to interpret human rights instruments,[113] it is probable that the reasoning and interpretive analysis of the Court in *Bijelic* will take on increased importance as an authority supportive of a trend in general international law to take into account the relative autonomy of sub-State government units in existence before a succession event to which impugned conduct may be attributed.

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II. EUROPEAN COURT OF HUMAN RIGHTS *MEDVEDYEV ET AL V FRANCE* (GRAND CHAMBER, APPLICATION NO 3394/03) JUDGMENT OF 29 MARCH 2010

A. Introduction

On 29 March 2010, the European Court of Human Rights (ECtHR), sitting as a Grand Chamber, delivered its Judgment in the *Medvedyev v France* case, which involved the interdiction and the exercise of enforcement jurisdiction over a drug smuggling vessel on the high seas.[1] The case was referred by both the applicants and the Respondent State to the Grand Chamber, following the Judgment of a Chamber of the Fifth Section of the Court, on 10 July 2008.[2] The Grand Chamber accepted this referral and the public hearing took place on 6 May 2009.[3] This decision is of considerable importance as one of the very few decisions of the Strasbourg Court which has touched upon issues pertaining to the law of the sea, let alone to interdiction of vessels on the high seas, and the only case to have found a violation of the Convention on the part of the interdicting State, namely France.

In general, maritime interdiction is a very common practice[4] in the fight against the illicit traffic of narcotic drugs, which is one of the most worrisome facets of

[113] JB Quigley, *The Genocide Convention: an International Law Analysis* (Ashgate Publishing, Kent, 2006) 77. Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, at the Conference Honouring Professor John Dugard, Leiden University Law Faculty, 20 April 2007 in 20 Leiden JIL (2007) 745–775.

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[1] See *Medvedyev et al v France*, Judgment of 29 March 2010 (Grand Chamber, Application No 3394/03); available at <www.echr.coe.int>; (accessed 19 April 2010).

[2] See *Medvedyev et al v France*, Judgment of 10 July 2008 (Fifth Section) (hereinafter 2008 Judgment). A short comment at the day of the hearing of the case was provided by T Thienel, *Oral Argument in* Medvedyev v France; available at <http://invisiblecollege.weblog. leidenuniv.nl/2008/05/13/oral-argument-in-medvedyev-v-france> (accessed 20 December 2008).

[3] For the web cast of hearing see at <http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20090506-1/en/> (accessed 19 April 2010).

[4] The terms 'interception' or 'interdiction' are used interchangeably to connote the physical interference with foreign-flagged or stateless vessels on the high seas. However, as a matter of international law, neither of these terms has any legal significance *eo nomine*. Rather, the only case of interference acknowledged by international law on the high seas is the right to visit enshrined in art 110 of the of the United Nations Convention on the Law of the Sea, 1833 UNTS 397 (hereinafter: LOSC).

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transnational organized crime.[5] It has been adopted by States, either through informal means, for example through the *ad hoc* consent of the flag State, or through bilateral and multilateral treaties, such as the Caribbean ship rider agreements[6] and the Vienna Convention respectively.[7] Notwithstanding the growing number of interdiction operations for counter-drug trafficking purposes carried out all over the world, there has been virtually no case brought before an international adjudicative body for violation of human rights law.[8] Thus, the decision in the case of *Medvedyev v France* attains greater prominence by adding a very significant, yet much neglected, parameter to the legal contours of interdiction of drug smuggling vessels, that is, human rights considerations.

B. The Case before the ECtHR

In short, the facts of the case were as follows: the *Winner*, a freighter sailing under the Cambodian flag on the high seas of the Atlantic Ocean, was suspected of carrying illicit drugs. France made a request to Cambodia for permission to stop and search the vessel, which was granted in a diplomatic note dated 7 June 2002, from the Cambodian Ministry of Foreign Affairs to the Ambassador of France in Phnom Penh.[9] On 13 June 2002 the French frigate *Le Hénaff* sent to intercept the freighter spotted a merchant ship off Cape Verde, which was not flying a flag, but was identified as the *Winner*. During the interception operation the freighter manoeuvred to avoid the frigate while the crew jettisoned packages containing cocaine over the stern into the sea. Only after a number of shots had been fired—first warning shots and then shots over its bow—did the *Winner* stop. Navy officials boarded the ship and the crew was arrested and confined to quarters, while the *Winner* was taken to the French port of Brest.

On 24 June 2002, the Brest prosecutor's office opened an investigation and two investigating judges were appointed. On 26 June 2002, 13 days after its interdiction, the *Winner* entered Brest harbour under escort. The cargo was handed over to the French police and the crew remained in custody. On the same day, the applicants were presented to the investigating judges at the police station in Brest, to determine whether

[5] Although a wide variety of methods are utilized by drug traffickers in plying their trade, the use of private and commercial vessels has long been extensive. On traffic of narcotic drugs generally see H Ghodse, *International Drug Control into the 21st Century* (Ashworth, Kent, 2008).

[6] In 2009, there were 24 bilateral counter-drug smuggling agreements between US and other States in the Caribbean region, which provided for the institution of ship-rider; see the latest International Narcotics Control Strategy Report (2009), available at <http://www.state.gov/p/inl/rls/nrcrpt/ 2009>.

[7] See United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted Vienna, 19 December 1988) 21 ILM (1988) 1261 (hereinafter: Vienna Convention).

[8] See also *Rigopoulos v Spain*, Application No 37388/97 EHRR 1999-II. In comparison, apparently there have been more relevant cases with regard to interdiction of vessels carrying asylum seekers on the high seas: see inter alia *Haitian Center for Human Rights v United States*, Case 10.675, Report No 51/96, Inter-American Commission of Human Rights Doc OEA/Ser.L/V/II.95 Doc 7 rev (13 March 1997).

