

## When Soering Went to Iraq....:

# Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the European Court of Human Rights' *Al-Saadoon* Case

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## Abstract

In its admissibility decision in the *Al-Saadoon* case the European Court of Human Rights (ECtHR) held that the United Kingdom had jurisdiction over the applicants, who had been arrested by British forces and kept in a British-run military prison in Iraq. Just before the respective mandate of the Security Council expired on 31 December 2008, the applicants were transferred to Iraqi custody at Iraqi request and thereby exposed to the risk of an unfair trial followed by capital punishment. In this respect, the case resembles the *Soering* case, although the applicants were, unlike *Soering*, not on British territory but on occupied Iraqi soil before they were handed over. This aspect raises the question of the relative importance of Iraqi sovereignty as a norm when in conflict with the UK's human rights obligations. The authors trace back the ECtHR's case law concerning the extraterritorial application of the Convention and continue to analyse the UK judgments and the ECtHR's admissibility decision in the *Al-Saadoon* affair in light of these cases. Furthermore they consider the doctrinal consequences of the ECHR's extraterritorial effect in cases like *Soering* and *Al-Saadoon*, where contracting parties violate guarantees of the Convention by exposing a person within their jurisdiction to a risk of a treatment contrary to these guarantees by a third state. Finally, they test the argument brought forward by the UK that not transferring the applicants would have violated Iraqi sovereignty, examining established patterns through which the ECtHR and the UK Courts have coped in the past with international law norms potentially competing with the Convention.

## A. Introduction

Almost exactly twenty years after its famous *Soering* judgment<sup>1</sup> the European Court of Human Rights (ECtHR) rendered its admissibility

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<sup>1</sup> *Soering v. United Kingdom* [GC], ECtHR (1989) Appl. No. 14038/88, Series A No. 161.

decision in the *Al-Saadoon* case.<sup>2</sup> Although the facts of the case resemble the *Soering* case, they differ in one decisive respect, raising questions about jurisdiction and the relevance of conflicts between the European Convention of Human Rights (ECHR) and other international law norms.

Soering was an 18-year old German national, who had allegedly killed his girlfriend's parents in the state of Virginia in the United States of America. After he had been arrested in the United Kingdom, the United States sought his extradition under the terms of the countries' extradition treaty. In Virginia, the death penalty could be imposed after a conviction for murder; prisoners usually spent between six and eight years on death row before their execution. Soering claimed he could face the death penalty and the death row phenomenon if he were extradited. In its judgment on the merits, the Court found that the death row phenomenon could amount to inhuman treatment.<sup>3</sup> Since the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Art. 3, the United Kingdom, extraditing Soering would violate that Article.<sup>4</sup>

Considering that treatment contrary to Art. 3 would be inflicted by the United States, a non-member state of the ECHR, it is not surprising that this judgment was widely considered a watershed in the jurisprudence of the ECtHR.<sup>5</sup> Meanwhile the Court has confirmed and refined its reasoning repeatedly and extended it to the context of expulsion.<sup>6</sup> Today it is

<sup>2</sup> *Al-Saadoon and Mufdhi v. United Kingdom* (dec.), ECtHR (30 June 2009), Appl. No. 61498/08.

<sup>3</sup> *Id.*, para. 111; reaffirmed in *Poltoratskiy v. Ukraine*, ECtHR (2005), Appl. No. 38812/97, ECHR Rep 2003-V paras 133, 145.

<sup>4</sup> *Soering* [GC], *supra* note 1, para. 111.

<sup>5</sup> Admittedly, the European Commission of Human Rights had already, before *Soering*, held that a person's deportation or extradition may give rise to an issue under Art. 3 of the Convention where there were serious reasons to believe that the individual would be subjected, in the receiving State, to treatment contrary to that Article. See *Soering v. United Kingdom* Appl. No. 14038/88, EComHR (1989), DR°58, 230, para. 94; *Altun v. the Federal Republic of Germany*, Appl. No. 10308/83, EComHR (1983), DR 36, 209; *M. v. France*, Appl. No. 10078/82, EComHR (1984), DR 41, 103; *Kirkwood v. the United Kingdom*, Appl. No. 10479/83, EComHR (1984), DR 37, 158.

<sup>6</sup> *Cruz Varas and others v. Sweden* [GC], ECtHR (1991) Appl. No. 15576/89, ECHR (1991) Series A No. 201; *Chahal v. United Kingdom* [GC], ECtHR(1996) Appl. No. 22414/93, ECHR Rep. 1996-V; *Jabari v. Turkey*, (ECtHR 2000) Appl. No. 40035/98, ECHR Rep. 2000-VIII; *Hilal v. United Kingdom*, ECtHR (2001), Appl. No. 45276/99, ECHR 2001-II; *Ismoilov and others v. Russia*, ECtHR (2006), Application No. 2947/06; most recently confirmed in *Kaboulov v. Ukraine*, ECtHR

established case law that a party to the ECHR exposing a person to the likelihood of ill treatment in a place outside its jurisdiction may violate Art. 3.

Simplifying the facts of the *Al-Saadoon* case, they may be grasped by imagining Soering to be arrested and detained not in the United Kingdom but in occupied Iraq (B.). Accordingly, the *Al-Saadoon* decision (C.) gave the Court a new opportunity to express itself on the extraterritorial application of the ECHR (D. I.). Its jurisprudence on this matter has not been without contradictions in the past. This article will analyse relevant case law and seek to reconcile it to some extent (D. I. 1.). The legal uncertainty surrounding this issue will be illustrated by contrasting the reasoning of the High Court of Justice and the Court of Appeal of England and Wales when applying the Human Rights Act in the case of *Al-Saadoon* (D. I. 2.). When discussing the admissibility decision of the ECtHR, it will be argued that the Court in *Al-Saadoon* has further developed its case law, following a trend to shift the determination of jurisdiction from legal to factual criteria (D. I. 3.) As to the merits of the case, which have not been decided yet, it is submitted that the *Soering* principle applies to *Al-Saadoon* as well. Therefore, the Court's previous jurisprudence on this issue will be analysed, thus speculating whether the Court is likely to follow the applicants' arguments concerning a violation of the substantive rights of the Convention (E). Lastly the issue of conflicts between the ECHR and other rules of public international law will be discussed (F). The possible conflicting norms of public international law will be mapped (F. II.), and different methods of coping with norm conflicts will be described as used in the past by the Strasbourg organs as well as the British Courts when applying the ECHR or the Human Rights Act, respectively (F. III.).

## B. The Background to the *Al-Saadoon* Case

The *Al-Saadoon* case concerns a complaint by two Iraqi nationals arrested by British forces shortly after the invasion of Iraq in March 2003. They claimed that the British authorities in Iraq had transferred them to

(19.09.2009) Appl. No. 41015/04. The Court has further expanded the Soering-principle to claims of ill treatment not only at the hands of public authorities, but also by private groups and individual. See *H.L.R. v. France* [GC], ECtHR (1997) Appl. No. 24573/94, Rep. 1997-III (ill treatment by private drug traffickers), *Ahmed v. Austria*, ECtHR (1996) Appl. No. 25964/94, ECHR Rep. 1996-VI (warring clans in a civil war situation).

Iraqi custody, thus putting them at real risk of an unfair trial to be followed by execution by hanging.

The British authorities in occupied Iraq formed part of the so-called Multi-National Force (MNF) led by the United States of America. After major combat operations of the invasion had ended, the Coalition Provisional Authority (CPA) was created as a caretaker administration until an Iraqi government could be established. In July 2003 the Governing Council of Iraq was formed and the CPA assumed a consultative role. An order of the CPA stipulated that, for the duration of the order, MNF premises on Iraqi territory were to remain inviolable and subject to the exclusive control and authority of the MNF. The following day full authority was transferred from the CPA to the interim government. Thereafter the MNF, including the British contingent, remained in Iraq pursuant to requests by the Iraqi government and authorisation from the UN Security Council. In November 2004, the United Kingdom and Iraqi authorities entered into a Memorandum of Understanding (MoU). It stipulated, *inter alia*, that the interim Iraqi Government had legal authority over all criminal suspects in the physical custody of the British contingent. The MNF's UN mandate to remain in Iraq expired on 31 December 2008.

Suspected of being senior members of the Ba'ath Party under the former regime, of orchestrating violence against the coalition forces and of being involved in the killing of two British soldiers by Iraqi militia forces, the applicants had been arrested by British forces following the invasion of Iraq and detained in British-run detention facilities. In December 2005, the British authorities had formally referred the murder case against them to the Iraqi criminal courts. In May 2006, an arrest warrant was issued against them under the Iraqi Penal Code and an order was issued which authorised their continued detention by the British Army. Their cases were then transferred to Basra Criminal Court, which had decided that the allegations against the applicants constituted war crimes subject to trial by the Iraqi High Tribunal (IHT), a court set up under Iraqi national law with the power to impose the death penalty. The UK Government had not been able to obtain an assurance from the Iraq authorities that the death penalty would not be imposed.<sup>7</sup> The IHT had repeatedly requested the British forces to transfer the applicants into its custody. The applicants, in turn, had unsuccessfully sought judicial review of the proposed transfer before British

<sup>7</sup> *Al-Saadoon, supra* note 2, paras 47, 96, 102.

Courts.<sup>8</sup> Precisely on 31 December 2008, before the UN Mandate expired, the applicants were transferred to Iraqi custody contrary to a provisional measures order issued by the ECtHR on the same day.

### C. The ECtHR's Admissibility Decision

The applicants submitted to the ECtHR that their transfer to Iraqi custody breached their rights under Art. 2 (right to life), 3 (prohibition of torture), 6 (right to a fair trial) and 34 ECHR (individual application) and Art. 1 of Protocol No. 13 (abolition of the death penalty). Additionally they alleged that the transfer was in violation of Art. 13 (right to an effective remedy) and Art. 34 ECHR since transfer was contrary to an interim measure of the ECtHR issued under Rule 39 of the Rules of the Court.

The UK Government disputed that the case fell within the Convention's territorial scope under Art. 1. Relying on the ECtHR's *Banković* decision,<sup>9</sup> they argued that the Convention was not to be applied extraterritorially other than in exceptional cases. The mere exercise of military force against an individual was not one of those exceptional cases. Where a state was present in the territory of another sovereign state over which it did not exercise effective control, jurisdiction could only be established in accordance with international law, i.e. with the host state's consent, invitation or acquiescence. In any event, such a basis ceased to exist after the UN mandate had expired on 31 December 2008. At that moment, the UK was obliged under public international law to surrender the applicants. The Convention could not be interpreted to require a contracting state to resist, by military force if necessary, the lawful demands of the police or other officials of a non-contracting state acting on its own territory.

<sup>8</sup> *R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2008] EWHC 3098; *R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence* [2009] EWCA Civ 7; for both decisions cf. M. Cross & S. Williams, 'Between The Devil And The Deep Blue Sea: Conflicted Thinking In The *Al-Saadoon* Affair', 58 *International and Comparative Law Quarterly* (2009) 3, 689-702; C. Romainville, 'Contentieux Irakien et Extra-territorialité: De la nécessité de dépasser *Bankovic*', 80 *Revue Trimestrielle des Droits de l'Homme* (2009), 1007-1036. It can be added that, on 9 September 2009, charges against the applicants were dismissed by the IHT on grounds of "insufficient evidence to support the crime" (reported by N. Bhuta, 'Conflicting International Obligations and the Risk of Torture and Unfair Trial', 7 *Journal of International Criminal Justice* (2009) 5, 1133, 1147).

<sup>9</sup> *Banković and others v. Belgium and 16 other contracting states* [GC] (dec.) ECtHR (2001), Appl. No. 52207/99, ECHR 2001-XII.



Therefore, according to the government, the case was to be declared inadmissible in the first place.<sup>10</sup> Alternatively, they argued that there were no substantial grounds for believing that the applicants would face the death penalty. Also, no flagrant denial of a fair trial before the IHT was to be expected which could give rise to a violation of Arts 2 and 3 if followed by an execution. Their last argument again concerned their obligations under general international law. Since the death penalty was not contrary to international law, a refusal to surrender the applicants could not be justified. Rather, if they had released the applicants, or had given them safe passage to another part of Iraq, a third country or the United Kingdom, they would have violated Iraqi sovereignty and, moreover, would have impeded the Iraqi authorities' ability to carry out their obligations under international law to bring alleged war criminals to justice.<sup>11</sup> Similarly, they tried to justify their breach of the ECtHR's interim measure by referring to their obligations under international law. They maintained that an indication under Rule 39 of the Rules of the Court could not require a contracting state to violate the law and sovereignty of a non-contracting state.<sup>12</sup>

A Chamber of the Court declared the case admissible in part on 30 June 2009. As to the extraterritorial application of the Convention, the Court recalled that the United Kingdom initially exercised *de facto* control over the detained applicants as a result of the use or threat of military force. Moreover UK's *de facto* control over the premises was subsequently reflected in law, particularly by the CPA order stipulating the inviolability of the MNF premises on Iraqi territory and the MNF's exclusive control and authority over them. The Court thus came to the conclusion that the applicants were within the United Kingdom's jurisdiction.<sup>13</sup> As to the alleged violations of the substantive rights, the Court declared part of the complaints inadmissible: The applicants had not exhausted domestic remedies with regard to the alleged violations of Arts 2 and 3 concerning the conditions of the detention and the risk of ill treatment in the Iraqi prison in which they were detained.<sup>14</sup> The other complaints concerning the alleged risks attendant on trial, conviction and sentencing by the IHT were declared admissible, however, and notably not manifestly ill-founded (Art. 35

<sup>10</sup> *Al-Saadoon*, *supra* note 2, paras 75-81.

<sup>11</sup> *Id.*, paras 102-107.

<sup>12</sup> *Id.*, paras 114-117.

<sup>13</sup> *Id.*, para. 87-88.

<sup>14</sup> *Id.*, para. 93.

para. 3).<sup>15</sup> Finally the Court stated that the alleged violations of Arts 13 and 34 concerning the breach of the interim measure were also to be examined on the merits.<sup>16</sup>

## D. Jurisdiction Issues: Extraterritorial Application of the Convention

The central question addressed in the *Al-Saadoon* admissibility decision was whether the requirements under Art. 1 concerning the territorial scope of the Convention were met. Art. 1 ECHR states: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.

Unlike *Soering* the applicants in *Al-Saadoon* were detained not on British territory but on Iraqi soil. The question therefore arises whether the Convention applies *ratione loci*. The answer depends on the meaning of the terms “within their jurisdiction” in Art. 1. In absence of a definition of the term in the Convention it is up to the Court to decide about the precise content of Art. 1.<sup>17</sup>

### I. Previous Case Law – Far from Consistent

#### 1. Early Approaches

In their early case law, both the European Commission of Human Rights (EComHR) and the ECtHR were very generous when considering the extraterritorial application of the Convention. The EComHR held that the term “within their jurisdiction” was not “equivalent to or limited to the national territory of the High Contracting Party concerned”. Based on the wording, in particular of the French text, and the object of Art. 1, as well as on the purpose of the Convention as a whole, the Commission repeatedly stipulated that the contracting parties were bound to secure the rights and freedoms of the Convention “to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory

<sup>15</sup> *Id.*, para. 110.

<sup>16</sup> *Id.*, para. 120.

<sup>17</sup> Art. 32 of the Convention defines the jurisdiction of the Court as encompassing “all matters concerning the interpretation and application of the Convention”.

or abroad”.<sup>18</sup> Thus for the Commission a state’s jurisdiction was not only not limited to its territory but rather depended on the exercise of “actual authority”, a factual determinant. The Court followed this approach in *Drozd and Janousek*, a case which concerned the responsibility of France and Spain for criminal convictions by an Andorran Court equipped with French and Spanish judges. Here it stated that responsibility under the Convention could be involved “because of acts of their authorities producing effects outside their own territory”.<sup>19</sup>

## 2. Cases against Turkey Regarding Northern Cyprus: The Concept of “Effective Overall Control”

In subsequent years the Court upheld its assumption that the territorial scope of the Convention was not limited to the national territory of its parties *a priori*.<sup>20</sup> In the *Loizidou* case,<sup>21</sup> which concerned the consequences of the Turkish intervention in Cyprus in July 1974 and its subsequent occupation of the northern part of the island ever since, the Grand Chamber recalled in its decisions on both the preliminary objections and the merits that the concept of ‘jurisdiction’ under Art. 1 was not restricted to the national territory of the contracting parties as a matter of principle.<sup>22</sup> In the merits judgment, the Court stated that the responsibility of a contracting

<sup>18</sup> *Cyprus v. Turkey*, EComHR, Appl. Nos 6780/74 and 6950/75, EComHR Plenary (1975), DR 2, 125, 136; see also *Hess v. United Kingdom*, EComHR, Appl. No. 6231/73, EComHR Plenary (1975) DR 2, 72 (73); *X and Y v. Switzerland*, EComHR, Appl. Nos 7289/75 and 7349/76, EComHR Plenary (1977) DR 9, 57 (71); *Stocké v. Germany*, EComHR, Appl. No. 1755/85, EComHR Plenary (1989) Series A No. 1999, para. 166.

