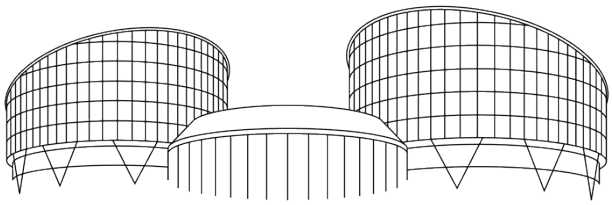

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF AL-SAADOON AND MUFDHI v. THE UNITED KINGDOM

(Application no. 61498/08)

JUDGMENT

STRASBOURG

2 March 2010

FINAL

04/10/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Al-Saadoon and Mufdhi v. the United Kingdom**,**

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

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
Ján Šikuta,
Mihai Poalelungi,
Nebojša Vučinić, *judges*,
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 2 February 2010,

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

PROCEDURE

1. The case originated in an application (no. 61498/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Iraqi nationals, Mr Faisal Attiyah Nassar Khalaf Hussain Al-Saadoon and Mr Khalef Hussain Mufdhi ("the applicants"), on 22 December 2008.

2. The applicants, who were granted legal aid, were represented by Mr P. Shiner, a lawyer practising in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicants alleged that their detention by British forces in Basra and their transfer by those forces to the custody of the Iraqi authorities fell within the jurisdiction of the United Kingdom and gave rise to violations of their rights under Articles 2, 3, 6, 13 and 34 of the Convention and Article 1 of Protocol No. 13.

4. On 30 December 2008 the Acting President of the Section decided to grant the applicants' request for an interim measure under Rule 39 of the Rules of Court. The Government were therefore informed that the applicants should not be removed or transferred from the custody of the United Kingdom until further notice. By a letter dated 31 December 2008, the Government informed the Court that the applicants had nonetheless been transferred to the custody of the Iraqi authorities earlier that day.

5. On 17 February 2009 the Chamber decided to refuse a further application by the applicants for an interim measure under Rule 39 and decided to give the case priority under Rule 41 and to expedite the procedure. On the same day, the President of the Chamber decided to give

notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

6. On 20 March 2009 the Equality and Human Rights Commission was granted leave by the President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2). On 25 March 2009 the Bar Human Rights Committee of England and Wales, British Irish Rights Watch, the European Human Rights Advocacy Centre, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, JUSTICE, Liberty and REDRESS ("the group of interveners") were also granted leave to intervene.

7. On 30 June 2009 the Court unanimously decided to disapply Article 29 § 3 of the Convention, to declare the complaints concerning conditions of detention and the risk of ill-treatment and extrajudicial killing in Iraqi custody inadmissible, to join the question of the admissibility of Article 13 of the Convention and the issues arising under Article 34 to the merits and to declare the remainder of the application admissible.

8. On the same day, the President of the Chamber put further questions to the parties. The parties' responses to those questions were received on 21 August 2009.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The occupation of Iraq

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

11. Major combat operations in Iraq ceased at the beginning of May 2003. The United States of America and the United Kingdom thereafter became occupying powers within the meaning of section III of the Hague Regulations on the Laws and Customs of War on Land (1907) and the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 1949) ("the Fourth Geneva Convention"). Article 27 of the Fourth Geneva Convention placed an obligation on the United Kingdom,

within the area it occupied, to protect the civilian population against all acts of violence and Articles 41, 42 and 78 gave the United Kingdom the power, *inter alia*, to intern Iraqi civilians where necessary for imperative reasons of security.

12. The Coalition Provisional Authority (CPA) was created by the government of the United States of America as a "caretaker administration" until an Iraqi government could be established. It had power, *inter alia*, to issue legislation. On 13 May 2003 the US Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the CPA with responsibility for the temporary governance of Iraq. The CPA administration was divided into regional areas. CPA South remained under United Kingdom responsibility and control, with a United Kingdom regional coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. British troops were deployed in the same area. The United Kingdom was represented at CPA headquarters through the office of the United Kingdom Special Representative. Although the United Kingdom Special Representative and his office sought to influence CPA policy and decisions, he had no formal decision-making power within the CPA. All the CPA's administrative and legislative decisions were taken by Ambassador Bremer.

