In The House of Lords

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
(ENGLAND)

BETWEEN:

THE QUEEN
on the application of
HILAL ABDUL-RAZZAQ ALI AL JEDDA

Appellant

- and -

THE SECRETARY OF STATE FOR DEFENCE

Respondent

CASE FOR THE INTERVENERS (JUSTICE AND LIBERTY)

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A. INTRODUCTION

1. By order of the Appeal Committee of your Lordships' House dated 9 May 2007, JUSTICE and the National Council for Civil Liberties ("Liberty") were given leave to present written and oral submissions in intervention in this appeal.

2. JUSTICE, founded in 1957, is an independent human rights and law reform organisation and the British section of the International Commission of Jurists. Liberty, founded in 1934, is an independent non-party political body whose principal objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom.

3. This intervention addresses two of three issues, as agreed between the Appellant and the Respondent (collectively "the parties") in the Amended Statement of Facts and Issues ("the SFI"):

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a. Whether, by reason of the provisions of United Nations Security Council Resolution ("UNSCR") 1511 (2003) and/or UNSCR 1546 (2004) and/or UNSCR 1637 (2005) and/or UNSCR 1723 (2006) and/or (so far as it may be relevant) UNSCR 1483 (2003) the detention of the Appellant is attributable to the United Nations ("the UN") and thus outside the scope of the ECHR, and

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b. Whether the provisions of Article 5(1) of the ECHR ("ECHR5(1)") are qualified by the legal regime established pursuant to UNSCR 1546 (and subsequent resolutions) by reason of the operation of Articles 25 and 103 of the UN Charter (respectively "UNC25" and "UNC103"), such that the detention of the Appellant has not been in violation of ECHR5.

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4. The Interveners submit, in summary that:

a. The conduct in issue, the arrest and detention of the Appellant, is conduct attributable to the Respondent and not the multi-national force or the UN. The approach of the Strasbourg Court in ***Behrami and Saramati*** is to be distinguished since the applicants in that case did not argue, and therefore the Court did not consider, whether the impugned (in)actions there were within the effective control of the respondents (as they are here). Even if the ***Behrami and Saramati*** approach is adopted, it, similarly, yields the conclusion that the conduct in question is attributable to the Respondent and not the UN since the Respondent was acting pursuant to an authorised Chapter VII operation conducted under UK command and control.

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b. UNSCR 1546 does not oblige the Respondent to undertake Geneva Convention IV, Article 78-type internment: it confers a discretionary mandate on the Respondent to undertake internment where the Respondent regards it as necessary for imperative reasons of security. Nor does UNSCR 1546 prescribe the modalities for the implementation of internment – that is also a matter for the Respondent's discretion. The Respondent ought to have exercised its discretion compatibly with ECHR5(1). It has failed to do so and has violated the Appellant's ECHR5(1) rights. UNSCR 1546 does not displace or modify the Respondent's ECHR5(1) obligations.

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c. If UNSCR 1546 is interpreted as obliging the Respondent to undertake internment in a manner which is contrary to ECHR5(1): the Respondent can justify its violation of the Appellant's ECHR5(1) rights if it can show that the UN system provides (both substantively and procedurally)

protection equivalent to that in ECHR5(1). The UN system does not. Whilst it may provide similar substantive guarantees to those in ECHR5(1) it does not provide any mechanism for enforcing their observance. The Respondent cannot, therefore, rely on UNSCR 1546 as displacing or modifying its ECHR5(1) obligations.

d. Alternatively, as a matter of international law, if UNSCR 1546 is to be interpreted as the Respondent contends then it is *ultra vires* and non-binding. UNC103 is not engaged and cannot be relied upon as displacing ECHR5(1).

B. THE ROLE OF INTERNATIONAL LAW IN THE ECHR SYSTEM

5. This case concerns a fundamental human right, as embodied in ECHR5(1). This right is reflected in other international treaties (e.g. the Universal Declaration of Human Rights Article 3 and the International Covenant on Civil and Political Rights Article 9). It has long been recognised as a fundamental right in English law,[1] independently of such international sources.[2]

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6. If it is assumed that the Convention rights protected by the Human Rights Act 1998 ("the HRA") are of the same scope as those protected

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[1] A v SSHD [2004] UKHL 56 [2005] 2 AC 68: *"[T]he human right in question, the right to individual liberty, is one of the most fundamental of human rights."* (§81 *per* Lord Nicholls); *"It is impossible ever to overstate the importance of the right to liberty in a democracy."* (§100 *per* Lord Hope)

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[2] A v SSHD (see fn1 above): *"[This case] calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom. .., But I would not like anyone to think that we are concerned with some special doctrine of European law. Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law."* (§§86-87 *per* Lord Hoffmann)

by the ECHR[3] then Your Lordships' House will need to determine this appeal, and whether the Appellant's ECHR5(1) rights have been violated by the Respondent, by taking into account the jurisprudence of the Strasbourg Court ("the Court") (s.2, HRA). Recent guidance on the scope of the duty under s.2, HRA was provided by Lord Bingham in *Kay v London Borough of Lambeth* [2006] UKHL 10.[4]

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7. Given the extent of the Respondent's reliance on international law, and, especially, UNC25 and UNC103, it follows that the determination of this appeal will depend in large part on the relationship between international law and the ECHR and – in particular – whether the Court would use international law as relied upon by the Respondent.

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8. The Court's judgments are known for their commendable brevity. This brevity should not be manipulated. It would be wrong to determine the appeal by reference to abstract quotations taken out of context - e.g. "*The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part*"; *Al-Adsani v UK* 21.11.01 (2002) 34 EHRR 11, §55, cited in *Bankovic v Belgium* 12.12.01 (2001) 11 BHRC 435, §57 upon which the Respondent relies: **[Detailed Grounds of Defence/§19]**, cf.

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[3] As a consequence of the amendments to the SFI, Your Lordships' House is no longer required to determine whether the Convention rights protected by the HRA are of the same scope as those protected by the ECHR. The Interveners note that they would not necessarily accept that this issue has been determined, in the manner found by the Court of Appeal, by the previous judgments of the House in *R(Quark Fishing) v SSFCO* [2005] UKHL 57 [2005] 3 WLR 837 and *R(Al-Skeini) v SSD* [2007] UKHL 26 [2007] 3 WLR 33.

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[4] *"The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings … But by section 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a Convention right such as a right arising under article 8. There are isolated occasions … when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the Convention rights specified in section 1(1) of the 1998 Act. That Court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down."* (§28)

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the Concurring Opinion of Judge Ress in *Bosphorus Hava Yollari v Ireland*, 30.6.05 Application No. 45036/98, §5.[5] It would be equally wrong to determine the appeal by reference to isolated cases without being informed of the broader landscape of the Court's jurisprudence. It is therefore essential to consider, first, the framework within which the Court has drawn upon international law (in this part) and then to apply that framework in relation to, secondly, attribution (parts C and D below) and, thirdly, violation (parts E and F below) to see if it permits of either of the results advocated by the parties. Finally, international law principles more generally are considered in part G.

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9. Unlike the EC Treaty (Article 307)[6] the ECHR makes no reference to other treaty obligations. The only express references to other rules of international law, in relation to the substantive provisions, are in ECHR7, 15, and A1P1. The Court refers to international law, as appropriate, when applying these Articles to cases before it.

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[5] *"A general remark is necessary on [§150 of the judgment] as regards the interpretation of the Convention "in the light of any relevant rules and principles of international law", which principles include that of pacta sunt servanda. This cannot be interpreted to give treaties concluded between the Contracting Parties precedence over the Convention. On the contrary, as the Court recognised in the case of Matthews v the United Kingdom … international treaties between the Contracting Parties have to be consistent with the provisions of the Convention. The same is true of treaties establishing international organizations. The importance of international cooperation and the need to secure the proper functioning of international organizations cannot justify Contracting Parties creating and entering into international organisations which are not in conformity with the Convention. Furthermore, international treaties like the Convention may depart from rules and principles of international law normally applicable to relations between the Contracting Parties. Therefore, in the case of Al-Adsani … (which the Court cited in this connection in its judgment in the present case), the Court's approach to the relationship between different sources of public international law was not the right one. The correct question should have been whether, and to what extent, the Convention guarantees individual access to tribunals in the sense of Article 6 §1 and whether the parties could and should have been seen as nevertheless reserving the rule on state immunity. Since the Contracting Parties could have waived their right to invoke State immunity by agreeing to Article 6§1 of the Convention, the starting point should have been the interpretation of Article 6 §1 alone. Unfortunately this question was never asked."* Nb. Regardless of how the *Al-Adsani* Court approached the issue, the key point is that its consideration of international law was rooted in the context of ECHR6(1) – see §51 below.

