

COUNCIL TO DISPLACE HUMAN RIGHTS**by Francesco Messineo***

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1. INTRODUCTION

Hilal Abdul-Razzaq Ali Al-Jedda is an Iraqi national who was granted asylum in the United Kingdom in the early 1990s and subsequently gained British citizenship. In October 2004, while allegedly visiting his family in Baghdad, he was arrested and taken into British custody in Basra. In early December 2007, when the House of Lords rendered the judgment we will be analyzing here, he was still in detention on a preventive basis without charge or trial (internment) for ‘imperative reasons of security in Iraq’.¹ Although these reasons have never been tested by any court in Iraq or in the UK, we will proceed – as UK courts did – on the assumption that they were sound. In fact, Mr Al-Jedda was released without charge in mid-December 2007 – oddly enough, only a few days after the House of Lords dismissed his appeal. He was also thereafter deprived of UK citizenship on the basis that doing so was ‘conducive to the public good’.²

In early 2005 Mr Al-Jedda had started proceedings in the High Court to challenge the legality of his detention and obtain a transfer to the UK. Essentially, he claimed that his detention violated the Human Rights Act 1998 (HRA) because it was in breach of Article 5 of the European Convention on Human Rights (ECHR).³ This establishes that ‘everyone has the right to liberty and security of person’ and that ‘no one shall be deprived of his liberty’ save in some pre-determined cases enumerated in the article and ‘in accordance with a procedure prescribed by law’. The Divisional Court,⁴ the Court of Appeal⁵ and the House of Lords all dismissed the claim and the subsequent appeals, albeit addressing at times different issues.

There are many reasons why Mr Al-Jedda’s case is very interesting for international lawyers. Two will be analyzed here. First, it was one of the first human rights cases in which a domestic court had to cope with the *Behrami* admissibility decision rendered by the European Court of Human Rights (ECtHR) in May 2007,⁶ and thus decide on the attribution of conduct of multi-national forces authorized by the UN Security Council (SC). Secondly, it touched upon

1. *R. (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 AC 332 (hereinafter *Al-Jedda (HL)*), paras. 1-2.

2. It has been alleged that his release might have been part of a cease-fire agreement with insurgent groups: A. Barker, ‘UK army accused of letting Iraq killers go’, *Financial Times* (online), 14 February 2008, at <www.ft.com/cms/s/0/1adffd02-db3a-11dc-9fdd-0000779fd2ac.html> (last visited on 29 August 2008).

3. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS p. 222 (1950).

4. *R. (Al-Jedda) v. Secretary of State for Defence*, [2005] EWHC 1809 (Admin) (hereinafter *Al-Jedda (QBD)*).

5. *R. (Al-Jedda) v. Secretary of State for Defence*, [2006] EWCA Civ. 327, [2007] QB 621 (hereinafter *Al-Jedda (CA)*).

6. *Behrami v. France*, application no. 71412/01 and *Saramati v. France, Germany and Norway*, application no. 78166/01 (Admissibility), (2007) 45 EHRR SE10 85.

the much disputed question of SC resolutions potentially conflicting with human rights provisions. This article critically analyzes these two aspects of the case.

However, before proceeding any further it is necessary to give a brief summary of the decision by the Lords. The judgment was rendered on 12 December 2007 by Lord Bingham, Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown. Three main issues were contested before the court. First, the question whether it was the UN, rather than the UK, which should be held responsible for the detention of Mr Al-Jedda. Secondly, the question of whether UNSC resolutions on Iraq displaced and/or qualified Mr Al-Jedda's ECHR rights under Article 5 was raised. Thirdly, the question of whether English law applied to a claim in tort against the UK government was considered.

The Lords dismissed the appeal by Mr Al-Jedda unanimously. However, their Lordships' reasoning on the three issues sensibly diverged one from the other, making it very hard to assess what *ratio decidendi* can be ascribed to the House of Lords as such. If one looks only at the formal declarations of agreement, Lord Bingham's opinion emerges as the leading judgment, which was unanimously followed by the other Lords except for a dissent with regard to the first question. But the matter is slightly more complex.

As for the first issue, that of attribution, the only two clear-cut positions on Lord Bingham's opinion were that of Lord Carswell, unreservedly agreeing with him, and that of Lord Rodger, who delivered a strong dissenting opinion on this matter.⁷ Lord Brown agreed with the conclusion reached by Lord Bingham, but cast some doubts on the line of reasoning, modifying it slightly. Baroness Hale declared herself in agreement with Lord Bingham, but at the same time pointed at the 'essential' arguments set out by Lord Brown.⁸ The result of this split voting is that there is only a minimum common ground ascribable to the majority, which may be summarized as follows. Mr Al-Jedda's internment was clearly to be attributed to the UK, and not to the UN. Contrary to the Secretary of State's pleadings, the issue of attribution should not be solved with reference to the above-mentioned *Behrami* ECtHR decision because the facts in that case were different. True, the *Behrami* case decided, *inter alia*, that certain acts by K-FOR in Kosovo were to be attributed to the UN rather than the respondent NATO states, hence they were not reviewable by the ECtHR. But the analogy between K-FOR and MNF-I did not stand close scrutiny,⁹ chiefly for the reason that 'the UN's own role in Iraq was completely different from its role in Kosovo'¹⁰ and the UN 'had not assumed ultimate authority or control over [MNF-I]'.¹¹ On his part, Lord Rodger devoted most of his opinion to the

7. *Al-Jedda (HL)*, *supra* n. 1, at paras. 55-113 per Lord Rodger and at para. 131 per Lord Carswell.

8. *Ibid.*, at para. 124.

9. *Ibid.*, at para. 24 per Lord Bingham and at para. 124 per Baroness Hale.

10. *Ibid.*, at para. 124 per Baroness Hale, who refers to Lord Brown's reasoning at paras. 145-149.

11. *Ibid.*, at para. 149 per Lord Brown.

opposite argument that the *Behrami* precedent would indeed apply and render the application by Mr Al-Jedda unsuccessful in Strasbourg. The factual differences between Iraq and Kosovo, he argued, were irrelevant, and there seemed to be no significant legal difference between the two situations. This became especially evident when considering that the ECtHR in *Behrami* attributed the impugned act to the UN even if ‘effective command of the relevant operational matters was retained by NATO’.¹²

As for the second issue before the Lords – that of the displacement/qualification of Article 5 ECHR by relevant SC resolutions – Lord Bingham’s leading opinion was in principle unanimously agreed by the rest of the Lords, albeit with some caveats. While Lord Rodger declared himself substantially in agreement (save obviously that his solution on the first issue would have rendered it unnecessary to dwell on the second),¹³ and so did Lord Brown,¹⁴ Lord Carswell and Baroness Hale voted in favour but expressed some discomfort in doing so. In particular, Baroness Hale underlined that ‘displacing’ and ‘qualifying’ meant two different things, and the question should be answered bearing this in mind.¹⁵ In sum, the line of reasoning attributable to the majority of the House of Lords is that the relevant SC resolutions created an obligation upon the UK to intern someone when necessary for imperative reasons of security.¹⁶ By any means, the resolutions at least authorized such internment.¹⁷ By virtue of Articles 25 and 103 of the UN Charter, this provision prevailed over Article 5 ECHR, so that Mr Al-Jedda could not invoke a violation of the latter before UK courts.¹⁸ However, while the internment was not unlawful *per se*, the question was left open as to which ECHR guarantees might be compatible with the internment regime, in particular for how long it could be protracted and which safeguards would apply.¹⁹

Finally, as for the third issue before the House, their Lordships unanimously upheld the Court of Appeal’s view that it was Iraqi law, and not English law, which would apply to a claim by the appellant founded on tort or delict for false imprisonment.²⁰ This problem falls outside the scope of the present analysis and will not be considered any further.

12. *Ibid.*, at para. 87.

13. *Ibid.*, at paras. 114-118.

14. *Ibid.*, at para. 152.

15. *Ibid.*, at para. 126.

16. *Ibid.*, at paras. 32-39 per Lord Bingham (though not in unequivocal terms), at para. 118 per Lord Rodger, at paras. 151-152 per Lord Brown, at para. 135 per Lord Carswell.

17. *Ibid.*, at paras. 127-129 per Baroness Hale.

18. *Ibid.*, at para. 36 per Lord Bingham, at para. 118 per Lord Rodger, at para. 152 per Lord Brown.

19. *Ibid.*, at para. 39 per Lord Bingham, at para. 126 per Baroness Hale, at paras. 130, 136 per Lord Carswell.

