Detention During International Military Operations: Article 103 of the UN Charter and the *Al-Jedda* Case

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Introduction

The *Al-Jedda* case was decided by the highest court in England and Wales, the House of Lords, on 12 December 2007.[1] It concerned internment on security grounds by British forces operating in Iraq as part of a multinational force authorized by the United Nations Security Council. Two principal issues arose in the House of Lords. *First,* whether the conduct of the British forces was attributable to the United Nations (as the conduct of French and Norwegian KFOR forces was in *Behrami and Saramati*[2]). *Second,* whether, by virtue of Article 103 of the Charter of the United Nations, the United Kingdom's obligations under article 5(1) of the European Convention on Human Rights were qualified by its obligations under the Charter. The second point arose both as a matter of international law and under the UK's Human Rights Act 1998.

I. Detainee Issues

The case illustrates the difficult legal and political issues faced

[1] *R (on the application of Al-Jedda) v. Secretary of State for Defence.* The case went through three instances in the English courts. The Divisional Court (Moses and Richards JJ) gave judgment on 12 August 2005, [2005] EWHC 1809 (Admin). The Court of Appeal (Brooke, May and Rix LJJ) gave judgment on 29 March 2006, [2007] QB 621. The House of Lords (Lords Bingham and Rodger, Lady Hale, Lords Carswell and Brown) gave judgment on 12 December 2007, [2007] UKHL 58, [2008] 3 All ER 28, [2008] 2 WLR 31. See case-notes by R. O'Keefe, Vol. 76 *B.Y.I.L.* 2005, pp. 578-585; Vol. 77 *B.Y.I.L.* 2006, pp. 481-485 and Vol. 78 *B.Y.I.L.* 2007, pp. 564-582 and A Orakhelashvili, Vol. 102 *A.J.I.L.* 2008, pp. 337-345. See also K. Starmer, 'Responsibility for Troops Abroad: UN-Mandated Forces and Issues of Human Rights Accountability', Vol. 3 *European Human Rights Law Review* 2008, pp. 318-336, reproduced in P. Shiner & A Williams (eds.), *The Iraq War and International Law* (Oxford, Hart, 2008), pp. 265-283 and E. Lagrange, 'L'Application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national', Vol. 112 *R.G.D.I.P.* 2008, pp. 521-565.

[2] ECtHR, *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* (Applications Nos 71412/01 and 78166/01), Decision on Admissibility, 2 May 2007, Vol. 46 *I.L.M.* 2007, pp.743-775 and Vol. 45 *E.H.R.R.* 2007, SE10, pp 85-124.

by troop-contributing States in international military operations[3] in connection with detainees, including when they contribute to a multilateral force authorized by the United Nations. As we shall see, these issues have arisen for many countries, both in the courts and at the political level, and in a variety of different situations.[4] Indeed, some of the legal issues go much wider than detention, as is illustrated by the sanctions cases in various jurisdictions, including before the European Courts which raise similar issues about the relationship between the action of the Security Council and human rights.

The *Al-Jedda* case concerned one aspect (the legal basis for internment/detention without trial/administrative detention) of a complex set of "detainee issues" arising in Iraq and elsewhere.[5] (We are not concerned here with prisoners of war, where the law is, generally speaking, clear and well known to members of the armed forces.[6]) Other issues include the treatment to be afforded

[3] 'International military operations' is not a term of art. Other widely used, though perhaps narrower, terms are 'peace operations' (*Report of the Panel on UN Peace Operations* (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000) and 'international peace operations' (D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford, Oxford University Press, 2008, 2nd ed.), Chapter 13).

[4] They are, for example, becoming critical in the current efforts to counter 'piracy' off the coast of Somalia.

[5] J. Pejic, 'Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and other Situations of Violence', Vol. 87 Issue 858 *I.R.R.C.* 2005, pp. 375-391; F. Naert, 'Detention in Peace Operations: The Legal Framework and Main Categories of Detainees', Vol. 45 this *Review* 2006, pp. 51-78; D. Wilson, *Treatment of Detainees in Iraq*, Chatham House International Law Discussion Group, 28 September 2006 (available on the Chatham House website, at http://www.chathamhouse.org.uk/research/international_law/papers/view/-/id/393/); P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge, Cambridge University Press, 2006), pp. 224-249 and B. Oswald, 'Detention in Military Operations: Some Military, Political and Legal Aspects', Vol. 46 this *Review* 2007, pp. 341-361 (including at note 1 a useful list of articles).

[6] It is set out in detail in the Third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. See generally A. Rosas, *The Legal Status of Prisoners of War* (Helsinki, Suomalainen Tiedeakatemia, 1976, reprinted Turku, Institute for Human Rights, Abo

to persons at the time of detention and while in detention,[7] review of detention and the release of detainees, and the rules governing the transfer of detainees to coalition partners or to the authorities of the territorial state.[8] Nowadays the law, "fragmented yet interconnected", has to be seen in the context of the "politics of detention".[9]

The relationship between international humanitarian law and international human rights law, and the law of the United Nations Charter (including rules laid down by the UN Security Council in its mandatory decisions), may be contested. The applicable law may differ as between different troop-contributing countries, for

Akademi University, 2005) and H. Fischer, 'Protection of Prisoners of War' in D Fleck (ed.), *supra* note 3, pp. 367-417.

7 For example, the controversy over the status and treatment of detainees held by the US at Guantánamo Bay: see M Schmitt, 'The United States Supreme Court and Detainees in the War on Terror', Vol. 37 *Israel Yearbook on Human Rights* 2007, pp. 33-84. For the position under the UK's Human Rights Act 1998, see *R (Al Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [2007] 3 WLR 33; case-note by R. O'Keefe, Vol. 78 *B.Y.I.L.* 2007, pp. 529-546. Article 75 of Additional Protocol I sets out the minimum rights to which all are entitled.

