GoJIL | Goettingen Journal of International Law

Vol. 1, No. 3 (2009)

GoJIL | Goettingen Journal of International Law

Goettingen Journal of International Law (GoJIL)
c/o Göttingen Institute for International and European Law
Platz der Göttingen Sieben 5
37073 Göttingen
Germany
info@gojil.eu
www.gojil.eu
ISSN 1868-1581

The Goettingen Journal of International Law is published Open Access and semiannually by Göttingen Law School students.

Submissions: The GoJIL encourages submissions addressing general international law and employing methodologies from neighbouring disciplines such as international relations, history, or economics. The Journal also welcomes contributions emanating from specialized branches of international law such as international criminal law, international humanitarian law, and international economic law, in particular if they address issues which are of general relevance.

The length of contributions is not restricted. However, we recommend a maximum of 15,000 words. Contributors are requested to insert a short abstract to their submission. Contributions should be saved in MS Word (any version through 7.0) format. Authors should be prepared to supply any cited sources upon request. The full Author Style Sheet is available online at http://gojil.uni-goettingen.de/authorguidelines.pdf.

The views expressed in all contributions to the GoJIL are those of the individual authors and do not necessarily represent the views of the Board of Editors or the Göttingen Institute of International and European Law.

GoJIL | Goettingen Journal of International Law

Vol. 1, No. 3 (2009)

Contents

Editorial

Articles

Current Developments in International Law

Book Review

GoJIL | Goettingen Journal of International Law

Vol. 1, No. 3 (2009)

Editorial

It is already December and the year of 2009 is almost over. With the publication of its third and closing issue for Volume I the GoJIL is completed. With this final issue of the year, the Editorial Board looks back on a very inspiring and successful albeit busy year of publishing.

In February 2009, the first issue of the GoJIL was released. Prior to that, it took more than a year to prepare for the release of the first issue. In planning for the first year, the Editorial Board set high goals; three issues were to be published in 2009, including one special issue on a specific subject. The stakes were high, but with the appreciation and support, not only at its place of birth, the Georg-August-University Göttingen, but also in the international legal community, and the strong commitment of the team, the GoJIL managed to publish the targeted three issues in its Volume I. In addition, the team also organized a workshop on "Strategies for Solving Global Crises – The Financial Crisis and Beyond" in fall 2009.

It could be said that the GoJIL might have entered – after a relatively short period of time – into a stage of day-to-day-business with its third issue this year. But in editing, there is no such "business as usual". And it is pretty much the same in international law. It develops constantly and challenges scholars to grow continuously with these very changes. The best example underlining this hypothesis is the legal history of the former Federal Republic of Yugoslavia. With the break-up of the former republic, the necessary application of international law in the situation resulted inevitably in the same being challenged. The International Court of Justice was required to decide in several cases on the facts and also on the application of international law. Now, it is the International Court of Justice again, that is asked to examine the application of international law in its Advisory Opinion on the legality of the Unilateral Declaration of Independence with regard to Kosovo. New methods of solving the situation have been attempted: United Nations Special Envoy Martti Ahtisaari, after many others, was finally put in charge to initiate round tables discussions with the parties. These attempts

proved to be futile. Today, the International Court of Justice, an established mechanism, is required to deal with the new conditions. In the Kosovo situation, one can see that the principles invoked and those that may have been violated, have been in existence for centuries: the principle of sovereignty and territorial integrity, and the principles of self-determination and of human rights. Additionally, the authority of the Security Council of the United Nations and of the United Nations itself is challenged. It goes without saying, to answer the question posed by the General Assembly will not be easy. International law as it stands has to adapt to the current situation. Of course, the international community will be looking to The Hague and the opinion that will be written by the 15 judges. Additionally, law journals attempt to make a contribution to solve the situation, in hope that the judges will rely, at least in part, on the published works of scholars.

Revisiting the example of Kosovo, it demonstrates that the will of people has become increasingly important in our times. It's all about people! This mantra of recruitment offices determines in various ways today's discussions in international law. This year, a deficit of democratic representation of the German people led the *Bundesverfassungsgericht* (Constitutional Court of the Federal Republic of Germany), in its controversial Lisbon judgment, to demand modifications of Germany's process of treaty ratification of the Treaty of Lisbon. The people's right to self-determination also plays a role in Spain with regard to the people in Catalonia. As we have learnt from news reports just a few days ago, the people in parts of Catalonia voted yet again in a non-binding referendum for the independence of Catalonia. In a Swiss referendum, the people have voted in favor of a ban of the erection of minarets which will now be incorporated into the Swiss constitution. This bears the questions what can happen in a case of conflict between democratic participation and international human rights obligations. It will be interesting to see if the European Court of Human Rights in Strasbourg will be asked to decide and what position it will take regarding the referendum and the freedom of religion.

The people demanding "*Wir sind das Volk*" (We are the People) led to the end of the socialistic German Democratic Republic 20 years ago. Although the people seem to play an important role in international law, the definition of "people" is still unclear. This lies at the heart of many disputes today. Do Kosovars constitute a people? Even the Kosovars themselves avoid this question and rather base their arguments on resolution 1244 of the United Nations' Security Council. The Serbs as opponents in the case at hand stress a breach of resolution 1244 rather than focusing on the right to self-determination. It was in fact the other states submitting their statements

to the Court which relied on this principle. The neighboring state of Albania, for example, submitted partly on the right to self-determination. It will be interesting to see which line of reasoning the Court will take when answering the General Assembly's question. One may consider Kosovo's membership in international organizations, indicating a normative force of the factual (*normative Kraft des Faktischen*) to quote Jellinek. His doctrine of the three elements, although not directly relied upon by the main participants Serbia and Kosovo, could see a revival due to the questions being raised not only with regard to Kosovo, but also with regard to South Ossetia, Tibet etc.

In the final issue of this year, scholars use the opportunity provided by GoJIL as a platform to examine and discuss the application of international law to current situations and challenges faced.

We compliment Marco Benatar, the winner of the second GoJIL Student Essay Competition on "Justifying the Use of Force", for his remarkable approach. He strikes new paths in taking a look at the "wired" world and considers "Cyber Force" as a means of force in his article "The Use of Cyber Force: Need for Legal Justification". Further, we take this winning paper as well as the contributions of all participants as a testament for the high academic standard and the courageous approach of young academics. This prompts us to continue to hold Student Essay Competitions. The topic of the following competition in 2010 will be "The Rise of Self-Determination".

On the subject of changes and challenges, the French concept of "*droit à l'ingérence*", also known as humanitarian assistance, was developed to counter violations of human rights. Marie-José Domestici-Met, the first French scholar publishing in the GoJIL, presents, and elaborates on, this concept in the first part of a tripartite series "Humanitarian Action – A Scope for the Responsibility to Protect?" She describes the evolution of this concept, applying a geopolitical approach, in this first introductory part. The author refers to several international and internal conflicts faced by the international community during the past decades and relates them to the emergence of the concept. She further illustrates how the international community copes with old and new situations.

Not only does international law change due to current developments, circumstances may also arise where domestic law has to adapt to conform to international law. For instance, in 2006, China acceded the World Trade Organization. Since the accession had a special outcome on China's banking sector, Jiaxiang Hu examines the consequences in "Market Access or Market Restrictions – Analysis on the Regulations of PRC on Administration of Foreign-funded Banks".

International law finds itself somehow in a paradox situation: its proliferation as proof of its success goes hand in hand with difficulties. States or parties develop alternative treaty based mechanisms. The problems international law faces differ from field to field. In the distinct branches, several approaches have been developed to solve the problems. In International Environmental Law, for instance, framework conventions are used. Nele Matz-Lück in the fourth article of this issue elaborates on this matter in "Framework Conventions as a Regulatory Tool" and demonstrates the advantages of their usage in all fields of international law.

Nevertheless, one may question whether international law as a system runs the risk of collapsing on account of its plurality. Fortunately, states enter into treaties and accept various legal obligations. On the reverse side, states become subjects of various legal norms and hence may come into conflict with rules of general international law or contradicting treaty obligations. This issue dedicates its section "Current Developments" to the highly fascinating clashes of norms that are challenging the application of human rights.

61 years after the Universal Declaration of Human Rights, the claim of universal validity of human rights continues to be confronted with new practical difficulties, which arise from extraterritorial acts of states or the challenges through acts of the United Nations Security Council, and the normative problems with the simultaneous application of different legal regimes.

In 2009, we are not only celebrating the 20 years anniversary of the Fall of the Berlin Wall, it has also been 20 years since the European Court of Human Rights' decision in the *Soering case*. In "When Soering Went to Iraq…: Problems of Jurisdiction, Extraterritorial Effect and Norm Conflicts in Light of the *Al-Saadoon Case*", the authors Cornelia Janik and Thomas Kleinlein examine how the European Court Human Right and the British Courts coped with international law norms that potentially compete with the Convention.

The conflict between Art. 103 United Nations Charter and Human Rights is a relevant part of the contribution by Marko Milanović dealing with the *Sayadi v. Belgium* case before the Human Rights Committee.

Is the principle of state sovereignty challenged not only by a single people, but also by international organizations? Kenneth Anderson in a book review examines Paul Kennedy's "The Parliament of Man: The Past, Present, and Future of the United Nations". The author refutes Paul Kennedy's thesis about slow global governance take-over by international institutions in place of sovereign states.

The following contributions shed some light on the subjects raised. And as these subjects show: there is no business as usual, neither in international law nor in international law discourse.

The Editors

GoJIL | Goettingen Journal of International Law

Acknowledgments

Without the incredible support and help of the following people, we would not have been able to accomplish this ambitious project. We would like to thank:

- All members of the GoJIL Advisory Board and Scientific Advisory Board
- The University and Law Faculty of Göttingen
- The Joachim Herz Stiftung
- The Göttinger Verein zu Förderung des Internationalen Rechts e.V.
- The Göttinger Universitätsverlag
- The Göttingen Institute for Public International Law and European Law
- Neela Badami
- Elizabeth Campbell
- Roslyn Fuller
- Karen Kimkana
- Michael Koebele
- Tim Nicolls
- Dan Peat
- Stephan Schill

Goettingen Journal of International Law 1 (2009) 3, 375-396

The Use of Cyber Force: Need for Legal Justification?

Marco Benatar*

Table of Contents

* Cand. Jur., Lic. Jur. (Vrije Universiteit Brussel); LL.M. (New York University).

doi: 10.3249/1868-1581-1-3-benatar

Abstract

This short essay presents a legal analysis of *cyber force*, an intangible form of international coercion that exploits computer networks leaving havoc in its wake. After providing recent examples of this phenomenon, as well as circumscribing its scope, the essay sets out to determine to what extent cyber force can be reconciled with contemporary *jus ad bellum*. Two key questions will be addressed: is cyber force a use of force as defined in article 2(4) of the UN Charter, and if so, could it conceivably rise to level of an armed attack justifying self-defence as meant by article 51 of the same document? In order to respond to these queries, the analysis hinges upon the interpretative techniques of the Vienna Convention of the Law of Treaties as well as the current doctrinal debates regarding cyber force. The essay ends with a brief consideration of plausible prospects with respect to the regulation of this novel form of coercion.

A. Introduction: "Here Come the Cyber Wars"[1]

Among tech savvy pundits, Estonia is renowned for two things, one commendable, the other unenviable. The tiny Baltic country has the reputation of being the most "wired" country of Europe where regular online elections and free Wi-Fi abound.[2] Unfortunately, Estonia is also the first country ever to have experienced a large-scale co-ordinated attack against state-run computer systems.[3] The reason for this digital onslaught: a controversial decision to remove a Soviet war monument, the Bronze Soldier of Tallin, from the city centre, much to the ire of the local Russian population. What followed was a cyber siege lasting three weeks, with attacks launched against a plethora of public websites.[4] Quite surprisingly,

1 M. Weiss, Here Come the Cyber Wars: Are We Ready?, *Reason.Com* (17 August 2007) available at http://www.reason.com/news/show/121896.html (last visited 15 June 2009).

2 J. Davis, Hackers Take Down the Most Wired Country in Europe, *Wired Magazine* (21 August 2007) available at http://www.wired.com/politics/security/magazine/15-09/ff_estonia (last visited 15 June 2009).

3 A. Kobilnyk, 2008 – Year of the First Cyber-War?, *First Science.Com* (13 January 2008) available at http://www.firstscience.com/home/perspectives/editorials/2008-year-of-the-first-cyber-war_41826.html (last visited 15 June 2009).

4 P. Finn, Cyber Attacks Stalk Estonia, *Washington Post*, 19 May 2007; D. B. Hollis, 'Why States Need an International Law for Information Operations', 11 *Lewis &*

the destructive effect of this computerized aggression was not the result of highly sophisticated hacking tools. Rather, it was brought about by relatively primitive Distributed Denial of Service attacks (DDos) in which a website is flooded by constant requests, overwhelming the server thereby causing it to malfunction.[5] No state has claimed responsibility and despite Estonia pointing its finger to the Russian government, no involvement of the latter has been conclusively proven. In the aftermath of the attacks, NATO established the Cooperative Cyber Defence Centre of Excellence in Tallin.[6]

If more recent instances of digital aggression are anything of an indication, the future looks grim for peace in cyberspace. In August 2008, the world witnessed the first (known) case of cyber attack coinciding with actual armed conflict during the Russian-Georgian War.[7] More recently, in July of this year, unidentified hackers hit multiple targets in South Korea and the United States.[8] Governments are bracing themselves for the worst. McAfee, a major computer security company, observes: "[…] with an estimated 120 countries working on their cyberattack commands, in 10-20 years experts believe we could see countries jostling for cyber supremacy".[9]

Besides demonstrating that reliance on high-tech is a double-edged sword, cyber attacks raise a hugely important legal question: are they illegal uses of force? The UN Charter and customary international law proclaim the prohibition of the use of force between states. But what is precisely meant by "force" and can we interpret the use of force in a way that includes cyber attacks within its gamut? If we can construe cyber force as a *species* of illegal coercion, this might help bolster the legal abnegation of interstate violence. If, however, we fail in our enterprise, there will remain scant legal impediments to launching the computer wars of tomorrow.

Clark Law Review (2007) 4, 1024-1025; S. L. Myers, 'E-stonia' Accuses Russia of Computer Attacks, *New York Times*, 18 May 2007; The Cyber Raiders Hitting Estonia, *BBC News* (17 May 2007) available at http://news.bbc.co.uk/2/hi/europe/6665195.stm (last visited 20 July 2009).

5 Kobilnyk, *supra* note 3.

6 The website of the Centre: http://www.ccdcoe.org/ (last visited 20 July 2009).

7 J. Markoff, Before the Gunfire, Cyberattacks, *New York Times*, 12 August 2008.

8 Targets included the White House, Pentagon, State Department (US), Presidential Office and Defense Ministry (South Korea). Governments Hit by Cyber Attack, *BBC News* (8 July 2009) available at http://news.bbc.co.uk/2/hi/technology/8139821.stm (last visited 20 July 2009); New 'Cyber Attacks' Hit S Korea, *BBC News* (9 July 2009) available at http://news.bbc.co.uk/2/hi/asia-pacific/8142282.stm (last visited 20 July 2009).

9 McAfee, Cybercrime: The Next Wave, Virtual Criminology Report (2007), 12, available at http://www.mcafee.com/us/research/criminology_report/default.html (last visited 15 June 2009).

This paper aims to tackle this conundrum. Firstly, a rudimentary definition and typology of cyber force will be provided, as well as a comparison of this novel concept with the germane notions of cyber crime and cyber espionage. Thereafter, the core topic, the legality of cyber force, will be addressed. An attempt will be made to reconcile article 2(4) of the UN Charter with cyber force using the interpretative techniques of the 1969 Vienna Convention on the Law of Treaties (VCLT). This will be followed by a short discussion of article 51 of the UN Charter. Here, the central question is whether cyber force could conceivably rise to the level of an "armed attack". Finally, the paper looks at future prospects of incorporating computer attack in international law.

B. The Concept of Cyber Force

For the purpose of this paper, *cyber force*[10] is defined as coercive measures[11] that are (1) taken by a state or an entity whose actions are attributable to the state and (2) travel through cyberspace[12] exploiting the interconnectedness of computer networks to cause harmful effects in another state.

Varying greatly in intensity, ranging from web vandalism to attacking critical infrastructures, cyber force ultimately takes on one of three forms. The first type, *syntactic attack*, targets the *operating system* of a computer by means of malicious code or hacking.[13] Examples include worms which

[10] Legal literature on this topic gives many names to these (or similar) types of coercive acts. Examples include "cyber force", "cyber attack" and "information warfare". For the purpose of this paper, such terms are used interchangeably.

[11] Coercion involves "the government of one state compelling the government of another state to think or act in a certain way by applying various kinds of pressure, threats, intimidation or the use of force." See C. C. Joyner, 'Coercion', marginal number 1, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), available at http://www.mpepil.com (last visited 15 June 2009).

[12] Originally employed by sci-fi author William Gibson to describe an alternate computerized world of reality, the notion of cyberspace now has evolved into a technical term. Although no commonly accepted definition exists, cyberspace is conceived as a space where computer networks, information systems and the Internet interact. See W. Gibson, *Neuromancer* (Ace Books, 1984), 51.

[13] Malicious code is computer language that can destroy or obstruct files and programs on the targeted computer. V. M. Antolin-Jenkins, 'Defining the Parameters of Cyberwar Operations: Looking for Law in All the Wrong Places?', 51 *Naval Law Review* (2005), 139.

consistently copy themselves resulting in major slowdown,[14] trap doors that grant attackers unauthorized access to enter a computer system,[15] and logic bombs that lie dormant in computers for long periods of time until a trigger activates them upon which they unleash havoc.[16] Hacking involves breaking into a computer in order to spy or exploit an operating system. Access can be gained by relying on human weakness (social engineering), using sniffer programs to intercept passwords, user names etc. (eavesdropping) or using a dictionary program to try all possible code combinations (brute-force intrusion).[17]

Semantic attacks, the second kind of cyber force, are not aimed at operating systems but rather the *accuracy of information* retained by computers. The goal is to corrupt data so as to mislead users into thinking that information is true. This is particularly dangerous when a governmental website is targeted, for the public at large will be inclined to trust the data and act accordingly.[18]

Thirdly, *mixed attacks* involve a *combination* of syntactic and semantic attacks. Understandably, this category of cyber warfare has the ability to bring about extreme levels of devastation if well-orchestrated.[19]

In order to delineate the concept of cyber force, the latter has to be distinguished from similar acts. The first such distinction is between cyber force and *cyber crime*. The difference is twofold. In terms of the perpetrator, acts of cyber force are committed by a state or state-related entity, whereas private entities commit cyber crime.[20] As for the applicable law, interstate computer attacks are regulated by international law, in contrast to cyber

14 J. Barkham, 'Information Warfare and International Law on the Use of Force', 34 *New York University Journal of International Law and Politics* (2001) 1, 63.

15 C. C. Joyner & C. Lotrionte, 'Information Warfare as International Coercion: Elements of a Legal Framework', 12 *European Journal of International Law* (2002) 5, 836.

16 Barkham, *supra* note 14, 63.

17 S. J. Cox, 'Confronting Threats Through Unconventional Means: Offensive Information Warfare as a Covert Alternative to Preemptive War', 42 *Houston Law Review* (2005) 3, 887-888.

18 Antolin-Jenkins, *supra* note 13, 140.

19 *Id.*, 141.

20 D. M. Creekman, 'A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-Attacks from China', 17 *American University International Law Review* (2002) 3, 653.

crime, which is a matter of domestic criminal law and law enforcement.[21] With respect to the second point of difference some subtle distinction is in order. Cyber crime is not purely a matter of domestic legislation that eludes international law. The European Cybercrime Convention is an excellent example of efforts undertaken at the intergovernmental level to form a common policy on cyber crime.[22]

Cyber force also differs from *cyber espionage*. They share the commonality of using the same techniques to penetrate the computer networks of a targeted state yet they diverge in terms of finality. The goal of espionage is to obtain sensitive information for a variety of purposes, in contrast to a cyber attack which aims to generate deleterious effects akin to an act of force. From a legal perspective, espionage is generally punishable under domestic law and amounts to a legitimate, if unfriendly, act under international law, whereas cyber attacks violate the rules of international law related to the recourse to force.[23]

C. The Legality of Cyber Force

I. Article 2(4) UN Charter – Narrow Interpretation

This section will examine the notion of force as defined in article 2(4) of the UN Charter, the cardinal provision of the *jus ad bellum*.[24]

21 J. J. Rho, 'Blackbeards of the Twenty-First Century: Holding Cybercriminals Liable Under the Alien Tort Statute', 7 *Chicago Journal of International Law* (2007) 2, 701-702.

22 *Council of Europe Convention on Cybercrime*, 23 November 2001, Treaty Doc. 108-11, ETC No. 185.

23 Y. Dinstein, 'Computer Network Attacks and Self-Defense', in M. N. Schmitt & B. T. O'Donell (eds), *Computer Network Attack and International Law* (2002), 105; S. P. Kanuck, 'Information Warfare: New Challenges for Public International Law', 37 *Harvard International Law Journal* (1996) 1, 276; W. G. Sharp, *Cyberspace and the Use of Force* (2000), 123-132.

24 The UN Charter includes various rules dealing with the use of force as well as international peace and security in the broader sense. Within this legal framework, article 2(4) plays a pivotal role by virtue of the fundamental rule it enshrines. Therefore, it is fair to refer to this rule as "the mother of all provisions relating to the use of force in the Charter". See N. Schrijver, 'Article 2, paragraphe 4', in J-P Cot, A. Pellet & M. Forteau (eds), *La Charte des Nations Unies: Commentaire Article par Article* (2005), 446. Furthermore, this paper will be solely dedicated to the use of force to the exclusion of the law of armed conflict (*jus in bello*). For an excellent short overview of the relationship between cyber attacks and humanitarian law, see:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The interpretative techniques enshrined in the 1969 Vienna Convention on the Law of Treaties (VCLT) will serve as a "toolbox".[25] Although article 4 of the VCLT stipulates that it only applies to treaties concluded after its entry into force, its rules of interpretation have acquired customary force and are held to be applicable to the UN Charter.[26] The goal here is to determine whether we can conceive of a new notion of force, cyber force, which fits within article 2(4) without stretching the provision to its breaking point.

1. Textual Exegesis

When attempting to unearth the ordinary meaning of a term, one feels naturally drawn to the dictionary.[27] A brief overview of some major dictionaries of the English language is sufficient to discover that force has several connotations. In the narrow sense it designates physical force. In the broader sense it comprises a host of measures. Thus, it is possible from a purely linguistic perspective to argue for either an expansive or limited reading of the concept of force.[28]

M. N. Schmitt, H. A. Harrison Dinniss & T. C. Wingfield, Computers and War: The Legal Battlespace, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (June 2004) available at http://www.ihlresearch.org/ihl/pdfs/schmittetal.pdf (last visited 15 June 2009).

25 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 18232 [VCLT]; The VCLT covers the most important areas of the law of treaties, including the rules on interpretation, which can be found in articles 31-33. The following interpretative elements will be used: text, context, *travaux préparatoires*, and subsequent practice.

26 G. Ress, 'Interpretation', in B. Simma (ed.), *The United Nations Charter: A Commentary*, 2nd ed. (2002), 18.

27 This is a valid tool of interpretation in international law and is often used by the ICJ. See A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (2007), 183.

28 H. Brosche, 'The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations', 7 *Case Western Reserve Journal of International Law* (1974) 1, 19; This is hardly an

Examining the context in which article 2(4) operates yields more interesting results. Firstly, article 2(4) merely mentions "force" without any qualifying adjectives. The framers undoubtedly were aware of the diverse forms of coercion available to states, so it is possible that a deliberate choice was made to develop a rule that could flexibly adapt to new and unforeseeable forms of violence and keep its relevance as a norm of conduct for international relations.[29]

Secondly, other articles of the UN Charter do explicitly refer to "armed force".[30] From this we could reason *a contrario* that whenever the drafters meant to say armed force, then they would not be hesitant to write that *ad verbatim* in the UN Charter.[31]

Thirdly, the use or threat of force is only illicit when it targets the "territorial integrity or political independence of any state", or is conducted in "any other manner inconsistent with the Purposes of the United Nations".[32] Evidently, military coercion can generate these deleterious effects. That does not however prevent other forcible measures from achieving the very same consequences.[33]

idiosyncrasy of English; the French (*la force*) and Spanish (*la fuerza*) counterparts yield the same imprecise results.

29 Comment, 'The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations', 122 *University of Pennsylvania Law Review* (1974) 4, 999.

30 Art. 41 Charter of the United Nations: "The Security Council may decide what measures not involving the use of *armed force* are to be employed to give effect to its decisions […]" (emphasis added); Art. 46 Charter of the United Nations: "Plans for the application of *armed force* shall be made by the Security Council with the assistance of the Military Staff Committee" (emphasis added); Art. 47.3 Charter of the United Nations: "The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any *armed forces* placed at the disposal of the Security Council […]" (emphasis added). Brosche, *supra* note 28, 20.

31 Comment, *supra* note 30, 997.

32 The aforementioned purposes of the UN can be found in Art. 1(1) Charter of the United Nations: "To maintain international peace and security, and to that end: […] and to bring about by peaceful means, […], adjustment or settlement of international disputes or situations which might lead to a breach of the peace" and Art. 2(3) Charter of the United Nations: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

33 By way of illustration, the imposition of a comprehensive trade embargo (economic coercion), spreading subversive propaganda (ideological coercion) or isolating a government in the international arena (diplomatic coercion) can be as invidious (if not more) to the political independence of a state as the onslaught of a bombing campaign.

Advocates of the restricted reading of article 2(4) refute these assertions. Firstly, the seventh perambulatory clause of the UN Charter states that "*armed* force shall not be used save in the common interest" (emphasis added). The UN Charter is structured in such a manner that the preambulatory clauses are broader in scope than the provisions that follow and implement them. Hence, it would run counter to the design and consistency of the treaty for article 2(4) to prohibit force in the broad sense, whilst the goal of the UN is to abnegate force in the narrow sense.[34] Moreover, article 41 contains a list of measures "not involving the use of armed force" that the Security Council can adopt under Chapter VII including the "complete or partial interruption of […] means of communication". In this day and age it is not hard to accept that the internet fits this description to a tee.[35]

We can conclude from this analysis that the wording of article 2(4) is ambiguous to say the least. The very same text is conducive to radically opposed understandings of the concept of force.[36]

2. Travaux Préparatoires

The proposals and ensuing discussions of the UN Conference on International Organization (UNCIO) of 1945 form the essential starting point for any historical inquiry into the *raison d'être* of the UN Charter. This is certainly the case with respect to article 2(4), due to the electrifying debates and divergence of views it gave rise to.[37]

During the drafting of what would become article 2(4), a host of unsuccessful proposals were submitted in favor of expanding the prohibition to virtually all conceivable uses of force. Ecuador suggested outlawing

See M. S. McDougal & F. P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (1994), 28-30.

34 M. N. Schmitt, 'Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework', 37 *Columbia Journal of Transnational Law* (1999) 3, 904.

35 Hollis, *supra* note 4, 1041.

36 It is disappointing that the language of a fundamental rule such as this one is plagued by a high degree of indeterminacy. However, see *contra* O. Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Review* (1984) 5/6, 1625: "These interpretive questions concerning the meaning of "force" and "threat of force" are of importance in some situations and they indicate that the precise scope of the article requires further definition. However, they are essentially peripheral questions. They do not raise questions as to the core meaning of the prohibition and do not, therefore, require one to conclude that article 2(4) lacks determinate content".

37 Schrijver, *supra* note 24, 443.

moral and physical force,[38] whilst Iran endorsed banning direct and indirect political force.[39] The most famous attempt was made by the Brazilian delegation, who suggested the following amendment: "All members of the Organization shall refrain in their international relations from the threat or use of force and from the threat or use of economic measures in any manner inconsistent with the purposes of the Organization".[40] The proposal was ultimately torpedoed by a vote of 26 to 2.[41] The overwhelming refusal to expand article 2(4) can thus be seen as a confirmation of the restrictive view on force as denoting only armed force.

3. Subsequent Practice

A good indicator of subsequent practice can be found in the various resolutions adopted within the institutional framework of the UN that deal with issues of peace and security. When such declarations garner widespread support they can become authoritative accounts of how the UN Charter should be interpreted.[42]

The Declaration on Friendly Relations,[43] adopted on the 25th anniversary of the organization as a landmark resolution,[44] prohibits the threat or use of force in international relations. During the committee sessions, opposing arguments were voiced as to the scope of "force". The majority of Western nations wanted to maintain the restricted notion of armed force. The African and Asian group preferred a purpose-based analysis irrespective of the form of pressure. The Central and South

38 6 U.N.C.I.O. Docs. 561 (1945); 3 U.N.C.I.O. Docs. 399, 423 (1945).

39 6 U.N.C.I.O. Docs. 563, 588 (1945).

40 6 U.N.C.I.O. Docs. 559 (1945).

41 6 U.N.C.I.O. Docs. 334-339, 405, 609 (1945). It is interesting to observe that although in 1945 it was in large part the Third World advocating and the West opposing the inclusion of economic force, the tables would turn radically a few decades later: at the height of the Arab Oil Crisis, Western scholars went to great lengths to qualify the economic boycott of the OPEC countries as an illegal use of force. See C. E. Cameron, 'Developing a Standard for Politically Related State Economic Action', 13 *Michigan Journal of International Law* (1991) 1, 218-219.

42 A. Boyle, 'Soft Law in International Law-Making', in M. D. Evans (ed.), *International Law*, 2nd ed. (2006), 146.

43 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 24 October 1970 [Friendly Relations Declaration].

44 G. Arangio-Ruiz, *War, The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979), 1.

American group was divided on the matter.[45] In the end, the final text makes no mention of other forms of interstate pressure and uses terms that can only relate to armed force.[46] In addition, the declaration links the principle on non-intervention in domestic affairs to economic and political coercion.[47] Therefore, the majority view connects article 2(4) with force and the principle of non-intervention with other forms of coercion.[48]

The Declaration on the Non-Use of Force[49] strengthens that conclusion.[50] In a similar fashion, the structure and language of this resolution implies a separation of coercive measures with armed force on the one hand and other types of pressure on the other hand.[51]

Beyond the confines of the United Nations, the term "force" is used in numerous treaties often without any further specification or qualifying adjectives.[52] Such is the case for various mutual defense pacts (e.g.

45 Schmitt, *supra* note 35, 906-907.

46 "war of aggression", "violate the existing international boundaries of another State", "violate international lines of demarcation", "irregular forces or armed bands", "acts of civil strife or terrorist acts", "military occupation". Schmitt, *supra* note 35, 907.

47 Friendly Relations Declaration, *supra* note 45: "No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".

48 A. Randelzhofer, 'Article 2(4)', in B. Simma (ed.), *The United Nations Charter: A Commentary*, 2nd ed. (2002), 118; *Contra* Arangio-Ruiz, *supra* note 46, 99-100. Although not defining the precise scope of the non-use of force rule, Arangio-Ruiz asserts that other forms of coercion are included in this prohibition. His main argument is derived from the fact that neither the Declaration nor the Charter have a differentiated sanction for economic and political coercion as opposed to armed force.

49 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, 18 November 1987 [Declaration on the Non-Use of Force].

50 The drafting history of the text also reflected deep divisions between nations akin to those witnessed during the negotiations of the Declaration on Friendly Relations; C. Gray, 'The Principle of Non-Use of Force', in V. Lowe & C. Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (1994), 34.

51 Para. 1 Subpara. 7 Declaration on the Non-Use of Force: "States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements"; Para. 1 subpara. 8 Declaration on the Non-Use of Force: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".

52 Schmitt, *supra* note 35, 906.

NATO[53]), international organizations (e.g. African Union[54]) and other international instruments (e.g. Rome Statute[55]).

4. Conclusion

It is apparent from this analysis that the UN Charter adopts a clear-cut approach to force by distinguishing three types: armed, economic and political.[56] All can lead to a violation of international law, namely the principle of non-intervention,[57] but only force of an armed nature can violate the norm enshrined in article 2(4) and therefore constitute a use of force in the technical sense.[58] Later attempts in the General Assembly to replace this model with a broader one failed.

53 Art. 1 *North Atlantic Treaty*, 4 April 1949, 34 U.N.T.S. 243: "The Parties undertake, as set forth in the Charter of the United Nations, […] to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations".

54 Art. 4(f) *Constitutive Act of the African Union*, 11 July 2000, OAU Doc. CAB/LEG/23.15: "Prohibition of the use of force or threat to use force among Member States of the Union".

55 Preamble *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90: "Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations".

