CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Dominic McGoldrick and Sarah Williams

I. BETWEEN THE DEVIL AND THE DEEP BLUE SEA: CONFLICTED THINKING IN THE *AL-SAADOON* AFFAIR

On 31 December 2008 British forces transferred two Iraqi citizens, Faisal Attiyah Nassar Al-Saadoon and Khalaf Hussain Mufdhi (the claimants), to the jurisdiction of the Iraqi High Tribunal (IHT). The decision to transfer was taken following the finding by both the Divisional Court and the Court of Appeal that the proposed transfer would be lawful, dismissing the claimants' claim for judicial review.[1] In transferring the claimants, the United Kingdom violated a provisional measures order issued by the European Court of Human Rights (the ECtHR).[2] The Secretary of State for Defence characterized United Kingdom compliance with such orders 'normally [as] a matter of course' but cited 'exceptional circumstances' in the present case: '[w]e cannot comply with requests to act in a manner which the [. . .] Court of Appeal has held to be a breach of our international legal obligations.'[3] Given the expiry of the United Nations mandate for the Multi-National Force (MNF) in Iraq, the United Kingdom Government considered itself to have 'no lawful option other than transfer to the Iraqi authorities'.[4]

A. Background

The claimants were initially interned by British forces on 30 April and 21 November 2003 on grounds of security. Both had been senior members of the Ba'ath party in the district of Al-Zubair and were believed to have been concerned in the orchestration of

[1] *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2009] EWCA Civ 7 ('Appellate judgment'); *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2008] EWHC 3098 ('Divisional Court judgment').

[2] eg Letter dated 30 December 2008 from Fatos Araci, Deputy Section Registrar, European Court of Human Rights, to Mr. P Shiner, Public Interest Lawyers.

[3] L May, 'Pair Accused of Murder Handed Over to Iraqi Authorities' *The Independent* (31 December 2008).

[4] Letter dated 31 December 2008 from Derek Walton, Agent of the Government of the United Kingdom to Mr. TL Early, Section Registrar, European Court of Human Rights, cited in letter dated 13 January 2009 from Andrew Dismore, MP, Chair of the Joint Committee on Human Rights, to the Rt Hon John Hutton MP, Secretary of State for Defence.

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violence against the MNF in occupation. Held briefly in a detention facility of uncertain administration,[5] they were transferred to the British-run Divisional Temporary Detention Facility on 15 December 2003. On 20 April 2007, they were transferred to the British-run Divisional Internment Facility at Basra International Airport, where they remained until their transfer to Iraqi authorities.

An investigation carried out by the Special Investigations Branch of the Royal Military Police had implicated the claimants in the murder of two captured British servicemen. Accordingly, on 12 April 2006 a British officer laid a complaint before the special investigative panel of the Basra Criminal Court and on 18 May 2006 the claimants were produced to give evidence in response. They denied the allegations. The panel issued warrants for their arrest pursuant to the Iraqi Penal Code, and ordered their continued detention by the British contingent of the MNF. Henceforth, the claimants were classified for administrative purposes as criminal detainees rather than security internees. A Memorandum of Understanding had been concluded between the United Kingdom Government and the Iraqi Government on 8 November 2004, setting out 'the authorities and responsibilities in relation to criminal suspects'.[6] It made clear that the Iraqi government 'has 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]'.[7]

The Basra criminal court subsequently decided that the case fell within the jurisdiction of the IHT[8] and on 27 December 2007 the IHT requested the claimants' transfer into its custody. The United Kingdom Government declined to grant this request until such time as the English courts had considered the claimants' application for judicial review—but noted that its undertaking could not extend beyond 31 December 2008, at such time as Resolution 1790[9] expired and the independent mandate of the MNF in Iraq came to an end.[10]

At the High Court, and then the Court of Appeal, the claimants argued that they were within the jurisdiction of the United Kingdom for the purposes of the European Convention on Human Rights (ECHR); that transfer to the IHT would violate their rights under the Convention (due to substantial grounds for belief in a real risk of a flagrantly unfair trial, the use of the death penalty, and exposure to torture, inhuman or degrading treatment); that their transfer would breach customary international law on

[5] Some dispute remains as to whether the facility was US-run: Divisional Court judgment, para 25.

[6] Memorandum of Understanding, s 1, as reproduced in Divisional Court judgment, para 20.

[7] Memorandum of Understanding, s 2(1), as reproduced in Divisional Court judgment, para 20.

[8] *Law of the Iraqi Higher Criminal Court* (Law No 10 of 2005), as reproduced at http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf, Articles 1(2), 13.

[9] Resolution 1790 (2007), UN Security Council, para 1. See also Resolutions 1723 (2006), 1637 (2005), and 1546 (2004), especially para 10. The Divisional Court noted that an annex to Resolution 1790 includes a letter from the Iraqi Prime Minister 'which *inter alia* refers to the importance for Iraq of being treated as an independent and fully sovereign state, and identifies as a relevant objective that "the Government of Iraq will be responsible for arrest, detention and imprisonment tasks" and that when those tasks are carried out by the MNF 'there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq'.' Divisional Court judgment, para 21.