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

Section 6: Criminal Detentions

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

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

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

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

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

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

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

Section 7: Coalition Force Security Internee Process

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

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

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

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

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

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

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

14. The invasion had gone ahead after the abandonment of the efforts by the coalition States to obtain the backing of a United Nations Security Council (UNSC) resolution (UNSCR). UNSCR 1483 was adopted by the UNSC on 22 May 2003. Acting under Chapter VII of the United Nations Charter, the UNSC called on the coalition of occupying States, in conformity with the United Nations Charter and other relevant international law, to promote the welfare of the Iraqi people and work towards the restoration of conditions of stability and security. The UNSC further

requested the Secretary-General to appoint a Special Representative in Iraq: he was to report regularly to the UNSC on his activities under the UNSCR, which were to coordinate the activities of the United Nations and other international agencies engaged in post-conflict processes and humanitarian assistance in a number of specified ways, including the protection of human rights.

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

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

17. Pursuant to UNSCR 1483 (see paragraph 14 above), provision was made by CPA Order No. 48 of 10 December 2003 for the setting up of an Iraqi Tribunal to try members of the previous Iraqi regime alleged to be responsible for crimes and atrocities. In the Order, the CPA delegated to the interim government the following authority:

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

18. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the "Transitional Administrative Law"). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government ("the interim government") and the dissolution of the CPA. Section 26 of the Transitional Administrative Law made provision for the laws in force in Iraq at the time of that change to

continue in effect unless rescinded or amended by the interim government, and specifically for the laws, regulations, orders and directives issued by the CPA to remain in force until rescinded or amended by legislation duly enacted and having the force of law.

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

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

Section 1: Purpose

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

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

(b) the need to transition from this support;

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

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

..."

Section 5: Criminal Detentions

"(1) A national contingent of the MNF shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter 'criminal detainees') who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may

retain criminal detainees in facilities that it maintains at the request of the appropriate Iraqi authorities based on security or capacity considerations. Where such criminal detainees are retained in the detention facilities of a national contingent of the MNF the following standards will apply:

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

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

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

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

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

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

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

Section 6: MNF Security Internee Process

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

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

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

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

(5) Security internees who are placed in internment after 30 June 2004, must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist and in any case must be either released from internment or transferred to

the Iraqi criminal jurisdiction not later than 18 months from the date of induction into an MNF internment facility. Any person under the age of 18 interned at any time shall in all cases be released not later than 12 months after the initial date of internment.

...

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

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

Section 2: Iraqi Legal Process

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

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

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

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

..."

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

"The MNF may use without cost such areas for headquarters, camps or other premises as may be necessary for the conduct of the operational and administrative activities of the MNF. All premises currently used by the MNF shall continue to be used by it without hindrance for the duration of this Order, unless other mutually agreed arrangements are entered into between the MNF and the Government. While any areas on which such headquarters, camps or other premises are located remain Iraqi territory, they shall be inviolable and subject to the exclusive control and

authority of the MNF, including with respect to entry and exit of all personnel. The MNF shall be guaranteed unimpeded access to such MNF premises. Where MNF Personnel are co-located with military personnel of Iraq, permanent, direct and immediate access for the MNF to those premises shall be guaranteed."

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

22. On 28 June 2004 the occupation came to an end when full authority was transferred from the CPA to the interim government and the CPA ceased to exist. Subsequently the MNF, including the British forces forming part of it, remained in Iraq pursuant to requests by the Iraqi government and authorisations from the UNSC. In accordance with section 26 of the Transitional Administrative Law (see paragraph 18 above), the CPA Memorandum and Order set out above remained in force.

