the Memorandum of Explanation to the bill which led to the Institutional Act of the Rwanda Tribunal, mentions that a separate, specific regulation must be implemented in view of this variation on international legal assistance.

In this respect, pursuant to section 2, first subsection of this bill, the regulated version for international legal assistance, unlike classic extradition, provides for the surrender of a claimed person, to an international body, pursuant to a Resolution of the United Nations Security Council, and not, as is the usual case, to another sovereign state. This justifies its own regulation, which is provided by this bill.

Finally, the appellate Court establishes that in addition to the Vienna Convention on Treaties* (23 May 1969, *Trb.* 1977, 169), which concerns international written agreements between States, a second Vienna Convention was established on the law of treaties between States and international organizations or between international organizations** (Convention of 21 March 1986, *Trb.* 1987, 136). This also indicates that a distinction should be made between organizations and States. Although the appellate Court agrees with the Court (grounds for judgement 55) that at the time there was no thought of referral of prosecution to the Netherlands, this does not make for a forceful argument to now apply a teleologic interpretation without sufficient basis. Even the circumstance shown in the decision of the Rwanda Tribunal in the (comparable) *Bagaragaza* case that the Dutch government took the view that the Rwanda Tribunal does fall under the category of State in section 4a Criminal Code, does not bring the appellate Court to a different judgement.

Although, as mentioned before, the appellate Court finds that on this ground section 4a Criminal Code lacks applicability, the appellate Court feels it is advisable to also discuss the criteria for application of this section mentioned in paragraphs 15 b), c) and d).

17. As did the Court, the appellate Court finds that the jurisdiction and thus the competence of the Rwanda Tribunal, or its Prosecutor, to prosecute on the basis specifically of articles 1 and 2 of the Statute of the Tribunal established by Security Council resolution 955 (1994) of 8 November 1994 (hereinafter to be called: the Statute), is without any doubt, a fact. Thus, the condition stated in paragraph 15 b) above for application of section 4a of the Criminal Code has been met.

18. The condition of section 4a of the Criminal Code, mentioned above under paragraph 15 c), has also been met. In view of the complete and exclusive competence of the Prosecutor, as a body of the Tribunal, to prosecute this case (based on the articles 10 and 15, second paragraph, of the Statute), the appellate Court, along with the Court, has no doubt about the competence of the Prosecutor to refer the prosecution of this case. The appellate Court also considered that according to the wording of the Tribunal's procedure for referral of prosecution, described in article 1*bis* of its Rules of Procedure and Evidence (RPE), only cases which have already been brought before the Tribunal were concerned. In his request dated 29 September 2006 concerning referral of the prosecution in the present case, the Prosecutor mentioned that, according to the Statute, the referral of such un-indicted cases also lay within his competence. The appellate Court finds no reason to question this information, even more in view of the paragraph 39 of the letter dated 29 May 2006 from the President of the Tribunal to the Security Council of the United Nations, dealing with the Completion Strategy of the Tribunal.

Referral based on a convention?

19. Referral of prosecution is only one of the forms of international legal assistance in criminal matters, which in and of itself does not need to be based on a convention. This requirement does apply, however, as shown in section 4a of the Criminal Code, if the Netherlands has no original jurisdiction and the referral of prosecution must create (secondary) jurisdiction. The Court (grounds for judgement 61 through 65) ruled, also

* United Nations, *Treaty Series,* vol. 1155, p. 331.

** A/CONF.129/15.

on the base of the legal history provided by the Court, that a convention with such legal consequence requires a certain level of specificity: the competence to prosecute and bring to trial must ensue from the convention, which must include explicit agreements about referral of prosecution rights, and at least a regulation must have been set up with respect to the cases where referral is possible (grounds for judgement 65).

20. The appellate Court shares the view of the Court that some specificity is required. In any case, general agreements or declarations of intent about (mutual) cooperation in criminal matters cannot be deemed sufficient to create jurisdiction, also in view of the great interest attached to preventing conflicts of jurisdiction. As stated before, the requirements demanded from a jurisdiction creating referral of prosecution must be more stringent than those which apply to referral of prosecution alone (and to which the requirement to be based on a convention does not apply). In this respect, the appellate Court also draws attention to the statement made in the Explanatory Memorandum for the bill that led to the implementation of section 4a of the Criminal Code:

> "Additions to the rules of the Dutch Criminal laws with respect to penalization and liability to prosecution cannot be found in the proposed stipulations. To settle these subjects in view of international referral of prosecutions, a convention would be the appropriate place. That is also the case for the expansion of the competence of the Dutch criminal Court judge, for which the basis would not be the newly inserted section 4a of the Criminal Code, but the appropriate convention."

As it is, the public prosecutor is correct in pointing out that the conventions mentioned in section 552hh of the Code of Criminal Procedure (which in the case of refusal to extradite, demand the initiation of prosecution by referring the case to the prosecution authority, according to the principle of *aut dedere aut judicare*) do not contain a detailed system of rules. However, the States involved are obliged, in view of that possible trial, to guarantee the competence for the prosecution of the facts referred to in those conventions. That was the purpose of the insertion into the Code of Criminal Procedure of the indicated section. Now that the conventions relate to a group of specific offences, a certain limitation is also encountered in them (namely with respect to the cases to which the regulation applies).

In this respect, the appellate Court draws attention to the provision in article 4 of the United Nations Convention against illicit trade in drugs and psychotropic substances* of 20 December 1988, *Trb.* 1990, article 94. That article prescribes that jurisdiction is established with respect to certain situations (for example, should the act have been committed on the territory of the State which is a party to the convention, or should the suspect not be extradited because the suspect is a national of that State). In other cases, for example when the suspect is in the territory of a State who does not wish to extradite him, that State is competent, but surely not in every case obligated to establish jurisdiction. This convention has not been included in 552hh Code of Criminal Procedure, as the appellate Court deducts from the parliamentary history of the Sanctioning Act in question, because in this respect The Netherlands does not accept a secondary jurisdiction (the mandatory establishment of jurisdiction according to the convention has already been provided for in the regulation of jurisdiction in the Criminal Code). In other words, secondary jurisdiction must not only have a basis in a convention, but the Dutch legislator must also decide

* United Nations, *Treaty Series,* vol. 1582, p. 164.

whether to make use of an optional competence or not. That fact compels the judge to even more restraint in his interpretation of the rules of law.

21. The prosecution also draws attention to the formulation of section 4a: the competence to prosecute must ensue from the convention, which, according to the explanatory memorandum of the bill, the prosecution paraphrases. Whatever the case may be of this linguistic paraphrasing, the appellate Court also deduces from the quoted passage in paragraph 20 from the Explanatory Memorandum that a convention in the sense of section 4a of the Criminal Code not only must contain a regulation providing for referral of prosecution, but also must explicitly provide for secondary jurisdiction.

22. The prosecution also referred to a) the Charter of the United Nations in connection with the Statute of the Rwanda Tribunal (and the relevant resolutions and the Completion Strategy) and b) the Genocide Convention,* as being a convention in the sense of section 4a of the Criminal Code, from which the competence to prosecute ensues.

The Charter of the United Nations

23. With respect to the Charter of the United Nations, the Statute of the Rwanda Tribunal and the applicable Rules of Procedure and Evidence, the following can be established. Chapter VII of the Charter of the United Nations also forms, according to Resolution 955 (1994) a basis for the establishment of the Rwanda Tribunal, which underlines the weight of that body and the dominant obligations of states to comply with the Charter. The prosecution was correct in pointing this out, referring to the articles 25 and 103 of the Charter, which read as follows:

> "Article 25
>
> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
>
> [. . .]
>
> Article 103
>
> 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."

But, as considered before, those obligations should then be sufficiently articulated. The Charter does not contain a blank authorization to randomly make a demand on a State. The formulation of the mentioned Resolution also proves this under point 2, referring to the obligations which result from the Resolution and the Statute of the Rwanda Tribunal:

> "Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute. . . ."

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* Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, *Treaty Series,* vol. 78, p. 277.

24. In this respect the appellate Court points out a number of more specific stipulations:

a) The Statute of the Rwanda Tribunal stipulates among other things:

"Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national Courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national Courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national Courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

[. . .]

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents:

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal for Rwanda."

b) The Rules of Procedure and Evidence stipulate in Rule 11*bis,* among other things:

"Rule 11*bis:* Referral of the Indictment to another Court

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate Court for trial within that State.

(B) The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard."

c) For Dutch legislation, the Establishment Act of the Yugoslavia Tribunal is especially important. The Act, from which the following paragraphs apply also to the Rwanda Tribunal, stipulates *inter alia:*

"Article 2.