[10] See further *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence* [2008] EWCA Civ 1528, para 6.

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non-refoulement; and that the transfer would violate a legitimate expectation not to be exposed to the risk of the death penalty.[11]

B. *The Devil: a Qualified Approach to* Soering *in English law?*

The Divisional Court dismissed the claimants' application, finding that, although they were within the jurisdiction of the United Kingdom for the purposes of the ECHR, 'the United Kingdom was obliged under international law to transfer [them] into the custody of the Iraqi court; and that compliance with this obligation could not be said to involve a violation of ECHR rights.'[12] The Court of Appeal upheld this conclusion in principle but in any event chose to dismiss the claim as outside of the jurisdiction of the United Kingdom.[13] Quite apart from the broader conflict between the interpretations of the law emanating from the United Kingdom and Strasbourg, the decisions are thus of note on their own merits for the gloss they put on the English law of extraterritorial jurisdiction, and their adherence to a purported 'qualification' to the rule in *Soering*.

1. *Jurisdiction*

On the jurisdictional point, the Divisional Court correctly acknowledged *Al-Skeini*[14] as the controlling decision for the purposes of English law, incorporating Lord Brown's injunction to adhere closely to the 'watershed authority'[15] of *Banković v Belgium*.[16] It accepted that, prima facie, the physical position of the claimants was identical to that of Mr Mousa in *Al-Skeini* as well as the claimants in *Al-Jedda*.[17] At all material times, they were detained in facilities under the control of British forces in Iraq.[18] As such, it reasoned, the jurisdiction of the United Kingdom might be established 'by analogy with the extraterritorial exception made for embassies'.[19]

Somewhat unhelpfully, the Court folded preliminary consideration of any obligation the United Kingdom may have owed Iraq into its reasoning on jurisdiction. The Court had found it appropriate 'to look deeper', distinguishing *Al-Skeini* and *Al-Jedda* on the basis that in neither case was another State making any sort of 'active' claim for

[11] This latter point was dismissed in five brief paragraphs on the basis that 'the statements of policy do not go as far as the claimants need them to go in order to succeed on this issue.' Although the argument was clearly collateral to the main thrust of the case, it is a pity that this point did not receive further elaboration. Considering the 'exceptional' nature of the instant case, it is hard to envisage how the policy statements could have gone much further. Divisional Court judgment, paras 198–202.

[12] Appellate judgment, para 14.

[13] ibid, para 40.

[14] *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [2007] UKHL 26. See McGoldrick, (2007) 'Human Rights and Humanitarian Law in the UK Courts' Israel Law Review (2007) 40(2) 527–562.

[15] ibid para 108.

[16] *Banković v Belgium* (2001) 11 BHRC 435.

[17] *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, [2007] UKHL 58. The Secretary of State in this case conceded that, for the purposes of jurisdiction, the claimants fell within the principle in *Al-Skeini*.

[18] Divisional Court judgment, para 59. Indeed, the Court observed, '[i]f anything, the facilities in which the claimants [were] detained appear[ed] to have a greater degree of permanence than those in which Mr. Mousa was held'.

[19] *Al-Skeini* (n 14) para 132.

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jurisdiction.[20] The claimants, on the other hand, were acknowledged to have been 'subject to the jurisdiction and legal authority of the Iraqi courts since no later than 18 May 2006'. As a result, and clearly sensitive to the prima facie nature of a sovereign State's jurisdiction over its own nationals in its own territory, the Court described British forces as 'physical custodian[s]' of the claimants on behalf of Iraq.[21] In effect, the claimants were held purely 'on trust'—and thus the United Kingdom was under some sort of international obligation to transfer them on request. The Court struggled to articulate the nature of this obligation. Although it cited *B* (see below), it could not formulate anything more than a general obligation of non-interference in the sovereign affairs of a foreign state by analogy to diplomatic law.[22] It took greater comfort[23] from the decision of the United States Supreme Court in *Munaf v Geren*,[24] which found that detainees held by the US MNF contingent were within federal habeas jurisdiction[25] but that the habeas right did not mandate their release in order to 'rescue' them from surrender to Iraqi authorities for trial.[26] Although the Divisional Court did note that the jurisdictional context was 'very different',[27] it is worth emphasising that habeas corpus, under US law, is 'governed by equitable principles' and therefore that various concerns—including comity—may 'require a federal court to forego the exercise of its *habeas corpus* power'.[28] This is a very different approach to the regime applicable under English law, where it is by no means clearly established that the court enjoys any sort of discretion in permitting the transfer of an individual within UK jurisdiction in certain circumstances.