8 *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence*, judgment of 19 December 2008, [2008] EWHC 3098 (Admin), turned on whether it would be contrary to the UK Human Rights Act 1998 (death penalty, unfair trial, torture or inhuman or degrading treatment) for British forces in Iraq to hand over two Iraqi criminal justice detainees to the Iraqi authorities for trial before the Iraqi High Tribunal on war crimes charges involving the alleged murder two British soldiers in April 2003. The High Court (Richards LJ and Silber J), being bound by an earlier decision, held that it would not, even though there was a real risk of the death penalty being imposed, On 30 December 2008, the Court of Appeal upheld the High Court's decision. Later that day, the European Court of Human Rights issued a Rule 39 order to prevent the hand-over of the two men to the Iraqi authorities. UK forces nevertheless handed them over on 31 December 2008, saying that they had no legal powers to hold them (BBC News, 31 December 2009). For a US Supreme Court decision that involved both transfer to the Iraqi criminal courts and the availability of *habeas corpus* to US nationals detained by US forces in Iraq as part of MFN-I, see *Munaf et al v. Geren, Secretary of the Army* 553 U.S.__ (2008), decided on 12 June 2008.

9 The term is used by Oswald, *supra* note 5.

example, between those that are party to the European Convention on Human Rights and those that are not, or between those that are party to Additional Protocol I to the Geneva Conventions and those that are not. Even when the applicable law is the same, there may be important differences of interpretation, for example as to the extraterritorial effect of human rights treaties, and as to the meaning of "torture" and "inhuman and degrading treatment". Also, States are subject to differing compliance processes and mechanisms, political and judicial, within domestic systems and internationally.

These differences are not theoretical. They are not theoretical for the detainees. They are not theoretical for soldiers on the ground, military commanders, or the civilian officials (including lawyers) and politicians who have to grapple with detainee issues on a daily basis. The practical impact may be great. Human rights considerations, including differences of view as to the applicability and meaning of the various rules, may have a chilling effect on the willingness of states to participate in international military operations, and on what they are prepared to allow their armed forces to do when they do participate.[10]

These practical concerns have led to these matters being explored multilaterally in the 'Copenhagen Process on the Handling of Detainees in International Military Operations', an initiative of the Danish Government. The basic challenge is described as follows: "How do troop-contributing States ensure that they act in accordance with their international obligations when handling detainees – including when transferring them to local authorities

[10] John B Bellinger III, State Department Legal Adviser, said in a recent interview: "Many European countries go to great lengths to avoid detaining anybody because their soldiers carry on their backs with them the International Covenant on Civil and Political Rights or the European Convention on Human Rights -- it means that it imports an entire new body of law for them to deal with that they are not used to dealing with in these places. In many cases the European forces will simply avoid any detention at all" (transcript supplied by Mr Bellinger); A Hirsch & R Norton-Taylor, 'Rights Law "Makes UK Forces Shun Arrests"', *The Guardian,* 8 October 2008.

or to other troop-contributing countries?"[11] One aim of the Copenhagen Process appears to be to identify "best practice guidelines" for detainee handling. Another possibility would be to draw up model provisions for inclusion, where appropriate, in Security Council resolutions authorizing international military operations. If best practices and draft Security Council language can be agreed internationally, the need to agree on the underlying legal problems could become less crucial. This seems a realistic approach, since agreement on basic legal positions would be difficult. Indeed, given the radically differing views and commitments involved, it may be unattainable.[12] Moreover, the process may be valuable in itself if it leads to greater understanding of the issues.

II. Article 103 of the UN Charter

On a broader level, *Al-Jedda* is important for its careful treatment of Article 103 of the United Nations Charter. This key provision 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.

Article 103 has also been considered by the Court of First Instance and the European Court of Justice in *Kadi*, in the context of the implementation of United Nations sanctions.[13] These proceedings

[11] Ministry of Foreign Affairs of Denmark, Legal Department, 'The Copenhagen Process on the Handling of Detainees in International Military Operations', and 'Non-Paper on Legal Framework and Aspects of Detention' dated 4 October 2007, Vol. 46 this *Review* 2007, pp. 363-392. The principal meetings so far have been the Copenhagen Conference 11-12 October 2007, and a meeting on best practices in spring 2008. Another Copenhagen Conference is planned for spring 2009.

[12] Another international initiative is the preparation, within the UN's Department for Peace-keeping Operations (DPKO), of a draft directive on the handling of detainees by UN forces. Broad consultation with troop contributors will be needed if this venture is to succeed.

[13] Joined Cases C-402/05 P and C-415/05 P, *Yasin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission,* Judgment

concerned the freezing of assets by the European Union of persons listed by a UN Security Council sanctions committee. Like the *Al-Jedda* case, *Kadi* turned in part on the relationship between obligations under the UN Charter and obligations under the European Convention on Human Rights. (In *Kadi*, at issue were the right to property and the right to a hearing.) In the event, the European Court of Justice concluded that it could not question the validity of Security Council resolutions, but that it could annul the Commission Regulation implementing the listing of Kadi and Al Barakaat by the Security Council committee.[14]

At about the same time, in *Behrami and Saramati* the European Court of Human Rights had some important general observations on the central role of the UN's peace and security functions, and on the relationship between the Charter's provisions for the maintenance of international peace and security and the European Convention on Human Rights:

> 147. ... 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 ....
>
> 148. Of even greater significance is the imperative nature of the principle [*sic*] aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that

of the European Court of Justice, 3 September 2008. The judgments of the Court of First Instance were delivered nearly three years earlier, on 21 September 2005 (Cases T-315/01 and T-306/01, [2005] ECR II-3533). The Court of First Instance has given judgment in two further cases, in the course of which it merely summarized its findings in *Yusuf* and *Kadi*: *Ayadi v Council of the European Union* (Case T-253/02) and *Hassan v Council of the European Union* (Case T-49/04), [2006] All ER (D) 154 (Jul).