<sup>19</sup> *Drozd and Janousek v. France and Spain* [GC], ECtHR (1992), Appl. No. 12747/87, Series A, No. 240, para. 91. In this way the Court based the Convention’s application *ratione loci* on the concept of attribution, which is actually related to the application *ratione personae*. See on this issue: M. Milanović, ‘From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties’, 8 *Human Rights Law Review* (2008) 3, 411, 436-46.

<sup>20</sup> Accordingly, older textbooks on the ECHR teach that Art. 1 does not contain any territorial limitation; see J. G. Merrills & A. H. Robertson, *Human Rights in Europe*, 4th ed. (2001), 27-8; A. Carrillo Salcedo, ‘Article 1’, in L.-E. Pettiti *et. al.* (ed.), *La Convention Européenne des Droits de l’homme*, 2nd ed. (1999), 135, 137.

<sup>21</sup> *Loizidou v. Turkey* [GC] (Preliminary Objections), ECtHR (1995), App. No. 15318/89, Series A No. 310; *Loizidou v. Turkey* (Merits) [GC], ECtHR, App. No. 15318/89, ECHR, Rep. 1996-VI.

<sup>22</sup> *Loizidou* (Preliminary Objections) [GC], *supra* note 21, para. 62; *Loizidou* (Merits) [GC], *supra* note 21, para. 52.

party might also arise when, as a consequence of military action, whether lawful or unlawful, it exercises “effective control of an area” outside its national territory. It derived the obligation to secure the rights and freedoms set out in the Convention in such an area from the fact of such control, whether it is exercised directly, through its armed forces, or through a subordinate local administration.<sup>23</sup> The Court found it not even necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the Turkish Republic of Northern Cyprus because it was obvious from the large number of troops engaged in active duties in northern Cyprus that Turkey’s army exercised effective overall control over that part of the island.”<sup>24</sup> The Grand Chamber confirmed this jurisprudence in 2001 in the case *Cyprus v. Turkey*.<sup>25</sup> Additionally, another – new – aspect played a role in the Court’s reasoning, namely the “special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings”.<sup>26</sup> Considering that Cyprus was a party to the Convention but unable to secure the rights under the Convention in its northern part, the Court concluded that “any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question.”<sup>27</sup>

In summary, according to case law until the judgment in *Cyprus v. Turkey*, Art. 1 was in principle not restricted to the contracting state parties’

<sup>23</sup> *Loizidou* (Preliminary Objections) [GC], *supra* note 21, para. 62; *Loizidou* (Merits) [GC], *supra* note 21, para. 52.

<sup>24</sup> *Loizidou* (Merits) [GC], *supra* note 21, para. 56. Although the Court discussed the question of the Convention’s application *ratione loci* under the heading “the imputability issue” (*Loizidou* (Preliminary Objections) [GC], *supra* note 21, para. 49), it did not determine whether the concrete incriminating act (the negation of the applicant’s property rights) was attributable to Turkey, but introduced the criterion of “effective control of an area” in order to attribute all acts in northern Cyprus to Turkey.

<sup>25</sup> *Cyprus v. Turkey* [GC], ECtHR, Appl. No. 25781/94, ECHR 2001-IV, para. 77.

<sup>26</sup> *Id.*, para. 78 (emphasis in the original).

<sup>27</sup> *Id.* This reasoning is somewhat similar to the Human Rights Committee’s approach to the rights of the ICCPR: “The rights enshrined in the Covenant belong to the people living in the territory of the State party. [...] once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant, See HRC, *General Comment No. 26*, CCPR/C/21/Rev.1/Add.8/Rev.1, para. 4.

territory. When deciding on the Convention's application *ratione loci* for a whole area it relied on the criterion of "effective overall control", however it was not clear whether this applied only to cases in which a vacuum of protection would arise, i.e. on the territories of members of the Council of Europe.

### 3. *Banković*: The General Public International Law Concept of Jurisdiction

The assumption that the application of the Convention is in principle geographically unrestricted was overturned in the *Banković* case,<sup>28</sup> which concerned an application made by persons injured and on behalf of persons killed as a consequence of air strikes carried out by NATO countries in Belgrade in 1999. The Grand Chamber conducted a very thorough analysis of the meaning of Art. 1, drawing on the customary law rules contained in the Vienna Convention on the Law of Treaties (VCLT)<sup>29</sup> and thus referring to the ordinary meaning (Art. 31 para. 1 VCLT) of 'jurisdiction' in public international law, to state practice under the Convention (Art. 31 para. 3 lit. c VCLT) and to the Convention's *travaux préparatoires* (Art. 32 VCLT). It concluded that Art. 1 ECHR must be considered to reflect an essentially territorial notion of jurisdiction, and that other bases of jurisdiction, including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality, are exceptional requiring special justification in the particular circumstances of each case.<sup>30</sup> Thus, *Banković* can be considered to be a turning point in the Court's jurisprudence on Art. 1<sup>31</sup>, introducing a strong presumption of territoriality of the ECHR by trying to harmonise the Convention with general international law.

<sup>28</sup> *Banković* [GC], *supra* note 9.

<sup>29</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331.

<sup>30</sup> *Banković* [GC], *supra* note 9, paras 59-61.

<sup>31</sup> Accordingly authors use the term "pre-", respectively "post- *Banković* case law", see M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction', in F. Coomans & M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), 125, 136; M. Gondek, 'Extraterritorial Application of the European Convention on Human Rights', 52 *Netherlands International Law Review* (2005) 349, 357; Milanović, *supra* note 19, 423; Likewise the House of Lords described *Banković* as a "watershed", see *R (Al-Skeini) v. Secretary of State for Defence (Redress Trust intervening)* [2007] UKHL 26, [2008] 1 AC 153, para. 108 (*per* Lord Brown).

The *Banković* decision was widely attacked from various angles.<sup>32</sup> The main objection of many commentators concerns the Court's premise that the term 'jurisdiction' is to be understood in accordance with general international law. Some commentators argued that this was a misunderstanding which resulted from the Court's disregard of its usual interpretative doctrine of the Convention as a living instrument and its reliance on the interpretative rules of the VCLT, the latter being construed to preserve the sovereignty of the state parties- a consideration misplaced when interpreting a human rights treaty.<sup>33</sup> Others found the VCLT applicable in principle but criticised the Court for overemphasising the ordinary meaning rule and not sufficiently taking into account object and purpose of Art. 1 and the Convention as a whole (Art. 31 para. 1 VCLT).<sup>34</sup> A very valid critique concerned the Court's understanding of the ordinary meaning of the term 'jurisdiction' under general international law. It was pointed out that the term 'jurisdiction' was to be understood differently in different contexts of general international law. For example, it may be used with respect to the competence of a court, the domains of states in which they can act freely without outside interference (*domaine réservé*) or the

<sup>32</sup> The most crushing critique comes from Lawson who was one of the applicants' legal advisers in the *Banković* case, summarizing the judgment as "The Court got it all wrong", see R. Lawson, 'Life after Bankovic: On the extraterritorial application of the European Convention on Human Rights', in Coomans & Kamminga (eds), *supra* note 31, 83, 85. Agreeing with Lawson's statement: L. Loucaides, 'Determining the Extraterritorial Effect of the European Convention', 4 *European Human Rights Law Review* (2006), 391, 400. For a positive critique see: G. Ress, 'State Responsibility for Extraterritorial Human Rights Violations: The Case Bankovic' 6 *Zeitschrift für Europarechtliche Studien* (2003) 1, 73-89.

<sup>33</sup> M. Breuer, 'Völkerrechtliche Implikationen des Falles Öcalan', 30 *Europäische Grundrechte-Zeitschrift* (2003), 449, 450. Compare the Courts rather thin considerations on this point in paras 64-5 of *Banković* [GC], *supra* note 9: "It is true that the notion of the Convention being a living instrument to be interpreted in light of present-day conditions is firmly rooted in the Court's case-law. [...] However, the scope of Art. 1, at issue in the present case, is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection."

<sup>34</sup> Gondek, *supra* note 31, 360-3; B. Schäfer, 'Der Fall Banković oder Wie eine Lücke geschaffen wurde', 5 *MenschenRechtsMagazin* (2002) 3, 149, 156; K. Altiparmak, 'Bankovic: An obstacle to the application of the European Convention on Human Rights in Iraq?', 9 *Journal of Conflict & Security Law* (2004), 213, 223, 226-227; Romainville, *supra* note 8, 1022.

delimitation rules of the municipal legal orders of states.<sup>35</sup> The Court seems to have relied on the latter understanding of ‘jurisdiction’, thus conferring a concept which is used to determine the legality of the use of state power on a provision determining the applicability of a human rights treaty. If one took the Court at its word, the absurdity would arise that a person whose rights are affected extraterritorially by an *ultra vires* state action would be at a disadvantage in comparison to a person affected by legal state action.<sup>36</sup> Alternatively, it was widely proposed that ‘jurisdiction’ in the context of Art. 1 should be determined by factual criteria – whether state power is actually used or not – and not by legal criteria.<sup>37</sup> Such an understanding of ‘jurisdiction’ would not be contrary to international law. It might not reflect the term ‘jurisdiction’ in international law when delimiting municipal spheres but it would reflect the understanding of ‘jurisdiction’ as applied by other human rights treaty bodies.<sup>38</sup>

But even if the Court’s premise is incorrect – and the unanimous Grand Chamber ruling therefore highly vulnerable from a doctrinal point of view – the *Banković* ruling is still not a lost cause. In a move mostly overlooked by commentators, the Court, acknowledging that other bases of jurisdiction exist although they might be “exceptional and requiring special justification in the particular circumstances of each case”,<sup>39</sup> gave itself an opening and – as will be shown – took advantage of that opening in its later case law. It seized the opportunity to summarise previous cases in which it had affirmed the Convention’s application *ratione loci* outside a state’s territory and established three categories of accepted exceptions to the territoriality of the Convention. First, it referred to the factual matrix in *Drozd and Janousek* where the Court accepted that the responsibility of

<sup>35</sup> Milanović, *supra* note 19, 426 *et passim*; compare also M. Jankowska-Gilberg, *Extraterritorialität der Menschenrechte* (2008), 25-31.

<sup>36</sup> Gondek, *supra* note 31, 364; Romainville, *supra* note 8, 1021.

<sup>37</sup> Schäfer, *supra* note 34, 156, 160; Breuer, *supra* note 33, 450; Altiparmak, *supra* note 34, 229, 241; Loucaides, *supra* note 32, 399; Milanović, *supra* note 19, 417 *et passim*; Jankowska-Gilberg, *supra* note 35, 140-143. C. O. Judge Loucaides, *Assanidze v. Georgia* [GC] ECtHR, Appl. No. 71503/01, ECHR 2004-II. Agreeing with the Court: M. P. Pedersen, ‘Territorial Jurisdiction in Article 1 of the European Convention on Human Rights’, 73 *Nordic Journal of International Law* (2004), 279, in particular 301.

<sup>38</sup> For an overview of the understanding of ‘jurisdiction’ in other human rights treaties see Gondek, *supra* note 31, 378-381; and more thoroughly: M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009).

<sup>39</sup> *Banković* [GC], *supra* note 9, para. 61.

contracting parties could, in principle, be engaged because of acts of their authorities that produced effects or were performed outside their own territory.<sup>40</sup> Secondly, it cited the factual matrices of the cases against Turkey, where as a consequence of military action it exercised “effective control” of an area outside its national territory,<sup>41</sup> adding that the state party which had “effective control” of the relevant territory and its inhabitants abroad had to exercise “all or some of the *public powers normally to be exercised by that Government*.”<sup>42</sup> Finally, it identified those situations in which customary international law and treaty provisions recognise the extraterritorial exercise of jurisdiction by the relevant state, such as activities of diplomatic or consular agents abroad and incidents on board aircrafts or vessels registered in, or flying the flag of, that state.<sup>43</sup>

These examples are all more or less in line with the reach of jurisdiction under public international law as the Court understands it. This is fairly obvious with regard to situations in which extraterritorial jurisdiction is accepted by customary international law and also where the government consented, invited or acquiesced in the foreign state’s jurisdiction over its territory. Additionally, in cases of military occupation, Art. 43 of the Hague Regulations<sup>44</sup> and Arts 47-78 of the Fourth Geneva Convention<sup>45</sup> allow for the exercise of certain powers by an occupying state, occupation being defined as territory “actually placed *under the authority* of

<sup>40</sup> *Id.*, para. 69. This example is rather ill-chosen given the fact that the case stems from a phase where the Court seemed to consider jurisdiction *ratione loci* and *ratione personae* as alternative concepts to establish the application of the Convention. In the concrete case, Spanish and French jurisdiction, as understood by the Court in *Banković* did in fact exist though, since the judges operated in Andorra with the consent of the country. Still the Court did neither rely on this aspect then, nor when interpreting it in its *Banković* judgment.

<sup>41</sup> *Id.*, para. 70.

<sup>42</sup> *Id.*, para. 71 (emphasis added); see on this add-on: Lawson, *supra* note 32, 111; B. Miltner, ‘Extraterritorial Jurisdiction under the European Convention on Human Rights: An Expansion under *Issak v. Turkey*’, *European Human Rights Law Review* (2006), 172, 176.

<sup>43</sup> *Banković* [GC], *supra* note 9, para. 73.

<sup>44</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, Martens, NRG (3e série), vol. 3, 461.

<sup>45</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 U.N.T.S. 287.



the hostile army “ in Art. 42 of the Hague Regulations.<sup>46</sup> Arts 42 and 43 of the Hague Regulations make it clear that it is a question of fact whether the law of occupation is applicable,<sup>47</sup> thus resembling the notion of effective control, which also solely relies on factual criteria.<sup>48</sup>

This can be read as the Court requiring that exceptions to the territoriality of jurisdiction need to mirror the exceptions under public international law, although it did not explicitly say so anywhere in the judgment. This concept of congruence between general public international law and Art. 1 only establishes the presumption that jurisdiction is supposed to be primarily territorial. Exceptions are supposed to require “special justification”; they do not necessarily need to be accepted under general public international law as well. In addition, the Court did not say that the given enumeration was exclusive.<sup>49</sup>

In the case at hand, the Court was unable to subsume the NATO bombing under one of the recognised exceptions and also refused to come up with a new exception, instead concluding that there was no “jurisdictional link between the persons who were victims of the act complained of and the respondent States”.<sup>50</sup> It further noted that the Federal Republic of Yugoslavia was not a party to the Convention and hence rejected the argument based on the legal vacuum to be feared if jurisdiction

<sup>46</sup> Emphasis added. For the status of the 1907 Hague Regulations as customary international law see *Case of Major War Criminals*, International Military Tribunal at Nuremberg, Judgment of 1 October 1946, Official Documents, vol. I, 253-254; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 256, paras 75, 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 172, para. 89.

<sup>47</sup> Cf. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, ICJ, 47 ILM (2006), 271, 310, para. 173; R. Kolb & S. Vité, *Le droit de l'occupation militaire* (2009), 150-156; Y. Dinstein, *The International Law of Belligerent Occupation* (2009), 42-45.

<sup>48</sup> “Exercise of authority” is understood by some commentators of the Hague Regulations as existing “whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy”, thus resembling the *Louizidou* criterion of “effective overall control”, whereas others require that a party in a conflict is “in a position to substitute its own authority for that of the government of the territory”, reflecting the *Banković* approach referring to “public powers normally to be exercised by that Government”, see R. Wilde, ‘Triggering State Obligations extraterritorially: The Spatial Test in certain human rights treaties’, 40 *Israel Law Review* (2007), 503, 511, with references.

