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# In the House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

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BETWEEN

- (1) MAZIN JUM'AA GATTEH AL-SKEINI
- (2) FATTEMA ZABUN DAHESH
- (3) HAMEED ABDUL RIDA AWAID KAREEM
- (4) FADIL FAYAY MUZBAN
- (5) NUZHA HABIB YAAQUB UBAID AL RAYAHI
- (6) DAOUD MOUSA

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*Appellants*

- and -

SECRETARY OF STATE FOR DEFENCE

*Respondent*

AND BETWEEN

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- (1) MAZIN JUM'AA GATTEH AL-SKEINI
- (2) FATTEMA ZABUN DAHESH
- (3) HAMEED ABDUL RIDA AWAID KAREEM
- (4) FADIL FAYAY MUZBAN
- (5) NUZHA HABIB YAAQUB UBAID AL RAYAHI
- (6) DAOUD MOUSA

*Respondents*

- and -

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SECRETARY OF STATE FOR DEFENCE

*Appellant*

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## CASE FOR THE INTERVENERS

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### A. INTRODUCTION

#### The Interveners

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1. The Interveners in this case are (i) *The Aire Centre*, (ii) *Amnesty International Ltd*, (iii) *The Association for the Prevention of Torture*, (iv) *The Bar Human Rights Committee*, (v) *British Irish Rights Watch*, (vi) *Interights*, (vii) *Justice*, (viii) *Kurdish Human Rights*

*Project, (ix) The Law Society of England and Wales, (x) Liberty, and (xi) The Redress Trust.*<sup>1</sup>

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2. The Interveners have extensive experience of promoting the highest respect for human rights, the rule of law and State accountability for violations of human rights, including violations of the right to life and of the prohibition of torture or other ill-treatment. Between them:

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(i) They have investigated and documented incidents of unlawful killings, including those resulting from torture; worked with families of victims; and carried out research into such practices.

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(ii) They have contributed to the elaboration of international law and standards concerning the right to life, including the lawful use of force, and the right not to be subjected to torture or other ill-treatment, and the attendant obligations, such as the right to reparation, that give these rights effect.

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(iii) They have extensive knowledge of the interlocking *normative regimes of human rights and humanitarian law*, each of which aims to ensure the highest respect for the rule of law and State accountability for violations of individuals' fundamental human rights.

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(iv) They monitor and report on States' implementation in law and practice of these standards.

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(v) They have been engaged in litigation in national and international fora involving States' obligations arising from the above-mentioned law and standards.

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<sup>1</sup> See the Annex hereto for relevant details and experience of each Intervener.

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3. In the course of the proceedings in the courts below, *The Redress Trust* was given permission to and did intervene by way of written submissions before the Divisional Court, and both *The Redress Trust* and *The Aire Centre* were given permission to and did intervene jointly by way of written submissions before the Court of Appeal, addressing the various points of law raised by the conjoined appeals to Your Lordships' House.

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#### **Importance of the issues**

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4. The decision of the Interveners – as eleven national and international organisations – to intervene in these conjoined appeals is motivated by grave concern about the practices of States during the occupation of foreign territory that have the potential impact of subverting the rule of law and State accountability by undermining and circumventing domestic and international law and standards that ensure the protection of fundamental human rights, and the attendant obligations that give them effect. The Interveners are particularly concerned that the failure to hold States to the highest standards of accountability for violations of fundamental rights risks creating a practice and an expectation of impunity.

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5. In this context and in light of the global influence of the jurisprudence of Your Lordships' House, the Interveners consider that the outcome of this appeal will have profound and lasting implications in respect of the efforts to uphold the rule of law and state accountability for human rights protection, both domestically and world-wide.

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#### **Summary of the Interveners' submissions**

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6. The Interveners seek to advance and develop the following points in their submissions:

- (a) Control over the individual is the key factor in determining jurisdiction under the European Convention of Human Rights (ECHR). In cases where “effective control of an area” principles are applied, control is general in the sense that it means control of the immediate area or environment in which the individual is located. In cases where “state agency authority” principles are applied, control is specific in the sense that it means control over the individual himself or herself by State agents (usually by the exercise of legal or physical authority over him or her).
- (b) Control over the individual is also the key factor in determining jurisdiction under other international human rights instruments, and it is legitimate and necessary to have regard to the approach taken to jurisdiction by other international courts and bodies when determining the meaning and scope of jurisdiction under Article 1 ECHR.
- (c) As an occupying power, with a specific mandate to maintain security in South-East Iraq, a relationship of power, control and protection existed between the UK and the inhabitants of South-East Iraq during the relevant period.
- (d) In the cases of C1-C5, the fatalities in question occurred while UK troops were patrolling the streets of Basrah City in the exercise of powers available to them under international humanitarian law as an occupying power. They were exercising authority over the local population, backed up by the use of lethal force. In the case of C6, the fatality and ill-treatment occurred while Baha Mousa was in the custody of UK troops.

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(e) In those circumstances, jurisdiction under the ECHR is clearly established for C1-C6 either on “effective control of an area” or “state agency authority” principles, or both.

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(f) Jurisdiction is the key to accountability. Where individuals under the control of a Contracting State are killed or have arguably been subjected to ill-treatment by agents of that State, accountability should be achieved through an effective investigation.

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(g) No effective investigation has occurred in any of the cases C1-C6 and there is no question of accountability under Iraqi law for the acts in question because UK troops are immune from Iraqi legal process.

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## B. JURISDICTION UNDER THE ECHR

### The applicable principles

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7. The applicable principles on the meaning and scope of jurisdiction in Article 1 ECHR are well-established. They were brought together and summarised in the recent decision of the European Court in *Isaak and others v Turkey*<sup>2</sup> as follows:<sup>3</sup>

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(a) The Court reiterates that according to Article 1 of the Convention Contracting States must answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their “jurisdiction”.

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(b) The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts

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<sup>2</sup> Application no.44587/98

<sup>3</sup> These have been numbered, but the text of the judgment had not been altered.

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).

(c) Furthermore, the words “within their jurisdiction” in Article 1 of the Convention must be understood to mean that a State’s jurisdictional competence is primarily territorial (see *Cyprus v Turkey* (1975) 2 DR 125, §3b, *Banković and Others v. Belgium and 16 Other Contracting States (dec.)* [GC], no. 52207/99, § 59, ECHR 2001-XII).

(d) In exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there (“extra-territorial act”) may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention (see *Loizidou* cited above, pp. 2235-2236, § 52, *Issa and Others v. Turkey*, no. 31821/96, §§ 68 and 71, 16 November 2004).

(e) According to the relevant principles of international law, a State’s responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. 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 (see *Loizidou v. Turkey*, cited above, § 52).

(f) Moreover, a State may also be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found

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to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State (see, *mutatis mutandis*, *M. v. Denmark*, application no. 17392/90, Commission decision of 14 October 1992, DR 73, p. 193; *Illich Sanchez Ramirez v.*

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*France*, application no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 37, 39, 41 and the views adopted by the

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Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from

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the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (see, *mutatis mutandis*, *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, cited above).

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(g) In addition, the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the Convention. Any different conclusion would be at variance with the obligation

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contained in Article 1 of the Convention (*Cyprus v. Turkey* [GC], no. 25781/94, § 81, ECHR 2001-IV). This is particularly true in the case of recognition by the State in question of the acts of self-proclaimed authorities which

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are not recognised by the international community (see *Ilaşcu and Others v. Moldova and Russia*, cited above, § 318).

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(h) Finally, in the particular situation concerning Cyprus, the Court, in the case of *Cyprus v. Turkey* (cited above) found that having effective overall control over northern Cyprus, Turkey's responsibility could not be confined to the acts of its own soldiers or officials in northern Cyprus but had also to be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's jurisdiction must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey (*Cyprus v. Turkey*, cited above, § 77).