[14] In its judgment, the ECJ suspended the annulment for three months. Within that period, on 28 November 2008 the European Commission adopted Commission Regulation (EC) No 1190/2008, in which, after having communicated with the listed persons and having considered their comments, the Commission reinstated them in the list in Annex I to Regulation (EC) No 881/2002: see *O.J. L* 322,2 December 2008, p. 25.

> ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notable though the use of coercive measures. ....
>
> 149. ... 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 ... with the effective conduct of its operations. .... [15]

Combined with Article 25, Article 103 "means that the Council has the authority to make legally binding decisions with which States must comply in all circumstances".[16] Article 103 has been described as "an essential feature of Chapter VII sanctions regimes, which would be ineffective if they did not override other international agreements (such as trade treaties and aviation agreements)".[17]

Article 103 is reflected in the Friendly Relations Declaration of 1970.[18] The seventh principle (that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter) therein includes the following:

> Where obligations arising under international agreements are in conflict

[15] This passage was cited by the Fourth Section of the ECtHR in its Decision on Admissibility in Applications 36357/04 etc, *Berić and Others v Bosnia and Herzegovina*, 16 October 2007, § 29, and seems to be an authoritative expression of the Court's approach.

[16] S Ratner, 'The Security Council and International Law', in D. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder, Rienner, 2004), p. 592.

[17] M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (Washington, DC, US Institute of Peace Press, 2006), p. 34.

[18] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: UNGA Res. 2625 (XXV) of 24 October 1970.

with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

Article 30 of the Vienna Convention on the Law of Treaties likewise recognizes the absolute priority of the rule in Article 103. Article 30, paragraph 1, provides: "Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs". In the case of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, it was accepted that, while international organizations were not parties to the Charter, the Charter would nevertheless prevail with respect to treaties concluded by organizations. Article 30, paragraph 6, of the 1986 Convention provides that "[t]he preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail".

The International Law Commission's Study Group on Fragmentation considered Article 103 with some care, and the report, finalized by the Special Rapporteur, Martti Koskenniemi, is of interest: "What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not one of validity but of priority. The lower ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103".[19]

III. The *Al-Jedda Case*

It is characteristic of the decisions of the higher courts in the United Kingdom that not infrequently each judge explains his conclusions in the way he or she sees fit. This does not make for easy analysis. Even when they agree, not only on the result but also essentially as to the reasoning, the judges like to explain things in their own words, or at least to add a gloss or two. This

[19] UN Doc. A/CN.4/L. 682, §§ 328-360, at § 333.

is what happened in the House of Lords in *Al-Jedda*, where one of the five judges even expressed two different views.[20] Moreover, the speeches in the House of Lords were preceded by what Lord Bingham referred to as the "lengthy and careful judgments" of the courts below.[21] There are seven judgments in all. While this note focuses on the House of Lords, the judgments of Moses J in the Divisional Court and Brooke LJ in the Court of Appeal are also important for an understanding of the case.

As set out in the leading speech of Lord Bingham, three issues were considered by the House of Lords (only the first two are considered below):

- *First*, whether Al-Jedda's detention was attributable in international law to the United Kingdom. This argument relied on *Behrami and Saramati*, decided in May 2007, and had not been raised before.

- *Second*, whether article 5(1) of the European Convention on Human Rights was qualified by Security Council resolution 1546 (2004) by virtue of Articles 25 and 103 of the United Nations Charter, so that the detention did not violate article 5(1).

- *Third*, whether English law or Iraqi law applied to Al-Jedda's detention, and if so whether there was any basis for it. This was a question of English private international law, was only touched on briefly in the House of Lords, and is not dealt with here.[22]

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[20] See the 'Post Script' at the end of Lord Brown's speech (not included in 3 All ER). He is described in the *Law Reports* as "doubtful": [2008] 3 All ER 28, p. 29, or *.dubitante*: [2008] 2 WLR 31, p. 32.

[21] § 1.

[22] Lord Bingham (joined by the other members of the House of Lords) adopted the reasoning of the Court of Appeal to the effect that Al-Jedda's claim in tort was governed by the law of Iraq. No evidence of Iraqi law was before the court, which therefore did not consider this claim. Al-Jedda's contention that he had a good claim if Iraqi law applied is the subject of separate proceedings in the English courts, in which he claims that, on the coming into force of the Iraqi Constitution in May 2006, his continued detention became unlawful in Iraqi law. This case was heard by the High Court in December 2008.

1. The Facts

At the time of his detention, Al-Jedda was a dual UK-Iraqi national. He was arrested in Baghdad on 10 October 2004. He was flown to the British-operated Shaibah Divisional Temporary Detention Facility in Basra, where he was detained by British forces acting as part of the Multi-National Force in Iraq (MNF-I). He was still detained at the time of the House of Lords decision, though he was released shortly thereafter.

Al-Jedda was detained, without charge, on the ground that his detention was necessary for imperative reasons of security in Iraq. He was suspected of membership in a terrorist group involved in weapons smuggling and explosive attacks in Iraq, which he denied, but which he did not contest in the present proceedings. He was a security detainee, not a criminal detainee. The Secretary of State acknowledged that there was insufficient material available which could be used in court to support criminal charges against him. His detention was subject to periodic reviews.[23]

2. Powers of Detention in Iraq

The powers of detention available to MNF-I have varied over time. During the period of belligerent occupation (from the end of the conflict, in May 2003, until 28 June 2004), the Occupying Power had the obligation, under article 43 of the Hague Regulations of 1907, "to take all the measures in his power to restore, and ensure, as far as possible, public order and safety" ("*l'ordre et la vie publics*"), as well as the obligation, under article 27 of Geneva Convention IV, to protect the civilian population "especially against all acts of violence and threats thereof". Article 78 of Geneva Convention IV was applicable, which provides that "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take measures concerning protected persons, it may, at the most, subject them to assigned residence or internment". The article sets out procedural safeguards.

