HOUSE OF LORDS SESSION 2007–08
[2007] UKHL 58

on appeal from:[2006] EWCA Civ 327

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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Respondents:
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Interveners (Liberty and JUSTICE)
James Crawford SC
Shaheed Fatima
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LORD BINGHAM OF CORNHILL

My Lords,

1. Since October 2004 the appellant, who is a national of both this country and Iraq, has been held in custody by British troops at detention facilities in Iraq. He complains that his detention infringes his rights under article 5(1) of the European Convention on Human Rights, a Convention right protected by the Human Rights Act 1998, and also founds a good claim in this country under the English common law. These claims were rejected by the Queen's Bench Divisional Court (Moses and Richards JJ: [2005] EWHC 1809 (Admin), HRLR 1355) and also by the Court of Appeal (Brooke, May and Rix LJJ: [2006] EWCA Civ 327, [2007] QB 621. Both courts below delivered lengthy and careful judgments, commensurate with the importance and difficulty of the issues then raised, but a new issue has (by agreement) been raised and argued before the House, as explained below.

2. The appellant has not been charged with any offence, and no charge or trial is in prospect. He was arrested and has since been detained on the ground that his internment is necessary for imperative reasons of security in Iraq. He was suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into

Iraq for use in attacks against coalition forces. These allegations are roundly denied by the appellant, and they have not been tested in any proceedings. Nor is their correctness an issue in these proceedings. The House must therefore resolve the legal issues falling for decision on the assumption that the allegations are true, without forming any judgment whether they are or not.

3. In the courts below the appellant's Human Rights Act argument was directed to a single question, turning essentially on the relationship between article 5(1) of the European Convention on the one hand and the United Nations Charter, and certain resolutions of the UN Security Council, on the other. More specifically, this question is agreed to be whether the provisions of article 5(1) of the Convention are qualified by the legal regime established pursuant to United Nations Security Council Resolution ("UNSCR") 1546 (and subsequent resolutions) by reason of the operation of articles 25 and 103 of the UN Charter, such that the detention of the appellant has not been in violation of article 5(1). This is the issue which the courts below decided against the appellant, and it remains an issue dividing the parties. But it is now the second issue. For the Secretary of State, prompted (it seems) by the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami v France, Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01 (unreported), 2 May 2007) has raised an entirely new issue, not ventilated in the courts below, directed to the attributability in international law of the conduct of which the appellant complains. As agreed, the issue is "whether, by reason of the provisions of UNSCR 1511 (2003) and/or UNSCR 1546 (2004), and/or UNSCR 1637 (2005) and/or UNSCR 1723 (2006) and/or (so far as it may be relevant) UNSCR 1483 (2003), the detention of the appellant is attributable to the United Nations and thus outside the scope of the ECHR". The Secretary of State, relying strongly on *Behrami and Saramati,* contends that the appellant's detention is attributable to the UN, a contention which (if correct) defeats his claim under article 5. This has been treated as the first issue in this appeal.

4. What is now the third issue can be more simply expressed: whether English common law or Iraqi law applies to the appellant's detention and, if the former, whether there is any legal basis for his detention. The appellant would wish to contend that he has a good claim even if Iraqi law is applicable, but this question was not litigated below, was not agreed as an issue, has not been the subject of expert evidence of Iraqi law and has not been considered by the House.

The first issue

5. It was common ground between the parties that the governing principle is that expressed by the International Law Commission in article 5 of its draft articles on the Responsibility of International Organizations (adopted in May 2004 and cited by the European Court in *Behrami and Saramati*, para 30):

> "*Conduct of organs or agents placed at the disposal of an international organization by a state or another international organization*
>
> 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 international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct."

The European Court also quoted (para 31) from paras 1 and 6-7 of the ILC's authoritative commentary on this article (General Assembly Official Records 59th Session, Supp No 10 (A/59/10)):

> "1.When an organ of a state is placed at the disposal of an international organization, the organ may be fully seconded to that organization. In this case the organ's conduct would clearly be attributable only to the receiving organization…Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending state or as organ or agent of the lending organization. This occurs for instance in the case of military contingents that a state placed at the disposal of the [UN] for a peacekeeping operation, since the state retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organization or to the lending state or organization …
>
> 6.Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing state retains over disciplinary matters

and criminal affairs. This may have consequences with regard to attribution of conduct …

Attribution of conduct to the contributing state is clearly linked with the retention of some powers by that state over its national contingent and thus on the control that the state possesses in the relevant respect.

7.As has been held by several scholars, when an organ or agent is placed at the disposal of an international organization, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question."

6. Invited by the ILC to comment on the attribution of the conduct of peacekeeping forces to the UN or to contributing states, the UN Secretariat responded (A/CN.4/545, 25 June 2004, pp 17-18):

"The question of attribution of the conduct of a peacekeeping force to the United Nations or to contributing states is determined by the legal status of the force, the agreements between the United Nations and contributing states and their opposability to third states.

A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by member states under United Nations command although remaining in their national service are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander. The functions of the force are exclusively international and members of the force are bound to discharge their functions with the interest of the United Nations only in view. The peacekeeping operation as a whole is subject to the executive direction and control of the Secretary-General, under the overall direction of the Security Council or the General Assembly as the case may be.

As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation. The fact that any such act may have been

performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations vis-à-vis third states or individuals.

Agreements concluded between the United Nations and states contributing troops to the Organization contain a standard clause on third-party liability delineating the respective responsibilities of the Organization and contributing states for loss, damage, injury or death caused by the personnel or equipment of the contributing state. Article 9 of the Model Memorandum of Understanding between the United Nations and [participating state] contributing resources to [The United Nations Peacekeeping Operation] provides in this regard:

> 'The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this memorandum. However if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims' (A/51/967.annex).

While the agreements between the United Nations and contributing states divide the responsibility in the relationship between them, they are not opposable to third states. Vis-à-vis third states and individuals, therefore, where the international responsibility of the Organization is engaged, liability in compensation is, in the first place, entailed for the United Nations, which may then revert to the contributing state concerned and seek recovery on the basis of the agreement between them.

The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the assumption that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In authorized chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the state or states conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and

> control, international responsibility lies where *effective* command and control is vested and practically exercised (see paras 17-18 of the Secretary-General's report A/51/389)."

The cited paragraphs in the Secretary-General's report A/51/389 (20 September 1996) read:

> "17. The international responsibility of the United Nations for combat-related activities of the United Nations forces is premised on the assumption that the operation in question is under the exclusive command and control of the United Nations. Where a Chapter VII-authorized operation is conducted under national command and control, international responsibility for the activities of the force is vested in the state or states conducting the operation. The determination of responsibility becomes particularly difficult, however, in cases where a state or states provide the United Nations with forces in support of a United Nations operation but not necessarily as an integral part thereof, and where operational command and control is unified or coordinated. This was the case in Somalia where the Quick Reaction Force and the US Rangers were provided in support of the United Nations Operation in Somalia (UNOSOM II), and this was also the case in the former Yugoslavia where the Rapid Reaction Force was provided in support of the United Nations Protection Force (UNPROFOR).
>
> 18. In joint operations, international responsibility for the conduct of the troops lies where operational command and control is vested according to the arrangements establishing the modalities of cooperation between the state or states providing the troops and the United Nations. In the absence of formal arrangements between the United Nations and the state or states providing troops, responsibility would be determined in each and every case according to the degree of effective control exercised by either party in the conduct of the operation."

The UN Secretariat was further invited by the ILC to address the following question (see A/CN.4/556, 12 May 2005, p4):

> "In the event that a certain conduct, which a member state takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that state and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the state's wrongful conduct was not requested, but only authorized by the organization?

The Secretariat's answer was (ibid, p 46):

> "As for the third question raised by the commission, we are not aware of any situation where the Organization was held jointly or residually responsible for an unlawful act by a state in the conduct of an activity or operation carried out at the request of the Organization or under its authorization. In the practice of the Organization, however, a measure of accountability was nonetheless introduced in the relationship between the Security Council and member states conducting an operation under Security Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important 'oversight tool', the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the state conducting the operation, for the ultimate test of responsibility remains 'effective command and control'."

7. It is necessary to identify the main events occurring between March 2003 and the present before considering the application of these principles to the present case.

8. On 20 March 2003 coalition forces invaded Iraq. It is, as Brooke LJ observed in paragraph 15 of his judgment, "well known that the Coalition Forces invaded Iraq in the spring of 2003 after the abandonment of the efforts to obtain a further Security Council resolution which would give immediate backing to what the coalition states wished to do if Saddam Hussein did not comply with the Council's demands". On 16 April 2003 General Franks, a US general, issued a "freedom message" in which he announced the creation of the Coalition Provisional Authority ("the CPA"), a civilian administration

which would exercise powers of government in Iraq for the time being. Major combat operations were declared to be complete on 1 May 2003, although hostilities did not end on that date in all parts of the country. As from that date the US and the UK became occupying powers, within the meaning of Section III of the Hague Regulations on the Laws and Customs of War on land (1907) and the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War (1949) in the areas which they respectively occupied.