[9] The Diplomatic Note read as follows: The Ministry of Foreign Affairs and International Cooperation (. . .) has the honour formally to confirm that the Royal Government of Cambodia *authorises the French authorities to intercept, inspect and take legal action against the ship Winner*, flying the Cambodian flag (. . .)' (emphasis added).

or not their police custody should be extended. On 28 and 29 June 2002, the 11 crewmembers were charged with a series of drug crimes and placed in detention pending trial. The applicants applied to the Investigation Division of the Rennes Court of Appeal to have the evidence disallowed, submitting that the French authorities had acted *ultra vires* in boarding the *Winner*. In a final judgment of 15 January 2003, the Court of Cassation dismissed their appeal, explaining that:

> (. . .) in so far as Cambodia, the flag State, expressly and without restriction authorised the French authorities to stop the *Winner* and, in keeping with Article 17 of the Vienna Convention, only appropriate action was taken against the persons on board, who were lawfully taken into police custody as soon as they landed on French soil, the Investigation Division has justified its decision.

In May 2005, la cour d'assises spéciale d'Ille-et-Vilaine Ille-et-Vilaine found the applicants Georgios Boreas, Guillermo Sage Martinez and Sergio Cabrera Leon guilty of conspiring to import drugs illegally and sentenced them to twenty, ten and three years' imprisonment respectively, while it acquitted the rest of the accused.

On 19 December 2002, the applicants brought a case before the Court claiming an arbitrary deprivation of their liberty. Relying on article 5(1), on the one hand, they complained that their deprivation of liberty had been unlawful, especially in the light of the relevant international law, while, on the other, relying on article 5(3), they complained that they had waited 15 days to be brought before 'a judge or other officer authorised by law to exercise judicial power'. The relevant provisions of the Convention are the following:

Article 5:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.[10]

The Chamber concluded that the applicants had not been deprived of their liberty in accordance with a procedure prescribed by law and consequently held, unanimously, that there had been a violation of article 5(1). However, considering that the length of that deprivation of liberty had been justified by the 'wholly exceptional circumstances' of the case, in particular, the inevitable delay entailed by having the *Winner* tugged to France, the Court concluded, by four votes to three, that there had not been a violation of article 5(3). On 1 December 2008, the case was referred to the Grand Chamber at the government's and applicant's request. The Grand Chamber did not depart from the

[10] See European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 November 1950; 213 UNTS 2886 [hereinafter: ECHR or the Convention].

judgment of the Chamber and held that there had been a violation of article 5(1), albeit no violation of article 5(3) of the Convention. Finally, it held that France should pay the applicants €5,000 each in respect of non-pecuniary damages and €10,000 jointly for costs and expenses.

C. Legal Analysis of the Decision

The case raises two main issues, which will be canvassed in detail: a) the legality of the interdiction and the subsequent arrest at sea against the background of article 5(1) of the Convention, and b) the legality of the delay between the arrest and the judicial decision in the light the requirements of article 5(3) of the same Convention.

A preliminary, yet very important matter is the jurisdiction *ratione loci* of the Court in the present case.[11] It is true that the Respondent did not dispute the jurisdiction of the Court under article 1 of the Convention, in spite of the fact that the interception occurred on the high seas, i.e. extraterritorially of France. The Grand Chamber addressed this issue succinctly and held that 'as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of article 1 of the Convention.'[12]

This *dictum* of the Court lends credence to the prevailing view that the *ratione loci* scope of the Convention extends beyond the territory of a State party, in this case, on the high seas, provided that the State exercises effective control through its organs over the persons concerned.[13] This issue has been the source of much controversy, especially concerning the application of the ECHR in the territory of third States, ie beyond the '*espace juridique*' of the Convention.[14] Nevertheless, this apparent geographical limitation has not been consistently upheld in a series of post-*Banković* decisions,[15] and more importantly, it is not even necessary in the present context to argue against the *Banković* judgment, since the instance of a State vessel intercepting another vessel on the high seas fits squarely within that judgment's exclusion of 'the activities . . . on board . . . vessels flying the flag of that State'.[16] This assertion is further supported by the *Xhavara* case, involving the sinking of an Albanian vessel by

[11] The jurisdiction of the Court is posited in art 1, which provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Therefore, compatibility *ratione loci* requires the alleged violation of the Convention to have taken place within the jurisdiction of the respondent State or in territory effectively controlled by that State (*Cyprus v Turkey* [GC], no 25781/94, paras 75–81, EHRR 2001-IV; *Drozd and Janousek v France and Spain* Series A No 240 (1999) paras 84–90).

[12] See (n 1) para 67 (emphasis added).

[13] See on this issue generally E Lagrange, 'L' Application de la Convention de Rome à des Actes Accomplis par les Etats Parties en dehors du Territoire National' (2008) 112 RGDIP 521.

[14] In *Banković v Belgium*, however, the Court noted that the European Convention applies 'in the legal space (*espace juridique*) of the Contracting States' and it was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States'. See *Banković and Others v Belgium et al* (2001) 44 EHRR SE5; para 80.

[15] See inter alia: *Öcalan v Turkey* (Merits), Application No 46221/99, Chamber Judgment of 12 March 2003 and Grand Chamber Decision of 12 May 2005 and *Ilaşcu and Others v Moldova and Russia* [GC] no 48787/99, ECHR 2004-VII, para 314.