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[6] *"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."*

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10. It is apparent from the Court's jurisprudence, however, that international law also plays a role in the determination of:

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a. Jurisdiction (i.e. whether the impugned (in)actions occurred within the ECHR1 jurisdiction of the High Contracting Party ("HCP")): the Court considered this issue in the light of international law principles in *Bankovic*, see e.g. §59. Jurisdiction will not be considered further since the Respondent accepts, as a result of *Al-Skeini*, that the Appellant is within its ECHR1 jurisdiction. Note, however, that this concession has important consequences for the purposes of attribution: see §§30-32.

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b. Attribution (i.e. whether the impugned (in)actions can be attributed to a HCP): the Court has recently considered this issue in the light of international law principles in *Behrami v France* and *Saramati v France, Germany and Norway* 2.5.07 Application Nos. 71412/01 and 78166/01, (see §§14-22);

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c. Violation (i.e. whether the impugned (in)actions constitute a violation of the Applicant's ECHR rights): rather than applying international law in the abstract the Court has considered (1) whether ECHR obligations can be qualified or displaced by a HCP performing obligations pursuant to its membership of an international organisation, and (2) whether ECHR obligations are affected by a HCP performing discretionary acts pursuant to its membership of an international organisation or by a HCP's other international law rights or obligations (see §§40-51).

11. Aside from the broad issues of jurisdiction, attribution and violation there are other miscellaneous examples of the Court using international law in support of its decisions, for example in refusing to recognise as legitimate and lawful provisions of the "Constitution" of the "Turkish Republic of Northern Cyprus" in *Loizidou v Turkey*

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(Preliminary Objections) 18.12.96 (1996) 23 EHRR 513, §§43-45, and in determining the scope of its jurisdiction *ratione temporis*: *Blecic v Croatia* 8.3.06 (2006) 43 EHRR 48, §§45-48; 70.

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12. There are also examples of the Court *"reaching beyond international law standards"*, e.g. when the Court invalidated Turkey's territorial reservations to its acceptance of the Court's jurisdiction and then considered that these reservations could be severed from the main instrument of acceptance in order to preserve the validity of the instrument: *Loizidou v Turkey* 23.3.95 (1995) 20 EHRR 99 and, similarly, the earlier case of *Belilos v Switzerland* 29.4.88 (1988) 10 EHRR 466; see also Wildhaber, *"The ECHR and International Law"* ICLQ vol.56 April 2007, pp. 217-232 at 221 and 229.[7]

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13. It is apparent from this overview that it is wrong to assert that the Court will simply apply international law or determine a claim on the basis of international law. The Court's jurisprudence quite clearly uses international law within restricted parameters for the purposes of giving effect to the ECHR. It is necessary, therefore, to consider whether there is any basis, in the Court's jurisprudence, for deferring to an international law analysis on a given point.

C. ATTRIBUTION: THE LAW

14. Where a HCP is a member of an international organisation, and its membership is relevant to impugned (in)actions, the acts/omissions in question must be carefully analysed to determine whether they are attributable to (1) the HCP; (2) the international organisation or, possibly, (3) both the HCP and the international organisation.

[7] *"The Belilos and Loizidou approach disregarded the fact that at the heart of any treaty-based commitment there could only be agreement. The issue would then be whether human rights treaties made an exception in this respect. The Belilos and Loizidou approach emphasizes the integrity and unity of the Convention system, going beyond the consent- and sovereignty-oriented rules of general international law."*

15. Strasbourg case law contains examples of impugned (in)actions which are solely attributable to an international organisation, not party to the ECHR, of which a HCP is, in some way, a part: for example, various organs of the European Communities (*CFDT v European Communities* 10.7.78 Application No. 8030/77); the European Patent Office (*Heinz v Contracting States of the European Patent Convention* 10.1.94 Application No. 21090/92 DR 76-A 125); the United Nations (*Behrami and Saramati*). Authorities Tab 47 Authorities Tab 52 Authorities Tab 80

16. The Court's jurisprudence, and before it that of the Commission, has quite clearly provided, in these instances of sole attribution, that it is not competent *ratione personae* to examine the impugned (in)actions of the international organisation in question.[8] Applications based on such (in)actions are declared inadmissible.

17. On the other hand, where a HCP through its own conduct (1) carries out obligations or (2) exercises discretion pursuant to its membership of the international organisation that is conduct attributable to it:

    a. Where a HCP carries out obligations pursuant to its membership of an international organisation that gives rise to the principle of equivalent protection: see below §§40-46.

[8] Thus:

(a) The Commission *"points out that the European Communities are not a Contracting Party to the [ECHR] ..To this extent the consideration of the applicant's complaint lies outside the Commission's jurisdiction ratione personae."* (*CDFT v European Communities*, §3); Authorities Tab 47

(b) The Commission *"first recalls that it is in fact not competent ratione personae to examine proceedings before or decisions of organs of the European Communities, the latter not being a party to the [ECHR]"* (*M&Co v Germany* 9.2.90 Application No. 13238/87, p.8); Authorities Tab 51

(c) *"[The Commission] recalls its case-law according to which it is not competent ratione personae to examine proceedings before, or decisions of, organs of the European Communities, the latter not being a Party to the [ECHR] … this case-law also applies to the European Patent Office."* (*Heinz v Contracting States to the European Patent Convention*, p. 127); Authorities Tab 52

(d) *"In the present cases [as compared to Bosphorus] the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore distinguishable from the Bosphorus case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence ratione personae…In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible ratione personae with the provisions of the Convention."* (*Behrami and Saramati* §§151-152. The Court in *Behrami* had noted earlier, §144, that the UN has a legal personality separate from that of its member states and that it is not a Contracting Party to the ECHR. Authorities Tab 80

b. Where the HCP exercises discretion pursuant to its membership of an international organisation it is responsible for its conduct in the usual way: see below §§47-51.

18. The line between conduct attributable to a HCP carried out pursuant to its membership of an international organisation and conduct attributable to an international organisation *per se* (of which a HCP is a member) may be a fine one. This line is illustrated by the facts of *Behrami and Saramati*. The Court analysed, first, which entity (KFOR or UNMIK) had the mandate for the (in)actions and then whether that (in)action could be attributed to the UN. The Court held that:

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a. the impugned inaction in *Behrami*, the failure to de-mine undetonated cluster bomb units, was attributable to UNMIK, a subsidiary organ of the UN which had the mandate for supervising de-mining (§127). The acts were therefore, attributable to the UN itself (§§142-143), and

b. the impugned action in *Saramati*, unlawful detention, was attributable to KFOR which had the mandate of issuing detention orders (§127). Since KFOR was exercising lawfully delegated Chapter VII powers of the UNSC the action was attributable to the UN (§§132-141).

19. The Court considered that (1) "*the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated*" (§133; which it resolved in the affirmative: §135); (2) the troop contributing nations retained "*some authority*" over their troops (§138); and (3) that their involvement was not incompatible with the effectiveness of NATO's operational command (§139) - the UNSC having delegated to NATO the power to establish KFOR and operational command over KFOR (§135).