9. On 8 May 2003 the Permanent Representatives of the UK and the US at the UN addressed a joint letter to the President of the Security Council. In it they said that the states participating in the coalition would strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the Iraqi people; that the US, the UK and their coalition partners, acting under existing command and control arrangements through the commander of coalition forces, had created the CPA; that the US, the UK and their coalition partners, working through the CPA, should among other things provide for security in and for the provisional administration of Iraq; that they would facilitate the efforts of the Iraqi people to take the first steps towards forming a representative government based on the rule of law; and that the UN had a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq and in helping in the formation of an Iraqi interim authority. On 13 May 2003 the US Secretary for Defence, Mr Donald Rumsfeld, appointed Mr Paul Bremer to be administrator of the CPA, which was divided into regions, that in the south being under British control. The CPA promptly set about the business of government. By CPA Regulation No 1, dated 16 May 2003, the CPA assumed "all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war". Iraqi laws, unless suspended or replaced by the CPA, were to continue to apply insofar as they did not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with regulations or orders issued by the CPA. CPA Memorandum No 3 (CPA/MEM/27 June 2004/03) addressed issues of criminal procedure. In section 6(4) it referred to standards "in accordance with...the Fourth Geneva Convention", which were to apply to all persons who were detained by coalition forces when necessary for imperative reasons of security, providing a right of appeal by an internee to a competent body.

10. Resolution 1483 was adopted by the Security Council on 22 May 2003. The resolution opened, as is usual, with a number of recitals, one of which referred to the US and UK Permanent Representatives' letter

of 8 May "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command ('the Authority')". Then, acting under Chapter VII of the UN Charter, the Council called on the Authority, consistently with the UN Charter and other relevant international law, to promote the welfare of the Iraqi people and work towards the restoration of conditions of stability and security. The Council called upon all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. The Council further requested the Secretary General to appoint a Special Representative in Iraq: he was to report regularly to the Council on his activities under the resolution, which were to co-ordinate the activities of the UN and other international agencies engaged in post-conflict processes and humanitarian assistance, in a number of specified ways including the protection of human rights. The Council decided, as it did consistently thereafter, to remain seised of the matter. In July 2003 an Iraqi Governing Council ("IGC") was established, which the CPA was to consult on all matters concerning the temporary governance of Iraq.

11. Pursuant to UNSCR 1483 the Secretary General established a United Nations Assistance Mission for Iraq (UNAMI), a step welcomed by the Council in Resolution 1500 of 14 August 2003. This development was foreshadowed by the Secretary General in a report dated 17 July, in which he announced the appointment of Mr de Mello as his Special Representative and outlined the tasks which UNAMI was to undertake.

12. On 16 October 2003 the Security Council adopted Resolution 1511. Acting under Chapter VII of the UN Charter, the Council looked forward to the assumption of governmental powers by the people of Iraq and resolved that the UN, through the Secretary General, his Special Representative and UNAMI "should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government". The Secretary General was to report to the Security Council on his responsibilities under the resolution. In a new departure, the Council determined

> "that the provision of security and stability is essential to the successful completion of the political process…and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483

> (2003), and *authorizes* a multinational force ["MNF"] under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of [UNAMI], the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure".

Member states were urged to contribute assistance under this UN mandate, including military forces, to the multinational force referred to. The US, on behalf of the multinational force, was requested to report to the Council on the efforts and progress of this force.

13. On 8 March 2004 the IGC promulgated a transitional administrative law, paving the way towards an interim and then an elected Iraqi government. Reporting to the Security Council on 16 April 2004, the US Permanent Representative said that the multinational force had conducted "the full spectrum of military operations, which range from the provision of humanitarian assistance, civil affairs and relief and reconstruction activities to the detention of those who are threats to security…" In a submission made by the CPA to the UN High Commissioner for Human Rights on 28 May 2004 it was stated that the US and UK military forces retained legal responsibility for the prisoners of war and detainees whom they respectively held in custody. This was a matter of some significance, since by this time the abuses perpetrated by US military personnel at the Abu Ghraib prison had become public knowledge.

14. Chronologically, the next events to be noted are two letters, each dated 5 June 2004 and written to the President of the Security Council by the Prime Minister of the Interim Government of Iraq (Dr Allawi) and the US Secretary of State (Mr Powell). Dr Allawi looked forward to the establishment of a free and democratic Iraq, but stressed that security and stability continued to be essential to the country's political transition, and asked for the support of the Security Council and the international community until Iraq could provide its own security. He sought a new resolution on the multinational force mandate to contribute to maintaining security in Iraq, "including through the tasks and arrangements set out in the letter" from Mr Powell to the President of the Council. Mr Powell in his letter recognised the request of Dr Allawi's government for the continued presence of the multinational

force in Iraq and confirmed that the force, under unified command, was prepared to continue to contribute to the maintenance of security in Iraq. He continued, using language plainly drawn from article 78 of the Fourth Geneva Convention (although the period of occupation was about to end):

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions."

He regarded the existing framework governing responsibility for exercise of jurisdiction by contributing states over their military personnel as sufficient, and assured the President that "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions".

15. These letters were the immediate prelude to Resolution 1546, adopted by the Security Council on 8 June 2004. Little turns on the opening recitals, save that the Council welcomed the assurances in Mr Powell's letter and determined that the situation in Iraq continued to constitute a threat to international peace and security. Acting under Chapter VII of the UN Charter, the Council described the role of UNAMI, reaffirmed its authorisation under UNSCR 1511 (2003) for the multinational force under unified command, having regard to the annexed letters of Dr Allawi and Mr Powell, and decided

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

The Council further decided that the mandate for the multinational force should be reviewed at the request of the Government of Iraq or 12 months from the date of the resolution and that the mandate should end on completion of the political process described earlier in the resolution, but the Council undertook to terminate the mandate earlier if requested by the Government of Iraq. The US, on behalf of the multinational force, was again requested to report at stated intervals.

16. On 27 June 2004 the CPA issued a revised order giving members of the multinational force and the CPA general immunity from Iraqi process, and providing that they should be subject to the exclusive jurisdiction of their sending states. On the following day power was formally transferred to the Iraqi interim government, the CPA was dissolved and the occupation of Iraq by coalition forces came to an end. Such was the position when the appellant was taken into British custody in October 2004.

17. After this date there were two further resolutions of the Security Council (Resolution 1637 of 8 November 2005 and Resolution 1723 of 28 November 2006), to which, however, little significance was, rightly, attached. Their effect was to maintain the status quo. The appellant drew attention to reports made by the Secretary General to the Security Council which expressed concern about persons detained by units of the multinational force in a manner inconsistent, it was said, with any suggestion that this was, in international law, the responsibility of the UN. Thus, for instance, on 7 June 2005 (S/2005/373, para 72) the Secretary General reported that 6000 detainees were in the custody of the multinational force and despite the release of some detainees numbers continued to grow. He commented: "Prolonged detention

without access to lawyers and courts is prohibited under international law, including during states of emergency". Such observations were echoed in reports by UNAMI which, in its report on the period 1 July – 31 August 2005, para 12, expressed concern about the high number of persons detained, observing that "Internees should enjoy all the protections envisaged in all the rights guaranteed by international human rights conventions". In its next report (1 September – 31 October 2005) it repeated this expression of concern (para 6), and advised "There is an urgent need to provide [a] remedy to lengthy internment for reasons of security without adequate judicial oversight". The appellant pointed out that, according to an answer given by the armed forces minister in the House of Commons on 10 November 2004, UK forces in Iraq were operating under UNSCR 1546 and were not engaged on UN operations: Hansard (HC Debates), 10 November 2004, col 720W. A similar view, it was suggested, was taken by the Working Group of the UN's Human Rights Council (A/HRC/4/40/Add.1) which considered the position of Mr Tariq Aziz and, in paragraph 25 of its opinion on the case, stated:

> "The Working Group concludes that until 1 July 2004, Mr Tariq Aziz had been detained under the sole responsibility of the Coalition members as occupying powers or, to be more precise, under the responsibility of the United States Government. Since then and as the Iraqi Criminal Tribunal is a court of the sovereign State of Iraq, the pre-trial detention of a person charged before the tribunal is within the responsibility of Iraq. In the light of the fact that Mr Aziz is in the physical custody of the United States authorities, any possible conclusion as to the arbitrary nature of his deprivation of liberty may involve the international responsibility of the United States Government."

18. As already indicated, the Secretary of State founds his non-attributability argument on the judgment of the European Court, sitting as a Grand Chamber, in *Behrami and Saramati*, which related to events in Kosovo. The case concerned Resolution 1244, adopted by the Security Council on 10 June 1999. In the recitals to the resolution, the Council welcomed the statement of principles adopted to resolve the Kosovo crisis on 6 May 1999, which formed annex 1 to the resolution, and welcomed also the acceptance by the Federal Republic of Yugoslavia of the first nine points in a statement of principles which formed annex 2 to the resolution. Annex 1 provided, among other things, for the "Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations,

capable of guaranteeing the achievement of the common objectives." Annex 2 provided for the "Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives". The international security presence with substantial NATO participation was to be deployed under unified command and control. The international civil presence was to include an interim administration. Having determined that the situation in the region continued to constitute a threat to international peace and security, and acting under Chapter VII of the UN Charter, the Council determined on "the deployment in Kosovo, under United Nations auspices, of international civil and security presences …" A Special Representative appointed by the Secretary General was to control the implementation of the international civil presence and coordinate its activities with those of the international security presence. Member states and relevant international organisations were authorised to establish the international security presence whose responsibilities were to include, among other things, supervising de-mining until the international civil presence could, as appropriate, take over responsibility for this task. The responsibilities of the international civil presence were to include a wide range of tasks of a civilian administrative nature. Both these presences were to continue for an initial period of twelve months, and thereafter unless the Security Council decided otherwise. Both presences were duly established, the international security presence being known as KFOR and the international civil presence as UNMIK.

