CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 61498/08
by Al-Saadoon and Mufdhi
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 30 June 2009 as a Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having regard to the above application which was lodged on 22 December 2008,

Having regard to the decision of the Acting Section President of 30 December 2008 to indicate an interim measure to the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"),

Having regard to the Chamber's decisions of 17 February 2009 to refuse a further application by the applicants for an interim measure under Rule 39 of the Rules of Court, to give the case priority under Rule 41 and to expedite the procedure,

Having regard to the Acting Section President's decision of the same day to communicate the case to the Government and to examine the merits of the application at the same time as its admissibility (Article 29 § 3),

Having regard to the Acting Section President's decision of 20 March 2009 to grant leave to the Equality and Human Rights Commission to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2)

and his decision of 25 March 2009 to grant leave to intervene jointly as third parties to the Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, Liberty and REDRESS ("the group of interveners"),

Having regard to the observations submitted by the Government, the applicants and the third parties,

Having deliberated in private on 30 June 2009,

Delivers the following decision, which was adopted on that date:

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The facts of the case and the relevant legal framework may be summarised as follows.

A. The occupation of Iraq

2. On 20 March 2003 a coalition of armed forces (the Multi-National Force or "MNF"), led by the United States of America with a large force from the United Kingdom and smaller contingents from Australia and Poland, commenced the invasion of Iraq.

3. Major combat operations in Iraq ceased at the beginning of May 2003. The United States and the United Kingdom thereafter became occupying powers within the meaning of Section III of the Hague Regulations on the Laws and Customs of War on Land, 1949 and the Fourth Geneva Convention on the Protection of Civilians in Time of War, 1949. Article 27 of the Fourth Geneva Convention placed an obligation on the United Kingdom, within the area it occupied, to protect the civilian population against all acts of violence and Articles 41, 42 and 78 gave the United Kingdom the power, *inter alia*, to intern Iraqi civilians where necessary for imperative reasons of security.

4. The Coalition Provisional Authority (CPA) was created by the Government of the United States as a "caretaker administration" until an Iraqi government could be established, with power, *inter alia*, to issue legislation. On 13 May 2003, the United States Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the CPA with responsibility for the temporary governance of Iraq. The CPA administration was divided into regional areas. CPA South remained under United Kingdom responsibility

and control, with a United Kingdom regional coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. United Kingdom troops were deployed in the same area. The United Kingdom was represented at CPA headquarters through the office of the United Kingdom Special Representative. Although the United Kingdom special representative and his office sought to influence CPA policy and decisions, he had no formal decision-making power within the CPA. All the CPA's administrative and legislative decisions were taken by Ambassador Bremer.

5. CPA Regulation No. 1 gave the CPA authority to issue binding regulations and orders and memoranda in relation to the interpretation and application of any regulation and order. CPA Order No. 7, dated 9 June 2003, modified the Iraqi Penal Code to remove certain offences and, in section 3(1), suspended the operation of the death penalty in Iraq. CPA Memorandum No. 3 of 18 June 2003 was entitled "Criminal Procedures" and contained *inter alia* the following provisions:

"**Section 6: Criminal Detentions**

(1) Consistent with the Fourth Geneva Convention, the following standards will apply to all persons who are detained by Coalition Forces solely in relation to allegations of criminal acts and who are not security internees (hereinafter 'criminal detainees'):

(a) Upon the initial induction into a Coalition Force detention centre a criminal detainee shall be apprised of his rights to remain silent and to consult an attorney.

(b) A criminal detainee suspected of a felony offence may consult an attorney 72 hours after induction into a Coalition Force detention centre.

(c) A criminal detainee shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them.

(d) A criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than 90 days from the date of induction into a Coalition Force detention centre.

(e) Access to detainees shall be granted to official delegates of the international Committee of the Red Cross (ICRC). ...

(2) Where any criminal detainee held by Coalition Forces is subsequently transferred to an Iraqi Court, a failure to comply with these procedures shall not constitute grounds for any legal remedy or negation of process, but any period spent in detention awaiting trial or punishment shall be deducted from any period of imprisonment imposed.

Section 7: Coalition Force Security Internee Process

(1) Consistent with the Fourth Geneva Convention, the following standards will apply to all persons who are detained by Coalition Forces where necessary for imperative reasons of security (hereinafter 'security internees'):

(a) In accordance with Article 78 of the Fourth Geneva Convention, Coalition Forces shall, with the least possible delay, afford persons held as security internees the right of appeal against the decision to intern them.

(b) The decision to intern a person shall be reviewed not later than six months from the date of induction into an internment facility by a competent body established for the purpose by Coalition Forces.

(c) The operation, condition and standards of any internment facility established by Coalition Forces shall be in accordance with Section IV of the Fourth Geneva Convention.

(d) Access to internees shall be granted to official delegates of the International Committee of the Red Cross (ICRC). ...

(e) If a person is subsequently determined to be a criminal detainee following tribunal proceedings concerning his or her status, or following the commission of a crime while in internment, the period that person has spent in internment will not count with respect to the period set out in Section 6(1)(d) herein.

(f) Where any security internee held by Coalition Forces is subsequently transferred to an Iraqi Court, a failure to comply with these proceedings shall not constitute grounds for any legal remedy, but may be considered in mitigation in sentence."

6. The invasion had gone ahead after the abandonment of the efforts by the coalition States to obtain the backing of a United Nations Security Council (UNSC) resolution. Resolution 1483 was adopted by the UNSC on 22 May 2003. Acting under Chapter VII of the UN Charter, the UNSC called on the coalition of occupying States, consistently with the UN Charter and other relevant international law, to promote the welfare of the Iraqi people and work towards the restoration of conditions of stability and security. The UNSC further requested the Secretary General to appoint a Special Representative in Iraq: he was to report regularly to the UNSC on his activities under the resolution, which were to co-ordinate the activities of the UN and other international agencies engaged in post-conflict processes and humanitarian assistance, in a number of specified ways including the protection of human rights.

7. In July 2003 the Governing Council of Iraq was established, which the CPA was to consult on all matters concerning the temporary governance of Iraq.

8. UNSC Resolution 1511, adopted on 16 October 2003, underscored the temporary nature of the CPA's role; determined that the Governing Council of Iraq and its ministers were the principal bodies of the Iraqi interim administration which embodied the sovereignty of the State of Iraq during the transitional period until an internationally recognised, representative government was established and assumed the responsibilities of the CPA; called upon the CPA to return governing responsibilities and authorities to the people of Iraq as soon as practicable; and invited the Governing Council of Iraq to produce a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution. It authorised the MNF to take all necessary measures to contribute to the maintenance of security and stability in Iraq, and provided that the requirements and mission of the MNF would be

reviewed within one year of the date of the resolution and that in any case the mandate of the MNF was to expire upon the completion of the political process to which the resolution had previously referred.

9. Pursuant to UNSCR 1483 (see paragraph 6 above), provision was made by CPA Order No. 48, of 10 December 2003, for the setting up of an Iraqi Tribunal to try members of the previous Iraqi regime alleged to be responsible for crimes and atrocities. In the Order, the CPA delegated to the Interim Government the power:

> "to establish an Iraqi Special Tribunal (the 'Tribunal' [subsequently known as the 'Iraq High Tribunal' or 'IHT']) to try Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA ..."

10. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the "Transitional Administrative Law"). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government ("the Interim Government") and the dissolution of the CPA. Article 26 of the Transitional Administrative Law made provision for the laws in force in Iraq at the time of that change to continue in effect unless rescinded or amended by the Interim Government, and specifically for the laws, regulations, orders and directives issued by the CPA to remain in force until rescinded or amended by legislation duly enacted and having the force of law.

11. Further provision for the new regime was made in UNSC Resolution 1546, adopted on 8 June 2004. The Resolution endorsed "the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (article 1) and welcomed "that, also by 30 June 2004, the occupation will end and [the CPA] will cease to exist, and that Iraq will reassert its full sovereignty" (article 2). It noted that the presence of the MNF was at the request of the incoming Interim Government (as set out in correspondence between the Iraqi Prime Minister and the United States Secretary of State annexed to the resolution) and reaffirmed the authorisation for the MNF to remain in Iraq, with authority to take all necessary measures to contribute to the maintenance of security and stability there. Provision was again made for the mandate for the MNF to be reviewed within 12 months and to expire upon completion of the political process previously referred to.

12. A revised version of CPA Memorandum No. 3 was issued on 27 June 2004 ("CPA Memorandum No. 3 (Revised)") which amended the law and procedure in relation to detention. It provided:

"**Section 1: Purpose**

(1) This Memorandum implements CPA Order No. 7 by establishing procedures for applying criminal law in Iraq, recognizing that effective administration of justice must consider:

(a) the continuing involvement of the Multinational Force (MNF) in providing critical support to some aspects of the administration of justice;

(b) the need to transition from this support;

(c) the need to modify aspects of Iraqi law that violate fundamental standards of human rights;

(d) the ongoing process of security internee management in accordance with the relevant and appropriate standards set out in the Fourth Geneva Convention which shall be applied by the MNF as a matter of policy in accordance with its mandate.

...

Section 5: Criminal Detentions

(1) A national contingent of the MNF shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter 'criminal detainees') who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may retain criminal detainees in facilities that it maintains at the request of the appropriate Iraqi authorities based on security or capacity considerations. Where such criminal detainees are retained in the detention facilities of a national contingent of the MNF the following standards will apply:

(a) Upon the initial induction into the detention centre a criminal detainee shall be apprised of his rights to remain silent and to consult an attorney by the authority serving an arrest warrant.

(b) A criminal detainee suspected of a felony offence may consult an attorney 72 hours after induction into the detention centre.

(c) A criminal detainee shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them by the authority serving an arrest warrant.

(d) A criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than 90 days from the date of induction into the detention centre.

(e) Access to detainees shall be granted to the Iraqi Prisons and detainee Ombudsman (hereinafter 'the Ombudsman'). ...

(f) Access to detainees shall be granted to official delegates of the international Committee of the Red Cross (ICRC). ...

(2) Where any criminal detainee held by a national contingent of the MNF is subsequently transferred to an Iraqi Court, a failure to comply with these procedures shall not constitute grounds for any legal remedy or negation of process, but any period spent in detention awaiting trial or punishment shall be deducted from any period of imprisonment imposed.

Section 6: MNF Security Internee Process

(1) Any person who is detained by a national contingent of the MNF for imperative reasons of security in accordance with the mandate set out in UNSCR 1546 (hereinafter 'security internees') shall, if he is held for a period longer than 72 hours, be entitled to have a review of the decision to intern him.

(2) The review must take place with the least possible delay and in any case must be held no later than 7 days after the date of induction into an internment facility.

(3) Further reviews of the continued detention of any security internee shall be conducted on a regular basis but in any case not later than six months from the date of induction into an internment facility.

(4) The operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention.

(5) security internees who are placed in internment after 30 June 2004, must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist and in any case must be either released from internment or transferred to the Iraqi criminal jurisdiction not later than 18 months from the date of induction into an MNF internment facility. Any person under the age of 18 interned at any time shall in all cases be released not later than 12 months after the initial date of internment.

...

(9) If a person is subsequently determined to be a criminal detainee following a review of his or her status, or following the commission of a crime while in internment, the period that person has spent in internment will not count with respect to the period set out in Section 5(2) herein ..."

13. CPA Order No. 17 (Revised), dated 27 June 2004, dealt with the status of MNF personnel in Iraq. Section 2 established the immunity from Iraqi legal process of MNF personnel, as follows:

"**Section 2: Iraqi Legal Process**

(1) Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.

(2) All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall respect the Iraqi laws relevant to those Personnel and Consultants in Iraq including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA.

(3) All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States, except that nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by the above-mentioned Personnel or Consultants, or otherwise temporarily detaining any such Personnel or Consultants who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the detained person's Sending State in Iraq shall be notified immediately.

(4) The Sending States of MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State.

..."

Section 9(1) of the Order provided for the inviolability of MNF facilities, as follows:

"The MNF may use without cost such areas for headquarters, camps or other premises as may be necessary for the conduct of the operational and administrative activities of the MNF. All premises currently used by the MNF shall continue to be used by it without hindrance for the duration of this Order, unless other mutually agreed arrangements are entered into between the MNF and the Government. While any areas on which such headquarters, camps or other premises are located remain Iraqi territory, they shall be inviolable and subject to the exclusive control and authority of the MNF, including with respect to entry and exit of all personnel. The MNF shall be guaranteed unimpeded access to such MNF premises. Where MNF Personnel are co-located with military personnel of Iraq, permanent, direct and immediate access for the MNF to those premises shall be guaranteed."

