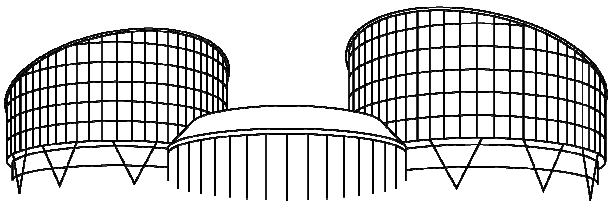

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM

(Application no. 55721/07)

JUDGMENT

STRASBOURG

7 July 2011

This judgment is final but may be subject to editorial revision.

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In the case of Al-Skeini and Others v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President,*
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Dean Spielmann,
Giovanni Bonello,
Elisabeth Steiner,
Lech Garlicki,
Ljiljana Mijović,
David Thór Björgvinsson,
Isabelle Berro-Lefèvre,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 9 and 16 June 2010 and 15 June 2011,

Delivers the following judgment, which was adopted on that last date:

PROCEDURE

1. The case originated in an application (no. 55721/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by six Iraqi nationals, Mr Mazin Jum'Aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadil Fayay Muzban, Mr Jabbar Kareem Ali and Colonel Daoud Mousa ("the applicants"), on 11 December 2007.

2. The applicants, who had been granted legal aid, were represented by Public Interest Lawyers, solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged that their relatives fell within United Kingdom jurisdiction when killed and that there had been no effective investigation into the deaths, in breach of Article 2 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 16 December 2008 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1). The parties took turns to file written observations on the admissibility and merits of the case. On 19 January 2010 the Chamber decided to relinquish jurisdiction to the Grand Chamber.

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. Judge Peer Lorenzen, President of the Fifth Section, withdrew and Judge Luis López Guerra, substitute judge, replaced him.

6. The applicants and the Government each filed a further memorial on the admissibility and merits and joint third-party comments were received from the Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Federation for Human Rights, the Law Society, and Liberty ("the interveners").

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 June 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr D. WALTON, *Agent,*
Mr J. EADIE QC,
Ms C. IVIMY,
Mr S. WORDSWORTH, *Counsel,*
Ms L. DANN,
Ms H. AKIWUMI, *Advisers;*

(b) *for the applicants*
Mr RABINDER SINGH QC,
Mr R. HUSAIN QC,
Ms S. FATIMA,
Ms N. PATEL,
Mr T. TRIDIMAS,
Ms H. LAW, *Counsel,*
Mr P. SHINER,
Mr D. CAREY,
Ms T. GREGORY,
Mr J. DUFFY, *Advisers.*

The Court heard addresses by Mr Eadie and Mr Singh.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case may be summarised as follows.

A. The occupation of Iraq 1 May 2003 to 28 June 2004

1. Background: United Nations Security Council Resolution 1441

9. On 8 November 2002 the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1441. The Resolution decided, *inter alia,* that Iraq had been and remained in material breach of its obligations under previous United Nations Security Council Resolutions to disarm and to cooperate with United Nations and International Atomic Energy Agency weapons inspectors. Resolution 1441 decided to afford Iraq a final opportunity to comply with its disarmament obligations and set up an enhanced inspection regime. It requested the Secretary-General immediately to notify Iraq of the resolution and demanded that Iraq cooperate immediately, unconditionally, and actively with the inspectors. Resolution 1441 concluded by recalling that the Security Council had "repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations". The Security Council decided to remain seized of the matter.

2. Major combat operations: 20 March-1 May 2003

10. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. Thereafter, other States sent personnel to help with the reconstruction effort.

3. Legal and political developments in May 2003

11. On 8 May 2003 the Permanent Representatives of the United Kingdom and the United States at the United Nations addressed a joint letter to the President of the United Nations Security Council, which read as follows:

> "The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete

disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.

In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.

The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; maintaining the territorial integrity of Iraq and securing Iraq's borders; securing, and removing, disabling, rendering harmless, eliminating or destroying (a) all of Iraq's weapons of mass destruction, ballistic missiles, unmanned aerial vehicles and all other chemical, biological and nuclear delivery systems and (b) all elements of Iraq's programme to research, develop, design, manufacture, produce, support, assemble and employ such weapons and delivery systems and subsystems and components thereof, including but not limited to stocks of chemical and biological agents, nuclear-weapon-usable material, and other related materials, technology, equipment, facilities and intellectual property that have been used in or can materially contribute to these programmes; in consultation with relevant international organizations, facilitating the orderly and voluntary return of refugees and displaced persons; maintaining civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; supporting and coordinating demining and related activities; promoting accountability for crimes and atrocities committed by the previous Iraqi regime; and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarization, demobilization, control, command, reformation, disestablishment, or reorganization of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

The United States, the United Kingdom and Coalition partners recognize the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative

institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialized agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of Member States, international and regional organizations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(Signed) Jeremy Greenstock
Permanent Representative of the United Kingdom

(Signed) John D. Negroponte
Permanent Representative of the United States"

12. As mentioned in the above letter, the occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority to act as a "caretaker administration" until an Iraqi government could be established. It had 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 Coalition Provisional Authority with responsibility for the temporary governance of Iraq. In CPA Regulation No. 1, dated 16 May 2003, Ambassador Bremer provided as follows:

"Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA), relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war, I hereby promulgate the following:

Section 1

The Coalition Provisional Authority

1) The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.

2) The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.

3) As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.

Section 2

The Applicable Law

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA. ..."

13. The Coalition Provisional Authority administration was divided into regional areas. CPA South was placed 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 Coalition Provisional Authority headquarters through the office of the United Kingdom Special Representative. According to the Government, although the United Kingdom Special Representative and his office sought to influence Coalition Provisional Authority policy and decisions, United Kingdom personnel had no formal decision-making power within the Authority. All the Coalition Provisional Authority's administrative and legislative decisions were taken by Ambassador Bremer.

14. The United Nations Security Council Resolution 1483 referred to by Ambassador Bremer in Coalition Provisional Authority Regulation No. 1 was actually adopted six days later, on 22 May 2003. It provided as follows:

"*The Security Council*,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

Reaffirming also the importance of the disarmament of Iraqi weapons of mass destruction and of eventual confirmation of the disarmament of Iraq,

Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,

Encouraging efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens

without regard to ethnicity, religion, or gender, and, in this connection, recalls resolution 1325 (2000) of 31 October 2000,

...

Welcoming the first steps of the Iraqi people in this regard, and noting in this connection the 15 April 2003 Nasiriyah statement and the 28 April 2003 Baghdad statement,

Resolved that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,

...

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority'),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

Concerned that many Kuwaitis and Third -State Nationals still are not accounted for since 2 August 1990,

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

...

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized,

representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

...

24. *Requests* the Secretary-General to report to the Council at regular intervals on the work of the Special Representative with respect to the implementation of this resolution and on the work of the International Advisory and Monitoring Board and *encourages* the United Kingdom of Great Britain and Northern Ireland and the United States of America to inform the Council at regular intervals of their efforts under this resolution;

25. *Decides* to review the implementation of this resolution within twelve months of adoption and to consider further steps that might be necessary.

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter."

5. Developments between July 2003 and June 2004

15. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority was required to consult with it on all matters concerning the temporary governance of Iraq.

16. On 16 October 2003 the United Nations Security Council passed a further resolution, 1511, which provided *inter alia* as follows:

"*The Security Council*

...

Underscoring that the sovereignty of Iraq resides in the State of Iraq, reaffirming the right of the Iraqi people freely to determine their own political future and control their own natural resources, reiterating its resolve that the day when Iraqis govern themselves must come quickly, and recognizing the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organizations, in taking forward this process expeditiously,

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and welcoming Member State contributions in this regard under resolution 1483 (2003),

Welcoming the decision of the Governing Council of Iraq to form a preparatory constitutional committee to prepare for a constitutional conference that will draft a constitution to embody the aspirations of the Iraqi people, and urging it to complete this process quickly,

...

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and underscores, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia* through steps envisaged in paragraphs 4 through 7 and 10 below;

...

4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority;

5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;

6. *Calls* upon the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable and requests the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made;

7. *Invites* the Governing Council to provide to the Security Council, for its review, no later than 15 December 2003, in cooperation with the Authority and, as circumstances permit, the Special Representative of the Secretary-General, a timetable and a programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution;

8. *Resolves* that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government;

...

13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the

Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;

15. *Decides* that the Council shall review the requirements and mission of the multinational force referred to in paragraph 13 above not later than one year from the date of this resolution, and that in any case the mandate of the force shall expire upon the completion of the political process as described in paragraphs 4 through 7 and 10 above, and expresses readiness to consider on that occasion any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq;

...

25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;

26. *Decides* to remain seized of the matter."

17. 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 Coalition Provisional Authority.

18. Provision for the new regime was made in United Nations Security Council Resolution 1546, adopted on 8 June 2004, which provided *inter alia*, that the Security Council, acting under Chapter VII of the United Nations Charter:

"1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below;

2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;

...

8. *Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to as 'Iraqi security forces'), operating under the authority of the Interim Government of

Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

9. *Notes* that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution;

10. *Decides* that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph seven above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities; ..."

6. The transfer of authority to the Interim Government

19. On 28 June 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government and the Coalition Provisional Authority ceased to exist. Subsequently the Multi-National Force, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi Government and authorisations from the United Nations Security Council.

B. United Kingdom armed forces in Iraq May 2003 to June 2004

20. During this period the Coalition Forces consisted of six divisions that were under the overall command of United States' generals. Four were United States divisions and two were multinational. Each division was given responsibility for a particular geographical area in Iraq. The United Kingdom was given command of the Multinational Division (South East), which comprised the provinces of Al-Basrah, Maysan, Thi Qar and Al-Muthanna, an area of 96,000 square kilometres with a population of 4.6 million. There were 14,500 Coalition troops, including 8,150 United Kingdom troops, stationed in Multinational Division (South East). The main theatre for operations by United Kingdom forces in Multinational Division (South East) were the Al-Basrah and Maysan provinces, with a total population of about 2.75 million people. Just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities.

21. From 1 May 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the Multinational Division (South East) area, in particular in Al-Basrah and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols,

arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the civil administration in Iraq in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

22. In the Aitken Report (see paragraph 69 below), prepared on behalf of the Army Chief of General Staff, the post-conflict situation in Iraq was described as follows:

> "The context in which operations have been conducted in Iraq has been exceptionally complex. It is not for this report to comment on the jus ad bellum aspects of the operation, nor of the public's opinions of the invasion. It is, however, important to note that the Alliance's post-invasion plans concentrated more on the relief of a humanitarian disaster (which did not, in the event, occur on anything like the scale that had been anticipated), and less on the criminal activity and subsequent insurgency that actually took place. One consequence of that was that we had insufficient troops in theatre to deal effectively with the situation in which we found ourselves. Peace support operations require significantly larger numbers of troops to impose law and order than are required for prosecuting a war: ours were very thinly spread on the ground. In his investigation (in April 2005) of the Breadbasket incident [alleged abuse of Iraqis detained on suspicion of looting humanitarian aid stores], Brigadier Carter described conditions in Iraq thus:
>
> '... May 2003, some 4 weeks or so after British Forces had started to begin the transition from offensive operations to stabilisation. The situation was fluid. Battlegroups had been given geographic areas of responsibility based generally around their initial tactical objectives. Combat operations had officially ended, and rules of engagement had changed to reflect this, but there was a rising trend of shooting incidents. Although these were principally between Iraqis, seeking to settle old scores or involved in criminal activity, there were early indications that the threat to British soldiers was developing ... The structure of the British Forces was changing. Many of the heavier capabilities that had been required for the invasion were now being sent home. Some Force elements were required for operations elsewhere, and there was pressure from the UK to downsize quickly to more sustainable numbers ... Local attitudes were also changing. Initially ecstatic with happiness, the formerly downtrodden Shia population in and around Basra had become suspicious, and by the middle of May people were frustrated. Aspirations and expectations were not being met. There was no Iraqi administration or governance. Fuel and potable water were in short supply, electricity was intermittent, and the hospitals were full of wounded from the combat operations phase. Bridges and key routes had been destroyed by Coalition bombing. Law and order had completely collapsed. The Iraqi Police Service had melted away; the few security guards who remained were old and incapable; and the Iraqi Armed Forces had been captured, disbanded or deserted. Criminals had been turned out onto the streets and the prisons had been stripped. The judiciary were in hiding. Every government facility had been raided and all loose items had been removed. Insecure buildings had been occupied by squatters. Crime was endemic and in parts of Basra a state of virtual anarchy prevailed. Hijackings, child kidnappings, revenge killings, car theft and burglary were rife. In a very short space of time wealth was being comprehensively redistributed.'

> In this environment, the British Army was the sole agent of law and order within its area of operations. When the Association of Chief Police Officers' lead for international affairs, Mr Paul Kernaghan, visited Iraq in May 2003, he said that he would not recommend the deployment of civilian police officers to the theatre of operations due to the poor security situation. The last time the Army had exercised the powers of an Army of Occupation was in 1945 – and it had spent many months preparing for that role; in May 2003, the same soldiers who had just fought a high-intensity, conventional war were expected to convert, almost overnight, into the only people capable of providing the agencies of government and humanitarian relief for the people of Southern Iraq. Battlegroups (comprising a Lieutenant Colonel and about 500 soldiers) were allocated areas of responsibilities comprising hundreds of square miles; companies (a Major with about 100 men under command) were given whole towns to run. The British invasion plans had wisely limited damaging as much of the physical infrastructure as possible; but with only military personnel available to run that infrastructure, and very limited local staff support, the task placed huge strains on the Army.
>
> One of the effects of this lack of civil infrastructure was the conundrum British soldiers faced when dealing with routine crime. Our experience in Northern Ireland, and in peace support operations around the world, has inculcated the clear principle of police primacy when dealing with criminals in operational environments. Soldiers accept that they will encounter crime, and that they will occasionally be required to arrest those criminals; but (despite some experience of this syndrome in Kosovo in 1999) our doctrine and practice had not prepared us for dealing with those criminals when there was no civil police force, no judicial system to deal with offenders, and no prisons to detain them in. Even when a nascent Iraqi police force was re-established in 2003, troops on the ground had little confidence in its ability to deal fairly or reasonably with any criminals handed over to it. In hindsight, we now know that some soldiers acted outside the law in the way they dealt with local criminals. However diligent they were, commanders were unable to be everywhere, and so were physically unable to supervise their troops to the extent that they should; as a result, when those instances did occur, they were less likely to be spotted and prevented."

23. United Kingdom military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against Coalition forces in Multinational Division (South East) since 1 May 2003. The violent attacks consisted of five anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145 mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.

C. The Rules of Engagement

24. The use of force by British troops during operations is covered by the appropriate Rules of Engagement. The Rules of Engagement governing the use of lethal force by British troops in Iraq during the relevant period was the subject of guidance contained in a card issued to every soldier,

known as Card Alpha. Card Alpha set out the Rules of Engagement in the following terms:

"CARD A – GUIDANCE FOR OPENING FIRE FOR SERVICE PERSONNEL

AUTHORISED TO CARRY ARMS AND AMMUNITION ON DUTY

GENERAL GUIDANCE

1. This guidance does not affect your inherent right to self-defence. However, in all situations you are to use no more force than absolutely necessary.

FIREARMS MUST ONLY BE USED AS A LAST RESORT

2. When guarding property, you must not use lethal force other than for the **protection of human life.**

PROTECTION OF HUMAN LIFE

3. You may only open fire against a person if he/she is committing or about to commit an act **likely to endanger life and there is no other way to prevent the danger.**

CHALLENGING

4. A challenge MUST be given before opening fire unless:

a. To do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s),

OR

b. You or others in the immediate vicinity are under armed attack.

5. You are to challenge by shouting:

'**NAVY, ARMY, AIR FORCE, STOP OR I FIRE.**'

Or words to that effect.

OPENING FIRE

6. If you have to open fire you are to:

a. Fire only aimed shots,

AND

b. Fire no more rounds than are necessary,

AND

c. Take all reasonable precautions not to injure anyone other than your target."