19. The applicants' claims in Strasbourg were not the same. The Behramis complained of death and injury caused to two children by the explosion of an undetonated cluster bomb unit, previously dropped by NATO. They blamed KFOR for failing to clear these dangerous mines. Mr Saramati complained of his extra-judicial detention by officers acting on the orders of KFOR between 13 July 2001 and 26 January 2002.

20. The Grand Chamber gave a lengthy judgment, rehearsing various articles of the UN Charter to which I refer below in the context of the second issue, and citing the ILC article and commentary referred to at para 5 above. Reference was made (para 36) to a Military Technical Agreement made between KFOR and the governments of Yugoslavia and Serbia providing for the withdrawal of Yugoslav forces and the deployment in Kosovo "under United Nations auspices of effective international civil and security presences". UNSCR 1244 (1999) was quoted at some length. The court noted (para 69) that the Yugoslav

Government did not control Kosovo, which was under the effective control (para 70) of the international presences which exercised the public powers normally exercised by that government. The court considered (para 71) that the question raised by the cases was less whether the respondent states had exercised extra-territorial jurisdiction in Kosovo but, far more centrally, whether the court was competent to examine under the Convention those states' contribution to the civil and security presences which did exercise the relevant control of Kosovo.

21. The court summarised (paras 73-120) the submissions of the applicants, the respondent states, seven third party states and the UN. In its own assessment it held that the supervision of de-mining at the relevant time fell within UNMIK's mandate and that for issuing detention orders within the mandate of KFOR (paras 123-127). In considering whether the inaction of UNMIK and the action of KFOR could be attributed to the UN, the court held (para 129) that the UN had in Resolution 1244 (1999) "delegated" powers to establish international security and civil presences, using "delegate" (as it had explained in para 43) to refer to the empowering by the Security Council of another entity to exercise its function as opposed to "authorising" an entity to carry out functions which it could not itself perform. It considered that the detention of Mr Saramati was in principle attributable to the UN (para 141). This was because (paras 133-134) the UN had retained ultimate authority and control and had delegated operational command only. This was borne out (para 134) by the facts that Chapter VII allowed the Security Council to delegate, the relevant power was a delegable power, the delegation was prior and explicit in Resolution 1244, the extent of the delegation was defined, and the leadership of the security and civil presences were required to report to the Security Council (as was the Secretary General). Thus (para 135) under Resolution 1244 the Security Council was to retain ultimate authority and control over the security mission and it delegated to NATO the power to establish KFOR. Since UNMIK was a subsidiary organ of the UN created under Chapter VII of the UN Charter its inaction was in principle attributable to the UN (paras 129, 142-143). Dealing finally with its competence *ratione personae*, the court said (para 149):

> "In the present case, chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR.
>
> Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and

> security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim."

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

22. Against the factual background described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.

23. The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. Thus when the case of Mr Mousa reached the House as

one of those considered in *R(Al-Skeini and others) v Secretary of State for Defence) (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. 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.

24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the 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 the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.

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

The second issue

26. As already indicated, this issue turns on the relationship between article 5(1) of the European Convention and article 103 of the UN Charter. The central questions to be resolved are whether, on the facts of this case, the UK became subject to an obligation (within the meaning of article 103) to detain the appellant and, if so, whether and to what extent such obligation displaced or qualified the appellant's rights under article 5(1).

27. Article 5(1) protects one of the rights and freedoms which state parties to the European Convention have bound themselves to secure to everyone within their jurisdiction. It has been recognised as a right of paramount importance. It is one to which, by virtue of the Human Rights Act 1998, UK courts must give effect. Its terms are familiar: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:…" There follows a list of situations in which a person may, in accordance with a procedure prescribed by law, be deprived of his liberty. It is unnecessary to recite the details of these situations, since none of them is said to apply to the appellant. In the absence of some exonerating condition, the detention of the appellant would plainly infringe his right under article 5(1).

28. The Charter of the United Nations was signed in June 1945 as the Second World War, with its horrific consequences in many parts of the world, was drawing to a close. It is necessary to review its terms in a little detail. In the preamble the parties expressed their determination to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights. Its objects, expressed in article 1, were (among others) to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace; and to promote and encourage respect for human rights. Member states bound themselves (article 2) to fulfil in good faith the obligations assumed by them in accordance with the Charter, and to give the UN every assistance in any action it might take in accordance with the Charter. By article 24 the Security Council has primary responsibility for the maintenance of peace and security and acts on behalf of member states in discharging that responsibility. Member states agree (article 25) to accept and carry out the decisions of the Security Council in accordance with the Charter.

29. Chapter VII governs "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". It opens (article 39) by providing that the Security Council shall determine the existence of any

threat to the peace, breach of the peace or act of aggression and decide what measures should be taken in accordance with articles 41 and 42 to maintain or restore international peace and security. Article 41 is directed to measures not involving the use of armed force. More pertinently, article 42 empowers the Security Council, if it considers that article 41 powers were or would be inadequate, to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. By article 43, member states undertake, in order to contribute to the maintenance of international peace and security, to make available to the Security Council on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities necessary for the purpose of maintaining international peace and security. Such agreements were to govern the number and types of forces, including their location, readiness and facilities and were to be negotiated as soon as possible on the initiative of the Security Council. No such agreements have, in practice, ever been made, and article 43 is a dead letter.

30. It remains to take note of article 103, a miscellaneous provision contained in Chapter XVI. It provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

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

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of UNSCRs 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorisation, not obligation, and the same usage is found in UNSCRs 1637 (2005) and 1723 (2006). In ordinary speech to authorise is to permit or allow or

license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.

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

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

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

> "41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of articles 42 and 43…
>
> 42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary…
>
> 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment".

These three articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons,

and it would seem to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 116, para 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

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

> "Such authorizations, however, create difficulties with respect to article 103. According to the latter provision, the Charter–and thus also SC resolutions–override existing international law only insofar as they create 'obligations' (cf. Bernhardt on article 103 MN 27 et seq.). One could conclude that in case a state is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with state practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the SC would be compromised. Thus, the interpretation of article 103 should be reconciled with that of article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well (see Frowein/Krisch on article 42 MN 28). The same conclusion seems warranted with respect to authorizations of economic measures under article 41. Otherwise, the Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace–it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of article 103 to all action under articles 41 and 42 and not only to mandatory measures."

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

34. I am further of the opinion, thirdly, that in a situation such as the present "obligations" in article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large

majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

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

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

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

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

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

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

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

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

The third issue

40. The third issue (whether English common law or Iraqi law applies to the detention of the appellant and, if the former, whether there is any lawful basis for his detention) can be addressed more shortly. It is directed first to the question whether a claim by the appellant in England against the Secretary of State for damages for false imprisonment is governed by English or Iraqi law. This claim is not founded on the Convention or the Human Rights Act but on tort or delict.

41. The general rule, enacted in section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995, is that the applicable law is the law of the country in which the events constituting the tort or delict occurred. That country in this case is Iraq, and therefore Iraqi law would ordinarily apply.

42. Section 12 of the 1995 Act provides that the general rule may be displaced if, on comparison of the factors connecting a tort or delict with the country where it occurred with factors connecting it with another country, it is "substantially more appropriate" for the applicable law for

determining the issues to be the law of the latter country rather than the former. Making that comparison, and relying on a number of factors connecting the alleged tort with this country, the appellant submits that English law is shown to be substantially more appropriate than Iraqi law to determine the issues raised by his claim.

43. This submission was made by the appellant to the Court of Appeal, which rejected it for reasons given by Brooke LJ in paragraph 106 of his judgment. It is unnecessary to rehearse those reasons. The Court of Appeal made no error of law, and there is no ground for disturbing its assessment, with which in any event I wholly agree. I would resolve this issue against the appellant. The appellant's claim in tort is governed by the law of Iraq.

44. For these reasons the appeal must be dismissed. The parties (other than the intervener) are invited to make submissions on costs within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

45. The appellant, Mr Al-Jedda, has been detained since October 2004 by British forces serving as part of the multinational force ("MNF") in Iraq. The basis of his detention is that his internment is necessary for imperative reasons of security in Iraq. Although the appellant does not accept that his internment is actually necessary, it is common ground that, for the purposes of this appeal, the House should proceed on the assumption that his internment is indeed necessary for the reasons given by the Secretary of State.

46. Similarly, it is common ground that the present appeal concerns only the alleged violation of the appellant's rights under article 5(1) of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). The House is not concerned with any issue relating to the provisions for the review of his continued detention – or indeed with any issue relating to article 5(4) of the Convention.