[23] Moses J, §§ 9-12 and 128-134 (Divisional Court); Brooke LJ, §§ 3-10 (Court of Appeal).

These responsibilities and obligations were expressly recognized in Security Council resolution 1483 (2003) of 22 May 2003. This resolution was reaffirmed by Security Council resolution 1511 (2003) of 16 October 2003, which was passed following a series of terrorist atrocities. MFN-I was authorized "to take all necessary measures to contribute to the maintenance of security and stability in Iraq". It was accepted in the *Al-Jedda* proceedings that the period of occupation terminated on 28 June 2004, well before Al-Jedda was detained. Security Council resolution 1546 (2004) of 8 June 2004, which applied during the period following the end of the occupation, including at the time of Al-Jedda's detention, was more specific. It provided that "the multilateral 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". The letter from US Secretary of State Colin Powell, annexed to the resolution, stated that:

> 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....

In the Divisional Court, Moses J considered it right to infer that the use of the words "internment where this is necessary for imperative reasons of security" was "not accidental. It provides a clear indication of the intention that the powers previously derived from Article 78 of Geneva IV were to be continued".[24] "The plain purpose of the resolution was to continue the pre-existing authorisation granted to the MNF."[25] These powers were continued by successive resolutions of the Security Council until the end of 2008.[26] The procedural requirements of Article 78 and the procedures applicable to Al-Jedda's internment were described

[24] § 87.

[25] § 90.

[26] UNSC Resolutions 1637 (11 November 2005); 1723 (28 November 2006) and 1790 (18 December 2007).

and considered in detail in the judgments of the Divisional Court and the Court of Appeal, which also set out applicable Iraqi law.[27]

There was thus continuity between the period of occupation and the subsequent period in terms of powers of detention. Yet the question of the application of international human rights law only became significant after the termination of the occupation, since it was widely accepted that the internment regime under occupation law is *lex specialis.*

The position will be transformed with effect from 1 January 2009, when the UN authorization expires. Relations will then be based on treaties and domestic law.[28]

3. First Issue: Whether the Conduct of British Forces was Attributable to the UN

The issue of attribution was only raised when the case reached the House of Lords, prompted by *Behrami and Saramati.* It is not necessary to analyse the arguments in detail. They largely speak for themselves, and are in any event very case-specific. Suffice to note that there were important differences among their Lordships.

Lord Rodger, after a careful analysis of the European Court's decision, concluded that the conduct of the British forces in question, like that of the French and Norwegian forces in *Behrami and Saramati*, was attributable to the United Nations and not to

[27] §§ 123-145 of the judgment of Moses J (Divisional Court) and §§ 18 -19 and 27-32 of the judgment of Brooke LJ (Court of Appeal). The principal Iraqi law was CPA (Coalition Provisional Authority) Memorandum No. 3 (Revised) of 27 June 2004.

[28] Agreement between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, 17 November 2008: Art. 22 (Detention) provides that no detention or arrest may be carried out by the United States Forces except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4 (Missions). It further provides that existing US detainees will either be turned over to Iraqi authorities or released.

the United Kingdom. Taking into account *Behrami and Saramati*, as the House of Lords was required to do under the Human Rights Act, there is much to be said for Lord Rodger's approach. As O'Keefe puts it, "Lord Rodger's detailed forensic examination is a model of conscientious judging, especially in its attentive application (insofar as the judgment permits) of the reasoning in *Behrami*".[29]

Lord Bingham, on the other hand, with whom Baroness Hale, Lord Carswell and (up to a point) Lord Brown agreed, came to the opposite conclusion. Lord Bingham noted that it was common ground between the parties that the governing principle was set out in draft article 5 of the International Law Commission's first reading draft articles on 'Responsibility of international organizations'. This reads:

> The conduct of an organ of a State ... 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.

After citing extensively from the Commission's commentary to draft article 5 and the UN Secretariat's written comments to the Commission, Lord Bingham first described the main events that had occurred between March 2003 and December 2007.[30] He then sought to analyse *Behrami and Saramati.*[31] He asked a series of questions:

> 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 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?[32]

Answering each question in the negative, he found that "[t]he analogy with the situation in Kosovo breaks down ... at almost

[29] Case-note by R. O'Keefe, Vol. 78 *B.Y.I.L.* 2007, pp. 564 *et seq.*, at p. 578.

[30] §§ 7-17.

[31] §§ 18-21.

[32] §§ 22.

every point".[33]

Lord Brown, on the other hand, concluded that there was only one reason why *Behrami and Saramati* did not apply: the very circumstances in which MNF came to be authorized and mandated in the first place, which he saw as having nothing to do with the Security Council. He said, "[t]he 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".[34] In a 'Post Script', however, he indicated that, having read Lord Rodger's speech, he found it sufficiently persuasive to cause him to doubt the correctness of his own conclusion.

4. Second Issue: Whether a Security Council Resolution Obligation to Detain Qualifies Article 5(1) ECHR

The second issue was the main focus of the judgments in the courts below. Lord Bingham was therefore able to deal with it relatively lightly.[35] It nevertheless remains the point of most general interest. The other judges seem to have been in substantial agreement with Lord Bingham, but they added short observations of their own.

Al-Jedda challenged his detention without trial, arguing that it was unlawful under article 5(1) of the European Convention on Human Rights, scheduled to the UK's Human Rights Act. It was common ground that the detention was not in conformity with article 5(1) if that provision applied, since it clearly fell within none of the exceptions listed therein.

Before the House of Lords, Al-Jedda relied chiefly on the argument that the Security Council resolution placed no obligation on the United Kingdom, but only authorized his detention, with the consequence (so it was argued) that Article 103 had no application.[36] Lord Bingham disagreed, on three grounds. *First*,

[33] §§ 24.

[34] §§ 141-149.

[35] §§ 26-39.

