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With (Great) Power Comes (Great) Responsibility: A Move Toward Greater Responsibility for States Exercising Power Abroad

Al-Jedda v the United Kingdom [GC] Appl No 27021/08 (ECtHR, 7 July 2011)

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Keywords

Attribution, Conflict of Norms, European Court of Human Rights, Iraq War, Jurisdiction, United Nations

Abstract

This case note addresses the recent European Court of Human Rights case *Al-Jedda v the United Kingdom*. In this case, the Court decided that the act of detaining and interning the applicant in Iraq was attributable to the United Kingdom, and not the United Nations, and that the applicant fell under the UK's jurisdiction. Having established jurisdiction, the Court addressed whether Al-Jedda's internment violated Article 5(1) of the European Convention on Human Rights. In order to answer this, the Court had to decide whether Article 103 of the UN Charter, together with a UN Security Council Resolution authorizing the UK (among other States) to secure and maintain security in Iraq, entailed a conflict of norms that resulted in the inapplicability of the ECHR's right to liberty. The Court concluded that no such conflict was present and, thus, that the UK had violated the right to liberty.

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* The views expressed by the author herein are those in her personal capacity and do not necessarily represent those of Weaver & Henderson On Point Legal.

I. Introduction

In the summer of 2011, the Grand Chamber of the European Court of Human Rights ('ECtHR' or 'the Court') delivered judgment in two cases relating to the activities of the United Kingdom ('UK') in post-Saddam Hussein Iraq. In the case that is the subject of this case note, *Al-Jedda v the United Kingdom*, the Court was faced with determining the legal relationship of power between the UK and the United Nations ('UN') regarding security operations in Iraq.¹ The legal characterization of this relationship has implications for future cases in which a State's actions are related to UN resolutions, for example peacekeeping missions, anti-terrorism Security Council resolutions, and authorizations of the use of force by the Security Council.

II. Facts and Main Legal Questions

On 20 March 2003, the UK, the United States ('US') and their coalition partners (together known as the Multi-National Force, 'MNF') invaded Iraq. By 1 May 2003, combat operations were declared completed, at which time the UK and the US became Occupying Powers within the meaning of international humanitarian law (see specifically Article 42 of the Regulations concerning the Laws and Customs of War on Land, 18 October 1907).² Shortly after, the Coalition Provisional Authority ('CPA') was established, which was to ensure the provision of security in Iraq. The CPA was administrated by the US and the UK.³

On 28 June 2004, the Iraqi Interim Government received full authority from the CPA, thus ending the official occupation of Iraq by the UK and the US. The MNF (including its British component) remained in Iraq as per the request of the Iraqi Government and with authorization from the UN Security Council.

On 10 October 2004, Mr. Al-Jedda, a British/Iraqi dual national, was arrested by US soldiers.⁴ Al-Jedda was transported in a British military aircraft to the Sha'aibah Divisional Temporary Detention Facility in Basrah City, Iraq. This detention center was run by British forces. Al-Jedda was held in this center until 30 December 2007. Although no criminal charges were brought, British forces believed Al-Jedda posed a threat to Iraq's security and continued to hold him.⁵ During this time, Al-Jedda's internment was reviewed by different bodies, including bodies comprised of Iraqi representatives, officers from the MNF and the Ambassador for the UK.⁶

On 8 June 2005, Al-Jedda brought a claim in the UK for judicial review of the lawfulness of his continued detention. During most of the domestic proceedings, the Secretary of State for Defense accepted that the applicant's detention was within the jurisdiction of the UK under Article 1 of the European Convention on Human Rights ('ECHR' or 'the Convention'). However, the Secretary argued Article 5(1) ECHR on right to liberty could not apply as Al-Jedda's detention was authorized by the UN in Security Council Resolution 1546, and thus the UK was obliged to comply based on Article 103 of the UN Charter.⁷ The case made its way to the House of Lords, at which point the Secretary of State contended that Al-Jedda's internment did not fall under the UK's jurisdiction because UN Security Council Resolutions 1511 and 1546 made the detention of Al-Jedda attributable to the UN.⁸