20. *Ibid.*, at paras. 40-43. See also [2009] *EWHC* 397 (QB).

2. THE FALSE ALTERNATIVE BETWEEN ATTRIBUTION TO THE UK AND TO THE UN

2.1 A brief account of *Behrami* and its faults

The issue of attribution arose directly before the House of Lords, where the Secretary of State for Defence argued for the first time that the detention should be ‘attributable to the UN and thus [it should be held] outside the scope of the ECHR’.²¹ Such a claim was ‘prompted (it seems) by the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami*’.²² It is then necessary to give a short critical account of the latter case.

The ECtHR on 2 May 2007 jointly declared inadmissible two separate applications, that of Mr Agim Behrami and his son against France, and that of Mr Saramati against France, Germany and Norway. The decision was not unanimous.²³ The applications had arisen from two different events occurring in Kosovo. Mr Behrami’s two sons had been respectively killed and injured in 2000 by an undetonated NATO bomb, and he blamed French forces deployed as part of K-FOR for not having demined the area.²⁴ Mr Saramati had been interned from 2001 to 2002 by the order of French and Norwegian K-FOR officials.²⁵ In both cases UNMIK was also involved.

The judgment followed a convoluted line of reasoning. The Grand Chamber initially analyzed the legal basis of the presence of K-FOR and UNMIK in Kosovo. It took into account the NATO bombing background and relevant SC resolutions, and then concluded, first, that the impugned actions were attributable to K-FOR and UNMIK. Secondly, that they were ‘therefore’ attributable only to the UN, and not to states contributing troops to either K-FOR or UNMIK.²⁶ In particular, as for K-FOR, it was held that the UN SC ‘retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO’.²⁷ As for UNMIK, it ‘was a subsidiary organ of the UN’.²⁸ From this attribution, it followed that the Court lacked competence *ratione personae* to examine further the impugned actions. First, the UN was ‘not a Contracting Party to the Convention’.²⁹ Secondly, according

21. *Ibid.*, at para. 3 per Lord Bingham.

22. *Ibid.*

23. No information is available as to the extent of dissent within the Court and the reasons thereof.

24. *Behrami* and *Saramati* cases, *supra* n. 6, at para. 61.

25. *Ibid.*, at paras. 5-7; 8-17. The application against Germany was withdrawn because no German official was involved.

26. *Ibid.*, at paras. 132-143; 144.

27. *Ibid.*, at para. 140.

28. *Ibid.*, at para. 142.

29. *Ibid.*, at para. 144.

to the *Bosphorus* case,³⁰ whenever there is a transfer of sovereignty by ECHR member states to an international organization, the presumption that Convention rights are protected by that IGO can be rebutted only if ‘in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient’.³¹ The subsequently necessary review of acts carried out on behalf of the UN would not be admissible on the part of the Court because of the aim of the UN SC and of its ‘unique’ powers and prerogatives under the Charter,³² which should not be interfered with to preserve the ‘UN’s key mission’ in this field.³³ Doing otherwise would ‘be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself’.³⁴

Sari, who was one of the first commentators of the *Behrami* case, wrote that the ECtHR had ‘asked itself the wrong questions and [had given] itself the wrong answers, but still arrived at the right result’.³⁵ According to him, the applications should have been deemed inadmissible because the impugned acts did not fall within the respondent states’ jurisdiction according to Article 1 ECHR.³⁶ This does not seem to be the case. Mr Saramati’s detention might well have fallen within French and Norwegian jurisdiction, *mutatis mutandis*, for the same reasons why Mr Al-Jedda’s internment fell within UK jurisdiction, as accepted by the parties.³⁷ In fact, it could be argued that the Court asked itself some ill-formulated questions on attribution, pretended not to ask itself some others on relative normativity, got them all wrong and eventually reached the wrong result.

First, the Court analyzed the question of attribution as if there were a dichotomy between attribution to the UN and attribution to a member state, i.e., as if one excluded the other. This is a misconception. Nothing in principle prevents an act from being attributable both to an international organization and to a state, another international organization, or any other subject of international law. This is quite an obvious statement (at least in this abstract

30. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* (Merits) (GC), no. 45036/98, (2006) 42 EHRR 1.

31. *Behrami and Saramati* cases, *supra* n. 6, at para. 145.

32. *Ibid.*, at para. 148.

33. *Ibid.*, at para. 149.

34. *Ibid.*

35. A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: the *Behrami* and *Saramati* cases’, 8 *Human Rights Law Review* (2008) p. 151 at p. 169. See also G. Verdirame, ‘Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations’, *European Human Rights Law Review* (2008) p. 209; M. Milanovic and T. Papic, ‘As Bad as it Gets: The European Court of Human Rights’ *Behrami* and *Saramati* Decision and General International Law’, 58 *ICLQ* (forthcoming, 2009).

36. Sari, *supra* n. 35, at pp. 159-162.

37. *Al-Jedda (HL)*, *supra* n. 1, at para. 48 per Lord Rodger; see *R. (Al-Skeini) v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 AC 153 (UK House of Lords, 13 June 2007), at para. 61 per Lord Rodger and para. 97 per Lord Carswell.

formulation), on which there has been agreement since the earliest stages of the work on responsibility of international organizations under development at the International Law Commission (ILC). Already in his first report of 2003 the Special Rapporteur Gaja clarified that 'saying that an international organization is responsible for its own unlawful conduct does not imply that other entities may not also be held responsible for the same conduct'.³⁸ This was endorsed by the Commission when it provisionally adopted the general principles and their commentary.³⁹ In his second report, Gaja dwelled further on the point,⁴⁰ drawing on the authority of scholars,⁴¹ cases⁴² and state practice.⁴³ Thus, as Sari correctly noted, in *Behrami* the attribution 'of the relevant acts and omissions to the UN merely demonstrates that the UN could in principle incur responsibility for the internationally wrongful conduct of KFOR and UNMIK, but this [does not] exclude the possibility that the same conduct may also be attributable to the respondent States and may engage their international responsibility'.⁴⁴

Secondly, the Court adopted the wrong criterion to establish whether the impugned actions were attributable to the UN. According to Article 5 of the draft articles on the responsibility of international organizations provisionally adopted by the ILC, 'the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another

38. International Law Commission, First report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/532, p. 20 (para. 38).

39. Commentary to provisional Art. 3, in Report of the International Law Commission, Fifty-fifth session, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 47 (para. 48): 'The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances.'

40. International Law Commission, Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, UN Doc. A/CN.4/541, pp. 3-8 (paras. 5-13) (hereinafter: ILC second report).

41. ILC second report, *supra* n. 40, at p. 4, where Gaja quotes J.-P. Ritter, 'La protection diplomatique à l'égard d'une organisation internationale', 8 *Annuaire français de Droit international* (1962) p. 427 at pp. 444-445 (with reference to 'dommage'); International Law Association, *Report of the seventieth conference held in New Delhi, 2-6 April 2002* (London, International Law Association 2002) p. 797. See also J. Crawford, 'Holding International Organisations and Their members to Account', p. 9, at <www.law.cam.ac.uk/docs/view.php?doc=4135> (last visited on 29 August 2008).

42. ILC second report, *supra* n. 40, at pp. 3-4 (para. 7), where Gaja quotes *Banković and others v. Belgium and other 16 member states* (Admissibility) (GC), no. 52207/99, 41 *ILM* (2002) p. 517 (ECtHR) and the *Legality of the Use of Force* cases before the International Court of Justice as two examples where NATO members were individually called to respond for the actions of their troops acting through NATO. None of these cases ever was decided on the merits.

43. In 1950 the US government accepted to pay compensation to China for damages occurred during the Korean war authorized by the UN SC: ILC second report, *supra* n. 40, at p. 15 (para. 32). And again in 2000 the US and China reached a bilateral agreement concerning the bombing of China's embassy in Belgrade during the NATO campaign of 1999: *ibid.*, at p. 4 (fn. 11). In both cases the US accepted responsibility for acts which involved an international organization (albeit to different degrees).