47. In short, the appellant complains that, since detention on the ground that it is necessary for imperative reasons of security is not permissible under article 5(1) of the Convention, his detention is unlawful under section 6(1) of the Human Rights Act 1998 ("HRA"). He seeks, inter alia, a declaration to that effect and a mandatory order that the Secretary of State should release him.

48. The fact that the appellant is detained in Iraq is not in itself a bar to such proceedings under the HRA. Although, for the most part, the Act applies only to acts of public authorities within the United Kingdom, it will also usually apply to acts of United Kingdom public authorities outside the United Kingdom where the victim is within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention: *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] 3 WLR 33. In the present case, counsel for the Secretary of State argued, however, that there are two distinct reasons why the appellant cannot rely on his article 5(1) Convention rights in these proceedings.

49. First, and more fundamentally, counsel submitted that the acts of the British forces in detaining the appellant were to be attributed to the United Nations in international law. The European Court of Human Rights would accordingly be incompetent ratione personae to consider any application by him in respect of those acts. The point was not, and could not have been, argued in the courts below since it is based on the subsequent decision of the Grand Chamber of the European Court of Human Rights in *Behrami v France*, *Saramati v France, Germany and* Norway (Application Nos 71412/10 and 78166/01) (unreported), 2 May 2007.

50. Secondly, counsel submitted that, in any event, by virtue of Security Council Resolution 1546, and articles 25 and 103 of the United Nations Charter ("the Charter"), the British forces were under an obligation to intern the appellant which superseded any obligation of the United Kingdom under article 5(1) of the Convention.

51. It is now well established, of course, that the Convention rights in Schedule 1 to the HRA are distinct obligations in the domestic legal systems of the United Kingdom. The Act does not incorporate into our domestic law the international law obligations under the Convention as such. See, for instance, *In re McKerr* [2004] 1 WLR 807. In the courts below, the appellant ran an argument based on that line of authority, to

the effect that, even if the international law obligations of the United Kingdom under article 5(1) had been superseded by the terms of Resolution 1546, that made no difference to the Secretary of State's domestic law obligation not to act incompatibly with the appellant's article 5 Convention rights as set out in Schedule 1 to the HRA. By virtue of section 1(2) of the HRA, that position could be changed only by the United Kingdom derogating from article 5(1).

52. In section 21(1) of the HRA the term "Convention" in the Act is defined, however, as meaning the European Convention "as it has effect for the time being in relation to the United Kingdom". On that basis, in the courts below the Secretary of State argued that, to the extent that article 5(1) was trumped by the terms of Resolution 1546 and articles 25 and 103 of the Charter, it did not have "effect...in relation to the United Kingdom" for purposes of the HRA.

53. At para 74 of its judgment, the Divisional Court accepted the Secretary of State's submission to that effect. Under reference to *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, the Court of Appeal did so also: [2007] QB 621, 652-654, paras 88-99, per Brooke LJ. The appellant did not challenge the decision of the Court of Appeal on that point before the House.

54. While the effect of *Quark Fishing* was not explored by counsel in relation to the Secretary of State's (new) first argument, the position must be the same as with his other argument. If the European Court would hold, as it held in relation to the defendant states in *Behrami*, that the action of the British forces in detaining Mr Al-Jedda was attributable to the United Nations, then it would also declare his complaint to be incompatible ratione personae with the provisions of the Convention: *Behrami*, para 153. In other words, the Convention would not have "effect...in relation to the United Kingdom" in respect of Mr Al-Jedda's detention. So, in accordance with the decision of the Court of Appeal, he could not bring proceedings in the English courts under the HRA alleging that his detention was unlawful because it was incompatible with his article 5(1) Convention rights.

55. I emphasise the point since it explains why the House, a domestic court, finds itself deep inside the realm of international law – indeed inside the very chamber of the United Nations Security Council itself. The House is confronted by these issues precisely because it is called

upon to assess how a claim by the appellant, that his international law rights under article 5(1) of the Convention had been violated by the United Kingdom, would fare before the European Court in Strasbourg. How would that court resolve the two issues of international law? Would the European Court hold that the appellant's complaint was incompatible ratione personae with the provisions of the Convention? If not, would it hold that, by reason of articles 25 and 103 of the Charter, in so far as there was a conflict, the obligations of the British forces under Security Council Resolution 1546 prevailed over the United Kingdom's obligations under article 5(1) of the European Convention? In answering these questions, the House must, of course, have regard to the way that the European Court has approached similar questions in the past. The interpretation and application of the decision of the European Court in *Behrami* are accordingly central to any consideration of the first question.

56. That decision arose out of events in Kosovo. One child, Gadaf Behrami, had been killed and another, Bekim Behrami, had been very seriously injured by an undetonated cluster bomb that had not been cleared. Mr Saramati had been detained by French forces. The applicant, Mr Agim Behrami, claimed that, in the case of his children, there had been a breach of article 2 of the Convention. Mr Saramati claimed that there had been a violation of article 5 of the Convention. The case of the Behrami children was complicated by a factual dispute as to which organisation was responsible for the failure to clear the mines. For present purposes, however, it is enough to concentrate on Mr Saramati's application, alleging that his rights under article 5 of the Convention had been violated by France.

57. France argued that Mr Saramati's detention had been carried out by her forces when acting as part of the international Kosovo Force ("KFOR"), in accordance with its mandate in Security Council Resolution 1244. Hence the impugned detention was attributable to the United Nations. As the European Court explained in *Behrami*, at para 121, it therefore had, first, to determine whether the detention was indeed "attributable" to the United Nations, "attributable" being understood in the same way as in article 3 of the draft Articles on the Responsibility of International Organisations. If the court found that the detention was indeed attributable to the United Nations, it had then to go on to consider whether the court was competent to review the detention. In the event, the court held, at para 140, that the United Nations retained ultimate authority and control and hence, at para 141, that the detention of Mr Saramati was in principle "attributable" to the United Nations. The court went on to conclude that, in these circumstances, the

Convention could not be interpreted in a manner which would subject the action of the French forces in detaining Mr Saramati to the scrutiny of the court: para 149. So his application to the European Court was inadmissible.

58. In deciding that the detention of Mr Saramati was attributable to the United Nations, the court paid particular attention to the legal basis on which the members of KFOR were operating. For present purposes the legal basis on which British forces in the MNF have been operating during the period of the appellant's detention must similarly be important.

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

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

61. It respectfully appears to me that the mere fact that Resolution 1244 was adopted before the forces making up KFOR entered Kosovo was legally irrelevant to the issue in *Behrami*. What mattered was that Resolution 1244 had been adopted before the French members of KFOR

detained Mr Saramati So the Resolution regulated the legal position at the time of his detention. Equally, in the present case, the fact that the British and other Coalition forces were in Iraq long before Resolution 1546 was adopted is legally irrelevant for present purposes. What matters is that Resolution 1546 was adopted before the British forces detained the appellant and so it regulated the legal position at that time. As renewed, the provisions of that Resolution have continued to do so ever since.

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

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

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

Kingdom in terms of article 1. The decision of the European Court in *Behrami* makes that quite clear. At para 71, the court said:

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

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

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

Chamber held that the detention of Mr Saramati was attributable to the United Nations.

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

67. As the Grand Chamber recalled in paras 18 to 20 of its judgment in *Behrami*, the provisions of Chapter VII were an innovation by comparison with the older public international law and the Covenant of the League of Nations. The League was not designed itself to take military action to preserve peace. It was envisaged that such action would continue to be taken by individual states. By contrast, the Charter centralises responsibility for international peace: article 24(1) gives the Security Council primary responsibility for the maintenance of international peace and security. Under article 39 in Chapter VII, it is for the Security Council to determine the existence of any threat to the peace and to make recommendations, or to decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security.

68. In Resolution 1546 the Security Council duly determined, in terms of article 39 of the Charter, that the situation in Iraq continued to constitute a threat to international peace and security. The Council then went on, under Chapter VII, to decide what measures were to be taken to deal with the threat.

69. In terms of article 42 of the Charter, where lesser measures would be inadequate, the Security Council:

> "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

Articles 43 to 45 of the Charter envisaged that agreements would be made between the Security Council and member states for the member states to provide forces for the purpose of taking the action necessary to maintain or restore international peace and security. In terms of such agreements member states could be obliged to provide forces. But no such agreements have in fact ever been concluded and there is no other mechanism by which the Security Council can actually require member states to provide such forces.

70. During the Cold War era the political situation meant that, in practice, the Security Council virtually never did decide to take action by force to maintain or restore international peace and security. When the political situation changed, still being unable to require member states to provide forces, the Security Council began to adopt resolutions which "authorised" member states to take the necessary action. The adoption of such resolutions has become settled practice in appropriate cases, though the details of the practice have evolved in the light of experience. Resolution 1546 is a resolution of this kind.

71. Resolution 1244, dealing with Kosovo, was an earlier resolution of the same kind, which proceeded on the basis of authorisation being given by the Security Council to the security force. Paragraph 7 was in these terms:

> "*Authorizes* member states and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below."

Annex 2 provided that agreement should be reached on a number of principles, in order to move towards a resolution of the Kosovo crisis. Among these principles was point 4:

> "The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees."