Nevertheless, the Divisional Court then proceeded to uphold UK jurisdiction over the claimants, rejecting the contention that Iraq's assertion of jurisdiction ipso facto robbed the UK of it:

> [The Secretary of State's] submissions on attribution and responsibility, in putting their entire focus on the jurisdiction and legal authority of the Iraqi courts over the claimants, suggest that the British forces have no autonomous role in the matter of the claimants' detention or transfer into the custody of the IHR. But plainly they do. They are lawfully present in Iraq as a contingent of the MNF pursuant to a UN mandate, subject to the exclusive jurisdiction of the United Kingdom and independent of the Iraqi state . . . The British forces have physical custody and control of the claimants. They have 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. Thus the transfer of the claimants into the custody of

[20] Divisional Court judgment, para 62. In *Al-Skeini*, Iraq was in a state of occupation at the material time and so did not have the capacity to assert its jurisdiction; in *Al-Jedda*, the claimants had been interned solely as a matter of British policy under the authority of Resolution 1546.

[21] ibid paras 63–66.

[22] ibid para 69.

[23] Appellate judgment, para 29.

[24] *Munaf v Geren*, slip opinion, 553 US___ (2008) 17–21, 28.

[25] In another decision, handed down on the same day, the US Supreme Court narrowly upheld an approach to extraterritoriality governed by 'objective factors and practical concerns, rather than formalism', even though the test approved ('complete jurisdiction and control') is somewhat higher than *Banković*. *Boumediene v Bush*, slip opinion, 553 US ___ (2008) 25, 34, 38–39. See also *Rasul v Bush*, 542 US 466 (2004) per Justice Kennedy (487); and generally Jenkins, '*Habeas corpus* and extraterritorial jurisdiction after *Boumediene*: towards a doctrine of 'effective control' in the United States' Human Rights Law Review, forthcoming. Advance Access published 11 May 2009: doi 10.1093/hrlr/ngp001.

[26] Divisional Court judgment, para 73.

[27] ibid, para 79.

[28] *Munaf* (n 24) 15, citing inter alia *Francis v Henderson*, 425 U.S. 536, 539 (1976); *Fay v Noia*, 372 U.S. 391, 438 (1963); *Ex parte Royall*, 117 US 241, 251 (1886).

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> the IHT would in our view be an action properly attributable in law to the United Kingdom . . . [29]

In summarizing its finding on jurisdiction, the Court added '[t]he very real differences in legal context, important though they are, are not sufficient in the final analysis to distinguish the position of the claimants from that of Mr. Mousa in *Al-Skeini* and of the claimant in *Al-Jedda* with regard to article 1 jurisdiction. The analogy with the extra-territorial exception for embassies and the like still holds good.'[30] As such, although the decision is hardly straightforward in this respect, it upheld the practical focus of *Al-Skeini*, and confined the question of the UK's obligations under international law to the substance of the case rather than the foundational matter of jurisdiction.[31]

Unfortunately, despite adopting a similar recital of the controlling law,[32] the Court of Appeal departed from the Divisional Court in its application. It is worth setting out the key part of its reasoning in full. The Court's reasoning in respect of UK jurisdiction (or the lack thereof) after 31 December 2008 is more or less common ground, and not of great concern:

> Until 31 December 2008 the United Kingdom forces at Basra enjoyed the guarantees of immunity and inviolability provided by CPA Order No. 17 (Revised). But those measures prohibited invasive sanctions; they did not confer executive power. In my judgment, from at least May 2006 until 31 December 2008, the British forces at Basra were not entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented to by Iraq, or otherwise authorized by a binding resolution or resolutions of the Security Council. So much flows from the fact of Iraq's sovereignty, and is not contradicted—quite the reverse—by any of the United Nations measures in the case. Thus the MNF mandate was extended by the Security Council at Iraq's express request. The letter requesting its extension (which was attached to Resolution 1790 (2007)) expressly stated at paragraph 4, '[t]he Government of Iraq will be responsible for arrest, detention and imprisonment tasks'. The various material Security Council Resolutions (1483 (2000), 1546 (2004) and 1790 (2007)) all emphasise the primacy of Iraqi sovereignty. As regards criminal detentions, CPA Memorandum No. 3 (Revised) makes it plain that so far as criminal detainees may be held by any national contingent of the MNF, they are held, in effect, to the order of the Iraqi authorities.
>
> In these circumstances, the United Kingdom was not before 31 December 2008 exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign State.[33]

This passage is striking, not least for the disregard it shows to the Secretary of State's concession in *Al-Jedda*. In the period from 2003 to 18 May 2006 (when the claimants were classified as security internees), the UK Government has accepted that it *was* exercising jurisdiction over the class of individual within which they fell. Notwithstanding the absence of such a caveat in the latter paragraph above, the brief reference to 'May 2006' in the former might be taken to reflect this view. The apposite question, therefore, explores what the contours of the UK's jurisdiction were in fact. Lord Rodgers observed that:

> [I]f there were ever any question as to the exact interplay between the rights and duties of the British forces as the forces of an occupying power and as members of the MNF under Resolution 1511, those questions no longer arose after the end of June 2004. From that

[29] Divisional Court judgment, para 79.
[30] ibid para 82.
[31] See further Appellate judgment, paras 49–50.
[32] ibid paras 24–27.
[33] ibid paras 32–33; see also para 40.