B. The transfer of authority from the CPA to the Iraqi Government and the United Kingdom-Iraq Memorandum of Understanding

14. On 28 June 2004 the occupation came to an end when full authority was transferred from the CPA to the Interim Government and the CPA ceased to exist. Subsequently the MNF, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the UNSC. In accordance with Article 26 of the Transitional Administrative Law (see paragraph 10 above), the above CPA Memorandum and Order remained in force.

15. In August 2004 the Iraqi National Assembly reintroduced the death penalty to the Iraqi Penal Code in respect of certain violent crimes, including murder, and drug trafficking. In a number of statements the United Kingdom authorities made it clear that the United Kingdom was opposed to the death penalty in all circumstances and called on Iraq to abolish it.

16. On 9 October 2005 the Iraqi National Assembly established the Iraqi High Tribunal ("IHT"). The IHT was given jurisdiction over a list of offences, including war crimes, committed in Iraq or elsewhere during the period 17 July 1968 to 1 May 2003. Article 19 of its Statute provided for a number of fair trial guarantees for accused persons. Article 24 provided that the IHT should impose the penalties prescribed by the Iraqi Penal Code.

17. On 8 November 2004 a Memorandum of Understanding ("MoU") regarding criminal suspects was entered into between the United Kingdom contingent of the MNF and the Ministries of Justice and Interior of Iraq (collectively referred to as "the Participants"). The preamble to the MoU recited the authority of the United Kingdom contingent of the MNF, "in

accordance with the mandate conferred by UNSCR 1546", to intern persons for imperative reasons of security, and the power of national contingents of the MNF, "in accordance with CPA Memorandum No. 3 (Revised)", to apprehend persons who were suspected of committing criminal acts. It also stated that "[w]hereas Iraq is developing its own custodial capacity with the aim of being able to confine all criminal suspects in its own facilities, it may, in the meantime, request [the United Kingdom contingent of the MNF] to confine persons who are suspected of having committed criminal acts in safe and secure detention facilities, subject to security and capacity considerations". The substantive provisions of the MoU included the following:

"**Section 1: Purpose and Scope**

This Memorandum of Understanding (MoU) sets out the authorities and responsibilities in relation to criminal suspects. For the purpose of this MOU, 'criminal suspects' are: ...

(c) individuals who are suspected of having committed criminal acts who are held at the request of the Iraqi authorities.

Section 2: Authorities and Responsibilities Generally

1. The Interim Iraqi Government (and any successor) has legal authority over all criminal suspects who have been ordered to stand trial and who are waiting trial in the physical custody of [the United Kingdom contingent of the MNF] in accordance with the terms of this Memorandum of Understanding (MoU).

2. The [United Kingdom contingent of the MNF] has a discretion whether to accept any particular criminal suspect into its physical custody and whether to continue to provide custody for a suspect who is in its physical custody at the time this MoU comes into operation or who, at any time in the future, comes into its custody. ...

Section 3: Authorities and Responsibilities in relation to individual criminal suspects

1. In relation to any criminal suspect being held in the physical custody of the [United Kingdom contingent of the MNF], the Ministry of Justice will:

(a) provide [the United Kingdom contingent of the MNF] with a written request for his delivery up to attend a court appearance or for any other purpose connected with the criminal process and will give as much advance notice of the proposed date when the presence of the suspect is required as is practicable.

...

(d) ensure that any criminal proceedings commenced against a criminal suspect progress without undue delay.

2. In relation to any criminal suspect being held in the physical custody of [the United Kingdom contingent of the MNF], [the United Kingdom contingent of the MNF]:

(a) will provide humane treatment and will not subject any criminal suspect to torture or to cruel, inhuman or degrading treatment or punishment;

...

(c) will take appropriate steps to ensure that the conditions of custody meet the standards set out in CPA Memoranda Nos. 2 and 3;

...

3. In relation to any criminal suspect apprehended by [the United Kingdom contingent of the MNF] and handed over to the Iraqi authorities as soon as reasonably practicable, in accordance with section 5 of the CPA Memorandum No. 3 (Revised), the Ministry of Justice and the Ministry of the Interior, as the case may be:

(a) will provide humane treatment and will not subject any criminal suspect to torture or to cruel, inhuman or degrading treatment or punishment; and

(b) will hold the criminal suspect in accordance with Iraqi law.

4. In relation to any criminal suspect transferred to the Ministry of the Interior or the Ministry of Justice by [the United Kingdom contingent of the MNF] from its detention facilities, the Ministry of Justice and the Ministry of the Interior, as the case may be, will:

(a) inform [the United Kingdom contingent of the MNF] before releasing any individual and will comply with any request by [the United Kingdom contingent of the MNF] that [the United Kingdom contingent of the MNF] 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 [the United Kingdom contingent of the MNF] will assume custody of that individual after consultation between the Participants to reach an agreed solution.
...

(c) provide an assurance that during any temporary periods when a suspect is in the hands of the Iraqi authorities whether at the [the United Kingdom contingent of the MNF]'s detention facility or elsewhere and at any time following the transfer of a suspect to Iraqi facilities,

(i) the suspect will be treated humanely and will not be subject to torture or to cruel, inhuman or degrading treatment or punishment; and

(ii) the requirements of CPA Orders with respect to co-operation with and reasonable access to be provided to the Iraqi Ombudsman for Penal and Detention Matters and the International Committee of the Red Cross will be adhered to.

5. If [the United Kingdom contingent of the MNF] decides that it is no longer prepared to provide custody facilities for a particular suspect, it shall give notice of this decision to the Ministry of Justice as soon as possible to enable the Ministry of Justice to make other arrangements for the custody of that suspect if it so wishes. The Ministry of Justice will then notify [the United Kingdom contingent of the MNF] of the arrangements it has made or alternatively will indicate that the suspect should be released. [The United Kingdom contingent of the MNF] will then use its best endeavours to enable any such alternative arrangements to be put in place."

18. The last relevant UNSC Resolution, No. 1790 of 18 December 2007, extended the MNF's mandate to remain, for the last time, until 31 December 2008. Annexed to the Resolution was a letter from the Iraqi Prime Minister which stated, *inter alia*:

"The Government of Iraq requests that the Security Council should consider extending the mandate of MNF-1 in the light of Iraq's achievements over the past few years, namely, the strengthened capacity of its Army and security forces and its significant successes in the security, political and economic spheres. A review of the role and authority of MNF-1 will thus be required in order to strike a balance between, on the one hand, the need to extend, one last time, the mandate of the force and, on the other hand, progress made by Iraq in the area of security. In this regard, it is important for Iraq to be treated as an independent and fully sovereign State and, in seeking the aforementioned balance, the following objectives should be highlighted:

...

4. The Government of Iraq will be responsible for arrest, detention and imprisonment tasks. When those tasks are carried out by MNF-1, there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq".

C. The legal basis for the presence of United Kingdom armed forces in Iraq from 1 January 2009

19. The Iraqi Council of Ministers Resolution 439/2008, passed on 16 December 2008, stated as follows:

"Article 1: The forces of the United Kingdom and Northern Ireland are permitted to stay in Iraq to complete the tasks they are given, and for these tasks to end no later than the 31st of May 2009 and to fully withdraw from Iraq no later than the 31st July 2009.

...

Article 4: (a) Members of the forces referred to in Articles 1 and 2 of the Law and members of the Ministries of Defence of the countries to which those aforementioned forces belong, who are working with those forces, shall be subject to the jurisdiction of Iraq with the exception of crimes committed by them while on duty which are not committed with intent or do not arise from gross negligence, and with the exception of those committed by them inside agreed facilities and military installations used by them, in which case they shall be subject to the jurisdiction of the country to which they belong.

...

(c) An accused member of the forces or the Ministry of Defence of the countries referred to in Articles 1 and 2 of this Law, shall be held in the custody of the authorities of the country to which the accused belongs. These authorities should make available the accused to the Iraqi authorities for the purposes of investigation and trial.

...

Article 6: The task and activities of the forces referred to in Articles 1 and 2 of this Law and their facilities and military installations during their temporary presence in Iraq are to be specified by the Government of Iraq with the agreement of the governments and parties concerned, providing that these troops do not carry out any operations or military activities within Iraqi land, airspace and waters without prior approval from the Government of Iraq."

20. The Iraqi Council of Ministers' Resolution 50/2008 of 23 December 2008, which took effect from 1 January 2009, authorised the Council of Ministers to take all necessary measures to achieve the withdrawal of forces no later than 31 July 2009 and to regulate their activities in accordance with Resolution 439/2008 in the meantime. It also provided that CPA Order No. 17 (Revised) (see paragraph 13 above) should be suspended until repealed according to standard procedure.

21. On 30 December 2008 the United Kingdom and Iraqi Governments signed a further Memorandum of Understanding ("the second MoU"), which came into effect on 1 January 2009. It recorded that British forces would complete specified tasks, mainly confined to training and advising Iraqi security forces, no later than 31 May 2009 and withdraw fully no later than 31 July 2009. Paragraph 5 of the second MoU provided that the United Kingdom and Iraqi forces would waive all claims against each other arising out of the specified tasks. The main facilities and military installations to be used by the United Kingdom forces during their temporary presence in Iraq were identified in paragraph 3, but the second MoU did not provide for the inviolability of those premises.

D. Protocol No. 13 to the Convention

22. Protocol No. 13 to the Convention, which prohibits the death penalty in all circumstances, was opened for signature on 3 May 2002 and entered into force on 1 July 2003. It was signed by the United Kingdom on 3 May 2002, ratified on 10 October 2003 and entered into force in respect of that State on 1 February 2004.

E. The applicants' arrest and detention

23. The applicants are Sunni Muslims from southern Iraq. The first applicant joined the Ba'ath Party in 1969, aged 17. In 1996 he became the Branch Member of the Al-Zubair branch of the Ba'ath Party (reporting to the second applicant, the General Secretary of the Al-Zubair branch). The second applicant joined the Ba'ath Party in 1968, aged 18. In February 2001 he became the General Secretary of the Al-Zubair branch, the highest rank in the province of Al-Zubair.

24. On or around 23 March 2003, two British servicemen, Staff Sergeant Cullingworth and Sapper Allsopp, were ambushed in Al-Zubair, southern Iraq, by Iraqi militia forces. Their bodies were found on 10 April 2003 buried in the grounds of a government building in Al-Zubair. They were found to have been killed by multiple gunshot wounds.

25. The first applicant was arrested on 30 April 2003 and the second applicant was arrested on 21 November 2003, by British forces in Basra. They were initially detained at a facility run by American forces known as

"Camp Bucca". On 15 December 2003 they were transferred to a British-run facility in Iraq known as the "Divisional Temporary Detention Facility". On 20 April 2007 they were transferred to another British detention facility in Iraq, the "Divisional Internment Facility", where they remained until 31 December 2008.

26. The applicants were initially classified as "security internees". Their notices of internment stated that they were suspected of being senior members of the Ba'ath Party under the former regime and of orchestrating anti-MNF violence by former regime elements, and that it was believed that if they were released they would represent an imperative threat to security. Between March 2003 and October 2004 the Special Investigations Branch of the United Kingdom's Royal Military Police conducted an investigation into the deaths of Staff Sergeant Cullingworth and Sapper Allsopp and concluded that the strength of the evidence against the applicants warranted referral of the case to the Iraqi authorities.

F. The referral of the applicants' cases to the Iraqi courts

27. On 16 December 2005, the cases against the applicants concerning the deaths of Staff Sergeant Cullingworth and Sapper Allsopp were formally referred by the United Kingdom contingent of the MNF to the Chief Investigative Judge of the Central Criminal Court of Iraq. The cases were subsequently transferred to the Basra Criminal Court and on 12 April 2006 a British officer attended that court to make a statement of complaint in respect of the killing of the two soldiers.

28. On 18 May 2006, the applicants appeared before the Special Investigative Panel of the Basra Criminal Court to give evidence in response to the complaint. The court issued arrest warrants under the Iraqi Penal Code and made an order authorising the applicants' continued detention by the United Kingdom contingent of the MNF. On 21 May 2006 the United Kingdom authorities decided to re-classify the applicants from "security internees" to "criminal detainees".

29. After an initial investigation, the Basra Criminal Court decided that, since the alleged offences constituted war crimes, the applicants' cases should be transferred to the IHT (see paragraph 16 above) and the IHT accepted that it had jurisdiction. The applicants twice appealed against the decision to transfer their cases to the IHT but the Basra Criminal Court in its appellate capacity dismissed the first appeal on 27 November 2006 and the Federal Appeal Court in Basra dismissed the second appeal on 16 May 2007.