Paragraph 9 of the Resolution indicated what the responsibilities of the international security presence were to include. In view of the terms of paragraph 9 and point 4 of Annex 2, as well as some other factors, in *Behrami* the Grand Chamber considered that it was evident that KFOR's security mandate included issuing detention orders: para 124.

72. As I have explained, the original authorisation for the setting up of the MNF in Iraq goes back to Resolution 1511, but Resolution 1546 was adopted in order to regulate the position when the occupation of Iraq came to an end. In Resolution 1546, having determined that the situation in Iraq continued to constitute a threat to international peace and security, acting under Chapter VII of the Charter, the Security Council accordingly welcomed:

> "the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution."

The Council also noted the commitment of all forces, promoting the maintenance of security and stability in Iraq, to act in accordance with international law, including obligations under international humanitarian law, and to co-operate with relevant international organisations.

73. The heart of the Resolution is to be found in paras 10-12, where the Security Council:

> "10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and

> without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities;
>
> 11. *Welcomes*, in this regard, the letters annexed to this resolution stating, inter alia, that arrangements are being put in place to establish a security partnership between the sovereign Government of Iraq and the multinational force and to ensure coordination between the two....
>
> 12. *Decides* further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four above, and *declares* that it will terminate this mandate earlier if requested by the Government of Iraq...."

74. The letters mentioned in paragraph 10 of the Resolution include a letter from the American Secretary of State dated 5 June 2004. The Secretary of State began his letter in this way:

> "Recognizing the request of the government of Iraq for the continued presence of the Multi-National Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the Iraqi Interim Government, I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction."

Mr Powell went on to refer to the continuing problems with security in Iraq and to recognise that "Development of an effective and cooperative security partnership between the MNF and the sovereign Government of Iraq is critical to the stability of Iraq." After describing the arrangements in more detail, he continued:

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute

> to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions."

75. Mr Powell then recorded that the MNF would establish or support a force to provide for the security of personnel and facilities of the United Nations in relation to its security effort. He went on to say that "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions."

76. In paragraph 31 of the Resolution, the Security Council requested the United States, on behalf of the multinational force, to report within three months from the date of the Resolution on the efforts and progress of the force, and on a quarterly basis thereafter. In paragraph 32 the Council decided to remain actively seised of the matter.

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

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

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

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

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

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

81. In a United Nations context, this distinction appears to go back to the decision of the International Court of Justice in *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion* [1973] ICJ Rep 166. The General Assembly, which did not itself have power under the Charter to review decisions of the United Nations Administrative Tribunal, had set up a committee to carry out this function. The question for the International Court of Justice was whether the committee had the competence to ask the International Court for advisory opinions, arising out of the exercise of its power to review Tribunal decisions. The General Assembly itself

had the competence to request advisory opinions. The International Court held that the committee did indeed have the competence to request advisory opinions for its own purposes, but not because the General Assembly had impliedly delegated its own competence to the committee. That could not be the basis, because the General Assembly could not have delegated to the committee the legal power, which it did not itself possess, to review Tribunal decisions. The court said, at p 174:

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

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

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

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

In other words, the delegation would be unlawful if it amounted to the Security Council transferring the responsibility which is vested in it under the Charter to the delegate. More specifically, the delegation

would be unlawful if the acts of the delegate entity were *not* attributable to the Security Council. As Blokker puts it, these principles "indicate a preference for control by the Council over operations by 'coalitions of the able and willing' so as not to abdicate the authority and responsibility bestowed on it by the Charter": N Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'" (2000) 11 EJIL 541, 554. The article is cited by the Grand Chamber at para 132. In the words of de Wet, *The Chapter VII Powers of the United Nations Security Council*, pp 265-266:

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

83. Referring to the limits to any permissible delegation by the Security Council, the Grand Chamber added, at the end of para 132:

> "Those limits strike a balance between the central security role of the UNSC and two realities of its implementation. In the first place, the absence of article 43 agreements which means that the UNSC relies on states (notably its permanent members) and groups of states to provide the necessary military means to fulfil its collective security role. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command."

84. The Grand Chamber accordingly proceeded, at para 133, to identify the key question as being:

> "whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the article 43 agreements never concluded."

At para 134, the court identified aspects of Resolution 1244 which, in its judgment, did indeed show that the Security Council retained such ultimate authority and control, while delegating its security powers to KFOR.

85. Before looking in detail at those aspects and how they compare with any equivalent aspects of Resolution 1546, it is necessary to deal with the suggestion that the terms of the Resolutions relating to KFOR and the MNF were so different that, while, in setting up KFOR, the Security Council was delegating the execution of its responsibility under Chapter VII to KFOR, it had not delegated anything to the MNF.

86. It will be recalled that the origin of the MNF is Security Council Resolution 1511 of 16 October 2003. Having determined that the situation in Iraq continued to constitute a threat to international peace and security, acting under Chapter VII of the Charter, the Council took various steps. Paragraphs 13 to 15 deal with the MNF:

> "13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;
>
> 14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;
>
> 15. *Decides* that the Council shall review the requirements and mission of the multinational force

> referred to in paragraph 13 above not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and *expresses* readiness to consider on that occasion any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq."

In paragraph 25 the Security Council requested:

> "that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months."

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

88. By contrast, in October 2003, in Iraq there were already forces in place, especially American and British forces, whom the Security Council could authorise to assume the necessary responsibilities. So it did not need to authorise the establishment of the MNF. In paragraph 13 the Council simply authorised "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" – thereby proceeding on the basis that there would indeed be a multinational force under unified command. In paragraph 14 the Council urged member states to contribute forces to the MNF. Absolutely crucially, however, in paragraph 13 it spelled out the mandate which it was giving to the MNF. By "authorising" the MNF to take the measures required to fulfil its

"mandate", the Council was asserting and exercising control over the MNF and was prescribing the mission that it was to carry out. The authorisation and mandate were to apply to all members of the MNF - the British and American, of course, but also those from member states who responded to the Council's call to contribute forces to the MNF. The intention must have been that all would be in the same legal position. This confirms that – as I have already held, at para 61 – the fact that the British forces were in Iraq before Resolution 1511 was adopted is irrelevant to their legal position under that Resolution and, indeed, under Resolution 1546.

89. Allowing for the different situations on the ground, the terms of that mandate to the MNF are comparable with the terms of the mandate given to KFOR in Resolution 1244. The terms of the mandate to the MNF were, of course, subsequently altered by Resolution 1546 in June 2004, but the changes had the effect of making the mandate more specific. Just as Resolution 1244 defined the responsibilities which KFOR was to carry out in terms of its mandate from the Security Council, so, equally, Resolution 1546 defined the tasks which the MNF was to carry out in terms of its mandate from the Security Council. The two Resolutions were essentially similar in these respects.

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

91. I therefore conclude that, when the Security Council, acting under Chapter VII, authorised the MNF to carry out its various tasks in terms of Resolution 1546, it was purporting to delegate these functions to the MNF, just as it had delegated functions to KFOR in Resolution 1244. Certainly, I can see no reason in the circumstances of the present case why, in the light of the decision of the Grand Chamber in *Behrami*, the European Court would hold otherwise. I should add that any other conclusion would be surprising since the lawyers who draft Security

Council resolutions on this "authorisation" model build on the practice of the Council. One would therefore expect to find that the, later, Resolution 1546 was based on the same principles as Resolution 1244. The Security Council will always be concerned, of course, to avoid the danger that a force, though nominally acting on behalf of the Council, is truly just made up of the forces of member states pursuing their own ends by military means in contravention of both article 2(4) of the Charter and the ius contra bellum of modern international law. Hence the insertion into the Resolutions, first, of a clear mandate for the force, of an indication of the date when the mandate will expire, of a mechanism for reports to be made to the Council and, finally, of an indication that the Council will remain seised of the matter. Again, the need for all these matters to be spelled out will be well known to the experts who draft the Resolutions.

92. With this in mind, I now turn to see how the Grand Chamber approached Resolution 1244 and how the position under Resolution 1546 compares.

93. The Grand Chamber first noted, at para 134, that Chapter VII allows the Security Council to delegate a power to "Member States and relevant international organisations". Secondly, the relevant power was one of those that could be delegated. Both of these points apply in the present case.

94. Thirdly, the Grand Chamber held that, in Resolution 1244 the delegation was neither presumed nor implicit, but rather prior and explicit. In fact, the delegation of the power to detain was not spelled out in that Resolution. By contrast, Mr Powell's letter, annexed to, and referred to in, Resolution 1546, listed internment as one of the tasks of the MNF. The Security Council therefore expressly authorised the MNF, in advance, to carry out internment, where this is necessary for imperative reasons of security.

95. Next, the Grand Chamber found that Resolution 1244 put sufficiently defined limits on the delegation by fixing the mandate with adequate precision: it set out the objectives to be attained, the roles and responsibilities accorded, as well as the means to be employed. The court noted that the broad nature of certain provisions could not be avoided, given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere in the detail of operational implementation and choices. Mutatis mutandis,

exactly the same can be said of Resolution 1546. In paragraph 10, and further by reference to the letters of the Iraqi Prime Minister and of the United States Secretary of State, the resolution identifies the mandate of the MNF and specifies the objectives which it is to pursue. The Secretary of State's letter includes an undertaking that "the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions." Again, as with Resolution 1244, the relatively broad nature of the decisions could not be avoided since the purpose of the Resolution was to fix broad objectives and goals and not to describe, or interfere in the detail of, operational implementation and choices.