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8. In the case of *Isaak and others v Turkey* itself, the applicant complained that Anastassios Isaak was beaten to death in the neutral UN buffer zone between the Republic of Cyprus and the Turkish occupied area of the self-proclaimed "Turkish Republic of Northern Cyprus" ("TRNC") by Turkish-Cypriot and Turkish civilians and uniformed "TRNC" policemen who had been allowed to enter the neutral zone by the "TRNC" authorities. The Turkish government claimed that it had no actual "jurisdiction" and/or control over northern Cyprus or of the UN-controlled buffer zone and hence that it could not be held responsible for the alleged attack. That being a substantive admissibility issue, jurisdiction had to be determined by the European Court.

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9. Applying these principles summarised in para. 7 above to the facts of the case, the European Court noted that: (1) Turkish forces had allowed the civilians and "TRNC" policemen to enter the UN buffer zone; (2) a video confirmed the participation of three "TRNC" policemen and a Turkish or Turkish-Cypriot military/police officer

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in the attack on Anastassios Isaak; and (3) that despite the presence of the Turkish armed forces and other “TRNC” police officers in the area, “nothing was done to prevent or stop the attack or to help the victim”.

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10. From this the European Court concluded that:

“ ... even if the acts complained of took place in the neutral UN buffer zone, the Court considers that the deceased was under the authority and/or effective control of the respondent State through its agents (see *Issa and others*, cited above). It concludes, accordingly, that the matters complained of in the present application fall within the “jurisdiction” of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State’s responsibility under the Convention.”

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11. *Isaak v Turkey* is therefore the third recent case on extra-territorial jurisdiction, along with *Ilascu v Moldova and Russia*<sup>4</sup> and *Issa v Turkey*,<sup>5</sup> where the European Court has set out a contemporary, post-*Bankovic*, articulation of the general principles applicable to the issue of jurisdiction. In doing so the European Court has reaffirmed its longstanding caselaw on the question of jurisdiction, taking the decision in *Bankovic* into consideration. These recent cases are therefore not inconsistent with the approach taken in *Bankovic* or in any way a departure from previous case law, but rather they are a reaffirmation and clarification of the applicable principles.

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#### **The Interveners submissions on jurisdiction**

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12. The Interveners submit that, following the approach of the European Court summarised above (and set out in *Isaak v Turkey*), a number of clear propositions can be made about the meaning and scope of “jurisdiction” under the ECHR. They are:

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<sup>4</sup> Appln. No.48787/99 (2005) 40 EHRR 50

<sup>5</sup> Appln. No. 31821/96

(a) Responsibility for acts or omissions under the ECHR flows from jurisdiction.

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(b) In interpreting the meaning of jurisdiction in Article 1 ECHR and analysing its scope, the European Court will examine and expressly draw on the jurisprudence of other international courts and bodies that have examined the matter.<sup>6</sup>

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In doing so, it has expressly endorsed the approach taken by the Inter-American Commission of Human Rights in *Coard v the United States* and the approach taken by the UN Human Rights Committee in *Lopez Burgos v Uruguay* and *Celiberti de Casatiego v Uruguay*.<sup>7</sup>

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(c) Although jurisdiction is primarily territorial, it also covers extra-territorial acts.<sup>8</sup>

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(d) As for extra-territorial acts, the responsibility of a Contracting State may be engaged where in practice that State “exercises effective control of an area outside its national territory” (what the parties have called jurisdiction based on “ECA” principles).<sup>9</sup>

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(e) Responsibility of a Contracting State may also be engaged where an individual in the territory of another State comes under the “authority and control” of the agents of a

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<sup>6</sup> See *Al Adsani v UK* (2002) 32 EHRR 273 at §55

<sup>7</sup> The significance of this will be seen when those cases are examined in detail below.

<sup>8</sup> *R v (Ullah) v Special Adjudicator* [2004] UKHL 26 [2004] 2 AC 323, §29.

<sup>9</sup> *Loizidou (Preliminary Objections)*, cited above, *Bankovic* §70-71, *Ilascu v Moldova (Merits)* 40 EHRR 40, *Issa (Merits)* §69, *Kalogeropoulou v Greece* (App. No. 59021/00) (unreported), *Kovacic v Slovenia (Admissibility)* (App. No. 44574/98 and others), *Assanidze v Georgia* (2004) 39 EHRR 32, §138 and *Dobrescu v Romania* (App. No. 60681/00).

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Contracting State (what the parties have called jurisdiction based on “SAA” principles).<sup>10</sup>

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- (f) Since *Bankovic*, the Grand Chamber of the European Court in *Ilascu* and the Chambers of the European Court in *Issa* and *Isaak* have considered both ECA and SAA principles of jurisdiction and recognised and affirmed that they co-exist.<sup>11</sup>

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- (g) ECA jurisdiction can be established where a Contracting State occupies some or all of the territory of another State.

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This was expressly recognised by the European Court in *Bankovic* at para.71 and is further supported by the European Court’s endorsement in *Isaak v Turkey* of its own earlier decision in *Loizidou v Turkey*.<sup>12</sup>

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- (h) ECA jurisdiction can also be established where a Contracting State conducts military operations in the territory of another State, even where it is not an occupying power.

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<sup>10</sup> *X v Federal Republic of Germany* 25.9.65 8 Yearbook 158, *Cyprus (1975)* and *Cyprus (1976)* cited above, *Hess v UK* 2 DR 72, *X and Y v Switzerland* DR 57, *W v United Kingdom* 28.2.83 (1983) 32 DR 190, *Freda v Italy* 21 DR 250, *Stocke v Germany (Admissibility)* and *(Merits)* (App. No. 11755/85), *Vearncombe v UK* (1989) 59 DR 186, *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, *Ramirez v France*, cited above, *Bankovic and others v Belgium and others*, *Ocalan v Turkey (Admissibility)* (App. No. 46221/99) and *(Merits)* (2005) 41 EHRR 45, *Kovacic v Slovenia* cited above, *Issa v Turkey (Admissibility)* (App. No. 31831/96) and *(Merits)* (App. No. 31831/96), *Isaak v Turkey*, cited above and *Loizidou (Preliminary Objections)*, cited above.

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<sup>11</sup> The exposition of principles recently set out in *Isaak* and the approach taken by the judgments of the Grand Chamber in *Ilascu* and the Chamber in *Issa* re-affirm the European Court’s consistent long-standing caselaw to this effect (see e.g. *Loizidou*).

<sup>12</sup> See also the observations of the European Court in *Treksa v Albania* 29.6.06 (App. No. 26937/04) at p.12.

*Issa v Turkey*, where it proceeded on the basis that if it could be proved that Turkey had “conducted [military] operations in the area where the killings took place” (an area within the territory of northern Iraq), it could be considered to have “exercised, temporarily, effective overall control” of that area.<sup>13</sup>

(i) Where ECA jurisdiction is established, the Contracting State may be required to secure the entire range of substantive rights set out in the ECHR, but that will not always be the case. It is fact-specific and depends on the overall degree of control.<sup>14</sup>

(j) SAA jurisdiction can be established by the acts of diplomatic or consular agents. But equally it can be established by the acts of police officers and/or soldiers carrying out functions abroad.

(k) One of the key principles underpinning SAA jurisdiction is the notion that the ECHR should not be interpreted so as to allow Contracting parties to perpetrate violations of the ECHR which it could not perpetrate on its own territory.

Since SAA depends on the “authority and control” of State agents over individuals in other countries, the Interveners submit that this means that the ECHR should not be interpreted so as to allow Contracting parties to perpetrate violations of the ECHR rights of those over whom their agents have “authority and control”, which it could not perpetrate on its own territory.