30. The IHT first requested that the applicants be transferred into its custody on 27 December 2007, and repeated that request on several occasions until May 2008. When asked by the English Court of Appeal to clarify why the applicants were not transferred by the United Kingdom

contingent of the MNF to the IHT between December 2007 and May 2008, counsel for the Government explained:

> "We took the view that there was then a genuine issue, because there had been no decision by any court as to whether or not there was the international law obligation that we say existed or any decision on the question of jurisdiction. That was resolved by the Divisional Court, and thereafter we have said it is not now possible for us to give that undertaking [not to transfer them]."

G. The judicial review proceedings

31. On 12 June 2008 the applicants issued judicial review proceedings in England challenging, *inter alia*, the legality of their proposed transfer. Shortly after proceedings were issued, the Government provided an undertaking that it would not transfer the applicants pending the determination of their claim before the English courts.

1. The Divisional Court

32. The hearing before the Divisional Court took place on 18-20 November 2008. Claims by the applicants concerning the legality of their detention by United Kingdom forces were adjourned.

33. At the hearing, the court expressed its concerns about what would happen to the applicants after the expiry of the UN Mandate on 31 December 2008. The Government put before the court evidence about the inter-governmental negotiations between the United Kingdom and Iraq that were then continuing as to whether and pursuant to what terms United Kingdom forces would be permitted to remain in Iraq post-31 December 2008. This included the following statement of Mr Watkins, one of the leaders of the United Kingdom's negotiating team:

> "... I recognised that, if possible, it would be desirable for UK forces to be in a position to continue to hold the Claimants for a period of time whilst this litigation is resolved. I therefore considered with colleagues whether it would be appropriate to raise this issue with the Iraqi negotiating team. I cannot comment in detail on sensitive inter-governmental negotiations, but the judgment was made that to introduce the issue of UK forces continuing to hold detainees, whether generally or specifically in relation to these two Claimants, risked adversely affecting the conduct and outcome of these important and urgent negotiations.
>
> Furthermore, the judgment was made that raising the issue would not in any event have resulted in any agreement with the Iraqi authorities whereby the Claimants remained in the custody of the British forces in Iraq, still less that they would agree to the removal of the Claimants from Iraq. Given the fact that the Iraqis are seeking the transfer of detainees from the US to Iraq and the fact that these two Claimants are Iraqi nationals accused of crimes within Iraq and that the Iraqi courts have repeatedly requested the transfer of these two Claimants in order to complete investigations and if appropriate try them, there was no realistic prospect of Iraq agreeing to allow them to remain within the custody of the UK. To have raised the issue would therefore have resulted in my judgment in no change in relation to the position of the Claimants, but

> would have risked adversely affecting the conduct and outcome of the negotiations with the Government of Iraq.
>
> ... I have considered whether there may be any other means whereby UK forces could continue to hold the claimants for a period of time beyond the end of this year pending the outcome of this litigation. Conceivably, we might ask the Government of Iraq to submit draft legislation to the CoR specifically to permit the UK to hold the Claimants indefinitely or pending the outcome of this litigation. Given the facts set out in the previous paragraph, I consider that there is no reasonable prospect that the Government of Iraq would accede to such a request. Furthermore, the process of drafting and passing such legislation would extend beyond the end of this year. And even raising the issue would in my considered opinion risk adversely affecting the passage of the legislation and finalizing of the inter-governmental arrangement.
>
> There is no likelihood in my view of the UK being able to secure any agreement from the Iraqi authorities that we may continue to hold the Claimants either indefinitely or pending the outcome of this litigation."

34. Judgment was delivered on 19 December 2008. The Divisional Court noted that the applicants had been subject to the jurisdiction and legal authority of the Iraqi courts since no later than 18 May 2006 (see paragraph 28 above). CPA Memorandum No. 3 (Revised) (see paragraph 12 above), which was the Iraqi law in force at the time, required the British forces to hand over "criminal detainees" to the Iraqi authorities as soon as practicable. This requirement was also reflected in the United Kingdom-Iraqi MoU of 8 November 2004 (see paragraph 17 above). Nonetheless, the Divisional Court rejected the Government's argument that the actions of the United Kingdom in respect of the applicants were attributable to the Iraqi authorities: the British forces were lawfully present in Iraq, pursuant to a UN mandate, as part of the MNF subject to the exclusive jurisdiction of the United Kingdom and independent of the Iraqi State. The British forces had physical custody and control of the applicants and had it in their power to refuse to transfer them to the custody of the IHT, even if to act in such a way would be contrary to the United Kingdom's international law obligations. The applicants therefore fell within United Kingdom's jurisdiction for the purposes of Article 1 of the Convention and the Human Rights Act.

35. The Divisional Court then considered whether the applicants could rely on the principle against *refoulement* in *Soering v. the United Kingdom*, (judgment of 7 July 1989, Series A no. 161). It rejected the Government's argument that the *Soering* principle could apply only to transfers across territorial boundaries, but it considered itself bound by the Court of Appeal's judgment in *R(B) v Secretary of State for Foreign and Commonwealth Affairs* ([2004] EWCA Civ 1344: see paragraph 65 below), which held that where a fugitive was within the jurisdiction of the United Kingdom but on the territory of another sovereign State (for example, within an embassy or consulate), the United Kingdom was under an international law obligation to surrender him unless there was clear

evidence that the receiving State intended to subject him to treatment so harsh as to constitute a crime against humanity.

36. The Divisional Court considered expert evidence relating to the fairness of proceedings before the IHT. It found no cogent evidence to support the applicants' claims that detainees held by the Iraqi authorities were subjected to torture to extract confessions and that evidence obtained by torture would be used against them. It found that although, during the two first trials before the IHT in which Saddam Hussein was one of the defendants (the *Dujayl* and *Anfal* trials), there had been a number of fatal attacks on IHT staff and defence lawyers, the situation had improved and no lawyers, witnesses or IHT staff members had been kidnapped or killed in 2008. It did not, therefore, consider that IHT staff and counsel would be so concerned about their safety as to prevent the applicants from having a fair trial and it found that adequate security measures were taken to protect witnesses. There had been no permanent replacements of judges in current trials and there was not a sufficient risk of replacement of the judiciary to operate as a factor prejudicing the possibility of the applicants' receiving a fair trial. The court noted examples of concerns expressed by third parties relating to the independence of the IHT, but observed that these related to events during the *Dujayl* and *Anfal* trials in early 2007, with no more recent examples of such concerns. Taking everything together, it was satisfied that the IHT was sufficiently independent to meet the requirements of a fair trial. There was no real risk of defence counsel being prevented from doing a proper job for the applicants in the event of a trial. The IHT statute and its rules had been modelled after the International Criminal Tribunals for Yugoslavia and Rwanda and the International Criminal Court. The protection afforded to defendants included the presumption of innocence; the right to be informed of charges; the right to defence counsel; the right to be tried without undue delay; the right to be present during trial; the right to examine or confront witnesses; the privilege against self-incrimination; the right not to have silence taken into account in determining guilt; the right of disclosure of exculpatory evidence and witness statements; the exclusion of coerced evidence; the right to ensure that interrogations are videotaped; the right to pose questions directly to the witness; and the right to appellate review. The Divisional Court concluded with regard to the risk of a breach of Article 6:

> "The overall picture which emerges is that, although initially there were deeply unsatisfactory aspects of the IHT and trial environment, which cast doubt on the ability to provide defendants with a fair trial at that time, there have been many significant improvements since then.
>
> ... To date the claimants have appeared before the Iraqi courts and have denied the allegations made against them; and there can be no complaint about the way in which the courts have dealt with them. As to the future, looking at the various points individually and cumulatively, the evidence before us falls a long way short of establishing substantial grounds for believing there to be a real risk that a trial of the

> claimants would involve a flagrant breach of the principles guaranteed by article 6. Thus, even if the Convention were to apply in the normal way, we would reject the claim that transfer of the claimants into the custody of the IHT would be contrary to article 6."

37. Next, the Divisional Court considered the evidence relating to the likelihood that the applicants would be subjected to the death penalty. It concluded:

> "Taking the evidence as a whole, we are satisfied that substantial grounds have been shown for believing there to be a real risk of the claimants being condemned to the death penalty and executed, contrary to protocol no. 13, if they are transferred into the custody of the IHT. In particular: (a) the penalties for the offences with which the applicants are charged include the death penalty; (b) there is clear evidence that persons convicted of such offences are liable in practice to be sentenced to death; (c) the matters relied on as mitigating against the imposition of the death penalty are not sufficiently cogent or certain to negative the real risk; (d) in spite of the efforts made on behalf of the Secretary of State, no assurance has been given that the death penalty will not be imposed in this case; and (e) in any event, even if President Aref [the President of the IHT] had given such an assurance, we are not satisfied it would necessarily be effective because he does not have the authority to bind the appeal chamber which would automatically have to consider the appropriate sentence, whatever decision the trial chamber had reached."

However, the court found that although the death penalty was prohibited by the Convention, it was not yet contrary to internationally accepted norms, at least where it was imposed for serious crimes following conviction at a trial that met minimum standards of fairness. It followed that "however repugnant the death penalty may be within our domestic legal system and under the Convention, its imposition would not be contrary to international law" and the risk that the applicants might be executed did not therefore operate to relieve the United Kingdom of its public international law obligation to transfer them to the custody of the IHT.

38. The Divisional Court next examined the issues under Article 3 of the Convention. It found that the IHT had requested that, prior to trial, the applicants should be detained in Compound 4 of Rusafa Prison, which was run by the Iraqi Ministry of Justice; if the applicants were convicted and sentenced to over ten years' of imprisonment, they would be sent to Fort Suse Prison, also run by the Ministry of Justice. The court referred to a report by the Provost Marshall, the British Army officer responsible for conducting inspections of United Kingdom overseas military detention facilities, who had inspected Rusafa Prison in April 2008 and found that Compound 4 "satisfied the requirements [of the Fourth Geneva Convention]" in respect of the applicants, providing "relative segregation, protection from elements and reasonable living conditions". Although the Provost Marshall's inspectors had received complaints from some detainees about the lack of visits and the quality of the food, no-one had complained of mistreatment. The Divisional Court also referred to an inspection report by the United States International Criminal Investigative Training

Assistance Programme on Compounds 1-6A at Rusafa, which found no indication that detainees were subjected to intentional or overt acts of mistreatment. Conditions at Compound 4 were found to comply with basic human rights standards; detainees were allowed regular visits from legal representatives and relatives; force was used only as a last resort when necessary to prevent prisoners from harming themselves or others; corporal punishment was forbidden and the prisoners interviewed stated that they had never known it to be used; and there was a robust system for the reporting of any mistreatment. In addition, the court had reference to the fact that, in accordance with paragraph 4(c) of section 3 of the MoU of 8 November 2004 (see paragraph 17 above), the Iraqi authorities had provided an assurance that, following transfer to Iraqi facilities, the applicants would be treated humanely. Although the applicants had adduced expert evidence concerning the conditions at Rusafa, this evidence did not establish any instances of actual mistreatment of prisoners. The evidence relating to Fort Suse Prison did not indicate that, if detained there, the applicants would be at risk of ill-treatment. The court therefore concluded that the evidence fell well short of establishing substantial grounds for believing that the applicants would face a real risk of treatment contrary to Article 3 if transferred into the custody of the IHT.

39. The Divisional Court concluded that the proposed transfer would be lawful and it dismissed the claim for judicial review, but added:

> "Whilst we have been led to that conclusion by our analysis of the legal principles and the factual evidence, we are seriously troubled by the result, since on our assessment the claimants, if transferred, will face a real risk of the death penalty in the event that they are convicted by the Iraqi court. In all normal circumstances the Convention (as well as the Extradition Act 2003 in extradition cases) would operate to prevent such a result. It arises here only because of the highly exceptional circumstances of the case and the application to them of the principles in *R(B) v. Secretary of State for Foreign and Commonwealth Affairs*, as we have understood the judgment of the Court of Appeal in that case. ..."

40. The Divisional Court granted the applicants leave to appeal to the Court of Appeal and, on 19 December 2008, granted an interim injunction prohibiting their transfer until 4 p.m. on 22 December 2008 to allow an application for interim relief to be made to the Court of Appeal.

2. The Court of Appeal

41. The applicants appealed against the Divisional Court's judgment, principally on the grounds that (1) the court had erred in concluding that there was a relevant public international law context which could have the effect of modifying the principle in *Soering* (cited above); (2) even if the court had applied the right test, it had been wrong to hold that the death penalty and execution were not contrary to internationally accepted norms; (3) Article 3 of the Convention and international law prevented transfer in

circumstances where substantial grounds had been shown for believing there to be a real risk of the applicants being condemned to death by hanging; (4) it was incorrect to conclude that any United Kingdom jurisdiction to try the applicants either did not exist or was subordinate to Iraqi claims; (5) the court had applied the incorrect test in respect of the applicants' claims concerning the fairness of any trial before the IHT; (6) the court had erred in concluding that the evidence before it did not establish substantial grounds for believing there to be a real risk that the applicants' trial would involve a flagrant breach of the principles guaranteed by Article 3.