Upon request of the Tribunal persons may be transferred for prosecution and trial for punishable facts of which the Tribunal pursuant to its Statute is competent to take cognizance of.

[. . .]

Article 9.

1. Requests of the Tribunal for any form of legal assistance, whether or not addressed to a specified judicial or police body in The Netherlands, will be acceded to by required action as much as possible.

2. The sections 552i, 552j, 552n, 552o through 552q, with the exception of the reference in section 552p, fourth subsection, to section 552d, second subsection of the Code of Criminal Procedure and section 51, first and fourth subsection, of the Extradition Act are *mutatis mutandis* applicable.

3. Representatives of the Tribunal will be permitted upon request to be present at the execution of the requests, and to have questions presented to the persons involved in the execution of the requests, as meant in the first subsection.

4. The Dutch authorities in charge of the execution of the requests for legal assistance are responsible for the safety of the persons involved therein and are authorized to that purpose to set conditions to the manner in which requests for legal assistance are executed.

Section 11.

1. Upon request of the Tribunal it is possible to enforce the imposed final and conclusive sentence of imprisonment by the Tribunal, in The Netherlands.

2. Upon request of the Tribunal the person sentenced may to that end be provisionally arrested.

3. The public prosecutor or deputy public prosecutor of The Hague is authorized to order the provisional arrest.

4. The sections 9, second subsection through fifth subsection. 10, 11, first subsection and second subsection, under a, and 12 of the sentence transfer enforcement Act are *mutatis mutandis* applicable.

5. Upon request of the Tribunal the issued orders at final and conclusive sentence by the Tribunal for refund as meant in section 24, third subsection, of the Statute, can be executed in The Netherlands. The sections 13, 13a, 13b and 13d through 13f with the exception of the reference in section 13d, second subsection, to section 552d, second

subsection, of the Code of Criminal Procedure of the sentence transfer enforcement Act are *mutatis mutandis* applicable."

25. According to the appellate Court, the following conclusions may be drawn from these stipulations:

a) Upon referral of prosecution to the Rwanda Tribunal the request must be acceded to without any reservation, while referral by the Tribunal according to Rule 11*bis* of the RPE in the under (*iii*) mentioned situation not only is dependent on the willingness of the requested state, but also on the existence of jurisdiction. That jurisdiction issue is extensively assessed (with other issues) by the Rwanda Tribunal before a request for referral to a State becomes effective. In this respect, the appellate Court refers to the decision of 19 May 2006 of Trial Chamber III , in which the Tribunal refused to refer prosecution of Bagaragaza to Norway because Norway did not have jurisdiction *ratione materiae* (in the sense of penalization of genocide) and could only prosecute on the basis of general offences. Norway did (according to note 11 of this decision) ratify the Genocide Convention, but had not implemented it in its national legislation. The appellate Court deduces that referral of prosecution of the Tribunal on the basis of Rule 11*bis* RPE can only take place if the requested State has independent (original) jurisdiction. There is no reason to assume that the Prosecutor would not be bound by this condition for (a request for) referral in the event that a case is not one brought before the Tribunal;

b) Article 28 of the Statute obligates States to cooperate with the Tribunal and in the second paragraph clearly mentions a number of requests for legal assistance which must be acceded to without delay. Along with the Court (grounds for judgement 75) the appellate Court finds that these obligations according to the wording of the article are linked to investigation and prosecution by the Tribunal itself.

The prescription of Rule 11*bis* RPE relates to the referral of prosecution to a State and is not supported by article 28 of the Statute. From the obvious connection with the hereafter mentioned Completion Strategy (see paragraph 26) in compliance with the instruction of the Security Council, the appellate Court deduces that Rule 11*bis* of the RPE finds direct support in the Charter. But this does not lead to the conclusion that the Prosecutor has more competence as a result of that Rule or that related obligations for States should be deduced from it other than those which follow from the wording of that Rule. And in Rule 11*bis* A, under (iii), the clear starting point is—as has already been established above—referral to a State that already has (original) jurisdiction. For that reason, according to the appellate Court, it cannot be said that by means of the Charter of the United Nations, prescriptions in the Statute of the Rwanda Tribunal and/or the Rules of Procedure and Evidence, the request in the present case for referral of prosecution made by the Prosecutor results in a conventional legal duty for the Netherlands which makes this request like a request as meant in section 4a of the Criminal Code.

The appellate Court would in this respect like to refer to the short paper submitted by the Advocate-General during the appeals trial, enclosed as an annex to the above-mentioned email message from the Prosecutor of 30 November 2007 (see paragraph 8),[3] with respect to the relationship between article 28 of the Statute of the Rwanda Tribunal and article 11*bis* of the Rules of Procedure and Evidence. In this paper attention is given, among

[3] Not reproduced herein.

other things, to the case law of the Appeals Chamber (of the Yugoslavia Tribunal) with respect to these articles. From this case law, the deduction can be made that the Appeals Chamber holds the opinion that no obligation exists for the States, neither on the basis of article 28 of the Statute of the Tribunal, nor on the basis of article 11*bis* of the Rules of Procedure and Evidence, for referral of prosecution by the Tribunal.

c) In the above-mentioned Establishing Act an attempt was made to translate the ensuing obligations from the Statute of the Rwanda Tribunal, into the Dutch situation, taking other Dutch legislation into account. In this way, the Establishing Act set up a bridge between the extradition laws, the laws governing the transfer of sentence enforcement and the regulation with respect to the (general) international small legal assistance in criminal matters. The appellate Court like the Court (grounds for judgement 77) cannot conclude otherwise than that the Dutch legislator (intentionally or by mistake) omitted to regulate the referral of prosecution to the Netherlands. The latter could (other than at the referral for execution of the Tribunal decisions) also still take place without a convention, but then without the case law expansion provided for in section 4a of the Criminal Code. Just as the Court, the appellate Court is of the opinion that the judge is not competent to fill the current void, apparently experienced by the prosecutor's office, by relying in this respect on the sole teleological interpretation.

26. The Prosecutor's request is prompted by the explanation in the Completion Strategy of the Rwanda Tribunal, which in accordance with instruction of the Security Council (Resolution 1503 (2003) of 28 August 2003) is aimed at concentrating on the senior leaders suspected of being most responsible for the crimes for which the Tribunal is competent, finalizing the proceedings not later than 2010, and, for that reason, transferring the intermediate and lower-rank accused to competent national jurisdictions. Thus the text of this Resolution cannot create any relevant obligation, since the Netherlands does not have the required (original) jurisdiction (competence).

The Genocide Convention

27. With respect to the jurisdiction which can be based on the Genocide Convention, of particular importance are articles V and VI of that convention and their transformation to article 5 of the Genocide Convention Implementation Act.

Convention on the Prevention and Punishment of the Crime of Genocide

"Article V

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

GENOCIDE CONVENTION IMPLEMENTATION ACT, ARTICLE 5

"1. Dutch criminal law is applicable to the Dutchman, who outside of the Netherlands is guilty of:

1. a crime described in the sections 1 and 2 of this Act;

2. the crime described in section 131 of the Criminal Code, if the crime spoken of in that section, is a crime as meant in the sections 1 and 2 of this Act.

2. Prosecution can also take place, if the suspect only after commission of the fact, becomes a Dutch national."

The appellate Court establishes that the Genocide Convention on its own, in view of the stipulations in article V, allows for an ample, even (secondary) universal establishment of jurisdiction, just as the International Court of Justice decided in its judgement of 11 July 1996:

"The Court sees nothing in this provision which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict. The contracting parties expressly state therein their willingness to consider genocide as 'a crime under international law', which they must prevent and punish independently of the context 'of peace' or 'of war' in which it takes place. In the view of the Court, this means that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.

As regards the question whether Yugoslavia took part—directly or indirectly—in the conflict at issue, the Court would merely note that the Parties have radically differing viewpoints in this respect and that it cannot, at this stage in the proceedings, settle this question, which clearly belongs to the merits.

Lastly, as to the territorial problems linked to the application of the Convention, the Court would point out that the only provision relevant to this, Article VI, merely provides for persons accused of one of the acts prohibited by the Convention to "be tried by a competent tribunal of the State in the territory of which the act was committed . . .". It would also recall its understanding of the object and purpose of the Convention, as set out in its Opinion of 28 May 1951, cited above: "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, 11 December 1946).

The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."

(I.C.J. Reports 1951, p. 23.)

It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.