D. Investigations into Iraqi civilian deaths involving British soldiers

1. The decision to refer an incident for investigation by the Royal Military Police

25. On 21 June 2003 Brigadier Moore (Commander of the 19 Mechanised Brigade in Iraq from June to November 2003) issued a formal policy on the investigation of shooting incidents. This policy provided that all shooting incidents were to be reported and the Divisional Provost Marshall was to be informed. Non-commissioned officers from the Royal Military Police were then to evaluate the incident and decide whether it fell within the Rules of Engagement. If it was decided that the incident did come within the Rules of Engagement, statements were to be recorded and a completed bulletin submitted through the chain of command. If the incident appeared to fall outside the Rules of Engagement and involved death or serious injury, the investigation was to be handed to the Royal Military Police, Special Investigation Branch (see paragraph 28 below) by the Divisional Provost Marshall at the earliest opportunity.

26. However, Brigadier Moore decided that from 28 July 2003 this policy should be revised. The new policy required that all such incidents should be reported immediately by the soldier involved to Multinational Division (South East) by means of a Serious Incident Report. There would then be an investigation into the incident by the Company Commander or the soldier's Commanding Officer. In his evidence to the domestic courts Brigadier Moore explained that:

> "The form of an investigation into an incident would vary according to the security situation on the ground and the circumstances of the individual case. Generally, it would involve the Company Commander or Commanding Officer taking statements from the members of the patrol involved, and reviewing radio logs. It might also include taking photographs of the scene. Sometimes there would be further investigation through a meeting with the family/tribe of the person killed. Investigations at unit level, however, would not include a full forensic examination. Within the Brigade, we had no forensic capability."

If the Commanding Officer was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the Rules of Engagement, there was no requirement to initiate an investigation by the Special Investigation Branch. The Commanding Officer would record his decision in writing to Brigadier Moore. If the Commanding Officer was not so satisfied, or if he had insufficient information to arrive at a decision, he was required to initiate an Special Investigation Branch investigation.

27. Between January and April 2004 there was a further reconsideration of this policy, prompted by the fact that the environment had become less

hostile and also by the considerable media and Parliamentary interest in incidents involving United Kingdom forces in which Iraqis had died. On 24 April 2004 a new policy was adopted by the Commander of Multinational Division (South East), requiring all shooting incidents involving United Kingdom forces which resulted in a civilian being killed or injured to be investigated by the Special Investigation Branch. In exceptional cases the Brigade Commander could decide that an investigation was not necessary. Any such decision had to be notified to the Commander of Multinational Division (South East) in writing.

2. Investigation by the Royal Military Police (Special Investigations Branch)

28. The Royal Military Police form part of the Army and deploy with the Army on operations abroad, but have a separate chain of command. Military police officers report to the Provost Marshall, who reports to the Adjutant General. Within the Royal Military Police, the Special Investigation Branch is responsible for the investigation of serious crimes committed by members of the British forces while on service, incidents involving contact between the military and civilians and any special investigations tasked to it, including incidents involving civilian deaths caused by British soldiers. To secure their practical independence on operations, the Special Investigation Branch deploy as entirely discrete units and are subject to their own chain of command, headed by Provost Officers who are deployed on operations for this purpose.

29. Investigations into Iraqi civilian deaths involving British soldiers were triggered either by the Special Investigation Branch being asked to investigate by the Commanding Officer of the units concerned or by the Special Investigation Branch on its own initiative, when it became aware of an incident by other means. However, the latter type of investigation could be terminated if the Special Investigation Branch was instructed to stop by the Provost Marshall or the Commanding Officer of the unit involved.

30. Special Investigation Branch investigations in Iraq were hampered by a number of difficulties such as security problems, lack of interpreters, cultural considerations (for example, the Islamic practice requiring a body to be buried within 24 hours and left undisturbed for 40 days), the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics, the climate and general working conditions. The Aitken Report (see paragraph 69 below) summarised the position as follows:

> "It was not only the combat troops who were overstretched in these circumstances. The current military criminal justice system is relevant, independent, and fit for purpose; but even the most effective criminal justice system will struggle to investigate, advise on and prosecute cases where the civil infrastructure is effectively absent. And so, in the immediate aftermath of the ground war, the Service Police faced particular challenges in gathering evidence of a quality that would meet the very

> high standards required under English law. National records – usually an integral reference point for criminal investigations – were largely absent; a different understanding of the law between Iraqi people and British police added to an atmosphere of hostility and suspicion; and the Army was facing an increasingly dangerous operational environment – indeed, on 24 June 2003, six members of the Royal Military Police were killed in Al Amarah. Local customs similarly hampered the execution of British standards of justice: in the case of Nadhem Abdullah, for instance, the family of the deceased refused to hand over the body for forensic examination – significantly reducing the quality of evidence surrounding his death."

The Aitken Report also referred to the problems caused to the Special Investigation Branch, when attempting to investigate serious allegations of abuse, by the sense of loyalty to fellow soldiers which could lead to a lack of co-operation from Army personnel and to what the judge in the court-martial concerning the killing of the sixth applicant's son had described as a "wall of silence" from some of the military witnesses called to give evidence.

31. On conclusion of a Special Investigation Branch investigation, the Special Investigation Branch officer would report in writing to the Commanding Officer of the unit involved. Such a report would include a covering letter and a summary of the evidence, together with copies of any documentary evidence relevant to the investigation in the form of statements from witnesses and investigators. The report would not contain any decision as to the facts or conclusions as to what had happened. It was then for the Commanding Officer to decide whether or not to refer the case to the prosecuting authority for possible trial by court-martial.

32. The Aitken Report (dated 25 January 2008: see paragraph 69 below) commented on the prosecution of armed forces personnel in connection with the death of Iraqi civilians, as follows:

> "Four cases involving Iraqi deaths as a result of deliberate abuse have been investigated, and subsequently referred to the Army Prosecuting Authority (APA) on the basis there was a *prima facie* case that the victims had been killed unlawfully by British troops. The APA preferred charges on three of these cases on the basis that it considered there was a realistic prospect of conviction, and that trial was in the public and service interest; and yet not one conviction for murder or manslaughter has been recorded.
>
> The Army's position is straightforward on the issue of prosecution. Legal advice is available for commanding officers and higher authorities to assist with decisions on referring appropriate cases to the APA. The Director Army Legal Services (DALS), who is responsible to the Adjutant General for the provision of legal services to the Army, is additionally appointed by The Queen as the APA. In that capacity, he has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for appeals before the Courts-Martial Appeal Court and the House of Lords. DALS delegates these functions to ALS officers appointed as prosecutors in the APA, and Brigadier Prosecutions has day to day responsibility for the APA. The APA is under the general superintendence of the Attorney-General and is, rightly, independent of

the Army chain of command: the APA alone decides whether to direct court-martial trial and the appropriate charges, and neither the Army chain of command, nor Ministers, officials nor anyone else can make those decisions. However complex the situation in which it finds itself, the Army must operate within the law at all times; once the APA has made its decision (based on the evidence and the law), the Army has to accept that the consequences of prosecuting particular individuals or of particular charges may have a negative impact on its reputation.

The absence of a single conviction for murder or manslaughter as a result of deliberate abuse in Iraq may appear worrying, but it is explicable. Evidence has to be gathered (and, as already mentioned, this was not an easy process); that evidence has to be presented in court; and defendants are presumed innocent unless the prosecution can prove its case beyond reasonable doubt. That is a stiff test – no different to the one that applies in our civilian courts. In the broader context, the outcome from prosecutions brought to court martial by the APA is almost exactly comparable with the equivalent civilian courts: for example, as at the end of 2006, the conviction rates after trial in the court martial system stood at 12% as compared with 13% in the Crown Courts. It is inevitable that some prosecutions will fail; but this does not mean that they should not have been brought in the first place. It is the courts, after all, that determine guilt, not the prosecutors. Indeed, the fact that only a small number of all the 200-odd cases investigated by Service Police in Iraq resulted in prosecution could be interpreted as both a positive and a negative indicator: positive, in that the evidence and the context did not support the preferring of criminal charges; but negative, in that we know that the Service Police were hugely hampered, in some cases, in their ability to collect evidence of a high enough standard for charges to be preferred or for cases to be successfully prosecuted.

It is important to note that none of this implies any fundamental flaws in the effectiveness of the key elements of the Military Criminal Justice System. Both the Special Investigation Branch of the Royal Military Police (RMP(SIB)) and the APA were independently inspected during 2007. The Police inspection reported that '...Her Majesty's Inspectorate of Constabulary assess the RMP(SIB) as having the capability and capacity to run a competent level 36 (serious criminal) reactive investigation'; and the inspection of the APA in February and March 2007 by Her Majesty's Crown Prosecution Service Inspectorate concluded that: '...the APA undertakes its responsibilities in a thorough and professional manner, often in difficult circumstances', adding that 95.7% of decisions to proceed to trial were correct on evidential grounds, and 100% of decisions to proceed to trial were properly based on public or Service interest grounds."

E. The deaths of the applicants' relatives

33. The following accounts are based on the witness statements of the applicants and the British soldiers involved in each incident. These statements were also submitted to the domestic courts and, as regards all but the fifth applicant, summarised in their judgments (particularly the judgment of the Divisional Court).

1. The first applicant

34. The first applicant is the brother of Hazim Jum'aa Gatteh Al-Skeini ("Hazim Al-Skeini"), who was 23 at the time of his death. Hazim Al-Skeini was one of two Iraqis from the Beini Skein tribe who were shot dead in the Al-Majidiyah area of Basrah just before midnight on 4 August 2003 by Sergeant A, the commander of a British patrol.

35. In his witness statement, the first applicant explained that, during the evening in question, various members of his family had been gathering at a house in Al-Majidiyah for a funeral ceremony. In Iraq it is customary for guns to be discharged at a funeral. The first applicant stated that he was engaged in receiving guests at the house, as they arrived for the ceremony, and saw his brother fired upon by British soldiers as he was walking along the street towards the house. According to the first applicant, his brother was unarmed and only about ten metres away from the soldiers when he was shot and killed. Another man with him was also killed. He had no idea why the soldiers opened fire.

36. According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire from a number of different points in Al-Majidiyah. As the patrol got deeper into the village they came upon two Iraqi men in the street. One was about five metres from Sergeant A, who was leading the patrol. Sergeant A saw that he was armed and pointing the gun in his direction. In the dark, it was impossible to tell the position of the second man. Believing that his life and those of the other soldiers in the patrol were at immediate risk, Sergeant A opened fire on the two men without giving any verbal warning.

37. The following day, Sergeant A produced a written statement describing the incident. This was passed to the Commanding Officer of his battalion, Colonel G, who took the view that the incident fell within the Rules of Engagement and duly wrote a report to that effect. Colonel G sent the report to Brigade, where it was considered by Brigadier Moore. Brigadier Moore queried whether the other man had been pointing his gun at the patrol. Colonel G wrote a further report that dealt with this query to Brigadier Moore's satisfaction. The original report was not retained in Brigade records. Having considered Colonel G's further report, as did his deputy chief of staff and his legal adviser, Brigadier Moore was satisfied that the actions of Sergeant A fell within the Rules of Engagement and so he did not order any further investigation.

38. On 11, 13 and 16 August 2003 Colonel G met with members of the dead men's tribe. He explained why Sergeant A had opened fire and gave the tribe a charitable donation of 2,500 dollars (USD) from the British Army Goodwill Payment Committee, together with a letter explaining the circumstances of the deaths and acknowledging that the deceased had not intended to attack anyone.

2. The second applicant

39. The second applicant is the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C shortly after midnight on 6 November 2003.

40. The second applicant was not present when her husband was shot and her evidence was based on what she was told by those who were present. She stated that on 5 November 2003, during Ramadan, Muhammad Salim went to visit his brother-in-law at his home in Basrah. At about 11.30 p.m. British soldiers raided the house. They broke down the front door. One of the British soldiers came face-to-face with the second applicant's husband in the hall of the house and fired a shot at him, hitting him in the stomach. The British soldiers took him to the Czech military hospital, where he died on 7 November 2003.

41. According to the British account of the incident, the patrol had received information from an acquaintance of one of their interpreters that a group of men armed with long-barrelled weapons, grenades and rocket-propelled grenades had been seen entering the house. The order was given for a quick search-and-arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant C entered the house through the front door with two other soldiers and cleared the first room. As he entered the second room he heard automatic gunfire from within the house. When Sergeant C moved forward into the next room by the bottom of the stairs, two men armed with long barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning. Sergeant C believed that his life was in immediate danger. He fired one shot at the leading man, the second applicant's husband, and hit him in the stomach. He then trained his weapon on the second man who dropped his gun. The applicant's family subsequently informed the patrol that they were lawyers and were in dispute with another family of lawyers over the ownership of office premises, which had led to their being subjected to two armed attacks which they had reported to the police, one three days before and one only thirty minutes before the patrol's forced entry.

42. On 6 November 2003 the Company Commander produced a report of the incident. He concluded that the patrol had deliberately been provided with false intelligence by the other side in the feud. Having considered the report and spoken to the Company Commander, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. He therefore produced a report to that effect the same day and forwarded it to Brigade, where it was considered by Brigadier General Jones. Brigadier Jones discussed the matter with his deputy chief of staff and his legal adviser. He also discussed the case with his political adviser. As a result, Brigadier Jones also concluded that it was a straightforward case that fell within the Rules of Engagement and duly issued a report to that effect. The applicant,

who had three young children and an elderly mother-in-law to support, received USD 2,000 from the British Army Goodwill Payment Committee, together with a letter setting out the circumstances of the killing.

3. The third applicant

43. The third applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the Institute of Education in the Al-Maaqal area of Basrah, where the third applicant worked as a night porter and lived with his wife and family.

44. According to the third applicant's witness statement, at about 8 p.m. on the evening in question, he and his family were sitting round the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles and one of his children on the arm. The applicant's wife and child were taken to hospital, where his child recovered but his wife died.

45. According to the British account of the incident, the third applicant's wife was shot during a fire-fight between a British patrol and a number of unknown gunmen. When the area was illuminated by parachute flares, at least three men with long-barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol. After about seven to ten minutes the firing ceased and armed people were seen running away. A woman (the third applicant's wife) with a head injury and a child with an arm injury were found when the buildings were searched. Both were taken to hospital.

46. The following morning, the Company Commander produced a report concerning the incident, together with statements from the soldiers involved. After he had considered the report and statements, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. He duly produced a report to that effect, which he then forwarded to Brigade. The report was considered by Brigadier Jones, who also discussed the matter with his deputy chief of staff, his legal adviser and Colonel G. As a result, Brigadier Jones came to the conclusion that the incident fell within the Rules of Engagement and required no further investigation.

4. The fourth applicant

47. The fourth applicant is the brother of Waleed Sayay Muzban, aged 43, who was shot and fatally injured on the night of 24 August 2003 by Lance Corporal S in the Al-Maqaal area of Basrah.

48. The fourth applicant was not present when his brother was shot, but he claims that the incident was witnessed by his neighbours. In his witness statement he stated that his understanding was that his brother was returning

home from work at about 8.30 p.m. on the evening in question. He was driving a minibus along a street called Souq Hitteen, near where he and the fourth applicant lived. For no apparent reason, according to the applicant's statement, the minibus "came under a barrage of bullets", as a result of which Waleed was mortally wounded in the chest and stomach.

49. Lance Corporal S was a member of a patrol carrying out a check around the perimeter of a Coalition military base (Fort Apache), where three Royal Military Police officers had been killed by gunfire from a vehicle the previous day. According to the British soldier's account of the incident, Lance Corporal S became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at a slow speed with its headlights dipped. When the vehicle was signalled to stop, it appeared to be trying to evade the soldiers so Lance Corporal S pointed his weapon at the driver and ordered him to stop. The vehicle then stopped and Lance Corporal S approached the driver's door and greeted the driver (the fourth applicant's brother). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When Lance Corporal S tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for Lance Corporal S's weapon. Lance Corporal S had to use force to pull himself free. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. Lance Corporal S fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned and again shouted into the rear of the vehicle. He appeared to be reaching for a weapon. Lance Corporal S believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about five aimed shots. As the vehicle sped off, Lance Corporal S fired another two shots at the rear of the vehicle. After a short interval, the vehicle screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died later that day or the following day.