[36] He had also relied on this argument, among others, in the courts below: see §§ 109-112 of the judgment of Moses J in the Divisional Court and §§

during the period when the United Kingdom was an Occupying Power (May 2003 to 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. This was only relevant indirectly, as Al-Jedda was not detained until October 2004. As Lord Bingham put it, "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".[37] *Second*, in relation to military or security operations the Security Council can in practice only use the language of authorization. Lord Bingham noted that "[t]here is ... a strong and ... persuasive body of academic opinion which would treat article 103 as applicable where conduct is authorized by the SC as where it is required". Like the Court of Appeal, Lord Bingham cited at length, with approval, from the commentary to article 39 of the Charter in *Simma*.[38] *Third*, Lord Bingham thought anyway that in a situation like that before him "obligations" in Article 103 "should not be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that ... is the mission of the UN. ... [The UK] was ... bound to exercise its powers of detention where this was necessary for imperative reasons of security".[39] Lord Carswell also addressed this point briefly, agreeing with Lord Bingham,[40] as did Lord Brown.[41]

Lord Bingham went on to note that "the reference in article 103 to 'any other international agreement' leaves no room for any excepted category" (such as obligations under human rights treaties).[42] He did not think that the Strasbourg Court would ignore

69-76 of the judgment of Brooke LJ (Court of Appeal).

37 § 32.

38 § 33, citing B. Simma (ed.), *The Charter of the United Nations. A Commentary* (Oxford, Oxford University Press, 2nd ed., 2002), p. 729.

39 § 34.

40 § 135.

41 § 150. Lord Brown cited in this regard the Grand Chamber's decision in *Banković and Others v Belgium and Others*, Application 52207/99, Decision on Admissibility, *ECHR* 2001-XII 333-353, § 62.

42 § 35.

the significance of Article 103.

Lord Bingham faced squarely the dilemma that the promotion of respect for human rights is also among the purposes of the United Nations. He addressed the possibility that States might derogate from article 5 in accordance with article 15 of the ECHR. The power of derogation, he said,

> 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 ... be taken in to account in interpreting the treaty it seems proper to regard article 15 as inapplicable.[43]

In conclusion on the second point, Lord Bingham said:

> 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

[43] § 38. Lord Carswell, the only other member of the House to refer to the question of derogation under article 15, agreed with Lord Bingham: § 132. In the Divisional Court, Moses J was also sceptical of the derogation route: see § 91, where he noted that "no state has derogated in relation to actions abroad at the invitation of the Security Council". The European Court of Human Rights touched on the relationship between the possible extraterritorial effect of the Convention and derogation in *Banković*, in which the Court did "not find any basis upon which to accept the applicants' suggestion that Article 15 covers all 'war' and 'public emergency' situations generally, whether obtaining inside or outside the territory of the Contracting State" (§ 62). In its decision of 10 July 1976 in *Cyprus v. Turkey*, the European Commission on Human Rights said that "Turkish armed forces in Cyprus brought any other persons or forces there 'within the jurisdiction' of Turkey, in the sense of Art. 1 (...) It follows that, to the same extent, Turkey was (...) competent *ratione loci* for any measures of derogation under Art. 15": 4 *E.H.R.R.* 1982, pp. 482 *et seq.*, at § 525.

> 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.[44]

Lord Rodger also tackled this point head on, and (after referring to the European Court's approach in *Behrami and Saramati* and citing in particular paragraphs 122 and 147), concluded that, had he had to decide the issue (which he did not, having held that the conduct in question was attributable to the UN), he would "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".[45]

Baroness Hale had concerns about the application of the article 25/103 argument. She considered that "some way has to be found of reconciling our competing commitments under the United Nations Charter and the European Convention", and agreed with Lord Bingham "that the only way is by adopting such a qualification of the Convention rights".[46] She continued, "[t]he right is qualified but not displaced. ... The right is qualified only to the extent required or authorized by the resolution. What remains of it thereafter must be observed".[47] She drew attention to the statement by Secretary of State Colin Powell, in his letter to the Security Council, that the MNF forces were committed to "act consistently with their obligations under the law of armed conflict, including the Geneva Conventions", and asked on what basis the detention of Al-Jedda was consistent with the United Kingdom's obligations under the law of armed conflict. But since the case had not been argued in this way she did not pursue the point.[48]

Lord Carswell likewise agreed with Lord Bingham, and emphasized that the power to intern "has to be exercised in such

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[44] § 39, cited in *Al-Saadoon and Mufdhi*, *supra* note 8, § 43.
[45] §§ 115-118.
[46] § 125.
[47] § 126.
[48] §§ 127-129.

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 he had referred earlier in his speech.[49] Lord Brown also agreed with Lord Bingham on this point.[50]

IV. Concluding Remarks

The points that arose in *Al-Jedda* included the nature of Security Council authorizations, issues of hierarchy between rules of international law and between international law and English law (the effect of Article 103 of the United Nations Charter on international human rights obligations, and indirectly on domestic human rights law), the question of derogations under the European Convention on Human Rights, and the application of *Behrami and Saramati.* On most of these, the House of Lords has added significantly to the debate.

The case is important for what it tells us about the likely approach of the English courts to the attribution issues that arose in *Behrami and Saramati*. It is interesting to note that, like the European Court of Human Rights in *Behrami and Saramati*, Lord Bingham placed considerable weight on the first reading draft articles of the International Law Commission, and the comments of the UN Secretariat.

Possibly of greater importance is the analysis by all judges in *Al-Jedda*, in the Divisional Court, Court of Appeal and House of Lords, of the relationship between obligations under the United Nations Charter and human rights obligations. *Al-Jedda*, as well as the European Court of Justice's 3 September 2008 judgment in *Kadi,* confirms that the effect of Article 103 of the Charter is to qualify all other international obligations, even those in the field of fundamental human rights (with the possible exception of *jus cogens* norms). *Al-Jedda* adds the important qualification that all concerned should ensure that such rights are not infringed to any greater extent than is inherent in carrying out the mandate of the Security Council.