56 Schmitt, *supra* note 35, 909.

57 This principle is enshrined in various sources: implicitly in Art. 2(1) of the UN Charter (sovereign equality), explicitly in the Friendly Relations Declaration and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. A/RES/36/103, 9 December 1981, as well as the jurisprudence of the International Court of Justice (e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, para. 202: "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. […] international law requires political integrity […] to be respected."

58 Some are, however, critical of the view that instrumentality should be the definitive factor for determining whether an act fits in the use of force paradigm. See McDougal & Feliciano, *supra* note 34, 240-241.

II. Article 2(4) UN Charter – Broad Interpretation

Acknowledging the conclusion above, one can endeavor to demonstrate that cyber attacks are perhaps not a new kind of force but instead a new kind of *armed* force. However, in order to do so, recourse will be sought to a more expansive legal technique, namely analogy.[59] Showing that cyber attacks are sufficiently similar to typical examples of armed force would allow for a broadening of the scope of article 2(4) to include cyber force.

1. Instrumentality Approach

How we legally qualify an act is contingent upon the type of tool that is used (armed, economic or political) rather than the harmful consequences that it causes.[60] This approach Hollis calls "instrumentality".[61]

In essence, the notion of armed force is one of weaponry.[62] So which weapons are authorized? The *jus ad bellum* remain silent on this issue. Not that this is a surprising state of affairs, given that article 2(4) does not even mention the word "armed" in its treatment of the prohibition of armed force.[63] In a similar vein, the International Court of Justice (ICJ) observed the following in its advisory opinion on the legality of nuclear weapons: "These provisions [pertaining to the use of force in the UN Charter] do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon […]".

Fortunately, several scholars have filled the void by construing an interpretation of armed force. The traditionalist understanding of armed

59 S. Vöneky, 'Analogy in International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), available at http://www.mpepil.com (last visited 15 June 2009).

60 Kanuck, *supra* note 23, 289.

61 Hollis, *supra* note 4, 1041.

62 J. N. Bond, 'Peacetime Foreign Data Manipulation as One Aspect of Offensive Information Warfare: Questions of Legality under the United Nations Charter Article 2(4)', *Advanced Research Project, Naval War College* (1996), 78.

63 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 244.

force consists of two elements, namely that an act of coercion is military as well as physical.[64]

The first condition, the *military* nature of the forcible measure, heavily relies on the ongoing leaps and bounds that military technology makes. The level of sophistication that characterizes modern weaponry develops at a rapid rate seeing that superior technology is paramount for keeping the edge and exerting a deterrent effect on potential adversaries. If article 2(4) cannot keep pace with this evolution, then it would become a redundant artifact merely able to regulate the means of combat known to the drafters of the UN Charter.[65] Figuring out when new forms of warfare meet the military requirement is a hard exercise, bearing in mind that there are no legal guidelines to follow. One way of approaching this quandary would be to accept that a weapon is military in nature, only when it is part of the official arsenal of the army of a state.[66]

A study of the United States Armed Forces illustrates how computer attacks can become a significant means of warfare and thus meet the requirement of military force. Firstly, the ability to use computer technology in combat situations has been comprehensively conceptualized in military doctrine. The key document in this regard is the *Joint Doctrine on Information Operations*[67] which theorizes a relatively wide spectrum of

64 D. Bowett, *Self-Defence in International Law* (1958): "taking the words [of article 2(4)] in their plain, common-sense meaning, it is clear that, since the prohibition is of the use or threat of force, they will […] apply [….] only to physical, armed force"; Randelzhofer, *supra* note 50, 118: "[…] only military force is the concern of the prohibition of the use of force"; C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', in 81 *Hague Academy of International Law, Recueil des Cours* (1952), 492: "[…] the word "force" in Article 2 (4) undoubtedly covers only armed or physical force […]. There seems to be general agreement on this point".

65 D. B. Silver, 'Computer Network Attack as a Use of Force under Article 2(4) of the United Nations Charter', in M. N. Schmitt & B. T. O'Donell (eds), *Computer Network Attack and International Law* (2002), 84.

66 This does not imply that a use of force has to be carried out by the armed forces (by way of illustration, the forcible act can also violate article 2(4) when perpetrated by paramilitaries, mercenaries, police forces etc.). See Joyner & Lotrionte, *supra* note 15, 854; H. B. Robertson, 'Self-Defense against Computer Network Attacks', in M. N. Schmitt & B. T. O'Donell (eds), *Computer Network Attack and International Law* (2002), 134-135.

67 Joint Chiefs of Staff, Joint Publications 3-13, Joint Doctrine for Information Operations (2006) available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13.pdf (last visited 15 June 2009).

techniques (so called IO "core capabilities").[68] Furthermore, major steps are underway to develop the army's computer network operations. In November 2006, an ambitious decision was made to establish an Air Force Cyber Command (AFCYBER).[69] Although the project was cancelled, in June 2009 Defense Secretary Gates ordered the creation of U.S. Cyber Command (USCYBERCOM), a new digital force set to reach full operational capacity by October 2010.[70]

Conversely, it is hard to see how the inherent intangibility of computer attacks can be reconciled with the second requirement, *physical/kinetic force*, which is traditionally understood as involving "any explosive effect with shock waves and heat".[71] Nevertheless, certain commentators poke holes in this theory, pointing to a host of non-physical actions that they consider violations of the prohibition on force. In their view, a weapon does not always need to be physical to come under the purview of article 2(4). However, the examples given are fallacious when put under legal scrutiny.

For instance, it has been argued that "locking-on" to a fighter jet is an illegal use of force justifying a military response[72] thus proving that non-physical coercion can fall within the *jus ad bellum*. This is a questionable statement for there is a far more compelling legal analysis: when an aircraft has been locked-on to, the pilot can preemptively exercise the right of self-defense in accordance with article 51 of the UN Charter.[73]

2. Consequentiality Approach

In his major work on the use of force, Brownlie established a new juridical basis for assimilating weapons to the use of force that would

68 There are 5 IO core capabilities: PSYOP (Psychological Operations), MILDEC (Military Deception), OPSEC (Operations Security), EW (Electronic Warfare) and CNO (Computer Network Operations).

69 8th Air Force to Become New Cyber Command, *U.S. Air Force* (3 November 2006) available at http://www.af.mil/news/story.asp?storyID=123030505 (last visited 20 July 2009).

70 The Secretary of Defense, Memorandum concerning the Establishment of a Subordinate Unified U.S. Cyber Command under U.S. Strategic Command for Military Cyberspace Operations (23 June 2009) available at http://online.wsj.com/public/resources/documents/OSD05914.pdf (last visited 20 July 2009).

71 I. Brownlie, International Law and the Use of Force by States (1963), 362.

72 M. S. Martins, 'Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering', 143 *Military Law Review* (1994), 44.

73 R. W. Aldrich, 'How Do You Know You Are at War in the Information Age?', 22 *Houston Journal of International Law* (2000) 2, 240.

otherwise be left out.[74] He argues that modes of warfare bring about the "destruction of life and property".[75] Therefore, a consequence-based test should be applied: if an act causes considerable harm to human beings and their surroundings, the requirement of physical force is fulfilled.

A number of commentators have taken Brownlie's words to heart and sought its application to cyber warfare. This is not surprising, as the consequences doctrine is ideal for categorizing forcible measures like cyber attacks which do not fit the definition of "physical force" but do have the potential to cause considerable physical damage[76]. The consequentiality model has been most famously applied to cyber attacks by Schmitt. He starts by pointing out that there are "easy cases" that fit the instrumentality model: cyber attacks that cause direct physical destruction and harm to human life analogous to armed force and that should therefore be equated to the latter.[77] This is the case when hackers take control of air traffic control systems and cause airplanes to crash[78] or give instructions to a nuclear plant that lead to its meltdown.[79]

On the other hand, there are instances of computer warfare that cannot be easily integrated into the classic force paradigm. He responds to this problem by enumerating a set of criteria that distinguish armed force from economic and political coercion with respect to their consequences. If a cyber attack meets these criteria then it strongly resembles armed force and could come under the purview of article 2(4).[80] Those requirements are the following:

1) severity (physical injury or destruction)
2) immediacy (high degree of immediacy of consequences)

74 Brownlie, *supra* note 74, 362.
75 *Id.*, 362.
76 T. A. Morth, 'Considering Our Position: Viewing Information Warfare as a Use of Force Prohibited by Article 2(4) of the U.N. Charter', 30 *Case Western Reserve Journal of International Law* (1998) 2/3, 591.
77 Schmitt, *supra* note 35, 913-914.
78 Bowman highlights the vulnerability of the U.S. Federal Aviation Administration (FAA). If a terrorist group or unfriendly power managed to launch a concerted attack on the computer systems that the FAA relies on, it could have a devastating impact on air travel. See M.E. Bowman, 'Is International Law Ready for the Information Age?', 19 *Fordham International Law Journal* (1996) 5, 1939.
79 In some sense, computer warfare allows low-tech states to "go nuclear" by exploiting the nuclear capabilities of the targeted states. See Dinstein, *supra* note 23, 105.
80 Schmitt, *supra* note 35, 913-914.

3) directness (consequences closely linked to the act of force)
4) invasiveness (high level of intrusion on the rights of the targeted state)
5) measurability (consequences easily ascertainable)
6) presumptive legitimacy (presumption of impermissibility until proof of self-defense).[81]

Although Schmitt's model remains the most refined theory to date for addressing the legality of cyber attacks under the *jus ad bellum*, this is not to say that it has resolved the issue definitively.[82]

Firstly, the issue of vagueness is problematic. Take for instance the criterion of "directness". Schmitt gives the example of a university that has to put its military research project on hold due to constant cyber intrusions into the campus laboratories. Obviously this will affect performance on the battlefield,[83] but is the correlation between the harm and the attack sufficient to amount to cyber force?

Secondly, Schmitt's model, just like the instrumentality approach, suffers from "under-inclusiveness". Cyber force has novel features that make it an extremely dangerous weapon but also different from conventional weaponry. As a result, certain instances of cyber force will not fulfill Schmitt's criteria. By way of illustration, destroying information held by the banking systems of a given country can bring the entire financial sector to its knees. Moreover, the whole operation can be effectuated in a matter of minutes and without a single casualty. No type of armed, political or economic force can accomplish such a feat, so there simply is no analogy to be made. This begs the question: does the uniqueness of cyber attack preclude it from being regulated by article 2(4)?[84]

Thirdly, on a more theoretical level, one can contemplate the value of this style of analogous reasoning. On the one hand, there is a sense of legitimacy in "treating like cases alike". On the other hand, some scholars claim that analogies should be limited when dealing with customary and treaty rules (in our case article 2(4) and its crystallization into custom). With respect to treaty provisions, certain jurists state that the result of applying an

81 *Id.*, 914-915.
82 In all fairness, Schmitt concedes that his test is limited in scope, describing it as a mere prescriptive shorthand and acknowledging that further gray zones will arise. *Id.*, 915.
83 *Id.*, 917.
84 Hollis, *supra* note 4, 1042.

analogical technique must correspond with the reasonable intentions or consent of the parties to the treaty as derived through interpretation.[85] As demonstrated above, it was not possible to convincingly argue for a notion of cyber force using the classical interpretive methods of the VCLT. Thus, this might temper the validity of a contradictory result based on an analogical argument. Regarding customary rules, some scholars advocate the inapplicability of analogical techniques, given that custom must derive from the consensus of states. Of course, in order for this argument to ring true, one has to accept the premise of voluntarism in international law.[86]

III. Article 51 UN Charter

So far, the focus in this paper has been on fitting cyber attacks within the contours of article 2(4). The next legal issue to consider is the compatibility of cyber force with article 51 of the UN Charter, which regulates the right to invoke self-defense in the event of an armed attack:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. (…)."

Both concepts are intrinsically linked in that all armed attacks constitute uses of force but only certain forceful acts rise to the level of an armed attack. The importance of this connection is twofold.

Firstly, evaluating whether cyber force can fulfill the requirements of an armed attack is entirely contingent upon accepting cyber force as a use of force. Thus, if cyber force is not a use of force in the sense of article 2(4), neither will it be an armed attack as understood in article 51. It is worth noting that the analysis that leads us to conclude that article 2(4) exclusively encompasses armed force is strengthened here. Beyond the obvious linguistic argument that the UN Charter refers to an *armed* attack, article 51 is often linked to the notion of aggression[87] which was elucidated by the UN General Assembly in its *Definition of Aggression*.[88] Aggression is "the use

85 Vöneky, *supra* note 62, marginal note 19.

86 *Id.*, marginal note 20.

87 C. Gray, *International Law and the Use of Force* (2004), 109; interestingly, the French version of the UN Charter prohibits "*aggression armée*" and not "*attaque armée*".

88 Definition of Aggression, G.A. Res. 3314 (XXIX), 14 December 1974 [Definition of Aggression].

of *armed* force by a State against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations".[89] The resolution subsequently gives a non-exhaustive inventory of actions that are considered aggression. It is apparent from this illustrative list that the aggressive acts are physical and armed in nature.[90]

Secondly, the partial overlap between the use of force and armed attack creates a legal vacuum: a state can be the victim of unwarranted armed coercion, yet unable to exercise a forceful response in self-defense. The ICJ illustrated this gap in the *Nicaragua* case in which it qualified the US supply of arms and logistics to the Contras as an illegal use of force, but refrained from equating it to an armed attack.[91] The judges reiterated this line of jurisprudence in the *Oil Platforms* case. They replied negatively to the US claim that the mining of an American vessel by Iran amounted to an armed attack, because in their view it failed to meet the *Nicaragua* standard according to which only the "most grave" forms of force will constitute an armed attack.[92]

Figuring out when a cyber force is sufficiently *severe* to rise to the level of an armed attack is crucial. One way of achieving this is through the threshold of "critical national infrastructure". The latter can be described as a collection of public and private institutions in a variety of sectors that are essential for a country's survival.[93] In its 2003 strategy paper, the US

89 Article 1 Definition of Aggression, *supra* note 91.

90 Examples include: invasion by armed forces of state, bombardment and blockade of ports or coasts. Article 3 Definition of Aggression, *supra note* 91. Schmitt, *supra* note 35, 925-926.

91 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, paras. 191, 195.

92 *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, paras. 51, 63, 64 and 72. However, see *contra* E. Wilmshurst, Principles of International Law on the Use of Force by States in Self-Defence (2005), *Chatham House*, ILP WP 05/01, 6, available at http://www.chathamhouse.org.uk/research/international_law/current_projects/#force (last visited 15 June 2009): "An armed attack means any use of armed force, and does not need to cross some threshold of intensity.".

93 The USA PATRIOT Act describes critical infrastructure as the "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters". USA PATRIOT Act of 2001 § 1016, 42 U.S.C. § 5195c (Supp. II 2002).

government recognizes the need to maintain and protect computer systems from imminent threats and describes key portions of cyberspace as critical national infrastructure.[94]

Currently the Department of Homeland Security has the task of protecting cyberspace and operates on the presumption that cyber attacks constitute criminal activity.[95] Some, however, suggest that in light of the great danger computer warfare poses to a state's safety, it would be preferable to approach cyber attacks from a national security perspective and allow for rigorous defense.[96] In that case, the *jus ad bellum* paradigm would come into play: if a cyber attack targets and causes damage to critical infrastructure (vital target) that would justify self-defense measures. If it affects a computer system that has not been given the "critical infrastructure" designation (non-vital target), but still resembles armed force to a sufficient degree, then it would still qualify as an illegal use of force.[97] Conversely, others disagree with this proactive approach. After all, there is no international consensus on what constitutes critical infrastructure so essential that any attack on it would justify a forcible response. States have full discretion to determine this in their national policy, therefore the threat of abuse is extremely high.[98]

D. Future Prospects

This paper has shown that the relationship between computer attacks and the *jus ad bellum* is an uneasy one and it would be hard to make any sweeping statement as to the legality or illegality of cyber force. Firstly, it was shown that strict adherence to the traditional methods of treaty interpretation (textual exegesis, *travaux préparatoires*, and subsequent practice) yield limited results: to claim that cyber force fits article 2(4) and

94 Executive Branch of the U.S. Government, The National Strategy to Secure Cyberspace (2003), available at http://www.dhs.gov/xlibrary/assets/National_Cyberspace_Strategy.pdf.

95 S. M. Condron, 'Getting It Right: Protecting American Critical Infrastructure in Cyberspace', 20 *Harvard Journal of Law & Technology* (2007) 2, 407.

96 *Id.*, 407-408; E. T. Jensen, 'Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense', 38 *Stanford Journal of International Law* (2002), 240; J. P. Terry, 'Responding to Attacks on Critical Computer Infrastructure: What Targets? What Rules of Engagement?', 46 *Naval Law Review* (1999), 185-187.

97 Creekman, *supra* note 20, 654-656.

98 Antolin-Jenkins, *supra* note 13, 165-166.

51 is overreaching. Secondly, the treatment of doctrinal models based on more expansive interpretations proved to be extremely useful in this regard, however, their ability to include all instances of cyber force is doubtful. Thirdly, although it is theoretically conceivable that a serious computer attack could rise to the level of an armed attack, this possibility is entirely contingent upon equating cyber force with an illegal use of force to begin with. Thus, given the current legal framework it would be most prudent to adopt an *ad hoc* approach when assessing new cases of digital aggression.

The inability to definitively outlaw cyber force is not necessarily a reason for disillusionment. Maybe it is better as a matter of policy not to integrate cyber force in the *jus ad bellum*. Using computer warfare to achieve military aims has the advantage over conventional weapons of being highly efficient and less prone to cause any loss of life.[99] Why then would we want computer operations to be subject to the highly stringent conditions for using force? Besides the question of policy, one could argue that there is already sufficient law to regulate interstate cyber conflict. After all, as mentioned in the pages above, even if a cyber attack does not amount to a use of force, it is still an intervention, which constitutes a violation of international law. In addition, authors have demonstrated that the use of cyber force might transgress the International Telecommunications Convention (which prohibits harmful interference with communications of other states party to the treaty)[100], the laws of neutrality[101] and international humanitarian law[102].

For those who do want to see cyber force become an integral part of international law, two possibilities seem to be at hand. The first is to wait for international organizations, primarily the United Nations, to address the issue of cyber warfare. Resolutions and state practice could crystallize into custom and/or change the way we construe the UN Charter's rules on the use of force.[103] It is hard to tell whether relying on international

99 Joyner & Lotrionte, *supra* note 15, 856.

100 R. D. Scott, 'Legal Aspects of Information Warfare: Military Disruption of Telecommunications', 45 *Naval Law Review* (1998), 62.

101 Due to the nature of cyberspace, launching a cyber attack often entails packets of information having to pass through neutral states in order to reach the targeted nation. See G. K. Walker, 'Information Warfare and Neutrality', 33 *Vanderbilt Journal of Transnational Law* (2000) 5, 1079-1202.

102 Schmitt, Harrison Dinniss & Wingfield, *supra* note 24; J. T. G. Kelsey, 'Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare', 106 *Michigan Law Review* (2008) 7, 1427-1452.

103 *Id.*, 1449-1450.

organizations will lead to the creation of a new legal framework any time soon, especially in a domain as fundamental as peace and security. A second possibility consists in designing a treaty on cyber war, a proposal which has been discussed at length by several writers.[104] Once again, it is hard to predict how states will respond to the call for regulation. In any event, the cyber wars of tomorrow will not be put on hold as a result of their ambiguous legality.

[104] D. Brown, 'A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict', 47 *Harvard International Law Journal* (2006) 1, 179-221; Hollis, *supra* note 4, 1057-1061; P. A. Johnson, 'Is it Time for a Treaty on Information Warfare?', in M. N. Schmitt & B. T. O'Donell (eds), *Computer Network Attack and International Law* (2002), 439-455; S. J. Shackelford, 'From Nuclear War to Net War: Analogizing Cyber Attacks in International Law', 27 *Berkeley Journal of International Law* (2009) 1, 246-251.

Goettingen Journal of International Law 1 (2009) 3, 397-416

Humanitarian Action – A Scope for the Responsibility to Protect?

Part I: Humanitarian Assistance Looking for a Legal Regime Allowing its Delivery to Those in Need under any Circumstances

Marie-José Domestici Met*

Although humanitarian action is a common expression, there is little legal theoretical work upon this precise wording. The Geneva law provides for a regime applicable in case of armed conflict, which is commonly construed as encompassing both humanitarian assistance and humanitarian protection. Humanitarian assistance consists of the provision of physical services (medical care, food, shelter, etc.), whereas protection, in its legal meaning, provides immunity due to a prohibition of killing, wounding or offending dignity. Humanitarian action can be considered as covering both. Additionally, it also refers to field activities conceived in favour of the human being.

But humanitarian assistance also occurs outside armed conflicts, and outside international humanitarian law (IHL) provisions, e.g. in front of natural catastrophes. And humanitarian protection, too, has an existence outside the scope of IHL: namely in favour of refugees.

Obviously, both humanitarian assistance – be it granted during an armed conflict or not – and protection – be it granted by IHL or by another body of law – are subject to violations and exposed to a lack of effectiveness. But humanitarian assistance is much more popular than protection; probably, since it is more visible.

* Professor of Law at Université Paul Cézanne, Aix-Marseille III, France.

doi: 10.3249/1868-1581-1-3-domestici-met

Therefore, the fact that the humanitarian assistance regime is insufficient to guarantee the actual delivery of assistance has come to the forefront sooner and with a more acute intensity. For the sake of providing a sufficient assistance, many improvements have been looked for by humanitarian workers and, then, by the United Nations (UN) on behalf of the International community.

Therefore, this article consists of three parts that will be published in the subsequent issues.

A first paper will show humanitarian assistance looking for a better legal regime. It will end upon an assessment: for the sake of the human being the UN have reached a point where assistance and protection are no longer that distinct, and where protection is not only defined as a legal immunity. This blurring of lines does not appear as an efficient solution. Hence, the international community has gone further with a new concept: the responsibility to protect.

The second paper will show how responsibility to protect was put forward and which scope it has been assigned up to now.

The third paper will try and advocate for an enlargement of the given scope of the responsibility to protect that could become way to ensure an efficient humanitarian action, under its two aspects: assistance and protection.

Table of Contents

Abstract

Humanitarian assistance existed prior to international humanitarian law (IHL). However, the existence of a legal regime of the humanitarian assistance goes back to the very origin of IHL. The Geneva law provides for a regime applicable in the case of armed conflict, which is commonly construed as encompassing both humanitarian assistance and humanitarian protection. Humanitarian assistance consists of the provision of physical services (medical care, food, shelter, etc.), whereas protection, in its legal meaning, provides immunity due to a prohibition of killing, wounding or offending dignity. Humanitarian action, even though no official definition of it has been enshrined in the Conventions, can be considered as covering both, and as referring to field activities conceived in favour of the human being.

But the implementation of humanitarian assistance has quickly proven to be difficult, due to the changes in geopolitics and in warfare. And the doctrine as well as the UN have tried to make the assistance efficient. Along this way, the UN tackled the theme of protection.

A. Humanitarian Assistance and International Humanitarian Law

It is first through assistance that Henry Dunant approached the issue, bringing assistance by himself, and with the help of the countrywomen of Solferino. The Geneva Convention of 1864 introduced the concept of neutrality as to the status of the wounded soldiers, and the same Convention required that States parties prepare for assistance in times of peace by creating, as a matter of prevention, societies to help the wounded, i.e. the National Red Cross – and later on – Red Crescent Societies.

Since 1949, humanitarian assistance is prescribed for each type of victim and in each type of situation regulated by the Geneva Conventions. Assistance is foreseen for the benefit of wounded and ill soldiers in campaign (Geneva Convention I), for wounded, ill and shipwrecked soldiers at sea (Geneva Convention II), for prisoners of war (Geneva Convention III), and for civilians (Geneva Convention IV, and Additional Protocols I and II). The newest provisions reinforce the humanitarian assistance regime. How-

ever, it has become renowned as a service provided to civilians, since over the last few decades, soldiers are far less in need of assistance than civilians.

Arts 23 and 59 of the fourth Geneva Convention outline the regime of humanitarian assistance, as conceived in 1949. It is compulsory for both, a state hosting victims and states whose territory has to be used to reach the victims and to allow the rescuers free passage. Arts 23 and 59 have to be construed in the sense of an obligation, since the sentence is in the future; this is a rule of legal interpretation.[1] However, this consent does have to formally take place, and, thus, bad will can severely impede the delivery of assistance.

In the first Additional Protocol of 1977, an additional obligation binds both, a State hosting victims and states whose territory has to be used to reach the victims and to facilitate the delivery of assistance. Humanitarian rescuers are mentioned in Art. 71:[2] they have to be respected and protected.

Even in non-international armed conflicts, Geneva law foresees the provision of assistance to victims. Thus, common article 3 of the 1949 Convention states that

> "Persons taking no active part in the hostilities, […] shall in all circumstances be treated humanely, […]: "The wounded and sick shall be collected and cared for" and "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

But, this comprehensive set of provisions is not always sufficient. More and more often, humanitarian workers find themselves in front of reluctant "host" States. This was uncommon with the traditional old style warfare, when States' armies met on a battlefield away from towns and civilians. In such situations the provisions of the Geneva Conventions were sufficient.

[1] See Art. 23, *Geneva Conventions relative to the Treatment of Civilian Persons in Time of War of August 12 1949*, 21 October 1950, 75 U.N.T.S. 287, 302: "Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary."; Art. 59, *Id*., 326: "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal."

[2] Art. 71, *Geneva Conventions, Additional Protocol No. I*, "Personnel participating in relief action".

However, with the increase of non-international armed conflicts, any humanitarian activity takes place - just as the conflict itself - "on the territory of a High Contracting Party". And the given State may consider it inappropriate for foreign humanitarian workers to enter its territory in the name of humanity. That is not to say that every State in the given position refuses humanitarian workers, or that every humanitarian organization attempts to enter without an authorization. This is the result of the type of troubles that have marked the second half of the 20th century: non-international conflicts and widespread violence outside precise conflicts have given less importance to the Geneva Conventions' provisions upon humanitarian assistance.

B. Humanitarian Assistance, a Reality Having its own Life Outside Humanitarian Law

Moreover, assistance is also needed outside conflict situations. One specific type of assistance proved early to be necessary: for travellers and migrants. The Order of Malta was created first to assist Christian pilgrims to Jerusalem and, later on, to protect them.

The 20th century has been one of massive displacements, though it was not the first[3]. After the end of the great migrations of the first millennium A.C., and after the basic structures of international law had been set up, less massive movements occurred. True, one could speak of emigration to colonies. Among the waves of migrants, one can mention persecuted Mayflower pilgrims, Dutch ships of Huguenots emigrating to South Africa, and the soldiers of the United Kingdom that were demobilised after the Waterloo battle put an end to 23 years' turmoil in Europe. Another case is that of economic migrants: Irish people on the brink of starvation at times of the potato crisis that denied them any hope in their country, or the example of Italians and Polish people heading to America at the turn of the century.

In the 20th century, the idea of attributing a specialized status – that of refugee - was first introduced: but refugee law does not primarily provide for assistance. The idea of organising migrations and providing assistance came later on. After World War II, the International Organisation for Migration (IOM) was created for helping transfers and United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) for assisting the displaced Palestinian people. Assisting 10 million people dis-

[3] Cf. the "great invasions" of the late Roman Empire.

placed by the disruption of Pakistan and the mutation of Eastern Pakistan into Bangladesh encouraged the UNHCR – first created for protection - to consider the material situation of displaced persons.

While the idea of creating a status like protection was slowly emerging - something which has not yet come to full status - the need for large-scale assistance had become obvious. After the east Pakistan crisis, Southern Africa, too, had to face large fluxes of population due to the situation created by the political and military confrontation between "White Africa" and the "Frontline States". Massive influxes accepted in Africa as relevant to refugee law,[4] refugee camps hosting Liberation Movements, attacks on the given "sanctuaries" aggravated the situation and made it even more complex. This urged even more the need for an action, firstly through assistance.

Around the same date, the great drought in the Sahelian areas (reaching from Western to Eastern ends of Africa) increased the sensitivity to humanitarian need outside conflict situations. True, one must acknowledge that the disaster was not everywhere purely natural and that, often an international conflict worsened the impact of the drought, e.g. the outstanding example of Mengistu's rule in Ethiopia.

Anyhow, natural disaster is one last area where humanitarian assistance is required. Be they due to earthquakes, hurricanes, landslides, or floods, people are deprived from their houses and belongings, exposed to cold and water, and are found without access to food or pure water. People in need may rely upon humanitarian assistance for their very survival. And, still, IHL is not applicable, since it is the law of armed conflicts.

Thus, the body of law known as "humanitarian law" is only part of the legal regime of humanitarian assistance. Large rescue operations such as the Goma refugee camps (1994 -1996) or the post–tsunami–operations do not fall under the IHL rule. Thus, the relatively demanding IHL rules cannot even be invoked under some circumstances. And, often the local state in its ridigity keeps assistance away for too long.

A new regime was demanded because of, on the one hand, the bad will of States in situations when they were legally bound by IHL, and, on the other hand, the lack of obligations under other circumstances, namely natural disasters.

[4] According to Art. III of the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S. 45, 48.

One crisis, the Biafra Crisis, played an important role in the creation of medical organisations, with a status even more private than the ICRC. The latter is entitled, by both the Geneva Conventions and the Statute of the Red Cross and Red Crescent Movement, to advocate with States for the respect of IHL. Moreover, the ICRC is entitled to make proposals for an improvement of IHL.

The Biafra crisis (1967 – 1970) indirectly triggered the creation of medical associations deprived from any international mandate, which, in the beginning, were deemed to be able to act more freely and thus more efficiently than the ICRC, which was considered as overloaded with constraints due to "humanitarian diplomacy."

Such was the case of the Biafran crisis. The Ibos, or Ibibos, the inhabitants of the South Eastern region of Nigeria were, at the end of the British colonial era, better educated in English than the Northern Haussas who used to attend coranic schools. As a consequence, the Ibos provided the new State with a good number of civil servants. But the Muslim Haussas did not accept a non Muslim rule. This triggered an anti-Ibos pogrom campaign. The Ibos fled from the Northern States, mainly towards their birthplaces, which they proclaimed independent under the name of Biafra. However, the Nigerian State decided to fight against this struggle for independence. The Nigerian army in its behavious did neither respect the civilians' immunity nor humanitarian activities.

Here took place the personal adventure which made Bernard Kouchner – the present French Minister for Foreign affairs – famous. Back then, Bernard Kouchner, a young physician, enrolled with the French Red Cross and was sent to the ICRC mission to Biafra. Kouchner encountered heavy difficulties on the host State's side (shelled field hospitals, bombed air strips, lack of cooperation from the neighbouring States, namely Cameroon). The ICRC, as mandated, called upon the States to negotiate in view of a full implementation of the Geneva law. The latter under the circumstances – a civil war – was not very demanding.[5] While the ICRC did its best, Ber-

[5] The text of Art 23, *Geneva Conventions No IV*, relating to civilians and providing that the relevant States "[…] shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary" was not applicable, due to the non international character of the situation. And the common article 3, - specific to this kind of situation -, a new provision adopted thanks to ICRC in the wake of the Spanish civil war, reads as follows: "The wounded and sick shall be

nard Kouchner and some other "French Doctors" considered it unbearable not to be able to freely enter and rescue. They invoked Hippocrates' oath which prohibits abstention in front of distress and equated the ICRC traditional discrete attitude with cowardice, if not with treason of the victims.

As a consequence, Kouchner held a press conference upon his return to Paris, denouncing ICRC at least as much as the Government of Nigeria. Then, together with some colleagues he created Médecins sans Frontières (MSF), the Charter of which was adopted in 1975.

The great famine in Ethiopia (1983-1985), made famous by the BBC and Bob Geldof's Band Aid, triggered a growth in private NGOs, which increasingly developed their own approach to humanitarian action. In the meantime, more and more conflicts broke out inside the boundaries of a single State, thus deserving the status of non-international armed conflicts. Some structural aspects of the given conflicts worsened the picture: the big fluxes of "refugees" (deserving or not the given label) fleeing through the closest border and gathering in camps, the use of these camps as "sanctuaries" by armed groups, and – last but not least – interferences of the so-called "superpowers" supporting either the Government or the insurgency.

In the given context, humanitarian assistance encountered a new kind of dysfunction: instrumentalization. The latter was a strong aspect of food aid in the Ethiopian crisis mentioned above, where the authorities controlled distribution and made use of the "hunger weapon" in their fight against opponents, namely Tigrean populations. MSF's withdrawal from Ethiopia, aimed at refusing to give any caution to the system, turned to be one of the mythic episodes of the humanitarian saga. Together with the less mediatised ICRC's withdrawal, they called for new improvements of the system.