<sup>49</sup> Cf. Ress, *supra* note 32, 84; Gondek, *supra* note 31, 371, 373;

<sup>50</sup> *Banković* [GC], *supra* note 9, para. 82.

of the respondent states was denied (*per Cyprus v. Turkey*). The Convention was only to operate within the “legal space (*espace juridique*) of the Contracting States”.<sup>51</sup> Additionally, it rejected the applicants’ argument that the positive obligation under Art. 1 extended to securing the Convention rights in a manner proportionate to the level of control exercised in any given extraterritorial situation.<sup>52</sup> The Court was of the opinion that the applicants’ submission was tantamount to arguing that anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that state for the purpose of Art. 1 of the Convention.<sup>53</sup>

It follows from this that the Court in *Banković* not only turned around the assumption that the Convention also applies extraterritorially but also restricted its “effective control over an area”-doctrine in such a way that control needs to be comparable to public powers normally exercised by a government. Furthermore it rejected the idea that the contracting states might have limited obligations under the convention according to the exercised level of control, thereby strictly separating between jurisdiction *ratione loci* and *ratione personae*. Lastly, it limited the Convention’s applicability to its *espace juridique*, in other words only on the territories of the Member states of the Council of Europe,<sup>54</sup> although different readings were also proposed.<sup>55</sup>

<sup>51</sup> *Id.*, para. 80.

<sup>52</sup> *Id.*, para. 85; Compare Lawson, *supra* note 32, 105, who submits that this “gradual” approach had always been implicit in the Strasbourg case law.

<sup>53</sup> *Banković* [GC], *supra* note 9, para. 85.

<sup>54</sup> Schäfer, *supra* note 34, 158 (with a subsequent critique); Ress, *supra* note 32, 84-85; R. Nigro, ‘Giurisdizione e obblighi positivi degli stati parti della Convenzione Europea dei Diritti dell’uomo: Il caso Ilascu’, 88 *Rivista di diritto internazionale* (2005), 413, 422-423; Loucaides, *supra* note 32, 398 (also with a subsequent critique); J. P. Costa, L’état, le territoire et la Convention Européenne des Droits de l’Homme, in: M. Kohen (ed.), *La Promotion de la Justice, des Droits de l’Homme et du Reglement: Liber Amicorum Lucius Caflisch* (2007), 179, 195; C. Droege, ‘Elective affinities? Human rights and humanitarian law’, 90 *International Review of the Red Cross* (2008) 871, 501, 515.

<sup>55</sup> Compare Lawson, *supra* note 32, 114; R. Wilde, ‘The “Legal” Space or “Espace Juridique” of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?’, 10 *European Human Rights Law Review* (2005), 115-124; T. Thienel, ‘The Judgment of the House of Lords in *R (Al Skeini) v. Secretary of State for Defence*, 6 *Journal of International Criminal Justice* (2008) 115, 119-20,

#### 4. *Öcalan*: The Concept of Control and Authority over a Person beyond State Territory

In the *Öcalan* case,<sup>56</sup> the applicant, the former leader of the Workers' Party of Kurdistan (PKK), sought refuge in several countries after Turkey had accused him of terrorism and Interpol had issued a wanted notice ("red notice"). He was eventually arrested inside an aircraft in the international zone of Nairobi Airport by members of the Turkish security forces, supposedly acting in cooperation with the Kenyan authorities, and forcibly brought back to Turkey. The Chamber only touched upon the question of the extraterritorial application: "Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the 'jurisdiction' of that State for the purposes of Art. 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory." The Court considered that the circumstances of the case were distinguishable from those in *Banković*, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey.<sup>57</sup> The Grand Chamber confirmed this finding in even shorter terms.<sup>58</sup>

This ruling is consistent with the jurisprudence of the EComHR which repeatedly affirmed the application of the Convention *ratione loci* when authorities of a contracting party had arrested an individual on the territory of a non-contracting party in cooperation with the latter.<sup>59</sup> Whether it also fits in with the *Banković* case depends on one's reading of the latter. What can safely be said is that the Court did not apply any of the exceptions mentioned in *Banković* to the facts of *Öcalan*:<sup>60</sup> This is immediately plausible with regard to *Louizidou*, because the Turkish agents did not have effective control over the Kenyan territory and acted in cooperation with the Kenyan authorities. Also the Court did not base its reasoning on any form of

*inter alia* suggesting that the Court was only pointing out that the applicant's argument concerning the Cyprus judgment were misconceived in the case at hand.

<sup>56</sup> *Öcalan v. Turkey* [GC], ECtHR (2003), Appl. No. 46221/99, ECtHR (2003) and [GC], ECHR 2005-IV.

<sup>57</sup> *Id.*, para. 93.

<sup>58</sup> *Id.*, para. 91.

<sup>59</sup> *Freda v. Italy*, EComHR Plenary (1980), DR 21, 254 and *Sánchez Ramirez v. France*, EComHR Plenary (1996), DR 86-B, 155.

<sup>60</sup> In spite of this the Grand Chamber was of the opinion that its judgment confirmed *Banković* "by converse implications", which points to the direction that it found one of the exceptions applicable.

extraterritorial jurisdiction as recognised under customary international law.<sup>61</sup> Moreover it only examined the question whether the arrest of Öcalan was legal with regard to the merits and not to the admissibility. This allows for the presumption that the consent or acquiescence of Kenya which allowed Turkey to exercise its enforcement jurisdiction was immaterial for the question of whether the scenario fell within Turkey's jurisdiction according to Art. 1.<sup>62</sup> Instead, the Court found it decisive that the applicant was subject to the "authority and control" of the Turkish agents.<sup>63</sup>

Arguably, the Court has developed two approaches towards jurisdiction through factual control.<sup>64</sup> First, jurisdiction can exist when a state exercises "effective control" over foreign territory as foreseen by the law of occupation. Here the Court requires an abstract impact on all circumstances of daily life in a certain territory which is only conceivable on the basis of a state-like apparatus fulfilling governmental functions.<sup>65</sup> Furthermore, this kind of extraterritorial jurisdiction seems to be restricted to the *espace juridique* of the Convention, thus limited to the territories of other contracting parties momentarily unable to fulfil their obligations under the Convention. Second, there is a different approach to situations in which a contracting party has "authority and control" over a person. Here jurisdiction exceptionally exists on an individual basis, superimposing the spatial jurisdiction of a contracting state over the territory of the host state only in relation to one specific person (or presumably to a group of specific persons).<sup>66</sup> Since the jurisdiction of the host state still exists, no vacuum needs to be filled; thus the requirement that the host state has to be a party to the Convention as well does not apply here. This kind of jurisdiction, however, is not reflected in general international law defining the legality of state power.

<sup>61</sup> See Breuer, *supra* note 33, 451.

<sup>62</sup> Gondek, *supra* note 31, 374; F. Rosenfeld, *Die humanitäre Besatzung* (2009), 117. For a different reading: Pedersen, *supra* note 31 (it's note 37), 299.

<sup>63</sup> An examination whether the exception of *Drozdz and Januszek* applied is omitted, see *supra* note 40.

<sup>64</sup> Similarly already with regard to the Strasbourg organs' case law prior to *Öcalan*: Miltner, *supra* note 42, 173-175; compare also F. Sperotto, 'Beyond Bankovic: Extraterritorial Application of the European Convention on Human Rights, 14 *East European Human Rights Review* (2008), 25, 39.

<sup>65</sup> T. Meerpohl, *Individualsanktionen des Sicherheitsrates der Vereinten Nationen* (2008), 209.

<sup>66</sup> *Id.*, 210.

The *Öcalan* judgment was often understood as a correction of the *Banković* decision turning away from normative towards factual criteria.<sup>67</sup> It has been shown, though, that *Banković* can also be read in a way that allows for exceptions to the territoriality of jurisdiction independent of their consistency with general international law. According to this reading, *Öcalan* would be perfectly in line with *Banković*. Be that as it may, when contrasted with *Banković* the *Öcalan* judgment has one rather awkward consequence: When arresting somebody outside its own territory (and then possibly killing this person), the contracting party must abide to the Convention; when dropping bombs on another territory and thereby killing people it does not.<sup>68</sup>

### 5. *Ilaşcu*: Combining the Court's Previous Case Law

The Court's ruling in *Banković* and *Öcalan* on the Convention's extraterritorial application was confirmed in the *Ilaşcu* case,<sup>69</sup> although, given the complexity of the case, this is not immediately obvious. The case concerned events in that part of the former Moldavian Soviet Socialist Republic known as Transdniestria, which in 1990 declared itself to be the "Moldavian Republic of Transdniestria (MRT)" but has never been recognised by the international community. Together with the three other applicants, Ilaşcu was arrested by agents of the "MRT", for alleged anti-Soviet activities and illegal subversion of the legitimate government of the "MRT". Subsequently, Ilaşcu was sentenced to death and the other applicants to terms of twelve to fifteen years' imprisonment. The applicants claimed that both Moldova and Russia were responsible for the violation of rights under the Convention. Referring to *Banković*, the Court indeed came to the conclusion that the applicants were within the jurisdiction of both states.

What is instructive in the present context is the Court's statement regarding Russia. It holds that due to Russia's continuous and active military, political and economic support for the "MRT", enabling it to survive by strengthening itself and acquire a certain amount of autonomy

<sup>67</sup> A. Clapham, 'Symbiosis in International Human Rights Law: The *Öcalan* Case and the Evolving Law on the Death Sentence', 1 *Journal of International Criminal Justice* (2003), 475, 480; Sperotto, *supra* note 64, 34.

<sup>68</sup> Similarly: Loucaides, *supra* note 32, 400; Altıparmak, *supra* note 34, 230.

<sup>69</sup> *Ilaşcu and others v. Moldova and Russia* [GC], ECtHR, Appl. No. 48787/99, ECHR 2004-VII.

vis-à-vis Moldova, the Russian Federation exercised “effective authority, or at the very least [...] decisive influence”, which engaged its responsibility in respect of the unlawful acts committed by the Transdniestrian separatists.<sup>70</sup> It has been concluded that the principles of extraterritorial application of the ECHR are valid not only in cases of military occupation *sensu stricto* but also in cases where a state party provides a separatist regime in another state with political, military, and economic support on a level which enables the separatist regime to survive.<sup>71</sup> This conclusion, however, mingles questions of both jurisdiction *ratione loci* and *ratione personae*. What can be safely said is that the “effective overall control” doctrine applies not only to states but also to non-state actors like separatist regimes. If such actors are supported by a state party with such intensity that they can be considered a “puppet regime” of that state party, their acts must be attributed to the state and thus give rise to the state’s responsibility under the Convention.<sup>72</sup> Thus, in its ruling with regard to Russia, the Court only combined the “effective overall control” doctrine, as developed in *Loizidou* and slightly modified in *Banković*, as an accepted exception from the territoriality of jurisdiction on the one hand, and the principle that a state might also be responsible for the acts of private actors – a question of the application of the Convention *ratione personae*<sup>73</sup> – on the other hand.<sup>74</sup> It thus did not introduce a new basis for extraterritorial jurisdiction but simultaneously made use of two settled concepts.

The Grand Chamber further reaffirmed its *Öcalan* ruling at this point in time (only decided by the Chamber) by examining not only who had jurisdiction over the territory in question but also who exercised jurisdiction on a concrete-individual basis over the applicants in the situation at hand.<sup>75</sup>

<sup>70</sup> *Id.*, paras 382, 392.

<sup>71</sup> Gondek, *supra* note 31, 372-373.

<sup>72</sup> Cf. *Ilaşcu* [GC], *supra* note 69, para. 318: “[T]he acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention”.

<sup>73</sup> C. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. (2009), 70-71, para. 42.

<sup>74</sup> Similarly: Nigro, *supra* note 54, 420.

<sup>75</sup> *Ilaşcu* [GC], *supra* note 69, paras 382-383.

## 6. *Issa*: Mediating between *Banković* and *Louizidou*

In the case of *Issa*,<sup>76</sup> the Court distanced itself from one of the key assumptions of *Banković*. This case concerned six Iraqi shepherds who were allegedly arrested and subsequently killed by Turkish soldiers in the course of a military operation conducted in Northern Iraq against Kurdish armed groups. The Chamber reaffirmed the *Banković* decision, stating that the concept of jurisdiction for the purposes of Art. 1 of the Convention had to be considered to reflect the term's meaning in public international law and was thus supposed to be understood as "primarily territorial".<sup>77</sup> On this basis, a state's responsibility may be engaged where, as a consequence of military action, whether lawful or unlawful, that state in practice exercises effective control of an area situated outside its national territory.<sup>78</sup> It thus paraphrased its *Louizidou* decision and at the same time distanced itself from the restriction formulated in *Banković* that the state needs to exercise those "public powers normally to be exercised by that Government" on the host state's territory. However, in the case at hand the effective control criterion was not fulfilled.

What is nevertheless notable is that the Court, admittedly only sitting as a Chamber, seemed to be very willing to accept that the Convention would also apply in Iraq if Turkey had exercised a higher degree of control over the entire territory, or alternatively over the specific area where the killing took place, despite the fact that Iraq lies clearly beyond the *espace juridique* of the Convention.<sup>79</sup>

## 7. Conclusion

We have attempted to outline the Court's basic assumptions with regard to the extraterritorial application of the Convention as they have

<sup>76</sup> *Issa and others v. Turkey*, ECtHR (16 November 2004), Appl. No. 31821/96.

<sup>77</sup> *Id.*, para. 67.

<sup>78</sup> *Id.*, para. 69.

<sup>79</sup> Compare: Gondek, *supra* note 31, 377; Miltner, *supra* note 42, 176-177; Droege, *supra* note 54, 515; Rosenfeld, *supra* note 62, 117; Sperotto, *supra* note 64, 34-35; Romainville, *supra* note 8, 1026. Lawson has pointed out that the ECtHR's ruling in *Issa* implicitly also opposes the *Banković* assumption that the contracting states need to secure "the entire range of substantive rights set out in the Convention" since no one would expect the Turkish forces in northern Iraq to do so to the Iraqi shepherds in the case at hand, but rather to respect their rights only insofar as they actually interfered with their lives, see Lawson, *supra* note 32, 105.

evolved over time. Nevertheless, the Court's case law can safely be summarised as far from consistent – oscillating between normative and factual criteria, mingling the Convention's applications *ratione loci* with its application *ratione personae* and stressing or denying the Convention's *espace juridique*. Therefore, it is no surprise that when the *Al-Saadoon* case was heard before the domestic courts of the United Kingdom, they came to different conclusions when applying the ECHR as incorporated in the Human Rights Act 1998 (HRA)<sup>80</sup> on the territory of Iraq.

## II. The UK Jurisprudence on *Al-Saadoon*

### 1. The House of Lords' Decision in *Al-Skeini* as a Precedent for the Convention's Application *ratione loci* in Iraq

The question of the application of the Convention for acts attributable to UK forces on Iraqi territory had already been an issue for the British judiciary prior to *Al-Saadoon*. In June 2007, the House of Lords gave its final ruling in the *Al-Skeini* case,<sup>81</sup> which concerned the deaths of six Iraqi civilians through shootings in the streets or in buildings, where UK soldiers were temporarily present, as well as the death of one Iraqi as a result of maltreatment by UK soldiers, which occurred while he was being held in a UK detention facility center in Basra. The Lords decided to follow the ECtHR's jurisprudence on the question of the extraterritorial application of the Convention, although the HRA only requires domestic Courts to "take [the ECtHR's jurisprudence] into account"<sup>82</sup> and not to treat them as precedents. In doing so, the Lords found themselves confronted with the fact that "the judgments and decisions of the European Court do not speak with one voice",<sup>83</sup> especially with regard to *Banković* on the one and hand *Issa* on the other.<sup>84</sup> However, they decided to give pre-eminence to the Grand

<sup>80</sup> Human Rights Act 1988, commenced 2 October 2000.

<sup>81</sup> *R (Al-Skeini)*, *supra* note 31; for a critique of this decision see R. Wilde, note on 'R (on the application of Al-Skeini) v. Secretary of state for Defence (Redress Trust intervening)', 102 *American Journal of International Law* (2008), 628.

<sup>82</sup> Art. 2 para. 1 lit. a HRA reads: "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights".

<sup>83</sup> *R (Al-Skeini)*, *supra* note 31, para. 67 (*per* Lord Roger).

<sup>84</sup> *Id.*, paras 68-80 (*per* Lord Roger).