At the time, the legislator, however, chose only to apply an active personality principle to the Implementation Act. It is important to establish that by doing that the Netherlands did not underestimate its conventional obligations, as can be deduced from the recent decision of the International Court of Justice of 26 February 2007.* Paragraph 442 of this decision reads:

> "The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own Courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal Courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to cooperate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic Courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction, on their criminal Courts based on criteria other than where the crime was committed which, are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so."

The (secondary) universal jurisdiction for genocide has, in the meantime, been laid down in section 3 of the International Crimes Act, which has been in force since 1 October 2003, as indicated before (see paragraph 12). That paragraph also established that the legislator at the time intentionally chose not to give retroactive force to this regulation. In this connection, the appellate Court also points to the answer of the Minister of Justice to Parliamentary questions asked as a result of the sentence of the Court of first instance in the current case.

The Court's consideration that it is faced with a void in the existing regulations, which it cannot solve by means of a reasonable interpretation of the law, is based on the phrasing of the above-mentioned multilateral conventions. To the extent that the Court considers that at the time of the indicted facts there was no national legal provision applicable which provided for jurisdiction with respect to genocide, it must be stated that this non-applicability results from the choice of the Dutch legislator and the position of the international law at the time not to establish broad extraterritorial jurisdiction. Currently, the Netherlands has, on the basis of the International Crimes Act, which came into force on 1 October 2003, a broader jurisdiction regulation for, among other things, the crime of genocide. The legislator explicitly chose, upon the enactment of this act, not to award retroactive force to this regulation with a broadened jurisdiction.

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* *Case concerning the application of the Convention on the prevention and punishment of genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* Judgment of 26 February 2007, General List No. 91, available at http://www.icj-cij.org.

28. In view of the manner in which our country implemented the Genocide Convention, the appellate Court is not able to see that this convention could now, by means of section 4a of the Criminal Code, create jurisdiction. The appellate Court again, perhaps unnecessarily, points out that the legislator has a choice upon implementation of conventions regarding the extent to which he wishes to implement the optional obligations in Dutch legislation.

Mini-convention

29. Ultimately the question is whether in the current case another agreement could amount to a convention in the meaning of section 4a of the Criminal Code. In the correspondence between the Prosecutor of the Rwanda Tribunal and organs of the State of the Netherlands, detailed above in paragraph 8, there are certain reference that may lead to the supposition that both organs have made agreements about the referral of the current case, so that the question could arise whether it was the intention to enter into a convention (in a substantive sense).

The prosecutor's office is of the opinion that this question can be answered affirmatively since there is consensus and there is sufficient specification about what the subject of the agreement is. In the view of the prosecutor's office, there are grounds to speak of a convention in the sense of section 4a of the Criminal Code. To support this point of view, the prosecutor's office refers to the requested opinion of 30 November 2007, given by K. Brölmann, senior lecturer in International Law at the University of Amsterdam. In this opinion it is concluded that, based on the free form of the convention, international law is not opposed to viewing the correspondence between the Prosecutor of the Rwanda Tribunal and the Minister of Justice as an international legal agreement or convention in the sense of international law. Brölmann reaches this conclusion based on the following: The agreement between the Dutch Minister and the Prosecutor of the Tribunal rests on (i) mutual communications; (ii) has legal effect; (iii) is between international legal entities, (iv) the parties are represented by (in accordance with relevant internal laws) organs, which from a perspective of international law, may be deemed to dispose of competence to enter into conventions. Considering this, according to Brölmann, the agreement conforms to the definition of convention.

Furthermore, the prosecutor's office draws attention to the reaction of the Prosecutor of the Rwanda Tribunal as shown in paragraph 8. In answering to the written request of the Advocate-General, the Prosecutor provided the information that an agreement was reached with the Dutch authorities concerning the transfer of prosecution of the suspect. The Prosecutor states in the message:

> . .
>
> "there was an agreement between the Prosecutor of the ICTR and authorities in the Netherlands concerning the transfer of the case against [suspect] as far as proceedings for the crimes of genocide are concerned."
>
> and furthermore:
>
> "In the opinion of the ICTR Prosecutor the agreement was binding upon delivery of the assent to the Request by the Minister of Justice of the Kingdom of the Netherlands."

The request of the Prosecutor and the letter of the Minister of Justice to the public prosecutor are, according to the Ministry of Foreign Affairs, on the other hand, not to be designated as a convention in the sense of international law. This point of view, as indicated in a letter of 22 November 2007 from the Legal Advisor, Head of the International Law Department of the Ministry of Foreign Affairs, to the Advocate-General, is based on the consideration that written consensus forms the basis of a convention in the sense of international law. In the present case, since the written request from the Prosecutor of the Rwanda Tribunal to refer prosecution did not result in a written response from the Dutch authorities, this requirement was not met.

The Court considers that in the above–mentioned correspondence (paragraph 8) between the Prosecutor of the Rwanda Tribunal and organs of State of the Netherlands certain points of reference can be found for the supposition that both organs have made arrangements about the transfer of the current case. Since the appellate Court sees no reason to doubt the authority of the Prosecutor to make those kinds of arrangements, the appellate Court assumes that in this manner an extremely free-form convention was entered into between the Prosecutor and the Dutch Minister of Justice.

Subsequently the question arises whether such a free-form convention can be regarded as a convention in the sense of section 4a of the Criminal Code. The appellate Court answers this question negatively. The appellate Court considers that section 4a of the Criminal Code relates to a general regulation which meets the requirements of recognizability. As it has been considered, those requirements have not been met. Also, article 91 of the Constitution prevents the Kingdom from being bound by such a convention since the free-form convention cannot be placed among the cases for which no approval is required. The appellate Court furthermore considers that the regulations of jurisdiction form an explicit and closed system with a high public order standard. In view of article 94 of the Constitution, it is not possible to deviate from this on the basis of unwritten law, but only on the basis of the overall binding stipulations of conventions and of decisions of international organizations. Things might have been different, if the United Nations had concluded a treaty with the Dutch authorities stipulating that within the framework of the Completion Strategy, the prosecution of suspects whose cases had not (yet) been brought before the Tribunal, could, in consultation with the Netherlands, be transferred to the Netherlands, also for cases for which the Netherlands has no original jurisdiction.

Conclusion

30. The above leads the appellate Court to the following conclusion. With respect to the regulation of jurisdiction in the case of genocide, a development in international and of national opinions has taken place in the past decades, which resulted in establishing a broad jurisdiction regulation in the International Crimes Act, to which however, no retroactive force has been assigned. The circumstances departed from at the establishment legislation for the Tribunals, have been fundamentally changed by the prescribed Completion Strategy of the Tribunals and have led to the need arising to take over criminal cases of (in this case) the Rwanda Tribunal. The appellate Court has had to establish however that the Dutch legal instruments on the point of secondary jurisdiction are not adequate. Inasmuch as the appellate Court sympathizes with the wish not to let the most serious of crimes, which is the case at present, go with impunity (as is emphasized in the Explanatory

Memorandum of the International Crimes Act), that wish, however, cannot provide sufficient underlying support for jurisdiction in the matter of genocide. The appellate Court stipulates that the above considerations have no relation to the (continued) prosecution of the same complex of facts in the form of war crimes or torture.

31. The above must result in declaring the prosecutor's office barred from prosecution of the suspect in the matter of genocide.

Decision

The appellate Court:

Overturns the judgement appealed against and renders new judgement.

Declares the prosecutor's office barred from prosecution of the suspect for count on the summons with case number 09/750007–07.

This judgement has been rendered by G.P.A. Aler, Master of Laws. G. Oosterhof. Master of Laws and CM. le Clercq-Meijer, Master of Laws, in the presence of the registrar M.C. Zuidweg, Master of Laws. It was pronounced in open appellate Court on 17 December 2007.