C. Looking for a Better Implementation Through a New Legal Approach

The "French Doctors"' – and by the government of France - forwarded concept of "*ingérence*" is too often considered a denial of any legal constraint in humanitarian action. This is not this author's personal analysis. Regardless, some more history is necessary.

The concept of "*ingérence*" goes back to the Afghan-Soviet war (1979-1989) which became a major turning point in the humanitarian assistance status saga. The American support to Afghan groups of warriors com-

collected and cared for." This does not show the existence of any obligation for the affected State. Even if the word "assistance" itself is not written.

bined with the strong NGO presence in the Afghan refugee camps in Pakistan and the freedom of movement of Afghan warriors in the Pakistani tribal areas created a very specific situation. Humanitarian workers were in a position to enter Afghanistan without the pro-Soviet Government of Afghanistan's permission, thanks to the help of warriors who were celebrated by the "free world" as freedom heroes.[6] Some of those humanitarian workers were eventually caught by the Soviet army and charged with espionage.

A situation developed where the Pakistan-based humanitarian workers were able to deploy to Afghanistan through the Tribal zones of the North Western Province, with the approval and sometimes even the help of the armed groups resisting the Soviet army. Conversely, this army, together with the pro-soviet Kabul government, was unable to prevent humanitarian workers from entering the territory. Even though some humanitarian workers were charged of spying by the pro-USSR Kabul government.

Thus, the State's and allies' bad will was by-passed, which created the illusion of a kind of "post-State situation" where the people's right to self determination together with the NGO's will were able to neglect the local State bad will, thus overriding the fundamental inter-State nature of the international society.

This was the origin of the French term "*ingérence humanitaire*". This concept was put forward during a congress held in Paris in January 1987 called the "Premier Congrès de Droit et de Morale Humanitaires." The meeting, which was somehow sponsored by the French government, ended with the Prime Minister committing to propose to the UN General Assembly (UNGA) a resolution including this concept, the text of which was voted on during the congress itself.

What we can name "humanitarian ideology" – human life and humanitarian rescue first – had still to be enshrined in positive international law, which has proven to be less easy than presumed. At a time when human rights where more and more strongly asserted,[7] the attempt to have a State committed to allow access of humanitarian goods to those in need, launched by the UN Office for Disaster Relief, UNDRO, was in vain.[8]

6 Although many rebel groups were USSR-supported, the USA did not always support the governments. Their support to the Nicaraguan Contras is a famous example of this.

7 The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 23 I.L.M. 1027 (1984) and the *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S 3.

8 This attempt failed in 1984, when UN Member States had refused to conclude a treaty.

Thus was born the idea of a civil society, which could impose on States its approach to major values, even though the UNGA minimized the significance of the resolution proposed by France[9].

After the fall of the Berlin Wall, humanitarian assistance *per se* became a component of international relations, relatively far from the assistance conceived by Dunant as a duty in a context of conflict. And impeding humanitarian action became to be qualified as "threat to peace" in several international crises.

A first step was made in the Iraqi-Kurdish affair, which happened to be both the climax in the so-called "*ingérence*" approach and the beginning of a new era of the Security Council-drawn humanitarian assistance scheme.

The Kurdish Iraqi minority, which had already suffered greatly from the Saddam Hussein regime, was obviously not on his side during the 1991 Gulf war. The end of this war, though a defeat for Saddam, did not amount to the end of the regime. Therefore, the Kurds feared reprisals. They fled in great number their cities, heading to the Turkish and Iranian borders. In early April 1991, there were more than one million in the mountains, exposed to cold, hunger and exhaustion. This case study is of the highest importance. On the "*ingérence*" side, we can point to an armed intervention, which is even stronger than the illegal cross-border humanitarian activities carried out in Afghanistan. On the other hand, for the first time, an activity aimed at providing humanitarian assistance was in a position to argue it was based in a UN Security Council (UNSC) resolution.

This turning point was marked by the then famous resolution 688,[10] adopted by the UNSC in the face of atrocities committed by Saddam's regime both in the South of Iraq (against the Shia majority) and in the North (against the Kurdish minority). For the first time, the UNSC recognized a "threat to peace", and hence its own jurisdiction, for a situation where a State abused human rights of its own population[11]. However, the UNSC did take advantage of this statement to take precise measures aimed at restoring the internal order. It was up to the main States of the victorious Coalition to take a strong attitude: upon a French request, soon joined by the United

9 GA Res. 43/131, 8 December 1988 and GA Res. 45/100, 14 December 1990. These resolutions do not encompass the word, neither the concept of "*ingérence*". They only call for a better cooperation of local States with humanitarian organisations.

10 SC Res. 688, 5 April 1991.

11 *Id*., para. 1: "Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, the consequences of which threaten international peace and security".

Kingdom, the USA, and then Spain and the Netherlands, was carried out the *Provide Comfort* operation. Without any Iraqi authorization, some battalions of the given armies went into the Iraqi Kurdish area entering from Turkey. They stayed for some three months, helping the Kurd population to go back to their cities under protection and helping them to build roads for this purpose, which were called the "blue roads". However, if the security of civilians was the objective, the means were not permitted. For sure, the UNSC could have authorized the operation, as it had done for the Gulf war itself[12]; however, it did not go any further than qualifying the situation and calling upon the Iraqi State to cooperate in order to improve the populations' situation. Thus it was an unauthorized interference in Iraq's affairs, although aimed at "providing population with comfort". This was the archetype of the "*ingérence*" concept. For the first time, armed forces were used in favour of the human being, in a way which was not that of the old "*intervention d'humanité*" of the 19th century. It was not, unlike before, in order to fight those who endangered protected persons. In this specific case, the French, British and US troops, each in its area of responsibility, together with Spanish and Dutch troops, were acting more as a kind of police force with added logistical competencies.

D. Looking for a Better Implementation Through the Recourse to Peacekeeping Tools

Even more significant steps towards the internationalization of the humanitarian assistance regime came with two major milestones: the Somalia 1992 -1995 and the Bosnia-Herzegovina 1993 – 1995 affairs.

In Somalia**,** a State where the society was structured by clanic belonging, clashes between clans in a context of severe drought, made the situation unsafe for humanitarian workers who had answered the "Somali call", according to UNSC resolution 794.[13] Being unsafe for humanitarian worker, the situation was as a consequence unsafe for drought-hit and famine starving populations.

In Bosnia-Herzegovina, the claim of Serbian and Croatian populations for independence from the Sarajevian Muslim-led government, to-

[12] The UNSC had resorted to the concept of "self defence" (Art. 51 Charter of the United Nations), in order to authorize "the States cooperating with Kuwait" (SC Res. 778, 2 October 1992) to act in collective self defence.

[13] SC Res. 794, 3 December 1992.

gether with attempts for uniting Bosnian Serbs with Serbia and Bosnian Croats with Croatia resulted in severe activities of ethnic cleansing. ~~At~~ At stake was the issue of which group would rule over which territory. For the sake of creating or (re)creating "pure" areas, a severe ethnic cleansing became part of the sad game. Thus, civilians became direct targets of forced displacement and sometimes even elimination. Humanitarian assistance heading to besieged cities was often blocked by militia-held checkpoints.

The qualification of "threat to peace" given to the above mentioned situations gave way to a wealth of measures the UNSC was entitled to adopt under Chapter VII. For the most part, the UNSC resorted to weaker measures in comparison to Chapter VII ones. Following the track that emerged under Secretary General Dag Hammarkjoeld in 1956 with the Suez affair, the UNSC created two peacekeeping operations - UNOSOM for Somalia and the UNPROFOR II for Bosnia-Herzegovina.[14]

With the Somali and the Bosnian crises, the legal status of humanitarian assistance was thoroughly renewed. Indeed, the bad will - be it, in Somalia, that of clanic groups, or, in Bosnia-Herzegovina, that of more structured militias, if not of the State itself[15] - could be overcome without any reference to the concept of, "*ingérence*", since the balance was no longer between the sovereign host States' will and the humanitarian workers desire to work. The UNSC decision made it a matter of peacekeeping, hence, a matter of UN jurisdiction. The ones who could, under the circumstances, impede humanitarian assistance were threatening the peace. This legal ground being taken for granted, the type of UNSC measures were altered under the pressure of needs.

In Somalia, as well as in Bosnia-Herzegovina, the "Chapter 6.5" peacekeeping scheme has proven to be insufficient. Purely peacekeeping forces had no legal basis for imposing measures in favour of peace. Unlike forces under Art. 42, peacekeeping operations under "Chapter 6.5" have: a weak legal regime: belligerents have to give their consent to the creation of the resolution; they must not have any input in the crisis and must keep an impartial attitude; and, above all, they cannot make use of force outside the case of individual self-defence of their members.

14 UNPROFOR I was due to watch over a cease fire implementation in Croatia but the outbreak of the Bosnian war brought the UNSC to create a peacekeeping force devoted to the protection of humanitarian assistance.

15 The Government of Sarejvo as to Sarajevian Serbs.

This last aspect made it impossible for the given forces – even though made of soldiers and often of well-trained ones[16] - to open roads, which were hindered by belligerents. There was something nonsensical in such a situation and, a large share of the opinion criticised and even mocked UNPROFOR. A strong call came from both western opinion and some belligerents – e.g. the Bosnian government – for a reinforced mandate.

This came in two steps. First, the call for an additional force, external to the peacekeeping operation, like the former *Provide Comfort* mission. In Somalia, it was named *Restore Hope*; and for Bosnia, UNSC resolution 770[17] called upon member States to provide forces. Then came the reinforcement of the peacekeeping forces, which progressively (in Bosnia-Herzegovina), or more suddenly ((in Somalia, coming only after blue helmets had been slaughtered)) obtained the right to shoot. UNSC Resolutions 836[18] adopted in June 1993 as to Bosnia-Herzegovina and UNSC resolution 837[19] also adopted in June 1993 as to Somalia stand at the peak of the peacekeeping forces' mandate.

The entitlement for using force was not the same in both of these cases. In Bosnia- Herzegovina, there was an escalation. First, there was an entitlement for armed escorts shooting not only on behalf of individual self-defence.[20] Then for the same Bosnian theatre was created a new concept: the UN protected safe areas. First, these were granted the "safety areas" label[21] with the idea that their status was impressive enough for protecting them from any attack or use of famine as a weapon.

However, this device suffered from a poor local and strategic analysis. Whereas IHL provides for "hospital and safety zones and localities"[22] and "neutralized zones"[23] without strategic stake (since they receive "wounded,

16 In Bosnia-Herzegovina, almost all of them came from Western Europe, namely France, United Kingdom, Italy, Spain, Germany.

17 SC Res. 770, 13 August 1992: "Calls upon States to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance […]."

18 SC Res. 836, 4 June 1993.

19 SC Res. 837, 6 June 1993.

20 As the peace-keeping force concept allows from its very designing by the United Nations Secretary General Dag Hammarskjoeld and the Canadian Minister of Foreign Affairs, Lester Pearson.

21 SC Res. 819, 16 April 1993; SC Res. 824, 6 May 1993.

22 Art. 14 *Geneva Convention No. IV*.

23 *Id.*, Art. 15.

sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven [...]"[24] and "a) wounded and sick combatants or non-combatants;(b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character [...])"[25], the six selected safety zones (Srebrenica, Sarajevo, Gorazde, Zepa, Bihac, Tuzla) were real stakes for the belligerents. Sarajevo, of course being the capital, had endured a tumultuous history since the 1914 attack on the Archduke Franz-Ferdinand that triggered the outburst of World War I. Such was the case in the Drina Valley cities as well. Zepa, Gorazde, Srebrenica were major stakes due to the historic importance recognized to his valley by the Bosnian Serb population and militia. The Valley still bears the stigma of World War II fights between the "Wehrmacht" on the one side, and on the other side Partisans and royalist resistants led by general Mihailovic. Tuzla and Bihac were Muslim strongholds surrounded by Serb strongholds which reinforced their value as stake in the war. Most of these cities were host to Bosnian Muslims and Muslim State Army, which still reinforced the significance as a stake. Thus, the granting by a UNSC resolution of the status of safe area was not sufficient to guarantee any immunity.[26]

The next step was ordering UNPROFOR to "use all means" in order to defend the safe areas.

In Somalia, the rise in the mandate was even stronger since, after a slaughter committed against 24 Pakistani blue helmets, the troops received the right to "take all necessary measures"[27] in order to seize those responsible for their slaughter and "to establish the effective authority of UNOSOM II throughout Somalia."[28]

E. From Securing Assistance Provision, the Stress has Shifted to Physical Protection

Legally, the UN solution seemed much better than the "*ingérence*", since there was a legal basis: Chapter VII of the UN Charter (UNC)[29]. No "*ingérence*" can be reproached to the UNSC as long as it invokes a threat to peace in terms of Art. 2 para. 7 UNC.

24 *Id.*, Art. 14.
25 *Id.*, Art. 15.
26 SC Res. 959, 19 November 1994; SC Res. 900, 4 March 1994.
27 SC Res. 837, 6 June 1993.
28 *Id.*
29 SC Res. 836, 4 June 1993; SC Res. 837, *supra* note 27.

But practically, the so-called "protected persons" were unsafe. However, in the meantime, human security was coming to the forefront with the United Nations Development Programme (UNDP) preparing its famous report listing its different branches.[30] Even worse, the years 1994 and 1995 saw events at the peak of human insecurity, which could be considered as the bare proof of the lack of guarantees provided by this physical approach to protection.

From April to July 1994, events developed in Rwanda which were to receive the label of genocide[31]: from 500 000 to 800 000 people were killed, most of them on ethnic basis and thanks to ruthless planning. The UN troops in Kigali were not numerous; but it seems that in the very beginning, they could have had a decisive input with a stronger mandate. The death of the Prime Minister, at least, could probably have been avoided.

But in Srebrenica, one of the Drina Valley besieged "safe areas", the mandate set up by UNSC resolution 836 was in vain. As a matter of excuse for the Dutch "blue helmets" who did not want to make the ultimate sacrifice, one must acknowledge firstly their insufficient number, and secondly some failures in the definition of the security zones (e.g. no delimitation) and a very confusing attitude of Bosnian forces (who left the city when the danger was increasing).

As such, in the second half of 1995 the safe areas created for physical humanitarian protection were disqualified and the humanitarian community was deluded. The events, which were to occur at the end 1996 in Eastern Zaïre, were no less dramatic, since they saw after the disqualification of the Security Zones the disqualification of refugee camps. By mid-August 1994, some two million Rwandan people had fled to Eastern Congo faced with this situation. Ethnic Tutsis, who represented the bulk of victims of the spring genocide, were also a group from which emerged the new government. The camps were stigmatized by the new Rwandan Tutsi authorities as being host to genocide perpetrators. They were also subject to attacks by Zairian Tutsis with the help of Rwandan forces, without gaining any help from the international community. The humanitarian world was more than deluded, it was internally torn apart between those calling for punishment of genocide perpetrators and those looking with compassion at the Goma, Bukavu and Uvira refugees, killed, wounded or compelled to flee into the rainforest.

30 United Nations Development Programme: *Human Development Report 1994: New Dimensions of Human Security* (1994).

31 SC Res. 955, 8 November 1994.

Therefore, new ways were needed.

F. Looking for Direct Armed Protection of Populations Together with Assistance

The Kosovo conflict in 1999 was another turning point, marked in turn by a high degree of physical protection. In 1989, after the suppression of the autonomy of the Serbian region named Kosovo, a clandestine parallel administration developed. Albanian Kosovars no longer sent their children to Serbian schools, rarely declared births to Serbian authorities, and no longer went to public hospitals. The EU undertook funding assistance for parallel services. The situation worsened when an armed conflict broke out between the Serbian army and the UCK (Kosovo liberation army). When the crisis was approached through peacekeeping tools, assistance appeared to be only ~~a~~ part of the help needed.

An OSCE-led cease-fire verification mission (KVM) was set up in order to monitor the belligerents' behaviour. Soon, the head of mission warned that massive killings by Serbs were suspected. The North Atlantic Treaty Organization's (NATO) answer was a military operation built upon a UNSC resolution, which, however, provided no direct authorisation, but had only foreseen new developments in case the KVM would assess failures. Whatever the legality of this operation, we are there in front of the NATO's conviction that both, assistance and legal protection to ban killings, were insufficient.

Physical protection through the military was put forward as the primary solution, assistance remaining a side way of alleviating the plight of populations who, during the air strikes, fled to Albania and Macedonia.

G. Looking for a Multi-Track System

1. The armed protection program, shaped in the '90s and illustrated by names such as Provide Comfort, Restore Hope, UNPROFOR, safe areas, but also Srebrenica, Kigali and Goma, did not disappear in the first decade of the 21st century. In Ivory Coast, Sierra Leone, Democratic Republic of Congo, Darfur, and Chad – whenever civilians were at risk – the UN, more and more frequently together with other organisations, created or called for creation of peacekeeping forces, some of them belonged to so-called "integrated missions." These missions undertook a variety of activities from peacekeeping to humanitarian activities such as human rights monitoring

and gender sensitizing over to human rights monitoring and gender sensitizing.

Such missions have often been criticized for the threat they are deemed to create for "humanitarian space". It is not only about protecting humanitarian assistance and humanitarian workers against major threats to life, coming from voluntary targeting. Beyond this huge problem, there is another one. With the deployment of military forces, lines can be blurred between protection and assistance, as well as between providers of both. Because of the voluntary nature of the danger, legal protection through persuasion tends to be replaced by physical scud. And, since the situation is so dangerous, assistance can sometimes only be brought by armed actors. For these actors, providing assistance may also make their military activities seem more acceptable. Some authors which are very hostile to the on-going Afghani affair crisis management have considered the Provincial Reconstruction Teams (PRT) as a fighting activity.

However the efficiency of such operations remains problematic, and has been once again heavily challenged by the Darfur affair, all the more as the "host" State has managed to avoid well-trained peacekeepers. Indeed, Sudan has successfully refused any significant non-African presence.

2. Hence, the search for legal formulae able to reinforce humanitarian assistance goes on, namely around legal formulae, and alongside two different tracks. The first one is that of international obligations; the second is that of the internal legal regime of humanitarian services and staff.

As to international obligations, the Institute for International Law has proposed the concepts of "right to assistance" and "duty to assist" in a comprehensive approach of all types of assistance and all types of distress. This initiative was adopted in a 2003 resolution in Bruges.

According to rule 55 of the ICRC survey on customary law[32] issued in 2005, the given body of law provides that both a State hosting victims and states whose territory has to be used to reach the victims "shall allow" access to humanitarian aid, which more or less corresponds to the provisions in the Conventions and Additional Protocols.

As to the internal regime of humanitarian services and staff, the International Federation of the Red Cross and the Red Crescent has made a huge work which resulted in 2007 in guidelines for internal law relating to humanitarian assistance, providing that visas for staff, customs procedures,

[32] See J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, ICRC, Cambridge (especially Rule 55 and 56).

radiofrequencies – which belong to State's jurisdiction – must be devised in order to facilitate assistance. Furthermore, in the wake of the December 26, 2004 Tsunami, some legal improvements have been arranged in the UN legal system concerning humanitarian reform (clusters, pool funds, coordinators, etc.)[33]. However, none of the above-mentioned devices, at any stage of the 150 years long humanitarian saga – and notably over the last 40 years – has brought any guarantee for assistance, nor for protection.

Therefore, there is still room for improvement; and the concept of "Responsibility to Protect" can help.

[33] See www.humanitarianreform.org.

Goettingen Journal of International Law 1 (2009) 3, 417-438

Market Access or Market Restrictions – Analysis on the Regulations of PRC on Administration of Foreign-Funded Banks

Jiaxiang Hu*

Table of Contents

* PhD (the University of Edinburgh, UK), Professor of Law School, Shanghai Jiao Tong University, P. R. China. This article is part of the research program supported by Shanghai Jiao Tong University (08TS7). The author expresses his sincere thanks to Professor John Jackson and other scholars of Georgetown Law Center for their help during the author's five month research there from October 2008 to February 2009. However, the author is responsible for all possible mistakes in the article. Email: jxhu@sjtu.edu.cn.

doi: 10.3249/1868-1581-1-3-hu

Abstract

In order to honor the commitments made on its accession into the World Trade Organization, China has opened its banking sector to foreign investment since December 11, 2006. Meanwhile, the State Council of China has promulgated the newly revised *Regulations of the People's Republic of China on Administration of Foreign-funded Banks* and China Banking Regulatory Commission has published the corresponding *Rules for Implementing the Regulations of the People's Republic of China on Administration of Foreign-funded Banks*. Although the new Regulations and Rules have ensured that the juridical-person banks with foreign fund can receive the same national treatment as that of their Chinese counterparts, they still contain some restrictions on the business of foreign bank branches. These restrictions, when examined *prima facie*, appear to be in conformity with the exception rule of prudential supervision under GATS. However, if we examine the specific commitments of China and other relevant rules, we may find that these restrictions are not so justified for prudential reasons. In other words, "prudential supervision" is not a persuasive excuse if China is challenged for these restrictive measures in the WTO dispute settlement proceedings. We suggest that China should reassess the new Regulations and Rules.

A. Introduction

As a general rule, WTO Members are obligated to keep their laws, regulations and administrative procedures in conformity with their concessions listed in the Annexes of the *General Agreement on Trade in Services* (GATS). In view of the special difficulties of some Members in opening their service markets, GATS permits WTO Members to define the specific sectors where their market access commitments will apply under the provisions of Article XVI. Article XX of GATS provides that each Member should set out in its Schedule the specific sectors it will open for other Members after its accession into the WTO. Furthermore, each Schedule will specify: (a) the terms, limitations and conditions on the market access of foreign business; (b) the conditions and qualifications on the national treatment to foreign business; (c) the undertakings of each Member relating to its additional commitments; (d) where appropriate the

time-frame for the implementation of such commitments; and (e) the specific time when the commitments become effective.[1]

Since its accession into the WTO in 2001, China has opened its banking sector to foreign-funded banks according to the commitments.[2] Specifically, China has phased out the restrictions on the business of foreign-funded banks in China following the time-frame set out in the Schedule[3]. China released geographic restrictions on foreign currency business to the foreign-funded banks on the date of her accession. As for the local currency business, China had removed all geographic restrictions before the end of the transitional period, i.e. December 11, 2006. In regard to the clients of foreign-funded banks, China has extended them from Chinese enterprises to all individuals. Meanwhile, China has lifted the ban on the local currency debt of foreign-funded banks in no more than 50% of their foreign currency debt and raised the percentage for foreign-funded banks to absorb foreign currency savings in China.[4] Criteria for authorizing foreign-funded banks to participate in China's financial business are set solely out of prudential reasons (i.e., contain no economic-need test or quantitative limits on licenses required by Article XVI of GATS). [5] Any non-prudential measures, which may restrict the ownership, operation, and legal status of foreign-funded banks, have been eliminated. The restrictions on foreign financial institutions to open their branches in China no longer exist. Based on the specific commitments, China has kept her promise to

1 WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999), 298-301.

2 According to Article 2 of the Regulations, the "term "foreign-funded bank" means any of the following institutions that are approved to be established within the territory of the People's Republic of China in accordance with relevant laws and regulations of the People's Republic of China: (1) a wholly foreign-funded bank funded by a foreign bank on its own or jointly with any other foreign financial institution; (2) a Chinese-foreign joint venture bank jointly funded by a foreign financial institution with a Chinese company or enterprise; (3) a branch of a foreign bank; and (4) a representative office of a foreign bank."

3 WTO, *Report of the Working Party on the Accession of China* (Schedule CLII – The People's Republic of China: Part II - Schedule of Specific Commitments on Services, List of Article II MFN Exemptions), Part II (Specific Commitments): Banking and Other Financial Services (excluding insurance and securities), WT/ACC/CHN/49, (1 October 2001) available at http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002144.pdf (last visited 16 December 2009).

4 On these two issues, the foreign-funded banks meet the same requirements as their Chinese counterparts. See Arts 29 and 31 of the Regulations.

5 Art. 13 of the Rules.

grant national treatment to the qualified foreign-funded banks as that of their Chinese counterparts in supplying services in China.[6]

In order to substantiate those commitments in the legal form, the State Council of China promulgated the newly revised *Regulations of the People's Republic of China on Administration of Foreign-funded Banks* (hereinafter "*Regulations*") on December 11, 2006, which provides the general directions on the set-up, operation and supervision of foreign-funded banks in China. Meanwhile, China Banking Regulatory Commission (CBRC) published the *Rules for Implementing the Regulations of the People's Republic of China on Administration of Foreign-funded Banks* (hereinafter "*Rules*"), which specifies the terms, conditions and limitations contained in the provisions of the Regulations. From the contextual viewpoint, the new Regulations and Rules appear in conformity with China's commitments and follow the basic principle of national treatment. [7] From the viewpoint of their impact in practice, however, some of the provisions in the Regulations and Rules still have the restrictive effect on the business of some foreign-funded banks in China.

B. Relevant Provisions and China's Specific Commitments

The Regulations take the "juridical-person bank" as the policy orientation. The juridical-person banks are referred to those foreign-funded banks, which have registered in China as Chinese juridical-person enterprises (hereinafter "juridical-person banks with foreign fund").[8] Specifically, they include the first two groups listed in Article 2, i.e. (1) a

6 As for the business scope of the foreign-funded banks in China, see Chapter Three of the Rules.

7 There are fundamental differences in terms of application under GATT and GATS. In GATT, both MEN and NT treatments are general or unconditional obligations while the GATS sets out general (unconditional) MEN obligation and specific (conditional) NT obligation.

8 While the juridical-person banks with foreign fund are held responsible for losses up to the limit of their registered capital, the foreign financial institutions, which have not registered in China as juridical-person banks, will bear all the actual losses. According to Articles 12 and 13 of the Commercial Banking Law of PRC, the minimum of registered capital for a national juridical-person bank is one billion yuan, one hundred million yuan for a municipal juridical-person bank and fifty million yuan for a rural juridical-person bank. All foreign financial institutions which have registered as juridical-person banks are, so far, limited to the national ones.

wholly foreign-funded bank funded by a foreign bank on its own or jointly with any other foreign financial institution; (2) a Chinese-foreign joint venture bank jointly funded by a foreign financial institution with a Chinese company or enterprise. While the juridical-person banks with foreign fund are qualified to receive the same treatment as that of their Chinese counterparts in market access, administrative supervision and business scope, the foreign bank branches and the representative offices of foreign banks which have not registered as the Chinese juridical-person enterprises (hereinafter "foreign bank branches") will still meet some restrictions in the above aspects. The specific differences are illustrated in table one:

Table 1: Differences in legal status, registered capital, operating capital and business restrictions between a juridical-person bank with foreign fund and a foreign bank branch

	Juridical-Person Bank with Foreign Fund	**Foreign Bank Branch**
Legal status and risk liability	(1) Registered in China as a Chinese juridical-person enterprise. (2) Supervised mainly by the Chinese authorities. (3) Liabilities up to the level of its registered capital.	(1) The branch of a foreign bank registered outside China. (2) Supervised mainly by the authorities of the registering country or region. (3) Bearing all the actual losses.
Minimum requirement for capital registered	One billion Chinese yuan (Renminbi) or the equivalence of exchangeable foreign currency	None
Minimum requirement for operating capital	No less than one hundred million Chinese yuan (Reminbi) or the equivalent of exchangeable foreign currency appropriated by its headquarter	No less than two hundred million Chinese yuan (Reminbi) or the equivalent of exchangeable foreign currency appropriated by its headquarter
Starting level for absorbing public savings	None	No less than one million Chinese yuan (Reminbi) in each fixed deposit
Banking card business	Permitted	Not permitted

Both the juridical-person banks with foreign fund and the foreign bank branches are permitted to absorb public savings in China. The foreign bank branches, however, must accept in each fixed deposit transaction of local currency no less than one million Chinese yuan (Reminbi) while there are no such restrictions on the juridical-person banks with foreign fund. The foreign bank branches are banned from issuing banking cards including debit cards and credit cards. In this way, the Regulations and Rules have

isolated the foreign bank branches from one of the most important banking sectors in China-retailing.[9]

Although the Regulations and Rules do not require the registration of a Chinese juridical-person enterprise as the precondition for a foreign financial institution to open its business in China,[10] the reality is that if a foreign financial institution wishes to extend its business of local currency to the clients with small amounts of capital and expand its business to the banking card sector in China, it must finish such registration beforehand. In other words, to register as a Chinese juridical-person enterprise is *de facto* the precondition for a foreign financial institution to fully receive the national treatment in China. While the juridical-person-bank orientation may be explained as the "prudential supervision" measures to the fast-developed Chinese finance,[11] the issue whether these restrictive measures are in conformity with China's commitments in specific and WTO rules in general is still in question.

Article XVI of GATS provides that the basic rules regulating each WTO Member on its market access of trade in services include "1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule (original note

9 The CBRC explained that since a foreign bank branch is registered outside China, it is not as easy to supervise its business as that of a juridical-person bank with foreign fund. These restrictions are designed to ensure the stability of Chinese finance. M. Yan & C. Chun-lin, 'The Banking Market Will Be Opened Next Month, Chinese Natural Persons May Put Their Money in the Foreign Financial Institution', *Yangzhi Evening News* (17 November 2006).

10 According to Article 3 of the Regulations, the "term "foreign financial institution" means a financial institution that is registered outside the territory of the People's Republic of China and is approved or licensed by the financial regulatory authority of its home country or region."

11 The so-called "prudential supervision" "needs to be addressed in the wider context of financial regulation […]" These restrictive measures relate to "paragraph 2 of the Annex on Financial Services of GATS, which states that members are not prevented from taking measures that are for prudential purposes. Thus, if a regulation is claimed to be of a prudential nature, it will not be subject to the commitments made to GATS. The prudential supervision touches upon the notion of a prudential regulation, and how this can be defined. It also concerns the way in which progressive liberalization can take place in the face of such a clause […]." M. Yokoi-Arai, 'GATS' Prudential Carve Out in Financial Services and Its Relation with Prudential Regulation', 57 *International & Comparative Law Quarterly* (2008) 3, 614.

omitted). 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as … (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service".[12]

As for the national treatment on trade in services, Article XVII:1 of GATS provides that "in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."[13] In order to distinguish each mode of services illustrated in Article I:2, Article XXVIII (Definition) of GATS specifies "commercial presence" as referring to any type of business or professional establishment, including through "(i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office, within the territory of a Member for the purpose of supplying a service."[14] In addition to the above provisions, Article XX:2 of GATS requires that WTO Members should ascribe to all the measures inconsistent with both the market access and national treatment requirements in the column relating to Article XVI (Market Access). This ascription will be considered to provide a condition or qualification to Article XVII (National Treatment).[15]

China has made its specific commitments in regard to the modes of supplying services in the banking and other financial sectors (excluding insurance and securities) as the following: "(a) Acceptance of deposits and other repayable funds from the public; (b) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction; (c) Financial leasing; (d) All payment and money transmission services, including credit, charge and debit cards, travelers cheques and bankers drafts (including import and export settlement); (e) Guarantees and

12 WTO, *supra* note 1, 298-299.

13 Note under this Article adds: "Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers." WTO, *supra* note 1, 299-300.

14 WTO, *supra* note 1, 305.

15 *Id.*, 301.

commitments; (f) Trading for own account or for account of customers: foreign exchange."[16]

It appears that China has not distinguished in its commitments the modes of supplying services between a juridical-person bank with foreign fund and a foreign bank branch. Neither has China set in its commitments the starting level for a foreign bank branch to accept public savings. On the contrary, a foreign bank branch may take the mode of "commercial presence" to provide services listed in the commitments to all Chinese clients after December 11, 2006 (the end of the five-year transitional period).[17] Therefore, China cannot limit the modes of service through the types of legal entity unless these limitations are clearly inscribed in the Schedule as required by Article XVI: 2 (e) of GATS.[18]

Based on the above analysis, the author of this article would point out that a foreign financial institution may take the type of either a juridical-person bank with foreign fund or a foreign bank branch to supply services in China. A foreign bank branch should not be treated less favorable than other types of legal entity. To be specific, it should be permitted to accept the savings of local currency from Chinese clients without the minimum requirement in each deposit transaction and to issue banking cards in China as well. The Chinese authorities should not require the registration into a Chinese juridical-person enterprise as the precondition for a foreign financial institution to supply the above services.

C. Empirical Research on the Regulations and Rules

As for the juridical-person-bank orientation in the Regulations and Rules, the CBRC explained that "they are the necessary measures out of supervision purposes. These measures will help the Chinese authorities to regulate the business of foreign-funded banks more conveniently, to make the supervision more effective and comprehensive, to ensure the stability of Chinese finance system and to protect the interests of depositors." The CBRC further stated that "the requirement for a foreign bank branch to accept a fixed deposit in each transaction of local currency no less than one

16 Report of the Working Party on the Accession of China, *supra* note 3.

17 According to Article XXVIII (d) of GATS, "commercial presence" includes the institutional form of foreign bank branches.