44. Sari, *supra* n. 35, at p. 159.

international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct'.⁴⁵ Thus, when states contribute troops to international organizations (e.g., to NATO for K-FOR and to the UN for UNMIK) the criterion to establish whether there is attribution to the international organization is that of 'effective control', which requires a factual (rather than abstract) evaluation on a case by case basis. Needless to say, the ILC work on the draft articles is still at a very early stage, not having reached completion of the first reading yet. Thus, it is premature to rely solely on its authority.⁴⁶ However, there is a very persuasive body of academic opinion and state practice on which the Special Rapporteur grounded this formulation, which fairly represents the current state of the debate on the matter.⁴⁷ Applying the criterion of 'effective control' to the situation in *Behrami* it is evident that a difference should be drawn between K-FOR and UNMIK. While doubts may legitimately be cast regarding the latter, as a matter of fact it is not possible to speak of 'effective control' of the UN over the impugned acts by K-FOR. According to the ILC, it is straightforward that 'conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States ... to take necessary measures outside a chain of command linking those forces to the United Nations'.⁴⁸ But the Court did not really use 'effective control' as a criterion. Rather, it went through a very tortuous route. First, it blurred UNMIK and K-FOR under the common label of forces 'under Chapter VII foundation'. UNSC Resolution 1244 (1999) had operated a double delegation. On one side, it had delegated 'willing organizations and Member States ... the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command'.⁴⁹ This was eventually to be K-FOR. On the other hand, the SC had delegated 'civil administration powers to a UN subsidiary organ (UNMIK)'. Hence, the latter was 'institutionally directly and fully answerable' to the SC, so that 'in principle' all its actions were attributable to the UN.⁵⁰ But this said nothing about the effective control over the impugned act in Mr Behrami's case. Secondly, Mr Saramati's internment, which concerns

45. Art. 5 and commentary (responsibility of international organizations), in Report of the International Law Commission, Fifty-sixth session, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10)*, pp. 109-115 (hereinafter ILC report 56th session).

46. Art. 5 of the draft articles was mentioned (but misapplied) in *Behrami*, *supra* n. 6, at para. 30. The parties in *Al-Jedda* agreed upon the applicability of Art. 5 of the draft articles: *Al-Jedda (HL)*, *supra* n. 1, at para. 5. This exonerated their Lordships from deciding on the authoritativeness of its formulation.

47. See ILC second report, *supra* n. 40, at p. 19 (fn. 64).

48. ILC report 56th session, *supra* n. 45, at p. 102 (para. 105). The practice of the UN confirms this view: ILC second report, *supra* n. 40, at pp. 16 (para. 33) et seq.

49. *Behrami*, *supra* n. 6, at para. 129.

50. *Ibid.*, at paras. 143-144.

us here, fell within K-FOR's 'security mandate'.⁵¹ The Court obviously could not use the same 'subsidiary organ' argument it used for UNMIK. Therefore, it sought to establish that the UN SC, acting under Chapter VII, retained 'ultimate authority and control so that operational command only was delegated' to K-FOR,⁵² with the result that the impugned action was 'in principle' attributable to the UN. However, it is not at all clear how this could be the case, given that the 'effective control' of the actual internment in the sense of Article 5 of the draft articles on the responsibility of international organizations was clearly with K-FOR, and not with the UN. In sum, the Court arbitrarily exchanged the 'effective control' test with an 'ultimate authority and control' one, and did not provide any arguments on why this was appropriate.

Therefore, the ECtHR should have concluded at least that the detention of Mr Saramati was both attributable to the defendants and within their jurisdiction. It should thus have declared his application admissible, and then addressed the substantive question of whether there had been a violation of Article 5 ECHR. Instead, the ECtHR confusingly declined its jurisdictional competence *ratione personae* of the defendants.

2.2 The uncomfortable distinguishing of *Behrami*

According to Lord Rodger's opinion in *Al-Jedda*, if one had to assess the outcome of a future claim by Mr Al-Jedda in Strasbourg, it was obvious that the ECtHR would reach the same conclusion it had reached about Mr Saramati's internment in *Behrami*.⁵³ Therefore, the ECtHR would lack competence to assess UN acts and a claim under the HRA was not available to the claimant.⁵⁴

However, the majority of the Lords did not agree with his view and distinguished *Behrami*, albeit without an agreed common rationale for doing so. Lord Bingham held in his leading judgment that when considering the Iraqi situation 'the analogy with the situation in Kosovo [broke] down ... at almost every point':

'The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But ... it is one thing to receive reports, another to exercise effective command and control.'⁵⁵

51. *Ibid.*, at para. 127.

52. *Ibid.*, at para. 133.

53. *Al-Jedda (HL)*, *supra* n. 1, at para. 105.

54. *Ibid.*, at para. 112.

55. *Ibid.*, at para. 24. See more generally at paras. 5-25.

Indeed, it was the criterion of 'effective command and control' that should have guided in the matter. This arose from Article 5 of the ILC draft articles on the responsibility of international organizations mentioned above.⁵⁶ In order to assess the existence of such control Lord Bingham considered the succession of the facts and the legal situation arising from SC resolutions adopted from 2003 to 2006 with relation to Iraq⁵⁷ and compared them with the situation in Kosovo from 1999 onwards.⁵⁸ First, he noted that it was not the UN that had dispatched the coalition forces to Iraq, nor had it established the Coalition Provisional Authority.⁵⁹ The forces had no UN mandate when they began their belligerent occupation, which formally lasted until the handing over of power to the Iraqi interim government on 28 June 2004.⁶⁰ He added: 'It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US.'⁶¹ More importantly, SC Resolutions 1511 and 1546 should not be interpreted as a delegation of power, but as an authorization to the UK to carry out functions that the SC could not perform itself. Indeed, 'it cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant'.⁶²

Lord Rodger devoted most of his reasoning on this issue to a rebuttal of Lord Bingham's arguments. He argued that the factual differences between Kosovo and Iraq were on the whole legally irrelevant. First, the fact that the Multinational Force was authorized by the UN only under UNSC Resolution 1511 (2003), some six months after the Coalition Provisional Authority had been the occupying power, was irrelevant. What mattered was the legal position of UK forces at the time of Mr Al-Jedda's detention, which was analogous to that of Mr Saramati in Kosovo in the *Behrami* case.⁶³ Also, even if Resolution 1511 had not established MNF-I, it urged member states to contribute to it and spelt out a mandate for it, thereby 'asserting and exercising control over the MNF and ... prescribing the mission that it was to carry out'.⁶⁴ Secondly, the difference in who was in charge of the civil administration (UNMIK in Kosovo, the Iraqi government in Iraq) was equally irrelevant to the line of reasoning in

56. ILC report 56th session, *supra* n. 45, at p. 109; quoted by Lord Bingham at para. 5 and also quoted (but misapplied) in *Behrami*, *supra* n. 6, at para. 30.

57. UNSC Res. 1483 (2003); UNSC Res. 1500 (2003); UNSC Res. 1511 (2003); UNSC Res. 1546 (2004); UNSC Res. 1557 (2004); UNSC Res. 1637 (2005); UNSC Res. 1700 (2006); UNSC Res. 1723 (2006). More recently, see UNSC Res. 1770 (2007) and UNSC Res. 1790 (2007), respectively renewing the peacekeeping mission UNAMI until August 2008 and extending the mandate of MNF-I until December 2008.

58. Especially with reference to the legal framework of UNSC Res. 1244 (1999).

59. *Al-Jedda (HL)*, *supra* n. 1, at para. 23.

60. *Ibid.*, at paras. 16 and 23.

61. *Ibid.*, at para. 23.

62. *Ibid.*

63. *Ibid.*, at para. 61.

64. *Ibid.*, at para. 88.

Behrami.⁶⁵ Most importantly, according to Lord Rodger, the ‘effective control’ criterion of the draft articles on the responsibility of international organizations used by Lord Bingham could not lead to the distinguishing of *Behrami*. The ECtHR had decided that the detention of Mr Saramati was attributable to the UN notwithstanding the fact that it was ‘equally obvious’ in that case that the UN was not ‘involved in the particular decision to detain the appellant or in the practical steps taken to carry out that decision’.⁶⁶ Also,

‘Paragraph 10 of Resolution 1546 ... gave the MNF the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to the Resolution. This authorisation was essentially similar to the authorisation given to K-FOR in Resolution 1244. Notably, for present purposes, it gave specific authorisation for the MNF to undertake the task of “internment where this is necessary for imperative reasons of security”.’⁶⁷

Overall, there was no legal reason that could validly lead to a distinguishing of *Behrami*.