B. The United Kingdom

Judgment of the House of Lords: R (on the application of Al-Jedda) v. *Secretary of State for Defence (12 December 2007)*[*]

Responsibility of international organization—Draft articles of the International Law Commission—Article 5 (1) of the European Convention of Human Rights—Reference to the Behrami case—Question of the attribution of a detention to a State member of the coalition or to the United Nations—Peacekeeping operations—Distinction between delegation and authorization of powers—Article 103 of the Charter of the United Nations—Detention without charge or trial for security reasons—Obligations imposed by resolutions of the Security Council—Role of the United Nations in the operation in Iraq—Law of foreign occupation—Competence of national courts

Summary

In the *Al-Jedda* case, the House of Lords was confronted with questions of attribution of conduct carried out by military forces acting under an authorization by the United Nations Security Council. The appellant, a national of the United Kingdom and Iraq, had been held in custody at detention facilities in Iraq by British troops belonging to the "multinational force under unified command" (MNF) authorized by Security Council resolutions 1511(2003) and 1546(2004). He complained, *inter alia,* that his detention, allegedly based on imperative reasons of national security, infringed his rights under article 5,

[*] Due to the length of the judgment, only selected extracts are reproduced herein. However, with the view to ease the comprehension of this judgment, a summary has been prepared by the United Nations Secretariat. The complete text is available on the internet at http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf.

para. 1, of the European Convention on Human Rights* (ECHR). Relying on the decision of the European Court of Human Rights (ECtHR) in *Behrami* & *Saramati,* the United Kingdom Secretary of State for defence claimed that the detention of Mr. Al-Jedda by British troops in Iraq was attributable to the United Nations, and not to the United Kingdom. This argument was rejected by all Lords with the exception of Lord Rodger of Earlsferry. Following the reasoning of ECtHR in *Behrami & Saramati,* Lord Rodger considered that the impugned conduct was attributable to the United Nations since there was no material difference between the legal position of the International Security Force in Kosovo (KFOR) and that of MNF; according to him, in both cases the United Nations Security Council had lawfully "delegated" its powers to the relevant forces while retaining the "ultimate authority and control" over those forces. The other Lords, who found that the detention of Mr. Al-Jedda was attributable to the United Kingdom and not to the United Nations, based their conclusions on the fundamental differences that existed, in their opinion, between the legal position of KFOR and that of MNF. In particular, they pointed to the fact that MNF was not acting under United Nations auspices and that the role of the United Nations in Iraq was limited to humanitarian relief and reconstruction. While Lord Brown of Eaton-under-Heywood reached his conclusions by denying that the United Nations had retained "ultimate authority and control" over the MNF—thus applying the criterion adopted by the ECHR in *Behrami & Saramati,* Lord Bingham based his reasoning on the lack of "effective authority and control" by the United Nations, thus following an approach which is more consistent with draft article 5 on responsibility of international organizations, as provisionally adopted by the International Law Commission. However, the Lords agreed that the authorisation laid in the Security Council resolution to intern the persons considered to be a real threat, which could be an obligation in certain circumstances, entitled the British forces to intern Mr. Al-Jedda. Furthermore, Lord Carswell noted this right, in accordance with Article 103 of the United Nations Charter prevailed on the right to liberty enshrined in article 5 of ECHR. Thus, the Government won ultimately on this ground. Finally, on the issue of the applicable law in this case, the Lords unanimously agreed that it was the Iraqi civil law that governed the British forces while in Iraq.

Extracts

Lord Bingham of Cornhill

[. . .]

21. The court summarised (paras 73–120) the submissions of the applicants, the respondent states, seven third party states and the United Nations. In its own assessment it held that the supervision of de-mining at the relevant time fell within [the] United Nations Interim Administration Mission in Kosovo ["UNMIK"]'s mandate and that for issuing detention orders within the mandate of KFOR (paras 123–127). In considering whether the inaction of UNMIK and the action of KFOR could be attributed to the United Nations, the court held (para 129) that the United Nations had in resolution 1244 (1999) "delegated" powers to establish international security and civil presences, using "delegate" (as it had explained in para 43) to refer to the empowering by the Security Council of another entity to exercise its function as opposed to "authorising" an entity to carry out functions which

* United Nations, *Treaty Series,* vol. 213, p. 221

it could not itself perform. It considered that the detention of Mr Saramati was in principle attributable to the United Nations (para 141). This was because (paras 133–134) the United Nations had retained ultimate authority and control and had delegated operational command only. This was borne out (para 134) by the facts that Chapter VII allowed the Security Council to delegate, the relevant power was a delegable power, the delegation was prior and explicit in Resolution 1244, the extent of the delegation was defined, and the leadership of the security and civil presences were required to report to the Security Council (as was the Secretary General). Thus (para 135) under Resolution 1244 the Security Council was to retain ultimate authority and control over the security mission and it delegated to North Atlantic Treaty Organisation ["NATO"] the power to establish KFOR. Since UNMIK was a subsidiary organ of the United Nations created under Chapter VII of the United Nations Charter its inaction was in principle attributable to the United Nations (paras 129, 142–143). Dealing finally with its competence *ratione personae,* the court said (para 149):

> "In the present case, Chapter VII allowed the United Nations Security Council to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely Security Council resolution 1244 establishing UNMIK and KFOR. Since operations established by Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by Security Council resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the United Nations's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a Security Council resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the Security Council in favour of the relevant Chapter VII resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the United Nations but they remained crucial to the effective fulfilment by the Security Council of its Chapter VII mandate and, consequently, by the United Nations of its imperative peace and security aim."

The court accordingly concluded (para 151) that, since UNMIK was a subsidiary organ of the United Nations created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII by the Security Council, their actions were directly attributable to the United Nations, an organisation of universal jurisdiction fulfilling its imperative collective security objective. The applicants' complaints were accordingly incompatible *ratione personae* with the provisions of the Convention.

22. Against the factual background described above a number of questions must be asked in the present case. Were United Kingdom ["UK"] forces placed at the disposal of the United Nations? Did the United Nations exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the United Nations rather than the UK? Did the United Nations have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK

forces part of a United Nations peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.

23. The United Nations did not dispatch the coalition forces to Iraq. The Coalition Provisional Authority ["CPA"] was established by the coalition states, notably the United States ["US"], not the United Nations. When the coalition states became occupying powers in Iraq they had no United Nations mandate. Thus when the case of Mr Mousa reached the House as one of those considered in *R (Al-Skeini and others)* v. *Secretary of State for Defence) (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the United Nations rather than the United States. Following Security Council resolution 1483 in May 2003 the role of the United Nations was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by Security Council resolution 1511 in October 2003. By Security Council resolution 1511, and again by Security Council resolution 1546 in June 2004, the United Nations gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorizing the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the United Nations accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the United Nations, or that UK forces were under such command and control when they detained the appellant.

24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the United Nations and operated under its auspices, with UNMIK a subsidiary organ of the United Nations. The multinational force in Iraq was not established at the behest of the United Nations, was not mandated to operate under United Nations auspices and was not a subsidiary organ of the United Nations. There was no delegation of United Nations power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the United Nations' proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the United Nations reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.

25. I would resolve this first issue in favour of the appellant and against the Secretary of State.

The second issue

26. As already indicated, this issue turns on the relationship between article 5(1) of the European Convention and Article 103 of the United Nations Charter. The central questions to be resolved are whether, on the facts of this case, the UK became subject to an obligation (within the meaning of Article 103) to detain the appellant and, if so, whether

and to what extent such obligation displaced or qualified the appellant's rights under article 5(1).

[. . .]

30. It remains to take note of Article 103, a miscellaneous provision contained in Chapter XVI. It 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".

This provision lies at the heart of the controversy between the parties. For while the Secretary of State contends that the Charter, and Security Council resolutions 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006), impose an obligation on the UK to detain the appellant which prevails over the appellant's conflicting right under article 5(1) of the European Convention, the appellant insists that the Security Council resolutions referred to, read in the light of the Charter, at most authorize the UK to take action to detain him but do not oblige it to do so, with the result that no conflict arises and Article 103 is not engaged.

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of Security Council resolutions 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorization, not obligation, and the same usage is found in Security Council resolution 1637 (2005) and 1723 (2006). In ordinary speech to authorize is to permit or allow or license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.

32. First, it appears to me that during the period when the UK was an occupying power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety. Article 43 of the Hague Regulations[*] 1907 provides, with reference to occupying powers:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

This provision is supplemented by certain provisions of the Fourth Geneva Convention.[**] Articles 41, 42 and 78 of that convention, so far as material, provide

> "41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of articles 42 and 43 . . .
>
> 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary . . ."

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[*] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[**] Geneva Convention relative to the protection of civilian persons in time of war, United Nations *Treaty Series,* vol. 75, p. 286.

> "78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment".