50. The Special Investigation Branch commenced an investigation on 29 August 2003. The investigators recovered fragments of bullets, empty bullet cases and took digital photographs of the scene. The vehicle was recovered and transported to the United Kingdom. The deceased's body had been returned to the family for burial and no post mortem had been carried out, so the Special Investigation Branch took statements from the two Iraqi surgeons who had operated on him. A meeting was arranged with the family to seek their consent for an exhumation and post mortem, but this was delayed. Nine military witnesses involved in the incident were interviewed

and had statements taken and a further four individuals were interviewed but found to have no evidence to offer. Lance Corporal S was not, however, questioned. Since he was suspected by the Special Investigation Branch of having acted contrary to the Rules of Engagement, it was Special Investigation Branch practice not to interview him until there was enough evidence to charge him. A forensic examination was carried out at the scene on 6 September 2003.

51. On 29 August 2003 Colonel G sent his initial report concerning the incident to Brigadier Moore. In it he stated that he was satisfied that Lance Corporal S believed that he was acting lawfully within the Rules of Engagement. However, Colonel G went on to express the view that it was a complex case that would benefit from a Special Investigation Branch investigation. After Brigadier Moore had considered Colonel G's report, discussed the matter with his Deputy Chief of Staff and taken legal advice, it was decided that the matter could be resolved with a unit-level investigation, subject to a number of queries being satisfactorily answered. As a result, Colonel G produced a further report dated 12 September 2003, in which he dealt with the various queries and concluded that a Special Investigation Branch investigation was no longer required. After discussing the matter again with his Deputy Chief of Staff and having taken further legal advice, Brigadier Moore concluded that the case fell within the Rules of Engagement.

52. By this stage, Brigadier Moore had been informed that the Special Investigation Branch had commenced an investigation into the incident. On 17 September 2003 Colonel G wrote to the Special Investigation Branch asking them to terminate the investigation. The same request was made by Brigadier Moore through his Chief of Staff during a meeting with the Senior Investigating Officer from the Special Investigation Branch. The Special Investigation Branch investigation was terminated on 23 September 2003. The deceased's family received USD 1,400 from the British Army Goodwill Payment Committee and a further USD 3,000 in compensation for the minibus.

53. Following the fourth applicant's application for judicial review (see paragraph 73 below), the case was reviewed by senior investigation officers in the Special Investigation Branch and the decision was taken to re-open the investigation. The investigation was recommenced on 7 June 2004 and completed on 3 December 2004, despite difficulties caused by the very dangerous conditions in Iraq at that time.

54. On completing the investigation the Special Investigation Branch reported to the soldier's Commanding Officer, who referred the case to the Army Prosecuting Authority in February 2005. The Army Prosecuting Authority decided that a formal preliminary examination of the witnesses should be held, in order to clarify any uncertainties and ambiguities in the evidence. Depositions were taken by the Army Prosecuting Authority from

the soldiers who had witnessed the shooting, and who were the only known witnesses. Advice was obtained from an independent senior counsel, who advised that there was no realistic prospect of conviction, since there was no realistic prospect of establishing that Lance Corporal S had not fired in self-defence. The file was sent to the Attorney General, who decided not to exercise his jurisdiction to order a criminal prosecution.

5. The fifth applicant

55. The fifth applicant is the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003, aged 15.

56. According to the statements made by the fifth applicant for the purpose of United Kingdom court proceedings, on 8 May 2003 his son did not return home at 1.30 p.m. as expected. The fifth applicant went to look for him at Al-Saad Square, where he was told that British soldiers had arrested some Iraqi youths earlier in the day. The applicant continued to search for his son and was contacted the following morning by A, another young Iraqi, who told that applicant that he, the applicant's son and two others had been arrested by British soldiers the previous day, beaten up and forced into the waters of the Shatt Al-Arab. Later on 9 May 2003 the applicant's brother informed "the British police" about the incident and was requested to surrender Ahmed's identity card. Having spent several days waiting and searching, the applicant found his son's body in the water on 10 May 2003.

57. The applicant immediately took his son's body to "the British police station", where he was told to take the body to the local hospital. The Iraqi doctor on duty told the applicant that he was not qualified to carry out a post mortem and that there were no pathologists available. The applicant decided to bury his son, since in accordance with Islamic practice burial should take place within 24 hours of death.

58. About 10 to 15 days after his son's funeral, the applicant returned to "the British police station" to ask for an investigation, but he was informed that it was not the business of "the British police" to deal with such matters. He returned to the "police station" some days later, and was informed that the Royal Military Police wished to contact him and that he should go to the Presidential Palace. The following day the applicant met with Special Investigation Branch officers at the Presidential Palace and was informed that an investigation would be commenced.

59. The Special Investigation Branch interviewed A and took a statement from him. They took statements from the applicant and other family members. At least a month after the incident, the investigators went to Al-Saad Square and retrieved clothing belonging to the applicant's son and to the other young men who had been arrested at the same time. At the end of the 40-day mourning period, the applicant consented to his son's body being exhumed for post mortem examination, but it was not possible

at that point to establish either whether Ahmed had been beaten prior to death or what had been the cause of death. The applicant contends that he was never given an explanation as to the post mortem findings and that he was not kept fully informed of the progress of the investigation in general, since many of the documents he was given were in English or had been badly translated into Arabic.

60. The applicant claims that eighteen months elapsed after the exhumation of his son's body during which time he had no contact with the investigators. In August 2005 he was informed that four soldiers had been charged with manslaughter and that a trial would take place in England. The court martial was held between September 2005 and May 2006. By that time, three of the seven soldiers who had been accused of his homicide had left the Army, and a further two were absent without leave. It was the prosecution case that the soldiers had assisted Iraqi police officers to arrest the four youths on suspicion of looting and that they had driven them to the river and forced them in at gunpoint "to teach them a lesson". The applicant and A gave evidence to the court-martial in April 2006. The applicant found the trial process confusing and intimidating and he was left with the impression that the court was biased in favour of the accused. A gave evidence that the applicant's son had appeared to be in distress in the water, but that the soldiers had driven away without helping him. However, he was not able to identify the defendants as the soldiers involved. The defendants denied any responsibility for the death and were acquitted because A's evidence was found to be inconsistent and unreliable.

61. The applicant's son's case was one of the six cases investigated in the Aitken Report (see paragraph 69 below). Under the heading "Learning Lessons from Discipline Cases" the Report stated:

> "... we know that two Initial Police Reports were produced in May 2003 relating to allegations that, on two separate occasions but within the space of just over a fortnight, Iraqis had drowned in the Shat' al-Arab at the hands of British soldiers. That one of those cases did not subsequently proceed to trial is irrelevant: at the time, an ostensibly unusual event was alleged to have occurred twice in a short space of time. With all their other duties, the commanders on the ground cannot reasonably be blamed for failing to identify what may or may not have been a trend; but a more immediate, effective system for referring that sort of information to others with the capacity to analyse it might have identified such a trend. In fact, the evidence suggests that these were two isolated incidents; but had they been a symptom of a more fundamental failing, they might have been overlooked. By comparison, if there had been two reports of a new weapon being used by insurgents to attack British armoured vehicles within a fortnight, it is certain that the Lessons Learned process would have identified its significance, determined the counter-measures needed to combat it, and quickly disseminated new procedures to mitigate the risk. The fact that this process does not apply to disciplinary matters is only partly explained by the need for confidentiality and the preservation of evidence; but it is a failure in the process that could be fairly easily rectified without compromising the fundamental principle of innocence until proven guilty."

The Report continued, under the heading “Delay”;

> “The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. ... The court martial in connection with the death of Ahmed Jabber Kareem did not convene until September 2005, 28 months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the Army, and a further two were absent without leave.
>
> In most cases, it is inappropriate for the Army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive. Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place.”

62. The fifth applicant brought civil proceedings against the Ministry of Defence for damages in respect of his son's death. The claim was settled without going to hearing, by the payment of 115,000 pounds sterling (GBP) on 15 December 2008. In addition, on 20 February 2009 Major General Cubbitt wrote to the fifth applicant and formally apologised on behalf of the British Army for its role in his son's death.

6. The sixth applicant

63. The sixth applicant is a Colonel in the Basrah police force. His son, Baha Mousa, was aged 26 when he died whilst in the custody of the British Army, three days after having been arrested by soldiers on 14 September 2003.

64. According to the sixth applicant, on the night of 13/14 September 2003 his son had been working as a receptionist at the Ibn Al-Haitham Hotel in Basrah. Early in the morning of the 14 September, the applicant went to the hotel to pick his son up from work. On his arrival he noticed that a British unit had surrounded the hotel. The applicant's son and six other hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. The applicant expressed his concern to the lieutenant in charge of the operation, who reassured him that it was a routine investigation that would be over in a couple of hours. On the third day after his son had been detained, the sixth applicant was visited by a Royal Military Police unit. He was told that his son had been killed in custody at a British military base in Basrah. He was asked to identify the corpse. The applicant's son's body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.

65. One of the other hotel employees who were arrested on 14 September 2003 stated in a witness statement prepared for the United Kingdom domestic court proceedings that, once the prisoners had arrived at the base, the Iraqi detainees were hooded, forced to maintain stress

positions, denied food and water and kicked and beaten. During the detention, Baha Mousa was taken into another room, where he could be heard screaming and moaning.

66. Late on 15 September 2003 Brigadier Moore, who had taken part in the operation in which the hotel employees had been arrested, was informed that Baha Mousa was dead and that other detainees had been ill-treated. The Special Investigation Branch was immediately called in to investigate the death. Since local hospitals were on strike, a pathologist was flown in from the United Kingdom. Baha Mousa was found to have 93 identifiable injuries on his body and to have died of asphyxiation. Eight other Iraqis had also been inhumanely treated, with two requiring hospital treatment. The investigation was concluded in early April 2004 and the report distributed to the unit's chain of command.

67. On 14 December 2004 the Divisional Court held that the inquiry into the applicant's son's death had not been effective (see paragraph 77 below). On 21 December 2005 the Court of Appeal decided to remit the question to the Divisional Court since there had been further developments (see paragraph 81 below).

68. On 19 July 2005 seven British soldiers were charged with criminal offences in connection with Baha Mousa's death. On 19 September 2006, at the start of the court-martial, one of the soldiers pleaded guilty to the war crime of inhumane treatment but not guilty to manslaughter. On 14 February 2007 charges were dropped against four of the seven soldiers and on 13 March 2007 the other two soldiers were acquitted. On 30 April 2007 the soldier convicted of inhumane treatment was sentenced to a year's imprisonment and dismissal from the Army.

69. On 25 January 2008 the Ministry of Defence published a report written by Brigadier Robert Aitken concerning six cases of alleged deliberate abuse and killing of Iraqi civilians, including the deaths of the fifth and sixth applicants' sons (“the Aitken Report”).

70. The applicant brought civil proceedings against the Ministry of Defence, which concluded in July 2008 by the formal and public acknowledgement of liability and the payment of GBP 575,000 in compensation.

71. In a written statement given in Parliament on 14 May 2008 the Secretary of State for Defence announced that there would be a public inquiry into the death of Baha Mousa. The Inquiry is chaired by a retired Court of Appeal judge, with the following terms of reference:

> “To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen's Lancashire Regiment in Iraq in 2003, and to make recommendations.”

At the time of adoption of the present judgment, the Inquiry had concluded the oral hearings but had not yet delivered its report.

F. The domestic proceedings under the Human Rights Act

1. The Divisional Court

72. On 26 March 2004, the Secretary of State for Defence decided, in connection with the deaths of 13 Iraqi civilians including the relatives of the six applicants, (1) not to conduct independent inquiries into the deaths; (2) not to accept liability for the deaths; (3) not to pay just satisfaction.

73. The 13 claimants applied for judicial review of these decisions, seeking declarations that both the procedural and the substantive obligations of Article 2 (and, in the case of the sixth applicant, Article 3) of the Convention had been violated as a result of the deaths and the Secretary of State's refusal to order any investigation. On 11 May 2004 a judge of the Divisional Court directed that six test cases would proceed to hearing (including the cases of the first, second, third, fourth and sixth applicants) and that the other seven cases (including that of the fifth applicant) would be stayed pending the resolution of the preliminary issues.

74. On 14 December 2004 the Divisional Court rejected the claims of the first four applicants but accepted the claim of the sixth applicant ([2004] EWHC 2911 (Admin)). Having reviewed this Court's case-law, in particular *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, ECHR 2001-XII, it held that, essentially, jurisdiction under Article 1 of the Convention was territorial, although there were exceptions. One exception applied where a State Party had effective control of an area outside its own territory. This basis of jurisdiction applied only where the territory of one Contracting State was controlled by another Contracting State, since the Convention operated essentially within its own regional sphere and permitted no vacuum within that space. This basis of jurisdiction could not, therefore, apply in Iraq.

75. There was an additional exception, which arose from the exercise of authority by a Contracting State's agents anywhere in the world, but this was limited to specific cases recognised by international law and identified piece-meal in the Court's case-law. No general rationale in respect of this group of exceptions was discernable from the Court's case-law. However, the instances recognised so far arose out of the exercise of State authority in or from a location which had a discrete quasi-territorial quality, or where the State agent's presence in the foreign State was consented to by that State and protected by international law, such as embassies, consulates, vessels and aircraft registered in the respondent State. A British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities and containing arrested suspects, could be covered by this narrow exception. It

was arguable that *Öcalan v. Turkey*, no. 46221/99, 12 March 2003, also fell into this category, since the applicant was arrested in a Turkish aircraft and taken immediately to Turkey. However, the Divisional Court did not consider that the Chamber judgment in *Öcalan* should be treated as "illuminating", since Turkey had not raised any objection based on lack of jurisdiction at the admissibility stage.

76. It followed that the deaths as a result of military operations in the field, such as those complained of by the first four applicants, did not fall within the United Kingdom's jurisdiction under Article 1 of the Convention, but that the death of the sixth applicant's son, in a British military prison, did. The Divisional Court further held that the scope of the Human Rights Act 1998 was identical to that of the Convention for these purposes.

77. The court found that there had been a breach of the investigative duty under Articles 2 and 3 of the Convention in respect of the sixth applicant's son since, by July 2004, some 10 months after the killing, the results of the investigation were unknown and inconclusive. The judge commented that:

> "329. ... Although there has been evidence of a rather general nature about the difficulties of conducting investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview people, about lack of interpreters, cultural differences, logistic problems, lack of records, and so forth – without any further understanding of the outcome of the [Special Investigation Branch's] report, it is impossible to understand what, if any, relevance any of this has to a death which occurred not in the highways or byways of Iraq, but in a military prison under the control of British forces. ...
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> 330. Although Captain Logan says that identity parades were logistically very difficult, detainees were moved to a different location, and some military witnesses had returned to the UK, she also says that these problems only delayed the process but did not prevent it taking place 'satisfactorily' .... There is nothing else before us to explain the dilatoriness of the investigative process: which might possibly be compared with the progress, and open public scrutiny, which we have noted seems to have been achieved with other investigations arising out of possible offences in prisons under the control of US forces. As for the [Special Investigation Branch's] report itself, on the evidence before us ... that would not contain any decision as to the facts or any conclusions as to what has or might have happened.
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> 331. In these circumstances we cannot accept [counsel for the Government's] submission that the investigation has been adequate in terms of the procedural obligation arising out of article 2 of the Convention. Even if an investigation solely in the hands of the [Special Investigation Branch] might be said to be independent, on the grounds that the [Special Investigation Branch] are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the [Special Investigation Branch] is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective."