42. On 22 December 2008 the Court of Appeal directed that the full appeal hearing would take place on 29-30 December 2008. It made an injunction prohibiting the applicants' transfer before 4.30 p.m. on 30 December 2008.

43. Among the evidence placed before the Court of Appeal was a further statement by Mr Watkins concerning the on-going negotiations with Iraq. He explained, *inter alia*, that the question of United Kingdom forces being permitted to exercise detention powers in Iraq had been expressly rejected by Iraq in the course of the negotiations:

> "In the course of discussions on Sunday 21 December, Iraqi officials made clear that, even in relation to any proposed authorised tasks, they did not consider it acceptable for UK forces to exercise detention powers after 31 December 2008.
>
> It remains my firm and considered view that, in all the circumstances, there is no likelihood of the UK being able to secure any agreement from the Iraqi authorities that we may continue to hold the Claimants either indefinitely or pending the outcome of this litigation. Further, as I said in my first witness statement, even raising the issue would risk adversely affecting the conduct and outcome of the current negotiations."

44. The Court of Appeal dismissed the appeal at 2.30 p.m. on 30 December 2009, with the following short oral reasons:

> i) On the facts the United Kingdom is not exercising jurisdiction over the appellants within the meaning of ECHR, Article 1. See in particular *Bankovic v UK* (2001) 11 BHRC 4. In essence the United Kingdom detains the appellants only at the request and to the order of the IHT, and is obliged to return them to the custody of the IHT by force of arrangements made between the United Kingdom and Iraq, and the United Kingdom has no discretionary power of its own to hold, release or return the appellants. They are acting purely as agents of the IHT.
>
> ii) *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 shows that an obligation of this kind to return persons to the host state has to be respected, albeit that the holding state in question is subject to ECHR obligations, unless -- paragraph 88 -- to return the appellants would expose them to a crime against humanity. We are bound by that decision, being a decision of this court.
>
> iii) Neither the death penalty generally, nor the death penalty by hanging, is shown to be a crime against humanity or an act of torture.
>
> iv) Accordingly, even if the United Kingdom is exercising Article 1 jurisdiction, contrary to our opinion, it is obliged to return the appellants to the custody of the IHT.

That is so before 31 December 2008; *a fortiori* after 31 December 2008, when there will be no UN mandate, no provision as between the United Kingdom and Iraq granting inviolability to the British base or allowing for any detention of the appellants by the United Kingdom forces, save to the order of the IHT. In short, the United Kingdom will have no colour of legal power whatever after 31 December to do anything other than return the appellants to the order of the IHT. There will be no power to move the appellants anywhere else, nor indeed to prevent the Iraqis taking the appellants from British custody. British troops could not be ordered to take any steps to prevent that happening. Before 31 December it is true that the base at Basra is inviolable under local arrangements made between the United Kingdom and Iraq, but that inviolability ceases tomorrow. That is why the United Kingdom is thereafter entirely legally powerless to take action other than in compliance with the wishes of the IHT or to resist any action taken by the Iraqi authorities.

v) No freestanding claim against the United Kingdom under customary international law can run, nor is there on the facts any viable claim under ECHR, Article 6."

45. The Court of Appeal refused the applicants permission to appeal to the House of Lords, stating that:

"Certainly there are some important issues that have been raised but in the context of this case, having regard to the position that obtains post-31 December 2008, it would not be right to grant permission."

46. The Court of Appeal also refused to grant the applicants interim relief pending either an application to the House of Lords for permission to appeal and for interim relief, or to this Court for interim measures. Shortly after 3 p.m. the Court of Appeal lifted the injunction which had prevented the applicants' transfer until 4.30 p.m. on the same day.

47. The Court of Appeal handed down its full written judgment on 21 January 2009 ([2009] EWCA Civ 7). It found, first, that there were substantial grounds for believing that the applicants would face a real risk of execution if they were transferred to the custody of the IHT, for the following reasons:

"It is common ground that the death penalty is a punishment available under Iraqi law for the offences with which the appellants are charged. The Divisional Court held (paragraph 148) that that was enough to give rise *prima facie* to a real risk of its being applied to the appellants. Accordingly, following the approach commended by the Strasbourg court in *Saadi v Italy* (Application no. 37201/06, judgment of 28 February 2008), in particular at paragraph 129, the burden effectively shifted to the Secretary of State to show that such a risk was not in fact made out.

Mr Lewis QC for the Secretary of State relied on evidence to the effect that the family of one of the victims had written to President Aref of the IHT to seek clemency for the appellants if they were found guilty. President Aref had earlier invited letters of this kind through the British Embassy, indicating that it would be helpful if the Embassy could waive claims to civil compensation and that he would then pass such letters to the trial chamber for their consideration. Ms Abda Sharif, Legal Adviser and Head of the Justice and Human Rights Section at the British Embassy in Baghdad, has given evidence of legal advice to the effect that the impact of a plea of clemency by the families of the victims in Iraq is likely to be that the Iraqi court 'will not impose the death penalty in any particular case'. Ms Sharif says that President Aref has

confirmed that such a plea for clemency is likely to be an important factor for any court in assessing what sentence would be imposed on the claimants. She also produces a letter from President Aref, given to her at a meeting on 21 October 2008, in which the court's procedures for considering sentence are described in some detail. The Divisional Court observed (paragraph 155):

'That letter represents President Aref's considered written position. It is striking that the letter gives no indication whatsoever that the death penalty would not be or even probably would not be imposed.'

Mr Lewis relied on the evidence of Mr Spillers, an American attorney who was the Rule of Law Liaison to the IHT between July 2008 and 22 December 2008. Mr Spillers had also met President Aref, on 27 October 2008. The President explained the factors which would influence the IHT against imposing a death sentence. These were 'an admission of the crime by the claimants, a request for forgiveness from the family of the victims, a request for forgiveness of the court for the acts, and a request for leniency from the family of a victim' (Divisional Court, paragraph 156). Mr Spillers reported the President as indicating that an assurance that the death penalty would not be imposed was 'implicit' in his account of these factors.

Mr Spillers has provided a further statement since the Divisional Court's judgment was delivered. He describes the outcome of the IHT proceedings in what has been called the 1991 Uprising case. The fifteen defendants were all former high-ranking members of Saddam Hussein's regime charged with crimes against humanity. Three were acquitted. Ten received very substantial terms of imprisonment. Only the remaining two were sentenced to death, including one ('Chemical Ali') who was already under sentence of death following an earlier trial.

...

In my judgment there is no sufficient basis for departing from the balanced assessment of the Divisional Court on this point. Mr Spillers' new evidence concerning the 1991 Uprising case, while helpful to the Secretary of State, is not so substantial as to overturn the lower court's conclusion. The real risk test is satisfied."

48. In support of its conclusion that the applicants did not fall within the United Kingdom's jurisdiction for the purposes of the Convention and the Human Rights Act it observed as follows:

"*The Legal Position Relating to the Appellants' Detention – Before 31 December 2008*

32. 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 (2003), 1546 (2004) and 1790 (2007)) all emphasise the primacy of Iraqi sovereignty. As regards criminal

detentions, CPA Memorandum No. 3 (Revised) makes it plan 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.

33. 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.

The Legal Position Relating to the Appellants' Detention – After 31 December 2008

34. As I stated earlier, once the Mandate expired there remained under international law no trace or colour of any power or authority whatever for the MNF, or any part of it, to maintain any presence in Iraq save only and strictly at the will of the Iraqi authorities. [Counsel for the applicants] sought to submit that the British base at Basra would by force of customary international law remain inviolable after 31 December. But she was unable to identify any principle which might, on the facts, support that position; and it is to my mind wholly inescapable that after that date British forces remaining in Iraq have done so only by consent of the Iraqi authorities and on such terms as those authorities have agreed. And it must have been plain, as soon as it was known when the Mandate would come to an end, that this would be the true state of affairs.

35. And there is no sensible room for doubt but that the terms on which British forces would be permitted to remain in Iraq by the Iraqi authorities would not encompass any role or function which would permit, far less require, British (or any other) forces to continue to hold detainees. ...

36. After 31 December 2008 British forces enjoyed no legal power to detain any Iraqi. Had they done so, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such person so detained.

Conclusion on the Jurisdiction Question

37. It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State Party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical. Drawing on the *Bankovic* judgment and their Lordships' opinions in *Al-Skeini*, I suggest that there are four core propositions, though each needs some explanation. (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. The first and second of these propositions imply (as perhaps does the term jurisdiction itself) an exercise of sovereign legal authority, not merely *de facto* power, by one State on the territory of another. That is of itself an exceptional state of affairs, though well recognized in some instances such as that of an embassy. 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; and there would be no principled basis on which the power could be said to be limited, and thus exceptional. ... It is impossible to reconcile a test of mere factual control with the limiting effect of the first two propositions I have set out, and, indeed, that of the last two, as I shall explain.

38. These first two propositions, understood as I have suggested, condition the others. If a State Party is to exercise Article 1 jurisdiction outside its own territory, the regional and indivisible nature of the Convention rights requires the existence of a

regime in which that State enjoys legal powers wide enough to allow its vindication, consistently with its obligations under international law, of the panoply of Convention rights – rights which may however, in the territory in question, represent an alien political philosophy.

39. The ECHR's natural setting is the *espace juridique* of the States Parties; if, exceptionally, its writ is to run elsewhere, this *espace juridique* must in considerable measure be replicated. In short the State Party must have the legal power to fulfil substantial governmental functions as a sovereign State. It may do so within a narrow scope, as an embassy, consulate, military base or prison; it may, in order to do so, depend on the host State's consent or the mandate of the United Nations; but however precisely exemplified, this is the kind of legal power the State must possess: it must enjoy the discretion to decide questions of a kind which ordinarily fall to the State's executive government. If the Article 1 jurisdiction is held to run in other circumstances, the limiting conditions imposed by the four propositions I have set out will be undermined."

49. The Court of Appeal also considered the question of conflicting international law obligations, which arose only if it was wrong about the lack of jurisdiction, and held that the Divisional Court had been correct in having regard to the United Kingdom's obligation under international law to transfer the applicants to the custody of the IHT:

"48. ... A State Party to the ECHR, exercising Article 1 jurisdiction in a foreign territory, may certainly owe duties arising under international law to the host State. Article 55 of the Vienna Convention [on Consular Relations, 1963], referred to in *R(B)* at paragraph 88, offers an obvious platform for such a potential duty. In this case the United Kingdom was plainly obliged under international law to transfer the applicants pursuant to the IHT's request. In such instances, there may be a conflict between the State Party's ECHR obligations and its international obligations.

49. One solution might have been to hold that the existence of such an international obligation is incompatible with the exercise of Article 1 jurisdiction, because it would show that the State Party's legal power in the relevant foreign territory lacked the amplitude required to guarantee the Convention rights. In that case there would be no conflict. Such a comfort would of course be no comfort to the appellants – the duty to transfer them would without more negative the ECHR jurisdiction, so that they would enjoy no Convention rights. However, such an outcome would, I think, have been consistent with *Bankovic*; but this is not the direction our courts have taken. Both *Al-Jedda* and *R(B)* recognize that a State Party may be fixed with potentially inconsistent obligations arising under the ECHR and international law respectively.

50. With great respect I see no reason to doubt this position. While I have certainly asserted that the scope of the article 1 jurisdiction has to accommodate the pressure on States Parties of international obligations apart from the ECHR, it by no means follows that the ECHR duty must always yield to the other obligation, so that no conflict can arise. No doubt it will be a matter for assessment in any case (where the issue sensibly arises) whether the international law obligations are so pressing, or operate on so wide a front, as in effect to deprive the relevant State Party of the *espace juridique* which the article 1 jurisdiction demands. They may not do so; and where they do not, this court's decision in *R(B)* shows the correct juridical approach."

50. The Court of Appeal rejected the applicants' argument based on *Őcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, that where the

proposed *refoulement* was to a State where after the trial the applicant might suffer the death penalty, no flagrant breach of the right to a fair trial under Article 6 of the Convention needed to be shown, only a real risk of an unfair trial. The court observed that *Őcalan* was not a *refoulement* case and that in *Bader and Kanbor v. Sweden*, no. 13284/04, ECHR 2005-XI, the Court had held that it was necessary in a deportation or extradition case for the applicant to establish a risk of suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty, before the Court could find a violation of Article 2 or 3 of the Convention. The Court of Appeal accepted the Divisional Court's assessment of the evidence about the fairness of proceedings before the IHT and therefore also dismissed the complaint under Article 6.