These three articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons, and it would seem to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* [2005] ICJ Rep 116, para 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of Security Council resolution 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

33. There are, secondly, some situations in which the Security Council can adopt resolutions couched in mandatory terms. One example is Security Council resolution 820 (1993), considered by the European Court (with reference to an European Community regulation giving effect to it) in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* (2005) 42 EHRR 1, which decided in paragraph 24 that "all states shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories . . .". Such provisions cause no difficulty in principle, since member states can comply with them within their own borders and are bound by Article 25 of the United Nations Charter to comply. But language of this kind cannot be used in relation to military or security operations overseas, since the United Nations and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them. Thus in practice the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks, and this is what (as I understand) it has done for some years past. Even in Security Council resolution 1244 (1999) relating to Kosovo, when (as I have concluded) the operations were very clearly conducted under United Nations auspices, the language of authorisation was used. There is, however, a strong and to my mind persuasive body of academic opinion which would treat article 103 as applicable where conduct is authorised by the Security Council as where it is required: see, for example, Goodrich, Hambro and Simons (eds), *Charter of the United Nations: Commentary and Documents,* 3rd ed (1969), pp 615–616; *Yearbook of the International Law Commission* (1979), Vol II, Part One, para 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp 150–151. The most recent and perhaps clearest opinion on the subject is that of Frowein and Krisch in Simma (ed), *The Charter of the United Nations: A Commentary,* 2nd ed (2002), p 729:

> "Such authorizations, however, create difficulties with respect to Article 103. According to the latter provision, the Charter–and thus also Security Council resolutions–override existing international law only insofar as they create 'obligations' (cf. Bernhardt on Article 103 MN 27 et seq.). One could conclude that in case a state is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result,

> however, would not seem to correspond with state practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the Security Council would be compromised. Thus, the interpretation of Article 103 should be reconciled with that of Article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well (see Frowein/Krisch on Article 42 MN 28). The same conclusion seems warranted with respect to authorizations of economic measures under Article 41. Otherwise, the Charter would not reach its goal of allowing the Security Council to take the action it deems most appropriate to deal with threats to the peace–it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the Security Council of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of Article 103 to all action under Articles 41 and 42 and not only to mandatory measures."

This approach seems to me to give a purposive interpretation to Article 103 of the Charter, in the context of its other provisions, and to reflect the practice of the United Nations and member states as it has developed over the past 60 years.

34. I am further of the opinion, thirdly, that in a situation such as the present "obligations" in article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the United Nations. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by Articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in Article 103 to "any other international agreement" leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* [1992] ICJ Rep 3, para 39; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] ICJ Rep 325, per Judge *ad hoc* Lauterpacht, pp 439–440, paras 99–100) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (Simma (ed), *The Charter of the United Nations: A Commentary,* 2nd ed (2002), pp 1299–1300).

36. I do not think that the European Court, if the appellant's article 5(1) claim were before it as an application, would ignore the significance of Article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties,* acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of States must be determined in conformity and harmony with the governing principles of international law: see, for instance, *Loizidou* v. *Turkey* (1996) 23 EHRR 513, paras 42–43, 52; *Bankovic* v. *Belgium* (2001) 11 BHRC 435, para 57; *Fogarty* v. *United Kingdom* (2001) 34 EHRR 302, para 34; *Al-Adsani* v. *United Kingdom* (2001) 34 EHRR 273, paras 54–55; *Behrami and Saramati,* above, para 122. In the latter case, in para 149, the court made the strong statement quoted in para 21 above.

37. The appellant is, however, entitled to submit, as he does, that while maintenance of international peace and security is a fundamental purpose of the United Nations, so too is the promotion of respect for human rights. On repeated occasions in recent years the United Nations and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards such as those which the Convention exists to protect. He submits that it would be anomalous and offensive to principle that the authority of the United Nations should itself serve as a defence of human rights abuses. This line of thinking is reflected in the judgment of the European Court in *Waite and Kennedy* v. *Germany* (1999) 30 EHRR 261, para 67, where the court said:

> "67. The court is of the opinion that where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective . . ."

The problem in a case such as the present is acute, since it is difficult to see how any exercise of the power to detain, however necessary for imperative reasons of security, and however strong the safeguards afforded to the detainee, could do otherwise than breach the detainee's rights under article 5(1).

38. One solution, discussed in argument, is that a state member of the Council of Europe, facing this dilemma, should exercise its power of derogation under article 15 of the Convention, which permits derogation from article 5. However, such power may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state's other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however

* United Nations, *Treaty Series,* vol. 1155, p. 331.

dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.

39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by Security Council resolution 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.

[. . .]

Lord Rodger of Earlsferry

[. . .]

59. There is an obvious difference between the factual position in Kosovo that lay behind the *Behrami* case and the factual position in Iraq that lies behind the present case. The forces making up KFOR went into Kosovo, for the first time, as members of KFOR and in terms of Security Council Resolution 1244. By contrast, the Coalition forces were in Iraq and, indeed, in occupation of Iraq, for about six months before the Security Council adopted Resolution 1511, authorising the creation of the MNF, on 16 October 2003.

60. While resolution 1511 provided the authority for establishing the MNF, the legal position of the British forces in Iraq changed significantly at the end of June 2004. From May 2003 until the end of June 2004, the British forces had been the forces of a power which was in occupation of the relevant area of Iraq. But on 28 June the occupation ended. The interim constitution of Iraq, the Transitional Administrative Law, came into effect and sovereignty was transferred to the Iraqi Interim Government. Since the United States and the United Kingdom were no longer occupying powers, a new legal basis for their actions had to be established. This is to be found in resolution 1546 which was co-sponsored by the United States and the United Kingdom and which the Security Council adopted on 8 June 2004. That Resolution regulated the position of the MNF when Mr Al-Jedda was detained in October 2004. By virtue of later resolutions, which do not need to be examined in detail, the core provisions of that Resolution have continued to regulate the position throughout the period of his detention.

61. It respectfully appears to me that the mere fact that resolution 1244 was adopted before the forces making up KFOR entered Kosovo was legally irrelevant to the issue in *Behrami*. What mattered was that resolution 1244 had been adopted before the French members of KFOR detained Mr Saramati so the Resolution regulated the legal position at the time of his detention. Equally, in the present case, the fact that the British and other Coalition forces were in Iraq long before resolution 1546 was adopted is legally irrelevant for present purposes. What matters is that resolution 1546 was adopted before the British

forces detained the appellant and so it regulated the legal position at that time. As renewed, the provisions of that resolution have continued to do so ever since.

62. Moreover, if there were ever any questions as to the exact interplay between the rights and duties of the British forces as the forces of an occupying power and as members of the MNF under resolution 1511, those questions no longer arose after the end of June 2004. From that point onwards the legal position of the members of the MNF set up under resolution 1511 was governed by resolution 1546.

63. Another factual difference between the situations in Kosovo and Iraq is, in my view, equally irrelevant to the legal position of the members of the military forces. In Kosovo the United Nations itself was in charge of the civil administration of the country through the United Nations Interim Administration Mission in Kosovo (UNMIK). In Iraq, after the end of June 2004, the civil government of the country was in the hands of the Iraqi Interim Government and the United Nations Assistance Mission for Iraq (UNAMI) was there simply to provide humanitarian and other assistance. The fact that the civilian administration in Kosovo was in the hands of UNMIK played no part in the European Court's decision that the actions of members of KFOR were attributable to the United Nations. Similarly, the fact that the civil government of Iraq was in the hands of the Iraqi Interim Government at the relevant time must be irrelevant for purposes of deciding whether the actions of members of the MNF in detaining the appellant were attributable to the United Nations.

64. Another point requires to be cleared out of the way. As already mentioned, in *R (Al-Skeini)* v. *Secretary of State for Defence* [2007] 3 WLR 33 the House held that proceedings could be brought under the HRA in United Kingdom courts in respect of violations of Convention rights by a United Kingdom public authority acting within the jurisdiction of the United Kingdom in terms of article 1 of the Convention. For purposes of the first issue in this appeal, however, the House is not concerned with whether or not Mr Al-Jedda, while detained by British forces, has been within the jurisdiction of the United Kingdom in terms of article 1. The decision of the European Court in *Behrami* makes that quite clear. At para 71, the court said:

> "The court therefore considers that the question raised by the present cases is, less whether the respondent states exercised extra-territorial jurisdiction in Kosovo but far more centrally ['fondamentalement'], whether this court is competent to examine under the Convention those states' contribution to the civil and security presences ['le rôle joué par ces Etats au sein des présences civile et de sécurité'] which did exercise the relevant control of Kosovo."

Having concluded that it was not competent, *ratione personae,* for the court to scrutinise the role played by the states in the civil and security presences in Kosovo, the court found it unnecessary to consider whether the court would have been competent *ratione loci* to examine complaints against the respondent states about extraterritorial acts or omissions: para 153. Equally, for purposes of the first issue in this appeal, the crucial point is whether the European Court would be competent, *ratione personae,* to scrutinise the role played by the British members of the MNF in detaining the appellant. If the court would not be competent for that reason, then the issue of whether it would be competent, *ratione loci,* does not arise.