20. As the Court explained in *Behrami and Saramati*, whether in(action) is attributable to an international organisation or a HCP (or, indeed,

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both) is to be determined by reference to the Draft Articles on the Responsibility of International Organisations. Article 5 of the Draft Articles adopted in 2004 during the 56th session of the International Law Commission, entitled *"Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation"* provides,

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> *"The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct."* (underlining added; see further the ILC commentary extracted at ***Behrami and Saramati***, §31)

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21. The UN itself has distinguished between three situations (in its response to the ILC's request regarding attribution in relation to peacekeeping forces: see UN Doc A/CN.4/545 dated 25.6.04, p.16, fn9):

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a. UN peacekeeping operations: the acts of Member States' military personnel contributing to such operations are attributable to the UN (UN Doc A/CN.4/545, p.17);

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b. Authorised Chapter VII operations conducted under national command and control: the acts of a Member State's military personnel are attributable to the State in question (UN Doc A/CN.4/545, p.18);

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c. Joint UN peacekeeping operation and an operation conducted under national command and control: the acts of a Member State's military personnel are attributable to the entity (UN/the Member State) exercising effective control over the military personnel in question (UN Doc A/CN.4/545, p.18).

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22. As a matter of law, it is possible that (in)action could be attributable to both an international organisation and a Member State of that organisation, i.e. that they could both, simultaneously, exercise

"effective control" over given circumstances. As a matter of fact, however, this situation is likely to be rare. Thus, as the UN has observed: *"we are not aware of any situation where the [UN] was held jointly or residually responsible for an unlawful act by a State in the conduct of an activity or operation carried out at the request of the [UN] or under its authorization."* (UN Doc A/CN.4/556 dated 12.5.05, p.46)

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D. ATTRIBUTION: THE PRESENT CASE

23. The *"conduct"* in the present case is the arrest and detention of the Appellant. On the assumption that British armed forces were placed *"at the disposal of"* the multi-national force in Iraq ("the MNF") Your Lordships' House needs to determine, in accordance with Article 5 of the Draft ILC Articles, whether the UN has *"effective control"* over that conduct. That is a question of fact. Importantly, <u>*Behrami and Saramati*</u> must be distinguished: the Court's treatment of the question of attribution is inextricably linked to the way in which the applicants argued that case.

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24. In <u>*Behrami and Saramati*</u> the applicants submitted that KFOR was the entity responsible for relevant acts: detention and de-mining (§73). The obvious corollary of the applicants' submission is that the responsibility of the HCPs could only have been engaged <u>through KFOR</u> and that the HCPs did not have effective control over the (in)actions in their own right as sovereign States. Obviously, therefore, the Court did not consider whether the HCPs had effective control over the (in)actions in question. Instead, the Court was compelled to determine attribution by considering (1) which entity was responsible for the acts by reference to which entity <u>had the mandate to perform the acts</u> and (2) the <u>relationship</u> between that entity and the UN.

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25. Your Lordships' House would only need to engage in the <u>*Behrami and Saramati*</u> sort of analysis if it were to be conceded (or if the

House held) that the Appellant's arrest and detention were not controlled by the Respondent. The House would then need to consider who had the mandate to undertake internment and whether, in exercising the mandate, that entity's acts were attributable to the UN.

(1) The Respondent – not the MNF - has "effective control" over the Appellant

26. There can be no doubt that the Respondent has "*effective control*" over the Appellant's arrest and detention. Indeed, it could almost be said that the Respondent has had *exclusive* control over the Appellant's arrest and detention. The role of the MNF, if indeed it has had a role, is *de minimis*.

27. UNSCR 1546 conferred the mandate "*to take all necessary measures to contribute to the maintenance of security and stability in Iraq*" on the MNF (§10).[9] Colin Powell's letter, attached to UNSCR 1546 specifies "*internment where this is necessary for imperative reasons of security*" as part of the range of tasks included in this mandate (§4).[10] UNSCR 1546 also reaffirmed the authorization for the MNF "*under unified command*" (§9), such authorization having previously been conferred by UNSCR 1511, §13.

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28. The UK is part of the MNF and shares the mandate, with the rest of the MNF, to, inter alia, undertake "*internment*" as specified in UNSCR 1546. The manner in which that mandate has been exercised

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[9] "*Decides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outline in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and program for the political process and benefit from reconstruction and rehabilitation activities*".(underlining added)

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[10] "*Under the agreed arrangement, the MNF stands 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, and the continued search for and securing of weapons that threaten Iraq's security…*" (underlining added)

in relation to the Appellant is considered below (§29). The evidence shows that the principal – indeed the only – actor with control over the Appellant's arrest and detention is the Respondent - not the MNF more generally. It is also revealing to compare the Respondent's sweeping involvement with the Appellant with France and Norway's far more limited involvement with the detention of Mr Saramati (see *Behrami and Saramati*, §§8-17).

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29. In this case:

a. Intelligence on the Appellant was considered at the *"Ministerial"* level prior to the Appellant's arrest **[Rollo/§11]**;

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b. British troops carried out the Appellant's arrest on 10 October 2004 **[SFI/§4]**;

c. British troops are detaining the Appellant **[Detailed Grounds of Defence/§1; SFI/§4; Chapman Exhibit/p.363]**;

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d. A British officer (Lt Col RD Watts) exercising authority delegated from another British officer (Major General Rollo) authorised the Appellant's initial internment **[Rollo/§9]**;

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e. Major General Rollo continued to authorise the Appellant's internment until 1 December 2004 **[Rollo/§19]**;

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f. Major General Riley (another British officer) continued to authorise the Appellant's internment from January 2005 until 10 June 2005 **[Riley/§11; §18]**;

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g. Since then the Divisional Internment Review Committee ("DIRC") (see below) has continued to authorise the Appellant's detention **[Dann/§35]**.

h. Major General Rollo and Major General Riley held the same position: they were, consecutively, *"Commander of Multi-National Division forces in South Eastern Iraq [Comd MND[(SE)] and the Commander of British Forces in MND (SE)"* **[Rollo/§1; Riley/§1]**. Their evidence is plain. The authority to intern individuals came from their British chain of command: *"In fulfilling my mission as Comd MND(SE) I was authorised by my British chain of command to intern individuals where necessary for imperative reasons of security in Iraq"* **[Rollo/§4; Riley/§4]**; Appendix pp. 435; 457 Appendix pp. 436; 458

i. The DIRC carries out periodic reviews of the Appellant's internment. The DIRC was initially composed of *"various British MND(SE) personnel including the Officer Commanding (OC) of the DTDF [Divisional Temporary Detention Facility], together with legal, military intelligence and operational Staff Officers, and MOD and FCO policy advisers (Polads)."* **[Rollo/§7]** but was later reduced to *"4 more senior members. The Chief of the Divisional HQ Staff; the Chief Divisional [policy adviser], the Chief Divisional Intelligence Officer and the Chief Divisional Legal Officer."* **[Riley/§8]** and, latterly, includes the GOC MND (SE), a UK 2-star Major General **[Dann/§§27; 34-35]**. As before, all of these appear to be British personnel. In addition, there is a Divisional Internee Monitoring Committee ("DIMC") which is composed of various officers: **[Riley/§9]**. There is no suggestion that these were not all British officers; Appendix p. 437 Appendix p. 458 Appendix p. 460

j. The only evidence of any non-British involvement in the Appellant's arrest or his detention is in **[Dann/§§36-39]**. She describes the Joint Detention Committee ("JDC"), from which approval is needed if it is considered that a security internee should be interned for longer than 18 months. The JDC is co-chaired by the Prime Minister of the Government of Iraq and by the Commander MNF-I (a US 4 star general):

[Dann/§36]. However, the witness statement goes on to describe that (1) in the only meeting of the JDC that has taken place it decided to delegate its authority to review applications to the Joint Detention Review Committee ("JDRC") (**[Dann/§37]**) and (2) although the JDRC is composed of representatives from the Iraqi government and MNF officers, when reviewing detention of persons detained by UK forces *"the relevant officers are UK officers"* (**[Dann/§38]**). It is clear from this evidence that insofar there has been, or there is scope for, any non-British involvement in the Appellant's detention it is trivial.

It follows that the Respondent - and not the MNF - has effective control over the Appellant's arrest and detention.