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> point onwards, the legal position of the members of the MNF . . . was governed by Resolution 1546.[34]

The relevant part of Resolution 1546 authorises the MNF:

> . . . to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to *this* resolution.. so that, *inter alia*, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities.[35]

In the appended letter from the Prime Minister of Iraq, the MNF mandate is framed by reference to 'maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council.'[36] The US Secretary of State's letter details the following:

> Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security . . .
>
> In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes.[37]

The basis for the UK's independent exercise of jurisdiction over security internees (under the umbrella of the MNF) is thus immediately apparent. It should be noted, however, that the list of discrete functions within the 'maintenance of security' and force protection mandate is illustrative, not exhaustive. Certainly, there is no express wording to exclude criminal detention from the MNF's remit. CPA Memorandum No 3 (Revised), which was issued some weeks after the passage of the Resolution, makes clear in fact that the MNF *does* 'have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees' provided that they are 'handed over to Iraqi authorities as soon as reasonably practicable'. Detainees may have been retained in MNF custody 'at the request of the appropriate Iraqi authorities based on security or capacity considerations'. (Neither the Court of Appeal nor the Divisional Court quite addressed the question as to whether, even if UK jurisdiction ceased at such point as it 'handed over' criminal detainees to Iraqi authorities, jurisdiction was not regained when the Iraqi authorities requested their continued custody by the MNF.) Certainly, the Court of Appeal failed to consider the insight offered by the MoU. Notwithstanding the absolute connotation of CPA Memorandum No 3 (Revised), section 3(4) of the MoU clearly contemplates that

[34] *Al-Jedda* (n 17) para 62.
[35] Resolution 1546 (n 9) para 10.
[36] ibid at Annex.
[37] ibid.

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the UK can exercise independent jurisdiction in Basra, within limited circumstances.[38] It provides:

> 4. In relation to any criminal suspect transferred to the [Iraqi government] by UK MNF-I from its detention facilities, the [Iraqi government] will:
>
> (a) inform UK MNF-I before releasing any individual and will comply with any request by UK MNF-I that UK MNF-I should reassume custody if,
>
> i. the individual is wanted for prosecution by any state that has contributed forces to the MNF for breaches of the laws and customs of war, or
> ii. the internment of the individual is necessary for imperative reasons of security,
>
> in which case UK MNF-I will assume custody of that individual after consultation between [the UK and Iraq] to reach an agreed solution.

This provision both recognizes the independent jurisdiction and mandate of British forces with respect to the maintenance of security (section 3(4)(a)(ii)) and illustrates that the UK could exercise a residual criminal jurisdiction over the claimants. It does not seem correct to say that the UK enjoyed no sovereign status of its own while operating as part of the MNF. However, to assume arguendo that the Court of Appeal was right, did the lack of formalism matter anyway? The Human Rights Committee has independently endorsed an approach to extraterritorial application of the ICCPR based on effective control; it continued to note that the principle applied 'regardless of the circumstances in which such power or effective control was obtained' and expressly illustrated its point by reference to troops operating under a foreign mandate.[39] Such a principle has not yet been endorsed in Strasbourg jurisprudence, but is not necessarily inconsistent with the (somewhat strained) decision in *Behrami*.[40]

Taken all in all, even adopting a narrow reading of the meaning of the Court of Appeal's finding, the circumstances do not seem clearly to reflect the UK's role as a mere 'agent' of the Iraqi Government. Moreover, as the Divisional Court noted,[41] a finding that the UK in fact had no jurisdiction over the claimants at the material time would also serve to exclude any hypothetical claim for ill-treatment in custody—a retrograde step which is not remedied by the potential availability of other disciplinary or criminal means of recourse. For these reasons, and despite its imperfections, the conclusion reached by the Divisional Court is to be preferred.

The occasion should also be seized to consider whether the Court of Appeal's decision offered a nuanced reading of *Al-Skeini*. Summarizing four core propositions of

[38] Both decisions are silent as to the status of the MoU. Although it is assumed for the present purposes that it is a non-binding agreement, and thus of evidential value only, a finding otherwise would not be fatal. On the range of instruments which might be described as MoUs, see Aust, *Modern Treaty Law and Practice*, (2nd edn, CUP, Cambridge, 2007) 32–57.

[39] *General Comment No 31: Nature of the General Legal Obligation Imposed on State Parties to the [ICCPR]* (Human Rights Committee, 26 May 2004) para 10.

[40] *Behrami and Behrami v France*, Application No 71412/01, 2 May 2007, not yet published. See Droege, 'Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges' (2008) 90 (871) International Review of the Red Cross 669, 686; Milanovic and Papic, 'As Bad as it Gets: The European Court of Human Rights's *Behrami and Saramati* Decision and General International Law' (2009) 58 ICLQ 267.

[41] Divisional Court judgment, para 82.