18 Measures defined in Article XVI:2 (e) of GATS are referred to those "which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service." WTO, *supra* note 1, 299.

million Chinese yuan is in conformity with the WTO rules. These measures, from the perspective of prudential supervision and international practices, are not restrictions, but conveniences and benefits conferred to a foreign bank branch in providing services in China. A foreign financial institution may decide on its own whether or not to register as a Chinese juridical-person bank." Based on these points, the CBRC concluded that these restrictive measures to a foreign bank branch are consistent with the international practices and the specific commitments made by China.[19]

In order to justify the above statements, the author of this article made a survey through questionnaires from February to March 2007 among all the foreign-funded banks in Shanghai.[20] Some of them responded to our survey cooperatively.[21] They include five juridical-person banks with foreign fund, two foreign bank branches and one representative office of foreign bank.[22] The survey includes questions concerning (a) business focus in China, (b) willingness to register as a juridical-person bank, (c) views to the juridical-person-bank orientation and restrictions on the foreign bank branches, (d) other questions relevant to the commitments made by China on banking sector liberalization.

The results indicate that the recent concentration of most juridical-person banks with foreign fund and foreign bank branches will still be on the wholesale business, i.e., the business with enterprises and each deposit is

19 Yan & Chun-lin, *supra* note 9.

20 Shanghai is the financial center of China and most foreign financial institutions chose this city as the first site to open their business in China. Although there is no official data available as to the total number of foreign-funded banks in China, one document published by the central government of China indicated that the total assets of foreign-funded banks in Shanghai, at the time of our survey, is 55% of that of all foreign-funded banks in China. 'The Rapid Growth of Foreign-funded Banks in Shanghai', available at http://www.gov.cn/jrzg/2006-05/10/content_277067.htm (last visited 16 December 2009).

21 When we made the survey, there were eight juridical-person banks with foreign fund, eight foreign bank branches and three representative offices of foreign banks which had opened their business in Shanghai. Five juridical-person banks with foreign fund, two foreign bank branches and one representative office of foreign bank responded to our survey. The representativeness of our survey is guaranteed by the response of eight banks out of nineteen in total. They either mailed back the questionnaire to us or answered our questions through telephone. The author would like to express his thanks to the postgraduate of the law school, Shanghai Jiao Tong University, Meng Qinkai for his help in the survey.

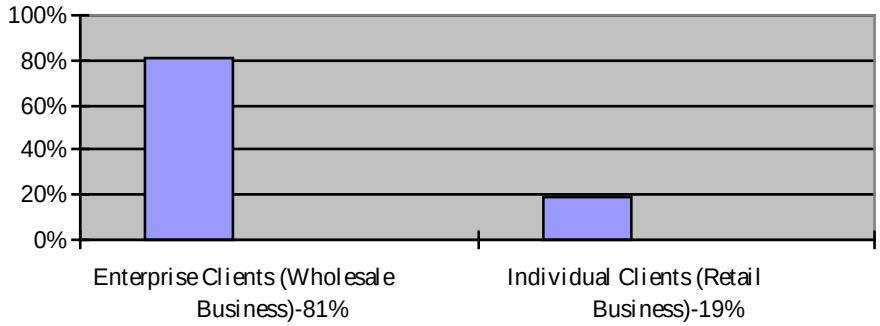
22 This article has concealed the names of these foreign-funded banks to avoid any possible inconvenience upon them. The author, however, is responsible for the authenticity of the data.

usually more than one million Chinese yuan (see Table 2). As some scholars pointed out, the 1.3 billion consumers and $1800 billion of foreign currency deposited in China are fascinating to many foreign financial institutions.[23] Many juridical-person banks with foreign fund have also expected to extend their business to the retailing of products of local currency, especially those with high profits such as banking cards, mortgage and personal finance. Among the eight foreign-funded banks which responded to the survey, the five juridical-person banks with foreign fund made clear that they had already started the retailing business of local currency and made a detailed plan for the future development. Although the number of juridical-person banks with foreign fund which held this view at the time of our survey is only a little more than half of the total number of this kind in Shanghai, their total registered capital is quite significant.[24] In addition, all of these five banks had already started their business in China even before they finished the registration and had established a large business network in China. The business of these five juridical-person banks with foreign fund constitutes the substantial part of banking business run by all foreign-funded banks in China.

[23] J. E. Jirak, 'Equity Investment in Chinese Banks: A Doorway into China's Banking Sector', *North Carolina Banking Institute*, (2006) 10, 329.

[24] According to Article 13 of the *Commercial Banking Law of PRC*, the minimum registered capital for a national bank is one billion yuan. The minimum registered capital for a city bank is one hundred million yuan. The minimum registered capital for a rural bank is fifty million yuan. All the five juridical-person banks with foreign fund, which responded to our survey, had decided to set their headquarters in Shanghai.

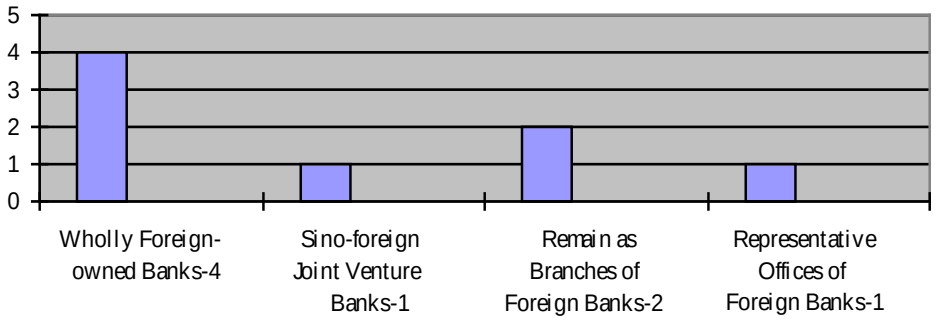
Table 2: Average percentage of business division of the five juridical-person banks with foreign fund



It appears that the decision of whether or not to register as a juridical-person bank with foreign fund is closely connected to the business focus of a foreign financial institution. Those, which focus their business on enterprise clients (wholesale business), do not consider for the time being to transform into juridical-person banks with foreign fund. They choose to be the foreign bank branches. Their operating capital mainly comes from the capital market or from their business partners. On the contrary, those wishing to extend their business to the individual clients (retail business) have finished the registration process. These juridical-person banks with foreign fund come from the United States, Japan and Hong Kong.[25] By accepting the deposits from individual clients, they are able to increase the sources of operating capital and reduce the cost of financing in China. Among the juridical-person banks with foreign fund, some choose the type of Chinese-foreign joint venture banks while others choose the type of wholly foreign-funded banks (see Table 3).

[25] For the purpose of this survey only, the PRC shall exclude Hong Kong Special Administrative Region, Macau Special Administrative Region and Taiwan notwithstanding the fact that Article 72 of the Regulations provides that the provisions shall *mutatis mutandis* be applicable to the juridical-person banks, bank branches and representative offices of banks with the fund from these regions unless otherwise stated by the State Council.

Table 3: Types of the foreign-funded banks in absolute numbers, which responded to the survey

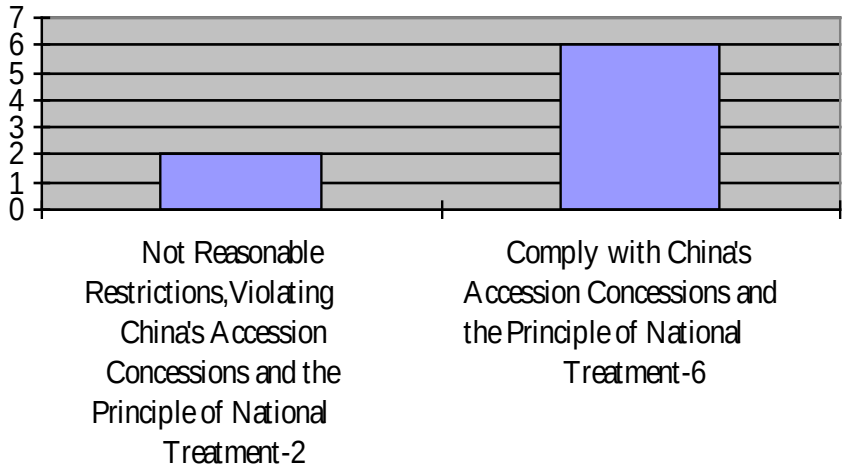


Basically, all the foreign-funded banks, which responded to our survey, agreed that China had honored the commitments made upon its accession into the WTO. Some of them, however, were of the view that the minimum requirement of one million yuan deposit of local currency from individual clients limited the business of foreign bank branches, which contradicted China's commitments (see Table 4). They also pointed out that the requirement to register to be a juridical-person bank with foreign fund before a foreign financial institution started the banking card business was not consistent with China's commitments. These restrictions would increase the operating cost of a foreign bank branch and limit its capacity of expanding business in China.

A typical question is: since China has promised to open the local currency market after the five-year transitional period, why does China require a foreign financial institution to register to be a juridical-person bank with foreign fund before it is permitted to start banking card business, or set a higher threshold in the business of individual clients for foreign bank branches? One possible answer is that China, by doing so, may exercise effective supervision on the juridical-person banks with foreign fund which are required to follow Chinese laws and regulations as their Chinese counterparts in the following aspects: supervision to the various levels of administrative management, necessity test of replenishing registered capital, criteria of supplementing managerial personnel and setting of uniform management methods.[26]

[26] As one scholar points out that there were a number of weaknesses in the Chinese legal and regulatory system before its WTO accession. Firstly, there were many gaps or

Table 4: Views on the consistency of the Regulations and the Rules with the WTO rules in absolute numbers



D. Contributing Factors and Bottom-Line of the Prudential Measures

I. Contributing Factors of the Prudential Measures

According to Article XVII:1 of GATS,[27] China should grant national treatment in the banking sector to the foreign service and service suppliers

gray areas where no suitable laws or subordinate legislation could apply. Secondly, a consistent and effective approach in enacting and amending laws was also lacking, as well as transparent procedures to bring in stakeholders' participation into the legislation process. Thirdly, enforcement laws and regulations were inadequate, and on many occasions financial sector supervisors would have to rely on the interpretation of the Supreme Court when implementing the law. Fourthly, the segregated regulatory system had overemphasized the regulations of market behaviors compared with the prudential regulations of financial institutions. Prudential supervision proves to be more difficult in a segregated system where financial institutions are engaged in cross-sector activities. These weaknesses, however, still exist even after China's accession into the WTO. L. Xuan, Interactive Role of GATS Commitments and Dynamics of Chinese Economic Reform in the Context of Banking Liberalization (February 2004) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=579842 (last visited 16 December 2009), 19.

27 WTO, *supra* note 1, 299-300.

subject to the conditions and qualifications specified in its commitments. Paragraph 2 (a) of the Annex on Financial Services of GATS (hereinafter "*First Annex*") provides that notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures out of *prudential reasons* (emphasis added) to protect investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of GATS, they shall not be used as a means of avoiding the Member's commitments or obligations under GATS.[28] Although the First Annex does not list the measures which may be implemented for prudential reasons, Article XVII:3 of GATS contains the relevant provisions on this issue, which provides that formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.[29] Based on these criteria, no matter what measures are promulgated by China, they will be considered as inconsistent with the WTO rules if these measures have *de facto* led the foreign legal entities in unfavorable conditions compared with their Chinese counterparts.[30] These measures will be challenged from other Members unless China is able to justify them for prudential reasons as permitted in paragraph 2 (a) of the First Annex.

Different from the transactions in the sales of goods, the activities of finance may be completed in the fictitious forms and separated from the real transactions, which may appear in multiples in the increasing of its profits.

28 WTO, *supra* note 1, 311.

29 WTO, *supra* note 1, 300.

30 On the banking sector access in China's Schedule, the existing limitations remaining effective include (1) foreign financial institutions which meet the following condition are permitted to established a subsidiary of a foreign bank or a foreign finance company in China: total assets of more than US $ 10 billion at the end of the year prior to filing the application; (2) foreign financial institutions which meet the following condition are permitted to establish a branch of a foreign bank in China: total assets of more than US $ 20 billion at the end of the year prior to filing the application; (3) foreign financial institutions which meet the following condition are permitted to establish a Chinese-foreign joint bank or a Chinese-foreign joint finance company in China: total assets of more than US $ 10 billion at the end of the year prior to filing the application. (4) Qualifications for foreign financial institutions to engage in local currency business are as follows: three years business operation in China and being profitable for two consecutive years prior to the application. Arts 10, 12, 11 and 34 of the Regulations respectively.

With these unique characteristics, the operation of finance has many inherent risks including credit risk, market risk and legal risk. The use of internet has also brought to the financial transactions with more systemic risks which include global systemic risks, solvency risks and other risks to the depositors.[31] So far, there is no mechanism in China "to address solvency issues within a financial conglomerate such as double or multiple gearing, risks incurred by unregulated entities, and erection of firewalls between subsidiaries and parent companies."[32] All these inherent risks together with the possibility of cross-border financial swindling make the payment become more difficult. This will lead to the financial crisis and even become the cause of social turbulence in some countries or areas.[33]

In view of these factors, the World Trade Organization, while promoting the opening of financial sectors within its Members, has recognized the necessity for each Member to take some restrictive measures for prudential reasons. The author of this article considers that the bottom-line implied in GATS is that any measures, which are *de facto* inconsistent with the requirements of national treatment, should be used only for prudential reasons. In the context of the Regulations and Rules, we need to look into whether these prudential reasons have been abused. To be specific, two relevant issues deserve questioning. One is the limits on prudential reasons permitted by GATS and the First Annex. The other is whether the juridical-person-bank orientation is really out of prudential reasons.

II. Bottom-line of the Prudential Reasons

The text of GATS and other WTO legal documents do not expressly provide the definition of "prudential supervision" or the limits on "prudential reasons".[34] A report on the review of further liberalization of trade in services published by the WTO Secretariat in 2000 provides that the recognized prudential supervision measures may include rate of capital sufficiency, restrictions on risk overlapping, requirements on risk management systems, management of the circulation of capital, banning of

31 L. L. C. Lee, 'The Basle Accords as Soft Law: Strengthening International Banking Supervision', 39 *Virginia Journal of International Law* (1998) 1, 33-34.

32 Y.-H. Kim, Financial Opening Under the WTO Agreement in Selected Asian Countries: Progress and Issues (September 2002) available at http://www.adb.org/Documents/ERD/Working_Papers/wp024.pdf (last visited 10 December 2009).

33 The current global financial crisis is more or less connected with these characteristics.

34 A. Kern, *The World Trade Organization and Financial Stability – the Need to Resolve the Tension Between Liberalisation and Prudential Regulation* (2002), 23.

internal dealings and dealings leading to conflicts of interest, classification of inefficient assets, test requirements on the competence and qualification of the members of board of directors and managers, requirements on the transparency and information disclosure, etc.[35] The listings in the above report do not include the registration of a juridical-person bank or the minimum level for each transaction. Since the finance capacity of each WTO Member varies, there is no uniform understanding with respect to the specific measures for prudential supervision. GATS allows WTO Members to determine on their own the "prudential reasons" and the relevant measures. This lenient consideration provides WTO Members with a possibility to practice trade protection in the name of prudential supervision.

On making its explanatory statements, the CBRC considers that there are two facts, which we need to keep in mind, while judging whether a specific measure is based on prudential reasons. One is that the purpose of implementing such restrictive measures is to protect the clients, especially the depositors, and to ensure the integrity and stability of the financial system. This may be regarded as the legitimacy in motives. The other is that it is an impractical way to judge the prudential measures of one Member with the criteria of other Members, as there are no uniform criteria, which are applicable to all WTO Members. One measure effective to a Member does not necessarily mean the same to others. The liberalization progress of trade in services should reflect the relevant Member's economic development levels and its policy orientations. All WTO Members have the right to take prudential supervision measures within the framework of GATS.[36] There is a sound reasoning in the explanations made by the CBRC. The point, however, is that the implementation of prudential supervision measures should satisfy the necessity test requirement in addition to the above two facts.[37] Otherwise, any unnecessary measures might be interpreted as prudential supervision measures.

Necessity testing may be based on mathematic data or empirical research. In the case of the Regulations and Rules, the Chinese authorities

35 The CBRC, Q&A Regarding the WTO and the Opening-up of the Chinese Banking Sector, Chapter I (Rules), available at http://www.cbrc.gov.cn/chinese/home/jsp/docView.jsp?docID=2854 (last visited 16 December 2009).

36 The CBRC, Q&A Regarding the WTO and the Opening-up of the Chinese Banking Sector, Chapter II (Rights and Obligations), available at http://www.cbrc.gov.cn/chinese/home/jsp/docView.jsp?docID=2858 (last visited 16 December 2009).

37 H. Xiaoyong, 'The Comparative Study of Market Accession of Foreign Banks and China's Commitments for WTO Entry', *International Business Research* (2004), 32-34.

need to provide convincing reasons for the restrictions on foreign bank branches. The abuse of prudential supervision measures will go against the original intention of the drafters. Although the text of GATS does not contain any provisions regarding the definition of necessity, paragraphs (a), (b), (d) and (i) of Article XX of GATS provide the basic elements for it. Therefore, before we determine whether a specific measure falls within the scope of prudential supervision measures, we may first look into the GATT/WTO dispute settlement practices.

In the *Tuna* case, the Panel concluded that the contracting party taking restrictive measures must prove that it had exhausted other reasonable alternative measures available, which were less contravening the GATT rules.[38] In the *Gasoline* case, the Panel excluded those alternative measures, which are impossible to carry out.[39] In the *Asbestos* case, the Appellate Body concluded that it needed to refer to the particular situations when judging whether a measure was out of prudential supervision reasons. Only under the justifications that the alternative measures were effective to achieve the legitimate purpose of the implementing Member, might those among them, which were less contravening the WTO rules, be accepted as the reasonable alternative measures.[40]

The GATT/WTO dispute settlement practice has provided some guidelines in clarifying the prudential supervision measures. Nevertheless, it is the practice achieved in the trade of goods. There is no comparable practice in the trade of services. More importantly, the WTO Dispute Settlement Body does not follow the *stare decisis* doctrine. In other words, no official interpretations concerning the prudential supervision measures exist. In view of this reality, the author of this article believes that the essential elements of prudential supervision measures should at least include the legitimacy in motives and the necessity in practice.

38 Panel Report, *United States – Restrictions on Imports of Tuna*, 30 I. L. M. 1594, 1991, 155.

39 See Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, paras 6.26- - 6.28.

40 See Appellate Body Report, *EC – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/R, 12 March 2001, paras 173-174.

E. Legal Analysis on China's Prudential Supervision Measures

Before we start any legal analysis on China's prudential supervision measures, it is necessary to clarify the following two issues related to the official statements made by the CBRC.[41]

(a) Pursuant to the provisions of Article XX of GATS, issues concerning (i) whether a Member opens its specific sectors of trade in services, (ii) to what extent a Member will open its sectors, and (iii) which restrictive measures the Member will take, should be specified in its Schedule upon accession into the WTO.[42] Therefore, international practices and customs do not have relevance to the specific commitments made by a WTO Member. To comply with international practices and customs does not necessarily mean compliance with a Member's specific commitments.

(b) Although the Regulations and Rules grant a foreign financial institution the right to determine whether or not to register as a Chinese juridical-person bank, the fact is that the registration is the precondition for a foreign financial institution to fully run its business in China. The foreign bank branches cannot enjoy the same treatment as that the juridical-person banks with foreign fund may have. The Chinese authorities do not provide any convincing data or persuasive reasons for this difference. Following this vein, the author of this article takes the view that the statements made by the CBRC cannot be justified.

I. Analysis on the Legitimacy in Motives of China's Restrictive Measures

According to the statements of the CBRC, the purpose of setting restrictions on certain businesses of foreign bank branches is to protect the interests of depositors and to ensure the integrity and stability of China's financial system. As foreign bank branches are not Chinese juridical-person enterprises, they are mainly supervised by the authorities of the registering countries or regions. If their parent banks suffer liquidity problems or payment crisis, the Chinese authorities will not be able to prevent foreign bank branches from further risks. As for the juridical-person banks with foreign fund, the Chinese authorities are able to do so by supervising the

41 Yan & Chun-lin, *supra* note 9.
42 WTO, *supra* note 1, 301.

flow of capital or freeze assets when a juridical-person bank with foreign fund is bankrupted. Therefore, the prudential supervision measures implemented by the Chinese authorities can be justified with the legitimacy in motives.

II. Analysis on the Necessity of China's Restrictive Measures

As previously mentioned, the Regulations and Rules have raised the threshold of market access on local currency business for foreign bank branches and banned them from certain modes of services in China. As a matter of fact, these restrictions have the effect to protect the Chinese counterparts from competition and this has been recognized by those foreign bank branches, which responded to our survey. If the Chinese authorities impose these restrictions for prudential supervision reasons, they need further to justify the necessity of these measures in practice.

As a general rule, the Regulations and Rules have provided the following requirements in regard to the operation and supervision for juridical-person banks with foreign fund and foreign bank branches:

(1) Minimum level of registered capital and operating capital (Article 8 of the Regulations).
(2) A series of prudential supervision requirements (Article 9 of the Regulations and Article 3 of the Rules).
(3) The sole shareholder or the shareholder in control of a juridical-person bank with foreign fund must be a commercial bank and the requirement of its minimum total assets (Articles 10 and 11 of the Regulations).
(4) Capital sufficiency rate requirement (8%) (Articles 10-12 of the Regulations and Article 6 of the Rules).
(5) Compliance with equity debt ratio requirements provided by the Commercial Banking Law of PRC (Article 40 of the Regulations).
(6) Reservations for the bad debts requirement (Article 41 of the Regulations).
(7) Requirement of compliance with the regulations regarding corporate governance and related transactions (Articles 42 and 43 of the Regulations).
(8) Requirements on the competence and qualifications of senior management personnel of juridical-person banks with foreign fund (Chapter IV of the Rules).

(9) Supervision and management provisions (Chapter V of the Rules).
(10) Other prudential supervision provisions set forth in the Regulations, Rules and the Commercial Banking Law of PRC.

In addition to the above requirements, the Regulations and Rules contain the following special provisions for foreign bank branches:

(1) 30% operating capital of any foreign bank branch should be deposited in the form of interest-producing assets in three or fewer Chinese-funded commercial banks with good records, which are designated by the CBRC (Article 44 of the Regulations and Article 85 of the Rules).
(2) The proportion of the share of Renminbi in the total amount of operating capital, reservations and other items to the Renminbi risk assets of a foreign bank branch should be no less than 8% (Article 45 of the Regulations).
(3) Any foreign bank branch should ensure the proportion of the remaining sum of the circulating capital compared with the remaining sum of the circulating debt shall be no less than 25% (Article 46 of the Regulations).
(4) The remaining sum of the foreign currency and local currency assets of a foreign bank branch should be no less than her remaining sum of foreign currency and local currency debt (Article 47 of the Regulations).

In the *Report on the Opening-up of the Chinese Banking Sector* published in March, 2007, the CBRC further provides that with "respect to foreign bank branches, China has requested under the market entry conditions that the parent bank of foreign-funded banks should guarantee without conditions the liabilities of its branch in China."[43] Article 17 of the Regulations provides that after the application to open a branch in China has been approved, the parent bank should submit to the CBRC "a guaranty letter issued by the foreign bank establishing a branch, stating that it shall be responsible for all the taxes and other indebtedness the proposed branch will

[43] The CBRC, Report on the Opening-up of the Chinese Banking Sector, (25 January 2007) available at http://www.cbrc.gov.cn/english/home/jsp/docView.jsp?docID=200703220DEB2435789A50E9FF2A1732C43BBA00 (last visited 16 December 2009)

incur." In addition, Article 9 of the Regulations specifically provides that the countries or regions where the shareholders of a proposed wholly foreign-owned bank, Sino-foreign joint bank or branch of a foreign bank are located should have perfect financial supervision systems and their financial authorities shall have established good supervisory and regulatory cooperation with the CBRC.[44]

The CBRC may use the above measures, especially the requirements on capital sufficiency rate, loss provision sufficiency rate, wholesale credit extension concentration ratio, cross-border capital flow and deposit payment capability, to isolate the risks from the foreign financial institutions in China. If the routine supervision cannot effectively control these risks, the CBRC may take special or specific inspection and supervision. Based on this analysis, the author of this article concludes that the provisions in the Regulations and Rules are detailed enough and the current prudential supervision measures on foreign bank branches cannot be justified with the necessity test in practice.

Since the foreign bank branches charge more for their service than their Chinese counterparts, their clients will still be limited to those with more assets. On the other hand, the banking card business usually focuses on the daily consumption of clients. Although the consumption by credit card is becoming more and more common in China, the high interest for overdraft (annual interest rate is more than 18%) may hold back the risks to a certain extent. Meanwhile, the users of debit cards must deposit enough money before they use the card. In view of all these factors, it appears that there are no natural links between the ban on foreign bank branches from banking card business and the protection to the depositors and the financial system.

F. Conclusion

The fact that a WTO Member determines on its own the specific prudential supervision measures does not necessarily mean that such measures can be used to evade its specific commitments. Other WTO

[44] By the end of 2006, China has established bilateral supervisory and regulatory cooperation links with 22 countries and regions which include the United States, Canada, Germany, Korea, Singapore, Hong Kong, Macau, France, Australia and Italy. The contents of cooperation include information sharing, cooperation on the market access and investigation on the spot, confidentiality with respect to the information concerning supervision, consultation on the issues of supervision and regulation. *Id*.

Members may still use the Trade Policy Review Mechanism or even the dispute settlement proceedings to challenge the legitimacy and necessity of these measures. When China is in disagreement with other Members for these restrictive measures on foreign bank branches, the prudential supervision may not be a sufficient and persuasive defense. In other words, these measures are likely to be considered as the violations of WTO rules and the specific commitments made by China.

There is no doubt that China's WTO service commitment represents the most rigorous liberalization in the WTO's history.[45] China has made it clear in Paragraph 308 of the Report of the Working Party on the Accession of China that "upon accession, China would ensure that China's licensing procedures and conditions would not act as barriers to market access and would not be more trade restrictive than necessary."[46] Based on the aforesaid analysis, the author of this article suggests that the State Council of China and the CBRC should reassess the relevant provisions of the Regulations and Rules.

[45] Xuan, *supra* note 26, 23.
[46] WTO, *supra* note 3, para. 308.

Goettingen Journal of International Law 1 (2009) 3, 439-458

Framework Conventions as a Regulatory Tool

Nele Matz-Lück*

Table of Contents

* Dr. jur., LL.M. (Environmental Law & Management), Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg. This article is based upon a presentation given at the workshop "Towards A Framework Convention on Biochemical Controls: Addressing Conceptual and Practical Issue", held at the University of Bath in September 2008.

doi: 10.3249/1868-1581-1-3-matz-lueck

Abstract

The adoption of framework conventions is a relatively recent phenomenon in international law and has mainly been employed in the field of international environmental law. According to the so-called "framework convention and protocol approach" parties agree on a more general treaty, the framework convention, and more detailed protocols to fill out the room left for specific regulations. While there are no legal definition and fixed models for framework conventions, they have certain characteristics in common. Namely the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance are assigned to the framework, while more detailed rules and the setting of specific targets are left to either parallel or subsequent agreements between the parties. This regulatory technique has certain benefits compared to single "piecemeal" treaties in international law. Yet, framework conventions and protocols are subject to the law of treaties and relevant practice and thus not *per se* easier to negotiate or more flexible than other agreements.

A. Introduction

The regulation of international issues by framework conventions is a relatively recent regulatory technique in international law and has mainly been employed in the field of international environmental law.[1] Framework agreements are usually associated with the so-called "framework convention and protocol approach" by which parties agree on a more general treaty, the framework convention, and more detailed protocols to fill out the room left by the legal framework for specific regulations.[2] The conclusion of treaties establishing a framework for further and more detailed norms reflects a change in the subjects of international law on the one hand and the enhanced

[1] The vast majority of literature on the law of treaties has not yet recognized framework agreements as a subject of debate. The inclusion of an entry on "Framework Agreements" into the new edition of the *Encyclopedia of Public International Law (EPIL)*, however, is an example of growing awareness of the characteristics of framework conventions as a regulatory tool. See N. Matz-Lück, 'Framework Agreements', in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2008) available at http://www.mpepil.com/ (last visited 23 August 2009).

[2] One of the first environmental framework agreements was the *Barcelona Convention for the Protection of the Mediterranean Sea against Pollution*, 16 February 1976, 15 I.L.M. 290.

complexity of contemporary international law on the other. A framework convention with one or several protocols could be a potential tool to effectively draft a new legal instrument on biochemicals to address the security issues associated with the rapid development of new substances.

There is no fixed model for framework agreements and the term does not have a technical meaning.[3] Contracting parties set up framework conventions which are adapted to their objectives and organisational needs. As a consequence they come in different shapes and institutional designs. They may range from mere procedural frameworks for further substantive agreements[4] to treaties that contain rights and obligations themselves while leaving certain specific questions to further regulation[5]. Yet framework treaties have certain fundamental characteristics in common. The character of an agreement as a framework is mainly established by the decision of the contracting parties to delegate questions that are relevant for achieving the agreement's objectives to additional regulation. Whether the issues of such regulations, most often adopted in the form of protocols, are already determined by the framework, whether they are negotiated in parallel or subsequently, depends upon the will of the negotiating states. Generally, the parties to the framework also establish some institutional structure for the further development of more substantive agreements.

If the title of a treaty explicitly refers to the instrument as a "framework convention", as does e.g. the UN Framework Convention on Climate Change,[6] the intent of the drafters to create a legal framework for further action is easy to identify. By labelling a treaty a framework convention the contracting parties indicate their intent to create a larger regulatory regime in a two-step procedure. However, the mentioning of the framework character in the title of a treaty is not a constitutive element. Sometimes conventions that were not explicitly drafted as framework agreements have been typified as such retrospectively when the "framework convention and protocol approach" was more widely used and qualified as a regulatory tech-

3 D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15.

4 An example for such a framework is the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, 22 June 1980, 19 I.L.M. 15.

5 The *Framework Convention on Climate Change*, 20 June 1992, 31 I.L.M. 849, for example, goes significantly further than the establishment of institutions for further negotiation and contains principles as well as rights and obligations for the different categories of States parties.

6 *Id.*

nique.[7] In this context, it should be stressed that the qualification as a framework convention does not bear any consequences under the law of treaties. All customary and codified rules governing *inter alia* the adoption, application, modification, interpretation and termination of treaties are, in principle, applicable to framework agreements and their protocols.[8]

B. Regulating International Affairs by Treaties

By sheer number treaties are the main legal tool regulating the relationship between states. Together with customary international law and general principles of law, treaties belong to the sources of international law.[9] Customary international law as an instrument is slow to evolve, restricted to fundamental rights and obligations, difficult to determine and generally inflexible. The evolution of customary international law requires two constitutive elements: state practice and the underlying *opinio juris*, i.e. the conviction that the relevant practice is owed to a legal obligation. In the absence of either codified treaty obligations or binding resolutions by the UN Security Council, state practice is difficult to steer when the development of new customary rules is desired and waited for. Although customary law is an important source of public international law it is hardly an instrument for the active creation of new international law. The figure of so-called "instant custom", i.e. customary international law that does not require a history of state practice, is questionable and, although proposed by some as a more flexible means of adapting international law to modern realities,[10] has not generally been accepted.[11]

7 The *Convention on the Prevention of Pollution from Ships*, 2 February 1973, (MARPOL 73/78), 12 I.L.M. 1319 and 1341 U.N.T.S. 3, with its different annexes on pollution sources and pollutants is an example to that extent, although it is not ordinarily classified as a framework convention D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15.

8 With only few exceptions the rules of the law of treaties are not of a compulsory nature. Hence, parties to a treaty can deviate by adopting specific provisions governing their agreement, e.g. on the entry into force or on amendments.

9 Art. 38 para. 1 lit. a) Statute of the International Court of Justice (ICJ) lists conventions as one of the primary means to decide cases in accordance with international law.

10 B. Langille, 'It's 'Instant Custom': How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 *Boston College International and Comparative Law Review* (2003), 145, 149.