96. Fifthly, the court noted that Resolution 1244 required the leadership of KFOR to report to the Security Council so as to allow the Council to exercise its overall authority and control. In fact, paragraph 20 of that Resolution requested the Secretary-General to report to the Council at regular intervals on the implementation of the resolution, "including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution."

97. Paragraph 31 of Resolution 1546 was different but, if anything, the difference was designed to give the Council more, not less, control of the MNF. In terms of paragraph 31 the Security Council requested the United States, on behalf of the MNF, to report within three months from the date of the Resolution on the efforts and progress of the force, and on a quarterly basis thereafter. This was a tightening of the system of six-monthly reports under Resolution 1511 and must represent the considered view of the Council as to the frequency and type of reporting which were necessary to allow it to maintain its ultimate authority and control over the MNF. So, unlike in Resolution 1244, there was provision for the United States, the member state with the lead in the MNF, to report directly to the Security Council within three months and on a quarterly basis after that. This actually involves an open meeting of the Security Council at which the United States briefs the Council on the progress of the efforts of the MNF. This is done alongside the Special Representative of the Secretary General who briefs the Council on other aspects of the United Nations mandate in Iraq. In practice, a member of the Iraqi Government is also present. The details are given by Linda Dann, a Deputy Legal Adviser in the Ministry of Defence, in her witness statement dated 17 August 2007.

98. Finally, the court noted that paragraph 19 of Resolution 1244 provided that the mandate was for an initial period of 12 months and was to continue thereafter, "unless the Security Council decides otherwise." Adverting to the familiar problem of the possibility of a veto by a permanent member preventing the Council from deciding to terminate the delegation, the Grand Chamber did not consider that this factor alone was sufficient for it to conclude that the Security Council did not retain ultimate authority and control.

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

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

101. Having completed its examination of the terms of Resolution 1244, the Grand Chamber then went into the detail of the chain of command from the Security Council down through KFOR. In the present case, the relevant chain of command was explained by Linda Dann in her witness statement dated 17 August 2007. The legal authority for MNF-I (i e the multinational force in Iraq) came from the decisions taken by the Security Council in the exercise of its Chapter VII powers. At the relevant time, the MNF-I was commanded by a United States 4-star General, with a United Kingdom 3-star Lieutenant General as his deputy. Among the forces which were subordinate to MNF-I and reported to it was the Multi National Corps-Iraq ("MNC-I"), which was based in Baghdad and commanded by a United States 3-star Lieutenant General with a United Kingdom 2-star Major General as his deputy. MNC-I exercised a unified operational control over the Multi National Divisions, including the Multi National Division (South East) ("MND(SE)"), of which the United Kingdom forces who detained Mr Al-Jedda formed part. The MND(SE) was commanded by a United Kingdom 2-star Major General, the GOC, who reported to MNC-I and was subject to the operational control of MNC-I and, ultimately, MNF-I. In September 2004 MND(SE) comprised forces from 11 countries besides the United Kingdom. The GOC commanding MND(SE) exercised operational control over the forces of all these national contingents. Again, I see no material difference between the chain of command in the present case and the chain of command for KFOR which the Grand Chamber was considering in *Behrami*.

102. In para 136, the court concluded that the delegation model demonstrated that direct operational command from the Security Council was not a requirement of Chapter VII collective security missions. In other words, it was possible, within the ambit of Chapter VII, for the Security Council to devise a system of delegation which was legally valid but did not involve the Council being in direct operational command.

103. The court then went on to reject submissions to the effect that, in the case of KFOR, the level of control by the individual States had been such as, in effect, to detach them from the international mandate and to undermine the unity of operational command. No such submissions are made about the British forces in the MNF in this case.

104. At para 140 of *Behrami*, the Grand Chamber found that, even if the United Nations might accept that there was room for improvement in the co-operation and command structures between the Security Council,

the troop contributing nations and the contributing organisations, the Council "retained ultimate authority and control and...effective command of the relevant operational matters was retained by NATO." The court continued, at para 141:

> "In such circumstances, the court observes that KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, 'attributable' to the UN within the meaning of the word outlined at paras 28 and 121 above."

This concluding paragraph is the culmination of the first part of the scheme set out in para 121 of the judgment. The court has been concerned to see that Resolution 1244 involved a delegation of the Security Council's powers to KFOR. More importantly, it has checked to see that the terms of the delegation were sufficiently precise – due allowance being made for the inevitable limitations on what could be prescribed in advance - and that the mechanisms for the Security Council retaining ultimate control were also sufficient, for that delegation to be lawful. Having concluded that this was indeed the position, it followed that, when the French troops detained Mr Saramati, they were exercising the powers which the Security Council had delegated to them. Since that delegation had not, unlawfully, deprived the Council of its responsibility for the exercise of those powers, the action of the French troops in detaining Mr Saramati was in principle attributable to the United Nations in terms of article 3 of the draft articles on the Responsibility of International Organisations.

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

106. In *Behrami*, at para 144, the Grand Chamber proceeded to consider the effect of its conclusion that the detention of Mr Saramati was in principle attributable to the United Nations. It noted that the United Nations is an organisation having a legal personality separate from that of its member states and that it is not a Contracting Party to the Convention. In particular, at para 146, the court began to consider whether it was competent ratione personae to review the acts of the respondent states carried out on behalf of the United Nations. It also went on to consider, more generally, the relationship between the Convention and the United Nations acting ["les actes de l'ONU"] under Chapter VII of the Charter.

107. I need not examine the Grand Chamber's reasoning in detail since the court would plainly adopt the same approach in any case where it had concluded that the actions of the respondent state in question had been carried out on behalf of the United Nations. I note, however, that, in reaching its conclusion, the court had regard, at para 147, to articles 25 and 103 of the Charter, as interpreted by the International Court of Justice. In para 148, the court attached "even greater significance" to the imperative nature of the principal aim of the United Nations and of the Security Council's powers under Chapter VII. While ensuring respect for human rights represents an important contribution to achieving international peace:

> "the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force…."

108. This leads to the court's conclusion, at para 149, that:

> "the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment of the UN's key mission in this field, including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing

> conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."

109. Finally, in para 151, the Grand Chamber rejected an argument based on its decision in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1 where the competence of the court had been upheld. The court noted that, in that case, the impugned act had been carried out by the respondent state authorities on its territory and following a decision by one of its Ministers. By contrast, the impugned acts of KFOR could not be attributed to the respondent states and, moreover, did not take place on the territory of those states or by virtue of a decision of their authorities. The same reasoning would apply to the action of the British forces, as members of the MNF, in detaining the appellant in Iraq, without there being any decision of the United Kingdom government ordering his detention.

110. The court finished up, at para 151, by repeating that:

> "UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective."

111. I am accordingly satisfied that, since the detention of the appellant by British forces taking part in the MNF was an action which was covered by Security Council Resolution 1546 and occurred in the course of the mission of the MNF, the European Court would hold that the Convention could not be interpreted in a manner that would subject that action to its scrutiny. A complaint by Mr Al-Jedda, based on the same allegations of a violation of article 5(1) as in the present case, would accordingly be held to be incompatible ratione personae with the provisions of the Convention. In consequence, the court would hold an application based on that complaint to be inadmissible.

112. Since article 5(1) of the Convention would therefore not have "effect...in relation to the United Kingdom" in respect of Mr Al-Jedda's detention in international law before the European Court in Strasbourg, in accordance with the decision of the Court of Appeal, which he does

not challenge, I conclude that Mr Al-Jedda cannot bring proceedings in the English courts under the HRA, alleging that his detention was unlawful because it was incompatible with his article 5(1) Convention right.

113. In my view, the result is accordingly that, like Mr Saramati, following the decision of the Grand Chamber in *Behrami*, Mr Al-Jedda must find his protection from arbitrary detention in the commitment, given by Mr Powell to the Security Council, that members of the MNF would at all times act consistently with their obligations under the law of armed conflict, including the Geneva Conventions. It is for the Security Council, exerting its ultimate authority and exercising its ultimate right of control, to ensure that this commitment is fulfilled.

114. That being my conclusion on the first issue, the second issue does not arise for determination. On that matter I am, however, in substantial agreement with what my noble and learned friend, Lord Bingham, has said. I add only these short observations.

115. As Lord Bingham has shown, both state practice and the weight of academic authority support the view that articles 25 and 103 apply where the Security Council, acting under Chapter VII, adopts a resolution, such as Resolution 1546, which "authorises" rather than requires member states to take military action to meet a threat to international peace. Counsel for the appellant nevertheless submitted that the European Court might well not follow that approach and might, instead, insist on enforcing the obligations of the Contracting States under the Convention. In particular, the court might hold that, in a case such as the present, "the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order'" in the field of human rights: *Behrami*, at para 145, quoting the decision in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1, 45, para 156.

116. I would reject that submission. As the entire judgment of the Grand Chamber in *Behrami* shows, the court is very concerned, in the context of the operations of forces under a United Nations mandate, to ensure that its position fits into the whole scheme of international law and, in particular, that it does not undermine the work of the Security Council in maintaining international peace and security. At para 122, the court:

> "recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine state responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty….."