Faced with the alternative between Lord Bingham’s construction on this point and Lord Rodger’s opposite arguments, the rest of the House of Lords concurred with the former in the formation of a majority but cast some doubts. In particular, Lord Brown had some difficulty with the idea that there was no delegation of power by the SC in Iraq. It seemed to him that insofar as Lord Bingham’s argument was right, it would have applied equally to Iraq and Kosovo: ‘in neither country could the UN as a matter of fact carry out its central security role so that in both it was necessary to authorise states to perform the role’.⁶⁸ He was of the opinion that the only true difference between the situation in Kosovo and that in Iraq was that in the latter case the UN had not established MNF-I, nor had it ever ‘assumed ultimate authority or control’ over it.⁶⁹ Baroness Hale, on her part, declared herself in agreement with Lord Bingham but also agreed that Lord Brown’s was the ‘essential reason’ for distinguishing *Behrami*, making it hard to understand which of the two *rationes decidendi* she (and, consequently, the majority) subscribed to.⁷⁰

The reason why it was so difficult for the House of Lords to find a common ground in distinguishing *Behrami* is that the Lords strove to make sense of this controversial decision. In fact, it might be the case that Lord Bingham and Lord Brown’s combined efforts in finding differences between the situation in *Al-Jedda* and that in *Behrami* was just a pretence aimed at reaching the right legal result, i.e., the attribution of the internment to the UK. One of

65. *Ibid.*, at para. 63.

66. *Ibid.*, at para. 65.

67. *Ibid.*, at para. 77.

68. *Ibid.*, at para. 143.

69. *Ibid.*, at para. 148.

70. *Ibid.*, at para. 124.

Lord Bingham's most vivid arguments, that it would be inconceivable to attribute the facts of Abu Ghraib to the UN,⁷¹ would apply equally to any K-FOR human rights violations in Kosovo (though arguably not UNMIK ones). So would Baroness Hale's argument that it would be 'unlikely in the extreme that the United Nations would accept that the acts of the [MNF-I] were in any way attributable to the UN'.⁷²

Indeed, some of the arguments set out by Lord Rodger in the first part of his dissenting opinion are clearly sound, especially when he explains why there are not any legally relevant factual differences between the two situations of K-FOR and MNF-I. Moreover, his general prediction that a claim by Mr Al-Jedda would fail in Strasbourg is probably accurate. By December 2007, the European Court had already applied its own *Behrami* precedent and hastily dismissed applications in at least three other cases.⁷³ However, their Lordships did not seem to be aware of these.

But why did the Court adopt such an approach towards *Behrami*? The first, obvious answer is that none of the parties had asked the House to dismiss the *Behrami* case, because such a dismissal would have been quite problematic: the appellant and the interveners wisely and successfully limited themselves to distinguishing it, and the defendant argued for its application. More generally, their Lordships' approach reflects the now established method of construction of HRA rights within the UK legal system, the so-called 'mirror principle'.⁷⁴ As Lord Rodger put it, 'the House, a domestic court, finds itself deep inside the realm of international law' because 'it is called upon to assess how a claim by the appellant ... would fare before the European Court in Strasbourg'.⁷⁵ Similarly, Baroness Hale argued in *Al-Skeini* that the role of the House of Lords is that to 'keep in step with Strasbourg, neither lagging behind nor leaping ahead'.⁷⁶ However, Lord Rodger almost seems to think that a UK court should decide a HRA claim as if UK judges were sitting in Strasbourg; that is, that they should be making a necessarily speculative forecast on what that court might do if presented with the case. This goes one step too far. Section 2(1) HRA provides that courts should 'take into account' the jurisprudence of the ECtHR when 'determining a question which has arisen in connection with a Convention right'. From the point of view of UK law, this does not mean that UK courts should 'apply [ECtHR] cases strictly as precedent, unlike the position under

71. *Ibid.*, at para. 23.

72. *Ibid.*, at para. 124.

73. *Gajic v. Germany*, application no. 31446/02 (Admissibility), 28 August 2007, unreported, in which the Court declared the application inadmissible in 512 words. See *Dušan Berić and others v. Bosnia and Herzegovina*, application no. 36357/04 (Admissibility), (2008) 46 EHRR SE6 77; *Kasumaj v. Greece*, application no. 6974/05 (Admissibility), 5 July 2007, unreported.

74. J. Lewis, 'The European Ceiling on Human Rights', *Public Law* (2007) p. 720. See also *In re McKerr (Northern Ireland)*, [2004] UKHL 12, [2004] 1 WLR 807, at para. 65.

75. *Al-Jedda (HL)*, *supra* n. 1, at para. 55.

76. *Al-Skeini*, *supra* n. 37, at para. 90 per Baroness Hale; see also *R. (Ullah) v. Special Adjudicator*, [2004] UKHL 26, [2004] 2 AC 323, at para. 20 per Lord Bingham.

European Community law'.⁷⁷ Indeed, not even the Strasbourg Court is bound by its own precedent: there is no *stare decisis* rule in the Convention system, and it could prove quite difficult to treat the inconsistent and 'not infrequently Delphic in character'⁷⁸ ECtHR jurisprudence as a clear-cut set of precedents. UK courts are not exempted at all from interpreting the Convention under relevant rules of international law. Rather than speculating on the question whether a certain claim would fail in Strasbourg for whatever reason, the question a domestic court should ask itself is what the correct interpretation of the Convention is under international law, taking into account ECtHR jurisprudence.

In sum, there were practical, institutional and domestic legal constraints which led to the Court's decision. Indeed, their Lordships were locked into an impossible alternative. Either they had to distinguish the *Behrami* case on the very shaky foundations on which the majority eventually did, or they had to apply it despite their discomfort with its results. The majority of the House of Lords reached the right result when it held that Mr Al-Jedda's internment was to be attributed to the UK. In doing so, it went as far as it could in sending a subtle message to Strasbourg that something was wrong in the *Behrami* case. It is for the ECtHR to take note of this message and consider revising its own views on the attribution of conduct to the UN and/or member states.

3. HUMAN RIGHTS AND THE SECURITY COUNCIL

3.1 Qualifying or displacing?

Once it has been established that Mr Al-Jedda's internment was attributable to the UK, there remains to be considered the second question addressed by the Lords. Does Article 5 ECHR apply to his internment, or has Mr Al-Jedda's right to liberty been 'displaced and/or qualified' by SC resolutions authorizing the use of force by MNF-I? Despite a formally unanimous vote in favour of Lord Bingham's opinion, some Lords delivered concurring opinions which are irreconcilable with it. Furthermore, the leading opinion itself was cast in somewhat inconsistent terms. It is therefore very difficult to distil a line of reasoning common to the whole court.

77. R. Clayton, 'The Human Rights Act Six Years On: Where Are We Now', 12 *European Human Rights Law Review* (2007) p. 11 at p. 18. See also *Alconbury*, [2001] UKHL 23, [2003] 2 AC 295 (UK House of Lords, 9 May 2001), at para. 26; *In re McKerr (Northern Ireland)*, *supra* n. 74, at para. 65; R. Masterman, 'Taking the Strasbourg Jurisprudence into Account: Developing a "Municipal Law of Human Rights" under the Human Rights Act', 54 *ICLQ* (2005) p. 907 at pp. 908 et seq.

78. A.T.H. Smith, 'The Human Rights Act: The Constitutional Context', in J. Beatson, ed., *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford, Hart Publishing 1999) pp. 3-10 at p. 6.

Lord Bingham started by saying that ‘in the absence of some exonerating condition, the detention of the appellant would plainly infringe his right under article 5(1)’.⁷⁹ The question, he argued, was whether by effect of Articles 103 and 25 of the UN Charter the UK was under an obligation to intern Mr Al-Jedda or was merely authorized to do so.

He then explained the ‘three main reasons’ why this was an obligation.⁸⁰ First, the UK had ‘to take necessary measures to protect the safety of the public’ and that of its soldiers.⁸¹ This obligation arose during the military occupation (i.e., ‘from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004’)⁸² and included the power to intern by virtue of Article 43 of the Hague Regulations and Articles 41, 42 and 78 of the Fourth Geneva Convention.⁸³ After June 2004, this obligation was still standing by virtue of UNSC Resolution 1546 (2004). This, together with later resolutions, ‘strongly suggest[ed] that the intention was to continue the pre-existing security regime and not to change it’.⁸⁴ Secondly, the seemingly non-mandatory language employed by the SC was not significant because the SC would not in any case have used mandatory language ‘in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under Article 43 of the Charter which entitle them to call on member states to provide them’.⁸⁵ Also, Article 103 of the Charter would be applicable ‘where conduct is authorized by the Security Council [as well as] where it is required’.⁸⁶ Thirdly, the term ‘obligations’ in Article 103 ‘should not in any event be given a narrow, contract-based, meaning’ because of the ‘importance of maintaining peace and security’,⁸⁷ thus the UK was ‘bound to exercise its power of detention where this was necessary for imperative reasons of security’.⁸⁸ Moreover, in interpreting Article 103 one could not invoke ‘the special character of the European Convention as a human rights instrument’, because ‘the reference in article 103 to “any other international agreement” [left] no room for any excepted category, and such appear[ed] to be the consensus of learned opinion’.⁸⁹ In fact, except when *jus cogens* was involved, ‘binding Security Council decisions taken under Chapter VII supersede[d] all other treaty commitments’.⁹⁰

79. *Al-Jedda (HL)*, *supra* n. 1, at para. 27.