11 G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983), 86.

Law as it is codified in treaties, however, may influence and promote the development of customary international law. Although there is no formal relationship between them treaties and customary law are to some extent linked. Treaties may explicitly codify an already existing rule of customary law. They may also formulate and by this means draw attention to evolving, i.e. not yet legally accepted and binding, rules under customary law. In this case wide acceptance of the treaty by states or reference to rules codified by the treaty in judicial decisions may promote the process of evolution of the customary rule.[12] The emerging rule of customary international law would then also bind states who are not parties to the treaty.[13]

Over time the issues regulated by treaties and the legal approaches towards regulation have changed considerably. When international law was still perceived as a means to provide for the peaceful co-existence of states, it had a minimalist and largely negative connotation: the prevention of violence between states. Early treaties concerned issues on a mainly bilateral basis and regulated such issues as the delimitation of boundaries, peace after armed conflicts and trade. Once the treaty was concluded in most cases it remained unchanged. Institutional support of the treaty was lacking. The parties to the treaty controlled compliance in a reciprocal manner. Lack of performance led to diplomatic exchanges and ultimately dispute settlement. Although states still conclude bilateral treaties - e.g. border treaties - new challenges of a modern world order, such as the conservation of the global environment or the ban of weapons of mass destruction, called for multilateral and, preferably, universal instruments with institutions for compliance control and assistance for implementation. International law changed towards a law of co-operation.

Threats to the security of the international community like the proliferation of nuclear weapons or environmental hazards such as ozone deple-

[12] *The UN Convention on the Non-Navigational Use of International Watercourses*, 36 I.L.M. 700, has not yet entered into force. However, certain rules codified in the treaty are used by international courts and tribunals to argue the *lex lata*. Since the entry into force of the convention is doubtful, some authors argue that its relevance must be seen in its impact on customary law rather than an evolution of treaty law, A. Tanzi, 'The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes', 11 *Leiden Journal of International Law* (1998), 441, 442.

[13] Only States that qualify as persistent objectors to certain norms of customary international law are not bound by them. On the notion of persistent objectors see O. Elias, 'Some Remarks on the Persistent Objector Rule in Customary International Law', 6 *Denning Law Journal* (1991), 37.

tion have to be based upon co-operation of a large number of states to be effective. Co-operation as a principle and as an obligation that is promoted by an institutional structure is at the heart of modern international regulatory systems. For example, the effectiveness of the regulation of modern weapons for biological, chemical or nuclear warfare depends upon the close collaboration of the relevant international actors and upon institutional structures for monitoring, reporting and decision-making. The drafting of international legal instruments, which were designed to achieve the new objectives while receiving wide international acceptance, became challenging. As a consequence international law developed new modes of legal technique.

The establishment of institutions by the parties to a treaty is not a characteristic restricted to framework treaties. The UN Convention on the Law of the Sea,[14] for example, has a Meeting of States Parties and even its own tribunal. Despite the conclusion of two implementation agreements, the Convention on the Law of the Sea is not perceived as a framework convention. Rather, due to the comprehensiveness of its provisions it is called the "constitution of the oceans". The two implementation agreements that were adopted to elaborate further on deep seabed mining and straddling fish stocks respectively do not turn the Law of the Sea Convention into a mere framework to be filled in by additional instruments. Although they may differ with regard to their mandate and competencies the organs set up by framework agreements serve to guarantee a "living convention" that allows and facilitates further regulation. Many framework agreements have established organs which are comparable to one another concerning their function, e.g. a plenary body for decision-making which is usually called the Conference of the Parties (COP) or the Meeting of the Parties (MOP), a secretariat for handling administrative matters and e.g. the collection of national reports and a body for scientific advice. The circumstance that many framework agreements have established organs responsible for technical and scientific advice does not result from their character as a framework but from the fact that most have been established in the field of international environmental law. Although there is no specific institutional design which distinguishes framework agreements from other institutionalised agreements, framework conventions benefit greatly from a permanent structure that allows *inter alia* for the establishment and support of working groups for the preparation of protocols and supervision of the effectiveness of the regime.

[14] *UN Convention on the Law of the Sea*, 10 December 1982, 21 I.L.M. 1261.

While universal acceptance of multilateral treaties that address issues of global concern seems a necessity to effectively achieve these instruments' objectives, striving for universality may also be a significant obstacle for effectiveness. In a world that is politically divided by the interests of the North and the South, universal legal regulation requires compromise that impedes substantive commitments by the parties. Often the choice is between many states but weak regulation or strong legal obligations but few participants. Framework conventions following the so-called "framework/protocol" approach attempt to overcome this dilemma. A vague and relatively weak framework upon which all parties can agree is negotiated to provide for the general objectives, principles and institutions while specific obligations are transferred to a protocol. Although the protocol may have significantly fewer parties than the framework, the stage is set and parties have created some room for further negotiation, monitoring, scientific evidence and persuasion of more parties to join the protocol.

In principle, the content and structural design of a treaty depends upon the decision of the states or organisations negotiating the agreement. The rules established by the law of treaties, with few exceptions,[15] are not obligatory and only apply in the absence of an agreement to the contrary between the negotiating parties. From a legal perspective treaties are flexible tools that can be easily amended or modified depending upon the agreed modes for such activities. In practice, however, the negotiation of treaties is time-consuming and can take years, many do not enter into force and ultimately they are difficult to modify and to adapt to new situations. Tools such as a dynamic interpretation of treaties that allow new concerns to be taken into consideration are limited in number and face their own specific restrictions.

[15] The rule of *pacta sunt servanda* is one of the leading customary principles of international law not at the disposal of the parties. The purpose of legal regulation by treaties would be obsolete if treaties would not, as a general rule, have to be performed. This customary rule has also been codified in Art. 26 of the *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 18232.

C. Notion and Legal Characteristics of Framework Conventions

I. Approaches to a Definition

As mentioned above the term "framework convention" is not a technical legal term. Since framework conventions vary considerably with regard to their content, the degree and form of substantive obligations and the institutional design, there is no agreed legal definition but only a collection of elements common to most framework agreements. One could argue from the function of framework agreements that they "establish a general system of governance, and not detailed obligations".[16] Hence, from a theoretical point of view one might say that the specific characteristic of a "typical" framework convention is the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance, while leaving more detailed rules and the setting of specific targets either to parallel or subsequent agreements between the parties. The "framework convention and protocol approach" which is used to describe the regulatory technique points at the two-step procedure inherent to most framework agreements. Such a process leads to the adoption of different international treaties on a subject matter that are linked by certain restrictions e.g. on the parties joining the protocols or by sharing institutions.[17] Such an aim at comprehensiveness can be contrasted with the so-called "piecemeal approach" to international regulation. In short, one could say that frameworks are broad and general treaties, whereas protocols are specific and detailed treaties. Taken together they attempt to address an issue of international law in an effective manner.

16 Bodansky, *supra* note 3, 15.

17 As the parties enjoy absolute freedom under the law of treaties as to design their agreement institutionally, the sharing of institutions between framework and protocol is not a necessity. Parties can either rely upon the institutional structure of the framework convention or create new institutions for the protocol. The freedom of institutional design may lead to structures which are abbreviated "COP-MOP": the Conference of the Parties (of the framework) serving as the Meeting of the Parties (to the protocol).

II. Piecemeal Approach v. Regulation by Framework Agreement and Protocol

The "framework convention and protocol approach" is usually perceived as the opposite to a "piecemeal approach" to legal regulation. When states pursue a piecemeal approach they try to address a larger problem by regulating isolated aspects thereof. Examples from the field of international environmental law are the Convention on Early Notification of a Nuclear Accident[18] and the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency.[19] Both were adopted as a reaction to the Chernobyl accident. States felt the need to address questions of preparedness to accidents as a matter of urgency without feeling able to comprehensively establish a regime on nuclear energy and environmental protection.[20]

While such a strategy has the benefit that parties can concentrate on the most pressing needs and adopt international law instruments in a timely manner, it also bears several risks. First of all the speedy negotiation and adoption of international treaties, i.e. often a quick compromise, can lead to shortcomings concerning the substantive regulations.[21]The negotiating parties may also lose sight of the larger picture if they only focus upon single aspects of an issue. Furthermore, international treaties may get more and more diversified and may contradict one another if there is no overarching framework that gives guidance on the general principles. The discussion of a specialization and fragmentation of public international law shows how difficult it can be to make different instruments dealing with aspects of the same larger issue coherent with one another. In general, a piecemeal approach may prove successful if a small and homogenous group of states seeks to regulate an issue urgently.[22] If such a group finds a solution by concluding an international treaty, this instrument can be used as a model for further regulation by other states or treaties on a regional or even global level.

18 *Convention on Early Notification of a Nuclear Accident*, 26 September 1986, 25 I.L.M. 1370.

19 *Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency*, 26 September 1986, 25 I.L.M. 1377.

20 U. Beyerlin, *Umweltvölkerrecht* (2000), 41.

21 This is also the main criticism concerning the mentioned treaties on nuclear accidents; see P. D. Cameron, 'Nuclear Safety after Chernobyl: The Role of International Law', 1 *Leiden Journal of International Law* (1988), 121.

22 Beyerlin, *supra* note 20, 41.

It proves complicated to form a comprehensive regime from different existing "piecemeal" agreements. In the field of biological diversity the many species-oriented or sectoral agreements that focused upon the conservation of certain animals or plants or regulated trade in species have not formally been linked to the 1992 Convention on Biological Diversity (CBD).[23] Although there had been plans to bring all former conventions together under a new "umbrella convention" all piecemeal treaties on different aspects of the conservation of biological diversity exist in parallel to one another. It depends upon implementation by the parties and upon co-operation between *inter alia* the secretariats and the conferences of the parties to different treaties to prevent contradictions or a doubling of efforts.

III. The Framework Convention as a Legal Tool

1. Different Shapes of Framework Agreements

While mainly developed in the environmental context, e.g. the Framework Convention on Climate Change, the Vienna Convention for the Protection of the Ozone Layer[24] or the Convention on Biological Diversity,[25] the framework convention as an instrument is not restricted to specific topics. So far the only agreement explicitly drafted as framework aiming at a "framework convention and protocol approach" in a non-environmental context is the Framework Convention on Tobacco Control(FCTC).[26] States parties have not yet agreed upon a protocol to the Framework Convention on Tobacco Control, but it leaves room for the regulation of different issues.[27] The European Framework Convention for

23 *Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 818.

24 *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, 26 I.L.M. 1516.

25 While not a framework convention by name, the Convention on Biological Diversity bears certain characteristics of a framework agreement and has been accepted as such. Bodansky, *supra* note 3, 16, calls the agreement a "borderline case" because of its provisions, for example, on conservation of biological diversity and access to genetic resources, which he considers more specific than in typical framework conventions.

26 *Framework Convention on Tobacco Control*, 21 May 2003, 42 I.L.M. 518.

27 On the proposal for a protocol to prevent smuggling of tobacco see N. Boister & R. Burchill, 'Stopping the Smugglers: Proposals for an Additional Protocol to the World Health Organization's Framework Convention on Tobacco Control', 3 *Melbourne Journal of International Law* (2002) 1, 33

the Protection of National Minorities,[28] while explicitly established as a framework agreement, follows a different approach. In this context the framework serves as legally binding guidance for national regulation that is adapted to the specific needs of the parties. Here again, the framework serves as an umbrella setting the general objectives and main principles while allowing each party sufficient room to take national particularities into account. In this case the framework treaty is a "normal" and relatively general treaty of international law that permits parties a great deal of leeway at the implementation level.

Despite certain indicators for characterizing an agreement as a framework convention, it may be difficult to draw a line between typical framework agreements and hybrid forms, i.e. conventions that set out a framework of governance and procedure for some issues but establish substantial and detailed rules in other respects. Such hybrid forms may not represent "typical frameworks" but follow the same ideas for certain issues. All frameworks share the procedural possibility to address an issue in a comprehensive manner by codifying consensus on the general objectives and basic principles while allowing for parallel or later legal agreement on specific issues under or aided by the institutional roof of the parent convention. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[29] is an example in this regard: the convention establishes detailed rules on the transboundary movement of wastes but leaves the question of liability to a subsequent protocol.[30] The benefit of transferring single and difficult questions to a protocol lies in the circumstance that the convention remains in force and must be implemented even if the protocol fails due to the lack of ratifications.[31]

A slightly different approach to framework treaties and later agreements is the formulation of general principles in the framework and their application to a specific situation in a bilateral or regional context. The Draft

28 *European Framework Convention for the Protection of National Minorities,* 1 February 1995, 34 I.L.M. 351.

29 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 28 I.L.M. 657

30 *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal,* 10 December 1999 available at http://www.basel.int/meetings/cop/cop5/docs/prot-e.pdf (last visited 1 December 2008).

31 *The Liability Protocol to the Basel Convention,* 10 December 1999, has not yet entered into force. For a list of ratifications see http://www.basel.int/ratif/protocol.htm (last visited 1 December 2008).

Articles on a Law of Transboundary Aquifers[32] had originally been envisaged by the International Law Commission (ILC) as a framework treaty to serve as binding guidance for further bilateral treaties between parties on shared groundwater resources. Such an approach would formulate the minimum legal standards, e.g. the preservation of ecosystems and an equitable utilization of the water resources, while allowing states to find management solutions that take into consideration the specific hydrological, geographical and socio-economic aspects of a joint utilization of the resource. When the Articles were adopted, the ILC did not propose to turn them into a legally binding framework convention but to use them as "soft-law", i.e. non-binding, recommendations. However, in the future state practice shall be monitored in order to reassess the possibility of a framework agreement at a later stage. In any case, such an agreement would not follow a framework convention and protocol approach but give legally binding guidance on bilateral and regional treaties between states and for national implementation.

2. Political Reasons for the Creation of Frameworks

As mentioned above, framework conventions are used to establish larger regimes consisting of legal regulation and institutional structures for more effective governance of an international issue. Whether the framework agreement is a suitable instrument to regulate an issue depends mainly upon the need to comprehensively regulate a question of international law with general rules and further more detailed regulation in additional instruments. The reasons for choosing a process that takes several steps to regulate an issue may be political rather than legal, e.g. when states agree on the urgency to address a question more generally but cannot reach consensus on all the details of a regulation without further (and potentially lengthy) negotiation. In the context of climate change and ozone depletion, for example, the drafters first agreed upon the general principles, objectives and institutions but left specific targets and timetables for later regulation. Sometimes such an approach is not only politically feasible but allows for further research and scientific evidence and advice on the means to achieve the objectives of the convention.[33] Although the deferral of questions to later regula-

[32] Text as adopted by the Drafting Committee of the International Law Commission on second reading, UN Doc A/CN.4/L.724, 29 May 2008.

[33] Many environmental agreements have established bodies for scientific and technical advice that assist with the implementation and further development of the treaties; e.g.

tion may seem to evade the difficult process of finding solutions to acknowledged problems, such a tactical procedure may create some room for further negotiation, additional evidence, political persuasion, institution-building (e.g. for technical, financial or other assistance) and practice. Although there can be no guaranteed success of a two-step procedure, the postponement of regulation may prove more successful then negotiations under political pressure to reach consensus within a limited timeframe. One does not know beforehand, whether pressure owed to constraints in time may create the necessary consensus to substantively regulate an issue or lead to particularly weak achievements due to compromises.

3. The Legal Nature of Framework Conventions

Generally, treaties may regulate all aspects of international relations and may be very detailed. A framework agreement is a legally binding treaty of international law. By its principal legal nature it does not differ from other conventions. The rules on the law of treaties, e.g. concerning the interpretation, modification and termination of treaties,[34] are fully applicable to framework conventions as well as to protocols or implementation agreements. The Vienna Convention on the Law of Treaties (VCLT) – "the treaty on treaties" – does not mention framework agreements as it was adopted in 1969 i.e. before a framework/protocol approach established itself as a regulative technique of public international law. While it may be discussed for various reasons whether the Vienna Convention on the Law of Treaties is still a viable tool to address modern multilateral treaties there seems no need to specifically take up the issue of framework agreements.

The significant difference between "normal" treaties and framework agreements concerns the relationship between the framework and more detailed protocols to the convention. It is a particularity of the framework convention and protocol approach that it relies upon a closed treaty regime. Only parties to the framework agreement can become members to the protocols. This precondition guarantees that states are bound by the guiding principles of the framework when interpreting and implementing the rights and obligations under the protocol. This issue however is best addressed by the parties to the framework in the text of the framework treaty. The Vienna Convention for the Protection of the Ozone Layer regulates in its Art.

the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) (Art. 25 CBD).

34 These are governed by the Vienna Convention on the Law of Treaties and by customary international law.

16para. 1 that "[a] State or a regional economic integration organizations may not become a party to a protocol unless it is, or becomes at the same time, a Party to the Convention."The other framework conventions that rely upon a framework-protocol approach contain similar provisions, e.g. Art. 32 CBD and Art. 33 para. 4 FCTC.

IV. Protocols

Usually parallel or subsequent agreements on more detailed questions envisage broad participation by all parties to the framework and are drafted as so-called "protocols" to the mother convention. The Framework Convention on the Ozone Layer and its very successful Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[35] or the Framework Convention on Climate Change and its not so successful Kyoto Protocol[36] and the Convention on Biological Diversity with its Cartagena Protocol on Biosafety[37] are some examples in this regard. Such protocols are international treaties themselves and the rules on international treaties apply to the framework as well as to the protocol.

As a consequence, protocols are not necessarily easier to negotiate than other treaties. If states already had great difficulty in agreeing on a framework, it may be a lengthy process to find consensus concerning a protocol with clear and enforceable commitments, although time may allow for further developments such as scientific evidence or institutions supporting further regulation e.g. by granting assistance. Much depends upon the framework itself with its guiding objectives and the preparation of a protocol by e.g. the treaty's organs, and, of course, whether states entering into negotiations can agree on the substantive content of a protocol. Sometimes protocols are envisaged from the beginning and even negotiated in parallel to the framework convention. In other cases the framework only provides for the procedure to adopt protocols without specifying topics. The most effective method seems to include the most relevant issues for further protocols already in the text of the framework agreement in order to keep the focus on the most pressing needs for further development. The list, however,

35 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 I.L.M. 1550.

36 *Kyoto Protocol*, 11 December 1997, 37 I.L.M. 32; As the Kyoto Protocol terminates in 2012 parties are currently attempting to negotiate a new protocol which shall replace the Kyoto Protocol.

37 *Cartagena Protocol on Biosafety*, 29 January 2000, 39 I.L.M. 1027.

should not be enumerative to prevent a modification procedure if a change in circumstance requires a protocol on another issue. By such a procedure states are obliged to co-operate through or with assistance by the treaty's organs and negotiate on specific issues without losing the possibility to address further topics.

Even if targets and timetables are transferred to later agreements, the framework convention itself is not without effect. The establishment of the guiding principles and an institutional setting serve to facilitate the conclusion of further protocols while at the same time reducing the freedom of the parties to design the protocols and their national legislation. Since the principles and objectives as well as rules on governance of the treaty regime are laid down in the framework agreement, it is also relevant for the development of state practice in regard to the later protocols.

Apart from the limitations concerning the parties to the protocols the general rules of the law of treaties are applicable. Protocols only enter into force if a certain number of parties join. This number is specified in the protocol. The Montreal Protocol, for example, required 11 instruments of ratification or accessions[38] (Art. 16 para. 1 Montreal Protocol). Each party willing to be bound by the protocol has to sign and ratify the protocol or accede to it at a later stage.

V. Flexibility of Framework Conventions

Whether framework conventions are flexible to respond to scientific, technical or other changes depends upon the provisions for the adoption of protocols or annexes and methods of modification and amendment. It is not a specific characteristic of frameworks to be more flexible than other treaties. The possibility to adopt protocols to fill in the framework seems a flexible tool to address issues left open by the general setting. However, protocols being treaties the drafting process can be lengthy, the adoption can easily fail due to a lack of consensus and the entry into force depends upon ratification of each party to the framework. While some treaties accept majority voting for the adoption or modification of (technical) annexes, the modification of treaties still depends upon consensus of all states parties. If it is considered a viable tool to establish lists, e.g. listing prohibited substances, these should be included in annexes that can be changed more eas-

[38] A particularity, which is not unusual in environmental law, is the requirement that the eleven parties must represent two-thirds of 1986 global consumption of the controlled substances. Otherwise the entry into force is postponed until the condition is fulfilled.

ily to react to factual changes in a timely manner. Whether it is considered effective to operate with different technical lists or whether drafters prefer one substantive provision covering all known and future activities or a combination of both is a political decision.

VI. Relationship to Other Instruments

As a general rule – and subject to certain specific exceptions – international treaties exist independently from one another. There is no general hierarchy of sources or of treaties in international law. A rudimentary kind of ranking is established by the concept of *ius cogens*, i.e. norms of international law of a peremptory nature. In this case, a hierarchy between treaties can arise, because a treaty which codifies an accepted rule of *ius cogens* will render void all other treaties infringing that rule. Likewise if a new peremptory norm of general international law emerges any treaty in conflict with that norm is void and terminates (Art. 64 VCLT).Furthermore, one may argue that the UN Charter is a kind of prevailing constitution due to its Art. 103. However, even this perception is subject to much debate.[39]

In principle the validity and applicability of treaties is not affected by the conclusion of new agreements. In this respect framework agreements do not differ from other treaties. Their framework character is decisive for the relationship to their protocols but not for the one to other existing or future treaties. This means that a new framework convention on biochemical controls would exist in addition to the existing treaties.

The absence of a hierarchical legal order as known from national and supranational legal systems leads to a systemic structure in which international agreements are part of a parallel order. However, conventions do not exist in a legal vacuum. A new treaty is "born" into the existing system and may interact with existing and future agreements as well as with the existing rules of customary international law. Rules of the international law of treaties govern the relationship between different treaties.

In the simplest model all parties to an agreement later become parties to a new convention on the same subject matter. This case is addressed by Art. 30 para. 3 VCLT. Here the parties do not necessarily terminate the old agreement by the conclusion of a new one, but the prior one is only applicable as far as it is compatible with the later one. If all parties agree, existing treaties could also be modified in a way that they are governed by a new

[39] On the lack of general hierarchies see also R. Wolfrum & N. Matz, *Conflicts in International Environmental Law* (2003), 120 with further references.

legal and institutional framework. However, the case gets significantly more complicated if the parties to the two agreements are not identical. In such a case the old agreement remains fully applicable for states only party to this treaty in relation to all other parties, while the new one applies between all its parties. As a consequence there is no coherent legal regulation of an issue. The same may arise in the case of frameworks and protocols, if not all states to the framework also ratify the protocols. However, if a matter urgently requires regulation, it is beneficial to start a protocol with only a few parties and to hope for a role-model effect instead of adhering to the *status quo* or negotiating for consent of all parties. In case of the latter the necessary compromise to get all contracting parties of the framework to participate in the protocol may either take too much time or considerably water down the regulation.[40]

When attempting to create or add to a larger regulatory regime, the challenging task is to provide for the necessary complementarities. The interpretation of agreements in a "mutually supportive" way is one possibility to bring different agreements into coherence. Notions of a dynamic interpretation of agreements in the light of new facts or new legal commitments may also be employed. One of the main difficulties in the context of interpretation lies in the question which body is competent to decide on a (legally binding) interpretation.

Ultimately it depends upon the will of the parties to an agreement to design the relationship to other agreements. Parties can include so called "conflict clauses" in their agreements that regulate the relationship to existing or new treaties.[41] In the most common clause parties provide that the new agreement "shall not affect the rights and obligations under any existing […] international agreements"[42] or provide for a rule of interpretation

[40] It will remain difficult enough to establish a legal agreement that addresses the issue in question effectively and takes on board the most relevant global players. The Kyoto Protocol, for example, suffers *inter alia* from the fact that the USA as one of the largest emitters of carbon dioxide is not a party. The attempts to get Russia and Canada to join in order to achieve the necessary number of ratifications from industrialized states and states with economies in transition led to significant concessions.

[41] N. Matz-Lück, 'Treaties, Conflict Clauses', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008) available at http://www.mpepil.com (last visited 23 August 2009).

[42] Art. 47 para. 2 of the *Convention on the Stepping Up of Cross-border Cooperation particularly in Combating Terrorism, Cross-border Crime and Illegal Migration*, 7 July 2005 available at http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf (last visited 1 December 2008). Art. 22 para. 1 CBD is another example, yet,

that prevents limitations or detractions from the obligations under other treaties. Art. VIII of the Biological Weapons Convention (BWC) is an example of the latter concerning the relationship between the BWC and the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Conflict clauses can be included in the preamble of a treaty or in the substantive provisions. The preamble of a treaty is not legally binding but serves as guidance for the interpretation of the treaty text. Inclusion in the preamble is an option if the contracting parties cannot agree on binding provisions but want to address an issue.

D. Conclusion

Any new convention, whether designed as a framework for subsequent legal regulations or not, has to clarify the relationship to existing agreements. To maintain the *status quo* as a minimum legal basis, a new convention should specify in its preamble or in its substantive provisions that the rights and obligations under the existing treaties remain unchanged. This does not hinder the adoption of further duties in the new treaty. Parties to the new framework and its protocols can agree on stricter standards *inter se* without terminating the existing treaties.

When drafting a new agreement the designation as a framework is not decisive from a legal perspective. Rather, negotiating states shall prudently design an instrument and set up the relevant institutions that best cater for their needs within the realm of the politically feasible. For rapidly developing issues the creation of a flexible and "living" treaty is essential. If, as a consequence of the necessary evolution of the agreement, the elaboration of parallel or later protocols is considered important, the approach may well be classified as a framework and protocol one. This, however, does not hinder the development of substantive and specific provisions in the mother agreement.

Although the design as a framework convention offers the possibility to adopt protocols on specific issues and allows for a dynamic development, such a setting does not overcome the existing problems which were *inter alia* experienced with the drafting of a protocol to the Biological Weapons Convention. The negotiation of protocols can be effectively supported by

> the clause goes on to specify that this general rule only applies, if the exercise of those rights and obligations does not cause serious damage to biological diversity. In fact this establishes preference for the Convention on Biological Diversity and shows the considerable flexibility in drafting conflict clauses.

organs of the framework, yet in principle they remain subject to the ordinary rules on the negotiation and adoption of treaties. Only majority voting and the entry into force of protocols (or annexes) for all parties without their express consent could guarantee an instrument that reacts to the developments in life sciences in a timely manner.[43] This, however, does not correspond with current practice in international law as far as security issues are concerned and would most likely face political resistance.

[43] On consent as an obstacle to urgent law-making in an environmental context and questions of legitimacy see J. Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements', 15 *Leiden Journal of International Law* (2002) 1, 1.

Goettingen Journal of International Law 1 (2009) 3, 459-518

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

Cornelia Janik & Thomas Kleinlein*

Table of Contents

* The authors are doctoral candidates and research and teaching fellows at the Goethe-Universität, Frankfurt am Main. Thomas Kleinlein is a member of the Scientific Advisory Board. The authors would like to thank Helmut Aust, Tobias Thienel and Rob van de Westelaken for their very valuable comments on earlier versions of the text and Robert Feath for his language support.

doi: 10.3249/1868-1581-1-3-janik

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[1] the European Court of Human Rights (ECtHR) rendered its admissibility

* The authors are doctoral candidates and research and teaching fellows at the Goethe-Universität, Frankfurt am Main. Thomas Kleinlein is a member of the Scientific Advisory Board. The authors would like to thank Helmut Aust, Tobias Thienel and Rob van de Westelaken for their very valuable comments on earlier versions of the text and Robert Feath for his language support.

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

decision in the *Al-Saadoon* case.[2] 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.[3] 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.[4]

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.[5] Meanwhile the Court has confirmed and refined its reasoning repeatedly and extended it to the context of expulsion.[6] Today it is

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

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

4 *Soering* [GC], *supra* note 1, para. 111.

5 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.

6 *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.[7] 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

[7] *Al-Saadoon, supra* note 2, paras 47, 96, 102.

Courts.[8] 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,[9] 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.

8 *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).

9 *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.[10] 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.[11] 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.[12]

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.[13] 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.[14] 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

10 *Al-Saadoon*, *supra* note 2, paras 75-81.
11 *Id*., paras 102-107.
12 *Id*., paras 114-117.
13 *Id*., para. 87-88.
14 *Id*., para. 93.

para. 3).[15] 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.[16]

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.[17]

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

15 *Id.*, para. 110.
16 *Id.*, para. 120.
17 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".[18] 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".[19]

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*.[20] In the *Loizidou* case,[21] 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.[22] In the merits judgment, the Court stated that the responsibility of a contracting

18 *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.

19 *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.

20 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.

21 *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.

22 *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.[23] 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."[24] The Grand Chamber confirmed this jurisprudence in 2001 in the case *Cyprus v. Turkey*.[25] 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".[26] 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."[27]

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'

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

24 *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.

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

26 *Id*., para. 78 (emphasis in the original).

27 *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,[28] 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)[29] 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.[30] Thus, *Banković* can be considered to be a turning point in the Court's jurisprudence on Art. 1[31], introducing a strong presumption of territoriality of the ECHR by trying to harmonise the Convention with general international law.

28 *Banković* [GC], *supra* note 9.

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

30 *Banković* [GC], *supra* note 9, paras 59-61.

31 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.[32] 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.[33] 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).[34] 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

32 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 Extra-territorial 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.

33 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."

34 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.[35] 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.[36] 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.[37] 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.[38]

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",[39] 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

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

36 Gondek, *supra* note 31, 364; Romainville, *supra* note 8, 1021.

37 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.

38 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).

39 *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.[40] 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,[41] 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*."[42] 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.[43]

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[44] and Arts 47-78 of the Fourth Geneva Convention[45] allow for the exercise of certain powers by an occupying state, occupation being defined as territory "actually placed *under the authority* of

40 *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.

41 *Id*., para. 70.

42 *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.

43 *Banković* [GC], *supra* note 9, para. 73.

44 *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.

45 *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.[46] 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,[47] thus resembling the notion of effective control, which also solely relies on factual criteria.[48]

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.[49]

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".[50] 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

46 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.

47 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.

48 "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.

49 Cf. Ress, *supra* note 32, 84; Gondek, *supra* note 31, 371, 373;

50 *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".[51] 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.[52] 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.[53]

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,[54] although different readings were also proposed.[55]

51 *Id*., para. 80.

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

53 *Banković* [GC], *supra* note 9, para. 85.

54 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.

55 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. Secrectary 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,[56] 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.[57] The Grand Chamber confirmed this finding in even shorter terms.[58]

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.[59] 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*:[60] 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.

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

57 *Id.*, para. 93.

58 *Id.*, para. 91.

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

60 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.[61] 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.[62] Instead, the Court found it decisive that the applicant was subject to the "authority and control" of the Turkish agents.[63]

Arguably, the Court has developed two approaches towards jurisdiction through factual control.[64] 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.[65] 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).[66] 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.

61 See Breuer, *supra* note 33, 451.

62 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.

63 An examination whether the exception of *Drozd and Januszek* applied is omitted, see *supra* note 40.

64 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.

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

66 *Id.*, 210.

The *Öcalan* judgment was often understood as a correction of the *Banković* decision turning away from normative towards factual criteria.[67] 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.[68]

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,[69] 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

67 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.

68 Similarly: Loucaides, *supra* note 32, 400; Altiparmak, *supra* note 34, 230.

69 *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.[70] 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.[71] 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.[72] 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*[73]– on the other hand.[74] 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.[75]

70 *Id*., paras 382, 392.
71 Gondek, *supra* note 31, 372-373.
72 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".
73 C. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. (2009), 70-71, para. 42.
74 Similary: Nigro, *supra* note 54, 420.
75 *Ilaşcu* [GC], *supra* note 69, paras 382-383.

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

In the case of *Issa*,[76] 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".[77] 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.[78] It thus paraphrased its *Loizidou* 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 fulfiled.

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.[79]

7. Conclusion

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

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

[77] *Id.*, para. 67.

[78] *Id.*, para. 69.

[79] 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)[80] 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,[81] 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" [82] 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",[83] especially with regard to *Banković* on the one and hand *Issa* on the other.[84] However, they decided to give pre-eminence to the Grand

80 Human Rights Act 1988, commenced 2 October 2000.

81 *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.

82 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".

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

84 *Id*., paras 68-80 (*per* Lord Roger).

Chamber decision in *Banković*.[85] 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".[86] 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."[87] 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.[88] 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".[89] 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."[90] 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*.[91] It has been pointed out that this analogy does not hold given that military prisons do not have any special status under international law.[92] In lieu of relying on *Banković* the British jurisdiction over Basra prison can rather be explained by an extension of the *Öcalan*

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

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

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

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

89 *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*.

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

91 *Id*., para. 132 (*per* Lord Brown); para. 61 (*per* Lord Carswell).

92 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.[93]

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.[94] 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."[95] 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.[96]

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*.[97] The High Court, however, understood this objection as concerning the question of attribution.[98] 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.[99]

93 Similary: *Id*., 127-8.

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

95 *Id*., para. 61.

96 *Id*., para. 56.

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

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

99 *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".[100] 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".[101] 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.[102] 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

100 *Id.*, para. 82.
101 *Id.*
102 *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 2, para. 37 (*per* Lord Justice Laws).

for establishing extraterritorial jurisdiction.[103] 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.[104]

The House of Lords refused to grant leave to appeal.[105]

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

103 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.