Subsequently, Al-Jedda lodged an application with the European Court of Human Rights. On 19 January 2010, the case was admitted to the Grand Chamber, which dealt with the following main legal issues:

- (1) Whether Al-Jedda's internment in the Sha'aibah Divisional Temporary Detention Facility in Basrah City fell within the jurisdiction of the ECHR. In order to rule on this issue, the Court had to decide whether his internment was attributable to the UK, despite the issuance of certain resolutions by the UN Security Council.

1 In the other case, *Al-Skeini v the United Kingdom* [GC] Appl No 55721/07 (ECtHR, 7 July 2011), the Court decided that the United Kingdom had jurisdiction over applicants who had claimed the UK had violated the right to life because the UK had failed to investigate deaths of the applicants' family members. This case's expansion of jurisdiction to individuals in Iraq is seen as a new step in the Court's acceptance of extra-territorial application of human rights. See the case note on *Al-Skeini v UK* by Cedric Ryngaert in this edition of *Merkourios*.

2 *Al-Jedda v the United Kingdom* [GC] Appl No 27021/08 (ECtHR, 7 July 2011) (hereinafter: *Al-Jedda*), para 77.

3 *ibid.*

4 *Al-Jedda* (n 2), para 10.

5 *Al-Jedda* (n 2), para 11.

6 *Al-Jedda* (n 2), paras 12-13.

7 *Al-Jedda* (n 2), para 16.

8 *Al-Jedda* (n 2), para 18.

- (2) Whether Article 5(1) of the ECHR was violated by Al-Jedda's internment in the Sha'aibah Divisional Temporary Detention Facility in Basrah City. In order to rule on this issue, the Court had to decide whether the UK was obliged, via Article 103 of the UN Charter, to comply with a UN obligation to intern Al-Jedda, in which case the UK could not be held liable under Article 5(1) ECHR.

III. Judgment by the European Court of Human Rights Grand Chamber

The Court dealt first with the issue of jurisdiction. Article 1 of the ECHR reads: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.' The Court explained the importance of establishing jurisdiction: 'the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.'⁹

The ECtHR emphasized that the particular facts of the case must be examined to determine whether the applicant's detention was attributable to the UK or, as the UK submitted, only to the UN.¹⁰ The Court considered the following facts:

At the time of the Iraq invasion, there was no UN Security Council resolution authorizing roles in post-Saddam Hussein Iraq. After the US and UK occupation of Iraq, these occupying powers created the CPA 'to exercise powers of government temporarily.'¹¹ The UK and the US stated in a letter to the President of the UN Security Council that 'The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by [...] assuming immediate control of Iraqi institutions responsible for military and security matters.'¹²

In the preamble to Resolution 1483, the Security Council recognized the US and the UK as the Occupying Powers in Iraq. This Resolution used the Security Council's Chapter VII powers to call upon the Occupying Powers, through the CPA, 'to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability [...]'.¹³ The Court concluded that 'Resolution 1483 did not assign any security role to the United Nations.'¹⁴ The Court noted that the UK did not contend that the acts of British armed forces were in any way attributable to the UN.¹⁵

However, five months after the adoption of Resolution 1483, the Security Council adopted Resolution 1511 acting under Chapter VII of the UN Charter. In this Resolution, the Security Council authorized 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.'¹⁶ The UK purported that this Resolution was the beginning of the subjection of UK forces to UN control. The Court disagreed, stating that it:

d[id] not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations – or *more importantly*, for the purposes of this case – *ceased to be attributable to the troop-contributing nations*. The Multi-National Force had been present in Iraq since the invasion and had been recognized already in Resolution 1483, which welcomed the willingness of Member States to contribute personnel. The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, *was not changed as a result of Resolution 1511*.¹⁷

9 *Al-Jedda* (n 2), para 74, citations omitted.