65. My Lords, it may seem tempting to begin and end any discussion of the position by focusing on the appellant's detention and by asking—using the language in article 5 of the International Law Commission's draft articles on the Responsibility of International Organisations (2004)—whether the United Nations Organization was in "effective control" of the British forces as they were detaining him. Obviously, the answer is that what the British forces did by way of detaining the appellant, they did as members of the MNF under unified command. No one would suggest that the Security Council either was, or could have been, involved in the particular decision to detain the appellant or in the practical steps taken to carry out that decision. But that was equally obviously the case with the detention of Mr Saramati in the *Behrami* case. The Grand Chamber held, at para 140, that the Security Council "retained ultimate authority and control and that *effective command of the relevant operational matters was retained by NATO"* (emphasis added). On this basis—and despite the fact that the "effective command" of the relevant operational matters was retained by NATO—the Grand Chamber held that the detention of Mr Saramati was attributable to the United Nations.

66. The first step in the chain of reasoning which led the Grand Chamber to that conclusion was a consideration of what the Security Council was doing when it adopted the relevant provisions of resolution 1244 under Chapter VII of the Charter. Similarly, in the present case, the correct starting point is with the Security Council's adoption of resolution 1546.

[. . .]

77. Paragraph 10 of resolution 1546 therefore gave the MNF 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 the Resolution. This authorisation was essentially similar to the authorisation given to KFOR in resolution 1244. Notably, for present purposes, it gave specific authorisation for the MNF to undertake the task of "internment where this is necessary for imperative reasons of security."

78. I now turn to see how the Grand Chamber analysed the provisions of resolution 1244 and how that analysis would apply to any corresponding provisions of resolution 1546.

79. The key to the Grand Chamber's analysis is its recognition that in international law, by virtue of the terms of the Charter, the responsibility for preserving the peace and for taking the necessary military measures to achieve that end rests squarely on the Security Council. To what extent, therefore, is it lawful for the Security Council to delegate its responsibility to another body? Quite clearly, it could never delegate to any other body its duty under Article 39 of the Charter to determine the existence of any threat to the peace. But can it delegate to another body its power to take the necessary military action to maintain or restore international peace and security? The Grand Chamber's answer to that question (Yes, within limits) and the ramifications of that answer are critical elements in the court's decision that it would not be competent to scrutinise the actions of members of KFOR acting in terms of their mandate from the Security Council.

80. The Grand Chamber explains, in para 43, that:

> "Use of the term 'delegation' in the present decision refers to the empowering by the United Nations Security Council of another entity to exercise its function as opposed to 'authorising' an entity to carry out functions which it could not itself perform."

In this passage the court is not drawing a distinction between the Security Council empowering another entity to exercise a function which the Council itself would have the practical capability to perform and authorising an entity to carry out functions which the Council could not, as a practical matter, perform. On the contrary, it is drawing a distinction between the Council empowering another entity to exercise the Council's own function under the Charter ("delegation") and "authorising" an entity to carry out functions which the Council itself would have no legal power under the Charter to perform.

81. In a United Nations context, this distinction appears to go back to the decision of the International Court of Justice in *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion* [1973] ICJ Rep 166. The General Assembly, which did not itself have power under the Charter to review decisions of the United Nations Administrative Tribunal, had set up a committee to carry out this function. The question for the International Court of Justice was whether the committee had the competence to ask the International Court for advisory opinions, arising out of the exercise of its power to review Tribunal decisions. The General Assembly itself had the competence to request advisory opinions. The International Court held that the committee did indeed have the competence to request advisory opinions for its own purposes, but not because the General Assembly had impliedly delegated its own competence to the committee. That could not be the basis, because the General Assembly could not have delegated to the committee the legal power, which it did not itself possess, to review Tribunal decisions. The court said, at p 174:

> "This is not a delegation by the General Assembly of its own power to request an advisory opinion; it is the creation of a subsidiary organ having a particular task and invested with the power to request advisory opinions in the performance of that task."

The distinction between delegation and this kind of authorisation is discussed, in relation to Security Council authorisations under Chapter VII of the Charter, for example, in D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999), pp 11–13, and E de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), pp 258–260. The Grand Chamber referred to these works, among others, in para 130 of its judgment, when deciding that Chapter VII provided the framework for the Security Council's delegation of its security powers to KFOR in Resolution 1244.

82. What therefore has to be considered is whether, in resolution 1546, the Security Council was lawfully delegating its Chapter VII legal powers to take the necessary military measures to restore and maintain peace and security in Iraq to the MNF. As the Grand Chamber pointed out in *Behrami,* at para 132, under reference to, *inter alia, Meroni* v. *High Authority* (Case 9/56) [1958] ECR 133:

> "[the] delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of United Nations Security Council collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the United Nations."

In other words, the delegation would be unlawful if it amounted to the Security Council transferring the responsibility which is vested in it under the Charter to the delegate. More specifically, the delegation would be unlawful if the acts of the delegate entity were *not* attributable to the Security Council. As Blokker puts it, these principles "indicate a prefer-

ence for control by the Council over operations by 'coalitions of the able and willing' so as not to abdicate the authority and responsibility bestowed on it by the Charter": N Blokker, "Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'" (2000) 11 EJIL 541, 554. The article is cited by the Grand Chamber at para 132. In the words of de Wet, *The Chapter VII Powers of the United Nations Security Council,* pp 265–266:

> "What is important, however, is that overall control of the operation remains with the Security Council. The centralisation of control over military action embodies the centralisation of the collective use of force, which forms the corner stone of the Charter. A complete delegation of command and control of a military operation to a member state or a group of states, without any accountability to the Security Council, would lack that degree of centralisation constitutionally necessary to designate a particular military action as a United Nations operation. It would undermine the unique decision-making process within an organ which was the very reason states conferred to it the very power which that organ would now seek to delegate. This concern is encapsulated in the maxim *delegatus non potest delegare:* a delegate cannot delegate."
>
> [. . .]

87. If one compares the terms of resolution 1244 and resolution 1511, for present purposes there appears to be no relevant legal difference between the two forces. Of course, in the case of Kosovo, there was no civil administration and there were no bodies of troops already assembled in Kosovo whom the Security Council could authorise to assume the necessary responsibilities. In paragraph 5 of resolution 1244 the Security Council accordingly decided "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences." Because there were no suitable troops on the ground, in paragraph 7 of resolution 1244 the Council had actually to authorise the establishing of the international security presence and then to authorise it to carry out various responsibilities.

88. By contrast, in October 2003, in Iraq there were already forces in place, especially American and British forces, whom the Security Council could authorise to assume the necessary responsibilities. So it did not need to authorise the establishment of the MNF. In paragraph 13 the Council simply authorised "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq"—thereby proceeding on the basis that there would indeed be a multinational force under unified command. In paragraph 14 the Council urged member states to contribute forces to the MNF. Absolutely crucially, however, in paragraph 13 it spelled out the mandate which it was giving to the MNF. By "authorising" the MNF to take the measures required to fulfil its "mandate", the Council was asserting and exercising control over the MNF and was prescribing the mission that it was to carry out. The authorisation and mandate were to apply to all members of the MNF—the British and American, of course, but also those from member states who responded to the Council's call to contribute forces to the MNF. The intention must have been that all would be in the same legal position. This confirms that—as I have already held, at para 61—the fact that the British forces were in Iraq before resolution 1511 was adopted is irrelevant to their legal position under that Resolution and, indeed, under Resolution 1546.

89. Allowing for the different situations on the ground, the terms of that mandate to the MNF are comparable with the terms of the mandate given to KFOR in resolution 1244. The terms of the mandate to the MNF were, of course, subsequently altered by resolution

1546 in June 2004, but the changes had the effect of making the mandate more specific. Just as resolution 1244 defined the responsibilities which KFOR was to carry out in terms of its mandate from the Security Council, so, equally, resolution 1546 defined the tasks which the MNF was to carry out in terms of its mandate from the Security Council. The two resolutions were essentially similar in these respects.

90. It is true, of course, that the words "under United Nations auspices" appear in paragraph 5 of resolution 1244 and do not appear in resolution 1511 or resolution 1546. But the only point in its reasoning where the Grand Chamber attaches significance to the words "under United Nations auspices" is at para 131, where it is concerned with the phrase as it appears in the Military Technical Agreement. There is nothing in the judgment to suggest that the inclusion of those words in resolution 1244 played any part in the reasoning (from para 132 onwards) which led the court to hold that the Security Council had delegated effective command of the relevant operational matters to NATO, while retaining ultimate authority and control. Indeed the court does not mention the phrase in that context.