80. *Ibid.*, at para. 31.

81. *Ibid.*, at para. 32.

82. *Ibid.*

83. Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), 2 *AJIL* (1908) (Supp.) p. 90; 75 *UNTS* p. 287 (1949).

84. *Al-Jedda (HL)*, *supra* n. 1, at para. 32.

85. *Ibid.*, at para. 33.

86. *Ibid.*

87. *Ibid.*, at para. 34.

88. *Ibid.*

89. *Ibid.*, at para. 35.

90. *Ibid.*

But, having said all this, Lord Bingham surprisingly concluded on a quite different tone:

‘Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK *may* lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by SCR 1546 and successive resolutions, *but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention.*’⁹¹

Lord Rodger did not dwell on this issue, because his solution of the question of attribution rendered it unnecessary to do so. He nonetheless declared himself in agreement with Lord Bingham, and so did Lord Brown.⁹² On the other hand, Baroness Hale and Lord Carswell voted in favour but cast a number of doubts in doing so.

Baroness Hale began with some considerations on the ‘odiousness’ of internment and the importance of the protection of the rule of law especially for those accused of very grave crimes.⁹³ She then underlined that ‘displacing’ and ‘qualifying’ meant two different things, and that the question should have been answered bearing this in mind. According to her, Article 5 was ‘qualified but not displaced’.⁹⁴ Indeed, that between qualification and displacement

‘is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.’⁹⁵

However, it was ‘not clear’ how far UNSC Resolution 1546 (2004) went in authorizing internment, especially in light of ‘the commitment of the forces which made up the MNF to “act consistently with their obligations under the law of armed conflict, including the Geneva Conventions”’.⁹⁶ In fact, she wondered:

91. *Ibid.*, at para. 39 (emphasis added).

92. *Ibid.*, at paras. 114-118 per Lord Rodger and at para. 152 per Lord Brown.

93. *Ibid.*, at para. 122.

94. *Ibid.*, at para. 126.

95. *Ibid.*

96. *Ibid.*, at para. 127, quoting the letters annexed to UNSC Res. 1546 (2004).

‘On what basis is it said that the detention of this particular appellant is consistent with our obligations under the law of armed conflict? He is not a “protected person” under the fourth Geneva Convention because he is one of our own citizens. Nor is the UK any longer in belligerent occupation of any part of Iraq. So resort must be had to some sort of post conflict, post occupation, analogous power to intern anyone where this is thought “necessary for imperative reasons of security”. Even if the UNSC resolution can be read in this way, it is not immediately obvious why the prolonged detention of this person in Iraq is necessary ...’⁹⁷

In sum, it was only because of how ‘the argument ha[d] been conducted’ before their Lordships that Lord Bingham and Lord Brown could ‘speak of “displacing or qualifying” in one breath when clearly they mean[t] very different things’.⁹⁸

Lord Carswell, on the other hand, started off by saying that

‘where a state can lawfully intern people, it is important that it adopt certain safeguards: the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons.’⁹⁹

While he agreed in principle that there was an obligation to carry out the internment,¹⁰⁰ he added that such power had ‘to be exercised in such a way as to minimise the infringements of the detainee’s right under Article 5(1) of the Convention, in particular by adopting and operating to the fullest practicable extent’ the safeguards mentioned above.¹⁰¹

3.2 An ambiguous line of reasoning

At first sight, one could discount the view expressed by Baroness Hale on the ‘displacement’ rather than ‘qualification’ of Article 5 ECHR as the opinion of a minority. However, her criticism rightly addresses the core weakness in the line of reasoning adopted by Lord Bingham (and the majority with him): speaking of displacement and qualification ‘in one breath’. Also, the leading opinion cleverly manages to express two quite irreconcilable concepts as if they were one the consequence of the other. First, Lord Bingham set out at length the reasons why according to him the UK was not merely authorized, but under an obligation to intern Mr Al-Jedda. But in his last paragraph he abruptly recast the ‘obligation’ as something that the UK ‘may’ lawfully do, with the added caveat

97. *Ibid.*, at para. 128.

98. *Ibid.*, at para. 129.

99. *Ibid.*, at para. 130.

100. *Ibid.*, at para. 135.

101. *Ibid.*, at para. 136.

of having to apply some unspecified compatible elements from Article 5 ECHR, or what remained thereof.¹⁰² Nothing else was said on the matter: and one was left wondering how this could in practice be reconciled with the arguments on relative normativity energetically made before, which seemed to indicate a complete displacement (rather than a qualification) of Article 5 ECHR rights by virtue of Articles 103 and 25 UN Charter. Perhaps, the last paragraph of his judgment should be seen as mediating between the approaches of Baroness Hale and Lord Carswell on one side and Lord Rodger and Lord Brown on the other. But this is only matter for speculation. Whatever the case, the result is that the judgment is almost indeterminate: were it not for the repeated affirmation that the appellant's claim had to be dismissed, one could even have wondered if the Lords actually thought his internment was lawful. Indeed, as soon as the judgment was delivered some of the lawyers acting for Mr Al-Jedda declared in a press release that they were expecting their client 'to be on a plane home soon' because the Lords had 'in effect' told 'the UK Government' that

'one, holding our client for so long is not justified as strictly necessary and, two, in any event his important rights to due process through a hearing, proper access to lawyers, and a proper right to challenge the intelligence remain intact, and appear to have been breached.'¹⁰³

This is by definition a partial reading of the judgment, which unquestionably goes too far and refers to Baroness Hale's doubts as if they were agreed upon by the majority, which they were not. Also, the Lords only considered the issue of the legality of the internment under Article 5(1) (rather than the rest of Art. 5), therefore neither its procedure nor its factual bases.¹⁰⁴ In *Al-Jedda* their Lordships agreed unanimously upon only one thing: Mr Al-Jedda's appeal was to be dismissed. However, it still remains to be understood why Mr Al-Jedda was in fact freed shortly after the judgment was rendered, and at the same time stripped of his UK citizenship.¹⁰⁵ The vagueness of the judgment delivered by the Lords may have played a role in this puzzling political decision.

Furthermore, Baroness Hale correctly identified another weakness of the leading opinion when she complained that their Lordships 'have been concerned at a more abstract level with attribution to or authorisation by the United Nations [but] have devoted little attention to the precise scope of the authorisation'.¹⁰⁶ To answer correctly the relative normativity question of which obligations prevail, their Lordships should have devoted more time to a precise understanding of the legal framework in which the detention of Mr Al-Jedda

102. *Ibid.*, at para. 39 quoted above.

103. P. Shiner, 'Public interest lawyers, press release', 12 December 2007, at <www.cageprisoners.com/articles.php?id=2272> (last visited on 29 August 2008).

104. See *Al-Jedda (HL)*, *supra* n. 1, at para. 121 per Baroness Hale.

105. Barker, *supra* n. 2.

106. *Al-Jedda (HL)*, *supra* n. 1, at para. 129.

took place. The true substantive question – that of what UNSC Resolution 1546 (2004) actually did with relation to internment – was left at the margins of the judgment. This proceeded on the untested assumption that there would necessarily be a clash between Article 5 ECHR and the SC Resolution. In the following section, we briefly advance an alternative reading of this legal framework, taking into account the whole of Article 5 ECHR instead of its first paragraph only.