[16] See (n 14) para 73.

an Italian warship on the high seas,[17] and by the more pertinent *Rigopoulos v Spain* case, in which the jurisdiction *ratione loci* of the Court was never contested.[18]

Hence, the *Medvedyev* case comes to complement the above decisions and provide cogency to the argument that the Convention applies on the high seas, in so far as control, and therefore, jurisdiction is exerted by organs of the States parties. It is also important to stress that the jurisdiction was established even though the applicants were never transferred on board the French frigate, but remained confined and under control of French authorities on the *Winner* during their journey to Brest.[19]

In addition, the Government contended for the first time before the Grand Chamber, in 'preliminary observations', that the applicants' complaints were incompatible *ratione materiae* with the provisions of article 5 of the Convention.[20] This contention was premised upon the fact that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship and thus, according to the Government, the measures taken *ex post facto* did not amount to a further deprivation of their liberty.[21] The Court initially held that the Government was estopped from raising a preliminary objection of incompatibility *ratione materiae* at this stage of the proceedings.[22] However, since this objection pertained to its jurisdiction, the extent of which is determined by the Convention itself, the Court decided to address it and, subsequently, to reject it, by holding that 'the applicants' situation on board the *Winner* after it was boarded, because of the restrictions endured, amounted in practice to a deprivation of liberty, and that article 5(1) applies to their case'.[23]

D. The Legality of the Interdiction of the Winner

The first complaint of the applicants contests the argument of the French Government that their deprivation of liberty was 'prescribed by law', in the sense of article 5(1) of the Convention. The European Court of Human Rights has previously noted that, 'in laying down that any deprivation of life must be effected "in accordance with a procedure by law"', article 5(1) requires any arrest or detention to have a legal basis in domestic law; however, it falls to the Court to assess not only the legislation in force in this field, but also the quality of the other legal rules applicable to the persons concerned'.[24] The Court has further held that where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law.[25] In the present case, the Grand Chamber stressed that 'where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself

[17] See *Xhavara and Others v Italy and Albania* (Application No 39473/98), Admissibility Decision of 11 January 2001.
[18] See *Rigopoulos v Spain* (n 8).
[19] See (n 1) para 66.
[20] See ibid para 68.
[21] See ibid para 50.
[22] Under Rule 55 of the Rules of Court, any plea of inadmissibility must be raised by the respondent Party in its observations on the admissibility of the application, unless there are exceptional circumstances, such as the fact that the grounds for the objection of inadmissibility came to light late in the day. See ibid paras 69–71.
[23] ibid para 75.
[24] See *Amuur v France* (1996) 22 EHRR 533 (1996-III), para 50.
[25] See inter alia, *Bozano v France* Series A No 111 (1986) para 54; *Assanidze v Georgia* [GC], no 71503/01, para 171, EHRR (2004-II).

be foreseeable in its application (. . .), a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness . . .'.[26]

Against this background, the applicants, who shared the analysis followed by the Chamber in its judgment, claimed before the Grand Chamber that the interception of the *Winner* and their arrest 'was not prescribed by law' i.e. it lacked the requisite legal basis in international and French law. They submitted that there was no legal basis for the boarding of the *Winner* either in international conventions to which Cambodia was not a party, be it the LOSC or the Vienna Convention, or in the diplomatic note of the Ministry of Foreign Affairs of 7 June 2002.[27] Nor was article 13 of Law No 94-589 of 15 July 1994 concerning the 'modalities of the exercise by the State of its powers for the control at sea',[28] applicable in the circumstances of the present case, since it referred to international conventions to which Cambodia was not a party.[29]

In argument before the Chamber, they asserted that even if the Court decided that their arrest was 'prescribed by French law', i.e. that the 1994 Law was applicable, it was not 'sufficiently precise', as article 5(1) required.[30] The 1994 Law referred to article 17(4) of the Vienna Convention, which mentioned only that the boarding State should 'take appropriate action with respect to the vessels, persons and cargo on board'. In addition, it was argued that Law No 2005-371 of 22 April 2005, which amended the 1994 Law and extended its application to cases where the authorisation to visit was given by the flag State through bilateral agreements, was not *ratione temporis* applicable.[31] This Law, however, was more analytical with respect to the powers of the commanders of French warships to take coercive measures and thus less 'imprecise' than the 1994 Law.

In the assessment of the first argument of the applicants, it is important to stress the following points: firstly, the interception of the *Winner*, ie the right of visit and search of the vessel on the high seas, could only lawfully be effectuated within the legal contours of article 110 of LOSC.[32] On the face of this provision, it is evident that drug trafficking is not contemplated by the Convention as a specific ground for the right of visit. The LOSC only refers to illicit drug trafficking in article 108 and only requires that States cooperate in its suppression.[33] In more detail, paragraph 1 sets out a general obligation for all States to cooperate, when the illicit traffic is 'contrary to international conventions'.[34] On the other hand, paragraph 2 addresses the issue of providing assistance to suppress the traffic in question. Nevertheless, only the State 'which has

[26] See (n 1) para 80. cf also 2008 Judgment, para 53 and *Malone v UK* Series A No 82 (1984) 7 EHRR 14 para 67.

[27] See (n 1) para 43.

[28] As amended by the implementing law of the Vienna Convention see: la loi n° 96-359 du 29 avril 1996; 2008 Judgment, para 25.

[29] See (n 1) para 45.

[30] See 2008 Judgment, para 45.

[31] Section 12 of 2005 Law extended the application of the 1994 Law to 'to ships flying the flag of a State which has requested intervention by France or agreed to its request for intervention' see (n 1) para 35.

[32] In accordance with art 110 LOSC, the right to visit is accorded to warships and other state vessels against only those vessels, reasonably suspected of having engaged in some proscribed activity, such as piracy *jure gentium* and slave trading *et al.*

[33] See also M Nordquist (ed), *United Nations Convention on the Law of the Sea. A Commentary*, Vol. III, (1985) 224.