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<sup>13</sup> Paras.74-76.

<sup>14</sup> In *Isaak*, the European Court carefully prefaced its observations about securing the entire range of substantive rights set out in the ECHR, with the words “in the particular situation concerning Cyprus”.

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(l) The participation of agents of a State in a violent and lethal attack on an individual in the territory of another State can be sufficient to establish SAA jurisdiction and hence responsibility for that act.<sup>15</sup>

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(m) There is no need for the extra-territorial acts relevant to jurisdiction to have taken place within the legal space of the ECHR (*espace juridique*), either under ECA or SAA principles.

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This proposition is derived from the European Court's endorsement in *Isaak v Turkey* of its own earlier decision in *Issa v Turkey* where the events took place in northern Iraq, and its endorsement of the European Commission's earlier decision in *Illich Sanchez Ramirez v France*. In *Illich Sanchez Ramirez v France* the European Commission proceeded on the basis that since the applicant was seized by French police officers abroad, he was "under the authority, and therefore the jurisdiction, of France" notwithstanding the fact that the acts complained of took place in Sudan.<sup>16</sup>

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(n) Nor does it matter whether the the extra-territorial acts relevant to jurisdiction were lawful or unlawful.<sup>17</sup>

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<sup>15</sup> See *Isaak v Turkey*. Set against the European Commission's decision in *Illich Sanchez Ramirez v France*, which proceeded on the basis that jurisdiction and hence responsibility for a breach of Article 5 ECHR could be established where French police officers took hold of the applicant in Sudan, the conclusion of the European Court in *Isaak v Turkey* was hardly surprising.

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<sup>16</sup> Pp.161-162. In respect of the relationship between the *espace juridique* and ECA principles, see also *Kalogeropoulou v Greece*, p.12, *Kovacic v Slovenia*, p. 51 and *Assanidze v Georgia*, §138. The ECHR could apply to non-contracting European territories, see *X and Y v Switzerland* 14.7.77 DR 57, *Drozd and Jonousek v France and Spain* (1992) 14 EHRR 745, and acts in non-European states, see *X v Federal Republic of Germany* 25.9.65 8 Yearbook 158 and *X v UK* 15.12.77 12 DR 73.]

<sup>17</sup> See *Ben El Mahi v Denmark* 11.12.06 (App No. 5853/06) (unreported) in which the Court stated that a State's responsibility may be engaged where, as a consequence of military action - whether lawful or unlawful - that State in practice exercises effective control of an area situated outside its national territory.

13. From this analysis, the Interveners submit that it is clear that control over the individual is the key factor in determining jurisdiction. In ECA cases, control is general in the sense that it means control of the immediate area or environment in which the individual is located. In SAA cases, control is specific in the sense that it means control over the individual himself or herself by State agents (usually by the exercise of legal or physical authority over him or her).

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14. Control need not be lawful. Nor need it be complete (e.g. in *Issa v Turkey*, the European Court contemplated temporary control on ECA principles by military operations that clearly did not entail complete control; and in *Illich Sanchez Ramirez v France*, the European Commission accepted jurisdiction on SAA principles where the French police only had temporary and limited control of the applicant's immediate movements). But there must be a *relationship of control* between the Contracting party and the individual in question.

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15. In *Bankovic and others v Belgium and others*, the European Court found that the dropping of bombs from the air did not constitute effective control on the ground, and that the relatives of the applicants were not under the personal authority and control of agents of the respondent. Absent either element of control, it concluded that there was no exercise of jurisdiction. Put another way, the dropping of bombs on the buildings in question did not create the necessary *relationship of control* between the relatives of the applicants and the respondent States or their agents.

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C. THE POSITION ADOPTED BY OTHER INTERNATIONAL COURTS AND BODIES

**Relevance**

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16. The Interveners have already made the point that in interpreting the meaning of jurisdiction in Article 1 ECHR and analysing its scope, the European Court has examined and expressly drawn upon the jurisprudence of other international courts and bodies that have examined the matter. The Court has recognised that the ECHR ‘should so far as possible be interpreted in harmony with other rules of international law of which it forms part...’<sup>18</sup>. In doing so, it expressly endorsed the approach taken by the Inter-American Commission of Human Rights in *Coard v the United States* and that taken by the UN Human Rights Committee in *Lopez Burgos v Uruguay* and *Celiberti de Casatiego v Uruguay*.

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17. Such an approach is consistent with the European Court’s general approach to the interpretation of the ECHR and, it is submitted, that makes it both legitimate and necessary for Your Lordships’ Board to have regard to the position adopted by other international courts and bodies on the question of jurisdiction when considering the interpretation and scope of Article 1 ECHR in this case.

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**The wording of relevant provisions of human rights treaties**

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18. The provisions relating to the applicability of the various instruments vary. The International Covenant on Civil and Political Rights (ICCPR) guarantees rights protection to all persons “within [the] territory and subject to [the] jurisdiction” of State parties (Article 2). However the jurisprudence makes clear that this is a disjunctive test, and, despite an apparently more restrictive provision than that of the

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<sup>18</sup> *Al-Adsani v UK* (2002) 32 EHRR 273 at §55.

ECHR, supports a relatively broad approach to the circumstances in which persons may be subject to the state's jurisdiction beyond the State's territory. The Optional Protocol to the ICCPR refers to "individuals subject to [a State party's] jurisdiction" (Article 1).

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19. The UN Convention against Torture (CAT) expressly provides that State parties "... shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (CAT, Art. 2(1)). However, even in this case, the practice of the Interveners shows that the concept of "jurisdiction" has been given a broad interpretation.

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20. Within the Inter-American system, the American Declaration does not contain any provision relating to applicability, although some "jurisdictional" limitation appears to have been inferred, while the American Convention on Human Rights mirrors closely the ECHR provision, covering all persons 'subject to [the] jurisdiction' of the States parties.

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21. The African Charter contains no explicit restriction on jurisdiction. But some jurisdictional limitation whereby States are not responsible for violations they do not control may be said to be implied.

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### **The general legal principles that have been applied**

#### *Purposive interpretation*

22. A purposive approach to the interpretation of "jurisdiction" is adopted. International law, as codified in the 1969 Vienna Convention on the Law of Treaties, requires that the concept of "jurisdiction" be interpreted in light of the object and purpose of the treaty (VCLT, Art. 31(1), see also ICJ *Wall* Advisory Opinion, para 109), which, in the context of human rights treaties requires ensuring effective protection of fundamental rights, avoiding impunity and

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ensuring individuals' access to justice. Moreover, at least in relation to some instruments, it appears that the motivation behind the formulation of the 'jurisdiction' clause was only to prevent States incurring responsibility for violation of human rights treaties for conduct which they did not control, resulting from conduct of *other*

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*Avoiding 'unconscionable' double standards.*

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23. As regards the States' own conduct abroad, the guiding principle is that it would be "unconscionable" to permit a State to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory. (see *Lopez Burgos case*, para 10.3, *Celiberti de Casariego v. Uruguay*, see also the ICJ *Wall Advisory Opinion*, para 109).

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*The "power/authority/control over persons and property" test*

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24. The relevant jurisdictional test is whether the State has "authority and control" (Inter-American Commission) or "power or effective control" (UN Human Rights Committee: General Comment 31, UN Committee against Torture) over a person or property. The existence of "authority and control" is a *de facto* test and is assessed on a case-by-case basis. (see for example the UN Committee against Torture: Conclusions and recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, 10/12/2004, para 4, and the Committee's: *Conclusions and Recommendations: USA*).