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

105 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.[106]

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."[107] Interestingly, the Court did not explicitly refer to *Öcalan* at this point but rather quoted the EComHR in the *Hess* case[108], 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.[109] 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.

106 *Al-Saadoon*, *supra* note 2, paras 86-87.

107 *Al-Saadoon*, supra note 2, para. 88.

108 *Hess*, *supra* note 18.

109 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*.[110] 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

[110] *Supra* D. I. 3.

so as to impose responsibility on a contracting state for acts which occur outside its jurisdiction.[111] 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.[112] 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.[113] 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".[114] Strictly speaking, the legal concept of "extraterritorial effect" does not refer to the application of the Convention *ratione loci*.[115] 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"[116] 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.[117]

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.[118] As far as the obligation to secure the rights and

111 *Soering* [GC], *supra* note 1, para. 83.

112 *Soering* [GC], *supra* note 1, para. 88.

113 *Soering* [GC], *supra* note 1, para. 91.

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

115 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.

116 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.

117 Similary 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.

118 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.[119]

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.[120] If this was not the case then the Convention would require the contracting parties to impose its standards on third states or territories[121] and to act as indirect guarantors of its freedoms "for the rest of the world".[122] 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[123] as well as Arts 5,[124] 6[125] and 9.[126] The extraterritorial effect of Arts 2 and 3 was based on the "fundamental importance" of these provisions.[127] With regard to Arts 5, 6

119 More sceptically: Bhuta, *supra* note 8, 11-12.

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

121 Cp. *Drozd and Janousek* [GC], *supra* note 19, para. 110.

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

123 *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.

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

125 *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.

126 *Z and T v. the United Kingdom*, *supra* note 122.

127 *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".[128] Accordingly, in extradition cases the threshold for a violation of rights is different from Art. 3 which is an absolute right,[129] or Art. 2 which the Court held in another context to embody "the supreme value in the international hierarchy of human rights",[130] 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"[131] 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.[132] *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.[133] 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.[134] This argument can be endorsed for the sake of coherence.[135] Moreover, the Court, meanwhile,

128 *Id.*
129 *Chahal*, *supra* note 6, para. 79; Ovey & White, *supra* note 114, 74; O'Boyle, *supra* note 31, 69.
130 *Streletz, Kessler and Krenz v. Germany* [GC], Appl. Nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, para. 87.
131 *Soering* [GC], *supra* note 1, para. 90.
132 *S. R.*, *supra* note 123.
133 *Al-Saadoon*, *supra* note 2, para. 97.
134 *Id.*
135 See also Ovey & White, *supra* note 114, 62.

even takes it for granted that the evolving consensus in Europe to outlaw capital punishment has lead to the exception under Art. 2 being inapplicable, independent of a single state's ratification of Protocol No. 6 or 13, respectively.[136] 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[137] but ultimately rejected this idea.[138] 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.[139] 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.[140] Against this background, it regarded capital punishment in peacetime as an unacceptable form of punishment that is no longer permissible under Art. 2.[141] 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.[142] 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

136 *Kaboulov*, *supra* note 6, para. 99.

137 *Soering* [GC], *supra* note 1, para. 103.

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

139 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.

140 *Öcalan*, *supra* note 56, para. 195.

141 *Id*., para. 196.

142 *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."[143] 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.[144] 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 *Kabuloulov* itself. Be that as it may,[145] 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*[146] and *Öcalan*.[147] 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.[148] 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.[149] 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.[150]

143 *Kaboulov*, *supra* note 6, para. 99.

144 *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.

145 It has to be admitted that in the case of *Kaboulov* 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.

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

147 *Öcalan* [GC], *supra* note 56.

148 *Bader*, *supra* note 146, para. 42.

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

150 *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".[151] 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.[152] 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.[153] 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,

151 *Soering* [GC], *supra* note 1, para. 113; *Mamatkulov* [GC], *supra* note 125, para. 88.
152 *Al-Saadoon*, *supra* note 2, para. 95.
153 *Id*., para. 99.

which found that hanging was "speedy and certain",[154] it was of the opinion that these mistakes were only "anecdotal" and "partial", thus not giving rise to a violation of Art. 3.[155] 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.[156] With regard to Afghanistan, the Committee made clear that *public* hangings could be regarded as cruel and degrading punishment.[157] 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.[158] 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".[159] With regard to execution by gas asphyxiation it held that this would not meet the

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

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

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

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

158 *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,IACtHTR, 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.

159 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.[160] 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*.[161] 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.[162] 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.[163] But it already hinted at the possibility that the alleged legal obligation to transfer the

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

161 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 Rauschning* (2001), 419.

162 *Al-Saadoon*, *supra* note 2, para. 100.

163 *Al-Saadoon*, *supra* note 2, para. 110.

applicants to Iraqi custody might be "modified or displaced" under the ECHR.[164]

I. The Interplay between the ECHR and International Law

The relationship between the ECHR and international law has several facets.[165] This is due to the fact that the Convention can be qualified as both part of general international law[166] and a specific "instrument of European public order (*ordre public*) for the protection of individual human beings".[167] 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*[168] – and *ratione temporis*,[169] and when justifying the binding effect of interim measures of the Court[170] or when deciding questions of attribution.[171] However it has found an approach of its own to treaty reservations and their effects on the validity of states' undertakings[172] as

164 *Id*., para. 89.

165 See generally *L. Wildhaber*, 'The European Convention on Human Rights and International Law', 56 *International and Comparative Law Quarterly* (2007), 217.

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

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

168 *Supra* D. I. 3.

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

170 Cp. *Cruz Varas*, *supra* note 6 and *Mamatkulov*, *supra* note 125, para. 124.

171 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 Jedda' 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.

172 *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.[173] 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

[173] *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.[174] 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[175] 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.[176] 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.[177] 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.[178] 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.[179]

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

174 *Al-Saadoon*, *supra* note 2, para. 17.
175 *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 64.
176 *Al-Saadoon*, *supra* note 2, para. 107.
177 *R (Al-Saadoon and Mufdhi)*, High Court, *supra* note 8, para. 67.
178 *R (Al-Saadoon and Mufdhi)*, Court of Appeal, *supra* note 8, para. 36.
179 *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.[180] 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,[181] 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*.[182] 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),[183] 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.[184] This coincides with the British courts' reasoning on the

180 *Al-Saadoon*, *supra* note 2, para. 100.
181 *Id*., paras 64-65.
182 *R (B) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643.
183 *Vienna Convention on Consular Relations*, 24 April 1963, 596 U.N.T.S. 261.
184 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.[185]

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.[186] 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.[187] As for customary international law, it is very doubtful whether a right of asylum for either political or other offenders is recognised.[188] 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.[189] 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.[190]

185 *Supra* D. II. 2.

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

187 *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 that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.

188 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.

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

190 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.[191] 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.[192]

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,[193] thus adopting the English courts' determination.[194] 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.

191 See Thienel, *supra* note 55, 127.

192 To the same effect: Bhuta, *supra* note 8, 13, 15.

193 *Al-Saadoon*, *supra* note 2, para. 14.

194 *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".[195] 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,[196] such a definition can be found in Art. 42 of the Hague Regulations, [197] 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,[198] the end of occupation also ultimately depends on a factual determination of effectiveness, to be made according to the situation on the ground.[199] 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

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

196 *Supra* D. I. 3.

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

198 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 (last visited 7 December 2009).

199 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, availavle at www.mpepil.com (last visited 7 December 2009).

UK forces as required by Art. 42 of the Hague Regulations.[200] 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.[201]

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*".[202] 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.[203] 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

200 Cp. K. Dörmann & L. Colassis, 'International Humanitarian Law in the Iraq Conflict', 47 *German Yearbook of International Law* (2004), 292, 311.

201 UK Ministry of Defence, The Manual of the Law or Armed Conflict (2004), 276, para. 11.3.1.

202 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.

203 Dörmann & Colassis, *supra* note 2000, 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.[204] 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.[205] 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.[206] Accordingly, it does not go without saying that the law of occupation has not applied since July 2004.[207]

204 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.

205 Thürer & McLaren, *supra* note 199, 771.

206 Kolb, *supra* note 2044, 40-41.

207 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.[208] 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.[209] Accordingly, since the applicants agreed to be transferred to the United Kingdom, the rule should not apply in their case.[210]

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

208 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.

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

210 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; *Benvenisti*, *supra* note 1988, paras 21-22.

war criminals to justice.[211] 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.[212] 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.[213] This is correct insofar as UK criminal jurisdiction would not allow the UK agents to apprehend suspect persons abroad.[214] 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.[215] 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.[216] 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

211 *Al-Saadoon, supra* note 2, para. 107.

212 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, 3rd ed.(2008), 83-265; for the present case see Bhuta, *supra* note 8, 14-15.

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

214 Shaw, *supra* note 2122, 651, 680-683.

215 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.

216 M. Kamminga, 'Extraterritoriality', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2009), para. 22, available at 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.[217] 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.[218] Since both the United Kingdom and Iraq are parties to the International Covenant on Civil and Political Rights (ICCPR),[219] 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.[220] Furthermore, in its

217 *Öcalan* [GC], *supra* note 56, para. 92; *Öcalan* [GC], *supra* note 56, para. 90.

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

219 *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=UNTSONLINE&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en).

220 *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.[221] 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.[222]

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*.[223] 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.[224]

(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.

221 *Roger Judge*, *supra* note 116, para. 10.4.

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

223 *R (B)*, *supra* note 182.

224 *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[225] was understood as indicating that treaties entered into before the Convention was in force may displace substantive Conventions obligations.[226] 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.[227] 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*,[228] 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.[229]

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

225 *Hess*, *supra* note 18.

226 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.

227 Fassbender, *supra* note 2266, 463.

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

229 *Slivenko* (dec.) [GC], *supra* note 2288, paras 60-61.

'hierarchy'. In the House of Lords' *Al-Jedda* case,[230] 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.[231] 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.[232] 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.[233]

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.[234] 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,[235] the Court will supposedly not regard substantive obligations as generally displaced by virtue of a competing Charter law.[236]

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

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

231 *Id*., paras 33, 35

232 *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.

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

234 Milanović, *supra* note 2332, 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).

235 *Al-Saadoon*, *supra* note 2, para. 48.

236 *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".[237] 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*,[238] the applicant applied unsuccessfully for posts at the US Embassy and considered her rejection unlawful under UK discrimination legislation; in *McElhinney*,[239] 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*[240], 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,[241] *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,[242] whereas in *Al-Adsani* the argument was brought forward that immunity could not be claimed for instances of torture.[243] The Court, however, did not make use of this

237 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.

238 *Fogarty* [GC], *supra* note 2377.

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

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

241 *Fogarty* [GC], *supra* note 237, para. 31.

242 *McElhinne* [GC], *supra* note 23939, para. 30.

243 *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.[244] Only in *Al-Adsani* did it undertake a detailed analysis of the state of relevant customary international law.[245] 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*.[246]

Similarly, in the cases of *Waite and Kennedy*[247] and *Beer and Regan*[248], 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.[249]

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

244 *Id*., para. 53.

245 *Id*., paras 53-66.

246 For an analysis oft 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.

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

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

249 *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.[250] 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.[251] 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."[252] 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.

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

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

252 *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".[253] 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."[254] 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[255] 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

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

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

255 *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.*,[256] 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".[257] 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".[258]

The Grand Chamber endorsed this decision in its *Bosphorus* judgment,[259] 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.*[260] 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".[261] 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

256 *M. & Co. v. Germany*, EComHR (1990) Appl. No. 13258/87, , DR 64, 138.
257 *Id.*
258 *Id.*
259 Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], Appl. No. 45036/98, ECHR 2005-VI.
260 *Id.*, para. 150.
261 *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."[262] 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.[263]

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."[264] 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."[265] 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.[266] 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

262 *Id*., para. 155.

263 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.

264 *Al-Saadoon*, *supra* note 2, para. 109.

265 *Id*.

266 *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.[267] 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.[268] 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.

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

268 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.

Goettingen Journal of International Law 1 (2009) 3, 519-538

The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity

Marko Milanović*

Table of Contents

* LL.B (Belgrade), LL.M (Michigan), PhD candidate (Cambridge); Associate, Belgrade Centre for Human Rights, formerly law clerk to Judge Thomas Buergenthal, International Court of Justice. E-mail: mm676@cam.ac.uk. This article originated in a post at the EJIL: Talk! blog. I am grateful to Andreas Paulus and Dapo Akande for their previous comments.

doi: 10.3249/1868-1581-1-3-milanovic

Abstract

The article provides a critical review of the Human Rights Committee's views in *Sayadi v. Belgium*, a case dealing with United Nations Security Council (UNSC) terrorist blacklists. The case raised many complex issues of international law, most notably the question whether UNSC resolutions can prevail over human rights treaties by virtue of Art. 103 of the UN Charter. This issue – one of truly fundamental importance – has cropped up in several important recent cases which either addressed it or avoided it, including *Kadi* before the courts of the European Union, *Al-Jedda* before the UK House of Lords, and *Behrami* before the European Court of Human Rights. Regrettably, the Committee's decision did not do justice to the complexity and the gravity of the matters raised before it, as it failed to tackle the norm conflict issue head on and ignored the Charter's supremacy clause altogether. Such an approach advances neither the cause of human rights, nor the coherence of international law as a legal system.

A. Introduction

On 22 October 2008, the Human Rights Committee delivered its views in *Sayadi v. Belgium*,[1] a case dealing with United Nations Security Council (UNSC) terrorist blacklists. The case raised many complex issues of international law, most notably the question whether UNSC resolutions can prevail over human rights treaties by virtue of Art. 103 of the UN Charter. This issue – one of truly fundamental importance – has cropped up in several important recent cases which either addressed it or avoided it, including *Kadi* before the courts of the European Union,[2] *Al-Jedda* before the UK House of Lords,[3] and *Behrami* before the European Court of Human

1 *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006 (29 December 2008) [*Sayadi*].

2 Case T-315/01, *Kadi* v *Council and Commission*, [2005] ECR II-3649; Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, [*Kadi ECJ*].

3 *R (Al-Jedda) v Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31, 12 December 2007, [*Al-Jedda*].

Rights.[4] As I will now explain, the Committee's decision regrettably failed to do justice to the complexity and the gravity of the matters raised before it.

B. A Critique of *Sayadi*

The facts of the case were these: the applicants, a married couple of Belgian nationality living in Belgium, ran the European branch of an American NGO that was put on a Security Council blacklist pursuant to the sanctions regime established in Resolution 1267 (1999) and its progeny.[5] In 2003, after the initiation of a criminal investigation against the applicants in Belgium, the applicants' names were, at Belgium's request, put on a list drafted by the Sanctions Committee and appended to a UNSC resolution. Pursuant to EU and Belgian implementing legislation, the applicants' financial assets were frozen, and they were banned from travelling internationally. The applicants were not given access to the reasons nor provided any information relevant for their listing. In 2005, the applicants asked a Belgian court to order the Belgian government to initiate delisting procedures before the UNSC Sanctions Committee, and obtained such an order. Additionally, the criminal proceedings against them were dismissed. The Belgian government did initiate a delisting procedure, as ordered, but the UNSC Sanctions Committee refused to delist the applicants.

Before the Committee, the applicants raised the violations of several articles of the International Covenant on Civil and Political Rights (ICCPR), claiming that they were denied due process in the UNSC sanctions proce-

4 *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, ECHR (2007), App. Nos. 71412/01 & 78166/01, [*Behrami*].

5 The 1267 regime, established to deal with sanctions against member of Al-Qaeda, the Taliban and affiliated persons and organizations, is based on a list drafted by a subsidiary organ of the UNSC, the Sanctions Committee, and it directly obliges UN member states to implement certain measures, including asset freezing, against persons on that list. The 1267 regime was expanded or modified by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008). A different sanctions regime was established pursuant to Resolution 1373 (2001), adopted after the September 11 terrorist attacks. Resolution 1373 set forth a variety of state obligations in the fight against international terrorism. The Counter-Terrorism Committee of the UNSC established by that resolution and its progeny monitor the implementation of the resolution, but it does not draft lists of individuals against whom sanctions must be implemented by the UN member states. For a general overview, see the comparative table of various UNSC committees at http://www.un.org/sc/ctc//pdf/comparativetable. pdf. (last visited 16 December 2009)

dure and that Belgium implemented the outcome of this procedure, with a considerable impact on their life and without providing them with any remedy. As is apparent even from the mere recitation of the facts of the case, the applicants' due process claims were certainly well-grounded. This is of course nothing new. Many critical proposals have been made over the years with a view of improving the listing process, and indeed the process has undergone considerable improvement through subsequent UNSC action.

Yet, however justified the applicants' claim on the merits, the actual examination of the merits by the Human Rights Committee faced a great impediment, a consequence of the nature of state obligations under the UNSC listing process. Under Art. 25 and Chapter VII of the UN Charter, the UNSC can pass resolutions that have binding force on UN member states. Art. 103 of the Charter further provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' These obligations under the Charter include binding UNSC decisions made under the Charter, as confirmed by the ICJ in the *Lockerbie* case.[6]

Art. 103 of the Charter has a twofold effect: (1) it gives priority to Charter obligations over other international obligations (except for *jus cogens*), but it does not invalidate these conflicting obligations; and (2) it precludes the responsibility of a state for failing to abide by its conflicting obligation, so long as the conflict lasts.[7] To give an example: states A and B conclude a treaty of friendship, whereby they agree to freely trade with one another. Subsequently, the UNSC determines that state B is engaged in a threat to international peace and security, and passes a Chapter VII resolution ordering trade sanctions. State A would be obliged to implement the trade sanctions, notwithstanding its earlier trade treaty with B, and it would incur no responsibility for failing to abide by that treaty, even though the treaty is not void, but remains valid. As soon as the sanctions regime is terminated, the obligations arising from the trade treaty will regain full force.[8]

6 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114, 126, para. 42.

7 See Art. 59 of the ILC Articles on State Responsibility and the commentary thereto, UN Doc. A/56/10, chp.IV.E.2, at 365 23 April - 1 June and 2 July - 10 August 2001

8 For more on Art. 103, see M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009) 1, 76-79, and the authorities cited therein.

Back to *Sayadi* – because the listing of the applicants was done by a Chapter VII resolution, Belgium argued that its obligations under the resolution prevailed over its obligations under the ICCPR, by virtue of Art. 103 of the Charter. Indeed, the preclusive effect of Charter obligations is only confirmed by Art. 46 ICCPR, which provides that "[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of specialized agencies in regard to the matters dealt with in the present Covenant."

As stated above, norm conflicts between a UNSC resolution and human rights treaties have been the subject of several recent cases. In *Al-Jedda*, the House of Lords found that a UNSC resolution prevailed over Art. 5 ECHR by virtue of Art. 103 of the Charter, in regard of – otherwise prohibited – preventive detention in Iraq. In *Behrami and Saramati*, the European Court of Human Rights was faced with the question whether a UNSC resolution authorized similar preventive detention without judicial review in Kosovo, and avoided the Art. 103 issue by inventing out of whole cloth an attribution rule that would impute the acts of NATO peacekeepers in Kosovo to the UN.[9] In *Kadi*, the EU Court of First Instance (CFI) held that Charter obligations prevailed over EU human rights guarantees, so long as they did not impinge on human rights protected by *jus cogens*. On appeal, the European Court of Justice (ECJ) reversed the CFI, essentially by holding that Charter obligations cannot prevail over EU human rights protections, as EU law is an independent constitutional legal order which UNSC resolutions can penetrate only on its own terms. In the ECJ's view, nothing prevented its review of EU legislation implementing UNSC resolutions vis-à-vis EU constitutional guarantees, even though that might lead to member states incurring responsibility at the international level.

With such complex issues at hand, and with such rich and developing case law to draw from, one would have expected the UN Human Rights

9 For a critique of *Behrami*, see M. Milanović & T. Papic, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law', 58 *International & Comparative Law Quarterly* (2009), 267, esp. 289-293; see also A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami and Saramati* Cases', 8 *Human Rights Law Review* (2008), 151; K. Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test', 19 *European Journal of International Law* (2008) 3, 509-531.

Committee to produce a worthwhile contribution to the ongoing debate. What we got instead is this:

> "Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case."[10]

Art. 103 of the Charter is not even mentioned. The reasoning that the Committee gives – or rather, the lack thereof – is simply astonishing. Yes, *of course* the Committee is reviewing national measures taken by a state party in implementing the UNSC resolution, not the UNSC resolution itself. If it were otherwise, the Committee would have no personal jurisdiction, as it can only examine whether a state party, and not the UN, has committed a wrongful act under the ICCPR. This disposes of only one objection of Belgium, that the applicants were not within its jurisdiction or control, or that the act complained of was not attributable to Belgium.[11] But the question is no longer *what* the Committee is reviewing, but *what is it doing the reviewing against*. In Belgium's argument, it is the *ICCPR* itself that was displaced or qualified by virtue of Art. 103 of the Charter.[12] Though Belgium's implementation of the resolutions against the applicant might be characterized as wrongful under the ICCPR, this wrongfulness is precluded by the Charter – not to mention Art. 46 ICCPR.

In other words, Belgium's argument was exactly that of the House of Lords in *Al-Jedda*. There the question was the lawfulness of preventive, executive detention by UK troops in Iraq. This act was (*Behrami* notwithstanding) undoubtedly attributable to the United Kingdom. The authority for this act was a UNSC resolution, and this resolution prevailed over Art. 5

10 *Sayadi*, *supra* note 1, para. 10.3.
11 *Id.*, para. 6.1.
12 *Id.*, para. 8.1.

ECHR, which would have prohibited preventive detention. So was arguably the case here. The actual listing was done by a subsidiary organ of the UNSC, but the implementation of the measures prescribed by the UNSC could only have been done by Belgium. Only the implementation, not the actual listing, could have been attributable to Belgium, yet the implementation was nonetheless covered by the sanctions regime established by the UNSC, which presumably prevailed over the ICCPR by virtue of Art. 103 of the Charter. The application of Art. 103 may or may not have been avoided through some technique of norm conflict avoidance, but Art. 103 could not have been ignored as completely as it was by the Human Rights Committee.

Another useful comparison would be that with the ECJ's ruling in *Kadi*. The reason why the ECJ found the UNSC resolutions immaterial in that case was not just that it was reviewing EU legislation, a 'national' measure of implementation of a UNSC resolution, but that it was not reviewing this legislation against a human rights treaty subject to Art. 103 of the UN Charter, but instead against a corpus of constitutional norms independent of the Charter:

> "[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights."[13]

In other words, *Kadi* was for the ECJ purely a domestic affair, exactly as if, for instance, the US Supreme Court was reviewing legislation passed by Congress against the US Constitution. One may or may not be persuaded by the ECJ's idea that a legal order created by treaties between sovereign states can truly be so completely independent from the UN Charter and international law – I am not.[14] But that is at least a reasonable (and reasoned)

[13] *Kadi ECJ*, *supra* note 2, paras 316-317.
[14] See Milanović, *supra* note 8, 102-110.

position. As a general matter, there is no conceptual problem in having a constitutional court say to other state authorities that the domestic constitution prevails over the state's international obligations, for the purposes of that internal legal order.

But in *Sayadi* the Committee gives us no reasoning whatsoever. That it is reviewing a national implementing measure, and not the UNSC listing itself, is again both inevitable and entirely beside the point. Of course, it could never have done what the ECJ did in *Kadi*, as the very idea that the ICCPR is a constitutional instrument independent of the UN Charter would be both preposterous and contrary to the text of Art. 46 of the ICCPR itself. What the Committee did instead was to sidestep Art. 103 of the Charter as if it was not even there. Let us take a look at how the Committee reasons with regard to the travel ban imposed by the UNSC:

> "In the present case, the Committee recalls that the travel ban for persons on the sanctions list, particularly the authors, is provided by Security Council resolutions to which the State party considers itself bound under the Charter of the United Nations. Nevertheless, the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It is the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.[15]

The Committee thus looks at UNSC resolutions *within* the structure of the limitations clause of Art. 12(3) ICCPR, "whatever the argument" – but the whole point of Belgium's argument was that Art. 12, like the rest of the ICCPR, was inapplicable to the extent that it conflicted with its obligations under the UN Charter, pursuant to Art. 103 thereof. One may not like this argument – I do not – but one must still address it. What the Committee does instead is this:

[15] *Sayadi*, *supra* note 1, para. 10.6.

> "The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a "restriction" covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors' names to the Sanctions Committee. The proposal for the listing, made by the State party on 19 November 2002, came only a few weeks after the opening of the investigation on 3 September 2002. According to the authors, this listing appears to have been premature and unjustified. On this point, the Committee notes the State party's argument that the authors' association is the European branch of the Global Relief Foundation, which was placed on the sanctions list on 22 October 2002, and the listing mentions the links of the Foundation with its European branches, including the authors' association. The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party's arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors' names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists and for the resulting travel ban."[16]

The Committee again considers state obligations to comply with UNSC resolutions as something internal to the ICCPR, rather than obligations that are external to and can prevail over it. It further seems to consider that a state which communicates an individual's name to the Sanctions Committee of the UNSC commits a distinct wrongful act under the ICCPR if it does so without sufficient factual basis, apparently on the Human Rights

[16] *Id.*, para. 10.7.

Committee's assessment, even if the UNSC Sanctions Committee thinks that there *was* sufficient factual basis for the listing. The state is thus responsible for the travel ban itself, even though the travel ban was ordered by the UNSC.

But yet again this makes very little sense. It is indeed possible to conceive of several distinct wrongful acts for which a state could be responsible under the ICCPR in regard of UNSC targeted sanctions.[17] The real problem is whether these distinct acts fall within the scope of the relevant UNSC resolutions and the preclusive effect of Art. 103 of the Charter.

First, there is the actual listing by the Sanctions Committee, but this act is not only clearly within the scope of the UNSC resolution and Art. 103, but it is also attributable to a subsidiary organ of an international organization, i.e. to the organization itself. It is in principle only the UN that can be responsible for this act, and not its member states.

Second, there is the implementation of the listing, through measures enacted by states, such as the seizure of assets or travel bans. These measures are undoubtedly attributable to the states that enacted them, but they are equally covered by UNSC resolutions – that is their whole point. Contrary to what the Committee says, it is impossible to address these implementing measures without dealing with Art. 103 of the Charter. If a UNSC resolution and the list adopted pursuant to it say that states must enact these measures against Mr. Sayadi, while the ICCPR says that they may not do so, there is an apparent norm conflict that must be either avoided or resolved.

Third, another option would be to consider the actual voting for the listing by the representative of a member state in the UNSC Sanctions Committee as a distinct wrongful act if it is done (1) without adequate factual basis, or (2) without adequate procedural safeguards at the UNSC level. This option of course carries enormous difficulties with it. First, it applies even in theory only to states that are members of the relevant bodies, such as the UNSC and its Sanctions Committee. Second, there is a serious question as to whether, say, the United States would have any obligations under the ICCPR to an individual located in Belgium, i.e. as to whether the treaty would apply extraterritorially in such a situation. Finally, even if the act of voting could be decoupled from the decision by an international organ to list

[17] It would be useful to recall at this point Art. 2 of the ILC Articles on State Responsibility, which provides that there is an internationally wrongful act if (a) that act is attributable to a state, and (b) the act constitutes a breach of the international obligations of that state. Art. 103 of the Charter operates under (b) – it precludes the wrongfulness of what otherwise might have been a breach of the state's international obligations.

an individual, it is hard to see why it could be decoupled from the implementing measures, because it is these measures that actually cause the harm to the individual concerned. If these measures cannot be contested because of Art. 103 of the Charter, why should the voting that preceded it be contestable? At any rate, this act was not before the Committee in *Sayadi*.

Fourth, and this brings us back to *Sayadi*, the submission of a person to the UNSC listing process by a state could be considered as a distinct wrongful act, if it was done (1) without adequate factual basis, or (2) without adequate procedural safeguards at the national level. Thus, rather than the implementing measures, it would be the *suggestion* that the applicants be listed that would constitute a violation of the ICCPR, and this is indeed what the Committee seems to have done at para. 10.7 quoted above. But this solution is not really much of a solution.

First, it is again unclear why the suggestion for the listing could be contested if the lawfulness of the implementing measures which actually cause the harm to the individual could not be contested. Thus, for example, in the *Segi* case the European Court of Human Rights found that institutions and individuals who have merely been put on an EU list, but against whom no actual measures were taken, cannot be said to have been victims of a violation of the ECHR: "[t]he mere fact that the names of two of the applicants […] appear in the list referred to in that provision as 'groups or entities involved in terrorist acts' may be embarrassing, but the link is much too tenuous to justify application of the Convention."[18] If, on the contrary, the listing has consequences, then the lawfulness of these consequences must be assessed, which leads us back to Art. 103 of the Charter. In fact, the Committee in *Sayadi* did find Belgium responsible for the *travel ban* itself, not merely for the suggestion that it be put in place,[19] and the ban was undoubtedly covered by relevant UNSC resolutions – but it did so without addressing Art. 103 in any way whatsoever.

Second, taking this route would require the Committee (or other body) to make determinations that would actually defy the whole purpose of the exercise. As stated above, it would have to determine that the submission for the listing was done either (1) without adequate factual basis, or (2) without adequate procedural safeguards at the national level. Both of these options are problematic, especially the former, and both seem to have been employed by the Committee when it stated that:

[18] *Segi and Others v. 15 States of the European Union* (dec.), App. Nos. 6422/02; 9916/02 (23 May 2002).

[19] *Sayadi*, *supra* note 1, para. 10.7 *in fine*.

"The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party's arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors' names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists and for the resulting travel ban."[20]

The Committee continued as follows:

"The Committee notes that a criminal investigation that had been initiated against the authors at the request of the Public Prosecutor's Office was dismissed in 2005, and that the authors thus do not pose any threat to national security or public order. Moreover, on two occasions the State party itself requested the removal of the authors' names from the sanctions list, considering that the authors should no longer be subject, inter alia, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities' requests for the removal of the authors' names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken together, do not disclose that the restrictions of the authors' rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant."[21]

[20] *Id.*

[21] *Id.*, para. 10.8.

The Committee performed the same maneuver when it considered the possible violation of Art. 17 ICCPR, prohibiting unlawful attacks on one's honour and reputation:

> "The Committee takes note of the authors' argument that the State party should be held responsible for the presence of their names on the United Nations sanctions list, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors' names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the Public Prosecutor's Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 of the Covenant."[22]

The Committee is thus saying that the applicants should never have been suggested for a listing, i.e. that they have been submitted for the listing and then listed without adequate factual basis. The problem with this position is that the *UNSC Sanctions Committee* disagreed with it when the listing was made, and in fact *continued* to disagree with it when it rejected Belgium's first request that the applicants be delisted. It is impossible to rule otherwise without exercising quasi-judicial review of a factual determina-

[22] *Id.*, para. 10.13.

tion by a body that was not only actually created to make such determinations, but also is the only body that is in possession of the full factual record, as well as quite obviously acting under UNSC authority, thus again bringing us back to Art. 103 of the Charter. If the whole topic of judicial review of decisions by the UNSC on questions of *law* (to which I will turn in a moment) is controversial, then such review on questions of *fact* (or legal qualification of such facts) is more controversial by an order of magnitude. It is one thing to say, for example, that there are legal constraints on what the UNSC can do, and that courts can enforce these constraints. But it is quite another to say that courts can, for example, question the UNSC's determinations as to whether a particular situation qualifies as a threat to international peace and security.

Not only does the Human Rights Committee thus (implicitly, but unavoidably) question the UNSC Sanctions Committee's factual determination that Mr. Sayadi and his wife qualify for a 1267 listing. But it does so without having any access to the relevant factual record, and without pay any deference to the body which is in fact institutionally far more competent. It does so, moreover, by relying on the fact that criminal proceedings against the applicants have been dismissed – thereby showing its lack of understanding that one of the basic points of the 1267 sanctions regime was to impose sanctions quickly and efficiently, even (or especially even) against those people who could not be successfully prosecuted.[23] It further relies on the fact that no other members of the same organization present in other countries were listed but for the applicants – but this again runs afoul of the Sanctions Committee's judgment that the applicants should nonetheless be listed. Though the Human Rights Committee may not like this, it cannot challenge the legal regime established by the UNSC and the factual determination made by its subsidiary bodies without coming face to face with Art. 103 of the Charter.