Chamber decision in *Banković*.<sup>85</sup> The Lords' reading of *Banković* included the assumption that jurisdiction based on effective control was recognised "only in the case of territory which would normally be covered by the Convention".<sup>86</sup> Moreover, they found the ECtHR had suggested in *Banković* that "the obligation under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory *all* the rights and freedoms in Section 1 of the Convention."<sup>87</sup> On that basis, they ruled that the five appellants who had been killed on Iraqi territory were not within the jurisdiction of the United Kingdom.<sup>88</sup> Alternatively, they asserted that even if *Issa* was to be followed and the Convention's application was not geographically restricted accordingly, they "would not consider that the United Kingdom was in effective control of Basra and the surrounding area for purposes of jurisdiction under article 1 of the Convention at the relevant time", because "with all its troops doing their best, the United Kingdom did not even have the kind of control of Basra and the surrounding area which would have allowed it to discharge the obligations, including the positive obligations, of a contracting state under article 2".<sup>89</sup> With regard to the sixth appellant, who was beaten up by British troops in military detention and subsequently died, the Secretary of State had meanwhile accepted that "since the events occurred in the British detention unit, Mr Mousa met his death 'within the jurisdiction' of the United Kingdom for purposes of article 1 of the Convention."<sup>90</sup> Therefore, the Lords did not need to rule on this point but still endorsed the finding on grounds of an analogy to the jurisdiction in embassies and consulates under customary international law as a recognised exception in *Banković*.<sup>91</sup> It has been pointed out that this analogy does not hold given that military prisons do not have any special status under international law.<sup>92</sup> In lieu of relying on *Banković* the British jurisdiction over Basra prison can rather be explained by an extension of the *Öcalan*

<sup>85</sup> *Id.*, para. 68 (*per* Lord Roger); endorsed by Baroness Hale at para. 91 and Lord Brown at para. 108.

<sup>86</sup> *Id.*, para. 78 (*per* Lord Roger); endorsed by Baroness Hale at para. 90.

<sup>87</sup> *Id.*, para. 79 (*per* Lord Roger) (emphasis added); endorsed by Baroness Hale at para. 90.

<sup>88</sup> *Id.*, para. 81 (*per* Lord Roger); endorsed by Baroness Hale at para. 90.

<sup>89</sup> *Id.*, para. 83 (*per* Lord Roger); endorsed by Baroness Hale at para. 90. See also *supra* note 79 as to the range of rights which need to be guaranteed according to *Issa*.

<sup>90</sup> *Id.*, para. 61 (*per* Lord Roger); endorsed by Baroness Hale at para. 90.

<sup>91</sup> *Id.*, para. 132 (*per* Lord Brown); para. 61 (*per* Lord Carswell).

<sup>92</sup> Thienel, *supra* note 55, 127.

jurisprudence though, since a person held in prison can be considered as under the “authority and control” of the country running this prison.<sup>93</sup>

## 2. The Decision of the High Court of Justice in *Al-Saadoon*

In the *Al-Saadoon* case, the High Court remarked that the position of the claimants was indistinguishable from that of Mr Mousa, in the *Al-Skeini* case, in terms of physical custody.<sup>94</sup> Thus, “[o]n the face of it, applying the same approach to the claimants’ case would seem to lead to the conclusion that they, too, are within the article 1 jurisdiction of the United Kingdom.”<sup>95</sup> However, the High Court went on to examine whether there were grounds for distinguishing this case from *Al-Skeini* on the question of jurisdiction. In this respect, the Secretary of State submitted that, notwithstanding that the claimants were in the physical custody of British forces, they were not within the jurisdiction of the United Kingdom for the purposes of Art. 1 because the applicants were being held as criminal suspects at the order of the Iraqi court, a judicial organ of the sovereign state of Iraq. Accordingly, the legal authority being exercised over them was that of Iraq, exercising sovereignty on its own territory in relation to its own nationals. Moreover, the United Kingdom was obliged as a matter of international law to transfer the claimants to the custody of the Iraqi court as requested by that court.<sup>96</sup>

As to this second argument, it implies that an obligation under international law could displace the Convention. In order to make such an assessment, logically, the Convention must be applicable in the first place. It follows from this that this objection concerns the merits of the case but not the Conventions ‘jurisdiction’ *ratione loci*.<sup>97</sup> The High Court, however, understood this objection as concerning the question of attribution.<sup>98</sup> As such it found that the acts were attributable to the United Kingdom, since the British forces had physical custody and control of the claimants. They had it in their power to refuse to transfer the claimants to the custody of the IHT or indeed to release them, even though to act in such ways would be in breach of the United Kingdom’s obligations under international law.<sup>99</sup>

<sup>93</sup> Similarly: *Id.*, 127-8.

<sup>94</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 59 (*per* Lord Justice Richards).

<sup>95</sup> *Id.*, para. 61.

<sup>96</sup> *Id.*, para. 56.

<sup>97</sup> This was also the approach of the ECtHR, see *Al-Saadoon*, *supra* note 2, para. 89.

<sup>98</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 75.

<sup>99</sup> *Id.*, para. 79.

As to the first argument, that Iraq is already exercising jurisdiction over the applicants in a legal sense, it can be countered that the *Öcalan* case shows that jurisdiction might also be determined on factual grounds, thus superimposing existing legal jurisdiction. The High Court, in this context, on the one hand pointed to “the fact [...] that the claimants are at present in the physical custody of the British forces”.<sup>100</sup> On the other hand, it stated that it felt unable to distinguish this case from *Al-Skeini* with regard to the question of jurisdiction, thereby explicitly approving the analogy with the extraterritorial exception “for embassies and the like”.<sup>101</sup> Hence, it can be summarised that the High Court followed the House of Lord’s analysis in *Al-Skeini*, which construed an analogy to the *Banković* exceptions, to affirm UK jurisdiction over military prisons in Iraq but in its own analysis rather relied on factual criteria (“physical custody”) which is comparable to the ECtHR’s approach in *Öcalan*.

### 3. The *Al-Saadoon* Decision of the Court of Appeal of England and Wales

The Court of Appeal viewed things differently, however. It understood the ECtHR’s ruling on *Banković* and the House of Lord’s decision in *Al-Skeini* as containing “four core propositions” on jurisdiction, namely that it is an exceptional jurisdiction (1) to be ascertained in harmony with other applicable norms of international law (2), reflecting the regional nature (3) and indivisible nature (4) of the Convention rights. It deduced from the first and second of these propositions that they were to imply “an exercise of sovereign legal authority, not merely *de facto* power, by one State on the territory of another”. The power was to be given by law since, if it were given only by chance or strength, its exercise would by no means be harmonious with material norms of international law but offensive to them; there would be no principled basis on which the power could be said to be limited, and thus exceptional.<sup>102</sup> Therefore, according to the Court of Appeal, the exceptions contained in *Banković* had to be construed in accordance with public international law rules on the delimitation of municipal legal orders – an assumption that we tried to refute above. For the Court of Appeal, factual control as recognised in *Öcalan* was no valid basis

<sup>100</sup> *Id.*, para. 82.

<sup>101</sup> *Id.*

<sup>102</sup> *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 2, para. 37 (*per* Lord Justice Laws).

for establishing extraterritorial jurisdiction.<sup>103</sup> When applying its analysis to the case at hand, it had to come to the conclusion that the detention of the appellants by the British forces at Basra did not constitute an exercise of Art. 1 jurisdiction by the United Kingdom because, before the expiration of the Security Council mandate on 31 December 2008, the United Kingdom had not been exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. After that date, the British forces had no legal power to detain any Iraqi at all. Had they taken such action, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such person so detained.<sup>104</sup>

The House of Lords refused to grant leave to appeal.<sup>105</sup>

### III. The ECtHR's Ruling on the Application on the Convention *ratione loci* in *Al-Saadoon*

The ECtHR referred to its *Banković* decision as the leading authority as well. Thus it reiterated that "Art. 1 sets a limit, notably territorial, on the reach of the Convention" but that the Convention could be applied extraterritorially in exceptional cases. Nevertheless, the ECtHR came to the conclusion that the events in Iraq fell within the jurisdiction of the United Kingdom. It summarised the crucial facts as follows: The applicants were arrested by British armed forces in southern Iraq and later kept in British detention facilities until their transfer to the custody of the Iraqi authorities on 30 December 2008. During the first months of the applicants' detention, the United Kingdom was an occupying power in Iraq. The two British-run detention facilities in which the applicants were held were established on Iraqi territory through the exercise of military force. The United Kingdom initially exercised control and authority over the individuals detained in the detention facilities solely as a result of the use or threat of military force. Subsequently, the United Kingdom's *de facto* control over these premises was reflected in law. In particular, on 24 June 2004, CPA Order No. 17 (Revised) provided that all premises currently used by the MNF should be

<sup>103</sup> Following the House of Lords' judgment in *Al-Skeini*, the Court of Appeal only relied on *Banković* when deciding on the extraterritorial application of the HRA.

<sup>104</sup> *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 2, para. 40.

<sup>105</sup> See UK Parliament, Minutes of Proceedings of Monday 16 February 2009, <http://www.publications.parliament.uk/pa/ld200809/minutes/090216/ldordpap.htm> (last visited 7 December 2009).

inviolable and subject to the exclusive control and authority of the MNF. This provision remained in force until midnight on 31 December 2008.<sup>106</sup>

Accordingly, when summarizing the facts, the Court stressed the physical power that the agents of the United Kingdom had over the applicants when pointing to the fact that they were arrested by British forces and later held in custody in different British detention facilities. When stating that “[t]he United Kingdom exercised control and authority over the individuals” the Court already gave its result away; this being the same formulation as in *Öcalan*. The decisive passage reads: “The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction.”<sup>107</sup> Interestingly, the Court did not explicitly refer to *Öcalan* at this point but rather quoted the EComHR in the *Hess* case<sup>108</sup>, which concerned the responsibility of the United Kingdom for the detention of the former Nazi leader Rudolf Hess in the Allied Military Prison in Berlin-Spandau. This reference is not very conclusive because it stems from the phase, described previously, when the Commission held a general presumption that the Convention also applies extraterritorially.<sup>109</sup> Hence, the Court tried to suggest continuity in its case law on Art. 1 which plainly does not exist.

With regard to the language, the Court is rather confirming *Öcalan* where factual control over a person is decisive as opposed to legal control, which was required in all the exceptions in *Banković*. Although the Court also points to the UK’s *de jure* control over the premises, this is not decisive for the case since the Court found the United Kingdom’s *de facto* control over the premises was only “reflected in law”. If something is only a reflection, conceptually it cannot be a constitutive factor but only declarative of something else – here the *de facto* control.

<sup>106</sup> *Al-Saadoon*, *supra* note 2, paras 86-87.

<sup>107</sup> *Al-Saadoon*, *supra* note 2, para. 88.

<sup>108</sup> *Hess*, *supra* note 18.

<sup>109</sup> Accordingly, the decisive passage reads (p. 73): “The respondent Government takes place not in the territory of the United Kingdom but outside its territory, in Berlin. As the Commission has already decided, a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory, [...]. The Commission is of the opinion that there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention.”

The reason why the Court only cited *Hess* in the given case might be that, it would have had to admit that it had, inappropriately for a Chamber, established a new exception from *Banković* or at least extended the scope of the *Öcalan* exception. It should be recalled that the extraterritorial application of the Convention must be “exceptional” and requires “special justification in the particular circumstances of each case” according to *Banković*.<sup>110</sup> In *Öcalan*, the Turkish authorities exercised authority and control directly over one person by putting handcuffs on him and thereby arresting him. Immediately afterwards they transported him to Turkish territory, where Turkey is indisputably responsible under the Convention. Thus the ECtHR recognized Turkey’s extraterritorial jurisdiction for a crucial but rather short moment in time over one person on an individual basis. In *Al-Saadoon*, by contrast, the authority and control were not directly exercised over the applicants but over the premises in question, i.e. the British detention facilities. According to *Banković*, though, jurisdiction over premises was only foreseen when recognised under customary international law, a requirement which is not fulfilled in the case of military prisons. Instead the Court affirmed UK’s jurisdiction over a number of persons for an indeterminate time on a factual basis. This was not because of one single exceptional act but because of the ongoing factual control by means of the structures that the UK had set up. The UK was thereby in a situation to control all aspects of the applicants’ lives and thus to infringe in all the rights of the Convention and to omit all positive obligation under the former. Thus the Court established a new exception where *de facto* control trumps *de jure* control, or at least expanded the scope of the *Öcalan* exception.

## E. Extraterritorial Effects of the Convention

Related to, but not identical with, the question of the extraterritorial application of the Convention is the notion of extraterritorial effect, which played a role in both the *Soering* and the *Al-Saadoon* cases.

In *Soering*, the applicant, who had fled from the United States to the United Kingdom, was *prima facie* within UK jurisdiction in the sense of Art. 1. The treatment contrary to Art. 3 would, however, be carried out in the United States and through US authorities however. This gave the UK government ground to argue that the Convention should not be interpreted

<sup>110</sup> *Supra* D. I. 3.

so as to impose responsibility on a contracting state for acts which occur outside its jurisdiction.<sup>111</sup> The Court, however, relying on “the spirit and intendment” of Art. 3 ECHR, extended the “inherent obligation not to extradite also [...] to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment” proscribed by Art. 3.<sup>112</sup> It further clarified that liability was incurred by the extraditing contracting state by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill treatment.<sup>113</sup> It thereby introduced the principle of *non-refoulement* within the scope of Art. 3 ECHR and admitted that this article could have an “extraterritorial effect”.<sup>114</sup> Strictly speaking, the legal concept of “extraterritorial effect” does not refer to the application of the Convention *ratione loci*.<sup>115</sup> It is rather concerned with the question of what constitutes the incriminating act: The concrete violation – putting somebody in a cell for years awaiting his execution – or establishing “the crucial link in the causal chain”<sup>116</sup> for the violation – extraditing someone to a place where this is bound to happen. By focusing on the latter, the violation fell undoubtedly within UK jurisdiction according to Art. 1.<sup>117</sup>

*Al-Saadoon* differs from *Soering* in so far as the applicants already were on Iraqi territory to the effect that their transfer was not a trans-border issue. Nevertheless it can also be understood as an extradition case considering that the Court has decided that the applicants were within UK, and not Iraqi, jurisdiction.<sup>118</sup> As far as the obligation to secure the rights and

<sup>111</sup> *Soering* [GC], *supra* note 1, para. 83.

<sup>112</sup> *Soering* [GC], *supra* note 1, para. 88.

<sup>113</sup> *Soering* [GC], *supra* note 1, para. 91.

<sup>114</sup> C. Ovey & R. White, *Jacobs & White: The European Convention on Human Rights*, 4th ed. (2006), 88.

<sup>115</sup> See *Banković* [GC], *supra* note 9, para. 68; Gondek, *supra* note 31, 335; N. Mole, *Issa v. Turkey: Delineating the Extraterritorial Effect of the European Convention on Human Rights?*, *European Human Rights Law Review* (2005), 86, 86; Jankowska-Gilberg, *supra* note 35, 78; pointing in another direction: *Issa and others v. Turkey*, *supra* note 76, para. 68.

<sup>116</sup> So the Human Rights Committee has put it in a comparable case, *Roger Judge v. Canada*, Communication No. 829/1998, HRC (2003), UN Doc. CCPR/C/78/D/829/1998, para. 10.6.

<sup>117</sup> Similarly Carrillo Salcedo, *supra* note 20, 141; Pedersen, *supra* note 37, 284; Ress, *supra* note 32, 75-76, 85. Lawson, *supra* note 32, 84, 97; O’Boyle, *supra* note 3134, 126.

<sup>118</sup> Accordingly, the High Court held that the essential justification for the principle adopted in *Soering* did not depend on territorial boundaries, *supra* note 8, para. 85.

freedoms under the Convention is concerned, according to Art. 1, jurisdiction, and not territory, is the crucial criterion when defining the sphere in which a contracting state is responsible. Consequently, when affirming the Convention's jurisdiction *ratione loci* in its admissibility decision, the Court has implicitly affirmed that the *Soering* jurisprudence applies at least in principle.<sup>119</sup>

Unlike *Soering* the applicants did not invoke the death-row phenomenon which would trigger the applicability of Art. 3 ECHR. Instead they submitted that there were substantial grounds for believing that they were at real risk of being subjected to an unfair trial before the Iraqi Tribunal, followed by an execution by hanging. They alleged that this would give rise to breaches of their rights under Arts 2, 3 and 6 of the Convention and Art. 1 of Protocol No. 13 to the Convention. The notion of extraterritorial effect, however, can only be applied to certain rights at the core of the Convention.<sup>120</sup> If this was not the case then the Convention would require the contracting parties to impose its standards on third states or territories<sup>121</sup> and to act as indirect guarantors of its freedoms "for the rest of the world".<sup>122</sup> Whereas the Court in *Soering* explicitly recognised a limited extraterritorial effect only with regard to Art. 3, it did neither in *Soering* nor in later cases, exclude that under certain circumstances an extradition or expulsion might engage a contracting state's responsibility under Art. 2 and Art. 1 of Protocol No. 6<sup>123</sup> as well as Arts 5,<sup>124</sup> 6<sup>125</sup> and 9.<sup>126</sup> The extraterritorial effect of Arts 2 and 3 was based on the "fundamental importance" of these provisions.<sup>127</sup> With regard to Arts 5, 6

<sup>119</sup> More sceptically: Bhuta, *supra* note 8, 11-12.