It is hard to imagine that, having made that declaration, the court would readily fail to give effect to articles 25 and 103 of the Charter.

117. In fact, there is no need to speculate on the point, since in para 147 of its judgment, in setting out its reasons, the court recalled:

> "as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The court has therefore had regard to two complementary provisions of the Charter, articles 25 and 103, as interpreted by the International Court of Justice…."

The court referred back to para 27 of its judgment where it had cited the judgment of the International Court of Justice in *Nicaragua v United States of America* [1984] ICJ Rep 392, para 107, to the effect that article 103 means that the Charter obligations of member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the Charter or was only a regional arrangement. The court had also recalled that the International Court had found that article 25 means that United Nations member states' obligations under a Security Council Resolution prevail over obligations arising under any other international agreement: *Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom* [1992] ICJ Rep 1, p 16, at para 42, and p 113, at para 39 respectively. These judgments deal, of course, with the effect of member states' "obligations" under the Charter and under a Security Council resolution. Nevertheless, the Grand Chamber would not have referred to those decisions in para 147 of its judgment, if it had not considered that they explained the effect of articles 25 and 103 on the position of a member state whose forces were acting in terms of the

authorisation given to KFOR by Resolution 1422. The same would apply to the British forces acting as part of the MNF in terms of Resolution 1546.

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

119. Finally, so far as the third issue is concerned, I also agree with Lord Bingham that, for the reasons which he gives, the appellant's claim in tort is governed by the law of Iraq.

120. For these reasons I would dismiss the appeal.

BARONESS HALE OF RICHMOND

My Lords,

121. On 28 September 2004, more than three years ago now, a British citizen who is resident in this country arrived in Baghdad (where he has relatives) with his children. On 10 October he was arrested (by whom is disputed) and flown from Baghdad to a British detention facility in Basra. He has remained in the custody of British forces in Basra ever since. He has not been charged with, still less tried for, any criminal offence. Instead, his detention has been periodically reviewed and authorised by senior officers in the British army. He began these proceedings in June 2005, seeking a declaration that his detention is and has always been unlawful and a mandatory order either for his release or for his transfer to the United Kingdom if he is to be further detained. He has also begun separate proceedings to challenge the factual basis of his detention but these have not yet been heard.

122. If he were to be returned to this country, he might face detention for up to 28 days under the Terrorism Act 2000 or be made subject to a control order under the Prevention of Terrorism Act 2005. Otherwise he could only be detained if charged with a criminal offence. There is no

doubt that prolonged detention in the hands of the military is not permitted by the laws of the United Kingdom. Nor could it be permitted without derogation from our obligations under the European Convention on Human Rights. Article 5(1) of the Convention provides that deprivation of liberty is only lawful in defined circumstances which do not include these. The drafters of the Convention had a choice between a general prohibition of "arbitrary" detention, as provided in article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter. They were well aware of Churchill's view that the internment even of enemy aliens in war time was "in the highest degree odious". They would not have contemplated the indefinite detention without trial of British citizens in peace time. I do not accept that this is less of a problem if people are suspected of very grave crimes. The graver the crime of which a person is suspected, the more difficult it will be for him to secure his release on the grounds that he is not a risk. The longer therefore he is likely to be incarcerated and the less substantial the evidence which will be relied upon to prove suspicion. These are the people most in need of the protection of the rule of law, rather than the small fry in whom the authorities will soon lose interest.

123. Furthermore, this House has held that our obligations under the Convention are owed to people detained by the United Kingdom military in Iraq: see *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33. Why should this case be different from that? The difference is that no-one suggests that it is lawful for British soldiers so to maltreat a person in their custody, even in Iraq, that he dies of his injuries. But it is suggested that it is lawful to intern a person in Iraq. The source of that authority is said to be the United Nations Security Council resolutions dealing with the activities of US, UK and other forces making up the multi-national force ("MNF") after the transfer of power to the Iraqi Interim Government on 28 June 2004. It is said that either (i) those resolutions make the acts of the MNF attributable to the United Nations in international law, thus relieving the UK of responsibility for them; or (ii) those resolutions qualify or displace the obligations in the ECHR so that internment may in certain circumstances be lawful.

124. I would reject the first argument, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill. I agree with him that the analogy with the situation in Kosovo breaks down at almost every point. The United Nations made submissions to the European Court of Human Rights in *Behrami v France, Saramati v France, Germany and Norway* (Application Nos 71412/01 and 78166/01)

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

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

126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the 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.

127. It is not clear to me how far UNSC resolution 1546 went when it authorised the MNF to "take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the

letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks" (para 10). The "broad range of tasks" were listed by Secretary of State Powell as including "combat operations against members of these groups [seeking to influence Iraq's political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security". At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF to "act consistently with their obligations under the law of armed conflict, including the Geneva Conventions".

128. 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, given that any problem he presents in Iraq could be solved by repatriating him to this country and dealing with him here. If we stand back a little from the particular circumstances of this case, this is the response which is so often urged when British people are in trouble with the law in foreign countries, and in this case it is within the power of the British authorities to achieve it.

129. But that is not the way in which the argument has been conducted before us. Why else could Lord Bingham and Lord Brown speak of "displacing or qualifying" in one breath when clearly they mean very different things? We have been concerned at a more abstract level with attribution to or authorisation by the United Nations. We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings. With that caveat, therefore, but otherwise in agreement with Lord Bingham, Lord Carswell and Lord Brown, I would dismiss this appeal.

LORD CARSWELL

My Lords,

130. Internment without trial is so antithetical to the rule of law as understood in a democratic society that recourse to it requires to be carefully scrutinised by the courts of that society. There are, regrettably, circumstances in which the threat to the necessary stability of the state is so great that in order to maintain that stability the use of internment is unavoidable. The Secretary of State's contention is that such circumstances exist now in Iraq and have existed there since the conclusion of hostilities in 2003. If the intelligence concerning the danger posed by such persons is correct, - as to which your Lordships are not in a position to make any judgment and do not do so – they pose a real danger to stability and progress in Iraq. If sufficient evidence cannot be produced in criminal proceedings – which again the House has not been asked to and cannot judge—such persons may have to be detained without trial. Article 42 of the 4th Geneva Convention permits the ordering of internment of protected persons "only if the security of the Detaining Power makes it absolutely necessary", and under article 78 the Occupying Power must consider that step necessary "for imperative reasons of security." Neither of these provisions applies directly to the appellant, who is not a protected person, but the degree of necessity which should exist before the Secretary of State detains persons in his position – if he has power to do so, as in my opinion he has – is substantially the same. I would only express the opinion 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.

131. The issues argued in this appeal have been set out in the opinion of my noble and learned friend Lord Bingham of Cornhill, which I have had the advantage of reading in draft. I agree entirely with his reasoning and conclusions on the first and third issues and cannot usefully add anything to what he has said. On the second issue, the application of article 103 of the United Nations Charter, I also agree with his reasons and would only add a few observations of my own.

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

133. Article 103 provides:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

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

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

> "the multinational forces shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution …"

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

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

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

135. It was argued on behalf of the appellant that the Resolution did not go further than authorising the measures described in it, as distinct from imposing an obligation to carry them out, with the consequence that article 103 of the Charter did not apply to relieve the United Kingdom from observing the terms of article 5(1) of the Convention. This was an attractive and persuasively presented argument, but I am satisfied that it cannot succeed. For the reasons set out in paragraphs 32 to 39 of Lord Bingham's opinion I consider that Resolution 1546 did operate to impose an obligation upon the United Kingdom to carry out those measures. In particular, I am persuaded by State practice and the clear statements of authoritative academic opinion – recognised sources of international law – that expressions in Security Council Resolutions which appear on their face to confer no more than authority or power to carry out measures may take effect as imposing obligations, because of the fact that the United Nations have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which would entitle them to call on member states to provide them.

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

137. I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

138. Detention without trial (internment) is anathema to most people. Its use in wartime Britain was later described by Winston Churchill as "in the highest degree odious"— see Brian Simpson's Clarendon Press work under that title, 1994. But the internment condemned in wartime Britain was mostly of enemy aliens, many of them refugees from Nazi Germany, posing at most the scantiest of risks to the community. The appellant, by contrast, assuming he is responsible for even a fraction of what he is suspected of (see para 2 of my noble and learned friend Lord Bingham of Cornhill's opinion), represents an acute danger to all those striving for peace in Iraq. Internment is nonetheless proscribed absolutely by the European Convention on Human Rights and there can be no question but that, if article 5(1) applies to the appellant's internment in Iraq, he has been unlawfully detained ever since October 2004.

139. So far as article 5 is concerned, your Lordships are concerned exclusively with paragraph 1: the absolute bar on deprivation of liberty save in certain specified circumstances, none of which encompass internment. Issues as to the appellant's entitlement to the protections enshrined in article 5(4) and, if so, whether such protections have been provided, do not arise for determination on this appeal; rather they are the subject of other outstanding proceedings.