30. Furthermore, that the Respondent has the requisite control over the Appellant's arrest and detention follows, unavoidably, in the present case, from the fact that the Appellant is admitted as being within the Respondent's jurisdiction (*Al-Skeini*). There is, of course, a distinction between responsibility and jurisdiction. Thus, there could be facts where an individual's human rights were violated by state Y but where he was within the jurisdiction of state X: for example, Russia might be alleged to be responsible for violating Alexander Litvinenko's ECHR2 right to life when he was within the jurisdiction of the UK. Whether there is a coincidence of jurisdiction and responsibility will depend, always, on a scrutiny of the facts in any given case. It would, however, be astonishing to assert, even at a level of generality, that

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a. Where a state has jurisdiction over an individual by virtue of having custody over him (rather than by his presence on its territory)

b. That state does not have *prima facie* (or actual) responsibility for violating his human rights

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c. In particular where the alleged violation relates to a right to liberty and security.

31. These facts – which are, of course, those of the Appellant's case - represent a compelling coincidence of responsibility and jurisdiction. The basis on which the Respondent's jurisdiction exists (custody) is precisely the same as the basis on which its control and responsibility exists (deprivation of liberty).

B

32. This analysis is sufficient to show that the Respondent, and not the MNF, has *"effective control"* over the acts in question and that these acts are attributable to the Respondent and not the MNF. In the interests of completeness, however, it is noted that this conclusion would be the same even if the House were to embark upon a *Behrami and Saramati* type analysis.

C

Authorities Tab 80

D

(2) The Appellant's arrest and detention are not attributable to the UN

33. As noted above, the UK shared the mandate to undertake internment with the rest of the MNF. The key point is, therefore, to consider whether, in exercising that mandate the UK's acts are attributable to the UN. This question is to be analysed by asking whether the Respondent's presence in Iraq is as part of (1) a UN peacekeeping operation; (2) an authorised Chapter VII operation conducted under national command and control or (3) a joint UN peacekeeping operation and an operation conducted under national command and control (see §21 above).

E

F

34. Analysis of the principal UNSCRs shows that the Respondent's presence in Iraq, since UNSCR 1483, is to be classified as an authorised Chapter VII operation conducted under national command and control and, therefore, that the Respondent's acts are attributable to it alone (and not to the MNF; nor the UN):

Authorities Tab 149

G

a. In none of the relevant UNSCRs (from 1483 onwards) does the UNSC state that there is to be a UN peacekeeping operation in Iraq; **A**

b. UNSCR 1483, dated 22.5.03, post-dates two important events: <u>first</u>, the letter dated 8.5.03 from the US and UK permanent representatives to the president of the UNSC in which they inform the UNSC that the US, UK and Coalition partners had created the Coalition Provisional Authority ("CPA") (this letter is noted in the preamble to UNSCR 1438, §13) and <u>secondly</u>, the issue, on 16.5.03, of CPA Regulation No. 1 providing that *"The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration…The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives."* UNSCR 1438 therefore records the *status quo ante* as it had been communicated to the UN. **B** **C** **D**

Authorities Tab 149

Authorities Tab 143
Authorities Tab 247

c. UNSCR 1483 makes clear the limited role of the UN: it notes that the role of the UN will be in relation to *"humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance* (preambular §7 and operative §§8; 16) <u>as distinct from</u> (1) the role of the US and UK (occupying powers under unified command: preambular §13); (2) the CPA (see, e.g., operative §4) and (3) other Member States who may be contributing to conditions of stability and security in Iraq (§1). **E** **F**

Authorities Tab 149

d. This distinction between the limited role of the UN and the entities in control in Iraq (the US, the UK, the CPA and other Member States) is a consistent refrain in the following UNSCRs: see, eg., UNSCR 1511 operative §§6, 13, 14 as compared to §8 and UNSCR 1546 generally as compared to **G**

Authorities Tab 152
Authorities Tab 158

A

> §7. These UNSCRs authorise and mandate the MNF's presence and role in Iraq and that of national contingents. They do not assert that the UN has control over that presence and role nor that the MNF or the national contingents are, in fact, a UN peacekeeping operation.

B

35. For the reasons set out above (§§23-25), it is wrong to transport a *Behrami and Saramati* type-analysis onto the facts of this case. Authorities Tab 80

36. It would also be wrong to determine the present case by engaging (as is encouraged by **[Dann/§§18-23])** in a compare-and-contrast analysis between the UNSCRs in *Behrami and Saramati* and those in the present case. Given the highly fact-specific and individually tailored response of the UN to different international conflicts, such an analysis can yield only the most broad and general observations.

C

D

37. For example, the legal situation arising from UNSCR 1244 in Kosovo is distinct from Iraq and the UNSCRs relevant thereto, especially UNSCR 1546. Although both Kosovo and Iraq are covered by Chapter VII UNSCRs and both concern security presences (KFOR and the MNF), in Kosovo the UN was (and is) exercising through UNMIK a full set of competences which are typical of a State. This was never the case in Iraq: the relevant entity there, the CPA (not UNAMI: which has a far narrower remit, see, e.g. UNSCR 1511, operative §8), was established before UNSCR 1483 was issued and was controlled directly by the US, UK and other Coalition partners. It is essential to locate the role of security forces in different conflict situations within their appropriate context. It may be extremely misleading to compare security forces such as KFOR and MNF (as **[Dann/§§19-23]** seeks to do) by dislocating them from their context. The correct approach is to scrutinise each situation separately to see whether the conduct in question is attributable to a Member State or the UN.

Authorities Tab 133

Authorities Tab 158

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Authorities Tab 152

Authorities Tab 149

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38. In conclusion, in relation to attribution: both the evidence and the Respondent's admission that the Appellant is within its jurisdiction show that the Respondent (and not the MNF) has had effective control over the Appellant's arrest and detention. Furthermore, a wider analysis of the Respondent's role in Iraq shows that, since UNSCR 1483, it has been acting pursuant to an authorised Chapter VII operation – conducted under its national command and control. The Respondent's actions vis-à-vis the Appellant are, therefore, attributable to it alone and not to the UN.

Authorities Tab 149

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B

E. VIOLATION: THE LAW

C

39. Since the actions in question are attributable to the Respondent, the next question is whether it has violated the Appellant's ECHR5(1) rights.

(1) Strasbourg law and obligatory acts of a HCP as part of an international organisation

D

40. The principle of equivalent protection provides that:

a. Where a HCP is a member of an international organisation to which it has transferred part of its sovereignty (*Bosphorus*, §154);

Authorities Tab 77

E

b. And where it implements legal obligations (cf. exercises discretion: §§47-50) as a result of its membership of that organisation (*Bosphorus*, §§117; 156-157);

F

c. Then the HCP's action in compliance with such obligations is justified if the international organisation provides protection for fundamental rights equivalent (i.e. comparable, not identical) to that of the ECHR as regards both the substantive guarantees offered and the mechanisms controlling their observance (*Bosphorus*, §155);

G

A

d. Unless it can be shown in the circumstances of a particular case that the protection of ECHR/fundamental rights was manifestly deficient (*Bosphorus*, §156 and the Concurring Opinion of Judge Ress, §2).

B

41. The Respondent's case is that a HCP's obligations under Chapter VII UNSCRs will, by virtue of UNC103, prevail over its ECHR obligations.[11] If that is right, as a description of Strasbourg law, then the principle of equivalent protection, as described above, would be redundant in Strasbourg cases concerning Chapter VII UNSCRs. The rationale of the principle of equivalent protection is to prevent the guarantees of the ECHR being limited or excluded (*Bosphorus*, §154). If, as the Respondent contends, a HCP's Chapter VII UNSCR obligations would prevail over its ECHR obligations as a result of UNC103 then there would obviously be no need to apply the principle in those cases.