[49] § 136.

[50] §§ 151-152.

If the principle is accepted, its application in other cases will depend on all the circumstances. The language of Security Council resolution 1422 (2004) was particularly clear. It expressly authorized "internment where this is necessary for imperative reasons of security" and was no doubt drafted in light of the security detentions that were already taking place in Iraq. Whether the result would have been the same if the language had been less precise - "all necessary means", for example - cannot be predicted in the abstract. Much depends upon the surrounding circumstances, including the negotiating history of the resolution.[51] For example, in *Behrami and Saramati* the European Court of Human Rights accepted that the relatively general language in Security Council resolution 1244 (1999) authorized detention.[52] It is important to have the maximum degree of clarity in the drafting of the resolutions. The suggestion (within the Copenhagen Process) of developing possible language for use in Security Council resolutions is a good one. It could help to avoid potential problems, both political and in the courts.

The importance of Article 103 goes well beyond detainee issues. It is central to the effectiveness of sanctions imposed by the UN Security Council. The English Court of Appeal followed *Al-Jedda* in *A and others v H.M. Treasury*,[53] a case concerning the domestic implementation of UN sanctions, decided on 30 October 2008. The Court considered a submission that "fundamental principles of domestic law are not within article 103 of the UN Charter because they are not "obligations under any other international agreement" but are conferred, not only by article 6 of the ECHR, but by long-standing principles of the common law". At first

[51] M. Wood, 'The Interpretation of Security Council Resolutions', Vol. 2 *Max Planck Yearbook of United Nations Law* 1998, pp. 73-95.

[52] *Behrami and Saramati*, § 124 reads: "Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders".

[53] [2008] ECWA Civ 1187. See also *Al-Saadoon and Mufdhi*, *supra* note 8, §§ 43, 91.

instance, Collins J had rejected this submission, referring to the decision of the House of Lords in *Al-Jedda.* The Court of Appeal agreed. The Master of the Rolls cited Lord Bingham's conclusion at paragraph 39 of *Al-Jedda.*[54] He also cited, to similar effect, Lord Carswell in *Al-Jedda*: "I would emphasise ... that that power [viz: to detain] has to be exercised in such a way as to minimise the infringements of the detainees' rights under Article 5(1) ...".

The Master of the Rolls continued:

> The judge [at first instance] concluded that the reasoning of Lord Bingham and Lord Carswell was clearly applicable to the inevitable breaches of property rights and infringement of Article 8 rights resulting from the application of the AQO [Al Qaeda Order] to G. I agree.[55]

Al-Jedda confirms that Article 103 should not be interpreted narrowly if it is to have the effect intended by the drafters of the Charter. The position may be summarised as follows:

First, the effect of Article 103 is not to invalidate the conflicting obligation, but merely to qualify it to the extent of the conflict. Any other position, for example, that the conflicting obligation is or becomes void, is not borne out in practice and in most cases would make no sense. Thus, if a sanctions regime is incompatible with rights of navigation under the Danube Convention, it is obvious that the effect of Article 103 is not to void provisions of the Danube Convention, even for the target State, but merely to give priority to the Charter obligations while they subsist.

Second, the article clearly applies to obligations imposed by mandatory resolutions of the Security Council, since by virtue of Article 25 (and Article 48) such obligations are "obligations ... under the present Charter". *Lockerbie* is authority for this,[56] and has been followed in the European and English cases mentioned in this note.

Third, in order to be effective Article 103 must apply equally to

[54] *Supra* note 44.

[55] §§ 115-118.

[56] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Provisional Measures, ICJ Rep.* 1992, § 39.

action taken under authorizations of the Council. This question was canvassed at length in *Al-Jedda*, and at each level the English courts were unanimous in reaching this conclusion.

Fourth, there was no need for Article 103 to refer expressly to obligations under customary international law, since the obligations of States under Articles 25 and 48 of the Charter to carry out the decisions of the Council "lead to the same result, and it would in fact be anomalous if the Council were able to override obligations under treaties but not under customary law".[57]

Fifth, there are no exceptions to the obligations over which Charter obligations prevail. The possible exception (according to a widely held view) of *jus cogens* norms is more theoretical than real.[58] In any event, even though in *Kadi* the European Court of Justice (a domestic court for these purposes) annulled the domestic (European) measures implementing certain listing decisions of the Security Council Committee, and said that they had not been taken in conformity with human rights, the Court made it clear that it could not review Security Council resolutions on this or any other ground.[59] This should surely be the position in any domestic court, as with national legislatures and executives, if the international system of collective security is not to be subverted.

Hersch Lauterpacht wrote about Article 20 of the Covenant of the League, the Covenant equivalent of Article 103, in the 1936 *British Yearbook*.[60] He pointed out that, prior to September 1935 (when sanctions were applied against Italy), Article 20 "was seldom mentioned". Article 103 was likewise seldom mentioned until the Council became active following the Cold War. Lauterpacht

[57] Matheson, *supra* note 17, p. 34.

[58] See M. Wood, Second of the Hersch Memorial Lauterpacht Lectures on 'The UN Security Council and International Law', 8 November 2006, §§ 35-50 (website of the Lauterpacht Centre for International Law, University of Cambridge, at http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php).

[59] *Kadi*, *supra* note 13, §§ 86-106, 263-267 and (especially) 286-288. The Court overruled the Court of First Instance on this point.

[60] H Lauterpacht, 'The Covenant as the Higher Law', Vol. 17 *B.Y.I.L.* 1936, pp. 54-65.

wrote of Article 20 that it "is a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members, whenever concluded". The same could be said of Article 103 of the Charter.