23. In August 2004 the Iraqi National Assembly reintroduced the death penalty to the Iraqi Penal Code in respect of certain violent crimes, including murder and certain war crimes.

24. On 9 October 2004 the Iraqi National Assembly established the Iraqi High Tribunal (IHT). The IHT was given jurisdiction over a list of offences, including war crimes, committed in Iraq or elsewhere during the period 17 July 1968 to 1 May 2003. Article 19 of its Statute provided for a number of fair trial guarantees for accused persons. Article 24 provided that the IHT should impose the penalties prescribed by the Iraqi Penal Code.

25. On 8 November 2004 a memorandum of understanding (MOU) regarding criminal suspects was entered into between the United Kingdom contingent of the MNF and the Ministries of Justice and of the Interior of Iraq (collectively referred to as "the Participants"). The preamble to the MOU recited the authority of the United Kingdom contingent of the MNF, "in accordance with the mandate conferred by UNSCR 1546", to intern persons for imperative reasons of security, and the power of national contingents of the MNF, "in accordance with CPA Memorandum No. 3 (Revised)", to apprehend persons who were suspected of committing criminal acts. It also stated that "[w]hereas Iraq is developing its own custodial capacity with the aim of being able to confine all criminal suspects in its own facilities, it may, in the meantime, request [the United Kingdom contingent of the MNF] to confine persons who are suspected of having committed criminal acts in safe and secure detention facilities, subject to security and capacity considerations". The substantive provisions of the MOU included the following:

Section 1: Purpose and Scope

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

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

Section 2: Authorities and Responsibilities Generally

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

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

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

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

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

...

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

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

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

...

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

...

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

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

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

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

(a) inform [the United Kingdom contingent of the MNF] before releasing any individual and will comply with any request by [the United Kingdom contingent of the MNF] that [the United Kingdom contingent of the MNF] should reassume custody if,

(i) the individual is wanted for prosecution by any State that has contributed forces to the MNF for breaches of the laws and customs of war, or

(ii) the internment of the individual is necessary for imperative reasons of security,

in which case [the United Kingdom contingent of the MNF] will assume custody of that individual after consultation between the Participants to reach an agreed solution. ...

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

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

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

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

26. The last relevant UNSCR, 1790 of 18 December 2007, extended the MNF's mandate to remain, for the last time, until 31 December 2008.

Annexed to the Resolution was a letter from the Iraqi Prime Minister which stated, *inter alia*:

> "The government of Iraq requests that the Security Council should consider extending the mandate of MNF-1 in the light of Iraq's achievements over the past few years, namely, the strengthened capacity of its Army and security forces and its significant successes in the security, political and economic spheres. A review of the role and authority of MNF-1 will thus be required in order to strike a balance between, on the one hand, the need to extend, one last time, the mandate of the force and, on the other hand, progress made by Iraq in the area of security. In this regard, it is important for Iraq to be treated as an independent and fully sovereign State and, in seeking the aforementioned balance, the following objectives should be highlighted:
>
> ...
>
> 4. The government of Iraq will be responsible for arrest, detention and imprisonment tasks. When those tasks are carried out by MNF-1, there will be maximum levels of coordination, cooperation and understanding with the government of Iraq."

C. Information submitted by the Government about measures taken by them to express concern about the reintroduction of the death penalty in Iraq

27. In July 2004 the United Kingdom Government made representations to the Iraqi Deputy Prime Minister, Barham Saleh, and the Iraqi Minister of Human Rights that Iraq should not adopt the death penalty Order (which restored the death penalty for certain specified offences) of the interim Iraqi government.

28. Further representations were considered before the MOU was signed in November 2004. However, that MOU was intended to set out the authorities and responsibilities of the respective parties. Consequently, primarily as a result of the reintroduction by Iraq of the death penalty for certain specified offences, the judgment was made that Iraq would not respond favourably to requests that the MOU reverse the effect of the recently adopted Iraqi Order and prohibit the imposition or use of the death penalty. The judgment was made that it was better to pursue the United Kingdom's opposition to the imposition and use of the death penalty by other means.