140. In these proceedings the appellant contends, first, that his detention from the outset has been in violation of article 5(1); secondly, that it is actionable at common law as the tort of wrongful imprisonment. The respondent meets the first contention by submitting, first, that the appellant's detention is attributable not to the United Kingdom but rather to the United Nations and is, therefore, outside the scope of the Convention (a contention prompted by the European Court of Human Rights' ("ECtHR") recent admissibility decision in *Behrami v France, Saramati v France, German and Norway* (Application Nos 71412/01 and 78166/01 (unreported), 2 May 2007) ("*Behrami*"), and thus first advanced after the Court of Appeal decision now under appeal); secondly, as was held by both courts below, that article 5(1) is "qualified" or "displaced" by the legal regime established by a series of United Nations Security Council resolutions which expressly authorise internment where that is "necessary for imperative reasons of security in

Iraq." As for the appellant's claim in tort, the respondent submits that it is the law of Iraq which governs the claim and there is no reason to suppose the detention to be unlawful under Iraqi law (as to which, in any event, no evidence has been adduced).

Issue One – Attributability

141. I have found this altogether the most difficult of the three issues now before your Lordships. The obvious starting point is the ECtHR's recent decision in *Behrami,* in particular with regard to Mr Saramati's preventive detention (internment) by KFOR, a detention which the court (para 127) accepted "fell within the security mandate of KFOR" under UNSCR 1244. The court then reasoned essentially as follows:
(i) The UN had delegated to KFOR (through NATO in consultation with non-NATO Member States) "operational command only", retaining for itself "ultimate authority and control" (paras 135 and 140).
(ii) Accordingly KFOR was exercising lawfully delegated Ch VII powers of the United Nations Security Council ("UNSC") so that the impugned action (Mr Saramati's detention) was, in principle, directly attributable to the UN (paras 141 and 151).
(iii) Although it did not automatically follow that the court was incompetent *ratione personae* to review the acts of the respondent states carried out on behalf of the UN (the question posed at para 146), the court decided that in fact that was so (para 152) because, unlike the position in the *Bosphorus* case (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1), (a) KFOR's impugned acts could not be attributed to the respondent states, and in any event (b) KFOR's actions "were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective." (para 151).

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

143. Lord Bingham (para 24) concludes that the analogy with Kosovo breaks down at almost every point. I wish I found it so easy. My difficulty is not least with my Lord's view that "there was no delegation

of UN power in Iraq." By that I understand him to mean (paras 21 and 23) that, in contrast to the position in Kosovo, the UN in Iraq was merely authorising the USA and the UK to carry out functions which it could not perform itself as opposed to empowering them to exercise its own function. It seems to me, however, that in this respect the situation in Kosovo and Iraq was the same: in neither country could the 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. As the court in *Behrami* explained in paras 132 and 133, that necessarily follows from the absence of article 43 agreements. When the court posed "the key question whether the UNSC retained ultimate authority and control so that operational command only was delegated", it noted (para133): "This delegation model is now an established substitute for the article 43 agreements never concluded". And this seems to me entirely consistent with para 43 of the court's judgment: the mention there of "functions which it could not itself perform" I understand to refer to functions which the Security Council cannot itself perform as a matter of *law* and which accordingly can only be done by a different body properly authorised under the UN Charter – see Sarooshi, "The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers" (1999).

144. I turn, therefore, to "the key question" and in particular to the five factors which led the court in *Behrami* (para134) to conclude that the UN in Kosovo had retained ultimate authority and control. The first, that Chapter VII of the Charter allows the UNSC to delegate to member states, applies equally here. So too the second, the power to provide for security being a legally delegable power. The third I shall leave over for the moment. It is difficult to find any relevant distinction with regard to the fourth: UNSCR 1511 (which authorised the formation of the MNF) fixed its mandate no less precisely than UNSCR 1244 defined KFOR's mandate. Indeed, so far as the power of internment was concerned, resolution 1546 was altogether more specific (see paras 14 and 15 of Lord Bingham's opinion), resolution 1244 having entrusted KFOR merely with such general responsibilities as "ensuring public safety and order". Nor could the fifth factor, the reporting requirements, reasonably lead to a different conclusion about ultimate authority and control here. True, this case lacks the additional safeguard noted in *Behrami* that KFOR's report had to be presented by the UN Secretary General, but that surely is counterbalanced by the fact that the MNF's mandate ceases unless renewed by the SC whereas KFOR's mandate was to continue until the SC decided otherwise (a decision which, at least theoretically, a permanent member could have vetoed).

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

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

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

147. By resolution 1483, adopted on 22 May 2003, the SC had "[r]esolved that the United Nations should play a vital role in

humanitarian relief, for reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance" and, pursuant to it, the Secretary General had established UNAMI, an essentially humanitarian and civil aid mission. As para 13 of resolution 1511 indicated, it was that mission which was the UN's contribution to the situation in Iraq. The MNF under unified command which para13 was authorising was to contribute to the security of, amongst others, UNAMI. Unlike KFOR, however, it was not itself being deployed "under UN auspices". UNAMI alone represented the UN's presence in Iraq.

148. Nor did the position change when resolution 1546 was adopted on 8 June 2004, three weeks before the end of the occupation and the transfer of authority from the CPA to the interim government of Iraq on 28 June 2004. UNAMI was to continue with its work (para 7). So too was the MNF, both of them acting at the request of the incoming interim government of Iraq. Resolution 1546 accordingly reaffirmed the authorisation of the MNF under unified command (this time "in accordance with the letters annexed", described by Lord Bingham at para14). And, as para10 noted, consistently with the previous position, the MNF's tasks, including the prevention and deterrence of terrorism, were imposed so that, amongst other things, "the United Nations can fulfil its role in assisting the Iraqi people as outlined in para 7 above" – namely UNAMI's humanitarian and civil aid work. Nothing either in the resolution itself or in the letters annexed suggested for a moment that the MNF had been under or was now being transferred to United Nations authority and control. True, the SC was acting throughout under Chapter VII of the Charter. But it does not follow that the UN is therefore to be regarded as having assumed ultimate authority or control over the force. The precise meaning of the term "ultimate authority and control" I have found somewhat elusive. But it cannot automatically vest or remain in the UN every time there is an authorisation of UN powers under Chapter VII, else much of the analysis in *Behrami* would be mere surplusage.

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

Issue 2 – did the UN resolutions qualify or displace article 5(1)?

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

> "… the court does not find any basis upon which to accept the applicants' suggestion that article15 covers all 'war' and 'public emergency' situations generally, whether obtaining inside or outside the territory of the contracting state."

151. But the sounder and more fundamental reason for holding the article 5(1) proscription on internment to be qualified or displaced here is that article 25 of the Charter requires member states to accept and carry out security council decisions and article 103 provides that in the event of a conflict between that obligation and the member state's obligations under any other international agreement, the former are to prevail. The SC's decision here (see para 10 of UNSCR 1546) was "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed…" (which included amongst the MNF's "tasks" "internment where this is necessary for imperative reasons of security").

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

Issue 3 – whether English common law or Iraqi law applies to the appellant's detention

153. Unless the appellant can show that it is "substantially more appropriate" (section 12 of the Private International Law (Miscellaneous Provisions) Act 1995) to apply English law than Iraqi law to the circumstances of his detention, then, under section 11 of the Act, Iraqi law applies. For my part I cannot see why English law should sensibly be the appropriate law to apply here. Not only has the appellant's detention taken place in Iraq but all the circumstances occasioning and surrounding it are circumstances entirely particular to the situation in that country.

154. I add a paragraph about *Bici v Ministry of Defence* [2004] EWHC 786 (QB) because Mr Starmer has sought to place some reliance upon it. *Bici* was a claim in negligence and trespass to the person brought by two Kosovan Albanians against British soldiers arising out of a shooting incident during peacekeeping operations in Pristina. It had there been agreed (rather than decided) that English law should apply. In argument in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UK HL 26; [2007] 3 WLR 33, Mr Greenwood QC referred the House to *Bici* to demonstrate that tort law applies to the acts of British forces abroad so that "claims may be brought for personal injury, damage to property or wrongful killing committed by British forces in Iraq, in the same way as daims brought in respect of acts committed in the UK." Given that English law had been applied by agreement in *Bici*, Mr Starmer suggests that Mr Greenwood was implying that English law would apply similarly to all claims against British forces in Iraq. Mr Greenwood disputes this, submitting that his argument in *Al-Skeini* said nothing as to what substantive law would apply to any tort action brought here. That seems to me correct. No one was focusing there on the applicable law and, indeed, in *Al-Skeini* it plainly mattered nothing whose substantive law applied: under neither English nor Iraqi law could it be lawful to ill-treat a detainee so violently that he died. Here, however, it does matter and in my judgment both courts below were plainly right in the conclusion they reached: Iraqi law applies.

155. It follows from all this that, despite the appellant's success on the first issue, his appeal nevertheless fails and must be dismissed.

Post Script

Since writing this judgment I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Rodger of Earlsferry. I confess to having found it sufficiently persuasive to cause me to doubt the correctness of my own conclusion on the difficult issue of attribution. Given, however, that a majority of your Lordships are for the appellant on this issue and that in any event, having regard to the unanimity of view on issue two, it cannot decide the outcome of this appeal, I prefer to leave over for another day my final conclusion on the point. I just wish to indicate that I may change my mind.