51. Finally, the Court of Appeal rejected the applicants' argument under international law that execution by hanging fell to be regarded as a crime against humanity, inhuman or degrading treatment or a form of torture. While terrible errors occurred from time to time, where for example the hanged man's neck was not broken so that he suffocated, or the drop was too long so that he was decapitated, such evidence was anecdotal and partial. There was other evidence, such as that considered by the Royal Commission on Capital Punishment, in its Report of 1949-1953, which found that hanging was "speedy and certain". The court concluded that, since the evidence before it regarding this method of execution was very limited, it was in no position to arrive at any overall finding as to the effects of hanging for the purpose of making an assessment of its compatibility or otherwise with norms of customary international law.

3. The House of Lords

52. The applicants' lawyers contacted the Judicial Office of the House of Lords between 19 and 22 December 2008, but were advised that the Judicial Office would be closed over the Christmas and New Year period and would not reopen until 12 January 2009.

53. On 7 January 2009 the applicants' request for legal aid to petition the House of Lords was refused, primarily on the basis that the transfer (see paragraph 57 below) meant that no effective remedy would be available.

54. On 6 February the applicants lodged a petition for leave to appeal with the House of Lords. It was refused on 16 February 2009.

H. The Rule 39 interim measures and the applicants' transfer

55. On 22 December 2008, prior to the Court of Appeal hearing on interim relief, the applicants lodged an urgent application for interim measures under Rule 39 of this Court's Rules. The Government made written representations to the Court as to why the applicants' application should not be granted, copies of which were provided to the applicants.

56. Shortly after being informed of the ruling of the Court of Appeal on 30 December 2008, the Court gave an indication under Rule 39, informing the Government that the applicants should not be removed or transferred from the custody of the United Kingdom until further notice.

57. The applicants were transferred into the physical custody of the Iraqi authorities and admitted to Rusafa Prison on 31 December 2008.

58. On the afternoon of the same day, the Government informed the Court and the applicants' solicitors that the applicants had been transferred. In their letter to the Court the Government stated:

> "...the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court; and further that this action should not be regarded as a breach of Article 34 in this case. The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so."

I. The applicants' current position

59. In accordance with assurances given by the Iraqi Ministry of Justice in July and August 2008, the applicants were initially held at Rusafa Prison, Compound 4. In March 2009 they were transferred to Compound 1 of the same prison.

60. The applicants' trial before the IHT commenced on 11 May 2009. If convicted, the applicants will have 28 days from the date of the verdict in which to appeal to the Appeals Chamber of the IHT. Each is represented by an Iraqi qualified lawyer.

II. RELEVANT NATIONAL AND INTERNATIONAL LEGAL MATERIALS

A. Cases concerning jurisdiction over extra-territorial prisons

61. In *Rasul v. Bush*, (542 US 466, 29 June 2004), the United States Supreme Court decided, by six votes to three, that United States courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay, since by the express terms of its agreements with Cuba, the United States exercised complete jurisdiction and control over the Guantanamo Base.

62. In *R (Al Skeini and Others) v. the Secretary of State for Defence* [2004] EWHC 2911 (Admin), the Divisional Court held, in respect of an Iraqi national (Baha Mousa) who had died while in British custody in southern Iraq:

> "287. In the circumstances the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. It seems to us that it is

> not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison. It seems to us that our interpretation of *Drozd* also lends support to our conclusion, as do the two cases discussed (at paras 220/221 above) from Canada and the United States, viz *Cook v. The Queen* and *Rasul v. Bush*. We can see no reason in international law considerations, nor in principle, why in such circumstances the United Kingdom should not be answerable to a complaint, otherwise admissible, brought under articles 2 and/or 3 of the Convention".

When the case was considered by the Court of Appeal ([2005] EWCA Civ 1609, the Government conceded that the United Kingdom was exercising extra-territorial jurisdiction under Article 1 of the Convention in respect of Baha Mousa. The Court of Appeal upheld the Divisional Court's finding (§ 108), but on the basis that "Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops".

Before the House of Lords ([2007] UKHL 26) it was again conceded by the Government that the United Kingdom's jurisdiction under Article 1 of the Convention extended to a military prison in Iraq occupied and controlled by agents of the United Kingdom. The Government did not, however, accept the basis of jurisdiction regarding Mr Mousa as set out by the Court of Appeal. Lord Brown of Eaton-under-Heywood, with whom the majority of the House of Lords appeared to agree on this point, commented (§ 132):

> "I for my part would recognise the UK's jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies (an analogy recognised too in *Hess v United Kingdom* (1975) 2 DR 72, a Commission decision in the context of a foreign prison which had itself referred to the embassy case of *X v Federal Republic of Germany*)."

B. Explanatory report to Protocol No. 13 to the Convention

63. At its meeting on 21 February 2002, the Committee of Ministers of the Council of Europe adopted the text of Protocol No. 13 to the Convention and authorised the publication of the following explanatory report (footnotes omitted):

> "1. The right to life, 'an inalienable attribute of human beings' and 'supreme value in the international hierarchy of human rights' is unanimously guaranteed in legally binding standards at universal and regional levels.
>
> 2. When these international standards guaranteeing the right to life were drawn up, exceptions were made for the execution of the death penalty when imposed by a court of law following a conviction of a crime for which this penalty was provided for by law (cf., for example, Article 2, paragraph 1, of the ... Convention ...).

3. However, as illustrated below, there has since been an evolution in domestic and international law towards abolition of the death penalty, both in general and, more specifically, for acts committed in time of war.

4. At the European level, a landmark stage in this general process was the adoption of Protocol No. 6 to the Convention in 1982. This Protocol, which to date has been ratified by almost all States Parties to the Convention, was the first legally binding instrument in Europe - and in the world - which provided for the abolition of the death penalty in time of peace, neither derogations in emergency situations nor reservations being permitted. Nonetheless, under Article 2 of the said Protocol, 'A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war'. However, according to the same Article, this possibility was restricted to the application of the death penalty in instances laid down in the law and in accordance with its provisions.

5. Subsequently, the Parliamentary Assembly established a practice whereby it required from states wishing to become a member of the Council of Europe that they committed themselves to apply an immediate moratorium on executions, to delete the death penalty from their national legislation, and to sign and ratify Protocol No. 6. The Parliamentary Assembly also put pressure on countries which failed or risked failing to meet the commitments they had undertaken upon accession to the Council of Europe. More generally, the Assembly took the step in 1994 of inviting all member states who had not yet done so, to sign and ratify Protocol No. 6 without delay (Resolution 1044 (1994) on the abolition of capital punishment).

6. This fundamental objective to abolish the death penalty was also affirmed by the Second Summit of Heads of State and Government of member states of the Council of Europe (Strasbourg, October 1997). In the Summit's Final Declaration, the Heads of State and Government called for the 'universal abolition of the death penalty and [insisted] on the maintenance, in the meantime, of existing moratoria on executions in Europe'. For its part, the Committee of Ministers of the Council of Europe has indicated that it 'shares the Parliamentary Assembly's strong convictions against recourse to the death penalty and its determination to do all in its power to ensure that capital executions cease to take place'. The Committee of Ministers subsequently adopted a Declaration 'For a European Death Penalty-Free Area'.

7. In the meantime, significant related developments in other fora had taken place. In June 1998, the European Union adopted 'Guidelines to EU Policy Toward Third Countries on the Death Penalty' which, *inter alia*, state its opposition to this penalty in all cases. Within the framework of the United Nations, a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, was adopted in 1989. For a few years, the UN Commission on Human Rights has regularly adopted Resolutions which call for the establishment of moratoria on executions, with a view to completely abolishing the death penalty. It should also be noted that capital punishment has been excluded from the penalties that the International Criminal Court and the International Criminal Tribunals for the Former Yugoslavia and Rwanda are authorised to impose.

8. The specific issue of the abolition of the death penalty also in respect of acts committed in time of war or of imminent threat of war should be seen against the wider background of the above-mentioned developments concerning the abolition of the death penalty in general. It was raised for the first time by the Parliamentary Assembly in Recommendation 1246 (1994), in which it recommended that the Committee of Ministers draw up an additional protocol to the Convention, abolishing the death penalty both in peace- and in wartime.

9. While the Steering Committee for Human Rights (CDDH), by a large majority, was in favour of drawing up such an additional protocol, the Committee of Ministers at the time considered that the political priority was to obtain and maintain moratoria on executions, to be consolidated by complete abolition of the death penalty.

10. A significant further step was made at the European Ministerial Conference on Human Rights, held in Rome on 3-4 November 2000 on the occasion of the 50th anniversary of the Convention, which pronounced itself clearly in favour of the abolition of the death penalty in time of war. In Resolution II adopted by the Conference, the few member states that had not yet abolished the death penalty nor ratified Protocol No. 6 were urgently requested to ratify this Protocol as soon as possible and, in the meantime, respect strictly the moratoria on executions. In the same Resolution, the Conference invited the Committee of Ministers 'to consider the feasibility of a new additional protocol to the Convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of imminent threat of war' (Paragraph 14 of Resolution II). The Conference also invited member states which still had the death penalty for such acts to consider its abolition (ibidem).

11. In the light of texts recently adopted and in the context of the Committee of Ministers' consideration of the follow-up to be given to the Rome Conference, the Government of Sweden presented a proposal for an additional protocol to the Convention at the 733rd meeting of the Ministers' Deputies (7 December 2000). The proposed protocol concerned the abolition of the death penalty in time of war as in time of peace.

12. At their 736th meeting (10-11 January 2001), the Ministers' Deputies instructed the CDDH 'to study the Swedish proposal for a new protocol to the Convention ... and submit its views on the feasibility of a new protocol on this matter'.

13. The CDDH and its Committee of Experts for the Development of Human Rights (DH-DEV) elaborated the draft protocol and the explanatory report thereto in the course of 2001. The CDDH transmitted the draft protocol and explanatory report to the Committee of Ministers on 8 November 2001. The latter adopted the text of the Protocol on 21 February 2002 at the 784th meeting of the Ministers' Deputies and opened it for signature by member states of the Council of Europe on 3 May 2002."

C. "Diplomatic asylum"

64. Article 41 of the Vienna Convention on Diplomatic Relations, 1961 provides:

"1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State."

65. In *R(B) v. Secretary of State for Foreign and Commonwealth Affairs*, cited above, the Court of Appeal observed as follows:

> "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 Convention can require States to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Bankovic* to principles of international law. Furthermore, there must be an implication that obligations under a Convention are to be interpreted, insofar as possible, in a manner that accords with international law. What has public international law to say about the right to afford 'diplomatic asylum'?
>
> Oppenheim [Oppenheim's International Law edited by the late Sir Robert Jennings QC and Sir Arthur Watts QC 9th Edition Vol 1] deals with this topic at paragraph 495, from which we propose to quote at a little length:
>
> '**§ 495: So-called diplomatic asylum**
>
> The practice of granting diplomatic asylum in exceptional circumstances is of long-standing, but it is a matter of dispute to what extent it forms part of general international law.
>
> There would seem to be no general obligation on the part of the receiving state to grant an ambassador the right of affording asylum to a refugee, whether criminal or other, not belonging to this mission. Of course, an ambassador need not deny entrance to refugees seeking safety in the embassy. But as the International Court of Justice noted in the *Asylum* case ... in the absence of an established legal basis, such as is afforded by treaty or established custom, a refugee must be surrendered to the territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. Bearing in mind the inviolability of embassy premises, the permissible limits of such measures are not clear. The embassy may be surrounded by soldiers, and ingress and egress prevented; but the legitimacy of forcing an entry in order forcibly to remove the refugee is doubtful, and measures involving an attack on the envoy's person would clearly be unlawful. Coercive measures are in any case justifiable only in an urgent case, and after the envoy has in vain been requested to surrender the refugee.
>
> It is sometimes suggested that there is, exceptionally, a right to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action. The practice of states has afforded instances of the grant of asylum in such circumstances. The grant of asylum 'against the violent and disorderly action of irresponsible sections of the population' is a legal right which, on grounds of humanity, may be exercised irrespective of treaty; the territorial authorities are bound to grant full protection to a diplomatic mission providing shelter for refugees in such circumstances. There is some uncertainty how far compelling reasons of humanity may justify the grant of asylum in other cases. The International Court's judgment in the *Asylum* case suggests that the grant of asylum may be justified where 'in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims'. However, the Court went on to emphasise that 'the safety which arises out of asylum cannot be construed as a protection against the regular application of the

laws and against the jurisdiction of legally constituted tribunals'. Thus it would seem not to be enough to show that a refugee is to be tried for a 'political' offence: it must be shown that justice would be subordinated to political dictation and the usual judicial guarantees disregarded. Even where permissible, asylum is only a temporary expedient and may only be afforded so long as the reasons justifying it continue to subsist.'