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*Irrelevance of lawfulness*

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25. The lawfulness under domestic or international law of the action by which any of the forms of control were obtained is not relevant for the purposes of determining whether the State in fact exercises such

“authority or control” and therefore whether the individual is in fact “subject to its jurisdiction” (see Human Rights Committee, General Comment 31, para 10; see also ICJ, *Wall* Advisory Opinion).

*Presumption of “control”: military occupation*

26. Certain factual situations have been treated as in effect creating *presumptions* as to the authority and control exercised, among them effective control over territory, custody and, notably, military occupation. In numerous cases concerning situations of occupation, in particular in the *DRC v. Uganda* case and in the *Wall* Advisory Opinion, the ICJ assumed that in situations of occupation the human rights obligations in question were applicable, without entering into any discussion of either territorial control or personal control on the particular facts. This accords with the fact that under International Humanitarian Law, under both Article 42 of the Hague Regulations and under customary international law, “territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised” (see the *Wall* Advisory Opinion, para. 78).

27. Arguably, then, once a situation is qualified as occupation within the meaning of international humanitarian law, there is by definition “jurisdiction” for the purposes of the application of human rights law, or certainly a presumption of such (see in particular the ICJ in *DRC v Uganda* and in the *Wall* Advisory Opinion; see also the African Commission of Human and People’s Rights in the *DRC* case).

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## The International Court of Justice (ICJ)

28. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*,<sup>19</sup> which concerned the legal consequences of the construction by Israel of the security barrier partly in the occupied Palestinian territories, the ICJ concluded that obligations under various international human rights instruments were applicable to Israel's conduct in the occupied territories, in particular the ICCPR, the International Covenant on Economic Social and Cultural Rights (ICESCR) and the Covenant on the Rights of the Child (CRC).

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29. On the ICCPR, the ICJ found (emphasis added):

*"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."*

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*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*

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<sup>19</sup> ICJ Reports 2004, p. 136.

*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 (case No. 52/79, **López Burgos v. Uruguay**; case No. 56/79, **Lilian Celiberti de Casariego v. Uruguay**). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, **Montero v. Uruguay**).*

*The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, para. 4 (1955)). [...] 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.*

30. The subsequent case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*<sup>20</sup> was an inter-state case concerning State responsibility for actions of forces of the Ugandan army (UPDF) in the Democratic Republic of the Congo while seeking to combat anti-Ugandan counterinsurgents. The case established the responsibility of military occupants for acts and omissions affecting human rights to inhabitants in occupied territories. The ICJ did not find it necessary to explore the existence of a territorial or personal nexus but assumed the applicability of human rights treaties from the fact of sufficient control to constitute a military occupation.
31. The ICJ found Uganda was responsible for the conduct of its armed forces (which committed acts of killing, torture and other forms of

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<sup>20</sup> 19 December 2005, unreported.

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inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict) as well as

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for its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law. The ICJ found (para. 219) that there had been violations of international humanitarian law and international human rights law specifically the ICCPR, the African Charter, the CRC and the Optional Protocol to the CRC.

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32. The ICJ found (emphasis added):

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*“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.*

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*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.*

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*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.*

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[...]

216. [...] *The Court [in the Wall Advisory Opinion] further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories (ibid., pp. 178-181, paras. 107-113).”*

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33. The Interveners submit that the significance of this judgment is not just the ICJ’s general approach to jurisdiction, but also its characterisation of the relationship between an occupying power and the inhabitants of the occupied area. It is a relationship of power, control and protection, sanctioned by international law. It is a relationship that the ICJ considers unquestioningly establishes jurisdiction under international human rights treaties.

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### **The UN Human Rights Committee**

#### *General Comments*

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34. The UN Human Rights Committee has addressed jurisdiction in its General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. See in particular paragraph 10 (emphasis added):

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*“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces*

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*constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."*

35. The Interveners submit that the focus of the UN Human Rights Committee is clearly on the relationship between Member States and those over whom they exercise power or effective control. This was the test applied in the individual communications to which the Interveners now turn, both of which were specifically endorsed by the European Court in *Issa v Turkey* and *Isaak v Turkey*.

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*Individual communications*

36. In *Sergio Euben Lopez Burgos v Uruguay*,<sup>21</sup> the victim was a Uruguayan national, abducted and detained in Argentina by Uruguayan agents, and subsequently taken to Uruguay where he was subjected to ill-treatment. The case established one generic standard of "authority and control," putting emphasis not on territory but on the nexus between the individual and the State which affected the former's rights.

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37. The UN Human Rights Committee found (emphasis added):

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*"12.1 The Human Rights Committee further observes that although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individual within its territory and subject to its jurisdiction ...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.*

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*12.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not*

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<sup>21</sup> Communication No. R.12/52 (6 June 1979), UN Doc. Supp. No. 40 (A/36/40) at 176 (1981).

*to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.*

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*12.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:*

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*"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."*

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*In line with this, it would be unconscionable to interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which it could not perpetrate on its own territory."*

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38. In *Lilian Celiberti de Casariego v. Uruguay*<sup>22</sup> the victim was a Uruguayan national abducted from Brazil by Uruguayan agents, and subsequently taken to Uruguay where she was subjected to mistreatment. In relation to applicability of the ICCPR, the UN Human Rights Committee took precisely the same line as in *Lopez Burgos*.

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39. The UN Human Rights Committee found (emphasis added):

*"10.1 The Human Rights Committee observes that although the arrest and initial detention of Lilian Celiberti de Casariego allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ... ") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its*

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<sup>22</sup> Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 92 (1984).

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*jurisdiction...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.*

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*10.2 The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.*

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*10.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:*

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*"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. "*

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*In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."*

*Concluding observations in relation to individual country reports submitted by States parties.*

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40. The UN Human Rights Committee has also made comments and observations about jurisdiction in its concluding observations in relation to individual country reports submitted by States parties. Chronologically they are as follows:

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- (a) *Concluding Observations of the Human Rights Committee: Croatia*<sup>23</sup>, para 9 (emphasis added):

*“The Government of Croatia is urged to act vigorously against all manifestations of racial hatred. Public condemnation should be made of the circulation of lists of persons’ names based on ethnicity and further appropriate action should be taken. Strong efforts should be made to identify undeclared places of detention and to ensure that only bona fide prisoners of war are held in properly notified camps operating in accordance with the Geneva Conventions and the Covenant. Responsibility must be accepted for the acts of the military in other territories as well as in Croatia. Clear instructions should be issued to all military personnel as to their obligations under the Covenant. The foregoing had to be borne in mind in the context of support afforded, directly or indirectly, to local Croatian militia in Bosnia-Herzegovina. Those responsible for violations of human rights should be brought speedily before the courts. In that regard, the existing distinctions between military and civil jurisdictions should be reviewed so that military personnel might be tried and, if found guilty, punished under normal civil jurisdiction.”*

- (b) *Concluding Observations of the UN Human Rights Committee: United States of America*,<sup>24</sup> para. 284 (emphasis added):

*“The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State’ s territory.”*

- (c) *Concluding Observations of the Human Rights Committee: Israel*,<sup>25</sup> para. 10 (emphasis added):

<sup>23</sup> UN Doc. CCPR/C/79/Add.15, 28 December 1992.

<sup>24</sup> UN Doc. CCPR/C/79/Add.50, 3 October 1995.

<sup>25</sup> UN Doc. CCPR/C/79/Add.93, 18 August 1998.