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the rule on extraterritoriality (bearing in mind that, as a concept which is 'strategic rather than lexical', it has 'no sharp edge'), Laws LJ recalled that:

1. It is an *exceptional* jurisdiction.
2. It is to be ascertained in *harmony* with other applicable norms of international law.
3. It reflects the *regional* nature of the Convention rights.
4. It reflects the *indivisible* nature of the Convention rights.[42]

The first two propositions were further interpreted to conclude that jurisdiction for the purposes of the ECHR must be 'an exercise of sovereign *legal* authority, not merely *de facto* power . . . The power must 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'.[43] This assertion merits a degree of caution, at least in the understanding of the circumstances envisaged by the phrase 'given by law'. It should not—as the US Supreme Court noted (albeit in a different context) in *Boumediene*—be read to apply a formalistic requirement: extraterritorial jurisdiction does not depend upon the formal grant of a lease, the passage of a binding Resolution, or the conclusion of a treaty (although all these instruments may be of great evidential value). Rather, the term might better be understood as signifying the idea that extraterritorial jurisdiction must draw on the legal functions of the State to which it attaches—to the extent, as the Court put it, that the *espace juridique* of the ECHR 'must in considerable measure be replicated', albeit 'in a narrow scope'.[44] None of this reasoning compelled the Court's finding that the UK did not possess jurisdiction over the claimants, and thus required it to disturb the conclusion reached by the Divisional Court.

2. *The case of 'B' and the higher test for extraterritorial application of Soering*

In short, *Soering* establishes the potential liability of an ECHR State party where it takes action 'which has as a direct consequence the exposure of an individual to proscribed ill-treatment.' The ill-treatment need not be a certainty: it is only necessary to establish 'substantial grounds' for 'believing that the person concerned . . . faces a real risk'.[45] The *Soering* principle is expressly confined to torture or ill-treatment under Article 3 ECHR, but may be of broader application.[46] Recently, the Divisional Court applied for the first time a similar protection in the context of Article 6.[47]

The potential application of *Soering* outside UK territory was accepted by the Divisional Court.[48] However, both the Divisional Court and the Court of Appeal were significantly influenced by the latter's decision in *B*,[49] an authority which re-frames extraterritorial *Soering* protection significantly. Indeed, even though counsel for the claimants argued (perhaps with some force[50]) that *B* is wrongly decided, the Court of

[42] Appellate judgment, para 37, emphasis supplied.
[43] ibid.
[44] ibid para 39.
[45] *Soering v UK* 11 EHRR 439, para 91.
[46] Divisional Court judgment, para 46, citing *R (Ullah) v Special Ajudicator* [2004] 2 AC 323, para 24.
[47] *Brown v Government of Rwanda and the Secretary of State for the Home Department* [2009] EWHC 770 (Admin). For an exceptional Article 8 application see *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.
[48] Divisional Court judgment, paras 85–88.
[49] *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643.
[50] eg Divisional Court judgment, para 92.

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Appeal recalled that in 'civil' matters (such as this) it remains fettered by *stare decisis* and can do no other.[51]

B concerned an attempt by children who had sought asylum in Australia (and been detained by the Australian authorities in somewhat dubious circumstances) then to claim asylum in the British consulate in Melbourne, where they presented themselves. Although they ultimately returned to Australian custody voluntarily (under more or less veiled threat of 'removal' from the consulate), they subsequently sought judicial review of the decision not to permit them to remain, thus exposing them to the risk of treatment prohibited by the ECHR. On reaching the Court of Appeal, it was held that:

> In a case such as *Soering* the contracting state commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another state. The same is not necessarily true where a state permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the [ECHR] can require states to give refuge to fugitives within consular premises if to do so would violate international law . . . [T]here must be an implication that obligations under a Convention are to be interpreted, so far as possible, in a manner that accords with international law . . .
>
> We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving state requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving state can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from territorial jurisdiction: see article 55 of the 1963 Vienna Convention on Consular Relations. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending state to permit the fugitive to remain within the diplomatic premises in defiance of the receiving state. Should it be clear, however, that the receiving state intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to rake refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances, the Convention may well impose a duty on a contracting state to afford diplomatic asylum.
>
> It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined . . . We do not consider that the United Kingdom officials could be required by the Convention and by the Human Rights Act 1998 to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury.[52]

This reasoning raises two difficult issues. First, it seems to suggest that the *Soering* protection under the ECHR may be qualified by other obligations under international law; and second, it apparently advocates a higher test ('treatment so harsh as to constitute a crime against humanity') for any exception. These issues shall be considered in turn.

The extent to which *B* can be considered to lay down a principle of general application is uncertain. The Court of Appeal and Divisional Court clearly anticipated that it could—despite being 'based upon very limited (and old) authority' and situated in a discrete legal context of considerable controversy (diplomatic asylum) 'where the law

[51] Appellate judgment, paras 45–47.

[52] *B* (n 49) paras 84, 88–89.