[34] This obligation depends on the content of the above-mentioned Drug Conventions as well as it is an obligation of conduct rather than result. See also A Bellayer-Roille, 'La Lutte contre le Narcotrafic en Mer Caraïbe' 111 RGDIP (2007) 365.

reasonable grounds for believing that the ship flying *its* flag is engaged in illicit traffic' in such drugs or substances 'may request the co-operation of other States to suppress such traffic'.[35] As Sohn observes, '[t]he opposite case of a State asking for cooperation of a State whose ship is suspected of smuggling drugs to other countries is noticeably not mentioned.[36] Consequently, the argument of the French Government before the Chamber that the legal basis of the interception under scrutiny could have been found, amongst others, in article 108 was a *non sequitur.*[37]

Equally unconvincing seems the argument of the Government both before the Chamber and the Grand Chamber that the boarding of *Winner* was justified on the basis that it was not flying any flag when it was encountered by *Le Hénaff* on the high seas, thus it could be visited pursuant to article 110 (1) (d) of LOSC.[38] As was maintained by the applicants and held by the Court, it is self-contradictory, on the one hand, to ask the permission of Cambodia to board the vessel and, on the other, to consider it without nationality.[39] Even if the vessel was not flying the flag of any State at that time and refused to reply to the warnings of the French vessel, there were sound indications that it was the *Winner*, the vessel suspected for drug trafficking, which the French frigate was commissioned specifically to intercept. This was also authoritatively affirmed by the judgment of the Investigation Division of the Rennes Court of Appeal, which stated quite plainly that the merchant ship spotted on 13 June at 6 a.m. was identified as the *Winner*.[40] Moreover, should the *Winner* have been considered as a vessel without nationality, what *Le Hénaff* was entitled to do, according to the law of the sea, was, firstly, to approach the vessel (*'le droit d' enquête du pavillion'*) in order to ascertain its identity and nationality, and if that had not been possible, then board the vessel, but not search it, without further suspicion. It is contested whether it could exert any further enforcement jurisdiction over the persons on board the vessel, since both the LOSC and the pertinent internal law of France are silent in this respect.[41]

Nevertheless, by virtue of articles 92 and 110(1) of LOSC, such interference with the freedom of the high seas in cases of drug smuggling may be authorised pursuant to a treaty. The most important multilateral instrument in this regard is the Vienna Convention (1988), which expressly provides for the right to board the vessels of other State parties engaged in such activity.[42] However, this provision is inapplicable in the present context, since Cambodia was not party to the Convention.[43] This also casts serious doubts over the applicability of the1994 Act in the case at hand, since the latter set out the jurisdictional powers of France only vis-à-vis other State parties.

On the contrary, in its 2008 Judgement the Court was convinced by the argument of the French Government and of the relevant judicial authorities (eg the Investigation

[35] Emphasis added. See also M Nordquist (n 33) 224.

[36] See LB Sohn, 'International Law of the Sea and Human Rights Issues' in T Clingan (ed), *The Law of the Sea: What Lies Ahead?* (University of Miami, Miami, 1988) 60.

[37] See 2008 Judgment, para 31. cf also relevant arguments of the French Government before the Grand Chamber (n 1) para 55.

[38] Stateless vessels are the vessels, which, as a matter of international law, have no nationality. See in general H Meyers, *The Nationality of Ships* (Martinus Nijhoff, The Hague, 1967).

[39] See (n 1) para 88 and 2008 Judgment, para 53.

[40] See (n 1) para 89.

[41] See the concurring view of Churchill and Lowe, who set forth that '[t]he better view appears to be that there is a need of some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce the laws against them' in RR Churchill and AV Lowe (eds), *The Law of the Sea* (3rd edn, Manchester University Press, Manchester, 1999) 214.

[42] See art 17 (3) of Vienna Convention.

[43] See 2008 Judgment, para 57.

Division of the Rennes Court of Appeal), that the diplomatic note of the Cambodian Ministry of Foreign Affairs constituted an international agreement (*accord ad hoc*), granting France the right to visit the *Winner* on the high seas. More importantly, it held the latter accord to be the sole legal basis for the interception in question.[44] This was also upheld by the Grand Chamber, which unequivocally affirmed that 'the diplomatic note officialized Cambodia's agreement to the interception of the *Winner* . . . '[45]

This ruling of the Court certainly merits further analysis. Firstly, one must question whether the diplomatic note of 7 June 2002 constitutes *in stricto jure* a treaty or, in the alternative, an international agreement.[46] To address this, it is apposite to refer to the jurisprudence of the ICJ on this issue, which has consistently held that the form of an international agreement is not determinative of its legal nature; rather the decisive question is whether it does 'enumerate the commitments to which the Parties have consented [and] thus create rights and obligations in international law for the Parties'.[47] In other words, the decisive factor distinguishing binding agreements from other non-binding instruments is the intention of the parties and in the words of the ICJ, 'where . . . the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it'.[48] In the present case, France requested the authorisation to interdict the *Winner* and Cambodia assented to it, through official diplomatic channels. It is readily apparent that the intention of the parties was to 'enumerate commitments . . . and thus create right and obligations in international law', i.e. the right to visit and to exert enforcement jurisdiction, on the part of France and the concomitant waiver of any claim based upon the exclusive jurisdiction of the flag State on the high seas, on the part of Cambodia.

It follows from the foregoing that the latter *note verbale* was a binding international agreement; however, it must be ascertained to what extent this agreement provided the necessary legal framework for the interception and the exercise of jurisdiction, especially against the background of the law of the sea. The agreement authorised the French authorities 'to intercept, inspect and take legal action against the ship *Winner*', ie not only the right to visit in the sense of article 110 of LOSC, but also the right to exert enforcement jurisdiction over the vessel and the persons on board. In relation to article 110 of LOSC, it patently falls under the scope of the exception of article 110(1), which requires that the relevant 'acts of interference derive from powers conferred by treaty'.[49] Hence, the visit of the *Winner* was premised upon a lawful basis under the law of the sea.