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*“The Committee is deeply concerned that Israel continues to deny its responsibility to fully apply the Covenant in the occupied territories. In this regard, the Committee points to the long-standing presence of Israel in these territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein. In response to the arguments presented by the delegation, the Committee emphasizes that the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under article 2, paragraph 1, for the actions of its authorities. The Committee is therefore of the view that, under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa where Israel exercises effective control. The Committee requests the State party to include in its second periodic report all information relevant to the application of the Covenant in territories which it occupies.”*

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- (d) *Concluding observations of the UN Human Rights Committee: Israel,*<sup>26</sup> para. 11 (emphasis added):

*“The Committee therefore reiterates that, 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.”*

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- (e) *Concluding Observations of the Human Rights Committee: United States of America,*<sup>27</sup> para. 10 (emphasis added):

*“The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war...*

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<sup>26</sup> UN Doc. CCPR/CO/78/ISR, 21 August 2003.

<sup>27</sup> UN Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006.

## The Committee against Torture

41. The Committee against Torture has also made comments and observations about jurisdiction in its concluding observations in relation to individual country reports submitted by States parties:

- (a) *Committee against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland - Dependent Territories.*<sup>28</sup>

*"The Committee against Torture expresses its concern at [...] the State party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that "those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq"; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party's authorities; [...] The Committee recommends that: [...] the State party should apply articles 2 and/or 3, as appropriate, to transfers of a detainee within a State party's custody to the custody whether de facto or de jure of any other State; the State party should make public the result of all investigations into alleged conduct by its forces in Iraq and Afghanistan, particularly those that reveal possible actions in breach of the Convention, and provide for independent review of the conclusions where appropriate; [...]"*

- (b) *Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America.*<sup>29</sup>

<sup>28</sup> UN Doc. CAT/C/CR/33/3, 10 December 2004.

<sup>29</sup> UN doc. CAT/C/USA/CO/2, 18 May 2006.

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*"The Committee notes that a number of the Convention's provisions are expressed as applying to "territory under [the State party's] jurisdiction" (articles 2, 5, 13, 16). The Committee reiterates its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised. The Committee considers that the State party's view that those provisions are geographically limited to its own de jure territory to be regrettable. The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world. [ ... ] [...] The Committee recalls that intelligence activities, notwithstanding their author, nature or location, are acts of the State party, fully engaging its international responsibility." (emphasis added)*

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**The Inter-American Commission on Human Rights (the Inter-American Commission)**

42. The Inter-American Commission has addressed questions of jurisdiction in six cases.

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43. *Salas and others v. United States*<sup>30</sup> related to alleged violations resulting from the December 1989 US military intervention in Panama, and was brought under the American Declaration. The complaints related to deaths, personal injury, and destruction of homes and property as a direct result of indiscriminate military action. The petition was found admissible, no decision on the merits has been taken yet.

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44. The Inter-American Commission held (emphasis added):

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*"Where it is asserted that a use of military force has resulted in non-combatant deaths, personal injury, and property loss, the human rights of the non-combatants are implicated. In the context of the present case, the guarantees set forth in the*

<sup>30</sup> Case 10.573, Report No. 31/93, OEA/Ser.L/V/II.85 Doc. 9 rev. at 312 (14 October 1993).

*American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case."*

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45. *Haitian Centre for Human Rights v. United States of America (Haitian Interdictions)*<sup>31</sup> concerned action ("interdiction") by US federal agencies in international waters designed to prevent Haitian refugees from landing within the US, and thereby acquiring various procedural rights relating to asylum. The Inter-American Commission found violation of the right to life in that the US authorities have exposed the refugees to risk of death on return home as "repatriates".

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46. The Inter-American Commission found:

*"167. [...]The Commission has also noted the international case law which provides that if a State party extradites a person within its jurisdiction in circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.*

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*168. [...]The Commission therefore finds that the United States has breached the right to life of those unnamed Haitian refugees identified by the petitioners in its submissions who were interdicted by the United States, repatriated to Haiti, and later lost their lives after being identified as "repatriates" pursuant to Article I of the American Declaration."*

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47. *Victor Saldaño v. Argentina*<sup>32</sup> was brought under the American Convention against Argentina for failure to bring an inter-State case against the US for violations of the right to life and judicial guarantees in a death penalty case against an Argentinean national. The Inter-American Commission found the case inadmissible on the basis that the petitioner had not adduced any evidence that the Argentine State had exercised any "authority or control" over the

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<sup>31</sup> Case 10.675, Report N° 51/96, 13 March 1997.

<sup>32</sup> Petition, Report No. 38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 289 (1998).

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victim himself, or any authority or control over the local US officials which were alleged to have breached his rights to a fair trial. This is a clear example of a situation where the State has no meaningful control over the violations, which are not therefore within its 'jurisdiction'.

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48. The Inter-American Commission found (emphasis added):

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*16. [According to Article 1 (1) of the American Convention], States Parties have undertaken to respect and ensure the substantive guarantees enshrined in the Convention in favour of persons "subject to their jurisdiction". As implicitly established by the case law of the Commission and the Inter-American Court, this protection must extend to all human beings present within their national territory, irrespective of their nationality or status [fn 3: Inter-A.Ct of Human Rights , Advisory Opinion OC-2/82 "Effect of reservations on the entering into effect of the American Convention on Human Rights," paragraph 33].*

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*17. The Commission does not believe, however, that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory. This position finds support in the decisions of European Court and Commission of Human Rights which have interpreted the scope and meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Duties (European Convention). Article 1 of that instrument, on which Article 1(1) of the American Convention was largely patterned, stipulates that the high contracting parties "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."*

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*18. [Reference to the European Commission for Human Rights' conclusions in case Cyprus against Turkey]*

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*19. This understanding of jurisdiction--and therefore responsibility for compliance with international obligations--as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court.[fn 4: 4 European Court H.R. Loizidou v Turkey, A 310 paragraphs 56-64 (1995). European Commission HR X v UK No. 7547/76. 12 DR73*

(1977); *Bertrand Russell Peace Foundation Ltd. v UK* No. 7597/76, 14DR 117 at 124 (1978); *Mrs. W v UK* No. 9348/81, 32 DR 190 (1983).]

[...]

21. [The] relevant events--the arrest, trial, and sentencing of the alleged victim--took place entirely within the territory of another State and were carried out by the local authorities and organs of that foreign State. The Commission wishes to point out that the petitioner has not adduced any proof whatsoever that tends to establish that the Argentine State has in any way exercised its authority or control either over the person of Mr. Saldaño, prior or subsequent to his arrest in the United States, or over the local officials in the United States involved in the criminal proceeding taken against him.

49. *Coard et al v United States*,<sup>33</sup> was brought under the American Declaration by individuals who were arrested and detained by US soldiers in Grenada during the October 1983 military intervention after a coup. The victims were subsequently turned over to the Grenadian authorities, tried and convicted, the majority being sentenced to death. The Commission, deciding that the US had violated rights, again proceeded on the basis that extraterritorial exercise of jurisdiction is in no way exceptional and the focus is on whether the individual is in some way subject to the "control" of the State.

50. The Inter-American Commission found (emphasis added):

"37. While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- "without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a

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<sup>33</sup> Case 10.951, Report N° 109/99, 29 September 1999, Annual Report of the IACHR 1999, OEA/Ser.L/V/II.106, doc.6 rev., at 1283 (1999).



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*person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”*

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51. *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba,*<sup>34</sup> (commonly known as the “*Brothers to the Rescue*” case) was brought under the American Declaration, and concerned the shooting down by fighter planes from the Cuban air force of two private planes flying in international airspace which were owned by an anti-Castro organization based in the USA. The incident resulted in the deaths of all four persons on board. The Inter-American Commission held Cuba responsible for violating the right to life and the right to fair trial of the four victims. The Commission held that it was conclusively established that the victims had been placed under the “authority” of agents of the Cuban State, acting outside their own territory.

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52. The Inter-American Commission found (emphasis added):

*“ ... under certain circumstances the Commission is competent to consider reports alleging that agents of an OAS member state have violated human rights protected in the inter-American system, even when the events take place outside the territory of that state. In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. ... Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is*

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<sup>34</sup> Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999).