Appendix p. 288

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42. However, the Grand Chamber in *Bosphorus* applied the principle of equivalent protection in precisely such a case: i.e. where the impugned acts arose directly from the HCP's obligations under a Chapter VII UNSCR. In that case UNSCR 820 was implemented by EC Regulation 990/93 which was in turn implemented by an Irish SI 144/93. The Irish Government's acts pursuant to that SI, i.e. impounding aircraft leased by the Applicant, gave rise to the complaint under ECHRA1P1. The Court did not refer to UNC103 or the status of Chapter VII UNSCRs. The Court held that the applicant company, as the addressee of the impugned act, fell within the ECHR1 jurisdiction of the Irish Government; that its complaint about

Authorities Tab 77

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[11] There is, of course, no provision in the ECHR requiring that it be interpreted and applied in conformity with the UNC, cf. eg:

(a) Charter of the Organization of American States, Article 131: *"None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations";*

Authorities Tab 99

G

(b) North Atlantic Treaty, Article 7: *"This Treaty does not affect, and shall not be interpreted as affecting in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security."*

Authorities Tab 89

the act was compatible *ratione loci*, *personae* and *materiae* with the ECHR (§137) and that the impugned interference with the aircraft arose from the Irish Government's compliance with its legal obligations flowing from EC law (and not from an exercise of discretion) (§148). The Court then went on to describe and apply the principle of equivalent protection (§§150-157), concluding that EC law provided protection for fundamental rights equivalent to that of the ECHR; that the presumption therefore arose that the Irish Government did not depart from the requirements of the ECHR and that the presumption was not rebutted on the facts of the case (§§165-166).

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43. The Court analysed the Irish Government's acts by reference to its obligations, as a member of the European Communities, to implement EC Regulations rather than by reference to its obligations, as a member of the UN, to implement UNSCRs. Nothing can turn on this since the EC Regulation simply acted as the conduit for the UNSCR. It would be absurd to suggest that the Court would have regarded the Irish Government's acts as beyond ECHR scrutiny (being saved by the effect of UNC103) had there been no EC Regulation.

D

44. The principle of equivalent protection, as described in ***Bosphorus*** has been subsequently cited by the Court: see ***Capital Bank AD v Bulgaria*** 24.11.05 (2007) 44 EHRR 48, §110-111 (although not applied in that case since the Court was not satisfied that Bulgaria was acting pursuant to a binding international obligation imposed by the IMF).

Authorities Tab 79

E

45. The Grand Chamber revisited the principle of equivalent protection in ***Behrami and Saramati***. It set out the principle, as described in ***Bosphorus***, with approval (§145) but did not apply it on the basis of the facts in ***Behrami and Saramati***, viz., the impugned acts were attributable only to the international organisation – the UN – rather than to the respondent State authorities and did not occur within the jurisdiction of the respondent States ("*the impugned acts and omissions … did not take place on the territory of those States or by*

Authorities Tab 80 Tab 77

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virtue of a decision of their authorities", §151). *Bosphorus* was, therefore, distinguished. However, the Court expressed no criticism or disapproval of either the result in *Bosphorus* or the principle of equivalent protection.

46. Of course *Behrami and Saramati* too concerned the effect of a Chapter VII UNSCR. The Court expressly refers to having regard to UNC25 and 103, as interpreted by the ICJ (§§147; 27). It says no more than this.[12] This is very far from contending, as the Respondent does, that, as a matter of Strasbourg law, Chapter VII UNSCRs would be regarded as displacing/qualifying ECHR rights. If this was the case then one would expect the *Behrami and Saramati* Court to have said so, or to have given this as an alternative basis. It did neither.[13]

Appendix pp. 272; 288

Authorities Tab 80

(2) Strasbourg law, discretionary acts of a HCP as part of an international organisation and HCPs other international law rights and obligations

47. A HCP cannot evade ECHR obligations where (1) it performs discretionary acts pursuant to its membership of an international organisation nor where (2) it acts in its sovereign capacity and purports to rely on other international law rights and obligations as excusing its ECHR obligations. In such instances: (1) its discretion must be exercised compatibly with its ECHR obligations (cf. where

[12] Compare this to other cases where the Court (sitting as a Grand Chamber) has referred to the jurisprudence of international tribunals and positively adopted it, e.g. in relation to interim measures in *Mamatkulov and Askarov v Turkey* 4.3.05 (2005) 41 EHRR 25: *"The Court observes that the ICJ, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending."* (§124)

Authorities Tab 72

[13] The jurisprudence of the European Court of Justice on the relationship between the European Communities and the UN is not helpful in considering the relationship between the ECHR system and the UN: these are entirely separate relationships governed by separate treaties and principles. Thus, no helpful guidance can be obtained from the recent jurisprudence of the Court of First Instance in *Kadi v Council of the European Union and others* 21.9.05 Case T-315/01 (and see similarly *Yusuf v Council of the European Union and others* 21.9.05 Case T-306/01). In *Kadi*, the Appellant sought the annulment of Council Regulation 881/2002, giving effect to UNSCR 1390 (2002) by which all of his financial interests within the EC have been frozen. This case is on appeal, due to be heard by the ECJ in early October.

Authorities Tab 40 Tab 41

the HCP has an obligation: §§40-46) and (2) its other international law rights and obligations cannot displace or qualify its ECHR obligations.

Authorities Tab 50

48. In relation to (2): in *Soering v UK* 7.7.89 (1989) 11 EHRR 439 the UK Government contended that ECHR3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction and that to adopt this approach

> *"interferes with international treaty rights; it leads to a conflict with the norms of international judicial process, in that it in effect involves adjudication on the internal affairs of foreign States not Parties to the Convention or to the proceedings before the Convention institutions."* (§83).

49. The Court did not accept these arguments:

> *"It is also true that in other international instruments cited by the United Kingdom Government – for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3) – the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically. These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 for all and any foreseeable consequences of extradition suffered outside their jurisdiction. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms* [citing *Ireland v UK*, §239]. *Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective … In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"* (§86-87; underlining added)

Authorities Tab 46

50. The Court has, subsequently and consistently, referred to the principle that States' treaty rights and international law obligations must be exercised in accordance with the ECHR. It has done so in cases in which, like *Soering*, it has said that HCPs' international law rights to control the entry, residence and expulsion of aliens have to be exercised in accordance with the ECHR and that the ECHR therefore

guarantees greater protection than that available under, for example, the Refugee Convention: see *Amuur v France* 25.6.96 (1996) 22 EHRR 533 §41; *Chahal v UK* 20.10.96 (1996) 23 EHRR 413 §§73-80; *Ahmed v Austria* 17.12.96 (1996) 24 EHRR 278 §§38-41; *TI v UK* 7.3.00 Application No. 43844/98 p.15; *Shamayev v Georgia and Russia* 12.10.05 Application No. 36378/02 §335 and *Mahdid v Austria* 8.12.05 (2006) 42 EHRR SE 17 p.6. The principle has also been applied in other contexts. For example:

Authorities Tab 54
Authorities Tab 55
Authorities Tab 58 & 64
Authorities Tab 73
Authorities Tab 75

a. Municipal legislation implementing an EC Directive must be ECHR-compliant – i.e. the fact that it is based on a HCPs duty, under EC law, to implement the Directive does not remove it from the ambit of the ECHR: *Cantoni v France* 15.11.96 Application No. 17862/91 §§26; 28; 30.

Authorities Tab 56

b. A HCP has the responsibility of ensuring that its subsequent treaty commitments are ECHR-compliant[14]: *Matthews v UK* 18.2.99 (1999) 28 EHRR 361 where the Court held that the UK's responsibility under the ECHRA3P1 was engaged where it entered into the Maastricht Treaty, taken together with its obligations under Council Decision 76/787 and the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20.9.76 (§§29-35).

Authorities Tab 61

51. Finally, the Court has considered HCPs' international law obligations where those obligations are relevant, in the specific context of a particular ECHR provision, in determining whether that provision has been violated. The case law is focussed on ECHR6: the Court has considered whether the conferral of immunity from suit (on states and international organisations) pursues a legitimate aim and is proportionate:

[14] This has long formed part of ECHR-jurisprudence: see e.g. *Mr X and Mrs X v Federal Republic of Germany* 10.6.58 Application No.235/56, where the Commission stated the principle at p.300 but found, on the facts, no need to apply it.

Authorities Tab 43

Authorities Tab 62

a. In *Beer and Regan v Germany* 18.2.99 (2001) 33 EHRR 3 the Court considered that the immunity accorded to the European Space Agency was based on the protection of international organisations against interference by individual governments, that this was a legitimate aim (§§51; 53; *Waite and Kennedy v Germany* 18.2.99 (2000) 30 EHRR 251 §§61; 63) and proportionate (§§57; 62; *Waite and Kennedy* §§67; 72).