29. Further representations were made on this issue. During the United Kingdom's Presidency of the European Union in the second half of 2005, the Government made representations to the Iraqi Deputy Minister for Foreign Affairs advocating the abolition of the death penalty.

30. The Government supported a démarche against the use of the death penalty issued by the Austrian Presidency to the Ministry of Foreign Affairs in April 2006.

31. On 15 October 2006 the British ambassador made representations to the Iraqi President, Jalal Talibani, that he should not sign a death warrant in the event that a death penalty was passed on those involved in the abduction of Phillip Sands and Norman Kember.

32. The Prime Minister's Special Envoy for Human Rights in Iraq wrote to the President of Iraq on 28 February 2007 to request a stay of execution for four Iraqi women sentenced to death. The opposition to the imposition or use of the death penalty under any circumstances was reiterated.

33. In March 2007 the Government supported a démarche opposing the use of the death penalty following the imposition of the death penalty on Taha Yassin Ramadan.

34. The Government strongly supported the resolutions adopted by the United Nations General Assembly in December 2007 (A/Res/62/149) and in November 2008 (A/Res/63/168), calling upon all States that maintain the death penalty to establish a moratorium on executions with a view to abolition.

35. In response to recent executions in Iraq, the Government joined other European member States in a démarche against the death penalty delivered on 8 March 2009 and reissued on 13 April 2009 by the Czech European Union Presidency to Iraqi Vice President Tariq al-Hashemi and to the Head of the Iraqi Prime Minister's Office.

D. The legal basis for the presence of British armed forces in Iraq from 1 January 2009

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

Article 1

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

..."

Article 4

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

...

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

..."

Article 6

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

37. The Iraqi Council of Ministers Resolution 50/2008 of 23 December 2008, which took effect from 1 January 2009, authorised the Council of Ministers to take all necessary measures to achieve the withdrawal of forces no later than 31 July 2009 and to regulate their activities in accordance with Resolution 439/2008 in the meantime. It also provided that CPA Order No. 17 (Revised) (see paragraph 21 above) should be suspended until repealed according to standard procedure.

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

E. The applicants' arrest and detention

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

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

41. British forces in Basra arrested the first applicant on 30 April 2003 and the second applicant on 21 November 2003. They were initially detained at a facility run by American forces known as "Camp Bucca". On 15 December 2003 they were transferred to a British-run facility in Iraq known as the "Divisional Temporary Detention Facility". On 20 April 2007 they were transferred to another British detention facility in Iraq, the "Divisional Internment Facility", where they remained until 31 December 2008.

42. The applicants were initially classified as "security internees". Their notices of internment stated that they were suspected of being senior members of the Ba'ath Party under the former regime and of orchestrating anti-MNF violence by former regime elements, and that it was believed that if they were released they would represent an imperative threat to security.

43. Between March 2003 and October 2004 the Special Investigations Branch of the United Kingdom's Royal Military Police conducted an investigation into the deaths of Staff Sergeant Cullingworth and Sapper Allsopp and found evidence that the applicants were part of a group who slapped and rifle-butted the soldiers, at a time when they were prisoners of war; entered into an agreement to kill them; and were among those seen to have shot at them.

44. The minutes of the meetings of the Divisional Internment Review Committee (DIRC) referring to the applicants read as follows:

DIRC minute dated 27 July 2004

> "UK SofS [Secretary of State] is concerned about the death penalty and the [Iraqi] prosecutor is not sure that there is a realistic prospect of conviction as the offence happened too close to the actual hostilities. Negotiations are continuing at a high level."

DIRC minute dated 31 August 2004

> "Referred to SofS over proposed transfer to CCCI [Central Criminal Court of Iraq] because the death penalty might be imposed. There has now been a case conference between prosecutor, MoJ [Iraqi Ministry of Justice] and FCO legal [United Kingdom Foreign and Commonwealth Legal Advisers].
>
> CCCI is still considering whether to take the case. Comd [Commander] Legal will chase SofS and progress from CCCI."