<sup>120</sup> V. Röben, in: R. Grote & T. Marauhn (eds), *EMRK/GG. Konkordanz-Kommentar* (2006), Chap. 5, para. 92.

<sup>121</sup> Cp. *Drozdz and Janousek* [GC], *supra* note 19, para. 110.

<sup>122</sup> *Z and T v. United Kingdom* (dec.) ECtHR (2006), Appl. No. 27034/05.

<sup>123</sup> *S. R. v. Sweden* (dec.), ECtHR (2002), Appl. No. 62806/00; *Said v. the Netherlands* Appl. No. 2345/02, ECHR 2005-VI, para. 56; *Ismaili v. Germany* (dec.), ECtHR (2001), Appl. No. 58128/00; *Bahaddar v. the Netherlands*, EComHR, Appl. No. 25894/94, Rep. 1998-I, paras 75-78; *Aspichi Dehwari v. the Netherlands*, EComHR, Appl. No. 37014/97, EComHR Plenary (1998), para. 61; *Aylor-Davis v. France*, Appl. No. 22742/93, EComHR Plenary, DR 76, 164, 167; *Kareem v. Sweden*, Appl. No. 32025/96, EComHR Plenary, DR 87, 173, 181.

<sup>124</sup> *Tomic v. the United Kingdom* (dec.), ECtHR (2003), Appl. No. 17387/03.

<sup>125</sup> *Soering* [GC], *supra* note 1, para. 113; *Mamatkulov and Askarov v. Turkey* [GC], Appl. Nos. 46827/99 and 46951/99, ECHR 2005-I, para. 88.

<sup>126</sup> *Z and T v. the United Kingdom*, *supra* note 122.

<sup>127</sup> *Id.*



and 9, prospect of arbitrary detention, denial of a fair trial or persecution on religious grounds in the receiving country must be “sufficiently flagrant”.<sup>128</sup> Accordingly, in extradition cases the threshold for a violation of rights is different from Art. 3 which is an absolute right,<sup>129</sup> or Art. 2 which the Court held in another context to embody “the supreme value in the international hierarchy of human rights”,<sup>130</sup> is higher than usual.

## I. Imposition of Death Penalty

First and foremost, the possible execution of Al-Saadoon and Mufdhi could be in violation of Art. 1 of Protocol No. 13 concerning the abolition of the death penalty in all circumstances, which was ratified by the United Kingdom in October 2003. Since the Court has recognised that Protocol No. 6 on the abolition of the death-penalty has an extraterritorial effect, the same must hold true for Protocol No. 13, which extends the guarantees of Protocol No. 6 to include times of war. The applicants could thus successfully rely on the Soering principle with regard to Art. 1 Protocol No. 13 if they could establish that there were “substantial grounds”<sup>131</sup> for believing that they would be sentenced to death.

In its previous case law, the Court has examined complaints under Art. 1 of Protocol No. 6 and Arts 2 (and 3 of the Convention where necessary) together.<sup>132</sup> *In casu*, therefore, Al-Saadoon and Mufdhi did not rely on Protocol No. 13 exclusively but submitted that the death-penalty was contrary to the right to life as guaranteed under Art. 2.<sup>133</sup> According to its wording, however, Art. 2 para. 1, does not prohibit the execution of a court’s sentence following a conviction of a crime for which this penalty is provided by law. The *Al-Saadoon* case would be covered by this exception. The applicants, however, argued that the exception cannot be relied on by those states which have ratified Protocol No. 13.<sup>134</sup> This argument can be endorsed for the sake of coherence.<sup>135</sup> Moreover, the Court, meanwhile,

<sup>128</sup> *Id.*

<sup>129</sup> *Chahal*, *supra* note 6, para. 79; Ovey & White, *supra* note 114, 74; O’Boyle, *supra* note 31, 69.

<sup>130</sup> *Streletz, Kessler and Krenz v. Germany* [GC], Appl. Nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, para. 87.

<sup>131</sup> *Soering* [GC], *supra* note 1, para. 90.

<sup>132</sup> *S. R.*, *supra* note 123.

<sup>133</sup> *Al-Saadoon*, *supra* note 2, para. 97.

<sup>134</sup> *Id.*

<sup>135</sup> See also Ovey & White, *supra* note 114, 62.

even takes it for granted that the evolving consensus in Europe to outlaw capital punishment has led to the exception under Art. 2 being inapplicable, independent of a single state's ratification of Protocol No. 6 or 13, respectively.<sup>136</sup> Already in *Soering*, the Court considered the possibility that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as an abrogation to the exception provided for under Art. 2 para. 1<sup>137</sup> but ultimately rejected this idea.<sup>138</sup> Fourteen years later, the Court re-examined the matter in the *Öcalan* case mentioned above, in which the applicant had been sentenced to death by Turkish Courts.<sup>139</sup> The Chamber noted that "the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided". Stressing the fact that all the contracting states had signed, and all but three had ratified, Protocol No. 6 concerning the abolition of the death penalty in peacetime, and referring to the policy of the Council of Europe, which required that new member states undertake to abolish capital punishment as a condition of their admission into the organisation, the Court concluded that the "*de facto* abolition" of the death penalty at the time *Soering* was decided had meanwhile developed into a "*de jure* abolition" during peacetime.<sup>140</sup> Against this background, it regarded capital punishment in peacetime as an unacceptable form of punishment that is no longer permissible under Art. 2.<sup>141</sup> The Grand Chamber followed this reasoning but also agreed with the Chamber that it was not necessary to reach any firm conclusion on these points since the case could be decided on other grounds.<sup>142</sup> In the recently decided case of *Kaboulov*, however, the Court held that "in circumstances where there are substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment in the receiving country, Art. 2 implies an obligation not to extradite the individual. [...] Furthermore, if an extraditing State knowingly puts the person concerned at such high risk of losing his

<sup>136</sup> *Kaboulov*, *supra* note 6, para. 99.

<sup>137</sup> *Soering* [GC], *supra* note 1, para. 103.

<sup>138</sup> *Id.* Different on this point: C. O. Judge De Meyer, *Soering* [GC], *supra* note 1, who also found a violation of Art. 2.

<sup>139</sup> Three years later though, on 3 October 2002 the Ankara State Security Court commuted the applicant's death sentence to life imprisonment. Accordingly, the Court did not have to comment on the question whether the implementation, but only whether the imposition of the death penalty is contrary to the Convention.

<sup>140</sup> *Öcalan*, *supra* note 56, para. 195.

<sup>141</sup> *Id.*, para. 196.

<sup>142</sup> *Id.*, paras 163-165.

life as for the outcome to be near certainty, such an extradition may be regarded as ‘intentional deprivation of life’, prohibited by Art. 2 of the Convention.”<sup>143</sup> This is a rather surprising statement, given that the question was highly disputed before the Chamber and Grand Chamber in *Öcalan*. The Court, in support of its argument, cited a number of cases in which it supposedly came to the same conclusion.<sup>144</sup> However, in none of those cases did the Court base its finding on Art. 2 alone or circumvented definite decisions on the issue because the cases could be decided on other grounds – as could the case of *Kabouloulov* itself. Be that as it may,<sup>145</sup> if the Court is meanwhile of the opinion that Art. 2 may be violated when a person is extradited to a country where he might face the death penalty, this must *a fortiori* be the case when the extraditing state has ratified Protocol No. 13.

## II. Unfair Trial

It is disputed between the parties in the *Al-Saadoon* case whether the “flagrant denial test” applies with regard to the alleged unfairness of the applicant’s expected trial. The parties built their arguments around the cases of *Bader*<sup>146</sup> and *Öcalan*.<sup>147</sup> In *Bader*, a case which concerned a Swedish decision on deportation, the Court held, *inter alia*, that an issue might arise under Arts 2 and 3 if a contracting state deported an alien who had suffered or risks suffering “a flagrant denial” of a fair trial in the receiving state, the outcome of which had been or was likely to be the death penalty.<sup>148</sup> The applicants countered that in *Öcalan* the Court had held that Art. 2 would be violated if a death sentence would follow an “unfair trial”, the latter not necessarily having to be “flagrantly” unfair.<sup>149</sup> This argument must be rejected, however, as *Öcalan* was not an extradition case and thus it cannot be taken for granted that it can be relied on in the present context.<sup>150</sup>

<sup>143</sup> *Kabouloulov*, *supra* note 6, para. 99.

<sup>144</sup> *S. R.*, *supra* note 123; *Ismaili*, *supra* note 123; *Bahaddar*, *supra* note 123, paras 75-8; *Said*, *supra* note 123; *Dougoz v. Greece*, ECtHR (2001) Appl. No. 40907/98, ECHR 2001-II.

<sup>145</sup> It has to be admitted that in the case of *Kabouloulov* the responding state, the Ukraine, has also ratified both Protocol No. 6 and No. 13. However, the Court did not refer to these documents, but rather made this general statement as cited above.

<sup>146</sup> *Bader and Kanbor v. Sweden*, ECtHR, Appl. No. 13284/04, ECHR 2005-XI.

<sup>147</sup> *Öcalan* [GC], *supra* note 56.

<sup>148</sup> *Bader*, *supra* note 146, para. 42.

<sup>149</sup> *Al-Saadoon*, *supra* note 2, para. 98; see also *Öcalan* [GC], *supra* note 56, para. 165.

<sup>150</sup> *Cp. R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 53.

Accordingly, the applicants must establish that the trial before the IHT amounted to a “flagrant” denial of justice and that they were at real risk to be executed, in order to persuade the Court to find Arts 2 and 3 to be violated on that basis, irrespective of the aforementioned arguments concerning the imposition of the death penalty *in se*.

Moreover, in the cases of *Soering* and *Mamatkulov*, the Court did “not exclude” that “an issue might exceptionally be raised under Art. 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial”.<sup>151</sup> Consequently, the Court in *Al-Saadoon* might also find a violation of Art. 6 if a risk of a flagrant denial of justice could be proven by the applicants, independently of the question whether they risk capital punishment or not.

In any event, the applicants would have to convince the Court that the trial before the IHT does not merely constitute an unfair trial but amounts to a flagrant denial of justice, which might be hard to establish. As to the fairness of the trial before the IHT, the applicants, citing reports from NGOs and from the UN General Assembly’s Human Rights Working Group on Arbitrary Detention as well as the statements of an expert witness who had given evidence before British courts, claim that the defendants and the witnesses are subjected to extreme security risks including assassination. Additionally, they allege that judges are exposed to continual political interference. These shortcomings would explain a conviction rate of 78.4 % of the accused persons before the IHT, of which 35 % have been sentenced to death.<sup>152</sup> It is difficult to predict whether the ECtHR will follow the applicants. At any rate, the British Courts could not be convinced.

### III. Method of Execution

Lastly, the Court could have the opportunity to decide on the matter if an execution by hanging amounts to inhumane and degrading treatment. The applicants argue that hanging was an ineffectual and extremely painful method of killing and thus contrary to Art. 3.<sup>153</sup> The Court of Appeal denied this, admitting that errors had happened from time to time. Nevertheless, pointing to the Report of the Royal Commission on Capital Punishment,

<sup>151</sup> *Soering* [GC], *supra* note 1, para. 113; *Mamatkulov* [GC], *supra* note 125, para. 88.

<sup>152</sup> *Al-Saadoon*, *supra* note 2, para. 95.

<sup>153</sup> *Id.*, para. 99.

which found that hanging was “speedy and certain”,<sup>154</sup> it was of the opinion that these mistakes were only “anecdotal” and “partial”, thus not giving rise to a violation of Art. 3.<sup>155</sup> The ECtHR has never faced the question of whether hanging constitutes a violation of Art. 3, and neither other human rights courts nor human rights treaty monitoring bodies explicitly commented on this subject. The United Nations Committee against Torture was confronted with the question whether certain methods of execution might be in violation of Art. 1 (prevention of torture) or Art. 16 CAT (cruel, inhuman or degrading treatment or punishment which does not amount to torture). In this context, it raised concerns that executions in the United States which are conducted by lethal injection could be accompanied by severe pain and suffering and thus in violation of the above-mentioned rights.<sup>156</sup> With regard to Afghanistan, the Committee made clear that *public* hangings could be regarded as cruel and degrading punishment.<sup>157</sup> In the Inter-American system, where matters connected with the death-penalty are invoked more frequently than in its European counterpart, the Commission has repeatedly left the question open whether hanging constitutes cruel, inhuman or degrading treatment or punishment, although petitioners have advanced such arguments in several cases.<sup>158</sup> Also the Human Rights Committee never took a stand on this point but only generally held that when imposing capital punishment in order to be in conformity with Art. 7 ICCPR (prevention of torture and cruel, inhuman or degrading treatment or punishment), the execution of the sentence “must be carried out in such a way as to cause the least possible physical and mental suffering”.<sup>159</sup> With regard to execution by gas asphyxiation it held that this would not meet the

<sup>154</sup> Report of the Royal Commission on Capital Punishment, 1949 – 1953 (1953) Cmd. 8932, 247.

<sup>155</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, paras 37, 68-69.

<sup>156</sup> Conclusions and Recommendations of the Committee against Torture, United States of America, 25/06/2006; UN Doc. CAT/C/USA/CO/2, para. 31.

<sup>157</sup> Concluding observations of the Committee against Torture, Afghanistan. 26/06/93, UN Doc. A/48/44, para. 58.

<sup>158</sup> *Dave Sewell v. Jamaica*, Case 12.347, Report No. 76/02, IACtHR, Annual Report 2002, OEA/Ser.L/V/II117 Doc. 1 rev. 1 (2002), para. 118; *Benedict Jacob v. Grenada*, Case 12.158, Report No. 56/02, IACtHR, Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev.1 (2002), para. 98; *Joseph Thomas v. Jamaica*, Case 12.183, Report No. 127/01, IACtHR, Annual Report 2001, OEA/Ser.L/V/II.114 Doc. 5 rev. (2001), paras. 133, 136.

<sup>159</sup> HRC, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10/03/92, Supplement No. 40 (A/47/40), annex VI.A, para. 6.

test of “least possible physical and mental suffering”, and therefore would violate Art. 7 ICCPR.<sup>160</sup> Accordingly, when adjudicating about the question whether hanging amounts to cruel and inhuman treatment, the ECtHR would enter *terra nova* not only within its own jurisprudence but also beyond, which makes it unlikely that it would take position on this question if it could find a way to circumvent it.

## F. The Guarantees of the ECHR and Conflicting International Law Obligations

Additionally, the *Al-Saadoon* case raises fundamental questions about the relationship of the ECHR and other international law. This aspect was also inherent in the *Soering* judgment, where the Court as a matter of fact had to decide if the United Kingdom would be obliged to fulfil its obligations under the Convention, thus potentially violating its extradition treaty with the United States or the other way around. However the Court did not pick up this argument in *Soering*.<sup>161</sup> In *Al-Saadoon*, the potentially conflicting obligations are at the heart of the case, with the UK government arguing that the availability of the death penalty in Iraqi law and/or its imposition by the Iraqi courts would not, as such, be contrary to international law. Accordingly, any risk of its imposition would not justify the United Kingdom in refusing to comply with its obligation under international law to surrender Iraqi nationals, detained at the request of the Iraqi courts, to those courts for trial. The applicants, in contrast, deny that there was any international law obligation to transfer the applicants and that there was no legal basis that would justify the continuing detention after midnight on 31 December 2008.<sup>162</sup> In its admissibility decision, the Court considered the respective part of the application to be of such complexity that it should depend on an examination on the merits.<sup>163</sup> But it already hinted at the possibility that the alleged legal obligation to transfer the

<sup>160</sup> HRC, *Communication No 469/1991: Canada*, 07/01/94, UN Doc. CCPR/C/49/D/469/1991, para. 16.4.