*present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad."*

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In that case the planes which were shot down were private not military aircraft, and the whole incident took place in international airspace. No issue therefore arose as to whether the actions of the Cuban aircraft impinged on the enjoyment by any other State of its territorial sovereignty or the infringement of its exercise of territorial jurisdiction.

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53. *Detainees in Guantanamo Bay, Cuba*<sup>35</sup> related to provisional measures sought in relation to individuals detained by US authorities at Guantánamo Bay. The case was again brought under the American Declaration. The Inter-American Commission was principally concerned with arguments relating to the interaction of human rights law and international humanitarian law.

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54. The Inter-American Commission found (emphasis added):

*"... where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. In short, no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights."*

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<sup>35</sup> Request for Precautionary Measures, 13 March 2002, reprinted in ILM vol. 41 (2002), 532.

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**African Commission on Human and People's Rights (the African Commission)**

55. The African Commission has also addressed the question of jurisdiction.

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56. In *Democratic Republic of Congo/Burundi, Rwanda*<sup>36</sup> the African Commission found that there had been grave and massive violations of human and peoples' rights committed by the armed forces of Burundi, Rwanda and Uganda in the eastern provinces of the DRC, including massacres, rapes, mutilations, mass transfers of populations and looting of the peoples' possessions, in violation of the several provisions of the African Charter and of several provisions of the ICCPR, the Geneva Conventions of 12 August 1949 and of the Additional Protocol on the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

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57. The African Commission clearly acted on an implicit assumption that the African Charter is applicable as a result of a situation of 'effective occupation'(emphasis added):

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*"79. The Commission finds the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the Respondent States' armed forces were still in effective occupation of the eastern provinces of the Complainant State reprehensible and also inconsistent with their obligations under Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 and Protocol 1 of the Geneva Convention.*

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*80. They also constitute flagrant violations of Article 2 of the African Charter, such acts being directed against the victims by virtue of their national origin; and Article 4, which guarantees respect for life and the integrity of one's person and prohibits the arbitrary deprivation rights. [...]"*

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<sup>36</sup> Uganda (2003), Communication 227/ 1999 – reported in 20th Activity Report of the African Commission on Human and Peoples' Rights (January – June 2006), doc. EX.CL/279 (IX), Annex IV.

In its approach to jurisdiction, therefore, the African Commission has clearly adopted the same test as the ICJ adopted in *DRC v Uganda*.

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**D. THE NATURE OF THE OCCUPATION IN IRAQ**

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**Background**

58. Coalition forces invaded Iraq in the spring of 2003 after the abandonment of efforts to obtain a further UN Security Council Resolution.

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59. The period between 1<sup>st</sup> May 2003 and 28<sup>th</sup> June 2004 was a period of occupation and the United Kingdom was an occupying power under the relevant provisions of the Regulations annexed to the 1907 Hague Convention ("the Hague Regulations") and the 1949 Fourth Geneva Convention ("Geneva IV"), at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised sufficient authority for this purpose. As such the UK enjoyed all the benefits and bore all the burdens attributable to occupying powers under international humanitarian law.

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60. Throughout the relevant period the Coalition Provisional Authority ("CPA") existed for the purpose of exercising powers of government temporarily. One of its express tasks was to provide security, and its declared goal was to transfer responsibility to representative Iraqi authorities as early as possible.

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61. As the Court of Appeal below observed:

*"The United Kingdom had been given command of Multi-National Division (South-East) ("MND(SE)", which was one of the six divisions that made up the coalition forces in Iraq in this period. The division's area of responsibility comprised four provinces in South-East Iraq. Two of these (Al-Basrah and Maysan) represented the main theatre of*

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*operation for UK forces. These provinces had a total population of about 2.75 million people, and just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities. These troops had two main tasks: to maintain security (a task which included an effort to re-establish the Iraqi security force, including the Iraqi police), and to support the civil administration in Iraq in a number of different ways”.*<sup>37</sup>

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62. On 8<sup>th</sup> May 2003 the permanent representatives of the United States and the UK wrote a letter to the President of the Security Council in which they outlined the Coalition’s plans for the immediate and long term future of Iraq. They referred to the creation of the CPA, and they identified the Coalition’s goal as being the transfer of responsibility for administration to representative Iraqi authorities as early as possible. At the start of this letter they gave the following assurance:

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*“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.”*

63. On 16<sup>th</sup> October 2003 UNSCR 1511 (2003) was adopted. By para.14 the Security Council:

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*“Determines that the provision of security and stability is essential to the successful completion of the political process .... and authorizes a multi-national force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq....”*

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64. However, neither the Coalition forces nor the MNF were participating in a UN operation and neither was part of a UN peacekeeping mission. The significance of this is that all the participating forces in the MNF, including the UK, retained sole state responsibility for their own acts and omission at all material times during the invasion and occupation of Iraq.

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<sup>37</sup> Para.16.

**The powers and duties of the UK as an occupying power**

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65. The preamble to the Hague Regulations 1907 provide that:

*“According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.*

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....

*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples from the laws of humanity, and the dictates of the public conscience.”*

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66. Section III of the Hague Regulations is entitled “Military Authority over the Territory of the Hostile State”. Its first two articles read:

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*“42. Territory is considered occupied when it is actually placed under the authority of the hostile army ...*

*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.”*  
(emphasis added)

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67. In *DRC v Uganda* (see above), the ICJ was concerned to identify the obligations of the State of Uganda as an occupying power in the eastern part of the Congo. The ICJ cited Article 43 of the Hague Regulations and said:

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*“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.”*

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Although Iraq was not a party to the Hague Convention, in *Al-Jedda v Secretary of State* [2006] EWCA Civ 327 it was common ground before the Court of Appeal that Articles 42 and 43 contained a statement of the relevant principles of customary international law.

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68. Geneva IV, for its part, was expressly concerned with “the Protection of Civilian Persons in Time of War”. It was expressed to apply to all cases of declared war or of any other armed conflict which might arise between two or more of the High Contracting Parties (Article 2). The persons protected by the Convention are those “who at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, *in the hands of a Party to the Conflict or Occupying Power of which they are not nationals*” (Article 4; emphasis added).

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69. Articles 41 and 42 of Geneva IV provide:

*“41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.*

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*42. The internment...of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary...”. (emphasis added)*

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Article 43 requires the reconsideration of an internment decision by an appropriate court or administrative board designated by the detaining power “as soon as possible”, and thereafter periodically, and at least twice a year.

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70. Articles 64 and 78-79 provide:

*“64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention...*

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*The Occupying Power may, however, subject the population of the occupied territory to 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...*” (emphasis added)

71. As the ICJ rightly recognised in *DRC v Uganda*, occupation creates a relationship of power, control and protection between the occupying power and the inhabitants of the occupied area. Again as the ICJ rightly recognised in *DRC v Uganda*, that relationship establishes jurisdiction in international human rights law.

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**E. THE RELATIONSHIP BETWEEN THE UK AND C1-C6.**

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72. As has already been observed, during the relevant period the UK was an occupying power, at least in South East Iraq, under the relevant provisions of the Hague Regulations and Geneva IV.

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73. The UK was given command of South-East Iraq. 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities. Their main tasks were to maintain security and to support the civil administration in Iraq.

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74. In taking command of South-East Iraq and carrying out their tasks, UK troops were *exercising powers* available to them under international humanitarian law (treaty based and under customary international law). They exercised those powers to control the inhabitants of the area for which they were assigned responsibility.