[23] *Sayadi*, Appendix B, This is well noted by Ivan Shearer in his dissenting opinion: "The chronology of events, set out in paragraphs 2.1-2.3 of the Committee's Views, demonstrates, in my opinion, that the State party acted in good faith in responding to the demands of the United Nations Security Council under the terms of a binding resolution. It is not reasonable to assert that, even on the assumption of the possession of a degree of discretion as to the manner in which such obligations should be carried out, the State party should have awaited the outcome of its criminal investigation, launched on 3 September 2002 (and thus more than two months prior to the transmittal of their names to the Sanctions Committee), and not concluded until 19 December 2005. Regard must be had to the presumed imminence and seriousness of the danger posed by individuals and associations listed by the Sanctions Committee."

C. Some Alternatives

It is, of course, very, very easy to criticize, and I would not venture to do so without being able to point out some of the alternatives that were at the Committee's disposal. In my view, had the Committee truly wanted to tackle the norm conflict issue head on, which it had to do if it wanted to reach the merits of the case, it had several other options that would have been viable.

First, it could obviously have decided, as the House of Lords did in *Al-Jedda*, that the ICCPR was displaced or qualified by the UNSC resolutions, by virtue of Art. 103 of the Charter. This might not be a result to our liking, but it is a result that is hard to avoid – especially if the Committee wished, as it did, to assess Belgium's responsibility for the implementation of the sanctions against the applicants. Ivan Shearer's dissenting opinion in *Sayadi* takes this route.

Second, the Committee could have tried to minimize the scope of the conflict, or avoid it by attempting to harmoniously interpret the relevant UNSC resolution and the ICCPR. As a general matter, a very useful tool for such norm conflict avoidance would be a presumption that the UNSC did not wish to infringe on human rights absent a clear statement to the contrary. Such presumptions are a ubiquitous tool of interpretation in the domestic context, where courts narrowly interpret legislation which is couched in general and ambiguous terms in order to avoid a human rights issue. As I have argued elsewhere,[24] a clear statement rule is not only necessary to harmonize possibly conflicting norms of international law. Its purpose would be to foster the political responsibility of UNSC members, if they truly want to limit human rights through UNSC action. They would have to do so unambiguously and accept the political consequences of their actions, instead of relying on the usual array of diplomatic euphemisms. Indeed, in his concurring opinion in *Sayadi,* Sir Nigel Rodley precisely tries to introduce such an interpretative presumption: "the Charter wording strongly suggests that the first interpretation criterion is that there should be a presumption that the Security Council does not intend to take actions taken pursuant to its resolutions that should violate human rights."[25]

[24] See Milanović, *supra* note 8, 92-102.

[25] Individual opinion of Committee member Sir Nigel Rodley (concurring), in: *Sayadi,* Appendix B.

Unfortunately, however, this presumption is of only limited use in a case such as *Sayadi*. Its application requires both a level of generality in the language of a UNSC resolution and a consequent margin of discretion in which a state bound by that resolution is free to act. Neither of these conditions existed here. Once the applicants were listed by the UNSC Sanctions Committee, Belgium had to implement measures against them – it had no discretion in the matter whatsoever, short of disobeying the UNSC. Thus, while the presumption of conformity with human rights and the clear statement rule are good ways of avoiding a norm conflict in situations where, for example, the UNSC authorizes member states to take 'all necessary measures', and the member states interpret this broad authorization as allowing for preventive detention without any judicial review (as was the case in *Behrami*), it is hard to do so here.

The only discretion that Belgium had was in making its proposal to the Sanctions Committee that the applicants be listed. But, as I have explained before, it is impossible to find that this proposal was wrongful and at the same time avoid Art. 103 if the alleged defect was a lack of sufficient factual basis, since the Sanctions Committee thought and still thinks that there *is* sufficient factual basis for the listing. If, on the other hand, the defect with the listing, or Belgium's suggestion for the listing, was not substantive but merely procedural in nature (and assuming for a moment that these procedural standards could somehow be found in the ICCPR), the scope of the Committee's decision should have been far more limited than it in fact was. It could not have held, as it did, that the applicants' continued presence on the list or the ban on their travel were unnecessary, nor could it have indicated to Belgium, as it did,[26] that the proper remedy for the violations was for Belgium to do all it could to have their names removed from the list.

It is moreover hard to see what kind of process Belgium could have given to the applicants before making its proposal for the listing, while at the same time preserving the effectiveness of the sanctions regime. If Belgium had to, say, conduct a full adversarial hearing before it suggested the listing of certain individuals, at which it would have to give these individuals the opportunity to challenge the government's account of the facts that warranted their listing, not only would it probably have to disclose sensitive intelligence information to these individuals, but they would then have ample opportunity to evade the freeze on their assets or even escape the coun-

[26] *Sayadi*, *supra* note 1, para. 12.

try before a travel ban is imposed. Indeed, as I see it, the point of procedural safeguards in the listing process is in the correction of error *after* a listing is made – but this of course brings us right back to Art. 103.

Finally, and as the applicants in the case in fact suggested,[27] the Committee could have directly engaged in the review of the relevant UNSC resolution. It could have done so on two grounds. First, it could have tested the *external* validity of the UNSC resolution against the one certain body of law that the UNSC cannot override – *jus cogens*. Just like a treaty, a UNSC resolution conflicting with a peremptory norm – say ordering states to torture suspected terrorists – would be null and void. Second, the Committee could have tested the *internal* validity of the resolution against the UN's constitutive instrument, the Charter.[28] Generally speaking, there is little doubt that, as a matter of substantive law, an *ultra vires* decision of the Council which is contrary to the Charter has no binding force.[29] When it comes to human rights in particular, a persuasive argument can be made that the Council is *Charter-bound* to conform to certain human rights norms, not limited just to the norms of *jus cogens*. A textual argument would be that Art. 24(2) of the Charter requires the Council to act "in accordance with the Purposes and Principles of the United Nations," while Art. 1(3) provides for "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" as one of the purposes of the UN.[30]

On the facts of *Sayadi*, the former approach would have obviously been fruitless. The rights affected by the UNSC action – the freedom of movement and the prohibition of attacks on one's honour and reputation – cannot be qualified as *jus cogens* rights by any definition of the term,[31] nor

27 *Id.*, para. 5.6.

28 See Milanović, *supra* note 8, 92-97.

29 *See* ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 331: "Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with."

30 See generally D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *International & Comparative Law Quarterly* (1997), 309.

31 As Judge Higgins rightly stated in relation to *jus cogens*, "[t]he examples [of such norms] are likely to be very, very few in number." R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', 55 *International & Comparative Law Quarterly* (2006), 791, 801.

could, for that matter, the right to property, which is not even protected by the ICCPR. But the second route was still there. The Committee could have held, for example that the absence of due process protections at the UNSC level meant that the listing procedures were contrary to the Charter, and that accordingly the UNSC resolutions could not prevail over the ICCPR by virtue of Art. 103. Of course, this route would have been fraught with peril. Not only would the Committee have had to read a substantive content into the rather meager human rights provisions of the Charter, but it would also have had to assert its authority – if only incidental – to review UNSC decisions. It is understandable why the Committee was reluctant to do so, but the irony is that it at the same time engaged in a conceptually much worse, if less explicit, transgression against the UNSC's prerogatives, when it disagreed with the factual determinations made by the UNSC Sanctions Committee, as I have explained above. Perilous though it might have been, this approach would at least have been principled.

D. Conclusion

The Committee's views in *Sayadi* are paradoxically both bold and timid. Bold, because the Committee admonished states that they cannot violate human rights when fighting terrorism merely because they have obtained the UNSC's imprimatur. Bolder even (more bold perhaps than wiser), because the Committee questioned the very appropriateness of the applicants' listing. But so very timid at the same time, in its search for a third way when there was none. In the final analysis, the Committee had only two options: either acknowledge the primacy of UNSC resolutions over the ICCPR, or engage in some sort of meaningful review of the lawfulness of the UNSC's actions. On the facts of *Sayadi* there was simply nothing else to be done. In other cases, on other facts, there could be several more legitimate ways of avoiding a norm conflict and getting around Art. 103. Pretending that Art. 103 is actually not there in the Charter, however, is certainly not one of them.

It is this very timidity of the Committee that makes its views so unpersuasive, coupled with the paucity of its reasoning. The only truly meaningful discussion of these complex questions can be found in the individual opinions of some of the Committee's members. The silence in the views of the Committee itself, however, is positively deafening. Whatever disagreement there can be, it is particularly important for a body such as the Committee, which can only issue non-binding views and general comments, and

whose considerable authority relies solely on the expertise of its individual members, to provide adequate reasons for its decisions.

Lastly, unlike with the not-so-human-rights-friendly *Behrami* decision of the European Court of Human Rights, most of us probably approve of the end result in *Sayadi*. There is little doubt that critical decisions such as *Kadi* and *Sayadi* have exerted significant pressure on the Security Council, its subsidiary bodies, and its member states to improve their listing practices, and to show more respect for basic norms of due process. Indeed, the Committee's views in *Sayadi* were probably instrumental in bringing about the applicants' de-listing by the UNSC Sanctions Committee on 20 July 2009.[32] But this does not mean that the insubstantial nature of the Committee's reasoning in *Sayadi* should be subject to any less criticism – to the contrary. Only a principled approach to reviewing UNSC decisions can serve to guide us in the future.

[32] See the list of de-listed persons as updated on 10 August 2009, available at http://www.un.org/sc/committees/1267/docs/Delisted.pdf (last visited 13 December 2009).

Goettingen Journal of International Law 1 (2009) 3, 539-566

Does Anyone Really Want a Parliament of Man?

Paul Kennedy
The Parliament of Man:

The Past, Present, and Future of the United Nations (2006)

Kenneth Anderson*

Paul Kennedy inclines ever toward sweeping themes. Distinguished historian and teacher of an acclaimed course on grand strategy at Yale University, his most famous book is "The Rise and Fall of the Great Powers: Economic Change and Military Conflict".[1] His new book, "The Parliament of Man"[2], is likewise daunting in scope, a history of the rise of the United Nations and the efforts of the last hundred years at global governance.

* Professor of Law, Washington College of Law, American University; research fellow, The Hoover Institution, Stanford University, and member of the Hoover Task Force on National Security and Law. A short version of this essay appeared in Spanish in the Revista de Libros de la Fundacion Caja Madrid (November 2008), for which Professor Anderson serves as advisory editor on political science; he thanks his editor and translator at the Revista, Luis Gago, as well as his research assistants, Can Celik, Neil Pandey-Jorrin, David Wiseman, and Scott Yoo. Professor Anderson is author of the forthcoming Returning to Earth: Abiding Principles of Relations Between the United States and the United Nations (Rowman and Littlefield 2010); he can be reached at kanders@wcl.american.edu and he blogs on international law topics at www.opiniojuris.org.

1 P. Kennedy, *The Rise and Fall of Great Powers: Economic Change and military conflict* (1989) [Kennedy, 1989].

2 P. Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations* (2006) [Kennedy, 2006].

doi: 10.3249/1868-1581-1-3-anderson

Kennedy is what is called in Anglo-American academic tradition a "Whig historian"[3] – a historical teleologist. He offers a view of history marked, not just by definite moral ideas, definite ideas of right and wrong in history, what constitutes good people and enlightened government, but marked further and crucially by a firm (if only occasionally explicit) belief that history is gradually working itself out according to this telos, historical progress toward those moral ends. It arises from an honorable impulse, a belief in the ability of human beings collectively to exercise their agency toward the good. But it also raises questions of objectivity as to whether history is indeed working itself out toward those moral ends – and when, exactly. And, naturally, disputes over what those moral ends should be.

The idea of historical and moral progress was at the core of "The Rise and Fall of the Great Powers", but it was there expressed inversely. That book was a treatise on economic and political decline – specifically, the apparently inevitable decline of the United States, considered morally-historically against the decline of other empires. American political decline would apparently be the inevitable result of economic weakness arising from an imperial proclivity toward war, conflict, and militarization.[4] The historical scope was enormous (the years 1500 to 2000) but the moral sub-text disconcertingly narrow, focused almost entirely (as it seemed to me both on its publication and re-reading it today) on the late Cold War and, come to it, the Reagan years and the military build-up associated with them. Four centuries of history in order to explain five short years of American experience, and those five years then still underway? Rarely has the leap been quite so intellectually unprotected, bungee jumping without fastening the cord: from the unimpeachable, but also uninformative, observation that no empire in the course of history has lasted forever, to the claim that the American empire was teetering. And that is even accepting the claim that American empire is an empire and not a hegemon fundamentally different in kind from, say, imperial Spain or Britain.

The sotto-voce moral-historical lesson behind Kennedy's apparently dismayed, sorrowing voice of warning was plain enough; American decline is historically inevitable, but overall it is, for the whole world, a good thing.[5] That and (as I recall when the book came out) oodles of *schadenfreude* in Europe, a self-satisfied sense of political karma justified by a British profes-

3 A. Wilson & T. G. Ashplant, 'Whig History and Present-Centred History', 31 *The Historical Journal* (1988), 1, 10.

4 Kennedy, 1989, *supra* note 1, 514.

5 *Id.*, 514.

sor at Yale explaining it all as History. But karma is a slippery thing and so, in the endless turning of the wheel of this world of illusion and desire, ephemera and impermanence, Professor Kennedy's book appeared in 1987, a scant two years before the fall of the Soviet Union and the Warsaw Pact, the liberation of eastern and central Europe, and American victory in the Cold War. One man left standing, and not Soviet communism. American decline? Yet Kennedy's reputation has not suffered, least of all outside the United States (the book has been translated into twenty-three languages, after all) because it was always an expression of hope over experience. As if to say, 'Some day (God willing) it will be true': the essence of Kennedy's historiography, a historical claim conjoined to a moral plea to make it so.

Kennedy's new book, The Parliament of Man, is the flip-side of the same conjoined American declinism-Whig historical progressivism that characterized The Rise and Fall of the Great Powers. What many in 1987 (at least in the United States) took to be Kennedy's pessimism failed to understand that it was (from his standpoint and the standpoint of many in Europe) actually "progress." If progress was defined in the earlier book as the decline of American power, in the new book it is defined only slightly differently as the rise of the United Nations and "global governance".[6] Progress is the (presumably) emerging hegemony of international institutions of governance, replacement of the hegemony of the United States with the (presumably) emerging hegemony of the United Nations.[7] The emergence of global governance and the hegemony of the United Nations are understood, however, to depend upon the (presumed) decline of American power.[8] And so the first book and the second only really make sense together. They are the continuation of the same teleological moral-historical project.

There are many presumptions here, less about the past than the future. Kennedy's academic field is history,[9] but the reason people read him is that he is a speculative futurist. Each book purports to be about the past, but in fact each uses the past to will into existence a certain shared moral vision of the future. Each book offers this moral future as always being a historical possibility – and why not, since historical possibilities can hardly ever be

6 Kennedy, 2006, *supra* note 2, 51-58.

7 *Id.*, 51-58; see also I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (2008), 174-93.

8 R. Thakur, *The United Nations Peace and Security: From Collective Security to the Responsibility to Protect* (2006), 49.

9 See http://www.yale.edu/history/faculty/kennedy.html (last visited 19 September 2009)

ruled out a priori? Yet somehow, in real life, the moral vision seems always to be an indefinitely receding horizon. American decline or the rise of global governance, either way, Kennedy reads the fitful evidence across long periods of time to favor the glass half full, gradually filling; and yet it never seems quite to get there, never quite reaches the fullness of time. Like those mad American evangelists who prophesy the end of the world, but then have to recalculate on a regular basis, Kennedy's telling of history is a form of soothsaying.

A.

But I get ahead of myself. The subtitle of The Parliament of Man is the "history of the United Nations." The subtitle in the original UK edition is, more tellingly, more teleologically, the "past, present, and future" of the United Nations. "Parliament of Man" refers to an 1837 poem of the young Alfred Lord Tennyson, Locksley Hall.[10] The poem offers a rapturous "vision of the world" of the future. Its best-known passage alludes to all the "wonders that would be", in images simultaneously modern and romantic. It is remarkable as both vision and poem, and Kennedy does well to use it as the book's epigraph and ideological frame. Indeed, a quite fascinating historical note at the beginning of the book points out that this particular poem had a real-world effect: over a century later, the American president Harry Truman carried a copy of this poem about in his wallet and, when asked why he supported international institutions such as the incipient United Nations, he would pull it out to read aloud.[11]

Truman was not alone in taking his moral cue from that hundred-plus year-old poem; it has inspired internationalists over generations, and even Winston Churchill made note of it.[12] But Locksley Hall is Kennedy's moral compass as well – it "runs through the present work," he says. It defines his Whig historiography and his futurism, and he is honest in putting it front and center. Mankind, Kennedy draws from the poem, is going to destroy itself unless it invents "some form of international organization to avoid

[10] Kennedy, 2006, *supra* note 2, 'A note on Title'; A. Lord Tennyson, Locksley Hall, Selected Poems, Gramercy (2007); see also A. Lord Tennyson, Locksley Hall available at http://rpo.library.utoronto.ca/poem/2161.html (last visited 19 September 2009)

[11] Kennedy, 2006, *supra* note 2, "A note on Title".

[12] A. Schlesinger Jr., 'Bye, bye, Woodrow', *Wall Street Journal* (Eastern edition), 27 October 1993, A16.

conflict and advance the common humanity."[13] But though this is the centuries-running theme of all those many novels, poems, essays, scholarship, monographs, sermons, eulogies, polemics, jeremiads, songs, speeches, television shows, movies, videogames, and even Internet 'second life', is that what this poem tells us? If so, the gaps in the poem, its crucial interstices, its elisions, portend the possibility of something very different.

Tennyson writes at the onset of the Industrial Revolution in Britain.[14] Looking forward, he foresees the growth of global commerce, trade across the heavens – the "skies". he says, filled with airships "dropping down costly bales".[15] Free trade and incipient economic globalization, fuelled by technology; it is not unfamiliar to us today. But then those same skies are filled with war, the "nations' airy navies grappling in the central blue". Why, we are not told. Perhaps over that same global commerce, nations fighting for advantage over those "costly bales"; the poet does not say, but he does imagine, for example, the future horror of aerial bombardment, war in which there "rain'd a ghastly dew". Yet finally, somehow, after this war waged across the skies, the "war-drum throbb'd no longer, and the battle-flags were furl'd."[16]

Come next the planetary utopia, the end of national conflicts and wars. But here the poem pauses in profound ambiguity. The war drums cease to throb and the battle flags are furled, "In the Parliament of man, the Federation of the world."[17] Yet the poem is quite silent as to how this is to come about. It is ambiguous on precisely the central point. Is this 'Parliament of man', this 'Federation of the world', the cause of global peace or instead its effect? War's ceasing in the parliament of man? What is the meaning of this in? The question of cause and effect is not irrelevant even if the poem elides it. Nor is it irrelevant (it hardly needs saying) for Kennedy's Whig history – and the heart of the matter is whether his book elides it, too.

Locksley Hall is culturally a product of nineteenth century Britain that can still reach out to stir the sentiments of the twentieth and twenty-first centuries. But it partakes of a vastly more ancient tradition of utopianism, stretching back several thousand years and yet also still able to stir us today.

13 Kennedy (2006), see *supra* note 2, xii.

14 See A. Lord Tennyson, 'Biography, Encyclopedia Britannica' available at http://www.britannica.com/EBchecked/topic/587422/Alfred-Lord-Tennyson (last visited 19 September 2009).

15 A. Lord Tennyson, see *supra* note 10.

16 *Id.*

17 *Id.*

Consider the famous sentiment – nay, prophecy – inscribed at the headquarters of the United Nations in New York, taken from the second chapter of Isaiah: "They shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war any more."[18] Yet unlike Tennyson, the Biblical writer offers specifics, in the verses preceding, how this wondrous condition comes to pass. It is the most interesting, if most overlooked, passage in the chapter, and unsurprisingly it is not chiselled into the walls of the headquarters building at Turtle Bay:

> And it shall come to pass in the last days, that the mountain of the Lord's house shall be established in the tops of the mountains, and shall be exalted above the hills; and all nations shall flow unto it. And many people shall go and say, Come ye, and let us go up to the mountain of the Lord, to the house of the God of Jacob; and he will teach us of his ways, and we will walk in his paths: for out of Zion shall go forth the law, and the word of the Lord from Jerusalem.[19]

At that day, the Lord will "judge among the nations, and shall rebuke many peoples."[20] Then – and only then – shall they beat their swords into plowshares and universal peace obtain.

The writer of Isaiah describes an eschatological peace, the peace of the end of days. But he understands as a matter of course that this requires an eschatological cause. The Lord in the mountain of the Lord's house. One law coming from one place to all nations and all peoples. One judge before whom all nations come. Tennyson, by contrast, is a modern – a modern even if a romantic. While he proclaims an apparently eschatological peace, he has available to bring it to pass neither the Lord of Hosts nor even, seemingly, a genuinely transcendental (albeit secular) moving cause. On the contrary, the closest Locksley Hall comes to describing the proximate cause of this outbreak of global peace is pragmatic and practical, mild ratiocination, nothing at all transcendental: The "common sense of most", he says, shall hold a "fretful realm in awe". After having passed through "fretful" times – violent and troubled times, in other words – majoritarian common sense shall bring about what, in today's terms, sounds remarkably like Francis

[18] Book of Isaiah, 2:1-4, King James Bible.
[19] Book of Isaiah, 2:2, King James Bible.
[20] Book of Isaiah, 2:4, King James Bible.

Fukuyama's "end of history".[21] The "kindly earth" shall "slumber" in the lap of "universal law".[22]

B.

And so the dilemma in the moral heart of Kennedy's history. On the one hand, the quest is to achieve an eschatological peace, but with means that are non-eschatological, commonsensical, modern, rational and even majoritarian. From un-utopia to utopia; but are the means sufficient to the ends? Or, on the other hand, we might deny that the peace sought is eschatological – we might claim instead that it is merely the tranquillitis ordinis that Augustine made the proper object of earthly government – and it is therefore within our modern, rationalist means. But then two further problems. If the means are rational, then they must be truly rational. Any proposal for global tranquillitis ordinis must therefore take account of the rationality problems of collective action – the tendency of parties to help themselves to benefits offered in common but to refuse individually to bear the costs.[23] Locksley Hall refers passingly to "most" people and their "common sense" as the solution to this problem. Yet it is precisely commonsense – rationality – that advises each to promise publicly to support the commonweal, but then instead to defect privately and play "beggar thy neighbour". This is the problem that realists of international relations have always raised, on global issues ranging from international security to the Kyoto Protocol.[24]

Moreover, if the ends, and not simply the means, are merely rational, pragmatic, and commonsensical, why is the whole political undertaking of international organizations forever wrapped and infused with so much idealism and romanticism as to look, yes, eschatological? Glorious perpetual peace and all that? The ideological rhetoric that surrounds the UN – the rhetoric that permeates The Parliament of Man – has a constant and peculiar trope, always looking beyond the dismal, sordid, and not infrequently corrupt present of the United Nations to the glorious transcendental future of

21 See F. Fukuyama, *The End of History and the Last Man* (1992).

22 Lord Tennyson, see *supra* note 10.

23 The literature is immense, but the place to start is still M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

24 See S. J. Shackelford, 'The Tragedy of Common Heritage of Mankind', 28 *Stanford Environmental Law Journal* (2009), 109, 113; see also R. B. J. Walker, *Inside/Outside: International Relations as Political Theory* (1993), 7; S. Guzzini, *Realism in International Relations and International Political Economy: The Continuing Story of a Death Foretold* (1998).

global governance on offer. It is as though the present UN were a sickly sapling, but we must still, each and every time, excuse its failings because we look forward to the marvellous overarching tree of global governance that the sapling is to become. This is, roughly, Kennedy's book – it is his Whig moral history in a single metaphor. The rest of the book is more or less about convincing us to keep going with the sickly sapling that never, however, grows up to become the tree.

The grand enterprise might surely, at some point, be judged a mistake. Might not the best be the enemy of the good? Might the optimists' hope turn out to be false – that one can pursue a "pragmatic", "efficient", "good governance" UN of limited aims, ambitions, tasks, and mandate in the present and, simultaneously, pursue the vast ideal of genuine global governance for the future, a truly federal world of tomorrow? A false proposition, at least on the accumulated evidence? Perhaps the acceptance of the visionary ideal for the future somehow insidiously precludes (corrupts, to be precise, and holds hostage) the possibility of a more modest, but also more effective, UN of the present. A 2008 essay in El Pais by British journalist John Carlin (07-09-2008) complained about the relative invisibility of the current Secretary General, Ban Ki Moon, at least by comparison to his predecessor, Kofi Annan; it complains by extension that the UN as a whole is less visible than it was a few years ago.[25] Certainly the desire of Ban Ki Moon, quintessential diplomat, to be less visible than his 'rock star' predecessor is plain on its own terms[26] –but perhaps Ban Ki Moon is also seeking, with good reason, to restructure the idea and expectations of the UN away from the glorious future tree in favor of another vision altogether of the UN, a UN of few pretensions to glorious global governance, a UN aiming not at an overarching tree, but instead at creating a series of low, sturdy, limited hedge rows that perform competently their precise and limited functions.[27] Would this not be a better vision of the United Nations than a Paul Kennedyesque vision that it cannot possibly bring to pass and which, worse, in loudly announcing but failing to bring to pass, will cause much damage in its wake? But this is a

25 J. Carlson, 'Ban Ki Moon, El Hombre Invisible', *El Pais*, 7 July 2008, available at http://www.elpais.com/articulo/reportajes/Ban/Ki-moon/hombre/invisible/elpepusocdmg/20080907elpdmgrep_1/Tes (last visited 19 September 2009).

26 K. Annan, Lessons from the U.N. Leader, *Washington Post*, 12 December, 2006; Kofi and U.N. Ideals, *Wall Street Journal*, 14 December, 2006.

27 "General Assembly supports Ban Ki-moon's reform proposals for stronger UN." UN News Centre, 15 March 2007 available at http://www.un.org/apps/news/ storyAr.asp?NewsID=21883&Cr=UN&Cr1=reform. (last visited 19 September 2009).

hard doctrine to preach in the European Union, of course, where whole university departments, institutes, centres of advanced study (many well-subsidized by the EU itself) are devoted to exactly that optimism with regard to the EU itself as a constitutional order – and sometimes to the seemingly remarkable view that something resembling a constitutional structure can be scaled up by analogy from the EU to the world as a whole.[28]

Yet even this skepticism about the optimists' faith still takes the moral desirability of this vision of the UN on its own moral terms. It merely raises realist skepticism about whether it is possible to get there. One might further dispute (as certainly I do) that Kennedy's vision of global governance is morally the right one in the first place. I would propose instead a vision of global order based around the robust multilateral cooperation of democratic sovereigns that, nonetheless, remain both democratic and sovereign because they are the legitimate expression of particular political communities in a way that the "world" can never be. It is somehow practically taken for granted that the "moral" vision of global order is necessarily global governance around some version of internationalism. On that assumption, then the debate is between global governance idealism and some crabbed realism that, however, does not challenge the idealism of global governance through liberal internationalism in the first place.

The real debate is joined, however, not between idealism and realism, but between two different forms of idealism – one premised upon liberal internationalism's global governance and the other upon a community of ideally democratic sovereigns whose terms of governance reflect the consent of the governed.[29] The prevailing presumption that idealism must be liberal internationalist global governance errs in making the further assumption that the "international" is morally superior to the merely national – why? By accepting that the "international" expresses the "universal". The underlying moral premise is that the international expresses the universal because it is above the petty, parochial, and partial, the self-interests of democratic sovereigns. This presumed equivalence is far from self-evident, however; the international might be thought just as partial and self-

[28] See, e.g., E. de Wet, 'The Emergence of International and Regional Values Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law* (2006), 611-632.

[29] See the range of possible idealist positions, ranging from sovereignty to liberal internationalism, set out in K. Anderson, 'Remarks by an Idealist on the Realism of The Limits of International Law', 34 *Georgia Journal of International Law* (Winter 2006) 2, 253, 261-269.

interested and parochial, but its parochialism happens to be "global" and "transborder". The elites who live in the jet stream, as it were, beyond mere surface geographies, who live in the time zones between New York and Geneva: they too have interests, they too have partialities, they are not somehow the magical embodiment of the "universal" just because they are unconfined by earth-bound geography: theirs are the partialities and parochialisms and interests of those who […] live in the jet stream. There is no obvious reason why to give their values any special deference as "universal".[30]

But even accepting the premise of Kennedy's moral vision, must the frankly unimpressive present of the UN be forever justified on account of the UN's glorious future to come, if only we persevere? Can it be forever justified that way? It is unfortunately characteristic of Kennedy's self-imposed blinders – blinders that he imposes without further ado on his readers – that he devotes, for example, one single sentence to the oil-for-food scandal, in which Saddam was able to corrupt the UN's sanctions program at a cost of billions of dollars and vaster cost to his own people. Indeed, in an astounding mischaracterization, Kennedy deftly deflects blame for the UN's corruption away from the UN (the "Iraq canker", he calls it with masterful imprecision[31]) and back, finally, onto the US for its insistence on UN sanctions on Saddam's regime. The intellectual quality of this book would be considerably improved if its default position were not seemingly that anything bad can eventually be blamed on the US.

It is not that The Parliament of Man simply refuses to acknowledge either the failures of the present UN, or the justification of its continuing failure, by appeal to the future. Intellectual defenders of the UN such as Kennedy simply do not appear to see the rife contradictions as any serious intellectual problem. Instead the inconsistencies are taken as an opportunity to switch back and forth at will from one justification to another. Idealism, utopianism, and glorious future of global governance at one moment; and pragmatism, narrow rationality, and practical problem-solving in the present at the next. What might have been thought grave inconsistency, intellectual bobbing and weaving, is instead offered as the best of all intellectual worlds.

Kennedy therefore jumps freely among these intellectual positions in order to tell, as he sees it, a "story of human beings groping toward a com-

30 See K. Anderson & D. Rieff, 'Global Civil Society: A Sceptical View' in H. Anheier, *et al*. (eds), Global Civil Society (2005) available at http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=899771 (last visited 19 September 2009).

31 Kennedy, 2006, *supra* note 2, 76.

mon end, a future of mutual dignity, prosperity, and tolerance through shared control of international instruments."[32] The Parliament of Man seems sometimes to seek a bridge from the rational to the transcendent. Other times it backs off to suggest that "international organization" is finally all aimed at narrow pragmatics. I find these switches unsustainable. But in any case, the moral narrative that The Parliament of Man would like to tell – of the gradual, upward, evolutionary climb of human cooperation across nation-states finally to genuine global government – is eclipsed by having to explain the persistent gap between the apparent limits of rational cooperation and the utopian ideals that are supposed to animate the whole enterprise. The gap dominates Kennedy's history of the United Nations; it is what finally must be explained. The UN is also, he notes, a "tale of multiple setbacks and disappointments."[33] But Kennedy tells this tale in the way that a devout priest writes about the Church. Global governance is, finally, Kennedy's religion, and so the UN's constant lapses from virtue and goodness and rationality are explained as the inevitable errors of a pilgrim church finding its path, not as a reason to doubt the faith.

C.

Kennedy begins by distinguishing the UN and its founding from the earlier League of Nations. The Allies, he notes, who founded the UN had a reasonably clear idea of why the League had failed – an excess of idealism over realism, plus the fact that the League suffered from some specifically and spectacularly wrong notions of how collective security might work, or not. The UN's founders sought to build the new organization with structures that would recognize the world as it actually existed. Kennedy's account of the actors fashioning the fundamental architecture of the UN in the years 1941-45[34] – their heroic sense of the mission of the postwar even in the midst of war, yet their keen awareness that the structure of this new United Nations would have to be grounded in interests rather than merely ideals – is the best part of the book. It is diplomatic history keenly observed, and it will be a standard account for years to come. The war itself, Kennedy observes, sharpened those diplomats' sense of the necessity of keeping a firm eye on interests and not just ideals. Indeed, we can add, their watchword might well

32 Kennedy, 2006, *supra* note 2, xv.
33 *Id.*, xv.
34 *Id.*, 24-47.

have been, 'No More Kellogg-Briand Pacts'[35], international instruments that promise an easy universal peace but cannot possibly deliver and, much worse, deliver war as the consequence of their misbegotten promises.

Yet in another sense, those wartime founders continued all the same old idealisms and introduced some new ones, principally by adding the idea of human rights as a foundational ideal alongside the ideal of international peace. No question that these new ideals have deep roots; no question as well that they introduce new tensions and demands upon an international system that starts out with the goal of international peace and security (surely difficult enough) but which gradually adds the seeming sum of all human values, and most of those expressed in the language not just of aspiration, but of right. In order to understand this gradual unfolding of mission, Kennedy turns from comparison to the League to the main work of the book, a series of thematic chapters setting out in parallel the main values and, by extension, the work of the UN. The Parliament of Man is not in any sense a guide to the institutional UN – it is emphatically not, Kennedy says, a guide to the "alphabet soup" of UN agencies.[36] Yet for exactly that reason, and despite my reservations about Kennedy's agenda, this is an excellent book for explaining the UN and, given its deep affinities for the organization, one of the best efforts in public diplomacy on the UN's behalf, on its own terms and within its own ideology. Kennedy treats the broad themes of the UN's work in three categories (which in any case are announced in the first article of the UN Charter[37]): collective security; economic agendas of global north and south, and international development; and human rights and universal 'values'.