Authorities Tab 63

Authorities Tab 67

b. In *Al-Adsani* the Court considered that the grant of sovereign immunity to a state in civil proceedings pursues a legitimate aim (§54) and that measures taken by a Contracting State which reflect generally recognised rules of public international law on state immunity could not, in principle, be regarded as imposing a disproportionate restriction on the right of access in ECHR6(1): §56. See, similarly, *Fogarty v UK* 21.11.01 (2002) 34 EHRR 12 §§34-39 and *McElhinney v Ireland* 21.11.01 (2002) 34 EHRR 13 §§33-40.

Authorities Tab 68

Authorities Tab 69

Authorities Tab 65

c. In *Prince Hans-Adam II of Liechtenstein v Germany* 12.7.01 Application No. 4257/98 the Applicant claimed that his ECHR6(1) rights were violated by the exclusion of German jurisdiction (under Chapter 6, Article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation 1952) over his claim for restitution of a painting. The Court held, following *Waite and Kennedy*, that the limitation on access to German courts as a consequence of the Settlement Convention had a legitimate objective (§59) and was not disproportionate (§66-69).

Authorities Tab 63

F. VIOLATION: THE PRESENT CASE

52. In the light of these legal principles, the questions in the present case are:

A

a. Are the Respondent's acts, in arresting and detaining the Appellant, acts which it is obliged to undertake pursuant to its membership of the UN?

b. If so, does the UN system provide protection equivalent to that in ECHR5(1) for the Appellant's rights?

B

c. If the Respondent's acts are not obligatory, but discretionary, acts pursuant to its UN membership then has the Respondent violated the Appellant's ECHR5(1) rights?

C

(1) Are the Respondent's acts obligatory acts pursuant to its UN membership?

53. The Respondent argues that UNSCR 1546 authorises its arrest and detention of the Appellant **[Detailed Grounds of Defence/§§5; 19-26/28-29; 34-39]**. But, axiomatically, an authorisation to do something does not entail an obligation to do so. And even when a general obligation exists, it is a matter of fact to establish what degree of discretion is involved and whether it could (and should) have been exercised consistently with ECHR obligations.

Appendix p. 25

D

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54. As a pure matter of construction the only "obligation" imposed by UNSCR 1546 §10 is for the UK to contribute to the maintenance of peace and security in Iraq. The means by which it carries out that aim are not imposed upon it by the UNSCR. They are left wholly to the discretion of MNF-contributing nations like the UK. Accordingly, in arresting and detaining the Appellant pursuant to UNSCR 1546, the Respondent was exercising discretion and was not carrying out an obligation pursuant to its membership of the UN.

Appendix p. 294

F

G

(2) If the Respondent's acts are obligatory acts: does the UN provide equivalent protection for the Appellant's ECHR5(1) rights?

55. Even if the Respondent's acts are classed as being obligatory acts, this does not exonerate it from its ECHR obligations. In that case, it would still be necessary to determine whether the UN provides equivalent protection for the Appellant's ECHR5(1) rights. The answer is no.

56. Irrespective of whether or not the UNC is considered to provide substantive guarantees/protection for fundamental human rights, akin to the Appellant's ECHR5(1) rights, these are ineffective given the lack of mechanisms of control to ensure the observance of such rights. Thus, there is no judicial (or quasi-judicial) mechanism for the protection and preservation of those human rights in the UNC when UNSCRs are in issue:

Authorities Tab 77

a. Individuals have no right to petition the ICJ at all (cf. *Bosphorus* where the Court noted that individuals had access to the ECJ, albeit that it was limited (§162) but, see further, the Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki §3[15]);

b. There is no parallel in the UN/ICJ system to the initiation of actions before the ECJ by Community institutions which may, indirectly, benefit individuals (*Bosphorus* §163);

Authorities Tab 77

[15] *"[A]s the judgment itself acknowledges, individuals' access to the Community court is "limited" …Yet as the Court reiterated in the Mamatkulov …judgment …the right of individual application "is one of the keystones in the machinery for the enforcement of the rights and freedoms set forth in the Convention" (see §122..). Admittedly, judicial protection under Community law is based on a plurality of appeals, among which the reference to the Court of Justice for a preliminary ruling has an important role. However, it remains [the] case that, despite its value a reference for a preliminary ruling entails an internal, a priori review. It is not of the same nature and does not replace the external, a posteriori supervision of the [Court] carried out following an individual application. The right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the [EC]. For the Court to leave to the EU's judicial system the task of ensuring "equivalent protection", without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the filed of Community law, of Convention standards by a Community standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorized scrutiny."* (underlining added)

A

c. National courts do not, unlike the EC system, provide a remedy to individuals for a breach of international law (*Bosphorus* §164).

57. ECHR5-type human rights, insofar as they exist in the UNC, are wholly subject to the whim and expediency of *realpolitik*, as determined by the UN Security Council or powerful individual member states and as illustrated by the very fact of this litigation.

B

58. The lack of equivalent protection in the UN system renders the Respondent liable for any violation of the Appellant's ECHR5(1) rights.

C

59. Even if such protection exists, as a matter of generality, in the circumstances of the Appellant's case the protection given to his ECHR5(1) rights has been manifestly deficient. Accordingly, the Respondent's ECHR5(1) obligations are not displaced or qualified, even if its interpretation of the obligatory effect of UNSCR 1546 is correct.

D

(3) If the Respondent's acts are discretionary acts, has the Respondent violated the Appellant's ECHR5(1) rights?

E

60. However, as already noted, the Respondent was not under an obligation to carry out the internment. It was exercising its discretion. The next question, therefore, is whether the Respondent has violated the Appellant's ECHR5(1)[16] rights by exercising such discretion.

F

[16] The importance of ECHR5 has been repeatedly affirmed by the Court. For example:

(a) *"The Court has regard to the importance of [Article 5] in the Convention system: it enshrines a fundamental human right, namely protection of the individual against arbitrary interferences by the State with his right to liberty."* *Brogan v UK* 29.11.88 (1989) 11 EHRR 117, §58 — Authorities Tab 49

(b) *"The Court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty"*(*Aksoy v Turkey* 12.12.96 Application No. 21987/93, §76); *"Although the Court is of the view – which it has expressed on several occasions in the past… - that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture"* (*Aksoy*; §78; see, similarly, §84). — Authorities Tab 57

G

61. The Respondent can obtain no assistance from seeking to rely, out of context, on abstract statements by the Court to the effect that the ECHR cannot be interpreted in a vacuum and is to be interpreted in harmony with other principles of international law. If the Respondent wishes to argue that the Court would look to international law to resolve this case then it must point to specific case law upon which it relies.

62. There is none. Even allowing for the ways in which the Court has used international law (as set out above in relation to ECHR6) the Respondent cannot, in this case, use UNSCR 1546 so as to displace or qualify the Appellant's ECHR5(1) rights.

63. In the premises, once it is accepted that the conduct in question is attributable to the Respondent, it is difficult to see how the Respondent can conceivably evade its ECHR5(1) obligations:

a. If it is correct that UNSCR 1546 imposes an obligation to intern, then the Respondent's ECHR5(1) obligation to the Appellant will only be "displaced" it the Respondent can show that the UN system provides protection equivalent to ECHR5(1). That the Respondent patently cannot do.

b. If, as is properly the case, UNSCR 1546 confers discretion on the Respondent, then it is required to exercise that discretion compatibly with ECHR5(1) – which it self-evidently has not done.

Authorities Tab 60

(c) Kurt v Turkey 25.5.98 (1998) 27 EHRR 373, §122 where the Court referred to *"the fundamental importance of the guarantees contained in article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities."*

Authorities Tab 70

(d) Garcia Alva v Germany 13.2.2001 (2001) 37 EHRR 12, §39 the Court referred to *"the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned."*

G. INTERNATIONAL LAW: UNC AND UNSCR 1546

64. If, contrary to the foregoing, Your Lordships' House were to find that under Strasbourg law UNSCR 1546 might somehow qualify or displace the Appellant's ECHR5(1) rights then other international law considerations would come into play, as set out below.