In respect of the other five deaths, the judge considered that, if he were wrong on the jurisdiction issue and the claims did fall within the scope of

the Convention, the investigative duty under Article 2 had not been met, for the following reasons:

> "337. ... in all these cases, as in the case of Mr Mousa, the United Kingdom authorities were proceeding on the basis that the Convention did not apply. Thus the immediate investigations were in each case conducted, as a matter of policy, by the unit involved: only in case 4, that concerning Mr Waleed Muzban, was there any involvement of the [Special Investigation Branch] , and that was stood down, at any rate before being re-opened (at some uncertain time) upon a review of the file back in the UK. The investigations were therefore not independent. Nor were they effective, for they essentially consisted only in a comparatively superficial exercise, based on the evidence of the soldiers involved themselves, and even then on a paucity of interviews or witness statements, an exercise which was one-sided and omitted the assistance of forensic evidence such as might have become available from ballistic or medical expertise.
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> ...
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> 339. In connection with these cases, [counsel for the Government's] main submission was that, in extremely difficult situations, both in operational terms in the field and in terms of post event investigations, the army and the authorities had done their best. He particularly emphasised the following aspects of the evidence. There was no rule of law in Iraq; at the start of the occupation there was no police force at all, and at best the force was totally inadequate, as well as being under constant attack; although the Iraqi courts were functioning, they were subject to intimidation; there was no local civil inquest system or capability; the local communications systems were not functioning; there were no mortuaries, no post mortem system, no reliable pathologists; the security situation was the worst ever experienced by seasoned soldiers; there was daily fighting between tribal and criminal gangs; the number of troops available were small; and cultural differences exacerbated all these difficulties.
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> 340. We would not discount these difficulties, which cumulatively must have amounted to grave impediments for anyone concerned to conduct investigations as they might have liked to have carried them out. However, irrespective of [counsel for the applicants'] submission, in reliance on the Turkish cases, that security problems provide no excuse for a failure in the article 2 investigative duty, we would conclude that, on the hypothesis stated, the investigations would still not pass muster. They were not independent; they were one-sided; and the commanders concerned were not trying to do their best according to the dictates of article 2.
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> 341. That is not to say, however, that, in other circumstances, we would ignore the strategic difficulties of the situation. The Turkish cases are all concerned with deaths within the state party's own territory. In that context, the Court was entitled to be highly sceptical about the state's own professions of difficulties in an investigative path which it in any event may hardly have chosen to follow. It seems to us that this scepticism cannot be so easily transplanted in the extra-territorial setting. ..."

2. The Court of Appeal

78. The first four applicants appealed against the Divisional Court's finding that their relatives did not fall within the United Kingdom's jurisdiction. The Secretary of State also cross-appealed against the finding

in relation to the sixth applicant's son; although he accepted before the Court of Appeal that an Iraqi in the actual custody of British soldiers in a military detention centre in Iraq was within the United Kingdom's jurisdiction under Article 1 of the Convention, he contended that the Human Rights Act had no extra-territorial effect and that the sixth applicant's claim was not, therefore, enforceable in the national courts.

79. On 21 December 2005 the Court of Appeal dismissed the appeals and the cross-appeal ([2005] EWCA Civ 1609). Having reviewed the Court's case-law on jurisdiction under Article 1 of the Convention, Brooke LJ, who gave the leading judgment, held that a State could exercise extra-territorial jurisdiction when it applied control and authority over a complainant (which he termed "State agent authority", abbreviated to "SAA") and when it held effective control of an area outside its borders ("effective control of an area" or "ECA"), observing at § 80:

> "80. I would therefore be more cautious than the Divisional Court in my approach to the *Bankovic* judgment. It seems to me that it left open both the ECA and SAA approaches to extra-territorial jurisdiction, while at the same time emphasizing (in para 60) that because a SAA approach might constitute a violation of another state's sovereignty (for example, when someone is kidnapped by the agents of a state on the territory of another state without that state's invitation or consent), this route to any recognition that extra-territorial jurisdiction has been exercised within the meaning of an international treaty should be approached with caution."

He considered, *inter alia*, the cases of *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Freda v. Italy*, (dec.), no. 8916/80, Commission decision of 7 October 1980, Decisions and Reports (DR) 21, p. 250; and *Sánchez Ramirez v. France*, (dec.), no. 28780/95, Commission decision of 24 June 1996, DR 86-A, p. 155; and observed that these cases had nothing to do with the principle of public international law relating to activities within aircraft registered with a State flying over the territory of another State. Instead, the findings of jurisdiction in these cases were examples of the "State agent authority" doctrine applying when someone was within the control and authority of agents of a Contracting State, even outside the *espace juridique* of the Council of Europe, and whether or not the host State consented to the exercise of control and authority on its soil. Applying the relevant principles to the facts of the case he concluded that the sixth applicant's son came within the control and authority of the United Kingdom, and therefore its jurisdiction, from the time he was arrested at the hotel. The relatives of the other claimants had not been under the control and authority of British troops at the time when they were killed, and were not therefore within the United Kingdom's jurisdiction. He concluded in this connection that:

> "110. ... It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone's liberty he is under their control. This did not happen in any of these five cases."

80. He then examined whether, on the facts, it could be said that British troops were in effective control of Basrah City during the period in question, such as to fix the United Kingdom with jurisdiction under the "effective control of an area" doctrine. On this point, Brooke LJ concluded as follows:

> "119. Basrah City was in the [Coalition Provisional Authority] regional area called 'CPA South'. During the period of military occupation there was a significant degree of British responsibility and authority in CPA South, although its staff were drawn from five different countries and until the end of July 2003 the regional co-ordinator was a Dane. Indeed, only one of the four governorate teams in CPA South was headed by a British co-ordinator. However, although the chain of command for the British military presence in Iraq led ultimately to a US general, the Al Basrah and Maysan provinces were an area of direct British military responsibility. As I have already said ..., the Secretary of State accepts that the UK was an occupying power within the meaning of Article 42 of the Hague Regulations ..., at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised sufficient authority for this purpose.
>
> 120. But whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basrah City for ECA purposes. The situation in August - November 2003 contrasts starkly with the situations in northern Cyprus and in the Russian-occupied part of Moldova which feature in Strasbourg case-law. In each of those cases part of the territory of a contracting state was occupied by another contracting state which had every intention of exercising its control on a long term basis. The civilian administration of those territories was under the control of the occupying state, and it deployed sufficient troops to ensure that its control of the area was effective.
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> 121. [The statement of Brigadier Moore, whose command included the British forces in the Basrah area between May and November 2003] tells a very different story. He was not provided with nearly enough troops and other resources to enable his brigade to exercise effective control of Basrah City. ... [H]e described how the local police would not uphold the law. If British troops arrested somebody and gave them to the Iraqi police, the police would hand them over to the judiciary, who were themselves intimidated by the local tribes, and the suspected criminals were back on the streets within a day or two. This state of affairs gave the British no confidence in the local criminal justice system. It also diluted their credibility with local people. Although British troops arranged local protection for the judges, this made little difference. The prisons, for their part, were barely functioning.
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> 122. After describing other aspects of the highly volatile situation in which a relatively small number of British military personnel were trying to police a large city as best they could, Brig[adier] Moore said ...:
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> 'The combination of terrorist activity, the volatile situation and the ineffectiveness of Iraqi security forces meant that the security situation remained on a knife-edge for much of our tour. Despite our high work rate and best efforts, I felt that at the end of August 2003 we were standing on the edge of an abyss. It was only when subsequent reinforcements arrived ... and we started to receive intelligence from some of the Islamic parties that I started to regain the initiative.'

123. Unlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq. ...

124. In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations ...). It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways ..."

Sedley LJ observed, in connection with this issue:

"194. On the one hand, it sits ill in the mouth of a state which has helped to displace and dismantle by force another nation's civil authority to plead that, as an occupying power, it has so little control that it cannot be responsible for securing the population's basic rights. ... [However] the fact is that it cannot: the invasion brought in its wake a vacuum of civil authority which British forces were and still are unable to fill. On the evidence before the Court they were, at least between mid-2003 and mid-2004, holding a fragile line against anarchy."

81. The Court of Appeal unanimously concluded that, save for the death of the sixth applicant's son, which fell within the "State agent authority" exception, the United Kingdom did not have jurisdiction under Article 1 of the Convention. The court decided that the sixth applicant's claim also fell within the scope of the Human Rights Act 1998. Since the Divisional Court's examination of the case more information had emerged about the investigation into the death of the sixth applicant's son, including that court-martial proceedings were pending against a number of soldiers. The Court of Appeal therefore remitted the question whether there had been an adequate investigation to the Divisional Court for reconsideration following the completion of the court-martial proceedings.

82. Despite his conclusion on jurisdiction, Brooke LJ, at the express invitation of the Government, commented on the adequacy of the investigations carried out into the deaths, as follows:

"139. After all, the first two Articles of the [Convention] merely articulate the contemporary concern of the entire European community about the importance that must always be attached to every human life. ... Needless to say, the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.

140. In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the [Royal

> Military Police]. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the [Army Prosecuting Authority] and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from ECHR case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the [Royal Military Police] perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness."

3. The House of Lords

83. The first four applicants appealed and the Secretary of State cross-appealed to the House of Lords, which gave judgment on 13 June 2007 ([2007] UKHL 26). The majority of the House of Lords (Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) held that the general purpose of the Human Rights Act 1998 was to provide a remedial structure in domestic law for the rights guaranteed by the Convention, and that the 1998 Act should therefore be interpreted as applying wherever the United Kingdom had jurisdiction under Article 1 of the Convention. Lord Bingham of Cornhill, dissenting, held that the Human Rights Act had no extra-territorial application.

84. In relation to the first four applicants' complaints, the majority of the House of Lords found that the United Kingdom did not have jurisdiction over the deaths. Because of his opinion that the Human Rights Act had no extra-territorial application, Lord Bingham did not consider it useful to express a view as whether the United Kingdom exercised jurisdiction within the meaning of Article 1 of the Convention.

85. Lord Brown, with whom the majority agreed, began by observing that ultimately the decision about how Article 1 of the Convention should be interpreted and applied was for the European Court of Human Rights, since the duty of the national court was only to keep pace with the Court's case-law; there was a danger in a national court construing the Convention too generously in favour of an applicant, since the respondent State had no means of referring such a case to the Court. Lord Brown took as his starting point the decision of the Grand Chamber in *Banković* (cited above), which he described as "a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated". He considered that the following propositions could be derived from the decision in *Banković* (§ 109 of the House of Lords judgment);

> "(1) Article 1 reflects an 'essentially territorial notion of jurisdiction' (a phrase repeated several times in the Court's judgment), 'other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case' (para 61). The Convention operates, subject to article 56, 'in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states' (para 80) (ie within the area of the Council of Europe countries).

(2) The Court recognises article 1 jurisdiction to avoid a 'vacuum in human rights' protection' when the territory 'would normally be covered by the Convention' (para 80) (ie in a Council of Europe country) where otherwise (as in Northern Cyprus) the inhabitants "would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed' (para 80).

(3) The rights and freedoms defined in the Convention cannot be 'divided and tailored' (para 75).

(4) The circumstances in which the Court has exceptionally recognised the extra-territorial exercise of jurisdiction by a state include:

(i) Where the state 'through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by [the government of that territory]' (para 71) (ie when otherwise there would be a vacuum within a Council of Europe country, the government of that country itself being unable 'to fulfil the obligations it had undertaken under the Convention' (para 80) (as in Northern Cyprus).

(ii) '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 [where] customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction' (para 73).

(iii) Certain other cases where a state's responsibility 'could, in principle, be engaged because of acts ... which produced effects or were performed outside their own territory' (para 69). *Drozd v France* (1992) 14 EHRR 745 (at para 91) is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule. *Drozd*, however, contemplated no more than that, if a French judge exercised jurisdiction extra-territorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France's jurisdiction.

(iv) The *Soering v United Kingdom* (1989) 11 EHRR 439 line of cases, the Court pointed out, involves action by the state whilst the person concerned is 'on its territory, clearly within its jurisdiction' (para 68) and not, therefore, the exercise of the state's jurisdiction abroad."

Lord Brown referred to the *Öcalan*, *Freda* and *Sánchez Ramirez* line of cases (cited above), in each of which the applicant was forcibly removed from a country outside the Council of Europe, with the full cooperation of the foreign authorities, to stand trial in the respondent State. He observed that this line of cases concerning "irregular extraditions" constituted one category of "exceptional" cases expressly contemplated by *Banković* as having "special justification" for extraterritorial jurisdiction under Article 1. He did not consider that the first four applicants' cases fell into any of the exceptions to the territorial principle so far recognised by the Court.

86. Lord Brown next considered the Court's judgment in *Issa and Others v. Turkey*, no. 31821/96, § 71, 16 November 2004, on which the applicants relied, and held as follows:

> "127. If and insofar as *Issa* is said to support the altogether wider notions of article 1 jurisdiction contended for by the appellants on this appeal, I cannot accept it. In the first place, the statements relied upon must be regarded as *obiter dicta*. Secondly, as just explained, such wider assertions of jurisdiction are not supported by the authorities cited (at any rate, those authorities accepted as relevant by the Grand Chamber in *Bankovic*). Thirdly, such wider view of jurisdiction would clearly be inconsistent both with the reasoning in *Bankovic* and, indeed, with its result. Either it would extend the effective control principle beyond the Council of Europe area (where alone it had previously been applied, as has been seen, to Northern Cyprus, to the Ajarian Autonomous Republic in Georgia and to Transdniestria) to Iraq, an area (like the FRY considered in *Bankovic*) outside the Council of Europe—and, indeed, would do so contrary to the inescapable logic of the Court's case law on article 56. Alternatively it would stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state's 'authority and control'. It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Bankovic*, not least as to the Convention being 'a constitutional instrument of European public order', operating 'in an essentially regional context', 'not designed to be applied throughout the world, even in respect of the conduct of contracting states' (para 80). It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of 'authority and control' irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?
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> 128. There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric 'control and authority', going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. *Bankovic* (and later *Assanidze*) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be 'divided and tailored'. As *Bankovic* had earlier pointed out (at para 40) 'the applicant's interpretation of jurisdiction would invert and divide the positive obligation on contracting states to secure the substantive rights in a manner never contemplated by article 1 of the Convention.' When, moreover, the Convention applies, it operates as 'a living instrument.' *Öcalan* provides an example of this, a recognition that the interpretation of article 2 has been modified consequent on 'the territories encompassed by the member states of the Council of Europe [having] become a zone free of capital punishment' (para 163). (Paragraphs 64 and 65 of *Bankovic*, I may note, contrast on the one hand 'the Convention's substantive provisions' and 'the competence of the Convention organs', to both of which the 'living instrument' approach applies and, on the other hand, the scope of article 1—'the scope and reach of the entire Convention'—to which it does not.) Bear in mind too the rigour with which the Court applies the Convention, well exemplified by the series of cases from the conflict zone of south eastern Turkey in which, the state's difficulties notwithstanding, no dilution has been permitted of the investigative obligations arising under articles 2 and 3.

> 129. The point is this: except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in Southern Iraq and bound as such by Geneva IV and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant 'shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect 'the laws in force', not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied."

87. Lord Rodger (at § 83), with whom Baroness Hale agreed, and Lord Carswell (§ 97) expressly held that the United Kingdom was not in effective control of Basrah City and the surrounding area for purposes of jurisdiction under Article 1 of the Convention at the relevant time.

88. The Secretary of State accepted that the facts of the sixth applicant's case fell within the United Kingdom's jurisdiction under Article 1 of the Convention. The parties therefore agreed that if (as the majority held) the jurisdictional scope of the Human Rights Act was the same as that of the Convention, the sixth applicant's case should be remitted to the Divisional Court, as the Court of Appeal had ordered. In consequence, it was unnecessary for the House of Lords to examine the jurisdictional issue in relation to the death of the sixth applicant's son. However, Lord Brown, with whom the majority agreed, concluded:

> "132. ... As for the sixth case, 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*). ..."

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. International humanitarian law on belligerent occupation

89. The duties of an Occupying Power can be found primarily in Articles 42 to 56 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907: hereafter, "the Hague

Regulations") and Articles 27 to 34 and 47 to 78 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949: hereafter, "the Fourth Geneva Convention"), as well as in certain provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereafter, "Additional Protocol I").