The propositions in Oppenheim are based, to a large extent, on what seem to be the only juridical pronouncements on the topic to carry authority. On 20 November 1990 the International Court of Justice gave judgment in a dispute between Colombia and Peru that the two States had referred to the Court - *Asylum Case (Columbia v Peru)* (1950) ICJ Rep. 206. Colombia had given refuge in its embassy in Peru to the leader of a military rebellion, which had been almost instantaneously suppressed. At issue was the effect of two Conventions to which both Colombia and Peru were party which made provision in relation to the grant of asylum to political refugees but not to criminals. Colombia's arguments included the contention that by customary international law it was open to Columbia unilaterally to determine that the fugitive fell to be classified as a political refugee. Much of the judgment related to the effects of the two Conventions, but the Court made some general comments in relation to 'diplomatic asylum':

'The arguments submitted in this respect reveal a confusion between territorial asylum (extradition), on the one hand, and diplomatic asylum, on the other.

In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of the State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.'

In 1984 six fugitives who were subject to detention orders issued by the South African government sought refuge in the British Consulate in Durban. They became known as the Durban six. The British government decided that it would not compel them to leave but that it would not intervene on their behalf with the South African authorities. They were told that they could not stay indefinitely and, eventually they left. Five of them were immediately arrested and charged with high treason, which carried the death penalty. We were referred to an article in Human Rights Quarterly 11 (1989) by Susanne Riveles, which included the following propositions:

'There exists no universally accepted international agreement to assure a uniform response by states to grant refuge in a mission in an emergency. Most countries, with the exception of those in Latin America, deny outright the claim to diplomatic asylum because it encroaches upon the state's sovereignty.

Some countries give limited recognition to the practice, allowing 'temporary safe stay' on a case-by-case basis to persons under threat of life and limb. It should be recognised that a state has the permissible response of granting temporary sanctuary to individuals or groups in utter desperation who face repressive measures in their

home countries. Moreover, this should be considered a basic human right, to be invoked by those fleeing from the persecution for reasons of race, religion, or nationality, or for holding a political opinion in an emergency situation involving the threat of violence.'

Discussion

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 their territorial jurisdiction; see Article 55 of the 1963 Vienna Convention. 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 take 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. So far as Australian law was concerned, the applicants had escaped from lawful detention under the provisions of the Migration Act 1958. On the face of it international law entitled the Australian authorities to demand their return. We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act 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."

D. Cases concerning the obligation on a sending State to make representations against the use of the death penalty by the receiving State after the transfer of an individual from its jurisdiction

66. In *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (7 January 1994), the Human Rights Committee found that the fact that Mr Ng had been extradited to the United States of America, where he risked execution, gave rise to a violation by Canada of the International Covenant on Civil and Political Rights (ICCPR). The Committee further:

"18. ... request[ed] the State party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State party to ensure that a similar situation does not arise in the future."

67. In *Roger Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (20 October 2003), the Committee found that Mr Judge's deportation to the United States, where he had been sentenced to be executed, gave rise to violations by Canada of the ICCPR, and continued:

> "12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author."

68. In its judgment of 11 October 2002 in *Boumediene and others*, the Human Rights Chamber of Bosnia-Herzegovina found a number of violations of the Convention arising from the transfer of the claimants, who had been detained in Bosnia and Herzegovina, to the custody of the United States security services who subsequently removed them to the United States Naval Base at Guantánamo Bay. The Human Rights Chamber then ordered Bosnia and Herzegovina:

> (a) "to use diplomatic channels in order to protect the basic rights of the applicants" and, in particular, "to take all possible steps to establish contacts with the applicants and to provide them with consular support";
>
> (b) "to take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the US via diplomatic contacts that the applicants [would] not be subjected to the death penalty"; and
>
> (c) "to retain lawyers authorised and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals or other authoritative bodies in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible military, criminal or other proceedings involving the applicants".

COMPLAINTS

69. The applicants complained that their transfer to Iraqi custody gave rise to breaches of their rights under Articles 2, 3, 6 and 34 of the Convention and Article 1 of Protocol No. 13.

THE LAW

I. JURISDICTION

70. The applicants contended that throughout their detention and until their transfer on 31 December 2008 they fell within the jurisdiction of the

United Kingdom within the meaning of Article 1 of the Convention, which provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

The Government denied that the applicants fell within the United Kingdom's jurisdiction at the relevant time.

1. The parties' submissions

a. The applicants

71. The applicants accepted that jurisdiction under Article 1 of the Convention was essentially territorial and regional and that only in exceptional circumstances would the acts of a Contracting State performed or producing effects outside its territory constitute an exercise of jurisdiction. The Court had recognised a number of specific extra-territorial exceptions, principally (1) the activities of a State's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State ("the diplomatic exception"); (2) where a State had effective control of an area outside its national territory ("the effective control over an area exception"); (3) where a State exercises authority over persons or property through its agents operating on the territory of another State ("the State agent authority exception").

72. The applicants emphasised that jurisdiction under Article 1 was not limited to the extra-territorial jurisdiction which a State was entitled to exercise under international law. Although the "diplomatic exception" was predicated on the extra-territorial jurisdiction which a State was entitled to exercise over, for example, its embassies and consulates abroad, recognised both in customary international law and in treaty provisions, the "effective control over an area" and "State agent authority" exceptions did not depend on the lawfulness of a State's actions but instead on their context and their *de facto* effects (the applicants referred to statements in *El Mahi and Others v. Denmark* (dec), no. 5853/06, 11 December 2006; *Issa and Others v. Turkey*, no. 31821/96, §§ 69 and 71, 16 November 2004; *Loizidou v. Turkey (Preliminary Objections)* [GC], judgment of 23 March 1995, § 62, Series A no. 310; *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 320-321, ECHR 2004-VII). Thus, it was no answer to a claim of "effective control over an area" or "State agent authority" jurisdiction for a State to say that it could not have been exercising the necessary control because as a matter of international law it did not have the power to do so. The question was not whether the State was entitled to act as it did, but whether as a matter of fact it acted with the necessary degree of control over the area or individual.

73. The applicants submitted that they were within both the "effective control over an area" and "State agent authority" jurisdiction of the United Kingdom. They had been arrested by United Kingdom forces in 2003 and held as security internees while criminal investigations were carried out by the United Kingdom authorities. In 2004 it was the United Kingdom authorities who referred the applicants' cases to the Iraqi courts and in 2006 it was the United Kingdom authorities who held a meeting to determine whether or not to change their classification to that of "criminal detainees" following a decision of the Iraqi court. As the Divisional Court had found (see paragraph 34 above), the situation was distinguishable from that in *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240 or *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002, where the actions complained of lay altogether outside the control of the respondent Contracting States.

74. It was difficult to conceive of an arrangement which more demanded a legally binding agreement than where one State intended to divest itself of its sovereign authority over its own military personnel so as to render them merely agents of a foreign State. There was, however, no evidence that, as a matter of domestic or international law, United Kingdom armed forces had been loaned to the State of Iraq or acted under Iraq's exclusive direction and control. The only possible basis for the relationship of agency asserted by the Government was the MoU (see paragraph 17 above), but this was not legally binding. In any event, even if the United Kingdom had entered into an express international agreement with the Iraqi Government providing for an agency relationship or any other form of attribution of responsibility for the applicants, it could not rely on this as obviating its obligations under the Convention. The Court's case-law established that "where States establish international organisations, or *mutatis mutandis*, international agreements, to pursue co-operation in certain fields ... [it] would be incompatible with the purpose and object of the Convention if Contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution" (see *T.I. v. the United Kingdom* (dec), no. 43844/98, ECHR 2000-III; *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-I; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, § 154, ECHR 2005-III).

b. The Government

75. The Government submitted that the fundamental principle governing the scope of a Contracting State's jurisdiction under Article 1 was that such jurisdiction was "essentially" or "primarily" territorial. Any extension of jurisdiction outside the territory of a Contracting state was "exceptional" and required special justification in the particular circumstances of each case (see *Banković and Others v. Belgium and 16 other Contracting States*

(dec.) [GC], application no. 52207/99, §§ 61, 67 and 74, ECHR 2001-XII). In determining whether there were "exceptional circumstances" giving rise to "special justification" for concluding that jurisdiction had been established extra-territorially on the facts of a particular case, the Grand Chamber in *Banković* and the Court in its subsequent case-law had had regard to a number of inter-related principles, namely: (1) jurisdiction was not to be equated with the responsibility of a State in international law for the act in question; it was a prior condition which must be satisfied before responsibility could be established; (2) jurisdiction under Article 1 was an autonomous concept, but Article 1, in common with the Convention as a whole, had to be interpreted in light of and in harmony with other principles of international law; (3) the obligation of Contracting States under Article 1 was to secure all the rights and obligations in Part I of the Convention; jurisdiction under Article 1 could not be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question; (5) the Convention was a constitutional instrument of European public order which operated, subject to Article 56, in an essentially regional context and notably in the "legal space" (*éspace juridique*) of the Contracting States; it was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States; (6) the "living instrument" principle did not apply to Article 1 jurisdiction and could not operate to expand the narrowly defined categories of cases in which jurisdiction was recognised extra-territorially.

76. The Court had recognised that jurisdiction might exceptionally exist where the State exercised "authority and control" over an individual notwithstanding that he was not within either the territory of the Contracting State or territory effectively controlled by it. In *Banković* the Court had identified as examples cases involving diplomatic and consular officials and cases involving vessels such as ships and aircraft. These were not the only examples, but they exemplified the nature of the "authority and control" which, when exercised extra-territorially by a State agent over an individual, might exceptionally constitute an exercise of jurisdiction. As identified by the Court in *Banković*, the exceptional feature of such cases was that they involved an exercise of jurisdiction which derived from well established principles of international law.

77. In contrast, where a State was present in the territory of another sovereign State and there was no question of its taking effective control of the territory of that State and the State then acted in such a way as to affect individuals there, the existence of a basis in international law for its acts was of central importance to the question whether there was, exceptionally, special justification for concluding that it was exercising Article 1 jurisdiction over the affected individuals. The Court of Appeal had been correct to hold that the exercise of mere *de facto* power over an individual in non-State territory was insufficient in itself to constitute an exercise of

Article 1 jurisdiction. The Court in *Banković* had rejected the argument that the mere exercise of military force over an individual was sufficient to constitute an exercise of jurisdiction over that individual for the purposes of Article 1.

78. In the present case, as repeatedly recognised in UNSC Resolutions, Iraq was a sovereign State, exercising sovereign powers within its own territory over its own nationals. In *Banković* (cited above, § 60) the Court had referred to the well established principle of international law that a State may not exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence. Since 18 May 2006 the Iraqi courts, applying Iraqi law, had decided that the applicants should be detained. The transfer of the applicants into the custody of the Iraqi authorities on 31 December 2008 took place in circumstances where the United Kingdom forces had the power to detain Iraqi nationals only at the request of the Iraqi courts. The United Kingdom was obliged to return Iraqi nationals to the Iraqi authorities if the Iraqi courts so requested. Moreover, even that limited power to detain was to cease within a matter of hours. The United Kingdom forces were not to retain any power to detain Iraqi nationals after 31 December 2008 and, within hours of the actual transfer, the base would have ceased to be inviolable and the Iraqi authorities would have had the right to come physically to the base where the applicants were detained and remove them (see paragraph 21 above). The Convention could not be interpreted to require a Contracting State to resist, by military force if necessary, the lawful demands of the police or other officials of a non-Contracting state acting within the non-Contracting State's territory.

79. In the circumstances, the United Kingdom was not exercising any public powers through the effective control of any part of the territory or the inhabitants of Iraq, such as would exceptionally justify the extra-territorial application of the Convention (see *Banković*, cited above, § 71). Nor did the actions of the United Kingdom forces, in detaining the applicants at the United Kingdom base at the request of the Iraqi courts and transferring them, also at the request of the Iraqi courts, involve the exercise of any recognised extra-territorial authority by the United Kingdom (see *Banković*, cited above, § 73). The applicants were detained and transferred by United Kingdom forces solely on the basis of decisions taken unilaterally by the Iraqi courts. The position was thus analogous to those considered by the Court in *Drozd and Janousek* or *Gentilhomme*, both cited above.

80. The question before the Court was whether the applicants were within the United Kingdom's jurisdiction, not whether the acts of the United Kingdom forces were generally attributable to the United Kingdom. The arguments of the applicants and the third parties on general principles of attribution did not address these key facts.