10 *Al-Jedda* (n 2), para 76.

11 *Al-Jedda* (n 2), para 77, citing letter dated 8 May 2003 sent jointly by the Permanent Representatives of the UK and the US to the President of the UN Security Council. The CPA was comprised of both American and British officials. See CRS Report for Congress, *The Coalition Provisional Authority (CPA): Origin, Characteristic, and Institutional Authorities*, CRS-3 <www.fas.org/man/crs/RL32370.pdf> accessed 18 January 2012.

12 *Al-Jedda* (n 2), para 77, citing letter dated 8 May 2003 sent jointly by the Permanent Representatives of the UK and the US to the President of the UN Security Council.

13 *ibid.*

14 *ibid.*

15 *ibid.*

16 *Al-Jedda* (n 2), para 79, citing para 13 of Security Council Resolution 1511.

17 *Al-Jedda* (n 2), para 80, emphasis added.

Finally, the Court dealt with Resolution 1546,¹⁸ in which the Security Council reaffirmed authorization for the MNF. The Court determined that ‘There is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously.’¹⁹

The Court’s assessment of these facts led to the conclusion that the case was distinguishable from the *Behrami v France* and *Saramati v France, Germany and Norway*²⁰ cases, which dealt with the UN’s security role in Kosovo in 1999.²¹ The Court decided that in those cases, the detention of the applicant was attributable to the UN and not to any of the Member States, due to the ‘quite different’ role the UN played ‘as regards security in Kosovo’.²² To the contrary, the Court found that in Iraq the UN ‘had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant’s detention was not, therefore, attributable to the United Nations.’²³

After determining the issue of attribution, the Court spent less than one paragraph on the issue of whether the UK had jurisdiction over the individual applicant:

The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout. The decision to hold the applicant in internment was made by the British officer in command of the detention facility [...].²⁴

The Court next dealt with the application of Article 5(1) ECHR. The Court considered that ‘it has long been established that the list of grounds of permissible detention in Article 5(1) does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time.’²⁵ However, the UK contended that Al-Jedda’s internment did not constitute a violation of the Convention as Article 103 of the UN Charter, in conjunction with Regulation 1546, displaced the obligations created by the Convention.

Article 103 of the UN Charter reads:

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.

Before considering the application of Article 103, the Court determined whether any conflict of obligations was present that would necessitate its application. The Court decided that no such conflict existed, as the UN Resolutions did not oblige the UK to use internment as a method to secure Iraq. The Court considered that the UN is a body founded on the principle of ‘promoting and encouraging respect for human rights and fundamental freedoms,’²⁶ which led the Court to conclude:

there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. [...] In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.²⁷

Since the Court found no such language,²⁸ it held that Article 103 of the UN Charter did not apply. However, the Court held that Article 5(1) ECHR did apply and had been violated by the UK.²⁹

18 *Al-Jedda* (n 2), para 81.

19 *ibid.*

20 *Behrami v France* and *Saramati v France, Germany and Norway* [GC] Appl Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007).

21 *Al-Jedda* (n 2), para 83

22 *ibid.*

23 *Al-Jedda* (n 2), para 84.

24 *Al-Jedda* (n 2), para 85, citations omitted.

25 *Al-Jedda* (n 2), para 100, citations omitted.

26 Article 1 of the United Nations Charter, third subparagraph, cited in *Al-Jedda* (n 2), para 102.

27 *Al-Jedda* (n 2), para 102.

28 *Al-Jedda* (n 2), para 105.

29 *Al-Jedda* (n 2), para 110.

IV. Comment

This note comments on three aspects of the case. Firstly, I will address the tests the Court used to decide the issue of attribution. In *Al-Jedda*, the Court seems to deviate from previous case law on this matter. Secondly, I will deal with the issue of the UK's jurisdiction over the individual applicant. Although not quite apparent from the Court's decision in this case, previous cases show this issue to be a matter related to, but separate from, the issue of attribution. Both must be dealt with in order to establish the jurisdiction of the Court over the case. Finally, I will say a few words about the Court's interpretation of Article 103 of the UN Charter and what options are open to the Court for use in future cases.