[44] ibid para 59.

[45] See (n 1) 97.

[46] On the international plane, it is possible to have three categories of instruments: i) treaties within the strict definition of the VCLT, ii) other binding agreements, such as informal or oral agreements and iii) non-binding instruments, such as political accords or gentlemen's agreements. See generally M Fitzmaurice, 'The Identification and Character of Treaties and Treaty Obligations between States in International Law' 73 BYBIL (2002), 141. cf also art 2(1) of Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (hereinafter: VCLT).

[47] See *Case Concerning Maritime Delimitation and Territorial Questions (Qatar v Bahrain)*, ICJ Rep 1994 120. See also J Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff, The Hague, 1996) 215.

[48] See *Temple of Preah Vihear* case, (*Cambodia v Thailand*), Preliminary Objections, Judgment of 26 May 1961, ICJ Rep (1962) 31. See also the *Aegean Continental Shelf Case (Greece v. Turkey)* ICJ Rep (1978) 38–44.

[49] Both the 1958 High Seas Convention and the LOSC contained the exception 'where acts of interference derive from powers conferred by treaty'. cf the opinion of Sohn, who disputes whe-

Furthermore, the agreement under scrutiny does not operate only at the level of primary (permissive) rules of international law (article 110 (1) of LOSC), it also has a parallel secondary exculpating effect, since the consent that it encapsulates falls under the ambit of article 20 of the ILC Articles on State Responsibility.[50] The consent of the flag State, *in casu* Cambodia, conveyed by the diplomatic note, functions not only as a circumstance precluding the wrongfulness of the infringement of the freedom of the high seas, but also as a circumstance of precluding the wrongfulness of the exercise of enforcement jurisdiction on board the foreign vessel.[51] It can also operate as a waiver of any right to claim reparation on the part of the flag State.[52] Thus, contrary to the assertions of the applicants,[53] not only the right of visit but also the exercise of enforcement jurisdiction was afforded a legal basis under general international law.

In general, the practice of obtaining the consent of the flag State or even, initially the consent of the Master ('consensual boarding') in order to interdict the suspect vessels and subsequently exert enforcement jurisdiction has been very common in the context of counter-drug trafficking, especially in the Caribbean region.[54] It usually involves an administrative agency of the boarding State requesting the permission by the respective agency of the flag State often through informal means, such as telephone or facsimile.[55] The positive reply of the latter State to this request creates a bilateral relationship, which actually establishes the right to visit the vessel in question. In this vein, it is no doubt commendable that the ECtHR appeared cognizant of this abundant practice of the States concerned and its significance in the everyday fight against drug trafficking and thus was open to consider the diplomatic note as a sufficient legal justification for the boarding operation under scrutiny. This was, indisputably, a progressive and contemporaneous reading and application of the relevant rules of international law, which certainly deserves merit.

However, the same cannot unambiguously be uttered with respect to the next stage of the Court's *ratio decidendi* in the 2008 Judgment, where the Chamber moved to assess the 'quality' of the 1994 Law as well as of the Vienna Convention as far as the prerequisite of precision and accessibility is concerned.[56] Whatever its findings on this matter were, there are sound reasons for maintaining that the Court should have

ther informal agreements fall under the scope of article 110; LB Sohn, *Cases and Materials on the Law of the Sea* (Transnational Publishers, New York, 2004) 209.

[50] See Report of the International Law Commission on the Work of its Fifty-third Session Regarding the Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN GAOR ILC 56th Session, Supp 10 at UN Doc. A/56/10 A (hereinafter: ILC Articles).

[51] Art 20 sets forth that 'consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given'; see ILC Yearbook (2001-II) 173.

[52] cf art 45 of the ILC Articles.

[53] See (n 1) para 45.

[54] See the United States Coast Guard, *Guide to the Law of Boarding Operations*, (June 2008) (on file with the author) and also 'Le *consensual boarding*—Une évolution majeure du droit de la mer', 7 *Annuaire du droit de la mer* (2002), 556.

[55] In *United States v Gonzalez*, a conversation by telephone was held to constitute an 'arrangement' with another government; see Judge Kravitch, *United States v Gonzalez*, 776 F.2nd (11 Circuit, 1985) 936.

[56] See 2008 Judgment, para 60 ff.

proceeded in a different manner. In view of the fact that the Vienna Convention was inapplicable in the present context and the diplomatic note was the relevant '*fondement juridique*', the Court should also have declared the 1994 Law inapplicable, because, at the time of the judicial proceedings in France, this Act did not cover the case of ad hoc accords between France and other States.[57] As a result, since the 1994 Law was completely irrelevant in the present case, there was no basis in the French Law for the establishment of jurisdiction over the applicants.[58] It follows that the detention of the applicants was 'prescribed by law', but only by 'international law' and not by the domestic French law; therefore, on the face of the provision of article 5(1) and its judicial interpretation, this would suffice to conclude that there was a violation of the above provision.[59] Nonetheless, the Court opted not to completely set aside the 1994 Act, but rather to assess it against the background of the 'quality' prerequisite with the same result, ie that a violation of article 5(1) of the Convention has occurred.[60]

In short, as regards the 'quality' prerequisite, the reasoning of the Chamber in the 2008 Judgment was unassailable in light of the relevant jurisprudence of the ECtHR. In more detail, on the question whether the arrest and detention is 'lawful', including whether it complies with a 'procedure prescribed by law', the Convention refers back 'essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. However, it requires in addition that any deprivation of liberty should be consistent with the purpose of article 5, namely to protect individuals from arbitrariness'.[61] In the present case, the fundamental requirements against arbitrariness were not scrupulously adhered to, such as the 'precision' and the 'accessibility' of the applicable provisions as well as the non-impartiality of the reviewing judicial authority. In this vein, the finding of a violation of article 5(1) by the Court was not surprising. However, as was noted above, it was not necessary to follow this chain of argument; the Court could have decided that due to the lack of any domestic law governing the case of bilateral interception agreements with third States, the deprivation of the liberty of the applicants were *ipso jure* 'not prescribed by law'.