81. Finally, the Government pointed out that a finding that a Contracting State was under an obligation to secure the Convention rights and freedoms

when acting territorially and outside the regional space of the Convention gave rise to real conceptual, practical and legal difficulties. However, the non-application of the Convention did not entail that Contracting States were free to act with impunity extra-territorially. States were bound by other international law and domestic law obligations, under, for example, the Geneva and Hague Conventions.

c. The third parties

82. The Equality and Human Rights Commission submitted that the Court of Appeal had been incorrect in finding that legal authority was a condition precedent to the existence of jurisdiction under Article 1 of the Convention. The Court's case-law provided that *de facto* control and authority might, even in the absence of any legal authority, be sufficient to establish jurisdiction; examples were the *de facto* control exercised by Turkey in northern Cyprus (see *Loizidou*, cited above, and also *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV; *Banković*, cited above, §§ 70-73) and the acts of the Turkish agents who arrested Abdullah Öcalan in Kenya (*Öcalan*, cited above, § 91). The second strand of the Court of Appeal's reasoning, the issue whether the applicants' detention was attributable to the Iraqi or the British authorities, was a question of fact and evidence (see *Behrami v. France and Behrami and Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, ECHR 2007).

83. The group of interveners observed that public international law required that the concept of "jurisdiction" be interpreted in the light of the object and purpose of the particular treaty (Article 31 § 1 of the Vienna Convention on the Law of Treaties, 1969). In this connection, the Court had reiterated that it had to be mindful of the Convention's special character as a human rights treaty (*Loizidou v. Turkey* [GC], judgment of 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI). The interpretation in *Banković*, cited above, of "*espace juridique*" as a limitation to Article 1 jurisdiction was an unjustifiably rigid limitation which would conflict with the principle of the universality of human rights emphasised in the Preamble to the Convention. This interpretation in *Banković* was a single exception, which was not binding and which had not been followed in subsequent cases. Thus, the Convention had been considered applicable in territories outside the European "legal space", for example in northern Iraq (*Issa*, cited above); Kenya (*Öcalan*, cited above); Sudan (*Ramirez Sanchez v. France*, no. 28780/95, decision of the Commission of 24 June 1996, Decisions and Reports vol. 86-B, p. 155); Iran (*Pad and Others v. Turkey* (dec), no. 60167/00, 28 June 2007); in a UN neutral buffer zone (*Isaak v. Turkey*, no. 44587/98, 24 June 2008); and in international waters (*Women on Waves and Others v. Portugal*, no. 31276/05, 3 February 2009). The question whether a State exercised control, authority or power such as

to give rise to a finding of "jurisdiction" was one of fact, to be assessed on a case-by-case basis. This had been the Court's practice and it was also the practice of other international bodies interpreting other human rights instruments, such as the International Court of Justice and the UN Human Rights Committee with respect to the applicability of the ICCPR and the Inter-American Commission on Human Rights interpreting the American Convention on Human Rights. These international bodies had also held, as had the Court in the cases cited above, that the lawfulness under domestic or international law of the action by which any of the forms of control, authority or power were obtained was irrelevant in determining whether the State actually exercised control, authority or power over an individual and whether, therefore, the individual was in fact subject to that State's jurisdiction.

2. The Court's assessment

84. The Court must first determine whether, during the relevant period, the applicants fell within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention.

It recalls that Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Banković*, cited above, § 66).

85. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention (*Banković*, § 67). One example was the *Drozd and Janousek* case, cited above, where the Court accepted (§ 91) that the responsibility of Contracting Parties could, in principle, be engaged because of acts of their authorities, such as judges, which produced effects or were performed outside their own territory (and see also *Loizidou* (*preliminary objections*, cited above, § 62; *Banković*, cited above, § 69). The Court has also held that when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside its national territory, there may be an obligation under Article 1 to secure the Convention rights and freedoms within that area (*Loizidou* (*preliminary objections*, cited above, § 62; *Banković*, cited above, § 70). There are, additionally, other recognised instances of the extra-territorial exercise of jurisdiction by a State such as cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary

international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State (see *Banković*, cited above, § 73; and see also *X v. Federal Republic of Germany*, no. 1611/62, Commission decision of 25 September 1965, Yearbook of the European Convention on Human Rights, vol. 8, pp. 158 and 169; *X v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977; *WM v. Denmark*, no. 17392/90, Commission decision of 14 October 1993).

86. The Court recalls that the applicants were arrested by British armed forces in southern Iraq; the first applicant, on 30 April 2003 and the second applicant, on 21 November 2003. On 15 December 2003 the applicants were transferred from a United States detention facility to one run by the United Kingdom authorities (see paragraph 25 above). The applicants remained in one or another British detention facility until their transfer to the custody of the Iraqi authorities on 30 December 2008 (see paragraph 57 above). They were initially held as "security internees" but were reclassified by the British authorities on 21 May 2006 as "criminal detainees", following the issue of an arrest warrant and detention order by the Basra Criminal Court on 18 May 2006 (see paragraphs 26-28 above).

87. During the first months of the applicants' detention, the United Kingdom was an occupying power in Iraq. The two British-run detention facilities in which the applicants were held were established on Iraqi territory through the exercise of military force. The United Kingdom exercised control and authority over the individuals detained in them initially solely as a result of the use or threat of military force. Subsequently, the United Kingdom's *de facto* control over these premises was reflected in law. In particular, on 24 June 2004, CPA Order No. 17 (Revised) (see paragraph 13 above) provided that all premises currently used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF. This provision remained in force until midnight on 31 December 2008 (see paragraphs 20-21 above).

88. The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction (see *Hess v. the United Kingdom*, no. 6231/73, Commission decision of 28 May 1975, Decisions & Reports vol. 2, p. 72). This conclusion is, moreover, consistent with the dicta of the House of Lords in *Al-Skeini* and the position adopted by the Government in that case before the Court of Appeal and House of Lords (see paragraph 62 above).

89. In the Court's view, the applicants remained within the United Kingdom's jurisdiction until their physical transfer to the custody of the Iraqi authorities on 31 December 2008. The questions whether the United Kingdom was under a legal obligation to transfer the applicants to Iraqi custody and whether, if there was such an obligation, it modified or

displaced any obligation owed to the applicants under the Convention, are not material to the preliminary issue of jurisdiction (see, *mutatis mutandis*, *Bosphorus*, cited above, § 138) and must instead be considered in relation to the merits of the applicants' complaints.

II. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION CONCERNING CONDITIONS OF DETENTION AND THE RISK OF ILL-TREATMENT IN RUSAFA PRISON

90. The applicants complained that they would be subjected to ill-treatment and/or extra-judicial killing in detention in Rusafa Prison, in breach of Articles 2 and 3 of the Convention, which provide, as relevant:

"**Article 2 § 1**

Everyone's right to life shall be protected by law. ..."

"**Article 3**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

91. The Government submitted that this part of the application should be declared inadmissible for non-exhaustion of domestic remedies, since the applicants did not appeal against the Divisional Court's finding on this point. In judicial review proceedings the Court of Appeal was just as able as the court below to make determinations of fact and the applicants were granted a general permission to appeal, not restricted to points of law. The applicants could have appealed against the Divisional Court's factual findings in relation to Article 3 just as they did against its factual findings in relation to Article 6.

92. The applicants contended that they could not have appealed against the Divisional Court's finding that there was no real risk of ill-treatment, since the usual course in judicial review proceedings was that factual errors made at first instance were not subject to appeal except where related to an error of law. The grounds of appeal in connection with Article 6 had raised both points of law and fact. In any event, the position had changed since the domestic court proceedings because the applicants were now being held at Compound 1, rather than Compound 4, of Rusafa Prison.

93. The Court notes that the applicants did not appeal against the Divisional Court's findings regarding the conditions of detention at Compound 4 of Rusafa Prison and the risk of ill treatment there in breach of Article 3. It does not appear that the risk of extrajudicial killing in breach of Article 2 was raised before the Divisional Court or the Court of Appeal. In these circumstances, the Court considers that these parts of the application are inadmissible for non-exhaustion of domestic remedies.

III. ALLEGED VIOLATIONS OF ARTICLES 2, 3 AND 6 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 13, CONCERNING THE ALLEGED RISKS ATTENDANT ON TRIAL, CONVICTION AND SENTENCING BY THE IHT

94. The applicants alleged that, at the moment they were transferred to Iraqi custody, there were substantial grounds for believing that they were at a real risk of being subjected to an unfair trial before the IHT followed by execution by hanging. They alleged that this would give rise to breaches of their rights under Articles 2, 3 and 6 of the Convention and Article 1 of Protocol No. 13 to the Convention.

Article 6 provides, as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

Article 1 of Protocol No. 13 provides:

> "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

The Government denied that there was any risk of a breach of the above provisions.

A. The parties' submissions

1. The applicants

95. The applicants alleged that the fairness of trials before the IHT had been the subject of widespread and ongoing criticism from numerous non-governmental organisations and international bodies, focusing both on the IHT's lack of independence and its general ability to conduct a trial meeting even the most basic international requirements. They referred to reports by the International Center for Transitional Justice ("Dujail: Trial and Error? (November 2006)); the UN General Assembly's Human Rights Council Working Group on Arbitrary Detentions (Opinion 31/2006, in relation to the trial and detention of Saddam Hussein); Human Rights Watch ("The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi High Tribunal in the Dujail Case" (June 2007)); and the statements of their expert witness who had given evidence before the domestic courts. With reference to these reports, the applicants alleged in particular that IHT personnel and witnesses appearing before it were subject to extreme security risks, including the risk of assassination and that defendants were left without effective representation because of the risk to counsel. The applicants alleged that there was no tradition of judicial independence in Iraq and that the judges of the IHT were subject to continual political interference. These shortcomings explained the

conviction rate of approximately 80% of accused persons tried before the IHT.

96. The applicants submitted that they faced allegations of war crimes, punishable with sentences including the death penalty. In trials before the IHT to date, 78.4% of those tried had been convicted and of those, 35% had been sentenced to death. Despite strenuous efforts, and a letter from one of the victim's family asking for clemency, the Government had been unable to obtain an assurance from the Iraqi authorities that the death penalty would not be imposed. On the face of the evidence, there was a clear and real risk that the applicants would be executed if convicted by the IHT, as both the Divisional Court and the Court of Appeal had accepted.

97. The applicants reasoned that in accordance with Article 30 of the Vienna Convention on the Law of Treaties, Article 2 should be interpreted in the light of Article 1 of Protocol No. 13. Thus, for those States which had ratified the Protocol, the exception in the second part of the second sentence of Article 2 § 1 should be abrogated, with the effect that the passing or execution of a death penalty would breach Article 2 as well as Article 1 of Protocol No. 13. Support for this approach could be found in *Soering*, cited above, §§ 102-104 and *Öcalan*, cited above, §§ 164-165 and the position across Europe had developed significantly since *Öcalan*, with Protocol No. 13 in force in over 85% of the Council of Europe States.

98. In any event, the Court in *Öcalan*, §§ 166-169, had held that passing the death penalty following a trial which failed to meet "the most rigorous standards of fairness ... both at first instance and on appeal" would breach both Articles 2 and 3. It was argued by the Government in the domestic proceedings, and accepted by the Court of Appeal, that the threshold in foreign cases was met only by the imposition of the death penalty following a flagrantly unfair trial. However, this conclusion was not borne out by the Court's case-law; in *Bader* (cited above, § 47) the Court referred also to the risk of the imposition of the death penalty following an unfair trial; to the extent that *Bader* was authority for the Government's position, that decision was inconsistent with the reasoning of the Grand Chamber in *Öcalan.*

99. Finally, the applicants submitted that hanging was an ineffectual and extremely painful method of killing, such as to amount to inhuman and degrading treatment in breach of Article 3. They submitted three expert reports which indicated that there was an impermissibly high risk that the victim would suffer an unnecessarily painful and tortuous death by strangulation. Furthermore, the manner in which hangings were carried out in Iraq was seriously and fundamentally flawed. The footage of Saddam Hussein being jeered and taunted moments before being executed was available on the internet. The Iraqi Government had subsequently made undertakings to improve the procedure in relation to hanging but, nonetheless, the hanging of Barzan Hassan in 2007 had resulted in his being decapitated due to an error in calculation about the appropriate length of

rope. The errors in procedure were sufficiently grave to warrant the United Nations High Commissioner for Human Rights submitting an *amicus curiae* application in the sentencing of Taha Yasseen Ramadan before the IHT because of the real risk that the method of execution would itself amount to inhuman or degrading treatment or punishment.

100. In the applicants' submission, the Government had not established that the United Kingdom was under an international law obligation to transfer the applicants. The Government's observations on this issue focused on the sovereignty of Iraq and failed to mention the United Kingdom's sovereignty. Equally, while the Government placed repeated reliance on the relevant UNSC Resolutions, they had failed to refer to the obligations clearly expressed therein that the States concerned had to comply with their international obligations, including under humanitarian and human rights law. The applicants did not agree that the United Kingdom would have had no legal basis on which to continue detaining them after midnight on 31 December 2008; on the contrary, as a matter of international law under the Convention, it had been obliged to take whatever steps were necessary to protect the fundamental rights of persons within its jurisdiction. It may not have had, nor sought, any power to do so under Iraqi law but this Court was concerned with the Convention, not the Iraqi domestic legal order. The applicants had not sought impunity for the crimes which they were alleged to have committed. They could have been brought to the United Kingdom and tried there. There was no balance to be struck between the absolute right not to be exposed to the death penalty and the desirable outcome that a person stand trial for criminal offences.