(1) Does the "obligation" to "intern" in UNSCR 1546 "conflict" with ECHR5(1)?

65. UNC103 provides: Authorities Tab 85

> *"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."*

66. The first step in analysing whether UNC103 applies to the present facts is to identify what, if any, are the obligations of the Respondent under the UNC. It will be assumed that UNSCR 1546 constitutes the "decision"[17] in this case for the purposes of UNC25[18] and that the UK had a prima facie "obligation" under UNC103 to carry out the UNSCR.

67. The second step is to ascertain whether the UK has an "obligation" to undertake internment. As noted above (§§53-54), whilst UNSCR 1546 authorises internment it does not impose an obligation on the UK to do so.

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[17] The meaning of "decision" in UNC25 is unclear: Simma (ed), *The Charter of the United Nations: A Commentary* (2002) pp.454-455 (hereafter "Simma"). Chapter VII UNSCRs are capable of constituting binding decisions under UNC25 provided they are not couched in terms of a recommendation (Simma, p.457) and provided that the UNSC intended to create a binding decision (Simma, p. 458). Authorities Tab 287

NB. The technical classification of UNSCR 1546 as a "decision" under UNC25 and, therefore, as an "obligation" for the purposes of UNC103 does not determine the obligation/discretion question for the purposes of Strasbourg law (and whether the principle of equivalent protection applies) – that issue falls to be determined on the basis of the actual interpretation of UNSCR 1546 which does not require internment and merely confers a broad discretion on the UK to undertake it if necessary.

68. The third step is to determine whether – even assuming that undertaking internment can properly be described as an "obligation – this "obligation" conflicts with ECHR5(1), i.e. to determine whether UNSCR 1546 requires the UK to intern individuals contrary to ECHR5(1). UNSCR 1546 does not prescribe the precise modalities by which it is to be implemented. That is left to national contingents to decide. The conflict with ECHR5(1) arises from the UK's implementation of the so-called obligation to intern and its view of what "internment" in UNSCR 1546 means (see below, §71). There is nothing on the face of UNSCR 1546 which requires the "obligation" to "intern" to be exercised in a manner inconsistent with, or conflicting with, ECHR5(1). Thus, insofar as there is any "obligation" to undertake internment in UNSCR 1546 it does not lead, in and of itself, to a conflict with ECHR5(1).

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Appendix p. 291

69. The classification of UNSCRs as either creating obligations or conferring authorisations is a red herring. Even if authorisations are considered to be obligations for the purposes of UNC103 (as suggested by, eg., Simma, Gowland-Debbas and Sarooshi; see CA judgment §§69; 74) that does not answer the question of whether UNC103 is fully engaged. To answer that question it is necessary to consider (as set out above: §§65-68), in every case, what the authorisation/obligation actually is; the "conflict" (if any) and which "obligations under any other international agreement" (if any) are involved.

Appendix pp. 161; 164

(2) If UNSCR 1546 sanctions GCIV78-type-internment

70. If, contrary to the submissions at (1) above, it is considered that UNSCR 1546 does impose an obligation to intern which conflicts with ECHR5(1) then it is necessary to consider the consequences of this conflict.

Authorities Tab 85

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

71. The Respondent has submitted evidence stating that "internment" in §4 of Colin Powell's letter means "internment" as used in the Fourth Geneva Convention, Article 78 ("GCIV78").[19] If this interpretation of UNSCR 1546 is correct[20] it means that the UNSCR requires deprivation of liberty contrary to fundamental human rights and, therefore, contrary to the powers of the UNSC and the purposes of the UN. The Respondent's interpretation means, in short, that by adopting UNSCR 1546 the UNSC has acted *ultra vires*.

Appendix pp. 300-301

Authorities Tab 88

72. The UNSC is one of six principal organs of the UN.[21]

73. The organs of the UN, like the organs of any other body, must ensure, for the lawfulness and legitimacy of their acts, that they act within the parameters of the functions and powers given to them by the UNC.[22]

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[19] *"I, together with colleagues at the Foreign and Commonwealth Office and the Cabinet Office, was involved in the discussions with out US counterparts over the wording of what became UNSCR 1546 … and the drafting of the letter from Secretary of State Colin Powell … that was annexed to the Resolution (together with a letter from Prime Minister Allawi).*

The letter from the Secretary of State expressly refers to the use of internment in situations where "it is necessary for imperative reasons of security". This language mirrors the language used in article 78 of Geneva IV. This choice of language was deliberate. It was used to make it clear that what was intended was that the regime which had operated under Geneva IV would, as a matter of substance continue under the authority of the mandate to be provided by UNSCR 1546 once the occupation ended and Geneva IV itself no longer applied in Iraq. Further, the express reference (in the body of UNSCR 1546) to the letters was to make it clear that the authorisation in paragraph 10 of the Resolution to take "all necessary measures" to achieve the stated mission included internment as such a necessary measure." **[Rose/§§14-15]**; underlining added].

Appendix p. 338

[20] The Respondent's evidence shows only the intention of the UK (and possibly the USA) in using "internment" in drafting §4 of Colin Powell's letter. It does not show that this was the UNSC's intention in sanctioning, in UNSCR §10, the conduct described in the letter. As with treaty interpretation, the meaning to be given to words in a UNSCR must be autonomous: it cannot depend on a unilateral or bilateral understanding of a phrase in the context of a multilateral instrument.

[21] The others are the General Assembly, the Economic and Social Council, the Trusteeship Council, the ICJ and the Secretariat (UNC7).

Appendix p. 268

[22] As Bernhardt notes: *"Even if the SC has wide discretionary powers under [Chapter VII], these powers are not unlimited. The Charter is a legally binding document and no organ is endowed with complete freedom to act or not to act. The present author holds the opinion that in case of manifest ultra vires decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements. But the borderline is difficult to draw."* (Simma, p.1299)

Authorities Tab 287

See also:

(a) *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (21.6.71, ICJ (1971) ICJ Reports) where the ICJ considered that various UNSCRs *"were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out."* (§115; underlining added). See also §110.

Authorities Tab 106

(b) *Prosecutor v Tadic* (2.10.95, ICTY): *"The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that*

Authorities Tab 110

Appendix p. 272

74. The key empowering provision in relation to the SC is UNC24 which provides:

> *"(1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (2) In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII. (3) The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration."* (underlining added)

75. The Purposes and Principles of the UN are set out in UNC1 and 2[23] respectively. UNC1 provides that the Purposes of the UN are:

> *"(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian*

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organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power with the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law)." (§28).

Authorities Tab 85

[23] The Principles of the UN are set out in UNC2: *"(1) The Organization is based on the principle of the sovereign equality of all its Members. (2) All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter. (3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. (5) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. (6) The Organization shall ensure that states which are Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. (7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."*

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character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and (4) To be a centre for harmonising the actions of nations in the attainment of these common ends." (underlining added)[24]

76. Pursuant to UNC24 ("*shall act*"), the SC is required to act in accordance with, inter alia, the Principles in UNC1 in discharging its duty of maintaining international peace and security.[25] The SC's duty, as set out in UNC24(2) is imperative and the limits are categorically stated.[26]

Appendix p. 272

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77. The Purposes of the UN are not ordered hierarchically nor does UNC24 enable the SC to choose which of them it chooses to comply with and to what extent. It follows that UNSCRs can only be lawful under UNC24 if they, *inter alia*, both maintain international peace and security and promote and encourage respect for human rights and fundamental freedoms.

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78. In addition to UNC1, UNC55(c) and the preamble of the UNC affirm the importance of human rights observance by organs of the Security Council. Permitting or authorising internment *"where necessary for imperative reasons of security"* after the cessation of occupation in Iraq is not compatible with human rights.[27] As the ICJ noted in *Case*

Appendix pp. 266; 278

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[24] De Wet and Nolkaemper note another *"closely related"* reason why the UNSC is bound by fundamental human rights, viz., *"the United Nations has committed itself to these norms in a fashion that has created a legal expectation that it will honour them when authorizing (quasi-)judicial measures as a mechanism for restoring international peace and security. Any behaviour to the contrary would violate the principle of good faith to which the organization is bound in terms of Article 2 para 2 of the Charter."* (in *Review of Security Council Decisions by National Courts* (2002) 45 German Yearbook of International Law 166 at 175)

Authorities Tab 289

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[25] As Judge ad hoc Lauterpacht observed, in his separate Opinion in the *Bosnia Genocide Convention Case* (13.9.93, ICJ (1993) ICJ Reports 325): the significance of UNC24(2) should not be overlooked, §101.