91. I therefore conclude that, when the Security Council, acting under Chapter VII, authorised the MNF to carry out its various tasks in terms of resolution 1546, it was purporting to delegate these functions to the MNF, just as it had delegated functions to KFOR in resolution 1244. Certainly, I can see no reason in the circumstances of the present case why, in the light of the decision of the Grand Chamber in *Behrami,* the European Court would hold otherwise. I should add that any other conclusion would be surprising since the lawyers who draft Security Council resolutions on this "authorisation" model build on the practice of the Council. One would therefore expect to find that the, later, resolution 1546 was based on the same principles as resolution 1244. The Security Council will always be concerned, of course, to avoid the danger that a force, though nominally acting on behalf of the Council, is truly just made up of the forces of member states pursuing their own ends by military means in contravention of both Article 2 (4) of the Charter and the *ius contra bellum* of modern international law. Hence the insertion into the resolutions, first, of a clear mandate for the force, of an indication of the date when the mandate will expire, of a mechanism for reports to be made to the Council and, finally, of an indication that the Council will remain seised of the matter. Again, the need for all these matters to be spelled out will be well known to the experts who draft the Resolutions.

[. . .]

99. Again, the provision in paragraph 12 of resolution 1546 is different and must have been tailored to the realities of the situation in Iraq. It provided for the mandate of the MNF to be reviewed after 12 months or at the request of the Government of Iraq. So the Security Council could terminate the mandate after 12 months or alter it if experience showed that this was desirable. This is a further element which is designed to ensure that the Council retains ultimate control of the MNF. In addition, the mandate was to expire on the completion of the political process for the development of democratic civil government in Iraq set out in paragraph 4 of the resolution. So there was no question of the MNF having an indefinite open-ended mandate. Moreover, the Security Council declared that it would terminate the mandate earlier if requested by the Government of Iraq. This provision, too, is designed to make sure that the forces whose actions are authorised by the mandate cannot stay on beyond the time when their presence and assistance are required.

100. Arguably, in this respect also, resolution 1546 gave more control to the Security Council than resolution 1244. Under paragraph 19 of Resolution 1244, the mandate to KFOR was to continue, unless the Security Council decided otherwise. The risk, identified by the Grand Chamber, was that by using its veto, a permanent member could prevent the Council from deciding to bring the mandate to an end. By contrast, under paragraph 12 of Resolution 1546, the mandate to the MNF was to terminate automatically on the completion of the political process described in paragraph 4. This meant that a permanent member could not prolong the MNF's mandate by using its veto. Admittedly, the veto could be used against any proposal to alter the terms of the mandate after a review. But, if the provision in resolution 1244 was not sufficient for the Grand Chamber to conclude that the Security Council did not retain ultimate authority and control over the actions of the members of KFOR, I can see no reason why the court would decide differently in respect of resolution 1546.

[. . .]

105. My Lords, if that was the conclusion reached by the Grand Chamber in the case of the detention of Mr Saramati, I am bound to conclude that the court would reach the same conclusion in the case of Mr Al-Jedda. Just as the members of KFOR were exercising powers of the Security Council lawfully delegated to them by the Council, so also the members of the MNF were exercising powers of the Security Council lawfully delegated to them by the Council under resolution 1546. That being so, the court would hold, first, that the Council retained ultimate authority and control and so remained responsible in law for the exercise of those powers and, secondly, that the action of the British troops, as members of the MNF, in detaining Mr Al-Jedda was in principle attributable to the United Nations in terms of article 3 of the draft articles on the Responsibility of International Organisations.

[. . .]

118. Had it been necessary to decide the point, I would accordingly have held that, by virtue of Articles 25 and 103 of the Charter, the obligation of the United Kingdom forces in the MNF to detain the appellant under resolution 1546 prevailed over the obligations of the United Kingdom under article 5(1) of the Convention.

Baroness Hale of Richmond

[. . .]

123. . . . [I]t is suggested that it is lawful to intern a person in Iraq. The source of that authority is said to be the United Nations Security Council resolutions dealing with the activities of US, UK and other forces making up the multi-national force ("MNF") after the transfer of power to the Iraqi Interim Government on 28 June 2004. It is said that either (i) those resolutions make the acts of the MNF attributable to the United Nations in international law, thus relieving the UK of responsibility for them; or (ii) those resolutions qualify or displace the obligations in the ECHR so that internment may in certain circumstances be lawful.

124. I would reject the first argument, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill. I agree with him that the analogy with the situation in Kosovo breaks down at almost every point. The United Nations made submissions to the

European Court of Human Rights in *Behrami* v. *France, Saramati* v. *France, Germany and Norway* (Application Nos. 71412/01 and 78166/01) (unreported, 2 May 2007), concerning the respective roles of UNMIK and KFOR in clearing mines, which was the subject of the *Behrami* case. It did not deny that these were United Nations operations for which the United Nations might be responsible. It seems to me unlikely in the extreme that the United Nations would accept that the acts of the MNF were in any way attributable to the United Nations. My noble and learned friend, Lord Brown of Eaton-under-Heywood, has put his finger on the essential distinction. The United Nations's own role in Iraq was completely different from its role in Kosovo. Its concern in Iraq was for the protection of human rights and the observance of humanitarian law as well to protect its own humanitarian operations there. It looked to others to restore the peace and security which had broken down in the aftermath of events for which those others were responsible.

125. I also have difficulty with the second argument. It would be so much simpler if the European Convention on Human Rights had contained a general provision to the effect that the rights guaranteed are qualified to the extent required or authorised by United Nations resolutions. This may not be surprising: by then the European nations who had vowed "never again" would they tolerate the abuses they had suffered before and during the Second World War had become disillusioned with the United Nations as a reliable source of human rights protection. As Brian Simpson has put it, "Europe must go it alone" (*The European Convention on Human Rights: The First Half Century,* University of Chicago Law School). But now that the United Nations has to some extent emerged from its cold war paralysis, some way has to be found of reconciling our competing commitments under the United Nations Charter and the European Convention. I agree with Lord Bingham, for the reasons he gives, that the only way is by adopting such a qualification of the Convention rights.

126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the United Nations has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.

127. It is not clear to me how far Security Council resolution 1546 went when it authorised the MNF 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" (para 10). The 'broad range of tasks' were listed by Secretary of State Powell as including "combat operations against members of these groups [seeking to influence Iraq's political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security". At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF to "act consistently with their obligations under the law of armed conflict, including the Geneva Conventions".

[. . .]

Lord Carswell

[. . .]

132. The detention of the appellant would be in breach of article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), if it applies, for it does not fall within any of the cases in which it may be justified. Nor would it appear possible, as Lord Bingham has set out in paragraph 38 of his opinion, for the United Kingdom to exercise its power of derogation from article 5(1) in the circumstances of this case. The decision of the appeal on the second issue must therefore turn on the effect of Article 103 of the Charter, which formed the main subject of the argument before your Lordships.

133. Article 103 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 Secretary of State's case was therefore that the United Kingdom was under an obligation imposed by the United Nations under Chapter VII of the Charter to take such steps as are necessary to restore and maintain peace and security following the armed insurrection consequent upon the invasion of Iraq. This obligation overrode the United Kingdom's obligations under article 5(1) of the Convention.

134. Resolution 1546 of the Security Council, the material terms of which are set out in para 15 of Lord Bingham's opinion, provides that:

> "the multinational forces 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 . . ."

One of the annexed letters, dated 5 June 2004 and sent by the US Secretary of State General Colin Powell to the President of the Security Council, stated that the Multi-National Force stood ready:

> "to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, *internment where this is necessary for imperative reasons of security* . . ." (my emphasis).

It was accordingly contemplated by the resolution that the MNF could resort to internment where necessary.

135. It was argued on behalf of the appellant that the resolution did not go further than authorising the measures described in it, as distinct from imposing an obligation to carry them out, with the consequence that Article 103 of the Charter did not apply to relieve the United Kingdom from observing the terms of article 5(1) of the Convention. This was an attractive and persuasively presented argument, but I am satisfied that it cannot succeed. For the reasons set out in paragraphs 32 to 39 of Lord Bingham's opinion I consider that resolution 1546 did operate to impose an obligation upon the United Kingdom to carry out those measures. In particular, I am persuaded by State practice and the clear statements of authoritative academic opinion—recognised sources of international law—that expressions in Security Council resolutions which appear on their face to confer

no more than authority or power to carry out measures may take effect as imposing obligations, because of the fact that the United Nations have no standing forces at their own disposal and have concluded no agreements under Article 43 of the Charter which would entitle them to call on member states to provide them.