<sup>161</sup> Still, the argument was advanced. See *Soering* [GC], *supra* note 1, para. 83 and further severe critique of the *Soering* judgment by K. Doehring, ‘Vertragskollisionen – Der *Soering*-Fall’, in J. Ipsen *et al.* (eds), *Recht – Staat – Gemeinwohl: Festschrift für Dieter Rauschnig* (2001), 419.

<sup>162</sup> *Al-Saadoon*, *supra* note 2, para. 100.

<sup>163</sup> *Al-Saadoon*, *supra* note 2, para. 110.

applicants to Iraqi custody might be “modified or displaced” under the ECHR.<sup>164</sup>

## I. The Interplay between the ECHR and International Law

The relationship between the ECHR and international law has several facets.<sup>165</sup> This is due to the fact that the Convention can be qualified as both part of general international law<sup>166</sup> and a specific “instrument of European public order (*ordre public*) for the protection of individual human beings”.<sup>167</sup> Both features play a role in the case law of the Convention organs, thus unveiling the ambiguous status of the Convention. Accordingly, the Court has made use of general international law concepts when defining the concept of jurisdiction *ratione loci* – as seen in *Banković*<sup>168</sup> – and *ratione temporis*,<sup>169</sup> and when justifying the binding effect of interim measures of the Court<sup>170</sup> or when deciding questions of attribution.<sup>171</sup> However it has found an approach of its own to treaty reservations and their effects on the validity of states’ undertakings<sup>172</sup> as

<sup>164</sup> *Id.*, para. 89.

<sup>165</sup> See generally *L. Wildhaber*, ‘The European Convention on Human Rights and International Law’, 56 *International and Comparative Law Quarterly* (2007), 217.

<sup>166</sup> *Al-Adsani v. United Kingdom* [GC], Appl. No. 35763/97, ECHR 2001-XI, para. 55.

<sup>167</sup> *Loizidou* (Merits) [GC], *supra* note 21, paras 75, 93; *Banković* [GC], *supra* note 9, para. 80.

<sup>168</sup> *Supra* D. I. 3.

<sup>169</sup> *Blečić v. Croatia* [GC], Appl. No. 59532/00, ECHR 2006-III, cf. *Wildhaber*, *supra* note 165, 224.

<sup>170</sup> Cp. *Cruz Varas*, *supra* note 6 and *Mamatkulov*, *supra* note 125, para. 124.

<sup>171</sup> Although the Court has cited the relevant Draft Articles on Responsibility of International Organization of the ILC, the way it had made use of its content was subject to severe critique, see: A. Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’, 8 *Human Rights Law Review* (2008)1, 151, A. Breitegger, ‘Sacrificing the Effectiveness of the European Convention on Human Rights on the Altar of the Effective Functioning of Peace Support Operations: A Critique of Behrami & Saramati and Al Jeddah’ 11 *International Community Law Review* (2009) 2, 155; M. Milanović & T. Papić, ‘As Bad as it Gets: The European Court of Human Rights’ Behrami and Saramati Decision and General International Law’, 58 *International and Comparative Law Quarterly* (2009) 2, 267.

<sup>172</sup> *Belilos v. Switzerland*, ECtHR (1988), Appl. No. 10328/83, Series A, No. 132; *Loizidou* (Preliminary Objections) [GC], *supra* note 21; see S. Åkermark, ‘Reservation Clauses in Treaties Concluded Within the Council of Europe’, 48 *International and Comparative Law Quarterly* (1999) 3, 479.

well as to treaty interpretation.<sup>173</sup> The Convention organs' case law thus offers examples for both the claim for autonomy and the idea of applying the Convention in harmony with general international law. While acting in the relatively autonomous legal system of the European Convention, the Court seems to have a certain degree of latitude whether to grant concepts of general international law entry into its system or to develop idiosyncratic approaches. The question is of a different nature, though, if a veritable norm conflict between the guarantees of the Convention and other international law obligations of the parties to the Convention arises. In such a situation, where a different legal regime has a legitimate claim to enter the Convention's system, the Court cannot simply refuse entry if it expects to be followed in the future. Alternatively, if it chooses to do so, at least it has to increase its standard for justification.

## II. International Law Obligations Conflicting with the Convention in the *Al-Saadoon* Case

This last aspect would only be relevant for the decision on the merits in the *Al-Saadoon* case if there truly was a veritable norm conflict between the guarantees of the Convention and international law.

### 1. The United Kingdom-Iraq Memorandum of Understanding of 8 November 2004 Regarding Criminal Suspects

The United Kingdom's obligation under international law to transfer the applicants pursuant to the IHT's request could conceivably have been based on the United Kingdom-Iraq Memorandum of Understanding (MoU) of 8 November 2004 regarding criminal suspects. Section 2, para. 1 provides that the Interim Iraqi Government had legal authority over all criminal suspects who have been ordered to stand trial and who are awaiting trial in the physical custody of the UK contingent of the MNF in accordance with the terms of the MoU. In Section 3, para. 3 lit. a the MoU reflects CPA Memorandum No. 3, issued on 27 June 2004. According to its Section 5

<sup>173</sup> *Golder v. United Kingdom*, ECtHR (1975), Appl. No 4451/70, Series A, No. 18, para. 29; *Banković* [GC], *supra* note 9, paras 55-8; *Loizidou* (Merits) [GC], *supra* note 21, paras 43-5, cf. Ovey & White, *supra* note 114, 38-55. For a thorough analysis of general international law concepts and, in particular general international law on treaties, before the ECtHR and the IACtHR see F. Vanneste, *General International Law Before Human Rights Courts* (2009).



para. 1, criminal detainees shall be handed over to Iraqi authorities as soon as reasonably practicable.<sup>174</sup> The CPA had been created by the Government of the United States and CPA Regulation No. 1 gave the CPA authority to issue binding regulations and orders. Interpreting the MoU in good faith (Art. 31 para. 1 VCLT), one could come to the conclusion that not transferring the applicants, who were criminal suspects, at the end of the mandate amounts to a violation of its provisions. Be that as it may, the MoU is not regarded to be a legally binding document<sup>175</sup> and thus does not establish an obligation competing with the Convention in the first place.

## 2. The Sovereignty Argument

To that effect, in its submissions the United Kingdom did not refer to its obligations stemming from the MoU. Instead they argued that if they had either released the applicants or given them safe passage to another part of Iraq, a third country or the United Kingdom, this would have amounted to a violation of Iraqi sovereignty and would have impeded the Iraqi authorities in carrying out their international law obligation to bring alleged war criminals to justice.<sup>176</sup> In the British judgments, the High Court held that to allow suspected war criminals to escape the jurisdiction of the Iraqi courts would be an obvious and serious interference in the Iraqi criminal process and a violation of Iraqi sovereignty.<sup>177</sup> The Court of Appeal had considered British forces to enjoy no legal power to detain any Iraqi after 31 December 2008. Had the British forces done so, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such person so detained.<sup>178</sup> In a comparable case before the US Supreme Court, concerning two American citizens, the court took the view that because the claimants were being held by United States Armed Forces at the behest of the Iraqi Government pending their prosecution in Iraqi courts, release of any kind would interfere with the sovereign authority of Iraq.<sup>179</sup>

The applicants in the *Al-Saadoon* case objected before the ECtHR that these observations on the issue focused on the sovereignty of Iraq and failed

<sup>174</sup> *Al-Saadoon*, *supra* note 2, para. 17.

<sup>175</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 64.

<sup>176</sup> *Al-Saadoon*, *supra* note 2, para. 107.

<sup>177</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 67.

<sup>178</sup> *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 8, para. 36.

<sup>179</sup> *Munaf et al. v. Geren, Secretary of the Army, et al.*, No. 06–1666, US Supreme Court (12 June 2008), 17–21.

to mention the United Kingdom's sovereignty.<sup>180</sup> Indeed, sovereignty is a legal concept and not an *a priori* principle. Rules and concepts of international law demarcate sovereignty. To date, the ECtHR has only cited documents concerning diplomatic asylum among the relevant international legal materials,<sup>181</sup> while the issue of sovereignty has far more facets. The Court does not refer to the law of occupation, to case law concerning extraterritorial enforcement measures and competing claims to criminal jurisdiction and to the limits of Iraqi sovereignty established by human rights. These aspects should also be considered when examining the question of a potential violation of Iraqi sovereignty in case the UK would refuse to surrender the applicants.

#### a) Analogy to the Rules on Diplomatic Asylum?

An analogy between the present case, in which prisoners detained in a military facility claimed a right not to be handed over to the territorial state, and the granting of diplomatic asylum was drawn by the High Court. It referred to the case of *R (B) v. Secretary of State for Foreign and Commonwealth Affairs*.<sup>182</sup> In this case children, who had sought asylum in Australia and were placed in a detention centre under conditions, which gave rise to serious concerns, claimed asylum in the British consulate in Melbourne. Having returned to Australian custody more or less voluntarily, they sought judicial review of the decision not to permit them to remain in the consulate, thus exposing them to the risk of treatment prohibited by the ECHR. The High Court in *Al-Saadoon* held that if, in the light of Art. 55 of the Vienna Convention on Consular Relations (VCCR),<sup>183</sup> the consular officials in *B* were under an international law obligation to hand over the fugitives to the Australian authorities, it was difficult to see why the British forces in this case were not under an international law obligation to hand over the claimants to the Iraqi court which had asserted jurisdiction over them and at whose order and behest the claimants were being held in custody.<sup>184</sup> This coincides with the British courts' reasoning on the

<sup>180</sup> *Al-Saadoon*, *supra* note 2, para. 100.

<sup>181</sup> *Id.*, paras 64-65.

<sup>182</sup> *R (B) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643.

<sup>183</sup> *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 261.

<sup>184</sup> See *(R) Al-Skeini*, *supra* note 81, para. 132 (*per* Lord Brown), Baroness Hale and Lord Carswell agreeing.

jurisdictional question regarding the detention facilities, which was also construed as an analogy between embassies and military prisons.<sup>185</sup>

The British courts correctly held that diplomatic asylum is not permissible in general. In the *Asylum Case* of 1950, the International Court of Justice (ICJ) held that a decision to grant diplomatic asylum involved a derogation from the sovereignty of that state since it withdrew the offender from the jurisdiction of the territorial state and constituted an intervention in matters exclusively within the competence of that state. Such a derogation from territorial sovereignty could not be recognised unless its legal basis was established in each particular case.<sup>186</sup> Arts 22 and 41 of the Vienna Convention on Diplomatic Relations (VCDR) do not alter the position regarding the right of sending states to give diplomatic asylum in circumstances.<sup>187</sup> As for customary international law, it is very doubtful whether a right of asylum for either political or other offenders is recognised.<sup>188</sup> A recent study comes to the conclusion that diplomatic asylum is at least not universally recognised in international law. Unless certain narrow conditions are met, the granting of diplomatic asylum constitutes an intervention and a violation of territorial sovereignty.<sup>189</sup> According to the study, the principles of non-intervention and territorial sovereignty allow an exception only in cases where both the receiving state violates human rights obligations under treaty or customary international law and the sending state itself is bound to the respective human rights. The reasoning is based on arguments developed to justify humanitarian interventions – a much disputed concept itself.<sup>190</sup>

<sup>185</sup> *Supra* D. II. 2.

<sup>186</sup> *Asylum Case (Columbia v. Peru)*, ICJ Reports. 1950, 266, 274-275.

<sup>187</sup> *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95. Cf. E. Denza, *Diplomatic Law*, 2nd ed. (2004), 118, 381, with further references. Also cf. para. 5 of the preamble to the Vienna Convention on Diplomatic Relations where the parties affirm that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.

<sup>188</sup> Cf. *Asylum Case*, *supra* note 186, 274-278; I. Brownlie, *Principles of Public International Law*, 7th ed. (2008), 357; J. Combacau & S. Sur, *Droit international public*, 7th ed. (2006), 358.

<sup>189</sup> I. Klepper, *Diplomatisches Asyl: Zulässigkeit und Grenzen* (2009), 111-112; to the same effect: H. Carrie, *Das Diplomatisches Asyl im gegenwärtigen Völkerrecht* (1994), 146-148.

<sup>190</sup> Since the Ambassador of Honduras to the Netherlands filed an “Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil” on 29 October 2009, the ICJ might again have the opportunity to illuminate the issue of diplomatic protection. There, Honduras has asked the Court to declare that

For the case at hand, however, even the acknowledgment of such a right would not make a difference, since the analogy with diplomatic asylum stands on shaky ground for several reasons: First and foremost, the same argument as already advanced with regard to the jurisdiction question still holds true: In contrast to diplomatic and consular premises on the basis of Art. 22 VCDR and Art. 31 VCCR, military prisons simply do not have any special status in international law.<sup>191</sup> Second, the activities of the UK in Iraq reach much further than those of a diplomatic mission. Finally, the applicants did not voluntarily seek asylum but were detained against their will. Accordingly, the UK cannot rely on the sovereign rights which would emanate from an analogy to the impermissibility of diplomatic asylum.<sup>192</sup>

b) Application of the International Humanitarian Law on Occupation?

This leads to the question whether the UK forces can be qualified as an occupying power in the relevant period of time and whether the treatment of the applicants can be judged on the basis of, or at least analogous to, the rules on occupation, which also bestow certain rights on the occupying power normally to be exercised by the sovereign state. The ECtHR has already stated in its admissibility decision that the occupation of Iraq ended in June 2004,<sup>193</sup> thus adopting the English courts' determination.<sup>194</sup> Indeed, at first glance, the application of the law of occupation may seem to be far-fetched since Security Council Resolution 1546 of 8 June 2004 announced that by 30 June 2004 the sovereign Interim Government of Iraq "will assume full responsibility and authority [...] for governing Iraq", "the

Brazil, which gave refuge in its embassy in Honduras to "former" Honduran President José Manuel Zelaya and some of his supporters, "does not have the right to allow the premises of its Mission in Tegucigalpa to be used to promote manifestly illegal activities by Honduran citizens who have been staying within it for some time now and that it shall cease to do so." (cf. Press Release of the International Court of Justice No. 2009/30 of 20 October 2009). Although the political activities of Zelaya are central to the affair, some general remarks on the right to "diplomatic asylum" could finally be expected.

<sup>191</sup> See Thienel, *supra* note 55, 127.

<sup>192</sup> To the same effect: Bhuta, *supra* note 8, 13, 15.

<sup>193</sup> *Al-Saadoon*, *supra* note 2, para. 14.

<sup>194</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 13; *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 8, para. 6.

occupation will end and the Coalition Provisional Authority will cease to exist".<sup>195</sup> Yet, such an understanding is not imperative.

According to their common Article 2 para. 2, the four Geneva Conventions apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance". Still, although the Fourth Geneva Convention of 1949 contains specific rules applicable in situations of occupation in its Arts 47-78, it does not provide for a definition of occupation. As mentioned earlier,<sup>196</sup> such a definition can be found in Art. 42 of the Hague Regulations,<sup>197</sup> which stipulates: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Since Arts 42 and 43 of the Hague Regulations draw on questions of fact,<sup>198</sup> the end of occupation also ultimately depends on a factual determination of effectiveness, to be made according to the situation on the ground.<sup>199</sup> This is sustained by the Fourth Geneva Convention Art. 6 para. 3 GC IV prescribes that "[i]n the case of occupied territory, the application of the [...] Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of [Articles] 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143. Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Thus, despite the announcement of the Security Council in its Resolution 1546 that occupation will end by 30 June 2004, the decisive test remains whether Iraqi territory is "actually placed under the authority" of

<sup>195</sup> SC Res. 1546 (2004), 8 June 2004, operative paras 1-2.

<sup>196</sup> *Supra* D. I. 3.

<sup>197</sup> For the relationship between the Hague Regulations and the Fourth Geneva Convention see Article 154 GC IV.

<sup>198</sup> Cf. E. Benvenisti, 'Occupation, Belligerent', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), paras 5-11, available at [www.mpepil.com](http://www.mpepil.com) (last visited 7 December 2009).

<sup>199</sup> D. Thürer & M. McLaren, "'Ius post Bellum' in Iraq: A challenge to the applicability and relevance of international humanitarian law?", in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005), 763, 769; cf. A. Roberts, 'Occupation, Military, Termination of', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), paras 9-34, available at [www.mpepil.com](http://www.mpepil.com) (last visited 7 December 2009).