DIRC minute dated 28 September 2004

"A case conference was held in Baghdad on 24 Sep 04. This has convinced the prosecutors that there is a good case. However they have cold feet about prosecuting it as the matter is so high profile. Legal Branch will be considering with SBMR-I [Senior British Military Representative – Iraq] POLAD [Political Adviser] how to proceed; we may have to bring a prosecutor or assistant out from UK."

DIRC minute dated 19 October 2004

"S03 Legal [a military legal officer] has asked ALS [Army Legal Service] Brig Prosecutions to look into establishing a new post in Baghdad for an ALS officer to assist with the prosecution of this case. The requirements will be discussed between S03 Legal and the US JAG [Judge Advocate General] liaison team to the CCCI when S03 Legal attends Baghdad on Thursday 21 Oct 04."

DIRC minute dated 2 November 2004

"SIB [Royal Military Police Special Investigation Branch] have now completed final interviews, which have not progressed the case in any material way. Discussions between Legal Branch, SBMR-I POLAD and DALS [Directorate of Army Legal Services] are ongoing reference the bid for an ALS officer/civilian lawyer to assist with the prosecution of this case. S03 Legal [British military legal officer, Capt HRB Mynors] will go to Baghdad from 03 to 05 Nov 04 to begin to assess the paperwork and decide what further work is needed and how long it will take, in order better to decide on the requirement for the assistant prosecutor."

DIRC minute dated 9 November 2004

"S03 Legal visited Baghdad to consider the requirements for a CCCI LO [Iraqi Central Criminal Court Legal Officer]. The [deleted] Case is almost ready to take to court but the EOD [explosive ordinance disposal] case ... will need a significant amount of work. The decision over who will take on these cases has been staffed back to Brig ALS Advisory. Barry Burton (SBMR-I POLAD) thinks it should be an ALS officer, the ALS hierarchy are not sure. Due to the sensitivity of these cases it will probably be decided at ministerial level."

DIRC minute dated 16 November 2004

"The CCCI LO issue over who is to liaise with the CCCI over the prosecution of the EOD murder case ... is still being considered in the UK. Comd Legal will be chasing Brig ALS Advisory today.

HQ DALS, MOD [Ministry of Defence] and FCO are discussing who will take this case forward at the CCCI. The US LOs are not prepared to take the case on and have asked for a UK LO. It is not yet clear who this will be. Once it has been decided who will lead on the case, SIB will need to make further enquiries."

DIRC minute dated 24 November 2004

"APA [the Army Prosecuting Authority] has informed Legal Branch that Major Richard Allen ALS has been designated as the LO to the CCCI. Date of commencement tbc [to be confirmed]. This will affect internees 088888 and 090537 [the applicants] as they may eventually be transferred to the CCCI if it is decided to prosecute them."

DIRC minute dated 30 November 2004

"The issue is over who will conduct the case. It has been agreed that Major Richard Allen ALS will be sent to liaise with the CCCI in Baghdad wef [with effect from] Jan 05 to progress prosecutions. However it now appears that there is confusion over whether he will be allowed to progress this particular case (although others will be OK). S03 Legal will chase ALS to find out what will be decided about progress on this case. This case needs more investigations and a decision clarifying how many accused/what offences before it can be passed to the investigative magistrate of the CCCI and a remand order can be sought."

DIRC minute dated 31 January 2005

"The ALS CCCI LO is currently examining all the case papers and will produce a case analysis as to potential prosecution of all individuals implicated, including this internee. The case analysis is expected to be available in fourteen days. It will then be circulated within the MOD/FCO and other interested parties in order for a decision as to the way forward to be made, particularly given the potential death penalty issue.

Upon distribution of the case analysis from the ALS CCCI LO, pressure should be maintained on MOD/FCO to identify the way forward given the potential death penalty difficulties. POLAD to action."