In the Grand Chamber Judgment, the Court, rather ingeniously, eschewed addressing the 'quality' of the domestic law, as in the 2008 Judgment, and confined its *ratio decidendi* solely to the relevant international law, i.e. the diplomatic note between France and Cambodia. The Court observed, first of all, that the text of the diplomatic note mentions 'the ship *Winner*, flying the Cambodian flag', which is the sole object of the agreement. 'Evidently, therefore, the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a

[57] According to Thienel, this was implied by the question of the Judge Costa to the French Government during the oral pleadings, ie 'if the legal basis claimed by the Government is the domestic Act giving effect to the UN Convention against Illicit Traffic (. . .), can this Act apply where the Convention does not?'; see (n 2).

[58] See the relevant discussion in the context of the early cases before the US Courts in J Stieb, 'Survey of United States Jurisdiction over High Seas Narcotics Trafficking' (1989) 19 Georgia Journal of International and Comparative Law 119.

[59] See *Amuur* case (n 24) para 53.

[60] See 2008 Judgment, para 60 ff.

[61] See eg *Lukanov v Bulgaria* (1997) EHRR 1997-II, 543, para 41, *Wassink v The Netherlands* Series A No 185 (1990) para 24.

'clearly defined law' within the meaning of the Court's caselaw'.[62] This was heavily criticized in the Joint Partly Dissenting Opinion of Judges Costa, Casadevall *et al*., which stated that 'it is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas. The actions expressly authorised by Cambodia (interception, inspection, legal action) necessarily concerned the crew members.'[63] Secondly, the Court considered that the diplomatic note did not meet the 'foreseeability' requirement either. '[T]the intervention of the French authorities on the basis of an *ad hoc* agreement cannot reasonably be said to have been 'foreseeable' within the meaning of the Court's case-law . . .'[64]

This holds true as far as the requirements of preciseness and foreseeability of the relevant provision of the Convention are concerned. Nevertheless, it is submitted that it is not a matter of the ad hoc agreement to set forth all the necessary safeguards in accordance with the Convention. Such agreements serve only to facilitate the international cooperation of States in the field of the suppression of drug trafficking on the high seas.[65] Rather, it falls upon the relevant legislation of each contracting State to be sufficiently precise and foreseeable, so as to abide by these requirements.[66]

The Grand Chamber acknowledged that there is a deficit of international coordination in this respect; in its words, 'it is regrettable that the international effort to combat drug trafficking on the high seas is not better coordinated bearing in mind the increasingly global dimension of the problem'[67] In addition, in a very interesting and praiseworthy *obiter dictum*, it posited that the time is ripe to consider drug trafficking as a *crimen iure gentium*, analogous to piracy, namely, a crime subject to universal jurisdiction.[68] As the law stands, the preponderant view is that drug trafficking is not included in the list of the international crimes for which universal jurisdiction is afforded.[69] Nonetheless, there is certainly a trend towards this direction and there is the possibility that in the near future such argument would gain the acceptance of international doctrine.[70] This would be *de lege ferenda* very positive and welcome, in the sense that it would dissipate all these uncertainties concerning enforcement jurisdiction over drug smugglers on the high seas.

A final point concerning the legality of the interception of the *Winner* is the use of force in the course of the operation. To reiterate the relevant facts, the French frigate

[62] See (n 1) para 99.

[63] See Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Birsan, Garlicki, Hajiyev, Sikuta and Nicolaou, (n 1) para 7.

[64] ibid para 100. cf the different opinion of Judges Costa et al;ibid para. 9.

[65] See relevant analysis (n 58) and corresponding text.

[66] For instance, should the 2005 Law have been applicable, it would probably have met these requirements; see (n 33).

[67] See (n 1) para 101.

[68] 'Having regard to the gravity and enormity of the problem posed by illegal drug trafficking, developments in public international law which embraced the principle that all States have jurisdiction as an exception to the law of the flag State would be a significant step in the fight against illegal trade in narcotics. This would bring international law on drug trafficking into line with what has already existed for many years now in respect of piracy'; ibid.

[69] For example, during the drafting of the ICC Statute, the participants debated but ultimately rejected a proposal to include drug trafficking in the Court's jurisdiction. See relevant analysis in A Geraghty, 'Universal Jurisdiction and Drug Trafficking' (2004) 16 Florida Journal of International Law 387.

[70] See also the Princeton Principles of Universal Jurisdiction (2001), which even though did not include drug trafficking in the list of relevant crimes, they leave the door open for such development (Principle No. 2).

had to fire some warning shots across the bow of the *Winner* in order to make it stop. In addition, the boarding team exchanged shots with members of the crew which caused on individual to be wounded, resulting in his death a week later. As far as the warning shots are concerned, suffice it to say that this constitutes a very common measure in the course of maritime interdiction operations and is in keeping with the applicable framework of law enforcement at sea.[71] On the other hand, the exchange of shots with the crewmembers and the deadly injury of one of them appear to be more problematic and invite discussion.