UK forces as required by Art. 42 of the Hague Regulations.<sup>200</sup> Similarly, Art. 47 IV GC states that protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of international humanitarian law by any agreement concluded between the authorities of the occupied territories and the occupying power. If the transfer of authority to the local government is not sufficiently effective, an ensuing consent to the presence of troops does not lead to an end of occupation. The British Military Manual also points out that the law relative to military occupation is likely to be applicable if occupying powers operate indirectly through an existing or new appointed indigenous government.<sup>201</sup>

As for the end of occupation in Iraq on the basis of an “actual authority test”, authors particularly refer to operative paragraph 12 of Security Council Resolution 1546, which provides 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 4”, and that it “will terminate this mandate earlier *if requested by the Government of Iraq*”.<sup>202</sup> This formulation was taken up by operative paragraph 2 of the last relevant Security Council Resolution, No. 1790 (2007) of 18 December 2007, which reads “[The Security Council] [d]ecides further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or no later than 15 June 2008, and declares that it will terminate this mandate earlier if requested by the Government of Iraq”. Since the mandate depends on its request, it can be reasoned that the Iraqi Government exercised actual authority and that it was difficult to continue to speak of an occupation after June 2004.<sup>203</sup> However, there is no real guarantee that the Security Council will be in a position to withdraw the MNF if requested. It depends on a decision of the

<sup>200</sup> Cp. K. Dörmann & L. Colassis, ‘International Humanitarian Law in the Iraq Conflict’, 47 *German Yearbook of International Law* (2004), 292, 311.

<sup>201</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 276, para. 11.3.1.

<sup>202</sup> Emphasis added. For the argument that the handover of governmental control in the substantive sense can be determined on the basis of the timing of the democratic elections by the local population in occupied territory, which would mean that the election held in January 2005 marks the end of occupation see Y. Arai-Takahashi, *The Law of Occupation* (2009), 19-24. This criterion, however, mingles factual criteria with considerations of legitimacy not based on IHL.

<sup>203</sup> Dörmann & Colassis, *supra* note 200, 311.

Security Council according to the voting rules of Art. 27 of the UN Charter, including the right of veto of the permanent members of the Security Council. Furthermore, from a practical point of view, it seems unrealistic that the Interim Government could simply ask the Security Council to withdraw the MNF unless the Interim Government wanted to take a strong stand against the US and other countries supporting the MNF, with all the negative consequences arising from such a stance. Accordingly it can be assumed that a request to be successful depends on implicit US approval before submitting it to the Security Council.<sup>204</sup> Apart from that, Security Council Resolution 1546 is ambiguous. Whereas the first paragraph of the preamble and the first two operative paragraphs suggest that the occupation is officially over, this is somehow complicated or even contradicted by the Security Council's subsequent authorisation of the maintenance of a multinational force to counter ongoing security threats in operative paragraph 10. It can be said that even if the occupation in Iraq was officially over, the (former) occupying powers were still permitted to hold on to important state prerogatives.<sup>205</sup> In addition, it has been argued that the relevant Security Council resolutions all demand, explicitly or by reference to, respect for international humanitarian law and the law of occupation, at least that no derogation from the rules of occupation can be presumed.<sup>206</sup> Accordingly, it does not go without saying that the law of occupation has not applied since July 2004.<sup>207</sup>

<sup>204</sup> A. Carcano, 'End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government', 11 *Journal of Conflict & Security Law* (2006) 1, 41, 52 and 58; see also A. Roberts, 'The End of Occupation: Iraq 2004', 54 *International and Comparative Law Quarterly* (2005) 1, 27, Thürer & McLaren, *supra* note 199, 769-774; R. Kolb, 'Occupation in Iraq since 2003 and the powers of the UN Security Council', 90 *International Review of the Red Cross* (2008), 29, 45; but see *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 13; *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 8, para. 6; M. Zwangenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation', 86 *International Review of the Red Cross* (2004), 745, 746 – occupation came to an end in June 2004.

<sup>205</sup> Thürer & McLaren, *supra* note 199, 771.

<sup>206</sup> Kolb, *supra* note 204, 40-41.

<sup>207</sup> On the basis of factual criteria it was submitted that UK occupation of Basra on behalf of MNF continued at least until April 2008, when the Iraq army was in the process of slowly taking over control of the area from UK troops, cf. F. Messineo, 'The House of Lords in *Al-Jedda* and Public International Law', 56 *Netherlands International Law Review* (2009), 35, 55.

Finally, an application of IHL by analogy to international territorial administration in peace operations is considered suitable at least in principle.<sup>208</sup> Arts 79-135 GC IV contain regulations of treatment for detainees. According to Art. 133 paras 1 and 2, internment shall cease as soon as possible after the close of hostilities. However, internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty. Art. 77 GC IV demands that protected persons who have been accused of offences or convicted by the courts in occupied territory be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory. This is an absolute obligation not allowing derogation. However, the provision aims at excluding possible circumventions of the prohibition of deportations set out in Arts 49 and 76 GC IV.<sup>209</sup> Accordingly, since the applicants agreed to be transferred to the United Kingdom, the rule should not apply in their case.<sup>210</sup>

In summary, the application of the law of occupation depends on several factors which are difficult to evaluate. If it is applicable, Art. 77 GC IV need not necessarily validate the Iraqi claim to transfer the applicants at the end of the mandate.

### c) Extraterritorial Enforcement Measures and Competing Claims to Criminal Jurisdiction

Finally, *Al-Saadoon* could be conceptualised as a matter of competing claims of criminal jurisdiction and of extraterritorial enforcement measures. Before the ECtHR, the United Kingdom explicated that releasing the applicants or giving them safe passage would have impeded the Iraqi authorities in carrying out their international law obligation to bring alleged

<sup>208</sup> M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 *The European Journal of International Law* (2005) 4, 661, 691.

<sup>209</sup> J. Pictet (ed.), *Commentaire IV: La Convention de Genève relative à la protection des personnes civiles en temps de guerre* (1956), 391-392.

<sup>210</sup> It is to be kept in mind that the application of the rules on occupation does not say anything about the lawfulness of the occupation, which is regulated by the UN Charter and other rules of *ius ad bellum*, Dörmann & Colassis, *supra* note 200, 301; Benvenuti, *supra* note 1988, paras 21-22.



war criminals to justice.<sup>211</sup> This argument, though, would only give rise to a veritable norm conflict if Iraq's exclusive jurisdiction was violated.

Since the applicants were charged with war crimes, Iraq and the UK could establish competing claims of criminal jurisdiction based on the nationality and the territoriality principle on the one hand and on the passive personality principle and the universality principle on the other hand.<sup>212</sup> Arts 64-78 GC IV contain special rules on criminal jurisdiction in occupied territory. In its *Al-Saadoon* judgment, the High Court held that jurisdiction within a state's own territory, and in particular over a state's own nationals within this territory, was *prima facie* exclusive and that jurisdiction was *in casu* not affected by the presence of the MNF on the territory. To allow suspected war criminals to escape the jurisdiction of the Iraqi courts would be obvious and serious interference in the Iraqi criminal process and a violation of Iraqi sovereignty.<sup>213</sup> This is correct insofar as UK criminal jurisdiction would not allow the UK agents to apprehend suspect persons abroad.<sup>214</sup> Indeed, it cannot simply be inferred from the UK's legitimate claim to prescriptive and adjudicative jurisdiction that the UK has the necessary extraterritorial enforcement jurisdiction to carry out this jurisdiction to prescribe and to adjudicate.<sup>215</sup> Without the consent of the host state, the exercise of enforcement jurisdiction is unlawful because it violates the state's right to respect for its territorial integrity.<sup>216</sup> Viewed as a matter of inter-state relations, the answer to this question does not depend on whether the individuals concerned have consented to being transferred abroad.

In cases of transboundary abductions, however, arguments drawn from the rights and obligations of states *vis-à-vis* each other and from

<sup>211</sup> *Al-Saadoon*, *supra* note 2, para. 107.

<sup>212</sup> For an overview of the rules on criminal jurisdiction see M. Shaw, *International Law*, 6th ed. (2008), 652-687; further see the contributions to M. Bassiouni (ed.), *International Criminal Law*, vol. II, 3<sup>rd</sup> ed. (2008), 83-265; for the present case see Bhuta, *supra* note 8, 14-15.

<sup>213</sup> *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, paras 66-68.

<sup>214</sup> Shaw, *supra* note 2122, 651, 680-683.

<sup>215</sup> Cf. J. E. S. Fawcett, 'The *Eichmann Case*', 38 *The British Yearbook of International Law* (1962), 181, 184-202; B. Baker & V. Röben, 'To Abduct or to Extradite: Does a Treaty Beg the Question?', 53 *Heidelberg Journal of International Law* (1993), 657, 670.

<sup>216</sup> M. Kamminga, 'Extraterritoriality', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), para. 22, available at [www.mpepil.com](http://www.mpepil.com) (last visited 7 December 2009).

human rights law do not contradict each other. The ECtHR held in the *Öcalan* case mentioned above that a deprivation of liberty is inadmissible under Art. 5 para. 1 if it occurs in violation of the sovereignty of the host state or other norms of international law.<sup>217</sup> In the case at hand, by contrast, sovereignty may be violated in order to avoid human rights violations.

However, it might be relevant that, *in casu*, the applicants have been apprehended and detained until the end of the mandate with the consent of the territorial state. If the treatment the applicants expect in Iraq violated Iraq's own human rights obligations stemming from standards shared by Iraq and the UK, a valid argument can be made that the UK's denial to transfer them would not have been in contradiction with Iraqi sovereignty. The scope of a state's sovereignty and *domaine réservé* is not fixed but is determined both by the treaty obligations of a state and the state of development of customary international law.<sup>218</sup> Since both the United Kingdom and Iraq are parties to the International Covenant on Civil and Political Rights (ICCPR),<sup>219</sup> it would not be too far-fetched if the United Kingdom could refer to Iraq's human rights obligations *erga omnes (partes)* under the shared standard of the ICCPR and deny the transfer of the applicants. If the applicants must expect to be sentenced to death in violation of guarantees of fair trial, this could violate not only Art. 14 (procedural guarantees in civil and criminal matters) but also Art. 6 para. 2 ICCPR (right to life), which demands that sentence of death must not be imposed contrary to the provisions of the ICCPR.<sup>220</sup> Furthermore, in its

<sup>217</sup> *Öcalan* [GC], *supra* note 56, para. 92; *Öcalan* [GC], *supra* note 56, para. 90.

<sup>218</sup> K. Ziegler, 'Domaine Réservé', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), para. 2, [www.mpepil.com](http://www.mpepil.com) (last visited 7 December 2009).

<sup>219</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171. Ratification on 20 May 1976 and 25 January 1971, respectively; cf. <http://treaties.un.org> (last visited 7 December 2009) ([http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=1&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en)).

<sup>220</sup> *Mbenge v. Zaire*, Communication No. 16/1977, HRC (1983), UN Doc. CCPR/C/18/D/16/1977 paras 14.1, 14.2, 17; *Pinto v. Trinidad and Tobago*, Communication No. 232/1987, HRC (1990), UN Doc. CCPR/C/39/D/232/1987, paras 12.5-14.; *Kelly v. Jamaica*, Communication No. 253/1987, HRC (1991), UN Doc. CCPR/C/41/D/253/1987, paras 5.6-7; *Piandong et al. V. the Philippines*, Communication No. 869/1999, HRC (2000), UN Doc. CCPR/C/70/D/869/1999, para. 8; *Mansaraj et al v. Sierra Leone*, Communication Nos. 839, 840, 9841/1998, HRC (2001), UN Doc. CCPR/C/72/D/839/1998, paras 5.2, 6.1, 6.2; *Kurbanov v. Tajikistan*, Communication No. 1096/2002, UN Doc. CCPR/C/79/D/1096/2002; HRC

landmark case of *Judge v. Canada*, the Human Rights Committee held that abolitionist states must not remove, by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.<sup>221</sup> To be clear, this common human rights standard only justifies the simple denial to transfer the applicants, even if detained on behalf of Iraq, but not the extraterritorial exercise of enforcement jurisdiction to enforce this standard. Still, before the mandate actually expired on 31 January 2008, the United Kingdom arguably was in a legal position to avoid handing over the applicants.<sup>222</sup>

### III. Strategies to Cope with International Law Norms Competing with the Convention

Even if the refusal to hand over the applicants was illegal under general international law, it is not certain if, and to what extent the Court would find the United Kingdom's obligations under the Convention breached. As the case law of the Court shows, it has developed different strategies to cope with potential conflicts of international law and the Convention, mostly avoiding them in the first place.

#### 1. Displacing the Substantive Convention Obligations

A first method of solving such norm conflicts could be simply to displace the substantive Convention obligations or even to deny jurisdiction. This was the approach of the English Court of Appeal in the case of *B*.<sup>223</sup> It held that, if the *Soering* approach was to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention under certain conditions to the effect that it was understood to be compatible with public international law.<sup>224</sup>

(2003), paras 7.3-7.7. Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights*, 2nd ed. (2005), 142-4, paras 38-41.

<sup>221</sup> *Roger Judge*, *supra* note 116, para. 10.4.

<sup>222</sup> Cp. C. Droège, 'Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges', 90 *International Review of the Red Cross* (2008), 669, 683 and 694.

<sup>223</sup> *R (B)*, *supra* note 182.

<sup>224</sup> *Id.*, para. 88. For a critique see High Court judgment in *Al-Saadoon*, *supra* note 8, paras 90-91.

The decision of the EComHR in the *Hess* case already mentioned<sup>225</sup> was understood as indicating that treaties entered into before the Convention was in force may displace substantive Conventions obligations.<sup>226</sup> In *Hess*, after having denied that the participation in the exercise of the joint authority over Spandau Prison could bring the applicant detained in that prison under the jurisdiction of the United Kingdom, the Commission also commented on the agreement establishing the Allied prison *obiter dicta*: “The conclusion by the respondent Government of an agreement concerning Spandau prison of the kind in question in this case could raise an issue under the Convention if entered into when the Convention was already in force for the respondent Government. The agreement concerning the prison, however, came into force in 1945. Moreover, a unilateral withdrawal from such an agreement is not valid under international law.”

However, this is not the approach generally chosen by the Convention organs. In the past, they have rather held that a state bound by the Convention cannot invoke conflicting treaty obligations.<sup>227</sup> Conversely, as far as treaty obligations predating the Convention are concerned, the Court took an approach totally different from that of the Commission in *Hess*. In *Slivenko*,<sup>228</sup> the Grand Chamber rejected the argument that a treaty obligation entered into prior to the Convention could be qualified as a “quasi-reservation” to the Convention. By contrast, it emphasised that in the absence of specific reservations, ratification of the Convention by a state presupposed that any law then in force in its territory and any provisions of international treaties which a contracting state had concluded prior to the ratification should be in conformity with the Convention.<sup>229</sup>

Whereas the cases mentioned so far concerned treaties with regional reach at best, it is even doubtful whether Convention guarantees could be frustrated by competing international law obligations which result from the UN Charter. In its Art. 103 the Charter claims precedence over all other conventional international obligations, thus arguably stipulating a

<sup>225</sup> *Hess*, *supra* note 18.

<sup>226</sup> B. Fassbender, ‘Der Fürst, ein Bild und die deutsche Geschichte’, 28 *Europäische Grundrechte-Zeitschrift* (2001), 459, 463; Critically: D. Blumenwitz, ‘Die Hess-Entscheidung der Europäischen Menschenrechtskonvention’, 3 *Europäische Grundrechte-Zeitschrift* (1975), 497, 497-498.

<sup>227</sup> Fassbender, *supra* note 226, 463.

<sup>228</sup> *Slivenko v. Latvia* (dec.) [GC], ECHR 2002-II, paras 54-62; see also *Slivenko v. Latvia* [GC], ECHR 2003-X, para. 120.

<sup>229</sup> *Slivenko* (dec.) [GC], *supra* note 228, paras 60-61.