DIRC minute dated 3 April 2005

"The ALS CCCI LO has now considered all the case papers and prepared a case analysis as to the strength and viability of a potential prosecution of all individuals implicated, including this internee. Pursuant to a meeting with Comd Legal at HQ MND(SE) [Multinational Division (South-East) (Iraq)] on 09 Mar 05, it has been assessed that there exists sufficient evidence to prosecute the case against this internee. The case analysis is now with the MOD/FCO in London, where a meeting is expected to take place between PJHQ [Permanent Joint Head Quarters], the MOD and the FCO within the next fourteen days focusing on the legal ramifications surrounding the transfer of the case to the CCCI in Baghdad for prosecution, particularly given the potential death penalty issue.

Pressure should be maintained on the MOD/FCO to expedite the way forward in providing guidance on the potential death penalty difficulties now that the case analysis is complete and the early phases of the operation are underway. POLAD to action."

DIRC minute dated 3 May 2005

"The case analysis is now with the MOD/FCO in London and governmental discussions are ongoing (although currently stalled) on the legal ramifications surround [*sic*] the transfer of the case to the CCCI in Baghdad for prosecution, particularly given the possible application of the death penalty.

Pressure must continue to be maintained on the MOD/FCO to expedite the way forward now that the case analysis is with the Government for consideration. In particular, guidance must be sought on the safeguards that can be imposed before transferring the case to the CCCI, especially in light of the potential death penalty difficulties. POLAD to action."

DIRC minute dated 4 December 2005

[Having noted that the case analysis was still with the MOD/FCO in London]

"Comd Legal's hope is this internee's case, together with 090537, will be submitted before the CCCI in Baghdad during the week commencing 5 Dec 05 with the ultimate aim these internees be transferred out of the DTDF [Divisional Temporary Detention Facility] and handed over into the ICJS [Iraqi Criminal Justice System]. Comd Legal was of the view it would be easier to secure witness evidence in any CCCI case owing to the fact this internee, together with 0888888, were senior Ba'athists. Issues may arise over the detention of potential co-accused. Again, however it is assessed that the detention of such individuals who are still alive may prove less problematic than many other detention questions."

Minute of the Joint Detention Committee dated 30 December 2005

"This internee (together with ... Al-Saadoon ...) is, as a result of extensive investigation by the Special Investigative Branch of the Royal Military Police, believed to be responsible for the deaths (on or about 23 March 2003) of Staff Sergeant Cullingworth and Sergeant Allsopp, both of the British Army.

The investigation has resulted in eye witness testimony that alleges this accused (who was a civilian and head of the Az Zuabyr Ba'ath Party) was one of a group of people who slapped and rifle-butted the two above-named soldiers at a time when they were prisoners of war and were, therefore, protected persons under the Geneva Convention Relative to the Treatment of Prisoners of War dated 12 August 1949. This internee was a party to an agreement to kill the soldiers and was seen to be one of those who shot the two soldiers.

The police investigation is now complete and the United Kingdom intends to lodge the evidence with the Iraqi High Tribunal in the near future."

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

45. On 16 December 2005 the cases against the applicants concerning the deaths of Staff Sergeant Cullingworth and Sapper Allsopp were formally referred by the United Kingdom contingent of the MNF to the

Chief Investigative Judge of the Central Criminal Court of Iraq. The cases were subsequently transferred to the Basra Criminal Court and on 12 April 2006 a British officer attended that court to make a statement of complaint in respect of the killing of the two soldiers.

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

47. After an initial investigation, the Basra Criminal Court decided that, since the alleged offences constituted war crimes, the applicants' cases should be transferred to the IHT (see paragraph 24 above) and the IHT accepted that it had jurisdiction. The applicants twice appealed against the decision to transfer their cases to the IHT but the Basra Criminal Court in its appellate capacity dismissed the first appeal on 27 November 2006 and the Federal Appeal Court in Basra dismissed the second appeal on 16 May 2007.