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is ill-defined.'[53] The Divisional Court acknowledged that *B* does not explain 'the precise basis on which the relevant principles of international law displaced the obligations otherwise arising under the Convention'—although *Al-Jedda* does demonstrate that such obligations can do so, it is rightly considered as 'a special case' on the basis of the express aspiration to supremacy over other obligations in the relevant provision (Article 103 of the UN Charter). Most importantly, the Court recognized the potential circularity of argument that *B* may introduce:

> [N]otwithstanding the importance attached in *Banković* to achieving, so far as possible, conformity between the Convention and other principles of international law, we think that the Strasbourg court would be very slow to allow the protection conferred by the Convention to be displaced by other international law obligations of contracting states. *Soering* itself was an extradition case, but there was no suggestion that obligations arising under the relevant extradition treaty might qualify the application of article 3.[54]

Unfortunately, the Divisional Court was neither inclined nor felt able to depart from *B*. Again, it struggled to justify its conclusion as to the obligation owed to Iraq by the UK on anything other than a loose 'trust' analysis.[55] The Court of Appeal's analysis was hardly more compelling.[56] Neither decision confronted the question as to how this norm conflict might be properly addressed. Instead, both concluded that *Soering* did not protect the claimants, unless it could be shown that they fell within the higher standard of *B*.

The Divisional Court noted, rightly, that the source of the test in *B* is not apparent, nor even is it clear whether it represents one test (equivalence to a crime against humanity) or two (equivalence to a crime against humanity *or* clear necessity to protect individuals from the immediate likelihood of serious injury).[57] Given that a crime against humanity requires, inter alia, proof that the particular crime was committed in the context of a widespread or systematic attack upon a civilian population, it is hard to appreciate quite what standard of treatment inflicted upon an individual alone could meaningfully be considered to be analogous. Despite the strain this places on the Court of Appeal's words, it is better to read *B* as imposing a single tripartite standard—appreciation of 1) a clear necessity to prevent 2) the immediate likelihood of 3) serious injury—and treat the reference to a crime against humanity as a rhetorical flourish. This is clearly higher than the *Soering* test, which can be similarly rendered into tripartite form to require appreciation of 1) substantial grounds to believe in 2) a real risk that an individual might receive 3) prohibited treatment as a direct consequence of the transfer.

From an abundance of caution, the Divisional Court ostensibly applied 'both' tests expressly referred to in *B* as well as considering 'whether the claimants would be exposed to treatment contrary to internationally accepted norms'. Most unfortunately, it added:

> If the treatment to which the claimants would be exposed would provide a justification in international law for declining to transfer them into the custody of the Iraqi court, then in our view the international law obligations of the United Kingdom fall away and the Convention can be relied on in the normal way to resist the transfer.[58]

[53] Divisional Court judgment, para 90.
[54] ibid, para 91.
[55] ibid para 92.
[56] Appellate judgment, para 48.
[57] Divisional Court judgment, para 93.
[58] ibid para 94.

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The implication that the UK's obligations under the ECHR are in some way 'outside' international law is troubling, and contrary to Strasbourg jurisprudence.[59] By cordoning the ECHR off from the general *corpus* of international law, the Court created an artificial circularity which largely frustrated the exercise upon which it purported to embark. Somewhat defensively, it noted that in its opinion the claimants would have failed in respect of their arguments on torture or ill-treatment[60] and the right to a fair trial[61] under both *Soering* and *B*. This did not prove to be the case, however, with regard to the risk of execution.

On the issue of capital punishment, the Divisional Court accepted that there are substantial grounds for believing in a real risk of the claimants' execution, meeting the *Soering* test.[62] It did not consider that the statements made by various Iraqi officials amounted to an effective assurance that the death penalty would not in fact be handed down. However, it continued to observe that capital punishment per se is not yet unlawful under general international law, provided that it is only imposed for 'the most serious' crimes in the context of a trial which meets international standards of fairness.[63] As such, it considered that the risk of the claimants' execution does not suffice under *B* to relieve the United Kingdom of its obligation to transfer them to Iraq,[64] presumably on the theory that execution does not amount to 'serious injury' for the purposes of international law. The Court of Appeal similarly dismissed arguments based on customary law that execution by hanging is unlawful.[65]

The result of this reasoning, although open to criticism in a number of respects, is clear: the application of *Soering* is significantly qualified—one might even say displaced altogether[66]—in extraterritorial cases. This will remain the position in UK law at least until such time as the matter is raised at the House of Lords (which will not occur in the instant case[67]) or considered at Strasbourg.[68]

[59] See eg *Behrami* (n 40) para 122.

[60] Divisional Court judgment, paras 96, 166–167, 176, 185, 191–194, 196–197. On the role of diplomatic assurances, see also Droege (n 40) 694; Arbour, 'In Our Name and On Our Behalf' [2006] 55(3) ICLQ 511, 521–522.

