IN THE EUROPEAN COURT OF HUMAN RIGHTS (FOURTH SECTION)

App.No. 27021/08

BETWEEN:-

AL-JEDDA

Applicant

- and -

UNITED KINGDOM

Respondent

SUBMISSIONS MADE ON BEHALF OF
LIBERTY AND JUSTICE, INTERVENING

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(1) INTRODUCTION

1. These submissions are made pursuant to the request for leave to intervene by Liberty and JUSTICE ("the interveners"), dated 14 April 2009, and the permission for leave to intervene, granted by the President of the Chamber, and communicated to the interveners by the letter dated 21 April 2009 from the Section Registrar.

2. This intervention focuses, by reference to the questions attached to the Statement of Facts, on questions 3 and 4 (which raise issues regarding the relationship between the UK's Article 5 obligations and other international law obligations, including those arising under the UNSCR 1546 regime). Brief observations are made, in addition, on aspects of question 2 (attribution).[1]

[1] The issue of jurisdiction, as defined in question 1, is not separately addressed in these submissions. This is for two reasons: (1) The scope of Article 1, ECHR, jurisdiction has been considered very recently by the Court in *Al-Saadoon and Mufdhi v UK* (Application No. 61498/08), Decision dated 30 June 2009, and

Submissions on these questions – excluding any comments on the facts or merits of the case (pursuant to the indication in the Section Registrar's 21 April letter) – are set out below. The significance of these questions extends far beyond the confines of the present application. Consider, for example, the far reaching nature of a principle which would provide that UNSCRs (or, indeed, by analogy, other provisions of international law) displace ECHR rights and obligations.

(2) QUESTION 2: ATTRIBUTION

3. Conduct which stems from the work of an international organisation may, forensically, be attributable to: (a) the international organisation alone; (b) a State (or States), party to the international organisation and sufficiently involved in the conduct, or (c) both the international organisation and a State (or States). Whether the conduct in question falls to be characterised as (a), (b) or (c) will, most often, be essentially a matter of fact and dependent on the specific circumstances of each individual case. Question 2, as posed appended to the Statement of Facts, does not appear to permit of possibility (c). However, there can be no doubt that this is a separate forensic category albeit that it may only rarely occur in fact. For a recent case illustrating the possibility of joint and several liability in the context of international organisations see the admissibility decision dated 20 January 2009: *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserik UA v the Netherlands* (Application No. 13645/05).

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in a way which is highly relevant to the jurisdiction issue raised by the present application: *"The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction.."* (§88); (2) The attribution issue, in question 2, is likely to be highly relevant to the issue of jurisdiction in question 1. Brief observations are made on aspects of question 2 in these submissions.

4. In this context, the highly-fact sensitive admissibility decision of *Behrami and Saramati v France, Germany and Norway* (Application Numbers 71412/01 and 78166/01) needs to be handled with care. This is not so much in relation to the correctness of the legal test applied in that case (i.e. of assessing attribution by reference to effective control) but more over whether the application of the reasoning in that case can be traced onto other subsequent cases. Thus, it is respectfully submitted, that key to understanding the Court's decision is to recall the way in which the applicants *argued* the question of attribution in that case. The applicants submitted, in short, that KFOR was the entity which was responsible for the relevant acts of detention and demining (§73). The corollary of this submission is that the responsibility of the Respondent States could only have been engaged through KFOR and that the Respondent States did not have effective control over the impugned (in)actions in their own right as sovereign States. This led the Court to consider (a) which entity was responsible for the acts by reference to which entity had the mandate to perform the acts and (b) the relationship between that entity and the UN. The Court did not engage in any prior consideration of whether the Respondent States did have effective control over the impugned (in)actions in question: a question which may well arise in other cases (such as in this case) where that issue is not conceded.

(3) QUESTIONS 3 AND 4: THE ROLE OF INTERNATIONAL LAW OBLIGATIONS WITHIN THE ECHR

5. The final disposition on the questions raised by this case will, obviously, turn on the specific international law obligation (if any) which is found to be involved. The interveners restrict their submissions to various observations regarding the way in which the Court has treated the existence of international law obligations (including those found to arise out of a State's membership of an

international organisation) when adjudicating on States' obligations under the ECHR.

6. The Court's jurisprudence on State liability for conduct which is obligatory, pursuant to membership of an international organisation, is clear and to be found in the Court's oft-stated presumption of equivalent protection. This presumption was applied, by the Grand Chamber in *Bosphorus Hava Yollari v Ireland* (2006) 42 EHRR 1, in the context of obligations arising out of a UNSCR, made under Chapter VII of the UN Charter. The presumption of equivalent protection provides that:
    a. Where a State is a member of an international organisation to which it has transferred part of its sovereignty (*Bosphorus*, §154);

    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);

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

    d. Unless it can be shown in the circumstances of a particular case that the protection of the fundamental rights within the international organisation was manifestly deficient (*Bosphorus*, §156).

7. *Bosphorus* concerned UNSCR 820, which 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, ie. impounding aircraft leased by the Applicant, gave rise to the complaint under Article 1 of the First Protocol, ECHR. The Court held that the Applicant, the addressee of the impugned act, fell within the Article 1 jurisdiction of the Irish Government; that its complaint about 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[2] (and not from an exercise of discretion): §148. The Court then went on to describe and apply the presumption of equivalent protection (§§150-157). It concluded that EC law provided for fundamental rights equivalent to those of the ECHR and that the presumption (which was not rebutted on the facts of the case) arose that the Irish Government did not depart from the requirements of the ECHR: §§165-166.