UN collective security was borne out of two contradictory impulses. On the one hand, it began with the realist recognition that collective security must be enforced by the Great Powers and, as a consequence, must be consonant with their interests or at least not too directly contrary to any one of them. On the other hand, it internalized an idealist expectation that the Security Council would gradually evolve as an institution not just of Great Power confabulation, but of genuine global governance – into what former UN Secretary General Kofi Annan described as recently as 2005 as "our fledg-

35 Also called the "Pact of Paris," signed 27 August 1928, http://www.state.gov/r/pa/ho/time/id/88736.htm (last visited 19 September 2009)

36 Kennedy, 2006, *supra* note 2, xv.

37 U.N. Charter Art. 1, paras 1-3.

ling global collective security system.[38]" Sixty years on and yet still "fledgling" surely ought to raise some intellectual alarm bells. So which is it to be? A conference table where the Great Powers can try and hammer out multilateral deals – a talking shop preferable, where possible, to war? That was, Kennedy says, how Dwight Eisenhower praised the UN in the 1950s.[39] Yet that vision of Great Power multilateralism is, Kennedy adds, a "long way from the early vision of a federation of the world"[40] – and from the collective security system, fledgling or otherwise, that Annan simultaneously asserted and imagined upon completing his second term in office. It is not impossible to be both, as ever say the optimists; one the daily reality and the other "evolving" in expectation of the future, and this is Kennedy's hope: Whig history, once again.

Kennedy traces the Security Council's mostly derailed path leading up to and then into the Cold War, with the Security Council frozen between the great two antagonists. The Security Council was little more than a talking shop in those years, and often not even that. Yet a certain kind of collective security did hold in those years – not on account of the UN, but because the two antagonists were fundamentally status quo powers unwilling to risk general conflagration. Hopes for the UN unleashed by the end of the Cold War, Bush pere's call for a New World Order apparently based around international institutions, collective security finally enshrined in the Security Council, global governance finally on the horizon[41] – it is hard to overstate the excitement that many liberal internationalists felt in those heady days of the fall of the Berlin Wall. Indeed, in a perverse sense, Saddam's invasion and annexation of Kuwait was a fortuity, from the abstract standpoint of evolving global governance, because it was so nakedly a violation of everything the UN Charter stood for in the way of aggression, territorial conquest, the crudest violations of international peace and security, and internal genocide and crimes against humanity against the Kurds to boot. Everything bad in a single package, as it were; a peg for every interventionist to hang his hat.

38 K. Annan, 'Truman Library Speech', 11 December 2006, http://www.un.org/News/ossg/sg/stories/statments_full.asp?statID=40 (last visited 19 September 2009)

39 Kennedy, 2006, *supra* note 2, 47.

40 *Id.*, 47.

41 G. H. W. Bush, Address before a Joint Session of Congress on the Persian Gulf Crisis and the Federal Budget Deficit (11 September 1990).

D.

The subsequent wars of the Yugoslav succession and Rwanda in the 1990s forcefully brought everyone back to the realization that the Great Powers had interests, and they also had un-interests, and moreover that collective security in the Security Council had not magically, with the end of the Cold War, solved the problem of collective action and free-riding. But Kennedy significantly treats the collective action problem as one of the world system as a whole,[42] the classic collective action problem of collective security, insincere promising and easy defection, and free-riding. This is the customary international relations account, and he accepts it. But as a consequence, he therefore treats the US simply as a special case of an especially powerful, dominant, even hegemonic actor (particularly when recounting the diplomatic run-up in the UN to the 2003 Iraq invasion) within the unitary world system.[43] This is true as far as it goes – this collective action problem is of course real – but it does not fully capture the true collective action conundrum of the UN and collective security, or fully account for the role of the United States.

The truest description of the international security situation since 1990 is that it is a conjoined and parallel UN-US security system. It is best described as two parallel, interlinked security systems – a weak one, the UN collective security apparatus, and a strong one, the US security guarantee.[44] Understood this way, the US is not merely a, or even the, dominant and most powerful actor. Rather, the US offers a genuinely alternative system of international peace and security. And the dominant actor's willingness to extend a security guarantee to a sizable portion of the planet, explicitly and implicitly, alters the meaning, necessity, and quality of collective security at the UN itself. They are two different game-theory scenarios – a dominant

[42] Kennedy, 2006, *supra* note 2, 51 ([…] "the UN Security Council […] the heart of our global security system.")

[43] See, e.g., R. Thakur, The United Nations Peace and Security: From Collective Security to Responsibility to Protect (2006), 49 (if the "UN is the font of legitimate international authority, the USA has unparalleled capacity for the maintenance of international peace and security.")

[44] J. F. McManus, "U.S. defenders or UN Enforcers?", 30 May 2005, available at http://www.accessmylibrary.com/coms2/summary_0286-13878961_ITM; (last visited 19 September 2009); K. Anderson, 'United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations', 10 *Chicago Journal of International Law* (2009), 1.

actor within a UN collective security-defection international relations "game"; versus an actor that offers its own security package alongside that of the UN in a parallel collective security "game". In a diplomatic system characterized (in game theory terms) by insincere public promises, easy defection, moral hazard, and free-riding, the fig leaf is assiduously maintained that the UN constitutes, or anyway offers, a collective security system.[45] Whereas in fact, most leading players in Europe, Asia, and Latin America, and even the Middle East, are unwilling to test the strength of that system: insincere lip service to the UN system while actually relying on the United States.

A realist might say, in other words, that for all the extant elite complaining and populist anti-Americanism, a remarkable number of countries have counted the costs of adherence to the US security promise and found it rather better than their own, and better than the UN's, and better than anything else on offer, as to both benefits and costs. After all, the US does not even particularly care when those under its security hegemony (which extends far beyond its allies or clients to provide, perversely, significant stability benefits even to America's acknowledged enemies) heap abuse on it (justified or not) because, in the grand scheme of things, it understands (however inchoately and inconstantly) that the system incorporates (often heartfelt but, in the final policy result, insincere) public rejection and protest by the system's beneficiaries. The US is not imperial in a way that would cause it much to care. Part of accepting US security hegemony by its beneficiaries includes their rational desire to displace security costs onto another party, even if that providing party thereby has equally rational reasons to look to its own interests first, since it so overwhelmingly pays the costs.

Acceptance also includes realistic appraisal of the alternatives: would Europe (let alone Japan, South Korea, Taiwan, Indonesia, India, the Philippines, New Zealand, or Australia, or even Russia) prefer, for example, Chinese hegemony to the US? The crisis in Georgia forced a little bit of discussion – less than the newspaper headlines in that little war suggested, however – on the mission and role of NATO.[46] On the one hand, Europe is in

[45] Perhaps the best recent account of game theory in international law and relations is A. T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

[46] See V. Walt, As NATO Gathers, Its Future Is Looking Cloudy, Time, 2 April 2009, available at http://www.time.com/time/world/article/0,8599,1889320,00.html?iid=tsmodule; (last visited 19 September 2009); see also P I Belk & A. A. Rosen, Let NATO Settle the Border Wars, *Wall Street Journal*, 3 April 2009, available at http://online.wsj.com/article/ SB123870677956783813.html (last visited 19 Septem-

strategic disarray with the reassertion of regional Russian imperial will; the interests of those close to it are different from those far away, and then, of course, the problem of Iran. At some point even the United States will wonder, as a matter of budget and defense plans, what NATO is worth: how long does a hegemon support its free riders? Is this not the barely-coded message to Europe, just beneath the surface of President Obama's fineand uplifting words to the General Assembly and the Security Council? Because the United States plans to devote itself to becoming a Western European-style social democracy, we, like you, will no longer be able to afford our global role as security hegemon. So we will talk multilateralism instead. Decode the barely-hidden message to understand – as President Zarkozy plainly did as he listened with open incredulity to the American president's speech in the Security Council – that you will no longer be able to depend in the long-run on the US for the 'hard power' that today sets the outer boundary for the use of force and that, in turn, allows Europe the luxury of both not spending on security and preaching goodness and peaceable virtue to the world. *We* will be like *you*; but this is no cause for rejoicing in Europe.

Be wary, O Europe, above all, of liberal internationalist Americans bearing gifts of multilateralism. Be prudent and re-read your own great Raymond Aron.[47] What might Aron say today? An America that does *not* assert, rudely and brusquely, its own interests and views first through NATO and elsewhere, an America that sings sweet songs of multilateral interdependence is, surely, a superpower that has decided to simply go along with what everyone else does, which is another way of saying it has tired of supporting the free riders, which is another way of saying that it, too, says one thing but might do another, and what it might do is not show up when the big battalions are finally needed. Prudent Europeans fear and do not trust, above all, an America that does not put its own interests *first* and carry the rest along in train. Europe will soon enough face an Iranian nuclear weapon along with its massive dependence upon Russian natural gas, even as its military strength declines yearly – hourly – and in important respects it is today at least arguably more dependent on the American security guaran-

ber 2009); see also C. A. Kupchan, NATO's Hard Choices, *New York Times*, 30 March 2009, available at http://www.nytimes.com/2009/03/31/opinion/31iht-edkupchan.html. (last visited 19 September 2009).

47 For a brief, English-language introduction to the thought of R. Aron, see C. Caldwell, R. Aron and the End of Europe, Bradley Lecture Series, American Enterprise Institute (Washington DC 4 April, 2005).

tee, not less, than at any time since 1990.[48] Fear for yourselves, or at least for your children, when the Americans make a multilateralism and call it peace.

Come to that, one did not hear a great clamor among Europeans for the collective security of the UN, in the form of calls for resolution of the Georgia crisis by action of the Security Council – for obvious reasons. And yet, if one gives up the idea of the Security Council as the seat of collective security governance and understands it as the talking shop of the great powers, then it performed as well as should be expected. Of course it resolved nothing – but the architecture of the Security Council in the UN Charter anticipates that in a conflict among great powers on the Council, of course it cannot resolve anything. But it *did* provide a talking shop in which it was as a matter of course assumed that active, relatively public discussions would take place there – and, moreover would take place not just between antagonists, but much more publicly with other great powers, and even with non-great powers represented in rotation at the Council.[49] The Security Council performed well in the Georgia crisis, given what it is, not badly.[50]

But if we are indeed moving toward a more multipolar world – at least in certain regions, the Russian 'near abroad' or the Chinese periphery – then the great power conflicts promise to become more acute, not less. As David Rieff has pointed out, multipolarity is by definition competitive, not cooperative.[51] In such a world, the Security Council performs a vital, but perforce limited, function as multilateral talking shop for those conflicts – and its ability, as one hopes Ban Ki Moon and his advisors understand, to perform that function depends fundamentally on accepting its limitations. The rapturous fantasies of global governance that feature so prominently among

48 See the Special Issue 'Russia and International Law - From the North Pole to the Caucasus', 1 *Göttingen Journal of International Law* (2009) 2.

49 As Kennedy quite correctly says, even in the bitter Security Council in-fighting over the Iraq war, it could, and should, be said from a realist perspective that the "system worked, since the veto powers were always different from the rest […] Those who claimed at the time that the United Nations had 'failed' miss the point." Kennedy (2006), see *supra* note 2, 75 (emphasis in original).

50 Kennedy makes this point indirectly with respect to the founding of the UN and the Security Council, The Parliament of Man, at 51 ("another select group of Great Powers came together to hammer out the new world order of 1945 […] why should be at all surprised that they arrogated particular privileges to themselves? Contemporaries would have been staggered had they not done so.").

51 D. Rieff, Concerts and Silly Seasons, *Opendemocracy*, 23 February, 2007, available at http://www.opendemocracy.net/node/4380/pdf. (last visited 19 September 2009)

liberal internationalists – Professor Kennedy and nearly all professors of international law, for example – are not just a quaint holdover in a multipolar world, they are today an affirmative danger, because they tempt institutions beyond their limits in time of crisis. The grand irony, for which Georgia, now looking backwards over several years, perhaps serves as a harbinger, is that the most propitious time for dreaming of global governance was precisely when the US was at its maximum, largely unopposed strength. Why? Because that space of hegemonic-US time allowed much of the world, much of the democratic industrialized world, the luxury of imagining that its security was one thing, when it fact it was another.

There are people in the world who must rely on the UN collective security apparatus; and not always to their benefit. Not even America's peculiarly changeable combination of interest and ideals extends everywhere: Darfur and Congo, for example.[52] An important reason why the dual system persists is that the US and the industrialized world that takes its stability from US hegemony together see the UN system as the least costly system for enforcing minimum order in the hopeless world of failed and failing states – places that they will not, and realistically cannot, police (pace Afghanistan). But all this is emphatically not the system as Kennedy describes it; he offers instead the classic collective action problem located at the UN itself, in no small part because it is built into his a priori moral vision of the rise of UN hegemony necessarily through US decline. Kennedy might profitably consider that the existing UN system is one that is publicly in perpetual crisis and yet somehow, because of the parallel US security guarantee, never truly forced to a crossroads. It seems more plausible to see the UN in collective security as actually stable, to the point of stasis and stagnation. Even episodic protestations of crisis are an integral part of the quotidian theatre of the UN cul-de-sac.

On nearly every measure – population, influence, military might – the Security Council's five permanent members are completely unrepresentative of the world; Kennedy devotes much discussion to the issue, as one would expect if one thought the Security Council ought someday to be the principal organ of global security.[53] After all, the Council is not even especially a collection of the great powers anymore. This issue was (foolishly) the

52 For an eloquent recent attempt to address this problem, see T. Lindberg, The Only Way to Prevent Genocide, Commentary (April 2009), 9 ("Creative diplomacy can make a difference. But in the end, it may all come down to the willingness of the United States to act.").

53 Kennedy, 2006, *supra* note 2, 50-51 & 76

dominant discussion in largely abortive UN reform negotiations that took place in 2004-5: how to alter the composition of the Security Council to make it more realistically a meeting ground of the great powers, and how to make it more representative of the world as an idealized institution of global governance.[54] Kennedy candidly acknowledges that there is no solution to this issue; Kofi Annan, to his credit, urged the main players in UN reform to leave this question aside in favor of more urgent questions that could be resolved.[55] The main antagonist was not the United States, whose place on the Council is beyond question and is thus in the rare position of being a relatively neutral "honest broker" on the issue. The disputes arose instead from the lesser and declining military powers, France and Britain, as against the clamors of Japan, India, Nigeria, Brazil, and even economically powerful but de-militarized Germany.[56] Yet even if the existing "permanent five," holding a veto, would accept any alteration, in real life Japan is checked by China, India by Pakistan, Brazil by its Latin American neighbors, Germany by the global recoil at a third EU permanent member and, alas, it is far from inconceivable that, in the next quarter century, Nigeria might fall into grave civil war.

Nonetheless, to a large extent Kennedy insists on telling the tale of the Security Council in the post-Cold War period as largely an 'America versus the world' story – a morality tale of heroic liberal internationalists checkmated by Republican Party intransigence.[57] It is both tiresome and seriously misleading to devote so much of the text to minor and parochial issues of US politics in what is supposed to be a discussion of the world system. It is as though Kennedy, whose prose is otherwise lapidary, stunningly clear, and entirely free of academic jargon, suffers from a sort of political Tourette's Syndrome that causes him suddenly and inexplicably to lapse into irrelevant criticism of the US for this or that. Of what conceivable importance, for example, is his Little Englander digression on the virtue of the BBC over US news programmes, or any of a dozen other indulgences?

54 See, e.g., Press Release, General Assembly, 'Uniting for Consensus' Group of States Introduces Text on Security Council Reform to General Assembly: Proposes Maintaining Permanent 5 with 20 Elected Members, U.N. Doc. GA/10371 (26 July 2005), available at http://www.un.org/News/Press/docs/2005/ga10371.doc.htm. (last visited 19 September 2009)

55 Kennedy, 2006, *supra* note 2, 253.

56 *Id.*, 249-251.

57 E.g., *Id.*, 257 ("the paranoia of some American politicians"). These kind of references unfortunately litter the book.

The US, as Madeline Albright famously said, is the 'indispensable party'[58], but what matters are not the little bits of internal US political wickedness that Kennedy cannot shake from his mind, but instead a much more basic fact that much of the industrialized world accepts the US role and depends upon it regardless of what is said. Kennedy fails to take account of a conjoined UN-US security system that prominently features diplomatic insincerity. He moreover assumes, as ever, a specific normative direction for "progress," toward a genuinely UN system of collective security. Suppose, instead, that UN collective security is what everyone wants in theory but no one wants in practice? In any case, the rise of a new, multipolar world – not the decline of the United States as such, but instead, as Fareed Zakaria argues in a new book, The Post American World, the rise of new powers such as India and China, and the global risks posed by 'resource extraction authoritarian states' such as Russia, Venezuela, Saudi Arabia, and Iran – offers the opportunity to see how much America's allies and friends, and for that matter its enemies, actually want to give up the stability proffered by America's security guarantee.[59] That new world might offer much in the way of schadenfreude – it might not, however, be a thing of beauty.

E.

Economic agendas between the global north and south, international development and economic growth generally, are the least worked-out section of the book. They do not lend themselves very readily to diplomatic history. In any case, although throughout the history of the UN, ideological differences over what constitutes economic development have been sharp – permanent income transfer from the rich world to the poor, for example, or instead permanent economic growth in the developing world? – many of the arguments today are about means, not ends. The arguments over what works in international development are loud and sometimes bitter – but they are mostly about what works, not the desirability of development. The Parliament of Man is only moderately interested in these expert, mostly economic, debates, and slides off into a broader discussion about values and, eventually, the rise of human rights at the UN. But there is an important point here, not to be lost. Some UN agencies – the World Health Organization, for ex-

[58] See D. Chollet & J. Goldgeier, America Between the Wars (Public Affairs 2008), 176-177.

[59] See generally F. Zakaria, The Post American World (W.W. Norton & Company) (2008).

ample, or the World Food Program[60] – are widely considered to be good at what they do. Often proficiency goes hand with a technical, apolitical function, but not always. Peacekeeping operations, for example (apart from what is emerging as major corruption scandals involving large sums of money in procurement contracts), has generally been considered to be reasonably effective at its mission, although it is inherently political.

Effectiveness at the UN in fact has a simple predictor, one that Kennedy could have noted, except that it does not quite fit the narrative. Who pays? To whom is the agency accountable and upon whom is it fiscally dependent? Agencies that are accountable to, and subsist on the budget of, the General Assembly are generally bad at what they do. Agencies that are independently funded by voluntary contributions from donor countries in practice are much more effective.[61] The policy implications are clear. Indeed, they have long been clearer to European aid agencies than to the United States. Fund the things that work, and demand accountability for voluntary contributions. The regular UN budget of the General Assembly for 2006-7 was approximately US $3.8 billion; the peacekeeping budget, which is voluntary (although, for planning purposes, it is nonetheless agreed to by assessment among donors), was approximately US $5.28 billion.[62]

60 The question of why WHO has performed very well in the current swine flu crisis – and in general in other recent cases of threatened pandemics, such as SARS – is an important one. Part of the answer lies in the agency's status as technical, generally apolitical, and as an effective actor in coordination with the world's leading public health authorities, such as the US Centers for Disease Control. It has certain aspects in its work that resemble so-called "transnational global governance networks," contributing to its effectiveness. For an informal blog discussion of these issues, see E. Posner, "Economics and International Law of Flu Pandemics," Volokh Conspiracy Blog, 29 April, 2009, at http://volokh.com/posts/1241059256.shtml; (last visited 19 September 2009) K. Anderson, "Swine Flu, Pandemics, and Transnational Regulatory Networks," Opinio Juris Blog, 26 April, 2009, at http://opiniojuris.org/2009/04/26/swine-flu-pandemics-and-transnational-regulatory-networks/ (last visited 19 September 2009).

61 This was a general conclusion of the Gingrich-Mitchell report on UN reform; Task Force on the United Nations, American Interests and UN Reform (UN Institute of Peace 2005), at 42-61. Some of the conclusions drawn in this section come from my individual participation as an expert on the Task Force.

62 United Nations, Current Peacekeeping Operations, UN Background Note DPI/1634/Rev.94 (2009), available online at <http://www.un.org/Depts/dpko/dpko/bnote010101.pdf> (last visited 22 April 2009); The United Nations Today 18, 78 (Department of Public Information 2008); United Nations, Concluding Main Part of Session, General Assembly Adopts $4.17 Billion Budget Early Saturday, in Wake of Fifth Committee's Diplomatic Breakthrough, UN Press Release GA/10684 (2007).

Which is to say – Kennedy never grasps this point – the developed countries' aid agencies and large private foundation donors have in effect been carrying out a leveraged buyout of the functional and effective UN agencies for well over a decade. An LBO process at the UN, in fact, with Europe leading the way – quietly, however, and never quite admitting to it. A privatization, or at least 're-lateralization' among the rich countries, of international institutions and global governance, if you will.

The rest mostly lies in the hands, and the budget, of the General Assembly. Funded by mandatory dues, the General Assembly's budget is paid overwhelmingly by a handful of wealthy countries. The Parliament of Man operates at far too rarified an altitude to pay attention to the cash. It has, astonishingly, no serious discussion of funding even though one might have thought that the first mechanism for understanding the organization is to follow the money – as public choice theory or, for that matter, a Marxist might say, follow the material conditions underlying UN ideology to identify its "objective interests." So many, many pages dissecting proposals for reforming the Security Council that will, in fact, go nowhere, but no serious discussion of money? Kennedy really is a platonist at heart. The money exercise is slightly harder than it looks, however, as the UN does not have a unified budget; the Secretariat admits it does not really know how much it spends or even how many employees it has. The first ten countries' dues amount to about 76% of the regular budget for 2004-5 (the US is first at 22%, and Spain is number eight at 2.5%, just ahead of China at 2.07%), meaning that the remaining 180 or so countries in the world together account for merely a quarter of that budget, and the bottom 100 countries or so for effectively none whatsoever.[63]

Whatever the distributive justice of that arrangement, it is also a clear incentive for the non-paying majority in the General Assembly to extract greater and greater resources from the paying minority. It is a game – otherwise known as 'moral hazard' - to which the paying handful called a halt some years back (led, interestingly, by Germany).[64] The de facto policy of the developed countries today is clear, even if never announced as such –

[63] http://www.un.org/geninfo/ir/index.asp?id=150#budget1. (last visited 19 September 2009).

[64] "Moral hazard" describes the behavior of agents who do not bear the full cost of their actions and, being able to externalize their costs onto other actors, have fewer disincentives to undertake actions from which the risk of such actions might otherwise deter them. Adapted from, OECD, Glossary of Statistical Terms, http://stats.oecd.org/glossary/detail.asp?ID=1689. (last visited 19 September 2009)

starve the General Assembly of funds, or at least hold it as closely as possible to current spending, and instead devote scarce resources to particular agencies through voluntary contributions. Money sent to the care and feeding of the General Assembly evaporates rapidly through rent-seeking, moral hazard, inefficiency, impressively high UN salaries and benefits, and outright corruption and fraud.[65] It is unfortunate, to say the least, that Kennedy simply ignores these facts; faced with the sordid realities, he, like so many other observers, prefers to make general noises about how corruption and rent-seeking happen everywhere, and retreat to the platonic categories of the glorious future of global governance. Yet it bears noting that the rent-seeking and even the corruption, the competition and shifting alliances and hierarchies of ownership over resources available to the General Assembly contribute in their way to the general stability, stagnation and stasis that characterizes the UN; the seemingly immoveable 'UN in a cul-de-sac' reflects in part the stability of private deals and arrangements and rent-seeking over the General Assembly's resources.

F.

But the General Assembly and General Assembly budget directly fund much of the "values" apparatus of the United Nations, the underlying concepts to which Kennedy directs much enthused attention. Yet it is a curiously dated discussion. The narrative picks up the thread of the rise of human rights after 1945, and the explosion of human rights discourse and concerns after the Cold War ends.[66] Fair enough. Likewise the rise of "global civil society" – the international NGOs which, beginning with the landmines ban campaign of the 1990s, staked claims to be the "representatives" of the "world's peoples" (as Annan put it in 2000) to international organizations; likewise, fair enough, although critics in recent years have devoted much time to debunking the inflated claims of "representativeness."[67] But the rise of human rights and universal values must also take account today of two

65 The issues of rent-seeking and corruption receive remarkably little coverage in the press or anywhere else; the most useful watchdogs include C. Rosett and her blog, The Rosett Report, at http://pajamasmedia.com/claudiarosett/ and, for practically the only genuinely "investigative" reporting on a regular basis directed at the UN, see the New York-based Inner City Press, at http://www.InnerCityPress.com/. (last visited 19 September 2009).

66 Kennedy, 2006, *supra* note 2, 51-76.

67 *Id.*, 215.

other, linked phenomena, neither of which is easily assimilated to the historical rise of rights discourse.

One is the gradual transformation of the language of human rights – really, universal liberalism – through the course of the 1990s into a language of multiculturalism and identity politics, based around religion, ethnicity, race, gender, and post-colonial status. These all amount to claims of political privilege for particular groups that are seriously at odds with universal liberalism – but they are expressed in the language of, and imbued with, the sacred status of 'rights':[68] What is regarded in Kennedy's account, historically and into the future, as "liberal internationalism" with legitimacy claims to global governance would be more accurately rendered today as "multiculturalist internationalism" – and equally with legitimacy claims to global governance.[69]

The differences, despite the identical rights rhetoric, are profound, and as a political reality today they mostly concern the fraught relationship between Islam and Muslims globally, on the one hand, and universal, secular liberalism, including genuinely universal human rights, on the other. The latter is gradually accommodating itself to the former, not the other way around. More precisely, at least as far as organs of the General Assembly are concerned, the content of "human rights" is increasingly subordinated to the desires, interests, ideologies, and religious doctrines of the countries of the Islamic Conference. Rights discourse, at least as far as the leading human rights bodies of the UN are concerned, is not about universal liberalism anymore. Rights discourse has been drafted into the protection and assertion of religious identity in general and Islam (more precisely, 'Muslim-ness', treated as a kind of claim of constitutive ethnic identity and so facilitating the characterization of any criticism of it or its content of doctrine as racism) in particular.[70] The fundamental disconnect between, for example, Spain

68 For a discussion of this phenomenon, see K. Anderson, "Global Governance: The Problematic Legitimacy Relationship Between Global Civil Society and the United Nations," available in draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265839, (last visited 19 September 2009) and forthcoming in T. Pogge, *et al.* (eds), The Ethics of Global Philanthropy (2010).

69 Kennedy, 2006, *supra* note 2, 18.

70 The Durban II debate being only the latest move; see United Nations General Assembly, Outcome Document of the Durban Review Conference, e.g., Section 1, paragraph 13, available at http://blog.unwatch.org/wp-content/uploads/2009/04/ durban-ii-report.pdf. (last visited 19 September 2009).

having a serious debate over the "rights" status of the Great Apes,[71] the exquisitely calibrated, fine-tuning of an ideology of human rights to take into account genetic near neighbors, while at the same time, the ideology of rights is being redefined at the UN – with barely a whimper of protest, and none of it effective – to smash to bits the proud inheritance of Voltaire: well, enjoy the glass-bead game while it lasts.

This is a sharp discontinuity from the historical narrative dating from 1945 or even 1990. It does not find a place in Kennedy's account of the UN, which prefers to spend its time dreaming of being 'lapt in universal law'. The de facto rise of shari'a as the actual globalizing law moving to obtain across widening regions of the world, rather than secular and universal human rights, does not quite fit the narrative. But consider the lead UN agency on human rights, the Human Rights Council (which in 2005 replaced the Human Rights Commission, on account of the Commission's complete and utter domination by the world's worst human rights abusers, made possible, of course, because they were appointed to it with clockwork regularity by the General Assembly). Kofi Annan admirably made reform of the Human Rights Commission – its abolition, in fact, and replacement with the Council – central to his personal reform agenda in 2005.[72] But in the event, nearly every important reform mechanism that might positively have impacted the new Council was eliminated. The US stood nearly alone in opposition, warning against a "compromise" to which, remarkably, the leading human rights NGOs foolishly committed themselves out of little more (so far as I could tell at the time) than the desire to 'stick it' to then-US ambassador John Bolton.[73] Two years later, today, the "reformed" Human Rights Council is, if anything, still more dominated by the world's abusers than the old Commission, as even the New York Times (whose editorial page typically merely channels the UN Secretariat) made note.[74] Plus ca change?

71 L. Abend, "In Spain, human rights for apes," *Time* (18 July 2008), at http://www.time.com/time/world/article/0,8599,1824206,00.html. (last visited 19 September 2009).

72 The Secretary-General, Report of the Secretary-General on the follow-up to the outcome f the Millennium Summit, delivered to the General Assembly, U.N. Doc. A/59/2005 (21 March 2005), available at http://www.globalpolicy.org/reform/ initiatives/annan/2005/followupreport.pdf.

73 See J. Bolton, Surrender Is Not an Option: Defending America at the United Nations and Abroad (2007), at 234-238.

74 Editorial, The Dysfunctional Human Rights Council, *New York Times*, 10 April, 2009, available at http://www.nytimes.com/2009/04/11/opinion/11sat2.html. (last visited 19 September 2009).

But just as important is the content of the Human Rights Council's actual work on human rights. It has some useful special rapporteurs on particular subjects (although they do not include the current special rapporteur on Palestine and Israel, Richard Falk, who has publicly and bizarrely endorsed the possibility that American neo-conservatives plotted 9-11).[75] Leave aside the Council's grotesque, near exclusive preoccupation with Israel; leave aside its inability to criticize, as of this writing, even so great a human rights disaster as Zimbabwe under Mugabe; leave aside its laughable current concern that the British monarchy might be an affront to universal human rights and that the UK ought to hold a referendum on the matter.[76] The serious work of the Human Rights Council today, that which will outlive today, is to redefine the notion of human rights to be centrally about ensuring that free speech can never be directed against a religion or, really, much of anything else. Human rights, at least in the leading UN body devoted to the subject, is about liberalism. This, alas, and much more, eludes The Parliament of Man.

And so the book ends, with chapters devoted to more platonic theorizing about future structures of global governance that might one day come to pass.[77] It is a pleasant way for an intellectual to pass the time, one surmises. Indeed, The Parliament of Man closes with an 'Afterword' devoted (again) to Locksley Hall.[78] The reader of this review who thinks I have devoted far too much attention to it here seriously underestimates what it means to Paul Kennedy.

75 E. Lake, U.N. Official Calls for Study of Neocon's Role in 9/11, *New York Sun*, 10 April 2008, available at http://www.nysun.com/news/foreign/un-official-calls-study-neocons-role-911. (last visited 19 September 2009) (quoting R. Falk on a March 24, 2008 interview with K. Barrett, "It is possibly true that especially the neoconservatives thought there was a situation in the country and in the world where something had to happen to wake up the American people. Whether they are innocent about the contention that they made that something happen or not, I don't think we can answer definitively at this point. All we can say is there is a lot of grounds for suspicion, there should be an official investigation of the sort the 9/11 commission did not engage in and that the failure to do these things is cheating the American people and in some sense the people of the world of a greater confidence in what really happened than they presently possess.").

76 See N. Allen, 'Britain should get rid of monarchy, says UN', *Telegraph* (London), 14 June 2008, available online at http://www.telegraph.co.uk/news/newstopics/theroyalfamily/2122182/Britain-should-get-rid-of-the-monarchy-says-UN.html (last visited 19 September 2009).

77 Kennedy, 2006, *supra* note 2, 279.

78 *Id.*, 281-290.

G.

One might come away from the criticisms offered in this essay thinking that they are essentially a realist critique of excessive idealism. That is true, but it is far from the entire critical story. The more fundamental critique is not realism seeing practical problems with a utopian idealism. It is instead idealism set against idealism, moral vision set against moral vision. There are alternative idealisms for the world, honorable alternatives, to that of federalized global governance. One is the ideal of a robust multilateralism of democratic sovereigns, who dream of global cooperation, messy and incomplete and un-platonic, not of planetary governance. Robust multilateralism accepts the virtues of autonomous and sovereign political communities as defined in today's world by democratic nation states, and it seeks their deep cooperation even without the expectation that they will find 'ever closer union'. That seems to me, at least, a morally better ideal than the overly-universalist dream of global governance. And yet the ideal of the multilateralism of democratic sovereigns lacks both its Locksley Hall and its Paul Kennedy. Given that ideal's inherent realist modesty, its lack of puffery and hubris, alas, it seems likely it always will.