A. Tests Employed by the Court to Determine Attribution

The key question the Court addressed in determining whether it had jurisdiction over this case was whether the detention was *attributable* to the UN or the UK. In previous cases, *Behrami v France* and *Saramati v France, Germany and Norway*, the Court required a body to have 'ultimate authority and control' over acts and omissions in order for those acts and omissions to be attributable to that body. Thus, in the *Behrami* and *Saramati* cases, the Court found that because it was the UN which had 'ultimate authority and control' over the security mission, and because the UN had only delegated certain powers to NATO, the acts and omissions of NATO Member States in exercising those powers were still attributable to the UN and not to those Member States.³⁰

However, in *Al-Jedda*, the Court no longer used only the 'ultimate authority and control' test. In paragraph 84 (see above), the Court decided that the UN 'had *neither* effective control *nor* ultimate authority and control'³¹ without making clear which test it found to be the relevant one. This might be taken as a sign that the Court is moving away from the stricter (and highly criticized) 'ultimate authority and control' test and moving toward 'effective control', a test used by the UN International Law Commission in its Draft Articles of Responsibility for International Organizations.³² Furthermore, the 'effective control' test is the test of choice of international law scholars³³ and, it appears, had been agreed upon as the controlling test by the parties in *Al-Jedda*.³⁴ Since the 'effective control' test is a lower threshold than the 'ultimate authority and control' test, this move by the Court indicates an increase in the responsibility attributable to Council of Europe Member States when exercising power abroad.

Furthermore, the Court emphasized the continued attribution of the UK soldiers' acts to the UK *after* UN Resolution 1511 had authorized these soldiers (as part of the MNF) to contribute to the maintenance of security in Iraq. Here, the Court looked at more than just whether the acts had become attributable to the UN by way of Resolution 1511. The Court noted that the acts had not '*ceased* to be attributable to the troop-contributing nations.'³⁵ In doing so, the Court seemed to move away from the either/or approach to attribution that it appeared to take in *Behrami* and *Saramati*.

B. UK's Jurisdiction over the Individual Applicant

After addressing whether the UK could be held responsible for Al-Jedda's detention, the Court spent very little time addressing whether Al-Jedda fell within the UK's jurisdiction. In fact, it is difficult to discern whether the Court saw the decision on attribution as sufficient to determine that Al-Jedda did indeed fall within the UK's jurisdiction or whether more was necessary. A closer look at the one paragraph that deals with the pure jurisdictional issue reveals attribution is not enough.³⁶

This one paragraph merely states that the detention center in which Al-Jedda was held was 'controlled exclusively by British forces, and the applicant was therefore within the *authority and control* of the United Kingdom'.³⁷ Yet, one can infer the reference the Court made here to the *Al-Skeini v UK* case, delivered by the Court on the same day, that the term 'within

30 *Behrami v France* and *Saramati v France, Germany and Norway* [GC] Appl Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007), paras 133-141.

31 Emphasis added.

32 See Article 7 (old Article 5) of the Draft Articles of Responsibility for International Organizations (2011) and the comparable Article 6 of the Draft Articles on State Responsibility.

33 K Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test,' *The European Journal of International Law* Vol 19 No 3 (2008) 513.

34 *Al-Jedda* (n 2), para 84.

35 *Al-Jedda* (n 2), para 80, emphasis added.

36 *Al-Jedda* (n 2), para 85.