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75. In taking command of South-East Iraq and carrying out their tasks, UK troops also came under an obligation to *protect* the inhabitants of that area of Iraq. As the ICJ recognised in *DRC v Uganda*, that obligation arose under international humanitarian law and included an obligation to respect the applicable rules of international human rights law.

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76. Against that background, the Interveners submit, a relationship of power, control and protection existed between the UK and the inhabitants of that area of Iraq sufficient to establish jurisdiction under the ECHR - just as the equivalent relationship existed in *DRC v Uganda* and many other cases and was sufficient to establish jurisdiction under other international human rights instruments in those cases.

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77. In the cases of C1-C5, the fatalities in question occurred while UK troops were patrolling the streets of Basrah City in the exercise of powers available to them under international humanitarian law as an occupying power. They were exercising authority over the local population, backed up by the use of lethal force. In C1, and C3-5, the troops were acting as the law enforcement authority on the streets (to the exclusion of any other law enforcement authority) and the fatalities occurred when they exercised their powers to intervene in the various incidents. In C2's case, the troops were engaged as the law enforcement authority on a "search and arrest" mission.<sup>38</sup>

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78. In the case of C6, the fatality occurred while Baha Mousa was in the custody of UK troops. He had been arrested as part of Operation Salerno (an operation that included searching for and arresting individuals).

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79. Baha Mousa was 26 year old on 14<sup>th</sup> September 2003 when he was arrested. He sustained multiple injuries as a result of being ill-treated by UK soldiers both at the time of his arrest at a hotel and during his detention at a British military base in Basra, where he died. He died 36 hours after his arrest having received 93 separate injuries at the hands of the UK soldiers holding him, many inflicted while he was hooded.

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<sup>38</sup> CA judgment para.23

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80. Notably, Baha Mousa was first assaulted whilst still at the hotel (a fact that in itself caused difficulties at the court martial in attributing criminal responsibility). If the Secretary of State's concession that jurisdiction is established in his case includes jurisdiction and hence responsibility for this part of the attack, it has the curious consequence that the UK could be held accountable under the ECHR for the acts of its troops in kicking and punching Baha Mousa at the hotel, but not if they had simply killed him there and then.

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81. The Interveners submit that, in the circumstances described above, jurisdiction under the ECHR is clearly established for C1-C6 either on ECA principles or SAA principles, or both.

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82. If the test established by the European Court in *Issa v Turkey* or *Isaak v Turkey* in the context of its continuing jurisprudence were applied, jurisdiction under the ECHR would clearly be established.

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83. If the test established by the ICJ in *DRC v Uganda* were applied, jurisdiction under the ECHR would equally clearly be established.

84. Similarly, if the test established by the UN Human Rights Committee, or the Committee against Torture, or the Inter-American Commission on Human Rights, or the African Commission were applied, the relevant jurisdiction would be established.

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#### F. ACCOUNTABILITY

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85. Jurisdiction is the key to accountability. The Interveners have already made the point that in *Isaak v Turkey*, the European Court, having cited the cases of *M v Denmark*, *Illich Sanchez Ramirez v France*, *Coard et al v the United States*, *Lopez Burgos v Uruguay* and *Celiberti de Casariego v. Uruguay* as examples where jurisdiction was established on SAA principles, then remarked that:

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*“Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory”.*

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86. Where individuals under the control of a Contracting State are killed or have arguably been subjected to ill-treatment by agents of that State, the European Court insists that accountability should be achieved by an effective investigation.

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87. The principles underpinning the duty of effective investigation are very well established and were conveniently set out in the case of *Ahmet Ozkan and others v Turkey*<sup>39</sup> (see also *Jordan v UK* (2003) 37 EHRR 2, §102-109) which were summarised by Brooke LJ in the Court of Appeal below in the following terms:

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(a) The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1<sup>40</sup> to "secure to everyone within [its] 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.<sup>41</sup>

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(b) The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.<sup>42</sup>

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<sup>39</sup> [2004] ECHR (21689/93, 6th April 2004). In respect of Article 3 and the duty to investigate ill-treatment, see *Assenov v Bulgaria* 24760/94 [1998] ECHR 98 (28 October 1998) § 102. This principle was recently cited in *Jasar v The former Yugoslav Republic of Macedonia*, Application No. 69909/01, (15 February 2007).

<sup>40</sup> *McCann and Others v UK* § 61.

<sup>41</sup> *Ozkan v Turkey*, at para 309.

<sup>42</sup> *Ibid*, para.310. See also *Ilhan v Turkey* [GC], no. 22277/93, § 63.

- (c) What form of investigation will achieve those purposes may vary in different 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.<sup>43</sup>
- (d) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as 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.<sup>44</sup>
- (e) The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases 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.<sup>45</sup>
- (f) The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness 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

<sup>43</sup> *Ibid*, para.310. See also *Ilhan v Turkey* § 63.

<sup>44</sup> *Ibid*, para.310. See also *Finucane v UK* no. 29178/95, *McKerr v UK*, § 128, *Hugh Jordan v UK*, § 120, *Kelly and Others v UK*, § 114 and *Shanaghan v UK*.

<sup>45</sup> *Ibid*, para.311. See also *Paul and Audrey Edwards v UK*, no. 46477/99, § 71.

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death or the person or persons responsible will risk falling foul of this standard.<sup>46</sup>

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- (g) 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 the use of lethal force or ill treatment 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.<sup>47</sup>

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- (h) 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 next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.<sup>48</sup>

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88. In *R (Amin) v Home Secretary*<sup>49</sup> Lord Bingham summarised the purposes of the Article 2 ECHR procedural obligation in these terms:

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*"The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that*

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<sup>46</sup> *Ibid*, para.311. See also *Salman v Turkey* [GC], no. 21986/93, § 106.

<sup>47</sup> *Ibid*, para.312. See also *Hugh Jordan v UK*, § 108, 136-40.

<sup>48</sup> *Ibid*, para.313; see generally, the summary by Brooke L.J. in *R (Al-Skeini) v Secretary of State* [2005] EWCA 1609 at para.136, and also *McKerr v UK* § 148.

<sup>49</sup> [2003] UKHL 51 at [31]; [2004] 1 AC 653.

*lessons learned from his death may save the lives of others.<sup>50</sup>*

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89. The duty of effective investigation has now been recognised globally. On 16<sup>th</sup> December 2005, the UN General Assembly adopted the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>51</sup>. Article 3 of these Basic Principles, provides that:

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*“The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:*

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...

*(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”*

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90. The Interveners submit that the duty of effective investigation has not been fulfilled in any of the cases C1-C6. The defects in the investigations in the cases C1-C5 are obvious. They were perfunctory, lacking independence and wholly inadequate. Any suggestion that they satisfied the requirements of Article 2 ECHR is unarguable.

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91. In C6’s case, court martial proceedings were brought. However, these resulted in just one conviction resulting from the guilty plea by Corporal Payne on count 2, namely that between 13<sup>th</sup> September 2003 and 16<sup>th</sup> September 2003, in Basra, Iraq, he inhumanely treated Iraqi civilians arrested as a result of Operation Salerno. He denied his guilt on the most serious charges he faced, the unlawful killing or manslaughter of Baha Mousa. He also denied his guilt on an

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<sup>50</sup> Para.31.

<sup>51</sup> UN General Assembly Resolution 60/147.

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additional charge of doing acts intended to pervert the course of justice. All others charged were acquitted.

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92. As the rulings of McKinnon J make clear, the acquittals were not because anyone disputed that Baha Mousa and others arrested with him were attacked while in custody. Nor does anyone dispute that Baha Mousa died as a result of the attacks on him by UK soldiers while in custody. The acquittals arose because of the mistakes made in the investigation and prosecution of the cases and because of the difficulties of identifying the perpetrators, partly caused by the number of assailants involved in the sustained attacks, changing shifts, the non-prosecution of some soldiers (e.g. those who it is alleged assaulted Baha Mousa and others arrested with him at the hotel) and (perhaps most disturbing of all) because the surviving victims were unable to identify those who attacked them as they were hooded during the attacks. To date, no one has been found responsible for the ill-treatment that Baha Mousa suffered at the hands of several (unidentified) soldiers. There has been no explanation and no accountability.