In general, the issue of the permissibility of the use of force in interception operations at sea is not free from perplexity. According to the preponderant view,[72] the use of force in law-enforcement activities at sea should not be *ipso jure* disallowed. On the contrary, it is submitted that the State concerned may, in principle, use force but in extreme moderation and in strict accordance with the requirements of necessity and proportionality, since it is considered as a *lex specialis* case to the generic issue of the prohibition of the use of force.[73] This approach is not without resonance in the jurisprudence of international courts and tribunals.[74]

In the present context, it was reported that the deadly injury of a crewmember was an accident.[75] Even so, the firing of weapons into open doors as well as the firing of 'warning' shots against the crew casts doubts on the proportionality of the use of force *in casu*, especially in contemplation of the 'elementary considerations of humanity' applicable in law enforcement operations.[76] What seems to be odd, however, is that neither the applicants nor the Court made any reference to this issue. This could be construed as a *sub silentio* acknowledgment that the *de minimis* use of force in law enforcement operations at sea is in full accord with international law; let alone, it is 'prescribed by law' and does not lead to an arbitrary deprivation of personal liberty.[77] In any event, the use of force in the present case, in conjunction with the

[71] See: *inter alia M/V 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v Guinea)*, ITLOS Judgment of 1 July 1999, para 156.

[72] See inter alia AV Lowe, 'National Security and the Law of the Sea' 17 (1991) Theasurus Acroasium 162.

[73] In particular, it is averred that '[a]lthough the terms 'territorial integrity' and 'political independence are generally not intended to restrict the scope of the prohibition of the use of force they lend an argument in favour of the widely accepted view that certain cases of the threat or use of force within the law of the sea are not comprised by article 2 (4)'; see Randelzhofer, 'Art.2 (4)' in B Simma (ed), *The Charter of the United Nations. A Commentary* (2nd edn, OUP, Oxford, 2002) 124.

[74] See *M/V SAIGA II*, which expressed the view that 'international law requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances'; (n 76) para 155. See also Award of the Arbitral Tribunal of 17 September 2007 (Guyana/Suriname); 148 and comments in P Jimenez-Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorization of Forcible Action at Sea in the Light of Guyana/Suriname Award' (2008) 13 Journal of Conflict & Security Law 88–89.

[75] 'When they boarded the *Winner*, the French commando team used their weapons to open certain locked doors. When a crew member of the *Winner* refused to obey their commands, a 'warning shot' was fired at the ground, but the bullet ricocheted and the crew member was wounded'; see (n 1) para 13.

[76] See *MV Saiga*, (n 76) para 155 and also *Corfu Channel Case* (*United Kingdom v Albania*) Judgment of April 9 1949, ICJ Rep 1949 4, 22.

[77] This might be the ground why the applicants in the *Rigopoulos v Spain* abstained from raising this issue; (n 8).

armed force employed in the interception of the *Archangelos*,[78] buttress the view that such use of force falls within the normative bounds of law enforcement at sea as opposed to the purview of the prohibition of article 2(4) of the UN Charter.

E. The Reasonable Delay in the Sense of Article 5 (3) of ECHR

The second complaint before the Chamber was whether it was compatible with article 5(3) of ECHR for some of the applicants to be brought before a judge 48 hours and for others 72 hours after their arrival at Brest harbour, and in total fifteen and sixteen days respectively after their arrest at sea. It must be recalled that the relevant provision stipulates that '[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought *promptly* before a judge or other officer authorised by law to exercise judicial power . . .' The issue therefore is whether the period of 15 or 16 days without a judicial decision was in compliance with the requirement of 'promptness' laid down in the above provision.

In general, 'promptness has to be assessed in each case according to its special features';[79] however, 'the scope of flexibility in interpreting and applying the notion of promptness is very limited'.[80] In other words, 'the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by article 5 (3), that is to the point effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority'.[81] It is true that the promptness in the meaning of article 5 (3) has been very strictly interpreted in the majority of the relevant cases before the Court, which mainly involved terrorist offences.[82]

However, the most pertinent precedent in this regard was the *Rigopoulos v. Spain* case, in which the Panamanian flagged vessel *Archagelos* was boarded on 23 January 1995 on the high seas by a Spanish coastguard vessel. The Spanish authorities, after discovering more than 2 tonnes of cocaine on board the vessel, detained the crew and brought the vessel to Las Palmas after 16 days. The applicant, Mr Rigopoulos, filed a complaint based on the same ground as *Medvedyev*, i.e. the violation of article 5(3) of ECHR. Nevertheless, the Court considered that even though 'a period of sixteen days does not at first sight appear to be compatible with the concept of 'brought promptly' laid down in article 5(3) of the Convention', 'having regard to the *wholly exceptional circumstances* of the instant case, the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said to have breached the requirement of promptness in paragraph 3 of Article 5'.[83]

[78] There was an exchange of fire between a Spanish warship and several members of the crew of a drug smuggling vessel *Archangelos*, who had barricaded themselves into the engine room; *ibid.*

[79] See inter alia *De Jong, Baljet and van den Brink* Series A No 77 (1986) 8 EHRR 20, 25 para 52.

[80] See *TW v Malta* (No 25644/94) (1999) 29 EHRR 185, para 42.

[81] *Brogan v UK* Series A No 145 (1988) 11 EHRR 117, para 59.

[82] In the *Brogan v UK*, detention period exceeding four days for terrorist suspects were found not to be compatible with the requirement of prompt judicial control; see ibid paras 60–62. See also the *Aksoy v Turkey* (1996) 23 EHRR 553.

[83] See *Rigopoulos v Spain* (n 8) 9 (emphasis added).

Mindful of the *Rigopoulos* case, the Chamber in the 2008 Judgment held that it had not been materially possible to bring the applicants 'physically' before a 'legal authority' any sooner. It also found that two or three days in police custody after thirteen days at sea were justified under the circumstances. It considered that the duration of the deprivation of liberty suffered by the applicants was justified by 'wholly exceptional circumstances', in particular the time it inevitably took to get the *Winner* to France.[84] In conclusion, the Chamber appeared unwilling to deviate from the *Rigopoulos* precedent and thus it considered the same period of time to be reasonable under the 'wholly exceptional circumstances' surrounding the *Medvedyev* case.