Articles 42 and 43 of the Hague Regulations provide as follows:

> "42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.
>
> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Article 64 of the Fourth Geneva Convention provides that penal laws may be repealed or suspended by the Occupying Power only where they constitute a threat to the security or an obstacle to the application of the Fourth Geneva Convention. It also details the situations in which the Occupying Power is entitled to introduce legislative measures. These are specifically:

> "provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

Agreements concluded between the Occupying Power and the local authorities cannot deprive the population of occupied territory of the protection afforded by international humanitarian law and protected persons themselves can in no circumstances renounce their rights (Fourth Geneva Convention, Articles 8 and 47). Occupation does not create any change in the status of the territory (see Article 4 of Additional Protocol I), which can only be effected by a peace treaty or by annexation followed by recognition. The former sovereign remains sovereign and there is no change in the nationality of the inhabitants.

B. Case-law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human rights law and the extra-territorial obligations of States under international human rights law

90. In the proceedings concerning the International Court of Justice's Advisory Opinion on the *Legal Consequences of the Construction of a Wall*

in the Occupied Palestinian Territory (9 July 2004), Israel denied that the human rights instruments to which it was a party, including the International Covenant on Civil and Political Rights, were applicable to the Occupied Palestinian Territory and asserted (§ 102) that:

> "humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

In order to determine whether the instruments were applicable in the Occupied Palestinian Territory, the International Court of Justice first addressed the issue of the relationship between international humanitarian law and international human rights law, holding as follows:

> "106. ... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [International Covenant on Civil and Political Rights]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis,* international humanitarian law."

The International Court of Justice next considered the question whether the International Covenant on Civil and Political Rights was capable of applying outside the State's national territory and whether it applied in the Occupied Palestinian Territory. It held as follows (references and citations omitted):

> "108. The scope of application of the [International Covenant on Civil and Political Rights] is defined by Article 2, paragraph 1, thereof, which provides :
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> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'
>
> This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.
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> 109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [International Covenant on Civil and Political Rights], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina ... . It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany ...

...

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee. In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question 'whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction' for purposes of the application of the Covenant ... Israel took the position that 'the Covenant and similar instruments did not apply directly to the current situation in the occupied territories' ...The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' .... In 2003 in face of Israel's consistent position, to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza ...', the Committee reached the following conclusion :

'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' ... .

111. In conclusion, the Court considers that the [International Covenant on Civil and Political Rights] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

In addition, the International Court of Justice appeared to assume that, even in respect of extra-territorial acts, it would in principle be possible for a State to derogate from its obligations under the International Covenant on Civil and Political Rights, Article 4 § 1 of which provides:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Thus, in § 136 of the opinion, having considered whether the acts in question were justified under international humanitarian law on grounds of military exigency, the International Court of Justice held:

"136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions

which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument."

91. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda*), (19 December 2005) the International Court of Justice considered whether, during the relevant period, Uganda was an "Occupying Power" of any part of the territory of the Democratic Republic of Congo, within the meaning of customary international law, as reflected in Article 42 of the Hague Regulations (§§ 172-173). The International Court of Justice found that Ugandan forces were stationed in the province of Ituri and exercised authority there, in the sense that they had substituted their own authority for that of the Congolese Government (§§ 174-176). The International Court of Justice continued:

"178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."

The International Court of Justice established the facts relating to the serious breaches of human rights allegedly attributable to Uganda, in the occupied Ituri region and elsewhere (§§ 205-212). In order to determine whether the conduct in question constituted a breach of Uganda's international obligations, the International Court of Justice recalled its finding in the above *Construction of a Wall* Advisory Opinion that both international humanitarian law and international human rights law would have to be taken into consideration and that international human rights instruments were capable of having an extra-territorial application,

"particularly in occupied territories" (§ 216). The International Court of Justice next determined which were "the applicable rules of international human rights law and international humanitarian law", by listing the international humanitarian and international human rights treaties to which both Uganda and the Democratic Republic of Congo were party, together with the relevant principles of customary international law (§§ 217-219).

C. The duty to investigate alleged violations of the right to life in situations of armed conflict and occupation under international humanitarian law and international human rights law

92. Article 121 of the Third Geneva Convention provides that an official enquiry must be held by the detaining power following the suspected homicide of a prisoner of war. Article 131 of the Fourth Geneva Convention provides:

> "Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protection Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protection Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible."

The Geneva Conventions also place an obligation on each High Contracting Party to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons (Articles 49 and 50 of the First Geneva Convention; Articles 50-51 of the Second Geneva Convention; Articles 129 and 130 of the Third Geneva Convention; Articles 146 and 147 of the Fourth Geneva Convention).

93. In Report no. E/CN.4/2006/53 on Extrajudicial, Summary or Arbitrary Executions (8 March 2006), the United Nations Special Rapporteur, Philip Alston, observed in connection with the right to life under Article 6 of the International Covenant on Civil and Political Rights in situations of armed conflict and occupation (footnotes omitted):

> "36. Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. The right to life is non-derogable regardless of circumstance. This prohibits any practice of not investigating alleged violations during armed conflict or occupation. As the Human Rights Committee has held, 'It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees ... The provisions of the [International Covenant on Civil and Political Rights] relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.' It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but

> they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. ..."

94. In its judgment in the *Case of the Mapiripán Massacre v. Colombia*, 15 September 2005, the Inter-American Court of Human Rights held, *inter alia*, in connection with the respondent State's failure fully to investigate the massacre of civilians carried out by a para-military group with the alleged assistance of the State authorities:

> "238. In this regard, the Court recognizes the difficult circumstances of Colombia, where its population and its institutions strive to attain peace; However, the country's conditions, no matter how difficult, do not release a State Party to the American Convention of its obligation set forth in this treaty, which specifically continue in cases such as the instant one. The Court has argued that when the State conducts or tolerates actions leading to extra-legal executions, not investigating them adequately and not punishing those responsible, as appropriate, it breaches the duties to respect rights set forth in the Convention and to ensure their free and full exercise, both by the alleged victim and by his or her next of kin, it does not allow society to learn what happened, and it reproduces the conditions of impunity for this type of facts to happen once again."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

95. The applicants contended that their relatives were within the jurisdiction of the United Kingdom under Article 1 of the Convention at the moment of death and that, except in relation to the sixth applicant, the United Kingdom had not complied with its investigative duty under Article 2.

96. The Government accepted that the sixth applicant's son had been within United Kingdom jurisdiction but denied that the United Kingdom had jurisdiction over any of the other deceased. They contended that, since the second and third applicants' relatives had been killed after the adoption of United Nations Security Council Resolution 1511 (see paragraph 16 above), the acts which led to their deaths were attributable to the United Nations and not to the United Kingdom. In addition, the Government contended that the fifth applicant's case should be declared inadmissible for

non-exhaustion of domestic remedies and that the fifth and sixth applicants no longer had victim status.

A. Admissibility

1. Attribution

97. The Government pointed out that the operations that led to the deaths of the second and third applicants' relatives occurred after 16 October 2003, when the United Nations Security Council adopted resolution 1511. Paragraph 13 of that resolution authorised a Multi-National Force to take "all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). It followed that, in conducting the relevant operations in which the second and third applicants' relatives were shot, United Kingdom troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multi-National Force acting pursuant to the binding decision of the United Nations Security Council.

98. The applicants stressed that the Government had not raised this argument at any stage during the domestic proceedings. Moreover, an identical argument had been advanced by the Government and rejected by the House of Lords in *R (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58.

99. The Court recalls that it is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries. It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (*A. and Others v. the United Kingdom* [GC], no. 3455/05, § 154, ECHR 2009-...).

100. The Government did not contend before the national courts that any of the killings of the applicants' relatives were not attributable to United Kingdom armed forces. The Court considers, therefore, that the Government are estopped from raising this objection in the present proceedings.

2. Jurisdiction

101. The Government further contended that the acts in question took place in southern Iraq and outside the United Kingdom's jurisdiction under

Article 1 of the Convention. The sole exception was the killing of the sixth applicant's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction.

102. The Court considers that the question whether the applicants' cases fall within the jurisdiction of the respondent State is closely linked to the merits of their complaints. It therefore joins this preliminary question to the merits.

3. Exhaustion of domestic remedies

103. The Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies. They pointed out that although he brought judicial review proceedings alleging breaches of his substantive and procedural rights under Articles 2 and 3, his claim was stayed pending resolution of the six test cases (see paragraph 73 above). After those claims had been resolved, it would have been open to the applicant to apply to the Divisional Court to lift the stay, but he did not do so. His case was not a shooting incident, and the domestic courts had not had the opportunity to consider the facts relevant to his claims that his son was within the jurisdiction of the United Kingdom and that there had been a breach of the procedural obligation.

104. The applicants invited the Court to reject this submission. A judicial review claim had been lodged by the fifth applicant on 5 May 2004. It was, by agreement, stayed pending the outcome of the six test cases (see paragraph 73 above). The fifth applicant would have had no reasonable prospects of success if, after the House of Lords gave judgment in *Al-Skeini*, he had sought to revive and pursue his stayed judicial review claim. The lower courts would have been bound by the House of Lords' interpretation of Article 1 and would have applied it so as to find that the applicant's deceased son had not been within United Kingdom jurisdiction.

105. The Court observes that, according to the fifth applicant, his son died when, having been arrested by United Kingdom soldiers on suspicion of looting, he was driven in an army vehicle to the river and forced to jump in. His case is, therefore, distinguishable on its alleged facts from those of the first, second and fourth applicants, whose relatives were shot by British soldiers; the third applicant, whose wife was shot during exchange of fire between British troops and unknown gunmen; and the sixth applicant, whose son was killed while detained in a British military detention facility. It is true that the House of Lords in the *Al-Skeini* proceedings did not have before it a case similar to the fifth applicant's, where an Iraqi civilian met his death having been taken into British military custody, but without being detained in a military prison. Nonetheless, the Court considers that the applicants are correct in their assessment that the fifth applicant would have had no prospects of success had he subsequently sought to pursue his judicial review application in the domestic courts. Lord Brown, with whom

the majority of the House of Lords agreed, made it clear that he preferred the approach to jurisdiction in the sixth applicant's case taken by the Divisional Court, namely that jurisdiction arose in respect of Baha Mousa only because he died while detained in a British military prison (see paragraph 88 above). In these circumstances, the Court does not consider that the fifth applicant can be criticised for failing to attempt to revive his claim before the Divisional Court. It follows that the Government's preliminary objection based on non-exhaustion of domestic remedies must be rejected.

4. Victim status

106. The Government submitted that the fifth and sixth applicants could no longer claim to be victims of any violations of their rights under Article 2, since the death of each of their sons had been fully investigated by the national authorities and compensation paid to the applicants.

107. The Court considers that this question also is closely linked and should be joined to the merits of the complaint under Article 2.

5. Conclusion on admissibility

108. The Court considers that 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. It must therefore be declared admissible.

B. The merits

1. Jurisdiction

(a) The parties' arguments

(i) The Government

109. The Government submitted that the leading authority on the concept of "jurisdiction" in Article 1 of the Convention was the Court's decision in *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, ECHR 2001-XII). *Banković* established that the fact that an individual had been affected by an act committed by a Contracting State or its agents was not sufficient to establish that he was within that State's jurisdiction. Jurisdiction under Article 1 was "primarily" or "essentially" territorial and any extension of jurisdiction outside the territory of the Contracting State was "exceptional" and required "special justification in

the particular circumstances of each case". The Court had held in *Banković* that the Convention rights could not be "divided and tailored". Within its jurisdiction, a Contracting State was under an obligation to secure all the Convention rights and freedoms. The Court also held in *Banković* that the Convention was "an instrument of European public order" and "a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States". The essentially territorial basis of jurisdiction reflected principles of international law and took account of the practical and legal difficulties faced by a State operating on another State's territory, particularly in regions which did not share the values of the Council of Europe Member States.

110. In the Government's submission, the Grand Chamber in *Banković*, having conducted a comprehensive review of the case-law, identified a limited number of exceptions to the territorial principle. The principal exception derived from the case-law on northern Cyprus and applied when a State, as a consequence of military action, exercised effective control of an area outside its national territory. Where the Court had found this exceptional basis of jurisdiction to apply, it had stressed that the State exercising effective control was thereby responsible for securing the entire range of substantive Convention rights in the territory in question (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 75-80, ECHR 2001-IV; *Banković*, cited above, §§ 70-71; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 314-316, ECHR 2004-VII). Moreover, despite dicta to the contrary in the subsequent Chamber judgment in *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, the Grand Chamber in *Banković* made it clear that the "effective control of an area" basis of jurisdiction could apply only within the Convention legal space. In addition to the control exercised by Turkey in northern Cyprus, the Court had applied this exception in relation to only one other area, Transdniestria, which also fell within the territory of another Contracting State. Any other approach would risk requiring the State to impose culturally alien standards, in breach of the principle of sovereign self-determination.

111. According to the Government, the Court's case-law on Article 56 of the Convention further indicated that a State would not be held to exercise Article 1 jurisdiction over an overseas territory merely by virtue of exercising effective control there: see *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-XIV. If the effective control of territory exception were held to apply outside the territories of the Contracting States, this would lead to the conclusion that a State was free to choose whether or not to extend the Convention and its Protocols to a non-metropolitan territory outside the Convention "*espace juridique*" over which it might in fact have exercised control for decades, but was not free to

choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.

112. The Government submitted that, since Iraq fell outside the Convention legal space, the "effective control of an area" exceptional basis of jurisdiction could not apply. In any event, the United Kingdom did not have "effective control" over any part of Iraq during the relevant time. This was the conclusion of the domestic courts, which had all the available evidence before them. The number of Coalition Forces, including United Kingdom forces, was small: in South East Iraq, an area of 96,000 square kilometres and a population of 4.6 million, there were 14,500 Coalition troops, including 8,150 United Kingdom troops. United Kingdom troops operated in Al-Basrah and Maysan provinces, which had a population of 2.76 million for 8,119 troops. United Kingdom forces in Iraq were faced with real practical difficulties in restoring conditions of security and stability so as to enable the Iraqi people freely to determine their political future. The principal reason for this was that at the start of the occupation there was no competent system of local law enforcement in place, whilst at the same time there was widespread violent crime, terrorism and tribal fighting involving the use of light and heavy weapons.

113. Governing authority in Iraq during the occupation was exercised by the Coalition Provisional Authority, which was governed by the United States Ambassador Paul Bremer and which was not a subordinate authority of the United Kingdom. In addition, from July 2003 there was a central Iraqi Governing Council and a number of local Iraqi councils. The status of the Coalition Provisional Authority and Iraqi administration was wholly different from that of the "TRNC" in Cyprus or the "MRT" in Transdniestria, which were both characterised by the Court as "self-proclaimed authorities which are not recognised by the international community". The authority of the Coalition Provisional Authority and the Iraqi administration was recognised by the international community, through the United Nations Security Council. Moreover, the purpose of the United Kingdom's joint occupation of Iraq was to transfer authority as soon as possible to a representative Iraqi administration. In keeping with this purpose, the occupation lasted for only just over a year.

114. In the Government's submission, the fact that between May 2003 and June 2004 the United Kingdom was an Occupying Power within the meaning of the Hague Regulations (see paragraph 89 above) did not, in itself, give rise to an obligation to secure the Convention rights and freedoms to the inhabitants of South East Iraq. As an Occupying Power the United Kingdom did not have sovereignty over Iraq and was not entitled to treat the area under its occupation as its own territory or as a colony subject to its complete power and authority. The Hague Regulations did not confer on the United Kingdom the power to amend the laws and constitution of

Iraq so as to conform to the United Kingdom's own domestic law or regional multi-lateral international obligations such as the Convention. On the contrary, the Hague Regulations set limits on the United Kingdom's powers, notably the obligation to respect the laws in force in Iraq unless "absolutely prevented". Moreover, the resolutions passed by the United Nations Security Council recognised that governing authority in Iraq during the occupation was to be exercised by the Coalition Provisional Authority and that the aim of the occupation was to transfer authority as soon as possible to a representative Iraqi administration. It followed that the international legal framework, far from establishing that the United Kingdom was obliged to secure Convention rights in Iraq, established instead that the United Kingdom would have been acting contrary to its international obligations if it had sought to modify the constitution of Iraq so as to comply with the Convention. In any event, the Court's case-law demonstrated that it approached the question whether a State exercised jurisdiction extra-territorially as one of fact, informed by the particular nature and history of the Convention. The obligations imposed by the Fourth Geneva Convention and the Hague Regulations were carefully tailored to the circumstances of occupation and could not in themselves have consequences for the very different issue of jurisdiction under the Convention.