'hierarchy'. In the House of Lords' *Al-Jedda* case,<sup>230</sup> the lead opinion delivered by Lord Bingham proceeded on the basis that Art. 103 UN Charter was applicable also to mere authorizations by the Security Council and claimed primacy with regard to the ECHR despite its special character as a human rights instrument.<sup>231</sup> It came to the conclusion that there was a genuine norm conflict between an express authority of the Security Council and Art. 5 para. 1 ECHR, and accepted that the former prevailed. However, the UK had to ensure that a detainee's rights under Art. 5 are not infringed to any greater extent than is inherent in such detention.<sup>232</sup> Accordingly the presumption must be that member states will, as far as possible, carry out these measures in conformity with existing international law, unless otherwise indicated.<sup>233</sup>

Coming back to *Al-Saadoon*, it is doubtful whether the Court will opine that Iraqi sovereignty displaces conventional obligations. So far, it has shown a certain reluctance to explicitly recognise a pre-emptive effect of Art. 103 UN Charter with respect to the Convention.<sup>234</sup> Accordingly, despite the fact that the fundamental principle contained in Art. 2 para. 1 UN Charter is at stake, and that the relevant Security Council Resolutions 1483 (2003), 1546 (2004) and 1790 (2007) all emphasise the primacy of Iraqi sovereignty,<sup>235</sup> the Court will supposedly not regard substantive obligations as generally displaced by virtue of a competing Charter law.<sup>236</sup>

## 2. Determining the Content of General International Law

Of course, the ECHR will not, as argued above, set aside potentially conflicting norms under general international law simply because they are

<sup>230</sup> *R (Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31.

<sup>231</sup> *Id.*, paras 33, 35

<sup>232</sup> *Id.*, para. 39. For interpretation and critique of the judgment see C. Tomuschat, 'R (on the Application of Al-Jedda) v. Secretary of State for Defence: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists', 9 *Melbourne Journal of International Law* (2008) 2, 391; Messineo, *supra* note 207, 35; M. Milanović, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009) 1, 81-83.

<sup>233</sup> C. Droege, *supra* note 222, 690; Milanović, *supra* note 232, 97-98.

<sup>234</sup> Milanović, *supra* note 233, 86, referring to the cases of *Behrami and Behrami v. France*, Application No. 71412/01 and *Saramati v. France, Germany and Norway* [GC], Appl. No. 78166/01, ECtHR (2 May 2007).

<sup>235</sup> *Al-Saadoon*, *supra* note 2, para. 48.

<sup>236</sup> *Id.*, paras 101, 108.

not part of the Convention system. It has repeatedly stated that the Convention “cannot be interpreted in a vacuum” but “must also take the relevant rules of international law into account”.<sup>237</sup> More sophisticatedly, the Court could avoid a norm conflict in the first place by determining the content of general international law. This method might not be suitable where the allegedly conflicting norm flows from a clear treaty provision as in an extradition treaty but might be powerful with regard to indeterminate rules of unwritten general international law, especially where the law is in flux.

An example of a field of international law which is characterised by a good deal of legal uncertainty is the law of state immunity. Cases of the Court relevant in this context concern the right of access to court under Art. 6. In *Fogarty*,<sup>238</sup> the applicant applied unsuccessfully for posts at the US Embassy and considered her rejection unlawful under UK discrimination legislation; in *McElhinney*,<sup>239</sup> the applicant, an Irish national, claimed damages against the British government for psychological injuries resulting from the acts of a British soldier on the Northern Ireland Border, and in the case of *Al-Adsani*<sup>240</sup>, the applicant claimed compensation from the Kuwaiti Government and a Sheikh related to the Emir of Kuwait for detention and torture in a Kuwaiti State Security Prison for having circulated a sexual videotape of the Sheikh. In all these cases the domestic courts denied jurisdiction on grounds of state immunity, thus possibly violating Art. 6 para. 1. Also, in all three cases the applicants argued that public international law did not require the granting of state immunity, because an exception existed for their respective cases. Accordingly, the applicant in *Fogarty* claimed the existence of an exception to state immunity with respect to employment-related disputes,<sup>241</sup> *McElhinney* was of the opinion that such an exception existed with regard to personal injury caused by an act or omission within the forum state,<sup>242</sup> whereas in *Al-Adsani* the argument was brought forward that immunity could not be claimed for instances of torture.<sup>243</sup> The Court, however, did not make use of this

<sup>237</sup> See for example *Fogarty v. the United Kingdom* [GC], Appl. No. 37112/97, ECHR 2001-XI, para. 56; *Loizidou (Merits)* [GC], *supra* note 21, para. 43; *Maumousseau and Washington v. France*, Appl. No. 39388/05, ECHR 2007-XIII, para. 60.

<sup>238</sup> *Fogarty* [GC], *supra* note 2377.

<sup>239</sup> *McElhinney v. Ireland* [GC], Appl. No. 31253/96, ECHR 2001-XI.

<sup>240</sup> *Al-Adsani* [GC], *supra* note 166, paras 53-66.

<sup>241</sup> *Fogarty* [GC], *supra* note 237, para. 31.

<sup>242</sup> *McElhinne* [GC], *supra* note 23939, para. 30.

<sup>243</sup> *Al-Adsani* [GC], *supra* note 166, para. 51.

opportunity to take part in the development of international law and granted the convention states a margin of appreciation when deciding on the state of international law.<sup>244</sup> Only in *Al-Adsani* did it undertake a detailed analysis of the state of relevant customary international law.<sup>245</sup> Yet this might be due to the fact that the question whether the *ius cogens* prohibition of torture might suspend the principle of state immunity is more controversial than the alleged exceptions in the other cases and thus the rejection required a higher degree of justification. In the end the Court concurred with the British government that the exception was not to apply to *Al-Adsani*.<sup>246</sup>

Similarly, in the cases of *Waite and Kennedy*<sup>247</sup> and *Beer and Regan*<sup>248</sup>, which concern the privileges and immunities of an international organisation, the Court held that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation, including domestic law which “refers to rules of general international law or international agreements.” The Court regarded its own role to be confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.<sup>249</sup>

Thus it can be said that the Court does not make use of this strategy to determine the content of general international law in a way that avoids conflicts with the Convention. It rather prefers to grant the contracting states a certain leeway to determine the state of international law themselves. For the judgment in *Al-Saadoon*, this could mean that the Court will limit itself to concluding that the behaviour of the UK at issue was based on a maintainable understanding of Iraqi sovereignty. In abstract terms, this can be welcomed on the one hand since, according to Art. 32, the jurisdiction of the Court extends only to matters concerning the interpretation and application of the Convention and the protocols, and not to general international law. On the other hand, it is questionable whether the respective national courts are in positions better suited to make this

<sup>244</sup> *Id.*, para. 53.

<sup>245</sup> *Id.*, paras 53-66.

<sup>246</sup> For an analysis of the three judgments with regard to the different densities of control see C. Maierhöfer, ‘Der EGMR als “Modernisierer” des Völkerrechts? – Staatenimmunität und *ius cogens* auf dem Prüfstand’, 29 *Europäische Grundrechte-Zeitschrift* (2002), 391, 393-395.

<sup>247</sup> *Waite and Kennedy v. Germany* [GC], Appl. No. 26083/94, ECHR 1999-I.

<sup>248</sup> *Beer and Regan v. Germany* [GC], Appl. No. 28934/95.

<sup>249</sup> *Waite and Kennedy* [GC], *supra* note 247, para. 54; *Beer and Regan* [GC], *supra* note 8, para. 44.

determination if it does not concern a bilateral treaty obligation only, but a norm under general international law.

### 3. Conflicting International Law Obligations as a “Legitimate Aim” under the Convention

In most of the cases, the ECtHR regarded competing international law obligations as a “legitimate aim” under the Conventions and hence subject to a proportionality test. This can be seen in the immunity cases mentioned above with regard to Art. 6. In determining whether the right of access to a court was violated, the Court accepted the grant of sovereign immunity to a state in civil proceedings in order to “comply [...] with international law to promote comity and good relations between States through the respect of another State’s sovereignty” as a legitimate aim under the Convention.<sup>250</sup> Thus the Court seems to be of the opinion that, independently from the content of the obligation or principle, compliance with international law is a legitimate aim under the Convention *per se*. In doing so, the Grand Chamber subjected the granting of state immunity in the present cases to the usual proportionality test. Still, it did not treat the principle of state immunity in the same manner as any “legitimate aim” flowing from national decisions, but emphasised that “[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity”, explicitly relying on Art. 31 para. 3 lit. c VCLT in this context.<sup>251</sup> From this follows the Court’s presumption that “measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Art. 6 § 1.”<sup>252</sup> Thus it can be concluded that, although the Court subjects cases in which states act in a certain way in order to comply with international law to an examination under the Convention, it allows for a presumption that such an act is proportionate, thus avoiding a norm conflict to a certain extent.

<sup>250</sup> *Fogarty* [GC], *supra* note 2377, paras 33-9; *McElhinney* [GC], *supra* note 23939, paras 34-40; *Al-Adsani* [GC], *supra* note 166, para. 54.

<sup>251</sup> *McElhinney* [GC], *supra* note 23939, para. 36; *Fogarty* [GC] *supra* note 2377, para. 35; *Al-Adsani* [GC], *supra* note 166, para. 55.

<sup>252</sup> *McElhinney* [GC], *supra* note 23939, para. 36; *Fogarty* [GC] *supra* note 2377, para. 37; *Al-Adsani* [GC], *supra* note 166, para. 56.



In the cases of *Waite and Kennedy* and *Beer and Regan* concerning the immunity of an international organisation, the Grand Chamber did not see a legitimate aim in the compliance with the respective constitutive agreement of the international organisation, but still referred to its privileges and immunities as “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments”.<sup>253</sup> Also when balancing this aim against the Convention, it did not allow for a presumption of proportionality but decided this question by examining whether the applicant “had available to them reasonable alternative means to protect effectively their rights under the Convention.”<sup>254</sup> Accordingly, in this context the Grand Chamber was not as generous towards Germany’s international obligation as in the state immunity cases. This might be explained by the fact that, had the Court found a violation of the Convention, a norm conflict would have existed between the Convention and a multilateral agreement on the immunity of a regional European organization but not between the European Convention and a universal norm of international law. For obvious reasons, the Court might have felt in a better position to displace a norm in the first set of facts than in the latter.

If the Court were to follow this approach in *Al-Saadoon*, it would, in all likelihood, find respect for Iraqi sovereignty – if it would be truly violated by the refusal of the surrender – to be a “legitimate aim” under the Convention. Also the proportionality test might be modified by the presumption that the UK had acted proportionately by respecting Iraqi sovereignty. As far as Art. 3 is concerned, however, the proportionality test does not apply. The prohibition provided by Art. 3 against ill treatment is absolute also in expulsion cases<sup>255</sup> so that it is difficult to see how international law could affect its application in *Al-Saadoon*.

#### 4. Requiring a System of “Equivalent Protection” in Cases Regarding International Obligations

In cases in which a state acted in a certain way in order to comply with obligations flowing from its membership in an international

<sup>253</sup> *Waite and Kennedy* [GC], *supra* note 2477, para. 63; *Beer and Regan v. Germany* [GC], *supra* note 248, para. 53.

<sup>254</sup> *Waite and Kennedy* [GC], *supra* note 247, para. 68; *Beer and Regan v. Germany* [GC], *supra* note 2488, para. 58.

<sup>255</sup> *Supra* E.

organisation, the Strasbourg organs have developed an approach of their own to determine the conformity of the contracting state with the Convention. This approach was initially developed by the Commission in the case of *M. & Co.*,<sup>256</sup> in which the applicant claimed a violation of the Convention by Germany because its authorities had issued a writ for the execution of a judgment of the European Court of Justice according to which it had to pay a heavy fine for having violated the EC Treaty. There the Commission held that “the Convention does not prohibit a Member State from transferring powers to international organizations” but that such a transfer of powers in turn “does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded [...]. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective”.<sup>257</sup> It concluded that the “transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection”.<sup>258</sup>

The Grand Chamber endorsed this decision in its *Bosphorus* judgment,<sup>259</sup> a case in which the applicant claimed that Ireland had violated the Convention by impounding its aircraft, whereas Ireland argued that it had only implemented an EC Council Regulation. The Court emphasised “the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organizations”, as already recognised in *Waite and Kennedy* and *Bear and Regan*.<sup>260</sup> It further stated that “compliance with EC law by a Contracting Party constitutes a legitimate general interest objective within the meaning of Art. 1 of Protocol No. 1”.<sup>261</sup> As to the “equivalent protection” test, it slightly modified the *M. & Co.* approach, stating that “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive

<sup>256</sup> *M. & Co. v. Germany*, EComHR (1990) Appl. No. 13258/87, , DR 64, 138.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Appl. No. 45036/98, ECHR 2005-VI.

<sup>260</sup> *Id.*, para. 150.

<sup>261</sup> *Id.*

guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection."<sup>262</sup> It follows from this that the Grand Chamber accepts that compliance with all EC law is a legitimate aim under the Convention and that – comparably to *Waite and Kennedy* and *Bear and Regan* – the possible infringement flowing from this is justified as long as the international organisation offers a system of equivalent protection, both procedurally as well as substantially. The Court has continuously confirmed this jurisprudence and extended it to other international organisations.<sup>263</sup>

In the *Al-Saadoon* case, the third party interveners have relied on this case law and accordingly argued that “[i]n a line of cases, the Court had considered treaties providing for the transfer of competencies to international organisations and held such transfers to be generally permissible but only provided that Convention rights continued to be secured in a manner which afforded protection at least equivalent to that provided under the Convention.”<sup>264</sup> Therefore, the group of interveners submitted that “similar principles should apply where a subsequent international obligation of a contracting state, by treaty or otherwise, provided for joint or co-operative activity with another State, that impacted on the protection of Convention rights within the Contracting State’s jurisdiction.”<sup>265</sup> It is true that the Court has also applied this approach recently *mutatis mutandis* in contexts other than in those in which a state has only complied with binding obligations flowing from membership.<sup>266</sup> However, expanding this case law to the case at hand, where a possible norm conflict might arise between the Convention and Iraq’s sovereignty, does not seem to fit the pattern. First, the relationship between Iraq and the United Kingdom might be based on a form of co-operation now but has certainly not been entered into on this premise. Requiring the United

<sup>262</sup> *Id.*, para. 155.

<sup>263</sup> For a comprehensive overview see: C. Janik, ‘Die EMRK und internationale Organisationen. Ausdehnung und Restriktion der equivalent protection-Formel in der neuen Rechtsprechung des EGMR’, *Heidelberg Journal of International Law*, forthcoming 2010.

<sup>264</sup> *Al-Saadoon*, *supra* note 2, para. 109.

<sup>265</sup> *Id.*

<sup>266</sup> *K. R. S. v. United Kingdom* (dec), ECHR (2008) Appl. No. 32733/08; Cf. Janik, *supra* note 263.

Kingdom to either establish a system of equivalent protection in Iraq or leave the country (or even not invade) seems to be beside the point. Second, this approach is only suitable when a new subject of law is established whose legal order may be shaped by its creators. Iraq obviously is an original subject of law and the United Kingdom is not in the position to determine its legal system. Accordingly, this approach seems rather ill-suited for the case at hand.

## G. Conclusion

Although *Al-Saadoon* has only been decided with regard to its admissibility, it can already be said that the Court has left behind the spirit of the much criticised *Banković* decision. It was speculated that the Court decided *Banković* the way it did under the impressions of September 11, and in so doing it attempted not to restrict the fight against terrorism with human rights obligations.<sup>267</sup> By declaring the European Convention under certain circumstances applicable on the territory of Iraq, this era has surely passed. The Court is following a trend in which courts and treaty monitoring bodies are rejecting an *a priori* subordination of their human rights protection system to international security concerns.<sup>268</sup> Whether *Al-Saadoon* will be a milestone for the protective system of human rights will be seen once the Court (and subsequently possibly the Grand Chamber) has delivered its decision on the merits. At any rate, in the age of globalisation, de-territorialisation and trans-nationalisation, its practical importance will be comparable to that of the *Soering* case.

<sup>267</sup> Lawson, *supra* note 32, 115-116; Jankowska-Gilberg, *supra* note 35, 62; Implicitly: Mole, *supra* note 115, 87; Sperotto, *supra* note 64, 37.

<sup>268</sup> See joined cases C-402/05 P and C-415/0 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECJ, ECR (2008), I-06351; joined cases C-399/06 P and C-403/06 P, *Faraj Hassan and Chsfiq Ayadi v. Council of the European Union and Commission of the European Communities*, ECJ (3 December 2009); *Nabil Sayadi and Patricia Vinck v. Belgium*, Com. No. 1472/2006, HRC (29 December 2008), UN Doc. CCPR/C/94/D/1472/2006.