136. I accordingly am of opinion that the United Kingdom may lawfully, where it is necessary for imperative reasons of security, exercise the power to intern conferred by resolution 1546. I would emphasise, however, that that power has to be exercised in such a way as to minimise the infringements of the detainee's rights under article 5(1) of the Convention, in particular by adopting and operating to the fullest practicable extent safeguards of the nature of those to which I referred in paragraph 130 above.

137. I would dismiss the appeal.

Lord Brown of Eaton-under-Heywood

[. . .]

Issue One—Attributability

142. The respondent submits that there are no distinctions of principle to be found between Mr Saramati's detention by KFOR under Security Council resolution 1244 and the appellant's detention by the multinational force ("MNF") under Security Council resolution 1546. And since, if that be right, the appellant could not succeed in an application under the Convention in Strasbourg, he cannot succeed either in a claim domestically under the Human Rights Act 1998.

143. Lord Bingham (para 24) concludes that the analogy with Kosovo breaks down at almost every point. I wish I found it so easy. My difficulty is not least with my Lord's view that "there was no delegation of United Nations power in Iraq." By that I understand him to mean (paras 21 and 23) that, in contrast to the position in Kosovo, the United Nations in Iraq was merely authorising the US and the UK to carry out functions which it could not perform itself as opposed to empowering them to exercise its own function. It seems to me, however, that in this respect the situation in Kosovo and Iraq was the same: in neither country could the United Nations as a matter of fact carry out its central security role so that in both it was necessary to authorise states to perform the role. As the court in *Behrami* explained in paras 132 and 133, that necessarily follows from the absence of Article 43 agreements. When the court posed "the key question whether the Security Council resolution retained ultimate authority and control so that operational command only was delegated", it noted (para133): "This delegation model is now an established substitute for the Article 43 agreements never concluded". And this seems to me entirely consistent with para 43 of the court's judgment: the mention there of "functions which it could not itself perform" I understand to refer to functions which the Security Council cannot itself perform as a matter of *law* and which accordingly can only be done by a different body properly authorised under the United Nations Charter—see Sarooshi, "The United Nations and the Development of Collective Security: The Delegation by the United Nations Security Council of its Chapter VII powers" (1999).

144. I turn, therefore, to "the key question" and in particular to the five factors which led the court in *Behrami* (para 134) to conclude that the United Nations in Kosovo had retained ultimate authority and control. The first, that Chapter VII of the Charter

allows the Security Council to delegate to member states, applies equally here. So too the second, the power to provide for security being a legally delegable power. The third I shall leave over for the moment. It is difficult to find any relevant distinction with regard to the fourth: Security Council resolution 1511 (which authorised the formation of the MNF) fixed its mandate no less precisely than Security Council resolution 1244 defined KFOR's mandate. Indeed, so far as the power of internment was concerned, resolution 1546 was altogether more specific (see paras 14 and 15 of Lord Bingham's opinion), resolution 1244 having entrusted KFOR merely with such general responsibilities as "ensuring public safety and order". Nor could the fifth factor, the reporting requirements, reasonably lead to a different conclusion about ultimate authority and control here. True, this case lacks the additional safeguard noted in *Behrami* that KFOR's report had to be presented by the United Nations Secretary General, but that surely is counterbalanced by the fact that the MNF's mandate ceases unless renewed by the Security Council whereas KFOR's mandate was to continue until the Security Council decided otherwise (a decision which, at least theoretically, a permanent member could have vetoed).

145. To my mind it follows that any material distinction between the two cases must be found in the third factor, or rather in the very circumstances in which the MNF came to be authorised and mandated in the first place. The delegation to KFOR of the United Nations's function of maintaining security was, the court observed, "neither presumed nor implicit but rather prior and explicit in the resolution itself". Resolution 1244 decided (para 5) "on the deployment in Kosovo, under United Nations auspices, of international civil and security presences"—the civil presence being UNMIK, recognised by the court in *Behrami* (para 142) as "a subsidiary organ of the United Nations"; the security presence being KFOR. KFOR was, therefore, expressly formed under United Nations auspices. Para 7 of the resolution "[a]uthorise[d] member states and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2. .". Point 4 of Annex 2 stated: "The international security presence with substantial NATO participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."

146. Resolution 1511, by contrast, was adopted on 16 October 2003 during the USA's and UK's post-combat occupation of Iraq and in effect gave recognition to those occupying forces as an existing security presence. Para 13 of the resolution is instructive:

> "*Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorises* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq ["UNAMI"], the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure."

147. By resolution 1483, adopted on 22 May 2003, the Security Council had "[r]esolved that the United Nations should play a vital role in humanitarian relief, for reconstruction of Iraq, and the restoration and establishment of national and local insti-

tutions for representative governance" and, pursuant to it, the Secretary General [. . .] had established UNAMI, an essentially humanitarian and civil aid mission. As para 13 of resolution 1511 indicated, it was that mission which was the United Nations's contribution to the situation in Iraq. The MNF under unified command which para 13 was authorising was to contribute to the security of, amongst others, UNAMI. Unlike KFOR, however, it was not itself being deployed "under United Nations auspices". UNAMI alone represented the United Nations's presence in Iraq.

148. Nor did the position change when resolution 1546 was adopted on 8 June 2004, three weeks before the end of the occupation and the transfer of authority from the CPA to the interim government of Iraq on 28 June 2004. UNAMI was to continue with its work (para 7). So too was the MNF, both of them acting at the request of the incoming interim government of Iraq. Resolution 1546 accordingly reaffirmed the authorisation of the MNF under unified command (this time "in accordance with the letters annexed", described by Lord Bingham at para 14). And, as para 10 noted, consistently with the previous position, the MNF's tasks, including the prevention and deterrence of terrorism, were imposed so that, amongst other things, "the United Nations can fulfil its role in assisting the Iraqi people as outlined in para 7 above"—namely UNAMI's humanitarian and civil aid work. Nothing either in the resolution itself or in the letters annexed suggested for a moment that the MNF had been under or was now being transferred to United Nations authority and control. True, the Security Council was acting throughout under Chapter VII of the Charter. But it does not follow that the United Nations is therefore to be regarded as having assumed ultimate authority or control over the force. The precise meaning of the term "ultimate authority and control" I have found somewhat elusive. But it cannot automatically vest or remain in the United Nations every time there is an authorisation of United Nations powers under Chapter VII, else much of the analysis in *Behrami* would be mere surplusage.

149. It is essentially upon this basis, therefore, that I regard the present case as materially different from *Behrami* and am led to conclude that the appellant's internment is to be attributed, not to the United Nations acting through the MNF, but rather directly to the UK forces.

Issue 2—did the United Nations resolutions qualify or displace article 5(1)?

150. The United Nations resolutions expressly authorised "internment where this is necessary for imperative reasons of security". For the purposes of these proceedings it has to be assumed that security considerations have indeed demanded the appellant's internment. Even so, submits Mr Starmer QC for the appellant, his internment nevertheless remains unlawful unless and until the UK exercises its article 15 right to derogate from article 5. I would reject this argument. In the first place it is highly doubtful whether article 15 could be invoked with regard to action taken outside the member state's own territory—see, for example, the Grand Chamber's judgment in *Bankovic* v. *Belgium* (2001) 11 BHRC 435, para 62.

> " . . . the court does not find any basis upon which to accept the applicants' suggestion that article 15 covers all 'war' and 'public emergency' situations generally, whether obtaining inside or outside the territory of the contracting state."

151. But the sounder and more fundamental reason for holding the article 5(1) proscription on internment to be qualified or displaced here is that Article 25 of the Charter

requires member states to accept and carry out Security Council decisions and Article 103 provides that in the event of a conflict between that obligation and the member state's obligations under any other international agreement, the former are to prevail. The Security Council's decision here (see para 10 of Security Council resolution 1546) was "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 . . ." (which included amongst the MNF's "tasks" "internment where this is necessary for imperative reasons of security").

152. I find it quite impossible to regard that "task" as anything other than an Article 25 (Charter) obligation which is to prevail over the article 5 (ECHR) obligation not to intern. Mr Starmer argues that the UK could decline to intern a prisoner just as it could decline to execute him. As, however, Lord Bingham points out (at para 34) if, as is here to be assumed, internment is indeed necessary for imperative reasons of security, a decision not to intern would be a refusal to carry out the UK's allotted task. No such reasoning, of course, would apply in the case of capital punishment. In short, on this issue I agree with all that Lord Bingham has said.

[. . .]