3.3 **Extra-territorial internment and human rights: a model of coexistence**

Human rights obligations and humanitarian law should not always be presumed to be clashing, and the latter is not to be simplistically considered *lex specialis* with relation to the former. This has recently been clarified by the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and in its decision on *Armed Activities on the Territory of the Congo*.¹⁰⁷

Indeed, the combined result of Baroness Hale and Lord Carswell's concurring opinions and of the last paragraph in Lord Bingham's opinion is that at least some human rights obligations under Article 5 ECHR coexist with the obligations from UNSC Resolution 1546 (2004), rather than being completely displaced by the latter. With two 'and a half' votes, this may be deemed to be the opinion of 'half' the House of Lords. And it is correct. The point is quite simple, at least in the abstract: Article 103 UN Charter says that Charter obligations prevail only 'in the event of a conflict' between these and obligations arising from another treaty. Where there is no conflict, there is no prevailing obligation. Evidently, even interpreting obligations under UNSC Resolution 1546 (2004) in the broadest possible way, there remains at least some space of operation for certain obligations under Article 5 ECHR. A 'complete displacement' would only have occurred if, *per absurdum*, a SC resolution had obliged member states to indefinitely detain *incommunicado* people chosen at random among their adult healthy citizens who never were suspected of committing any crime. This is obviously never the case. Most of the times, the practical hurdle is precisely to understand to what extent obligations coexist. In our case, one should above all disentangle the two separate questions of the entitlement of British forces to be in Iraq from that of their entitlement to intern persons for reasons of security.

107. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), *ICJ Rep.* (2004) p. 136, at paras. 105-106; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment), *ICJ Rep.* (2005) at paras. 178 and 215-220.

3.3.1 *The legal basis of the UK presence in Iraq during Mr Al-Jedda's internment*

For obvious reasons, we will not dwell on the *jus ad bellum* arguments on the legality of the military intervention in Iraq of early 2003. The legal basis of the UK presence in Iraq (or lack thereof) evolved over time and has to be evaluated with relation to the moment under consideration. From October 2004, when Mr Al-Jedda was interned, to December 2007, when he was released, such legal framework remained substantially unchanged.

At the end of May 2004 there were around 8,600 UK troops deployed in Southern Iraq; they were around 5,500 in May 2007 and around 4,000 in March 2008.¹⁰⁸ All of them were part of Operation TELIC, the UK contribution to MNF-I. It follows that the legal basis of UK presence in Iraq largely coincided with the legal basis of MNF-I. This is the multinational force under unified command authorized by UNSC Resolution 1511 (2003) of 16 October 2003.¹⁰⁹ After the new Iraqi government was established in 2004, the SC renewed and expanded its mandate with the consent of the Iraqi government. This was done through UNSC Resolution 1546 (2004), which '[noted] that the presence of the multinational force in Iraq [was now] at the request of the incoming Interim Government of Iraq and therefore [reaffirmed] the authorization for [MNF-I]'.¹¹⁰ The force would '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 the Resolution.¹¹¹

Thus, Iraqi consent was the primary legal basis for the presence of MNF-I in Iraq from June 2004 onwards. The SC only took note of the agreement between MNF-I and Iraq and entrusted MNF-I with the mandate of protecting UNAMI, the UN's own peacekeeping mission in Iraq.¹¹² Indeed, the SC declared that it would 'terminate [MNF-I's] mandate earlier if requested by the Government of Iraq', and that the mandate would be reviewed at any time if the government so requested, and in any case every twelve months.¹¹³ The mandate was renewed with Iraq's consent every year in the period under examination here.¹¹⁴

Indeed, it could even be said that it was not strictly necessary for UNSC Resolution 1546 (2004) to re-authorize MNF-I, because the agreement between MNF-I and Iraq was a sufficient legal basis thereof. But the objection may be raised that the Iraqi government was established as the result of the 2003

108. UK Ministry of Defence, 'Operations in Iraq: Facts and figures', at <www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInIraqFactsandFigures.htm> (last visited on 29 August 2008).

109. UNSC Res. 1511 (2003), at para. 13.

110. UNSC Res. 1546 (2004), at para. 9.

111. *Ibid.*, at para. 10.

112. *Ibid.*

113. *Ibid.*, at para. 12.

114. UNSC Res. 1637 (2005); UNSC Res. 1723 (2006); UNSC Res. 1790 (2007).

military operation initiated by largely (though not exactly) the same countries and troops contributing to MNF-I from June 2004 onwards. As for the UK, the continuity between ‘major combat operations’ of March/April 2003 and MNF-I is clear from the fact that the operation retained the same name (TELIC).¹¹⁵ The same is true of the US, whose name ‘Operation Iraqi Freedom’ has also continued to be used as the name of MNF-I.¹¹⁶ Doubts could then reasonably be cast as to the validity of such agreement. Hence, UNSC Resolution 1546 and subsequent resolutions performed at least one fundamental legal function with relation to *jus ad bellum*. By welcoming the institution of the Iraqi government and the agreements between it and MNF-I, the SC recognized both the former and the latter. This serves as a shield against any objection to the legality of MNF-I presence.

3.3.2 *Humanitarian law on internment applicable to MNF-I and UK actions in Iraq*

An altogether different question is which humanitarian law provisions applied from October 2004 to December 2007 to UK (and MNF-I) troops in Iraq. Lord Bingham took the view that when the Coalition Provisional Authority (CPA) handed over its powers to the Iraqi Interim Government the occupation *ipso facto* ended. Therefore, it was only because of the language of UNSC Resolution 1546 (2004) – and of the annexed letters mentioning the Geneva Conventions – that the power to intern and the application of the Conventions survived after June 2004.¹¹⁷ The question is slightly more complex.

First, one should question whether the occupation had really ended at the time and place of Mr Al-Jedda’s internment. The UN SC in Resolution 1546 welcomed that ‘by 30 June 2004, the occupation [would] end and the Coalition Provisional Authority [would] cease to exist, and that Iraq [would] reassert its full sovereignty’.¹¹⁸ This endorsement by the SC is probably sufficient to explain Lord Bingham’s claim that the occupation ended on 28 June 2004. The occupying powers decided when, and how, to transmit sovereign power back to Iraq (and, crucially, to whom in Iraq); the mere declaration that this was the case and the extinction of one bureaucratic entity (the CPA) was considered sufficient by the SC to transform a hostile occupation into a friendly presence. But Article 42 of the Hague Regulations says that ‘territory is considered occupied when it is actually placed under the authority of the hostile army’.¹¹⁹ In theory, one should deduce therefrom that occupation only ended in the territory under consideration here (Basra) when the Iraqi government actually acquired effective authority and control over it as a matter of fact, rather than by effect of a

115. UK Ministry of Defence, *supra* n. 108.

116. See at <www.mnf-iraq.com> (last accessed on 29 August 2008).

117. *Al-Jedda (HL)*, *supra* n. 1, at para. 32.

118. UNSC Res. 1546 (2004), at para. 2.

119. Art. 42, *supra* n. 83.

declaration. This would mean that UK occupation of Basra on behalf of MNF-I would have continued at least until April 2008, when the Iraqi army was in the process of slowly taking over control of the area from UK troops.¹²⁰ But the SC seems to have thought otherwise.

However, even admitting that the SC had the power to declare the occupation ended, Lord Bingham is correct in saying that it was clear at the time of drafting the Resolution that some aspects of occupation law would remain in place. One possible legal reason for this may also be that the distinction between belligerent occupation and pacific occupation is fading away, as Benvenisti argues.¹²¹ In any case, occupation law applies notwithstanding the agreement of Iraq with MNF-I. That is, it applies even when the 'occupying army' is not 'hostile' anymore. Indeed, the Fourth Geneva Convention (GC-IV) applies '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',¹²² and in spite of 'any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory' and of 'any agreement concluded between the authorities of the occupied territories and the Occupying Power'.¹²³

In sum, rules of humanitarian law applicable to MNF-I are the result of the combination of three elements: relevant SC resolutions, the agreement between Iraq and MNF-I, and applicable occupation law. The letters of agreement between Iraq and MNF-I annexed to UNSC Resolution 1546 (2004) explicitly mention both the commitment by MNF-I to the Geneva Conventions and the power of internment 'where this is necessary for imperative reasons of security'. This is, of course, the language from Article 78 GC-IV, which deals with internment of protected persons in time of occupation.¹²⁴ It follows that, though perhaps not applying directly, Article 78 GC-IV is of guidance to understand the scope and limits of the power of internment granted to MNF-I. True, the guarantees of Article 78 GC-IV only apply to non-citizens, and Mr Al-Jedda was a dual UK-Iraqi citizen at the time of his internment. However, the object and purpose of Geneva Convention IV is that of protecting foreign civilians from consequences of war, on the assumption that citizens will be protected by their own domestic legal system. This may be illustrated by the fact that Article 4 GC-IV excludes from protected status those citizens of co-belligerent and neutral states who enjoy 'normal diplomatic representation in the State in whose hands they are': again, it is assumed that protection will be granted

120. UK Ministry of Defence, 'People of Basra "optimistic" as Iraqi Army take control in the city', 23 April 2008, at <www.mod.uk/DefenceInternet/DefenceNews/MilitaryOperations/PeopleOfBasraoptimisticAsIraqiArmyTakeControlInTheCity.htm> (last visited on 29 August 2008).