101. The applicants further submitted that the Government had not established that, if such an obligation existed, it had to compel the disapplication of the Convention. The national courts had followed the Court of Appeal's approach in *R(B)* (see paragraph 65 above) but there was no authority in the Court's case-law to show that the *R(B)* approach was correct. Indeed, the Government's contention that its other international obligations should have the effect of entirely displacing its obligations under the Convention was irreconcilable with the judgment in *Soering*, cited above. The requirement on the Court was to interpret the Convention as far as possible in conformity with other international obligations, whilst heeding its special character as a human rights treaty. Whilst the applicants accepted that the death penalty was not contrary to universal norms of customary international law, there was a clear *opinion juris* and State practice supporting a regional customary international law prohibition on exposure to the death penalty by European States. Thus, in addition to the obligation under the Convention, the United Kingdom was under a customary international law obligation not to expose the applicants to a risk of the death penalty. The Court had also to consider this obligation when interpreting the respondent State's Convention obligations in this case.

2. The Government

102. The Government submitted that there were no substantial grounds for believing that the applicants would face the death penalty, if convicted. While it was correct that Iraqi law permitted capital punishment in respect of offences such as those charged against the applicants, there was no presumption in favour of the death penalty. Following more recent trials before the IHT, such as the *1991 Uprising*, the *Friday Prayers* and the *Merchants* cases, all of which involved extremely serious charges of crimes against the Iraqi people, only six of the 27 individuals convicted had received the death penalty. In addition, letters had been sent by relatives of one of the murdered soldiers requesting clemency and the United Kingdom authorities had communicated their opposition to the death penalty to the IHT's President and to the Iraqi authorities.

103. The Government submitted that there was no real risk that the applicants would be submitted to a flagrant denial of justice, as the Divisional Court and Court of Appeal correctly decided on the basis of the extensive and recent evidence before them.

104. Moreover, even if the Court were to find that the applicants were at a real risk of being executed following conviction by the IHT, the relevant test under Articles 2 and 3 was that set out in *Bader*, cited above, namely the risk that the individual would suffer a flagrant denial of a fair trial in the receiving State, the outcome of which was or was likely to be the death penalty. In the present case, the evidence, as the domestic courts held, was that the applicants would receive a fair trial before the IHT.

105. They pointed out that the applicants had not brought the complaint about execution by hanging before the Divisional Court and had raised it for the first time very shortly before the hearing before the Court of Appeal. In these circumstances, the Government had not had the opportunity to bring full evidence on the question and it would not be appropriate for this Court to decide the issue on the basis of evidence brought very late in the proceedings and not fully examined by the national courts. In any event, although the Government were opposed to the imposition of the death penalty, and had communicated their opposition to the Iraqi authorities, they could not accept that execution by hanging *per se* resulted in additional suffering, over and above that inherent in the carrying out of the death penalty, such as to raise an issue under Article 3.

106. Moreover, even assuming that the applicants were within the jurisdiction of the United Kingdom under Article 1 of the Convention, the availability of the death penalty in Iraqi law and/or its imposition by the Iraqi courts would not, as such, be contrary to international law. In these circumstances, any risk of its imposition would not justify the United Kingdom in refusing to comply with its obligation under international law to surrender Iraqi nationals, detained at the request of the Iraqi courts, to those courts for trial. The Convention had to be interpreted in the light of

and in harmony with other principles of international law and the relevant international law principle in this case could not be more fundamental: the principle that all States must recognise the sovereignty of other States.

107. The Court had to give effect to limitations on the exercise of a Contracting State's jurisdiction, generally accepted by the community of nations, stemming from the fact that the State was acting on the territory of a third State. The United Kingdom had no option other than to transfer the applicants. It was operating in a foreign sovereign State which was demanding the applicants' return. As of midnight on 31 December 2008 the United Kingdom would have had no legal basis of any kind for detaining the applicants and no physical means of continuing to detain them or preventing the Iraqi authorities from entering the base and removing them. The other options would have been equally unworkable. If the United Kingdom had released the applicants, or given them a safe passage to another part of Iraq, a third country or the United Kingdom, this would have amounted to a violation of Iraqi sovereignty and would have impeded the Iraqi authorities in carrying out their international law obligation to bring alleged war criminals to justice. For these reasons, the case was clearly distinguishable from such cases as *Soering* or *Chahal*, both cited above, where the remedy sought by the applicant was to remain on the Contracting State's territory and where the Contracting State had a discretion whether or not to extradite or deport him.

3. The third parties

108. The Equality and Human Rights Commission submitted that there was a theme in the jurisprudence of the Court regarding the relationship between a State's international law obligations and its substantive obligations under the Convention. The Court had not generally regarded the substantive Convention obligations as displaced by virtue of a competing or conflicting international law obligation. A similar approach had recently been taken by the Grand Chamber of the European Court of Justice in *Kadi and Al-Barakaat v European Union Council* (Joined Cases C-402/05 & C-415/05P.

109. The group of interveners similarly maintained that, in accordance with Convention principles and jurisprudence and the general principles of customary international law as declared in the Vienna Convention on the Law of Treaties, the European Convention on Human Rights was not generally displaced by other international legal obligations, including bi-lateral treaties. The primary factors to be taken into account in resolving the question of an apparent conflict of obligations were: (1) the form of the legal instrument concerned; (2) the degree of compatibility the putatively conflicting obligation maintained with the Convention; for example whether a treaty providing for a transfer of competencies provided for equivalent protection in relation to Convention rights; and (3) the nature of the

Convention rights affected. The Convention was a multilateral treaty containing *erga omnes partes* human rights obligations. A State entering into a conflicting agreement with a non-Convention State continued to owe legal obligations to the other States Parties to the Convention. The Convention jurisprudence, particularly in cases concerning extradition, affirmed that other treaties did not displace the obligations under the Convention. In a line of cases, the Court had considered treaties providing for the transfer of competencies to international organisations and held such transfers to be generally permissible, but only provided that Convention rights continued to be secured in a manner which afforded protection at least equivalent to that provided under the Convention. The group of interveners submitted that similar principles should apply where a subsequent international obligation of a Contracting State, by treaty or otherwise, provided for joint or co-operative activity with another State, that impacted on the protection of Convention rights within the Contracting State's jurisdiction.

B. The Court's assessment

110. The Court considers that this part of the application raises serious questions of fact and law which are of such complexity that their determination should depend on an examination on the merits. It cannot, therefore, be considered manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and no other ground for declaring it inadmissible has been established.

IV. ALLEGED VIOLATIONS OF ARTICLES 13 AND 34 OF THE CONVENTION

111. The applicants contended that their physical transfer to the Iraqi authorities, in breach of the Court's indication under Rule 39 of the Rules of Court, gave rise to a violation of Article 34 of the Convention, which provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Furthermore, since at the time the House of Lords had not yet had the opportunity to determine their appeal, the transfer also violated their right to an effective domestic remedy, in breach of Article 13 of the Convention, which states:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government rejected these contentions.

A. The parties' submissions

1. The applicants

112. The applicants submitted that the consequences of transferring them to the Iraqi authorities in breach of the Court's Rule 39 indication could not have been more serious, both as to their right to individual petition and their right to an effective remedy. Both this Court's judgment in *Paladi v. Moldova* [GC], no. 39806/05, § 92, 10 March 2009 and the International Court of Justice's judgment in *LaGrand* (judgment of 27 June 2001, ICJ Reports 2001), on which the Government relied, made it clear that the obligation was to take all reasonable steps to comply with an indication of interim measures. Nonetheless, the Government had conceded that at no stage did they make any approach to the Iraqi authorities to investigate the possibility of detaining the applicants at the United Kingdom detention facility at Basra for the matter of the few weeks or months that it would take for the legal issues to be resolved. Moreover, the Government had failed to inform either the Court or the applicants' representatives on the morning of 31 December 2008 that they did not intend to comply with the Rule 39 indication; the Court was informed only when the transfer had taken place.

113. They claimed that the Government had been fully aware that the House of Lords did not have provision for vacation business and that the earliest a petition for leave to appeal and interim relief could be lodged was 12 January 2009. In transferring the applicants before that date, the Government knew that their right to seek such leave and thus their chance of an effective domestic remedy would be vitiated.

2. The Government

114. The Court had held in *Paladi*, cited above, that it was for a respondent Government to demonstrate that there was an objective impediment which prevented its compliance with an interim measure indicated under Rule 39 of the Rules of Court. In the Government's submission, the question whether there was such an objective impediment had to be assessed in each case with reference to the legal or factual scenario. As the Court had confirmed in its case-law, the Convention had to be interpreted in the light of and in harmony with other principles of international law. This was no less the case when it came to the interpretation of Article 34 and Rule 39. Indeed, much of the reasoning

behind the Court's decision in *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, ECHR 2005-I as to the binding nature of Rule 39 indications was based on consideration of other principles of international law, including the judgment of the International Court of Justice in *LaGrand*, cited above. In the *LaGrand* judgment, in a passage cited by the Court in *Paladi*, the International Court of Justice emphasised that its Order of provisional measures "did not require the United States to exercise powers it did not have", although it did impose the obligation to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the conclusion of the proceedings.

115. In the present case, the Rule 39 indication should not be interpreted as requiring the Contracting State to exercise powers it did not have, including notably the power to continue to detain the applicants after midnight on 31 December 2008. An indication under Rule 39 could not require a Contracting State to violate the law and sovereignty of a non-Contracting State. This was, indeed, an exceptional case. If it was correct that the relevant acts fell within the jurisdiction of the United Kingdom, the case was by definition "exceptional" in terms of the extraterritorial application of the Convention (see *Banković*, cited above, § 74). Further, the exceptional nature of the case derived specifically from the fact that the United Kingdom was acting or being required to act outside its own territory. It could not comply with the Rule 39 indication precisely because it was on the territory of another State. The Government were proud of their long history of cooperation with the Court and their compliance with previous Rule 39 indications. They had failed to comply with the indication in this case only because there was an objective impediment preventing compliance.

116. The Government dismissed as irrelevant the submissions by the third parties to the effect that the obligation to comply with a Rule 39 indication was not discharged by a competing international obligation. The present case did not involve conflicting obligations where a State could chose to act either in accordance with treaty A or treaty B. The simple point, which the interveners did not address, was that the Government could not comply with the Rule 39 indication; they did not have the relevant powers nor any discretion as to how to act. The applicants alleged that the Government could have done more, but this was to ignore the extreme sensitivity of the important and urgent negotiations that were taking place with Iraq at that time (see paragraphs 33 and 43 above).

117. In the Government's submission, the complaint under Article 13 was unfounded since the applicants did not seek leave to appeal to the House of Lords until 9 February 2009. At the time of the transfer there were no domestic proceedings pending.

3. The third parties

118. The Equality and Human Rights Commission submitted that there could be no principled exception to the principle in *Mamatkulov*, cited above, that a State's failure to comply with an interim measure would be a violation of Article 34, where the State's failure was based on an international law obligation. The rejection of such an exception flowed from the Court's case-law regarding conflicts between international law obligations and substantive Convention obligations and also from the rationale behind the *Mamatkulov* rule, which was the need to protect the practical effectiveness of the Convention system for individual applicants.

119. The group of interveners reasoned that, given the purpose and significance of interim measures in protecting Convention rights, the obligation under Article 34 to abide by these measures should be strictly and consistently applied. A State had to take all steps available to it to comply with the order and, in deciding whether and to what extent to comply with interim measures, could not substitute its own judgment for that of the Court. The judgments in *Soering* and *Mamatkulov* demonstrated that a competing international obligation did not permit the disregard of interim measures.

B. The Court's assessment

120. In the light of the parties' submissions, the Court notes that the question of the admissibility of the complaint under Article 13 and the issues arising under Article 34 are closely connected to the merits of the application as a whole. It accordingly joins these issues to the merits of the case.

For these reasons, the Court unanimously:

Disapplies the application of Article 29 § 3 of the Convention;

Declares the complaints concerning conditions of detention and the risk of ill-treatment and extrajudicial killing in Iraqi custody inadmissible;

Joins the question of the admissibility of Article 13 of the Convention and the issues arising under Article 34 to the merits;

Declares the remainder of the application admissible.

Lawrence Early
Registrar

Lech Garlicki
President