115. The Government accepted that it was possible to identify from the case-law a number of other exceptional categories where jurisdiction could be exercised by a State outside its territory and outside the Convention region. In *Banković* (cited above) the Grand Chamber referred to other cases involving the activities of diplomatic or consular agents abroad and on board craft and vessel registered in or flying the flag of the State. In *Banković* the Court also cited as an example *Drozd and Janousek v. France and Spain*, 26 June 1992, Series A no. 240, which demonstrated that jurisdiction could be exercised by a State if it brought an individual before its own court, sitting outside its territory, to apply its own criminal law. In *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV the Grand Chamber held that Turkey had exercised jurisdiction over the applicant when he was "arrested by members of the Turkish security forces outside an aircraft registered in Turkey in the international zone of Nairobi airport" and "physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey". In the Government's submission, none of these exceptions applied in the first, second, third and fourth applicants' cases.

116. The Government contended that the applicants' submission that, in shooting their relatives, the United Kingdom soldiers exercised "authority and control" over the deceased, so as to bring them within the United Kingdom's jurisdiction, was directly contrary to the decision in *Banković* (cited above). In *Banković* the Grand Chamber considered the applicability

of the Convention to extra-territorial military operations generally, having regard *inter alia* to State practice and Article 15 of the Convention, and concluded that the Convention did not apply to the military action of the respondent States which resulted in those applicants' relatives' deaths. Equally, in the present case, the military action of United Kingdom soldiers in shooting the applicants' relatives whilst carrying out military security operations in Iraq did not constitute an exercise of jurisdiction over them. No distinction could be drawn in this respect between a death resulting from a bombing and one resulting from a shooting in the course of a ground operation.

117. The Government rejected the applicants' argument that a jurisdictional link existed because the United Kingdom soldiers were exercising "legal authority" over the deceased, derived from the obligation under the Hague Regulations to ensure "public order and safety" in the occupied territory. The meaning of Article 1 of the Convention was autonomous and could not be determined by reference to wholly distinct provisions of international humanitarian law. Moreover, the duty relied on was owed to every Iraqi citizen within the occupied territory and, if the applicants were correct, the United Kingdom would have been required to secure Convention rights to them all. Nor could it be said that United Kingdom troops at the relevant time were exercising "public functions" pursuant to treaty arrangements (see *Banković*, cited above, § 73). In fact, United Kingdom troops were exercising military power in an effort to create a situation in which governmental functions could be exercised and the rule of law could properly operate. No sensible distinction could be drawn between the different types of military operation undertaken by them. There was no basis for concluding that the applicability of the Convention should turn upon the particular activity that a soldier was engaged in at the time of the alleged violation, whether street patrol, ground offensive or aerial bombardment.

118. In conclusion, the Government submitted that the domestic courts were correct that the United Kingdom did not exercise any Article 1 jurisdiction over the relatives of the first to fourth applicants at the time of their deaths. The cases could not be distinguished from that of the deceased in *Banković*, (cited above). Nor were the facts of the fifth applicant's case sufficient to distinguish it in this respect from those of the first to fourth applicants. The fifth applicant's son was not arrested in circumstances similar to those which founded jurisdiction in *Öcalan* (cited above). As a suspected looter, in the situation of extreme public disorder in the immediate aftermath of the cessation of major combat activities, he was physically required by United Kingdom soldiers to move from the place of looting to another location. The acts of the United Kingdom soldiers involved an assertion of military power over the fifth applicant's son, but no more. The Government accepted that the sixth applicant's son was within

United Kingdom jurisdiction when he died, but only on the basis found by the Divisional Court and subsequently by Lord Brown, with whom Lords Rodger and Carswell and Baroness Hale agreed, namely that jurisdiction was established when the deceased was detained in a United Kingdom-run military detention facility located in a United Kingdom base, essentially by analogy with the extra-territorial exception made for embassies. At the hearing before the Court, counsel for the Government confirmed that it was the Government's position that, for example, an individual being taken to a British detention facility on foreign soil in a British military vehicle would not fall within the United Kingdom's jurisdiction until the moment the vehicle and individual passed within the perimeter of the facility.

119. This did not mean that United Kingdom troops were free to act with impunity in Iraq. As Lord Bingham observed in his opinion in the House of Lords, the acts of the United Kingdom forces were subject to and regulated by international humanitarian law. United Kingdom soldiers in Iraq were also subject to United Kingdom domestic criminal law and could be prosecuted in the national courts. The International Criminal Court had jurisdiction to prosecute war crimes where the State was unwilling or unable to prosecute. Civil claims in tort could also be brought in the United Kingdom courts against United Kingdom agents and authorities alleged to have caused injury to individuals in Iraq.

(ii) The applicants

120. The applicants accepted that jurisdiction under Article 1 was essentially territorial. However, they underlined that it was not exclusively so and that it was possible for a Contracting State to exercise jurisdiction extra-territorially. The procedure under Article 56 allowed States to extend the reach of the Convention to other territories, with due regard to local requirements, by means of a notified declaration. However, it was clear from the case-law that Article 56 was not an exclusive mechanism for extra-territorial applicability.

121. The applicants submitted that the case-law of the Court and Commission recognised the exercise by States of jurisdiction extra-territorially through the principles of both “State agent authority” and “effective control of an area”. The first reference to “State agent authority” jurisdiction was in the Commission's admissibility decision in *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission decision on admissibility of 26 May 1975, vol. 2 Decisions and Reports (DR), p. 125, at p. 136, when the Commission observed that: “... authorised agents of the State ... not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property”. This principle was subsequently applied in *Cyprus v. Turkey*, nos. 6780/74 and 6950/75, Commission Report of 10 July 1976, when the Commission found the actions of Turkish soldiers

in Cyprus involved the exercise of Turkish jurisdiction. These actions comprised the killing of civilians, including individuals subject to the order of an officer and others shot while attempting to recover possessions from property under Turkish control; the rape of women in empty houses and on the street; the arbitrary detention of civilians; cruelty to detainees; displacement of civilians; and military confiscation of property. Since Turkey did not accept the Court's jurisdiction until 1990, the case was never examined by the Court. The Commission's report, however, did not support the suggestion that military custodial authority alone constituted a relationship of sufficient authority and control.

122. The applicants pointed out that in the later cases against Turkey concerning northern Cyprus which were examined by the Commission and the Court during the 1990s, Turkey accepted that its jurisdiction under Article 1 would be engaged in respect of the direct acts of Turkish military personnel. However, the Turkish Government shifted ground and argued that it did not have jurisdiction because the acts in question were not committed by Turkish agents but were instead attributable to an autonomous local administration installed in 1983, the "TRNC". The Court in *Loizidou v. Turkey* (preliminary objections) and in *Cyprus v. Turkey*, both cited above, countered this argument by elaborating the principle of "effective control of an area", which applied (see *Loizidou* (preliminary objections) § 62):

> "when as a consequence of military action - whether lawful or unlawful – [a Contracting State] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".

In these cases the Court did not give any indication that the "State agent authority" principle had been supplanted. In fact, in *Loizidou v. Turkey* (preliminary objections), before setting out the principle of "effective control of an area" jurisdiction, the Court observed (§ 62), that:

> "In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91)".

Furthermore, its conclusion on the question whether the alleged violation was capable of falling within Turkish jurisdiction relied on both grounds equally (§ 63):

> "In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the 'TRNC'. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property."

In the Court's subsequent case-law, the two principles had continued to be placed side-by-side (see *Banković* §§ 69-73; *Issa* §§ 69-71 (both cited above); *Andreou v. Turkey* (dec.), no. 45653/99, 2 June 2008; *Solomou and Others v. Turkey*, no. 36832/97, §§ 44-45, 24 June 2008). There was no precedent of the Court to suggest that "State agent authority" jurisdiction was inapt as a means of analysing direct actions by military State agents exercising authority.

123. The applicants argued that their dead family members fell within the United Kingdom's jurisdiction under the "State agent authority" principle. The Government had accepted, in respect of the sixth applicant's son, that the exercise of authority and control by British military personnel in Iraq was capable of engaging the United Kingdom's extra-territorial jurisdiction. However, jurisdiction in extra-territorial detention cases did not rest on the idea of a military prison as a quasi-territorial enclave. Jurisdiction in respect of the sixth applicant's son would equally have arisen had he been tortured and killed while under arrest at the hotel where he worked or in a locked army vehicle parked outside. Moreover, the authority and control exercised by military personnel was not limited in principle to actions as custodians, even if the arrest and detention of persons outside State territory could be seen as a classic instance of State agent authority (as was argued by the respondent Governments in *Banković*, cited above, § 37).

124. The applicants submitted that the deceased relatives of all six applicants fell within United Kingdom jurisdiction by virtue of the authority and control exercised over them by United Kingdom State agents. They emphasised that British armed forces had responsibility for public order in Iraq, maintaining the safety and security of local civilians and supporting the civil administration. In performing these functions, the British armed forces were operating within the wider context of the United Kingdom's occupation of South East Iraq. The control and authority was also exercised through CPA South Regional Office, which was staffed primarily by British personnel. The individuals killed were civilians to whom the British armed forces owed the duty of safety and security. There was thus a particular relationship of authority and control between the soldiers and the civilians killed. To find that these individuals fell within the authority of the United Kingdom armed forces would not require the acceptance of the impact-based approach to jurisdiction which was rejected in *Banković* (cited above), but would instead rest on a particular relationship of authority and control. In the alternative, the applicants argued that, at least in respect of the deceased relatives of the second, fourth, fifth and sixth applicants, the British soldiers exercised sufficient authority and control to bring the victims within the United Kingdom's jurisdiction.

125. The applicants further contended that their dead relatives fell within United Kingdom jurisdiction because, at the relevant time, the United Kingdom was in effective control of South East Iraq. It was their case that

where, as a matter of international law, territory was occupied by a State as an Occupying Power, because that territory was actually placed under the authority of that State's hostile army (see Article 42 of the Hague Regulations: paragraph 89 above), that was sufficient to constitute extra-territorial jurisdiction under Article 1 of the Convention. This consequence of belligerent occupation reflected the approach in international law, both as regards extra-territorial jurisdiction and extra-territorial application of human rights based on "jurisdiction".

126. They rejected the idea that the "effective control of an area" basis of jurisdiction could apply only within the Convention legal space. Furthermore, they reasoned that to require a State to exert complete control, similar to that exercised within its own territory, would lead to the perverse position whereby facts disclosing a violation of the Convention would, instead of entitling the victim to a remedy, form the evidential basis for a finding that the State did not exercise jurisdiction. Similarly, defining the existence of control over an area by reference to troop numbers alone would be uncertain, allow evasion of responsibility and promote arbitrariness. The application of the Convention should influence the actions of the Contracting States, prompting careful consideration of military intervention and ensuring sufficient troop numbers to meet its international obligations. The applicants endorsed the approach suggested by Sedley LJ in the Court of Appeal (see paragraph 80 above), that a Contracting State in military occupation was under a duty to do everything possible to keep order and protect essential civil rights. While the Court's case-law (the northern Cyprus cases and *Ilaşcu*, cited above) included details of numbers of military personnel deployed, this was relevant to establishing whether a territory had actually been placed under the authority of a hostile army, in cases where the respondent States (Turkey and Russia) denied being in occupation. Where, as in the present case, the respondent State accepted that it was in occupation of the territory, such an assessment was unnecessary.

127. The applicants argued that the duty on an occupying State under international humanitarian law to apply the domestic law of the territorial State and not to impose its own law could not be used to evade jurisdiction under the Convention, since the "effective control of an area" basis of jurisdiction applied also to unlawful occupation. They referred to the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo* and its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see paragraphs 90-91 above), where the International Court of Justice found that the occupying State was under a duty to apply international human rights law. The clear principle emerging from these cases was that belligerent occupation in international law was a basis for the recognition of extra-territorial human rights jurisdiction.

iii. The third parties

128. The interveners (see paragraph 6 above) emphasised that the Convention was adopted in the aftermath of the events in Europe of the 1930s and 1940s, when appalling human rights abuses were carried out by military forces in occupied territories. It was inconceivable that the drafters of the Convention should have considered that the prospective responsibilities of States should be confined to violations perpetrated on their own territories. Moreover, public international law required that the concept of "jurisdiction" be interpreted in the light of the object and purpose of the particular treaty. The Court had repeatedly had regard to the Convention's special character as an instrument for human rights protection. It was relevant that one of the guiding principles under international human rights law, which had been applied by the United Nations Human Rights Committee and the International Court of Justice when considering the conduct of States outside their territory, was the need to avoid unconscionable double standards, by allowing a State to perpetrate violations on foreign territory which would not be permitted on its own territory.

129. The interveners further emphasised that it was a common ground between the international and regional courts and human rights bodies that, when determining whether the acts or omissions of a State's agents abroad fall within its "jurisdiction", regard must be had to the existence of control, authority or power of that State over the individual in question. When the agents of the State exercised such control, authority or power over an individual outside its territory, that State's obligation to respect human rights continued. This was a factual test, to be determined with regard to the circumstances of the particular act or omission of the State agents. Certain situations, such as military occupations, created a strong presumption that individuals were under the control, authority or power of the occupying State. Indeed, one principle which emerged from the case-law of the International Court of Justice *inter alia* (see paragraphs 90-91 above), was that once a situation was qualified as an occupation within the meaning of international humanitarian law, there was a strong presumption of "jurisdiction" for the purposes of the application of human rights law.

(b) The Court's assessment

(i) General principles relevant to jurisdiction under Article 1 of the Convention

130. Article 1 of the Convention reads as follows:

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

As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed

rights and freedoms to persons within its own "jurisdiction" (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001- XII). "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković*, cited above, §§ 61 and 67; *Ilaşcu*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (*Ilaşcu*, cited above, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (*Banković*, cited above, § 67).

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.

(β) State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, § 91; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 62, Series A no. 310; *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI; and *Banković*, cited above, 69). The statement of principle, as it appears in *Drozd and Janousek* and the other cases just cited, is very broad: the Court states merely that the Contracting Party's responsibility "can be involved" in these circumstances. It is necessary to examine the Court's case-law to identify the defining principles.

134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these

agents exert authority and control over others (*Banković*, cited above, § 73; 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).

135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above*; Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002; and also *X and Y v. Switzerland*, nos. 7289/75 and 7349/76, Commission's admissibility decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005-IV, the Court held that "directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory". In *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86-89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* [GC], no. 3394/03, § 67, ECHR 2010-..., the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that

jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

137. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" (compare *Banković*, cited above, § 75).

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (*Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314-316; *Loizidou* (merits), cited above, § 52). Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights (*Cyprus v. Turkey*, cited above, §§ 76-77).

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area (see *Loizidou* (merits), cited above, §§ 16 and 56; *Ilaşcu*, cited above, § 387). Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region (see *Ilaşcu*, cited above, §§ 388-394).

140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the

Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements," to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89 and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-...).

(δ) The Convention legal space ("*espace juridique*")

141. The Convention is a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), cited above, § 75). It 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 *Soering*, cited above, § 86).

142. The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space" (see *Loizidou* (merits), cited above, §78; *Banković*, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction (see amongst other examples *Öcalan*, *Issa*, *Al-Saadoon and Mufdhi*, *Medvedyev*, all cited above).

(ii) Application of these principles to the facts of the case

143. In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States and the United Kingdom

became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 89 above).

144. As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States to the President of the United Nations Security Council (see paragraph 11 above), the United States and the United Kingdom, having displaced the previous regime, created the Coalition Provisional Authority "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States and the United Kingdom through the Coalition Provisional Authority was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that "The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters".

145. In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the Coalition Provisional Authority declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability ..." (see paragraph 12 above).

146. The contents of the letter of 8 May 2003 were noted by the Security Council in Resolution 1483, adopted on 22 May 2003. This Resolution gave further recognition to the security role which had been assumed by the United States and the United Kingdom when, in paragraph 4, it called upon the Occupying Powers "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ..." (see paragraph 14 above).