121. E. Benvenisti, 'Applicability of the Law of Occupation', 99 *ASIL Proc.* (2005) p. 29.

122. Art. 2, GC-IV; see Benvenisti, *supra* n. 121.

123. Art. 47, GC-IV; see Benvenisti, *supra* n. 121.

124. Art. 42 GC-IV also deals in similar terms with internment of protected persons outside occupied territory (internment 'may be ordered only if the security of the Detaining Power makes it absolutely necessary').

by the co-belligerent/neutral state directly. Thus, with relation to internment Article 78 GC-IV constitutes a *minimum* of protection which is to be expected under the international law of occupation.

According to Article 78 GC-IV, decisions on internment

‘shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by said Power.’

This provision should be read together with those of the same section which deal with the procedures applicable to protected persons indicted of a criminal offence. In particular, the ‘regular procedure’ established by MNF-I must be devised (*inter alia*) in accordance with the guarantees of Articles 71-77 GC-IV insofar as they are applicable to internment. So, while in internment there will be no proper trial because the person is not charged with any offence, internees should still enjoy the right to be promptly informed of the reasons of their detention, so that they can effectively exercise their right of appeal mentioned in Article 78 GC-IV.¹²⁵ They should have the right ‘to present evidence necessary to their defence’ and enjoy other rights of legal assistance.¹²⁶ The International Red Cross should be granted access to interned people, and their conditions of detention should be ‘sufficient to keep them in good health’ and ‘at least equal to those obtaining in prisons in the occupied country’, including access to spiritual and medical assistance.¹²⁷ Finally, the power to intern is always temporary. The Fourth Geneva Convention provides that ‘each interned person shall be released ... as soon as the reasons which necessitated his internment no longer exist’ and in any case ‘as soon as possible after the close of hostilities’.¹²⁸ The latter is also the limit for the detention of prisoners of war.¹²⁹ As for non-international armed conflict, interned civilians must also ‘be released as soon as the reasons for the deprivation of their liberty cease to exist’.¹³⁰ A prolonged internment for an indefinite time without any realistic *dies ad quem* in foresight would contravene international humanitarian law.

125. Art. 71 GC-IV.

126. Art. 72 GC-IV.

127. Art. 76 GC-IV.

128. Arts. 132 and 133 GC-IV respectively.

129. Art. 118 Geneva Convention (III) Relative to the Treatment of Prisoners of War (GC-III), 75 UNTS p. 135 (1949).

130. ‘Rule 128’, in International Committee of the Red Cross, J.-M. Henckaerts and L. Doswald-Beck, eds., *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge, Cambridge University Press 2005) p. 451.

3.3.3 *'Qualified but not displaced': UK obligations under Article 5 ECHR*

Pursuing to Article 5 ECHR, the UK undertook not to deprive anyone of liberty 'save in the following cases and in accordance with a procedure prescribed by law':

- a) the lawful detention of a person after conviction by a competent court;
- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.¹³¹

The person detained has a right to be informed 'promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'.¹³² If she is accused of a crime, she should be brought with no delay 'before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial'.¹³³ Even if she is not accused of any crime, she 'shall be entitled to take proceedings by which the lawfulness of [her] detention shall be decided speedily by a court and [her] release ordered if the detention is not lawful'.¹³⁴

Combining Article 5 ECHR with humanitarian law rules mentioned above, the result is as if a virtual further letter 'g)' was added in Article 5(1) to the list of allowed cases of deprivation of liberty: that of internment for imperative reasons of security in time of military occupation. This means that internment should be treated on equal terms with all other deprivations of liberty which do not involve the accusation of having committed a crime. Indeed, according to the International Red Cross study customary international humanitarian law

131. Art. 5(1) ECHR.

132. Art. 5(2) ECHR.

133. Art. 5(3) ECHR.

134. Art. 5(4) ECHR.

already prohibits ‘the arbitrary deprivation of liberty’.¹³⁵ Internment is an exception to this rule, so long as there are ‘serious and legitimate reasons’ – according to the International Criminal Tribunal for the Former Yugoslavia (ICTY) – ‘to think that the interned persons may seriously prejudice the security of the detaining power’.¹³⁶

Furthermore, obligations arising from Article 5(2) and Article 5(4) ECHR apply to internment: the person should be informed of the reasons of her internment and given a chance to appear before a judicial organ to review the legality of her detention. Also, the ‘procedures’ mentioned in Article 78 GC-IV should be devised in such a way to constitute a due process of law analogous to the guarantees of Article 5(3). In sum, it must be possible for the internee to challenge the existence of the ‘imperative reasons of security’ in front of an independent judicial organ. The point of internment is not to punish the internee, nor to be a substitute for a criminal trial when there is no evidence to conduct one. Due process must at all times be respected, both under humanitarian law and human rights law: in this respect, rather than there being a clash, there is a convergence of safeguarding provisions.

3.3.4 *Mr Al-Jedda’s internment may have violated UK obligations*

The question before the House of Lords in *Al-Jedda* was limited to Article 5(1), namely if relevant SC resolutions on Iraq displaced or qualified it. As such, the question was ill-formulated and not susceptible of a clear answer. As Baroness Hale rightly put it, it was an unhelpful ‘all or nothing’ kind of question.¹³⁷ Thus, one should perhaps not be surprised by the ambiguity of their Lordships decision. Indeed, it is not just SC resolutions, but the whole framework of humanitarian law applicable to the situation in Iraq – ensuing also, but not exclusively, from UNSC Resolution 1546 (2004) – which rendered the internment of Mr Al-Jedda legitimate in principle. But this same body of law also regulated it in practice. The crucial element is not relative normativity, nor Article 5(1). The latter indeed was qualified in the sense we saw above, and Mr Al-Jedda’s internment could not be deemed in violation of Article 5(1) *per se*. But nothing was said of the rest of Article 5. And there is no sufficient information available to evaluate whether his internment violated any other part of Article 5 or other applicable rules of international human rights or humanitarian law. For example, was he promptly informed of the reasons for his internment, as both human rights and humanitarian law provide? Was he allowed a due process of law established by the MNF-I in accordance with Article 78 GC-IV?

135. ‘Rule 99’, *supra* n. 130, pp. 344 et seq.

136. *Ibid.*, at p. 345, paraphrasing the ICTY in *Prosecutor v. Delalić and Others* (Čelebići case) (Trial Chamber), no. IT-96-21-T (16 November 1998), at para. 576. The Court was referring to Art. 42 GC-IV, rather than Art. 78 GC-IV, but the same reasoning seems applicable here.

137. *Al-Jedda* (HL), *supra* n. 1, at para. 126.

Could he challenge in a court the existence of those cogent reasons of security to intern him which were taken for granted in these proceedings? Had his detention been prolonged indefinitely for so long as to become no longer temporary (nor necessary, as Baroness Hale suggested),¹³⁸ and therefore contrary to international humanitarian law? These questions are all probably bound to remain without an answer, given that Mr Al-Jedda was swiftly freed only days after the House of Lords rendered its judgment.¹³⁹

3.4 A conflict model: *Solange* and international law

We have so far advanced a model of coexistence of international humanitarian and human rights obligations to explain the legal framework of Mr Al-Jedda's internment. Indeed, this is well-suited to disentangle and explain state obligations under public international law. It is the model which should be followed by all international courts, including the ECtHR, which is called to apply the Convention as a regional subset of rules of public international law, not as an alternative framework of autonomous law. So, if presented with the *Al-Jedda* case, the ECtHR should accept that Article 103 UN Charter applies to all states members of the ECHR and qualifies Article 5 ECHR in the manner seen above, instead of seeking refuge in dubious arguments on attribution as it did in *Behrami*. However, the model of coexistence of obligations may not be equipped to answer analogous questions arising under domestic law, especially constitutional law.