8. The presumption of equivalent protection has been recently stated and applied[3] by the Court in the *Cooperatieve Producentenorganisatie* case. The Court described it as follows:

> *"[A]s already noted, there is a presumption that a Contracting Party has not departed from the requirements of the Convention where it has taken action*

[2] The fact that the obligations in *Bosphorus* were analysed by reference to the EC rather than the UN (and therefore, not by reference to Article 103, UN Charter or the status of Chapter VII UNSCRs) does not affect the analysis of the case since (a) the EC law obligations themselves emanated, ultimately, from the UN and a Chapter VII UNSCR; thus, potentially, engaging Article 103 and (b) if there is any special status of Chapter VII UNSCRs or any particular effect of Article 103 vis-à-vis ECHR obligations then this would, no doubt, have coloured the parasitic EC law provisions and the Court's consideration of them. It does not appear to have done so.

[3] Other recent cases where the principle has been set out (but not applied since the cases were disposed of on other grounds) are: *Capital Bank AD v Bulgaria* (2007) 44 EHRR 48, §§110-111 and *Behrami*, §145.

in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. As a corollary, this presumption applies not only to actions taken by a Contracting Party but also to the procedures followed within such an international organisation itself and, in particular, to the procedures of the ECJ. In that respect, the Court also reiterates that such protection need not be identical to that provided by Article 6 of the Convention; the presumption can be rebutted only if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."

9. The Court's jurisprudence on State liability for conduct which is obligatory, pursuant to membership of an international organisation, must be seen in the wider context of the Court's jurisprudence regarding the relationship between a State's international law obligations and its substantive ECHR obligations.[4] The consistent theme of this jurisprudence is that the Court has not generally regarded the substantive ECHR obligations of States as being displaced by virtue of a competing or conflicting international law obligation (for a recent, similar and compelling, approach by the Grand Chamber of the ECJ see *Kadi v Council of the EU* [2008] 3 CMLR 41).[5] Indeed, to the contrary. For example:
    a. Even where there are specific international law instruments regulating a given subject and which provide a State with the right or ability to engage in

[4] International law does, of course, have a more general role to play in the Court's jurisprudence. For example, the Court is guided principally by the rules of interpretation in Articles 31-33, Vienna Convention on the Law of Treaties, when determining the meaning of terms and phrases within the ECHR. For a recent, and powerful, illustration of the extent of the Court's reliance on international law in this regard see the Grand Chamber judgment of *Demir and Baykara v Turkey* (Application Nos. 34503/97) dated 12 November 2008.

[5] The Grand Chamber reviewed the lawfulness of a European measure which was based on a UNSCR: *"the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness"* (§285).

particular conduct that conduct has been conditioned or restricted so as to ensure the compatibility of State conduct with ECHR obligations: e.g., in *Soering v UK* (1989) 11 EHRR 439 the Court rejected the UK's attempt to rely on specific treaties regulating the removal of persons from its territory and stated that, *"these considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 [ECHR] for all and any foreseeable consequences of extradition suffered outside their jurisdiction"* (§86). The Court has affirmed this principle in many subsequent cases including, more recently, in *Saadi v Italy* (2008) 24 BHRC 123, §125.

b. Where a State undertakes treaty obligations after it has ratified the ECHR those treaty obligations do not displace ECHR obligations, even where they emanate from the EU: e.g. in *Matthews v UK* (1999) 28 EHRR 361 the Court held that the UK had violated Article 3 of Protocol No.1 even where the claim arose in the context of the Maastricht Treaty, Council Decision 76/787 and the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage (§§29-35).[6]

10. The Court has occasionally taken account of States' international law obligations when considering substantive ECHR obligations. However, this has typically been where those international law obligations relate to a particular forensic component of the substantive ECHR right in question. So, e.g.,
    a. In relation to the case-law on the immunity from suit enjoyed by States and international organisations, which has focussed on alleged violations

[6] It is notable, in relation to timing arguments, that UNSCRs which post-date a State's ratification or accession to the ECHR cannot, properly, be classified as creating pre-ECHR "obligations" by reference to the fact that the UN Charter (and, therefore, Article 103) itself pre-dates the ECHR. The "obligations" (if any) imposed by UNSCRs should be judged by reference to the date on which the UNSCR in question is made.

of Article 6(1), the Court has considered whether the conferral of immunity from suit pursues a legitimate aim and is proportionate by reference to the international law on immunities.[7]

b. In relation to the case-law on a State's obligations arising out of membership of an international organisation, the Court has considered those obligations within the scheme of the ECHR: see the presumption of equivalent protection set out above.

(5) CONCLUSION

11. In conclusion, the interveners submit that the case law of this Court supports the following legal propositions:

a. International law obligations are not, prima facie, able to displace substantive ECHR obligations but may be relevant when considering specific components of ECHR rights.

b. One way in which the Court has considered them relevant is encapsulated in the presumption of equivalent protection: viz., where a State is a member of an international organisation, and where it implements legal obligations as a result of its membership of that organisation, then the State's conduct in compliance with such obligations is presumed to be compatible with the ECHR if the international organisation provides protection for fundamental rights which is equivalent to that of the ECHR as regards both the substantive guarantees offered and the mechanisms for controlling their observance -

[7] *Al-Adsani v UK* (2002) 34 EHRR 11, §§54; 56; *Fogarty v UK* (2002) 34 EHRR 12, §§34-39; *McElhinney v UK* (2002) 34 EHRR 13, §§33-40; *Waite and Kennedy v Germany* (2000) 30 EHRR 251, §§61; 63; 67; 72; *Beer and Regan v Germany* (2001) 33 EHRR 3, §§51; 53; 57; 62.

unless it can be shown in the circumstances of a particular case that the protection of the ECHR/fundamental rights was manifestly deficient.

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