Authorities Tab 109

[26] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (14.4.92, ICJ (1992) ICJ Reports 3), Dissenting Opinion of Judge Weeramantry, p. 61; see also pp. 61-65 for illuminating extracts from the UNC travaux which *"corroborates the view that a clear limitation on the plenitude of the [SC's] powers is that those powers must be exercised in accordance with the well-established principles of law."*

Authorities Tab 108

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[27] There is considerable academic commentary on precisely which human rights fall within the ambit of UNC1 and, therefore, which human rights the UNSC is required to act in accordance with under UNC24(2). See, for example, Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the Untied Nations?* (1997) 46 ICLQ 309 at 323-324; De Wet and Nolkaemper, *Review of Security Council Decisions by National Courts* (2002) 45 German Yearbook of International Law 166 at 173; Orakhelashvili, *The Impact of*

Authorities Tab 282

Authorities Tab 289

Authorities Tab 107

<u>*Concerning United States Diplomatic and Consular Staff in Tehran*</u> (24.5.80, ICJ (1971) ICJ Reports 3), *"wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations."* (§91).

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Authorities Tab 88

a. GCIV78 is intended to apply:

> *" … to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*
>
> *The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."*(Article 2)[28]
>
> And to
>
> *"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."*(Article 4)

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b. GCIV78 internment is exceptional.[29]

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c. GCIV78 does not, therefore, apply to the Appellant (a British citizen): see CA judgment §§40; 46. Nor does it apply to the UK's actions in Iraq post-June 2004 (when the Interim Iraqi Government took over from the CPA and by which time the occupation, of parts of Iraq, by the UK, ceased).

Appendix pp. 152; 153

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Authorities Tab 297

Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions, 16 EJIL (2005) 16 at 64-66. There can be no doubt, however, that the right to liberty is a sufficiently well-recognised human right and falls within the category of human rights in UNC1.

[28] NB. GCIV3 applies the Convention to non-international armed conflict and GCIV6 provides that *"in the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations.."*.

[29] *"In occupied territories the internment of protected persons should be even more exceptional that it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately."* (*Commentary to the Fourth Geneva Convention* (1958) at 367)

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d. After June 2004 the lawfulness of any deprivation of liberty for which the UK was responsible and had jurisdiction is properly to be determined by reference to the HRA and the ECHR.

e. If UNSCR 1546 is interpreted as making a GCIV78-equivalent internment power applicable in Iraq (and to the Appellant) the effect is to displace the human rights law that would otherwise be applicable.

79. UNSCR 1546 is, on this analysis, *ultra vires*. It is not a decision "in accordance with the Charter". As such, and leaving aside any other consequences of its *ultra vires* character, it is not binding. There is no obligation on the UK to agree to accept and carry it out. That this is the consequence of an *ultra vires* UNSCR is apparent from the ICJ's *Namibia Opinion* §115 (see fn 22). Thus, since the UK has no obligation vis-à-vis UNSCR 1546 and "internment", UNC103 is not engaged and ECHR5(1) is not displaced. The Respondent remains responsible, and liable, for any violation of the Appellant's ECHR5(1) rights.

Authorities Tab 106

80. There is no bar to Your Lordships' House finding that UNSCR 1546 is *ultra vires*. This is not a matter which is non-justiciable:

a. The general principle of non-justiciability, that courts will not adjudicate upon the transactions of foreign sovereign states on the plane of international law, was stated by Lord Wilberforce in *Buttes Gas and Oil Co v Hammer (No. 3)* [1982] AC 888[30]; see further, more recently: *Kuwait Airways*

Authorities Tab 13

[30] *"[T]he essential question is whether… there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of "act of state" but one for judicial restraint or abstention…In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalised in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."* (931-932)

Authorities Tab 19

v Iraqi Airways (Nos 4 and 5) [2002] UKHL 19 [2002] 2 AC 883, §135 (Lord Hope describing the foreign act of state doctrine).

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b. The Respondent may say that by extension the principle of non-justiciability and/or the foreign act of state doctrine are applicable to the acts of the UN, i.e. where two or more states act together on the plane of international law. Thus, a UNSCR will, generally, be beyond the review of English courts.

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Authorities Tab 13

Authorities 19

c. The principle described by Lord Wilberforce in *Buttes Gas* is, however, one of judicial restraint, not of judicial abstention (*Kuwait Airways*, §140, Lord Hope). It does not apply where the acts in questions raise allegations (or admissions) of human rights violations. Judicial and manageable standards exist for the adjudication of such issues. This is reflected in the well-recognised exception to the foreign act of state doctrine: that domestic courts may disregard foreign legislation where it is considered contrary to English public policy, which includes the safeguarding of human rights and giving effect to clearly established principles of international law: *Oppenheimer v Cattermole* [1976] AC 249, 265 (Lord Hodson), 277-278 (Lord Cross); *Kuwait Airways*, §§24-29 (Lord Nicholls).

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Authorities Tab 12

Authorities Tab 19

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Lord Wilberforce identified the issues which would require to be determined if the proceedings in that case continued and concluded,

"It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations ..there are .. no judicial or manageable standards by which to judge these issues, or to adopt another phrase … the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law…. For the reasons I have given, this counter-claim cannot succeed without bringing to trial non-justiciable issues. The court cannot entertain it." (938)

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d. This exception to the foreign act of state doctrine must apply, logically, to the conduct of several sovereign states acting together, as much as it does to one sovereign state acting unilaterally. That means that the jurisdiction of English courts will not be ousted, on the basis of non-justiciability, where a UNSCR – generally to be regarded as non-justiciable - violates fundamental human rights. That is so on the facts of the present case: if UNSCR 1546 is to be interpreted as the Respondent contends then it breaches the fundamental, and well-recognised, right embodied in ECHR5(1). It is therefore susceptible to review by Your Lordships' House.

e. Finally, it should be noted that the jurisdiction of the domestic courts is a matter wholly separate from the jurisdictional competences of other international tribunals (such as the ICJ,[31] ICTY[32] or the CFI[33]). The fact that those tribunals have or have not considered that they have the jurisdictional competence to inquire into the *vires* of a UNSCR is irrelevant.

[31] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia* the ICJ stated at §89,"*Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned."* Authorities Tab 106

See also the dissenting opinion of Judge Weeramantry in *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, p.55-56: "*[U]nlike in many domestic systems where the judicial arm may sit in review over the actions of the executive arm, subjecting to those acts to the test of legality under the Constitution, in the United Nations system the [ICJ] is not vested with the review or appellate jurisdiction often given to the highest courts within a domestic framework."* Authorities Tab 108

Cf. the separate concurring opinion of Judge ad hoc Lauterpacht in the *Bosnia Genocide Convention Case*: *"This is not to say that the Security Council can act free of all legal controls but only that the Court's power of judicial review is limited. That the Court has some power of this kind can hardly be doubted, though there can be no less doubt that it does not embrace any right of the Court to substitute its own discretion for that of the Security Council in determining the existence of a threat to the peace…But the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation."* (1993) ICJ Reports at §90 Authorities Tab 109

[32] *Prosecutor v Tadic* , §§15-25 Authorities Tab 110

[33] *Kadi*, see fn 13.

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JAMES CRAWFORD SC
Matrix Chambers

SHAHEED FATIMA
Blackstone Chambers

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11 October 2007

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IN THE HOUSE OF LORDS

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

THE QUEEN
on the application of
HILAL ABDUL-RAZZAQ ALI AL JEDDA

Appellant

- and -

THE SECRETARY OF STATE FOR DEFENCE

Respondent

CASE FOR THE INTERVENERS

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Agents for the Interveners