[61] Divisional Court judgment, paras 96, 109, 115, 130, 137, 140–141, 196. It should be noted that the *Soering* test in respect of a risk of Article 6 violations is somewhat higher than that for Article 3: para 100, citing to *EM (Lebanon) v Secretary of State for the Home Department* (n 47) paras 3, 34–35, 45, 53–57; *Othman (Jordan) v Secretary of State for the Home Department* [2008] EWCA Civ 290, paras 15–19. See also Appellate judgment, paras 16, 53, 55.

[62] Divisional Court judgment, paras 148, 158–159. See also Appellate judgment, para 22.

[63] Divisional Court judgment, paras 160–162. See further *General Comment No 6: the Right to Life* (Human Rights Committee, 1982) paras 6–7. Although the Divisional Court considered the fairness question to have been resolved (n 61), compare *In the matter of sentencing Taha Yassin Ramadan*, Application for Leave to Intervene as *Amicus Curiae* and Application in Intervention as *Amicus Curiae* of United Nations High Commissioner for Human Rights, Iraqi High Tribunal, 8 February 2007, on file with the authors.

[64] Divisional Court judgment, para 163.

[65] Appellate judgment, paras 57–71. Of general interest, note para 59 for a brief consideration of the extent to which a rule of customary law might be considered a cause of action in English courts.

[66] Compare *Al-Jedda* (n 17) per Baroness Hale, para 126.

[67] Leave to appeal to the House of Lords was refused: Appellate judgment, para 1.

[68] The ECtHR has indicated to the UK that it is likely to render a decision in this case, answering an application which claims violations of the claimants' rights under Articles 2, 3, 6, 13 and 34 of the ECHR.

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C. The Deep Blue Sea: a Binding Obligation Not to Transfer

Outside the courtroom, matters were further complicated for the UK Government by the issue of an ECtHR interim measures order in respect of the claimants, requiring that any transfer to Iraq was suspended.

Rule 39 of the ECtHR's Rules of Court provides that:

> 1. The Chamber, or where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

Although the text of the ECHR does not expressly recognize a right to interim measures,[69] the Grand Chamber of the ECtHR has made clear that the violation of a Rule 39 indication may entail a State's legal responsibility under Article 34 (the right of individual petition).[70] Taking account of 'the other principles of international law of which [the ECHR] forms a part',[71] the Court concluded:

> Likewise, under the Convention system, interim measures, as they have consistently been applied in practice [. . .], play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 . . .
>
> The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.[72]

Failure to comply with an interim measures order is unusual but not unprecedented.[73] The ECtHR ruled that the Article 34 obligation had been violated in *Mamatkulov*, as well as in *Shamayev* (where it noted that its own capacity to overcome certain hindrances did not rescue a state from its wrongful act).[74]

[69] *Cruz Varas v Sweden* (1991) 14 EHRR 1, paras 92, 97–103.

[70] *Mamatkulov and Askarov v Turkey* 2005-I, 41 EHRR 494 GC, para 102.

[71] ibid, paras 111–117. For the position at the ICJ, see *LaGrand Case (Germany v United States of America* [2001] ICJ Rep 466, paras 102–110. For the position at the Human Rights Committee, see *General Comment No 33: the Obligations of States Parties under the Optional Protocol to the [ICCPR]*, Advance Unedited Version, 5 November 2008, para 19; *Sholam Weiss v Austria*, 15 May 2003, Communication No 1086/2002, para 11.1; *Dante Piandiong, Jesus Morallos and Archie Bulan v the Philippines*, 19 October 2000, Communication No 869/1999, paras 5.1–5.4; *Glen Ashby v Trinidad and Tobago*, 26 July 1994, Communication No. 580/1994, paras 10.8–10.10. For the position under the American Convention on Human Rights, see *James et al v Trinidad and Tobago*, Order of 3 April 2009, unpublished, 5–7; *Hilaire et al v Trinidad & Tobago*, Judgment, 21 June 2002, Inter-American Court of Human Rights (Series C) No 94 (2002), paras 26–33, 190–200; *Juan Raul Garza v United States*, Decision on the Merits, 4 April 2001, Inter-American Commission on Human Rights, Case No 12.243, Report No 52/01, para 117.

[72] *Mamatkulov* (n 70) paras 125, 128.

[73] *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP, 2009) 844, fn 159.

[74] *Shamayev v Georgia and Russia* 2005–III, paras 473, 478–479.