Less reasonable appeared to be the other pronouncement of the Chamber concerning the requirement of article 5(3) that the applicants be brought before a 'judge or other officer authorised by law to exercise judicial power'. Notwithstanding that the Court itself had already considered the Prosecutor as lacking this requisite 'judicial power', and even though in the *Rigopoulos* case, it was the Tribunal of Madrid which immediately took over the case and not a Prosecutor, the Chamber was adamant in its view that the exceptional circumstances of the case justified the actions of French authorities under scrutiny.[85] However, it is important to stress that 'the judge (or other officer) before whom the accused is 'brought promptly' must be independent of the executive and of the parties to the proceedings'.[86] This essential feature of the above provision was undermined by the Court in the present case, since it was totally subordinated to the consideration that the delay in bringing the people was reasonable.[87]

Before the Grand Chamber, the applicants contended that 'exceptional circumstances' could justify failure to bring a person promptly before a judge only if the detention was supervised and controlled by a legal authority, which was not the case here. They objected to the argument concerning 'the time it inevitably took the *Winner* to reach France' in so far as they could have been repatriated on the French frigate instead of the *Winner*, which was 'in a deplorable state of repair'.[88] On the other hand, the Government asserted—producing the official reports for the first time before the Grand Chamber—that the applicants had in fact all been presented that very day, only hours after their arrival in Brest, to an investigating judge who had the power to order their release.[89]

The Grand Chamber devoted a few paragraphs setting out and discussing the basic characteristics of the protection afforded by article 5(3) of the Convention, such as the 'promptness', the 'automatic nature of the review' and the required 'powers of the judicial officer' and then applied these principles to the present case, drawing the same conclusion as the Chamber in 2008. Even though it characterized as 'regrettable' the fact that the Government submitted substantiated information concerning the presentation of the applicants for the first time before the Grand Chamber,[90] it condoned this irregularity on the part of the Respondent State. In the Court's view, the significant fact was that the applicants were brought before investigating judges on the same day of their arrival at Brest, 'who may certainly be described as "judge[s] or other officer[s]

[84] See 2008 Judgment, para 68. [85] ibid.

[86] *SCB v United Kingdom*, Judgment of 19 June 2001, para 22. See also *Assenov and others v Bulgaria*, (1998) EHHR-VIII 3264.

[87] See also on this point the Partially Dissenting Opinion in the 2008 Judgment of the Judge Berro-Lefèvre, Lorenzen and Lazaraova Trajkovska.

[88] See (n 1) para 107. [89] ibid para 111. [90] ibid para 127.

authorized by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention'.[91] Thus, as regards 'the characteristics and the powers of the judicial officer', ie the third principle referred to above, the Government was in full accord with the relevant provision. However, the Grand Chamber was silent on the question whether the Public Prosecutor who supervised the interception of the Winner met the above-mentioned requirement. As in the 2008 Judgment, it completely assimilated the present case with *Rigopoulos*, albeit the fact that in *Rigopoulos*, there was an independent Central Investigating Court and not a public prosecutor supervising the proceedings on board the ship on the day of interception.[92]

With regard to the period of thirteen days between the interception of the *Winner* and the presentation of the applicants before the investigating judges, the Grand Chamber followed the *ratio decidendi* of the Chamber in 2008. It emphatically added that 'there was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*'[93] As to the idea of transferring them to a French naval vessel to make the journey faster, the Court righteously asserted that 'it is not for the Court to assess the feasibility of such an operation in the circumstances of the case'.[94] It does not fall upon the Court to dwell in detail upon the course and the *modus operandi* of maritime interception operations, albeit to lay down the fundamental safeguards for the treatment of human beings under the jurisdiction of the Contracting States. Accordingly, the Court concluded that there has been no violation of article 5(3) of the ECHR.

F. Concluding Remarks

In the beginning of its deliberations of the case in 2008, the Chamber posed the question whether the end of suppressing the scourge of the traffic in narcotic drugs justifies all means.[95] In other words, to what extent are States entitled to set aside their international human rights law obligations in order to attain this undoubtedly laudable objective? In the 2010 Judgment, the Grand Chamber stated respectively that 'the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a 'safe haven'.'[96]

The Court in both of its Judgments found a violation of article 5(1) of the Convention on the part of France, on the basis that the pertinent provisions of international and national law were not adequately 'precise' and therefore the detention was not 'prescribed by law', within the meaning of the above article. On the other hand, it considered that the delay in bringing the applicants before a judicial organ was permissible under the 'wholly exceptional circumstances' of the case, ie the interception on the high seas far from the French territory.

[91] ibid para 128.
[92] See (n 97) and also the Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Spielmann, Tsotsoria, Power and Poalelungi appended to the Grand Chamber Judgment, ibid.
[93] ibid para 131.
[94] ibid.
[95] See 2008 Judgment, para 49.
[96] See (n 1) para 81.

Whatever the merits of these holdings, the significance of the *Medvedyev v France* decision is that it resoundingly introduced human rights and the rule of law to contemporary discourse over the fight against crimes on the high seas. It follows that the interdiction of foreign or stateless vessels on the high seas, which is practiced by many States for many reasons, amongst them, for counter-drug trafficking, should not only be regulated by the LOSC or other pertinent treaties, but also by human rights instruments. Accordingly, the States parties to the latter instruments are not free from their human rights obligations, because their vessels exercise jurisdiction beyond their territorial borders. To be more specific, they are not exempted from their obligation to have established their jurisdiction over the particular crimes or from their obligation to have provided for substantive and procedural guarantees against arbitrary deprivation of liberty of all the persons under their jurisdiction.[97]

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[97] For similar considerations in respect of the problem of piracy off Somalia see D Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 ICLQ 141; E Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century' in A Abass (ed), *Protecting Human Security in Africa* (OUP, Oxford, 2010) (forthcoming).

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