147. During this period the United Kingdom had command of the military division Multinational Division (South East), which included the province of Al-Basrah, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basrah took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations (see paragraph 21 above).

148. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority remained in power, although it was required to consult with the Governing Council (see paragraph 15 above). In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483. It also authorised "a multinational force under unified

command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" (see paragraph 16 above). United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed "the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq" (see paragraph 18 above). In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist (see paragraph 19 above).

(iii) Conclusion as regards jurisdiction

149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on 8 May 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.

2. Alleged breach of the investigative duty under Article 2

151. The applicants did not complain before the Court of any substantive breach of the right to life under Article 2. Instead they complained that the Government had not fulfilled its procedural duty to carry out an effective investigation into the killings.

Article 2 of the Convention provides as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

(a) The parties' arguments

(i) The Government

152. The Government reasoned that the procedural duty under Article 2 had to be interpreted in harmony with the relevant principles of international law. Moreover, any implied duty should not be interpreted in such a way as to place an impossible or disproportionate burden on a Contracting State. The United Kingdom did not have full control over the territory of Iraq and, in particular, did not have legislative, administrative or judicial competence. If the investigative duty were to apply extra-territorially, it had to take account of these circumstances, and also of the very difficult security conditions in which British personnel were operating.

153. The Government accepted that the investigations into the deaths of the first, second and third applicants' relatives were not sufficiently independent for the purposes of Article 2, since in each case the investigation was carried out solely by the Commanding Officers of the soldiers alleged to be responsible. However, they submitted that the investigations carried out in respect of the fourth and fifth applicants complied with Article 2. Nor had there been any violation of the investigative duty in respect of the sixth applicant; indeed, he did not allege that the investigation in his case had failed to comply with Article 2.

154. The Government emphasised, generally, that the Royal Military Police investigators were institutionally independent of the armed forces. They submitted that the Court of Appeal had been correct in concluding that

the Special Investigation Branch of the Royal Military Police was capable of conducting independent investigations (see paragraph 82 above), although Brooke LJ had also commented that the task of investigating loss of life "must be completely taken away from the military chain of command and vested in the [Royal Military Police]". The role of the military chain of command in notifying the Special Investigations Branch of an incident requiring investigation, and its subsequent role in referring cases investigated by Special Investigation Branch to the Army Prosecuting Authority did not, however, mean that those investigations lacked independence as required by Articles 2 or 3 (see *Cooper v. the United Kingdom* [GC], §§ 108-115, no. 48843/99, ECHR 2003-XII; *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II). The Army Prosecuting Authority was staffed by legally qualified officers. It was wholly independent from the military chain of command in relation to its prosecuting function. Its independence had been recognised by the Court in *Cooper* (cited above).

155. The Government pointed out that an investigation into the fourth applicant's brother's death was commenced by the Special Investigation Branch on 29 August 2003, five days after the shooting on 14 August. The Special Investigation Branch recovered fragments of bullets, empty bullet cases, the vehicle and digital photographs of the scene. They interviewed the doctors who treated the deceased and took statements. Nine military witnesses involved in the incident were interviewed and had statements taken and four further witnesses were interviewed but had no evidence to offer. The investigation was discontinued on 17 September 2003 after the Brigade Commander expressed the view that the shooting fell within the Rules of Engagement and was lawful. However, the decision to discontinue was taken by a Special Investigation Branch senior investigating officer, who was independent of the military chain of command. The investigation was reopened on 7 June 2004 and completed on 3 December 2004, despite the difficult security conditions in Iraq at that time. The case was then referred to the Army Prosecuting Authority, which decided not to bring criminal charges as there was no realistic prospect of proving that the soldier who shot the fourth applicant's brother had not been acting in self-defence. The Attorney-General was notified and he decided not to exercise his jurisdiction to order a prosecution. In the Government's submission, the investigation was effective, in that it identified the person responsible for the death and established that the laws governing the use of force had been followed. The investigation was reasonably prompt, in particular when regard was had to the extreme difficulty of investigating in the extra-territorial context. If the halting of the initial investigation gave rise to any lack of independence, this was cured by the subsequent investigation and the involvement of the Army Prosecuting Authority and

the Attorney-General (see *Gül v. Turkey*, §§ 92-95, no. 22676/93, 14 December 2000; see also *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 157 and 162-164, Series A no. 324).

156. The Government submitted that there was no evidence, in the fifth applicant's case, that the military chain of command interfered with the Special Investigations Branch investigation so as to compromise its independence. On the contrary, after receiving the investigation report the military chain of command referred the case to the Army Prosecuting Authority who in turn referred it for independent criminal trial. There was no undue delay in the investigation, in particular having regard to the difficulties faced by United Kingdom investigators investigating an incident which took place in Iraq eight days after the cessation of major combat operations. The fifth applicant was fully and sufficiently involved in the investigation. His participation culminated in the United Kingdom authorities flying him to England so that he could attend the court-martial and give evidence. In addition to the Special Investigation Branch investigation and the criminal proceedings against the four soldiers, the fifth applicant brought civil proceedings in the United Kingdom domestic courts, claiming damages for battery and assault, negligence and misfeasance in public office. In those proceedings he gave an account of his son's death and the investigation which followed it. The proceedings were settled when the Ministry of Defence admitted liability and agreed to pay GBP 115,000 by way of compensation. Moreover, on 20 February 2009 Major General Cubitt wrote to the fifth applicant and formally apologised on behalf of the British Army for its role in the death of his son. In these circumstances, the fifth applicant could no longer claim to be a victim of a violation of the Convention within the meaning of Article 34. Further, or in the alternative, it was no longer justified to continue the examination of the application (Article 37 § 1(c) of the Convention).

157. The Government further emphasised that the sixth applicant had expressly confirmed that he did not claim before the Court that the Government had violated his Convention rights. This reflected the fact that, in relation to his son's death, there had been: (1) a full investigation by the Special Investigation Branch, leading to the bringing of criminal charges against six soldiers, one of whom was convicted; (2) civil proceedings brought by the applicant, which were settled when the Government admitted liability for the mistreatment and death of the applicant's son and paid damages of GBP 575,000; (3) a formal public acknowledgement by the Government of the breach of the applicant's son's rights under Articles 2 and 3; (4) the judicial review proceedings, in which the applicant complained of a breach of his procedural rights under Articles 2 and 3 and in which it was agreed by the parties and ordered by the House of Lords that the question whether there had been a breach of the procedural obligation should be remitted to the Divisional Court; (5) a public inquiry, which was ongoing.

In these circumstances, the applicant could no longer claim to be a victim for the purposes of Article 34 of the Convention.

(ii) The applicants

158. The applicants emphasised that the Court's case-law regarding south-eastern Turkey demonstrated that the procedural duty under Article 2 was not modified by reference to security problems in a conflict zone. The same principle had to apply in relation to any attempt by the Government to rely on either the security situation or the lack of infrastructure and facilities in Iraq. The United Kingdom was aware, or should have been aware, prior to the invasion and during the subsequent occupation, of the difficulties it would encounter. Its shortcomings in making provision for those difficulties could not exonerate it from the failure to comply with the investigative duty.

159. They submitted that the United Kingdom had failed in its procedural duty as regards the first, second, third, fourth and fifth applicants. The Royal Military Police was an element of the British Army and was not, in either institutional or practical terms, independent from the military chain of command. The Army units exercised control over it in matters relating to safety and logistical support whilst in theatre. Its involvement in incidents was wholly dependent on a request from the military unit in question, as was illustrated by the fourth applicant's case, where the Special Investigation Branch response was stood down upon the instruction of the Commanding Officer. The Royal Military Police appeared to have been wholly dependent on the military chain of command for information about incidents. If it produced a report, this was given to the military chain of command, which decided whether to forward it to the Army Prosecuting Authority. The inadequacies within the Royal Military Police, regarding both lack of resources and independence, were noted by the Court of Appeal and by the Aitken Report.

160. The applicants pointed out that the Special Investigation Branch investigation into the fourth applicant's case had been discontinued at the request of the military chain of command. The further investigatory phase, re-opened as a result of litigation in the domestic courts, was similarly deficient, given the lack of independence of the Special Investigation Branch and the extreme delay in interviewing the firer and securing other key evidence. In the fifth applicant's case, the investigation was initiated at the repeated urging of the family, after considerable obstruction and delay on the part of the British authorities. The investigators were not independent from the military chain of command and the victim's family were not sufficiently involved. The applicants contended that the Government's objection that the fifth applicant lacked victim status should be rejected. The court-martial proceedings and the compensation he had received in settlement of the civil proceedings were inadequate to satisfy the procedural requirement under Article 2. In contrast, the sixth applicant did not claim

still to be a victim of the violation of his procedural rights under Articles 2 and 3.

(b) The Court's assessment

(i) General principles

161. The Court is conscious that the deaths in the present case occurred in Basrah City in South East Iraq in the aftermath of the invasion, during a period when crime and violence were endemic. Although major combat operations had ceased on 1 May 2003, the Coalition forces in South East Iraq, including British soldiers and military police, were the target of over a thousand violent attacks in the subsequent 13 months. In tandem with the security problems, there were serious breakdowns in the civilian infrastructure, including the law enforcement and criminal justice systems (see paragraphs 22-23 above; see also the findings of the Court of Appeal at paragraph 80 above).

162. While remaining fully aware of this context, the Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention. No derogation from it is permitted under Article 15, "except in respect of deaths resulting from lawful acts of war". Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c) (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 146-148, Series A no. 324).

163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see *McCann*, cited above, § 161). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility

(see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life (see, by implication, *McCann and Others*, cited above, §§ 150 and 162; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, ECHR2001-III (extracts); *McKerr*, cited above, §§ 143 and 151; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-125, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003-VIII; *Nachova*, cited above, §§ 114-115; and also, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006).

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict (see, amongst other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports of Judgments and Decisions* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90 and 309-320 and 326-330, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; *Kanlibaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed (see paragraph 93 above), concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports of Judgments and Decisions* 1998-I; *Ergi*, cited above, §§ 82-85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-166, 24 February 2005; *Isayeva*, cited above, §§ 215-224; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-165, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for

the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310; *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next-of-kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121; *Bazorkina*, cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see *Ahmet Özkan and Others*, cited above, § 312; *Isayeva*, cited above, § 212 and the cases cited therein).

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Shanaghan*, cited above, § 104). A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others*, cited above, §§ 311-314; *Isayeva*, cited above, §§ 211-214 and the cases cited therein).

(ii) Application of these principles to the facts of the case

168. The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading *inter alia* to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

170. It was not in issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question for investigation was whether in each case the soldier fired in conformity with the Rules of Engagement. In respect of the third applicant, Article 2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, although the Court has not been provided with the documents relating to the court-martial, it appears to have been accepted that he died of drowning. It needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the water. In each case eye-witness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eye witnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved. Moreover, the Government accept this conclusion.

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2. It is true that

the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, as the domestic courts observed (see paragraphs 77 and 82 above), the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in. If the Special Investigation Branch decided on its own initiative to commence an investigation, this investigation could be closed at the request of the military chain of command, as demonstrated in the fourth applicant's case. On conclusion of a Special Investigation Branch investigation, the report was sent to the Commanding Officer, who was responsible for deciding whether or not the case should be referred to the prosecuting authority. The Court considers, in agreement with Brooke LJ (see paragraph 82 above), that the fact that the Special Investigation Branch was not "free to decide for itself when to start and cease an investigation" and did not report "in the first instance to the [Army Prosecuting Authority]" rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.

173. It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. During the initial phase of the investigation, material was collected from the scene of the shooting and statements were taken from the soldiers present. However, Lance Corporal S, the soldier who shot the applicant's brother, was not questioned by Special Investigation Branch investigators during this initial phase. It appears that the Special Investigation Branch interviewed four Iraqi witnesses, who may have included the neighbours the applicant believes to have witnessed the shooting, but did not take statements from them. In any event, as a result of the lack of independence, the investigation was terminated while still incomplete. It was subsequently reopened, some nine months later, and it would appear that forensic tests were carried out at that stage on the material collected from the scene, including the bullet fragments and vehicle. The Special Investigation Branch report was sent to the Commanding Officer, who decided to refer the case to the Army Prosecuting Authority. The prosecutors took depositions from the soldiers who witnessed the incident and decided, having taken further independent legal advice, that there was no evidence that Lance Corporal S had not acted in legitimate self-defence. As previously stated, eye witness testimony was central in this case, since the cause of the death was not in dispute. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S was questioned about the incident, combined with the delay in having a fully independent investigator interview the other

military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174. While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court-martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable (see, in this respect, the comments in the Aitken Report, paragraph 61 above). Moreover, the Court considers that the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case. There appears to be at least *prima facie* evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such as this in the aftermath of the invasion.

175. In the light of the foregoing, the Court does not consider that the procedural duty under Article 2 has been satisfied in respect of the fifth applicant. Although he has received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the Army, there has never been a full and independent investigation into the circumstances of his son's death (see paragraph 165 above). It follows that the fifth applicant can still claim to be a victim within the meaning of Article 34 and that the Government's preliminary objection regarding his lack of victim status must be rejected.

176. In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. The Court therefore accepts the Government's objection in respect of the sixth applicant.

177. In conclusion, the Court finds a violation of the procedural duty under Article 2 of the Convention in respect of the first, second, third, fourth and fifth applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

178. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

179. The first, second, third, fourth and fifth applicants asked the Court to order the Government to carry out an Article 2-compliant investigation into their relatives' deaths. They also claimed GBP 15,000 each in compensation for the distress they had suffered because of the United Kingdom's failure to conduct a Convention-compliant investigation into the deaths.

180. The Government pointed out that the Court had repeatedly and expressly refused to direct the State to carry out a fresh investigation in cases in which it had found a breach of the procedural duty under Article 2 (see for example *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 222, ECHR 2009-...; *Ülkü Ekinci v. Turkey*, no. 27602/95, § 179, 16 July 2002; *Finucane,* cited above, § 89). They further submitted that a finding of a violation would be sufficient just satisfaction in the circumstances. In the alternative, if the Court decided to make an award, the Government noted that the sum claimed by the applicants was higher than generally awarded. They did not, however, propose a sum, leaving it to the Court to decide on an equitable basis.

181. As regards the applicants' request concerning the provision of an effective investigation, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Consequently it considers that in these applications it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance (see *Varnava*, cited above, § 222 and the cases cited therein).

182. As regards the claim for monetary compensation, the Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.

Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varnava*, cited above, § 224 and the cases cited therein). In the light of all the circumstances of the present case, the Court considers that, to compensate each of the first five applicants for the distress caused by the lack of a fully independent investigation into the deaths of their relatives, it would be just and equitable to award the full amount claimed, which, when converted into euros, comes to approximately EUR 17,000 each.

B. Costs and expenses

183. The applicants, emphasising the complexity and importance of the case, claimed for over 580 hours' legal work by their solicitors and four counsel in respect of the proceedings before the Court, at a total cost of GBP 119,928.

184. The Government acknowledged that the issues were complex, but nonetheless submitted that the claim was excessive, given that the applicants' legal advisers were familiar with all aspects of the claim since they had acted for the applicants in the domestic legal proceedings, which had been publicly funded. Furthermore, the hourly rates claimed by the applicants' counsel, ranging between GBP 500 and GBP 235, and the hourly rates claimed by the applicants' solicitors (GBP 180 and GBP 130) were unreasonably high. Nor had it been necessary to engage two Queen's Counsel and two junior counsel.

185. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 50,000 for the proceedings before the Court.

C. Default interest

186. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's preliminary objections regarding attribution and non-exhaustion of domestic remedies;

2. *Joins* to the merits the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and sixth applicants retained victim status;

3. *Declares* the application admissible;

4. *Holds* that the applicants' deceased relatives fell within the jurisdiction of the respondent State and *dismisses* the Government's preliminary objection as regards jurisdiction;

5. *Holds* that the sixth applicant can no longer claim to be a victim of a violation of the procedural obligation under Article 2 of the Convention;

6. *Holds* that there has been a breach of the procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants and *dismisses* the Government's preliminary objection as regards the victim status of the fifth applicant;

7. *Holds*
   (a) that the respondent State is to pay each of the first five applicants, within three months, EUR 17,000 (seventeen thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (b) that the respondent State is to pay jointly to the first five applicants, within three months, EUR 50,000 (fifty thousand euros), plus any tax that may be chargeable to the applicants on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English and French, and notified at a public hearing on 7 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Jean-Paul Costa
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinions of Judge Rozakis and Judge Bonello are annexed to this judgment.