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93. Against that background, the Interveners submit that (quite apart from the other shortcomings in the investigation identified by the Court of Appeal below and by the Appellants in their printed case) in the case of C6, just as in the cases of C1-C5, the duty of effective investigation under Article 2 ECHR has not been fulfilled.

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#### **Immunity in Iraq**

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94. The Interveners are concerned to emphasise the extent of the immunity enjoyed by UK troops under Iraqi law during the relevant period.
95. The Coalition Provisional Authority (CPA) Order No 17 (revised) provides that:

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*"Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process" (section 2(1)).*

*"MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States, ..." (section 2(2)).*

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*"The Sending States of MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State." (section 2(4)).*

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96. The Interveners submit that these provisions powerfully reinforce their submissions on jurisdiction. There is no question of accountability under Iraqi law for the acts in question in this case. A refusal to recognise the exercise of jurisdiction and hence accountability under the ECHR in the present cases will result in the very situation that the ECHR and other international bodies have clearly stated must not exist: namely that a State party can be and remain unaccountable and unsanctioned for perpetrating violations of its ECHR obligations on the citizens and territory of another State, when it would be accountable and severely sanctioned if it perpetrated them on its own citizens and on its own territory.

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26 March 2007

**Keir Starmer QC**  
Doughty Street Chambers

  
**Richard Hermer**  
Doughty Street Chambers

F

**Charles Banner**  
Landmark Chambers

G

**Azeem Suterwalla**  
Doughty Street Chambers



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IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL  
(ENGLAND)

BETWEEN

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(1) MAZIN JUM'AA GATTEH AL-SKEINI  
(2) FATTEMA ZABUN DAHESH  
(3) HAMEED ABDUL RIDA AWAID KAREEM  
(4) FADIL FAYAY MUZBAN  
(5) NUZHA HABIB YAAQUB UBAID AL RAYAHI  
(6) DAOUD MOUSA

*Appellants*

- and -

C

SECRETARY OF STATE FOR DEFENCE

*Respondent*

AND BETWEEN

D

(1) MAZIN JUM'AA GATTEH AL-SKEINI  
(2) FATTEMA ZABUN DAHESH  
(3) HAMEED ABDUL RIDA AWAID KAREEM  
(4) FADIL FAYAY MUZBAN  
(5) NUZHA HABIB YAAQUB UBAID AL RAYAHI  
(6) DAOUD MOUSA

*Respondents*

- and -

SECRETARY OF STATE FOR DEFENCE

*Appellant*

E

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ANNEX  
TO INTERVENERS' PRINTED CASE

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The relevant details and experience of each Intervener:

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- (i) *The AIRE Centre* provides information and advice on international human rights law, and training for judges, public officials, lawyers and human rights NGOs across the 46 member states of the Council of Europe. The Centre also provides direct legal representation to applicants taking cases to the European Court of Human Rights and has been involved in more than 70 cases against 14 jurisdictions. A

number of these cases concern the accountability of States for violations of human rights occurring outside their metropolitan territory, some of which have occurred as a result of the acts and omissions of their military personnel.

(ii) *Amnesty International Ltd* is a company limited by guarantee. It aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. It monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe. Its mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organisation works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community. It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognised human rights.

(iii) *The Association for the Prevention of Torture (APT)* is an independent non-governmental organization based in Geneva, Switzerland, since 1977. Its objective is to prevent torture and ill-treatment of persons deprived of their liberty, in all countries of the world. To achieve this the APT: advocates for the adoption and implementation of legal norms that prohibit torture and ill-treatment; promotes monitoring of places of detention and other control mechanisms that can prevent torture and ill-treatment; strengthens the capacity of persons seeking to prevent torture, especially national

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human rights organizations. In December 2004 it was awarded the French Republic's Human Rights Prize for its prevention work.

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- (iv) *The Bar Human Rights Committee* is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world. It is also concerned with defending the rule of law and internationally recognised legal standards relating to the right to a fair trial.

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- (v) *British Irish Rights Watch* is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Its services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. It takes no position on the eventual constitutional outcome of the conflict. Its charitable objects include the procurement of the abolition of torture, extrajudicial executions, and arbitrary arrest and detention. In its work in Northern Ireland since 1990 it has researched killings by the security forces and have worked to obtain effective investigations into such killings.

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- (vi) *Interights* is an international human rights law centre based in London. Its main purpose is to assist judges and lawyers in the use of international and comparative law, and national, regional and international mechanisms, for the better protection of human rights. It advises on legal rights and remedies and assists lawyers and non-governmental organisations in the preparation and presentation of cases before international, regional and domestic courts and tribunals. It frequently intervenes as *amicus curia* in cases that raise issues of general importance concerning the interpretation of fundamental rights. It has previously intervened in cases before the European Court of Human Rights, the Inter-American Court of Human Rights, the

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African Commission on Human and Peoples Rights, the UN Human Rights Committee and domestic courts.

- (vii) *Justice* was founded in 1957 as an independent human rights and law reform organisation. It is the British branch of the International Commission of Jurists. Its mission is to advance justice, human rights and the rule of law. Justice has a long history of intervening in cases which raise important matters of public interest concerning the legal protection of fundamental rights. It has, for instance, made interventions before the House of Lords in such recent cases as *Leeds City Council v Price and others* [2006] UKHL 10, *Roberts v Parole Board* [2005] UKHL 45, and *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26. It has also made numerous interventions before the European Court of Human Rights: see e.g. *Khan v United Kingdom* (2000) 31 EHRR 45 and *John Murray v United Kingdom* (1996) 22 EHRR 29; the Judicial Committee of the Privy Council: see e.g. *Brown v Procurator Fiscal* (2001) 2 WLR 817; and the European Court of Justice: see e.g. *R v Secretary of State for the Home Department ex parte Manjit Kaur* (4 July 2000). Further, it has represented applicants before the ECtHR: see e.g. *Hussain and Singh v United Kingdom* (1996) 22 EHRR 1.

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- (viii) *The Kurdish Human Rights Project* is an independent, non-political human rights organisation dedicated to the promotion and protection of the human rights of all persons in the Kurdish regions of Turkey, Iraq, Iran, Syria and elsewhere. It is a registered charity founded in London in 1992 working with its partner organisations in the regions.

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- (ix) *The Law Society of England and Wales* regulates and represents the solicitors' profession in England and Wales and has a public interest role in working for reform of the law.

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- (x) *Liberty* was formed in 1934 and is an independent and non-party political organisation which seeks to protect civil liberties and

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promote human rights in the United Kingdom. It has supported cases raising civil liberties issues since 1934 and has had a legal department with employed staff for well over 25 years. It has been particularly active in promoting the rights protected by the European Convention on Human Rights both before the Commission and Court of Human Rights and in the domestic courts, particularly since the introduction of the Human Rights Act 1998. Consequently, it is a recognised authority on the ECHR and has sought and received permission to intervene in a number of leading domestic cases under the HRA. Recent examples include *R (Limbuella, Tesema and Adam) v Secretary of State for the Home Department* [2005] 3 WLR 1014 and *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

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- (xi) *The Redress Trust* is an international human rights nongovernmental organisation with a mandate to assist torture survivors to seek justice and other forms of reparation. Over the past 12 years, it has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law. It regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and tribunals. At the domestic level, it assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, it represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State's obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.