37 *ibid*, emphasis added.

the authority and control' indicates a ground for jurisdiction. Thus, it appears that the Court does not hold it sufficient for an act to have been *attributable* to the UK; authority and control of the UK over the individual is what must be established before Article 1 ECHR is fulfilled and the Convention can be deemed applicable. Interestingly, in the case of detention, once it has been determined that a State is responsible for having detained an individual, it is difficult to claim that the State – at the time of detention – did not exercise authority and control over that individual.³⁸ However, in regard to other acts, such as aerial bombings, one could imagine that attribution and 'authority and control' over the individual being bombed do not necessarily coincide.³⁹

C. *ECtHR Interpretation of Article 103 of the UN Charter*

In assessing whether the UK violated Article 5(1) ECHR by keeping Al-Jedda in internment, the Court had to deal with Article 103 of the UN Charter. Although 'it has long been established that the list of grounds of permissible detention in Article 5(1) does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time',⁴⁰ the UK argued that the obligations imposed on it by the UN to maintain security in Iraq had to prevail over the UK's obligations under Article 5(1) ECHR, as per Article 103 of the UN Charter. On this point, the Court refused to defer to the UK's interpretation of its UN obligations, instead ruling that 'the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.'⁴¹ Only an explicit derogation from this presumed intention is sufficient in the Court's mind to conclude that the UN obliges a Member State to violate human rights law.

V. ECHR Jurisdiction: Where to Next?

While this is a positive development from the perspective of human rights protection, the Court did not give any indication of how it would rule if a UN resolution mandated the UK to engage in activity that clashed with human rights obligations. There are two possible paths for the Court to follow in relation to this issue in future cases:

1. Decline to find a conflict between the UN obligation and the human rights norm. There are several ways to do this. The first entails ruling that the UN obligation leaves a Member State with sufficient discretion to comply with the obligation in a way that does not violate other international law obligations (this is essentially what the Court ruled in *Al-Jedda*). The second way is simply by reading the Convention's norms so restrictively that a clash with a UN obligation is prevented. Finally, the Court could decide that the Convention norms are separate from those created by the international treaties referred to in Article 103. In such a case, Convention norms would be treated as more comparable to domestic norms. Although such norms do not excuse non-compliance with international norms such as UN rules, they can nevertheless be used to review State behavior that is forced by an international norm. This approach means that the ECtHR could hold a State accountable for violating Convention law, even though the Convention law would not free the State from its international law obligation to comply with the UN norm. The Court could decide to launch its review of the State's behavior only after having ascertained that the UN norm requiring the behavior was not subject to sufficient human rights review by the UN itself or it could review the behavior immediately;⁴² or
2. Review the UN obligation wherein a Member State invokes Article 103 of the Charter against the UN Charter itself, including the principles of human rights included in the Charter.⁴³

It remains to be seen what course the European Court of Human Rights will take in future cases. In its recent case law, the Court has not shown itself to be particularly pro-active in reviewing obligations set down by other international organizations

38 See for example *Ocalan v Turkey* [GC] Appl No 46221/99 (ECtHR, 12 May 2005) and *Ilich Sanchez Ramirez v France* Appl No 28780/95 (ECommHR, 24 June 1996).

39 See for example *Bankovic and Others v Belgium and 16 Other Contracting States* Appl No 52207/99 (ECtHR, 19 December 2001).

40 *Al-Jedda* (n 2), para 100.

41 *Al-Jedda* (n 2), para 105.

42 See M Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law* Vol 20:69 (2009) 92-102 for a further expansion of these possibilities.

43 *ibid* 102-127 for a further expansion of these possibilities.

against the ECHR.⁴⁴ It appears thus that the Court's most likely course of action would be to continue to use strategy (1) where possible. UN Security Council resolutions mandating asset freezing and authorizing intervention into Libya, among others, make it no more than a matter of time before cases testing the Court's position on this issue make their way through the domestic channels to Strasbourg. It remains to be seen if the Court will venture toward strategy (2) in cases where even the most highly creative minds can no longer interpret the norms as non-conflicting. ■

44 See for example *Bosphorus v Ireland* [GC] Appl No 45036/98 (ECtHR, 30 June 2005).