Summary - Detention During International Military Operations: Article 103 of the UN Charter and the *Al-Jedda* Case

The 2007 decision of the House of Lords in *Al-Jedda* explored two questions in depth: the attribution to the UN of the conduct of British forces in Iraq in relation to a security detainee; and whether the UK's Charter obligation to detain (imposed by a Chapter VII Security Council resolution) qualified its obligation under Article 5(1) ECHR (on deprivation of liberty). The first question involved analysis of the ECtHR's 2007 decision in *Behrami and Saramati*, which the House of Lords distinguished on the facts. The more interesting part of the decision (and of the judgments of the lower courts) was its treatment of Article 103 of the UN Charter, a key provision of the Charter. The author notes the general approach of ECtHR to the Charter in *Behrami and Saramati*, which gives primacy to the first of the Purposes of the United Nations, the maintenance of international peace and security. He concludes that the effect of Article 103 is not to invalidate the conflicting obligation, but merely to qualify it to the extent of the conflict; that Article 103 applies to obligations imposed by the Security Council; that it applies equally to action taken under authorizations of the Council; and that there are no exceptions to the obligations over which Charter obligations prevail (except possibly *jus cogens* norms).

Résumé - La détention lors d'opérations militaires internationales : l'article 103 de la Charte des Nations Unies et l'affaire *Al-Jedda*

La décision rendue en 2007 par la Chambre des Lords britannique dans l'affaire *Al-Jedda* abordait en détail les deux questions suivantes. Tout d'abord la question de savoir si le comportement des forces armées britanniques à l'égard d'une personne détenue pour des raisons de sécurité en Irak est imputable à l'ONU. Deuxièmement, la question de savoir si l'obligation du Royaume Uni de détenir des personnes, en vertu de la Charte des Nations Unies (par l'effet d'une résolution du Conseil de Sécurité prise dans le cadre du Chapitre VII de cette Charte) modifie ses obligations contractées en application de l'article 5(1) de la CEDH (concernant la privation de liberté). Dans le cadre de la première question, la Chambre des Lords procéda à une analyse de la décision de la CEDH de 2007 dans l'affaire *Behrami et Saramati*, décision qui divergeait de celle de la Chambre des Lords en raison des faits invoqués dans cette affaire. C'est toutefois la discussion de l'article 103 de la Charte de l'ONU, une disposition importante de cette Charte, qui forme la partie la plus intéressante de la décision rendue par la Cour (et des jugements des tribunaux inférieurs). L'auteur relève que l'approche générale de la Charte adoptée par la CEDH dans l'affaire *Behrami et Saramati* accorde la primauté à l'objectif premier des Nations Unies, à savoir le maintien de la paix et de la sécurité internationale. Il conclut que l'article 103 n'infirme pas une obligation incompatible, mais la modifie uniquement dans la mesure de son incompatibilité; que l'article 103

s'applique aux obligations imposées par le Conseil de Sécurité de l'ONU; qu'il est également applicable à des actions menées avec l'autorisation du Conseil de Sécurité; et que la primauté des obligations découlant de la Charte ne supporte aucune exception (sauf probablement les règles de *jus cogens*).

Samenvatting - Detentie in internationale militaire operaties: artikel 103 van het VN-Handvest en de zaak *Al-Jedda*

De uitspraak van het Britse House of Lords in 2007 in de zaak *Al-Jedda* bestudeerde uitvoerig twee vragen. Ten eerste, de toerekening aan de VN van het gedrag van Britse strijdkrachten ten aanzien van een persoon die werd vastgehouden omwille van veiligheidsredenen in Irak. Ten tweede, of de verplichting van het VK krachtens het VN-Handvest om (ingevolge een resolutie van de VN-Veiligheidsraad onder Hoofdstuk VII van dit Handvest) personen vast te houden, de verplichtingen van het VK onder artikel 5(1) EVRM (inzake vrijheidsberoving) wijzigde ("kwalificeerde"). In het kader van de eerste vraag kwam een analyse aan bod van de uitspraak van het EHRM van 2007 in *Behrami en Saramati*, dewelke het House of Lords op basis van de feiten van deze zaak onderscheidde. Het meest interessante deel van de uitspraak (en van de vonnissen van de lagere rechtbanken) was de behandeling van artikel 103 VN-Handvest, een belangrijke bepaling van dit Handvest. De auteur neemt akte van de algemene benadering van het VN-Handvest door het EHRM in *Behrami en Saramati*, die voorrang geeft aan de eerste der doelstellingen van de VN, namelijk het handhaven van internationale vrede en veiligheid. Hij besluit dat artikel 103 niet leidt tot de ongeldigheid van een tegenstrijdige verplichting, maar enkel tot het wijzigen ("kwalificeren") ervan in de mate van de tegenstrijdigheid; dat artikel 103 van toepassing is op verplichtingen opgelegd door de VN-Veiligheidsraad; dat het eveneens van toepassing is op maatregelen genomen op basis van een toestemming van de Veiligheidsraad; en dat er geen uitzonderingen zijn op de verplichtingen waarover verplichtingen krachtens het VN-Handvest primeren (behalve mogelijk regels van *ius cogens*).

Zusammenfassung - Haft in internationalen Militäreinsätze: Artikel 103 der VN-Charta und die Sache *Al-Jedda*