At the outset of the proceedings, Mr Al-Jedda sought to affirm that HRA rights were autonomous domestic rights independent of their ECHR equivalents. The Divisional Court¹⁴⁰ and the Court of Appeal dealt with the question,¹⁴¹ and the latter applied the House of Lords precedent in *Quark Fishing* to the effect that HRA rights are only existent insofar as they have effect at the relevant time as ECHR rights enforceable in Strasbourg against the UK.¹⁴² This is due to the 'mirror principle' mentioned above.¹⁴³ The matter was not the object of appeal before the House of Lords and it will not be dwelt upon here, except to mention that convincing criticism on the principle has been expressed by some scholars.¹⁴⁴ In fact, public international law has very little to say about how a domestic UK statute should or should not be interpreted. But one last brief remark needs to be made with relation to what we may call 'a model of conflict'.

138. *Ibid.*, at para. 128.

139. Barker, *supra* n. 2. But see the new proceedings: [2009] *EWHC* 397 (QB).

140. *Al-Jedda (QBD)*, *supra* n. 4, at paras. 33-74.

141. *Al-Jedda (CA)*, *supra* n. 5, at paras. 88-99.

142. *R. (Quark Fishing Ltd) v. Foreign Secretary*, [2005] *UKHL* 57, [2006] 1 *AC* 529 (UK House of Lords, 13 October 2005), at para. 25 per Lord Bingham, at paras. 32-34 per Lord Nicholls and at paras. 87-88 per Lord Hope.

143. *Supra* n. 74 and accompanying text.

144. See, e.g., Lewis, *supra* n. 74; Masterman, *supra* n. 77; Clayton, *supra* n. 77.

Indeed, had Mr Al-Jedda's challenge of the 'mirror principle' succeeded before the lower courts, Article 5 ECHR rights would have been treated by the court as domestic English 'constitutional' rights with extra-territorial effect. One would then have had to question what happens if and when international law conflicts with domestic 'constitutional' provisions such as *habeas corpus*. It would be wrong to think that this is a very recent debate sparked by decisions on SC resolutions on terrorism such as *Kadi*.¹⁴⁵ Already in the early 1970s German and Italian constitutional courts were debating the impact of transfers of sovereignty through international treaties in their judgments on the relationship between EU law and conflicting domestic constitutional rights.¹⁴⁶ In the famous *Solange-I* case of 1974, the Federal Constitutional Court of Germany decided that 'so long as' (*solange*) the legal framework of the European Communities lacked a system of protection of human rights comparable to that of the German Constitution, the 'guarantee of fundamental rights' of the latter '[would] prevail'.¹⁴⁷ Subsequent German cases recognized the advancement of European integration and of the protection of human rights within the Communities,¹⁴⁸ but eventually confirmed in the *Maastricht* case that 'an effective protection of basic rights for the inhabitants of Germany will ... generally be maintained as against the sovereign powers of the [European] Communities and will be accorded the same respect as the protection of basic rights required unconditionally by the Constitution'.¹⁴⁹ This evolution of the *Solange-Maastricht* German case-law, though not explicitly mentioned, was perhaps of inspiration for the ECtHR when in turn it was addressing its own relationship with the EU in *Bosphorus*. The ECtHR defended in principle the prominence of the ECHR system whenever a transfer of sovereignty by member states was done towards a system not providing an 'equivalent level of protection of fundamental rights'.¹⁵⁰ With regard to general public international law, a modern equivalent of this *solange* approach may be adopted by domestic courts willing to build a degree of resilience of their own constitutional law: as long as international law will

145. European Court of Justice, *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, nos. C-402/05 P and C-415/05 P, 3 September 2008, [2008] CMLR 3, 41; see also the opinion of Advocate General Poiares Maduro, *ibid.*; see also European Court of First Instance, *Kadi v. Council of the European Union and Commission of the European Communities*, no. T-315/01, [2005] ECR II-3649. On a similar issue, see *A., K., M., Q. & G. v. HM Treasury*, [2008] EWHC 869 (Admin).

146. E.g., Italian Constitutional Court, *Frontini contro Ministero delle Finanze*, no. 183/73, [1974] CMLR 2, 372, 388-390.

147. *Solange-I* case (*Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*), [1974] CMLR 2, 540, 551.

148. *Solange-II* case (*Re the application of Wünsche Handelsgesellschaft*), [1987] CMLR 3, 225, 259 and 262-265.

149. *Maastricht* case (*Manfred Brunner and Others v. The European Union Treaty*), [1994] CMLR 1, 57, 79.

150. *Bosphorus* case, *supra* n. 30, at para. 155; the Court then held at para. 165 that the EU provided for a protection equivalent to that of the ECHR system.

not provide for sufficient remedies against individual human rights violations with an effective framework of protection, they may decide to apply their own constitutional law and protect their inhabitants even when in so doing they would violate international law. Had the House of Lords construed domestic HRA rights as wholly independent from ECHR rights, the *Al-Jedda* case could have become part of an evolving transnational judicial dialogue on the matter – perhaps taking into account the constitutional relevance of *habeas corpus* within the English legal system since 1215.

However, this is not a question which can be addressed here. Until international law has built its own constitutional system following the rule of law,¹⁵¹ international lawyers should respectfully bow away from this debate and leave the matter to domestic legal systems. Indeed, so far every country has developed its own way of dealing with international law provisions conflicting with its constitutional ones, and any generalization (such as the difference between ‘monistic’ and ‘dualistic’ systems) is unavoidably artificial or not particularly helpful. What matters to victims of human rights violations is which specific domestic and international remedies are available to them, not abstract theories concerning a yet unestablished world constitutional order.

4. CONCLUSION

Hilal Al-Jedda was detained for more than three years without charge or trial in a British prison in Basra on the grounds that his internment was necessary for imperative reasons of security in Iraq. The House of Lords had to decide whether this violated the international obligations the UK had undertaken under Article 5(1) ECHR. After reaffirming that the internment occurred within UK jurisdiction and deciding that it was attributable to the UK (*Behrami* notwithstanding), their Lordships held that Article 5(1) would indeed have been violated were it not for the fact that the obligation was qualified by UNSC Resolution 1546 (2004), and thus inapplicable to the present case. However, some other type of human rights obligations under the broader framework of Article 5 ECHR would apply to Mr Al-Jedda’s internment, but this was outside the scope of the questions put before their Lordships. To get to this result, the court went through a series of arguments under public international law, some of which were unconvincing. This is arguably due to how the arguments were put before it in the first place. Nonetheless, the overall solution reached by the House of Lord was the correct one, despite the many questions it left unanswered.

151. This may be under development: see, e.g., E. de Wet, ‘The International Constitutional Order’, 55 *ICLQ* (2006) p. 51; A.A. Cançado Trindade, ‘International Law for Humankind: Towards a New *Jus Gentium*’, 316 *Recueil des cours* (2005) pp. 13-439 and 317 *Recueil des cours* (2005) pp. 11-312.

The *Al-Jedda* judgment is a very interesting case-study on the relationship between UK courts and the ECtHR. The now established ‘mirror principle’ may be construed in various ways. In the extreme form in which Lord Rodger put it in his dissenting opinion, it would mean that UK judges would almost try to speculate in London whether protection will be granted in Strasbourg. This exercise would easily lend itself to creeping mistakes on the interpretation of international human rights law. Paradoxically, the somewhat less rigorous distinguishing approach followed by the majority was the only one the House could possibly adopt to send a subtle message to Strasbourg that something was wrong with the *Behrami* decision. It is now for the latter Court to decide whether to ‘acknowledge receipt’ of this message and reconsider its jurisprudence on the matter.

On the other hand, as for the question of displacement and/or qualification of Article 5(1) rights, the court never really addressed the important matters – again mostly because of the manner in which the arguments were put before it. In this respect, Baroness Hale delivered the most acute opinion, from which all the contradictions of the judgment as a whole emerged. In fact, there was some space for the court to make the right arguments, for example by distinguishing between *jus in bello* (on which the court was deciding) and *jus ad bellum* (on which the court was not called to decide).

But perhaps it is unfair to ask of a domestic court specializing in many different and complex areas of the common law to be as crystal-clear in its international law arguments as one would require from an international court. Paradoxically, such high expectations of the House of Lords are the result of the ever increasing involvement of UK courts in matters which fall squarely within the domain of international law rather than UK law. These are all very complex matters on which there is often disagreement both in legal doctrine and in legal practice. Thus, when international judges make mistakes (as they sometimes do: *Behrami docet*) domestic judges should be excused for their difficulty in openly declaring that their supposedly more specialized colleagues got it spectacularly wrong.