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Failure to comply does not automatically result in the finding of a violation, but instead triggers the ECtHR's inquiry as to whether the respondent State also failed to honour its commitment not to hinder the applicant's right of petition.[75] The permanent removal of an individual from circumstances where they may effectively instruct their representatives in pursuing their case may be an especially relevant consideration.[76] That said, in cases concerning expulsion/extradition, the test is frequently met on the basis of the non-compliance alone.[77] In a recent decision in this context, the ECtHR described interim measures as 'binding' for the first time.[78] Perhaps relevant to the instant case, the ECtHR noted in *Olaechea Cahuas* that an applicant may be hindered in their right of petition by non-compliance with an interim measure, even though the risk to which the measure was originally addressed did not come to pass.[79]

The issue of the ECtHR order crystallized the legal dilemma in which the UK found itself on the afternoon of 31 December 2008. Domestic courts clearly indicated that its legal obligation lay in one direction; Strasbourg clearly indicated that its legal obligation lay in another, plainly incompatible, direction. Somewhat ironically, had either the Divisional Court or Court of Appeal opportunity to consider it, the interim measure order might even have met the test of *B*—the binding nature of interim relief is at least arguable as a matter of general international law,[80] and thus might have been sufficient to resist the UK's obligation to Iraq. Certainly, at such time as the ECtHR passes a judgment in this case,[81] the UK should be prepared to be found in violation at least of its Article 34 obligation.

D. Comment: Unavoidable and Irreconcilable Norm Conflicts

Quite apart from the vagaries of the reasoning on specific points, the al-Saadoon affair as a whole might be characterized by the idea of 'norm conflict'. Milanović recalls *Soering* as an example of an unavoidable and irreconcilable norm conflict,[82] describing a scenario where meeting one obligation necessarily entails the breach of an equal but distinct other obligation:[83] the State must breach either its obligation to transfer the individual or its obligation to protect that individual from the consequences of transfer. Conflicts of this type are particularly hard to resolve in the context of international law, lacking as it does 'the key method for resolving genuine norm conflicts . . . a centralised system with a developed hierarchy, and at that a hierarchy based on the *sources* of norms.'[84] Arguably, the great ambiguity surrounding the reasoning underlying the

[75] *Olaechea Cahuas v Spain* 2006–X, paras 67, 71.
[76] *Mamatkulov* (n 70) para 108.
[77] Harris et al (n 73) 843.
[78] *Aoulmi v France* 2006–I, 46 EHRR 1, para 111.
[79] *Olaechea Cahuas* (n 75) para 81.
[80] See, eg *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment (not yet published), 19 January 2009, paras 50–53, 61 (2). Whereas earlier failures to comply may have mitigated by confused circumstances and short notice, such an argument could not be made on this occasion. Addo, '*Vienna Convention on Consular Relations (Paraguay v United States of America) ('Breard')* and *LaGrand (Germany v United States of America)*, Applications for Provisional Measures' [1999] 48(3) International and Comparative Law Quarterly 673, 679.
[81] (n 68).
[82] Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative and International Law 1, forthcoming. Advance copy (available at http://ssrn.com/abstract=1372423) 75.
[83] ibid, 6.
[84] ibid, 7–9.

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application of *B* to the present case emanated from judicial reluctance to confront the possibility that the UK was under two equal but opposite obligations, and thus to step into the realm of policy-making by making a *choice* between the two. Attempts to force a resolution of the norm conflict—by using the test derived from *B* to establish a quasi-hierarchy of norms, with 'general' international law norms superior to those of the ECHR—were both unconvincing and, ultimately, futile. The UK has been 'outed' in having to make a choice between one obligation and the other, between expediency[85] and principle.

MATTHEW E CROSS* & SARAH WILLIAMS**

II. IMMUNITY FOR HEADS OF STATE ACTING IN THEIR PRIVATE CAPACITY—*THOR SHIPPING A/S V THE SHIP 'AL DUHAIL'*

The doctrine of State immunity has undergone considerable change in modern times. No longer is it the position under customary international law, and the law of most national jurisdictions, that States and heads of State are afforded absolute immunity from the jurisdiction of international and national courts and tribunals. In particular, the prevailing practice of States today is to apply a restrictive doctrine of State immunity, whereby immunity is not afforded in relation to what can broadly be described as 'commercial transactions'.[1] The development of this practice was in part due to the explosion in the growth of international trade and investment, which led to the recognition that there would otherwise exist an unfair balance of power if private litigants were denied a judicial remedy in situations where States (or heads of State) engage in commercial activities outside of what would ordinarily be termed official governmental functions.

Despite the inroads which have been made in refining the doctrine of State immunity to meet modern demands, the law remains undeveloped in a number of important aspects. One such aspect is the situation where an application is brought *in rem* against a ship owned by a head of State, where that head of State is acting in his or her personal capacity, and where no commercial activity has occurred within the jurisdiction of the forum State. This article will examine the law on this issue in light of the recent Federal Court of Australia decision in *Thor Shipping A/S v The Ship 'Al Duhail'*.[2] The case concerned an application brought *in rem* in the Federal Court of Australia against a vessel owned by the Amir of Qatar. The Amir, as the head of State of Qatar, appeared

[85] See, eg Divisional Court judgment, para 87.

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[1] As evidenced by State practice, State immunity is often restricted in relation to commercial activity, the infringement of intellectual property rights, employment contracts, and personal injury. See H Fox QC, *The Law of State Immunity* (OUP, Oxford, 2002) 22.

[2] [2008] FCA 1842 (Dowsett J) (hereinafter, *Thor Shipping*).

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