Das Urteil des britischen House of Lords in der Sache *Al-Jedda* aus dem Jahr 2007 hat zwei Fragen eingehend untersucht. Erstens die Zuschreibung an den VN des Benehmens der britischen Streitkräfte hinsichtlich einer wegen Sicherheitsgründe festgehalten Person in Irak. Zweitens, ob die Verpflichtung des VK kraft der VN-Charta (infolge einer Resolution des VN-Sicherheitsrats unter Kapitel VII dieser Charta) Personen festzuhalten, die Verpflichtungen des VK in Artikel 5(1) der EMRK (bezüglich der Freiheitsberaubung) geändert („qualifiziert") hat. Im Rahmen der ersten Frage kam eine Analyse des Urteils der EMRK aus dem Jahr 2007 in *Behrami* und *Saramati* an die Reihe, welche

das House of Lords auf der Grundlage der Fakten von dieser Sache unterschied. Der meist interessante Teil des Urteils (und der Urteile der niedrigeren Gerichte) stellte die Behandlung des Artikels 103, eine wichtige Bestimmung der VN-Charta, dar. Der Autor nimmt die allgemeine Betrachtungsweise der VN-Charta von der EMRK in *Behrami* und *Saramati* zur Kenntnis, welche die erste der Zielsetzungen der VN, nämlich die Handhabung der internationalen Frieden und Sicherheit, den Vorrang gibt. Er beschließt, dass der Artikel 103 nicht zur Ungültigkeit einer widersprüchlichen Verpflichtung führt, sondern nur zur Änderung („Qualifizierung") in dem Maße der Widersprüchlichkeit; dass der Artikel 103 auf die von der VN-Sicherheitsrat auferlegten Verpflichtungen anwendbar ist; dass der Artikel gleichfalls auf die aufgrund der Zustimmung des Sicherheitsrates getroffenen Maßnahmen anwendbar ist, und dass es keine Ausnahmen auf die Verpflichtungen, worüber die Verpflichtungen kraft der VN-Charta prävalieren, gibt (abgesehen von möglichen Regeln *ius cogens*).

Riassunto - La detenzione di individui per motivi di sicurezza nel corso di operazioni militari internazionali: L'articolo 103 della Carta delle Nazioni Unite e il caso *Al-Jedda*

La sentenza del 2007 dell'*House of Lords* nel caso *Al-Jedda* ha preso in esame, in maniera approfondita, due distinte ed importanti questioni di diritto internazionale. La prima concerneva l'attribuzione alle Nazioni Unite della responsabilità per la condotta delle Forze armate britanniche in Iraq. Il caso di specie, difatti, riguardava l'arresto di un individuo per ragioni di sicurezza, da parte di militari di Sua Maestà. La seconda, invece, considerava l'eventuale conflitto normativo tra le obbligazioni internazionali del Regno Unito discendenti, da un lato, da una Risoluzione del Consiglio di sicurezza adottata "ex capo VII" (che prevedeva la facoltà di procedere all'arresto di individui sospetti) e, dall'altro, dal rispetto dell'art. 5(1) della CEDU, sul diritto alla libertà personale. Alla soluzione della prima questione si è giunti mediante l'esame della recente sentenza della Corte europea dei diritti dell'uomo nei casi *Behrami* e *Saramati*, dalla quale, tuttavia, l'*House of Lords*, ha preso le distanze, in ragione dei diversi elementi di fatto alla base dei due procedimenti. Ad ogni buon conto, la parte più interessante della sentenza dell'alta corte britannica (e delle sentenze delle corti inferiori) consiste nell'esame della seconda questione, risolta sulla base del valore preminente, attribuito dai *Law Lords* all'art. 103 dello Statuto ONU. A tal riguardo, l'articolo esamina l'approccio generale adottato dalla Corte di Strasburgo in *Behrami* e *Saramati*. Tale orientamento fa prevalere la necessità del mantenimento della pace e della sicurezza internazionale – primo tra i fini delle Nazioni Unite – sugli altri obblighi internazionali degli Stati membri. Nelle conclusioni, l'autore precisa che: l'effetto dell'art. 103 non è quello di invalidare ogni obbligazione degli Stati membri in contrasto con gli obblighi imposti loro dal Consiglio di sicurezza, ma quello di qualificare le obbligazioni internazionali degli Stati avendo riguardo a quanto stabilito nelle Risoluzioni del medesimo Consiglio;

l'art. 103 si applica sia agli obblighi imposti agli Stati dal Consiglio di sicurezza, che alle azioni semplicemente autorizzate dallo stesso Consiglio; non vi sono eccezioni (escluse forse le norme di *jus cogens*) alla prevalenza accordata agli obblighi imposti dalla Carta delle Nazioni Unite sulle altre obbligazioni internazionali degli Stati.

Resumen - La detención en las operaciones militares: el artículo 103 de la Carta de las Naciones Unidas y el asunto *Al-Jedda*

La decisión tomada en 2007 por la Cámara de los Lores del Reino Unido en el asunto *Al-Jedda* examinaba detenidamente las dos cuestiones siguientes. Primeramente la cuestión si se podía imputar a la ONU el comportamiento de las Fuerzas armadas británicas en Irak con los detenidos por razones imperativas de seguridad. Luego, la cuestión si la obligación del Reino Unido de detener a personas, que resulta de la Carta de las Naciones Unidad (por efecto de una resolución del Consejo de Seguridad bajo el Capítulo VII de la Carta) modificaba las obligaciones derivadas del artículo 5(1) del CEDH (relativas a la privación de libertad). La primera cuestión nos lleva a un análisis del dictamen del TEDH (Tribunal Europeo de Derechos Humanos) en los asuntos *Behrami y Saramati* en 2007, que difiere de la Cámara de los Lores basándose en los hechos invocados en estos asuntos. La parte más interesante del dictamen del Tribunal (y de tribunales inferiores) es su interpretación del artículo 103 de la Carta de la ONU, una disposición esencial de esta Carta. El autor destaca que el enfoque general de la Carta adoptado por el TEDH en los asuntos *Behrami y Saramati*, establece la primacía del objetivo primero de las Naciones Unidas, o sea el mantenimiento de la paz y de la seguridad internacionales. Concluye que el artículo 103 no invalida una obligación conflictiva sino que simplemente la modifica en la medida de su incompatibilidad; que el artículo 103 se aplica a las obligaciones impuestas por el Consejo de Seguridad de la ONU; que se aplica también a las acciones realizadas con autorizaciones del Consejo de Seguridad; y que la primacía de las obligaciones contraídas en virtud de la Carta no admite ninguna excepción (salvo probablemente las reglas del i*us cogens*).