J.-P.C.
M.O.B.

CONCURRING OPINION OF JUDGE ROZAKIS

When citing the general principles relevant to a State party's jurisdiction under Article 1 of the Convention (see paragraphs 130 et seq. of the Grand Chamber's judgment), the Court reiterates its established case-law that apart from the territorial aspect determining the jurisdictional competence of a State party to the Convention, there are "exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries" (see paragraph 132). It then proceeds to discuss such exceptional circumstances. In paragraphs 133 to 137, under the title "State agent authority and control", it refers to situations where State agents operating extraterritorially, and exercising control and authority over individuals, create a jurisdictional link with their State and its obligations under the Convention, making that State responsible for the acts or omissions of its agents, in cases where they affect the rights or freedoms of individuals protected by the Convention. Characteristic examples of such exceptional circumstances of extraterritorial jurisdiction are mentioned in the judgment (see paragraphs 134 to 136), and concern the acts of diplomatic and consular agents, the exercise of authority and control over foreign territory by individuals which is allowed by a third State through its consent, invitation or acquiescence, and the use of force by State agents operating outside its territory.

So far so good, but then, under the title "Effective control over an area", the Court refers to "[a]nother exception to the principle of jurisdiction ...", when "as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory". I regret to say that I cannot agree that this ground of jurisdiction constitutes a separate ("another") ground of jurisdiction, which differs from the "State authority and control" jurisdictional link. It is part and parcel, to my mind, of that latter jurisdictional link, and concerns a particular aspect of it. The differing elements, which distinguish that particular aspect from the jurisdictional categories mentioned by the Court, can be presented cumulatively or in isolation as the following: (a) the usually large-scale use of force; (b) the occupation of a territory for a prolonged period of time; and/or (c) in the case of occupation, the exercise of power by a subordinate local administration, whose acts do not exonerate the occupying State from its responsibility under the Convention.

As a consequence, I consider that the right approach to the matter would have been for the Court to have included that aspect of jurisdiction in the exercise of "State authority and control" test, and to have simply determined that "effective" control is a condition for the exercise of jurisdiction which brings a State within the boundaries of the Convention, as delimited by its Article 1.

CONCURRING OPINION OF JUDGE BONELLO

1. These six cases deal primarily with the issue of whether Iraqi civilians who allegedly lost their lives at the hands of United Kingdom soldiers, in non-combat situations in the United Kingdom-occupied Basrah region of Iraq, were "within the jurisdiction" of the United Kingdom when those killings took place.

2. When, in March 2003, the United Kingdom, together with the other Coalition forces invaded Iraq, the Coalition Provisional Authority (CPA) conferred upon members of that Authority the fullest jurisdictional powers over Iraq: "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives". This included the "power to issue legislation": "The CPA shall exercise powers of government temporarily".[1]

3. I fully agreed with the findings of the Court, but I would have employed a different test (a "functional jurisdiction" test) to establish whether or not the victims fell within the jurisdiction of the United Kingdom. Though the present judgment has placed the doctrines of extra-territorial jurisdiction on a sounder footing than ever before, I still do not consider wholly satisfactory the re-elaboration of the traditional tests to which the Court has resorted.

Extra-territorial jurisdiction or Functional jurisdiction?

4. The Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.

5. Up until now, the Court has, in matters concerning the extra-territorial jurisdiction of Contracting Parties, spawned a number of "leading" judgments based on a need-to-decide basis, patchwork case-law at best. Inevitably, the doctrines established seem to go too far to some, and not far enough to others. As the Court has, in these cases, always tailored its tenets to sets of specific facts, it is hardly surprising that those tenets then seem to limp when applied to sets of different facts. Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another. *Issa* flies in the face of *Banković* and the cohabitation of *Behrami* with *Berić* is, overall, quite problematic.

6. The late Lord Rodger in the House of Lords had my full sympathy when he lamented that, in its application of extra-territorial jurisdiction "the

[1] Paragraph 12 of the Grand Chamber's judgment.

judgments and decisions of the European Court do not speak with one voice". The differences, he rightly noted, are not merely ones of emphasis. Some "appear much more serious".[2]

7. The truth seems to be that Article 1 case-law has, before the present judgment, enshrined everything and the opposite of everything. In consequence, the judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application. A considerable number of different approaches to extra-territorial jurisdiction have so far been experimented with by the Court on a case-by-case basis, some not completely exempt from internal contradiction.

8. My guileless plea is to return to the drawing board. To stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlie the fundamental functions of the Convention.

9. The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the supremacy of the rule of human rights law. In Article 1 they undertook to secure *to everyone within their jurisdiction* the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its preamble: "the *universal* and effective recognition and observance" of fundamental human rights. "Universal" hardly suggests an observance parcelled off by territory on the checkerboard of geography.

10. States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum *functions* assumed by every State by virtue of its having contracted into the Convention.

11. A "functional" test would see a State effectively exercising "jurisdiction" whenever it falls within its power to perform, or not to perform, any of these five functions. Very simply put, *a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.*

12. Jurisdiction means no less and no more than "authority over" and "control of". In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional - in the sense that when it is within a State's authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not,

[2] Paragraph 67, House of Lords opinion in *Al Skeini*, [2007] UKHL 26.

identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.

13. The duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations *and from having the capability to fulfil them* (or not to fulfil them).

14. If the perpetrators of an alleged human rights violation are within the authority and control of one of the Contracting Parties, it is to me totally consequential that their actions by virtue of that State's authority, engage the jurisdiction of the Contracting Party. I resist any helpful schizophrenia by which a nervous sniper is within the jurisdiction, his act of shooting is within the jurisdiction, but then the victims of that nervous sniper happily choke in blood outside it. Any hiatus between what logical superglue has inexorably bonded appears defiantly meretricious, one of those infelicitous legal fictions a court of human rights can well do without.

15. Adhering to doctrines other than this may lead in practice to some riotous absurdities in their effects. If two civilian Iraqis are together in a street in Basrah, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street - same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.

16. In my view, the one honest test, in *all* circumstances (including extra- territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any State that has grandiosely undertaken to secure the “universal” observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d'etre* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches.

17. The failure to espouse an obvious functional test, based exclusively on the programmatic agenda of the Convention, has, in the past, led to the adoption of a handful of sub-tests, some of which may have served defilers of Convention values far better then they have the Convention itself. Some of these tests have empowered the abusers and short-changed their victims.

For me the primary questions to be answered boil down to these: when a State ratifies the Convention, does it undertake to promote human rights wherever it can, or does it undertake to promote human rights inside its own confines and to breach them everywhere else? Did the Contracting Party ratify the Convention with the deliberate intent of discriminating between the sanctity of human rights within its own territory and their paltry insignificance everywhere else?

18. I am unwilling to endorse *à la carte* respect for human rights. I think poorly of an esteem for human rights that turns casual and approximate depending on geographical coordinates. Any State that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.

19. The functional test I propose would also cater for the more rarefied reaches of human rights protection, like respect for the positive obligations imposed on Contracting Parties: was it within the State's authority and control to see that those positive obligations would be respected? If it was, then the functional jurisdiction of the State would come into play, with all its natural consequences. If, in the circumstances, the State is not in such a position of authority and control as to be able to ensure extraterritorially the fulfilment of any or all of its positive obligations, that lack of functional authority and control excludes jurisdiction, limitedly to those specific rights the State is not in a position to enforce.

20. This would be my universal vision of what this Court is all about – a bright line approach rather than case by case, more or less inspired, more or less insipid, improvisations, cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory – and none measured against the essential yardstick of the supremacy and universality of human rights anytime, anywhere.

Exceptions?

21. I consider the doctrine of functional jurisdiction to be so linear and compelling that I would be unwilling to acquiesce to any exceptions, even more so in the realm of the near-absolute rights to life and to freedom from torture and degrading or inhuman treatment or punishment. Without ever reneging on the principle of the inherent jurisdiction of the occupying power that usually flows from military conquest, at most the Court could consider very limited exceptions to the way in which Article 2 and Article 3 are applied in extreme cases of clear and present threats to national security that

would otherwise significantly endanger the war effort. I would not, personally, subscribe to any exceptions at all.

Conclusion

22. Applying the functional test to the specifics of these cases, I arrive at the manifest and inescapable conclusion that all the facts and all the victims of the alleged killings said to have been committed by United Kingdom servicemen fall squarely within the jurisdiction of the United Kingdom, which had, in Basrah and its surroundings, an obligation to ensure the observance of Articles 2 and 3 of the Convention. It is uncontested that the servicemen who allegedly committed the acts that led to the deaths of the victims were under United Kingdom authority and control; that it was within the United Kingdom's authority and control whether to investigate those deaths or not; that it was within the United Kingdom's authority and control whether to punish any human rights violations, if established; and that it was within the United Kingdom's authority and control whether to compensate the victims of those alleged violations or their heirs. Concluding that the United Kingdom had *all this* within its full authority and control, but still had no jurisdiction, would for me amount to a finding as consequential as a good fairy tale and as persuasive as a bad one.

23. The test adopted by the Court in this case has led to a unanimous finding of jurisdiction. Though I believe the functional test I endorse would better suit any dispute relating to extra-territorial jurisdiction, I would still have found that, whatever the test adopted, all the six killings before the Court engaged United Kingdom jurisdiction. I attach to this opinion a few random observations to buttress my conclusions.

Presumption of jurisdiction

24. I would propose a different test from that espoused by the domestic courts to establish or dismiss extra-territorial jurisdiction in terms of Article 1, in cases concerning military occupation, when a State becomes the recognised “occupying power” according to the Geneva and The Hague instruments. Once a State is acknowledged by international law to be “an occupying power”, a rebuttable presumption ought to arise that the occupying power has “authority and control” over the occupied territory, over what goes on there and over those who happen to be in it – with all the consequences that flow from a legal presumption. It will then be incumbent on the occupying power to prove that such was the state of anarchy and impotence prevailing, that it suffered a deficit of effective authority and control. It will no longer be for the victim of wartime atrocities to prove that the occupying power actually exercised authority and control. It will be for the occupying power to rebut it.

25. I was puzzled to read in the domestic proceedings that "the applicants had failed to make a case" for United Kingdom authority and control in the Basrah region. I believe that the mere fact of a formally acknowledged military occupation ought to shift any burden of proof from the applicants to the respondent Government.

26. And it will, in my view, be quite arduous for an officially recognised "occupying power" to disprove authority and control over impugned acts, their victims and their perpetrators. The occupying power could only do that successfully in the case of infamies committed by forces other than its own, during a state of total breakdown of law and order. I find it bizarre, not to say offensive, that an occupying power can plead that it had no authority and control over acts committed by its own armed forces well under its own chain of command, claiming with one voice its authority and control over the perpetrators of those atrocities, but with the other, disowning any authority and control over atrocities committed by them and over their victims.

27. It is my view that jurisdiction is established when authority and control over others are established. For me, in the present cases, it is well beyond surreal to claim that a military colossus which waltzed into Iraq when it chose, settled there for as long as it cared to and only left when it no longer suited its interests to remain, can persuasively claim not to have exercised authority and control over an area specifically assigned to it in the geography of the war games played by the victorious. I find it uncaring to the intellect for a State to disclaim accountability for what its officers, wearing its uniforms, wielding its weapons, sallying forth from its encampments and returning there, are alleged to have done. The six victims are said to have lost their lives as a result of the unlawful actions of United Kingdom soldiers in non-combat situations - but no one answers for their death. I guess we are expected to blame it on the evil eye.

28. Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.

Futility of the case-law

29. The undeniable fact is that this Court has never, before today, had to deal with any case in which the factual profiles were in any way similar to those of the present applications. This Court has, so far, had several occasions to determine complaints which raised issues of extra-territorial jurisdiction, but all of a markedly different nature. Endeavouring to export doctrines of jurisdiction hammered out in a case of a solitary air-strike over a radio station abroad (*Banković*) to allegations of atrocities committed by

the forces of an occupying power, which has assumed and kept armed control of a foreign territory for well over three years, is anything but consequent. I find the jurisdictional guidelines established by the Court to regulate the capture by France of a Cambodian drug-running ship on the high seas, for the specific purpose of intercepting her cargo and bringing the crew to justice (*Medvedyev*), to be quite distracting and time-wasting when the issue relates to a large territory outside the United Kingdom, conquered and held for over three years by the force of arms of a mighty foreign military set-up, recognised officially by international law as an "occupying power", and which had established itself indefinitely there.

30. In my view, this relentless search for eminently tangential case-law is as fruitful and fulfilling as trying to solve one crossword puzzle with the clues of another. The Court could, in my view, have started the exercise by accepting that this was judicial *terra incognita*, and could have worked out an organic doctrine of extra-territorial jurisdiction, untrammelled by the irrelevant and indifferent to the obfuscating.

Indivisibility of Human Rights

31. The foregoing analysis is not at all invalidated by what is termed the "indivisibility of human rights" argument which runs thus: as human rights are indivisible, once a State is considered to have extra-territorial "jurisdiction", then that State is held to be bound to enforce *all* the human rights enshrined in the Convention. Conversely, if that State is not in a position to enforce the whole range of Convention human rights, it does not have jurisdiction.

32. Hardly so. Extraterritorially, a Contracting State is obliged to ensure the observance of all those human rights which *it is in a position to ensure*. It is quite possible to envisage situations in which a Contracting State, in its role as an occupying power, has well within its authority the power not to commit torture or extra-judicial killings, to punish those who commit them and to compensate the victims – but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line. If the "indivisibility of human rights" is to have any meaning at all, I would prefer that meaning to run hand in hand with that of the "universality of human rights".

33. I believe that it ill suits the respondent Government to argue, as they have, that their inability to secure respect for all fundamental rights in Basrah, gave them the right not to respect any at all.

A vacuum of jurisdiction?

34. In spite of the fact that, as a leading partner in the Coalition Provisional Authority, the United Kingdom Government were "vested with all executive, legislative and judicial authority"[3] over that part of vanquished Iraq assigned to them, the United Kingdom went a long and eloquent way in its attempt to establish that it did not exercise jurisdiction over the area assigned to it. It just stopped short of sharing with the Court who did. Who was the mysterious, faceless rival which, instead of it, exercised executive, legislative and judicial authority for three years and more over the area delegated to the United Kingdom? There unquestionably existed a highly volatile situation on the ground, pockets of violent insurgency and a pervasive, sullen resistance to the military presence.

35. However, in the Basrah region, some authority was still giving orders, laying down the law (*juris dicere* - defining what the binding norm of law is), running the correctional facilities, delivering the mail, establishing and maintaining communications, providing health services, supplying food and water, restraining military contraband and controlling criminality and terrorism as best it could. This authority, full and complete over the United Kingdom military, harassed and maimed over the rest, was the United Kingdom's.

36. The alternative would be to claim that Basrah and the region under the United Kingdom's executive, legislative and judicial responsibility hovered in an implacable legal void, sucked inside that legendary black hole, whose utter repulsion of any authority lasted well over three years. A proposition unlikely to find many takers on the legal market.

Human rights imperialism

37. I confess to be quite unimpressed by the pleadings of the United Kingdom Government to the effect that exporting the European Convention on Human Rights to Iraq would have amounted to "human rights imperialism". It ill behoves a State that imposed its military imperialism over another sovereign State without the frailest imprimatur from the international community, to resent the charge of having exported human rights imperialism to the vanquished enemy. It is like wearing with conceit your badge of international law banditry, but then recoiling in shock at being suspected of human rights promotion.

38. Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent

[3] See paragraph 12 of the Grand Chamber's judgment.

the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.

39. I, for one, advertise my diversity. At my age, it may no longer be elegant to have dreams. But that of being branded in perpetuity a human rights imperialist, I acknowledge sounds to me particularly seductive.