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

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

G. The judicial review proceedings and the approaches made by the United Kingdom Government to the Iraqi authorities concerning the application of the death penalty to the applicants

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

1. Approaches made by the United Kingdom Government to the Iraqi authorities concerning the application of the death penalty to the applicants

50. Five days later, on 17 June 2008, Abda Sharif (Legal Adviser at the British embassy in Baghdad) met with the President of the IHT, President Aref, to reiterate the United Kingdom's strong opposition to the death penalty. During this discussion President Aref invited letters from the victims' families and from the British embassy in Baghdad opposing the imposition of the death penalty in this case, as that would be a factor which would be taken into account by the court. President Aref also indicated that it would be helpful if the British embassy waived its right to civil compensation.

51. On 29 June 2008 the Second Secretary Human Rights Officer at the British embassy in Baghdad, Mr Gordon Ross, met with President Aref to further discuss the situation and what would be the effect if only one of the families of the two victims were to write to seek clemency. The President indicated that if only one of the two families sought clemency, the letter from one family would be taken into account by the court and the fact that the other family had not done so would not significantly affect matters.

52. The Government were able to contact one of the families of the two victims. That family agreed to support a plea for clemency and the non-imposition of the death penalty in the event that the applicants were convicted of a capital offence.

53. The British embassy in Baghdad also wrote seeking the non-imposition of the death penalty. It also waived any right to civil compensation.

54. Abda Sharif held a further meeting with President Aref on 18 August 2008 and presented him with the letter from the British embassy, outlining the United Kingdom's opposition to the imposition of the death penalty. The letter was signed by the British ambassador, Christopher Prentice, and waived the right to compensation. This was accompanied by a letter dated 6 August 2008 from one of the families seeking clemency, with an Arabic translation.

2. The proceedings in the Divisional Court

55. The hearing before the Divisional Court took place on 18 to 20 November 2008. Claims by the applicants concerning the legality of their detention by British forces were adjourned.

56. At the hearing the court expressed its concerns about what would happen to the applicants after the expiry of the United Nations mandate on 31 December 2008. The Government put before the court evidence about the intergovernmental negotiations between the United Kingdom and Iraq that were then continuing as to whether and pursuant to what terms British

forces would be permitted to remain in Iraq post-31 December 2008. This included the following statement of Mr Watkins, one of the leaders of the United Kingdom's negotiating team:

> "... I recognised that, if possible, it would be desirable for UK forces to be in a position to continue to hold the claimants for a period of time whilst this litigation is resolved. I therefore considered with colleagues whether it would be appropriate to raise this issue with the Iraqi negotiating team. I cannot comment in detail on sensitive inter-governmental negotiations, but the judgment was made that to introduce the issue of UK forces continuing to hold detainees, whether generally or specifically in relation to these two claimants, risked adversely affecting the conduct and outcome of these important and urgent negotiations.
>
> Furthermore, the judgment was made that raising the issue would not in any event have resulted in any agreement with the Iraqi authorities whereby the claimants remained in the custody of the British forces in Iraq, still less that they would agree to the removal of the claimants from Iraq. Given the fact that the Iraqis are seeking the transfer of detainees from the US to Iraq and the fact that these two claimants are Iraqi nationals accused of crimes within Iraq and that the Iraqi courts have repeatedly requested the transfer of these two claimants in order to complete investigations and if appropriate try them, there was no realistic prospect of Iraq agreeing to allow them to remain within the custody of the UK. To have raised the issue would therefore have resulted in my judgment in no change in relation to the position of the claimants, but would have risked adversely affecting the conduct and outcome of the negotiations with the government of Iraq.
>
> ... I have considered whether there may be any other means whereby UK forces could continue to hold the claimants for a period of time beyond the end of this year pending the outcome of this litigation. Conceivably, we might ask the government of Iraq to submit draft legislation to the CoR [Council of Representatives] specifically to permit the UK to hold the claimants indefinitely or pending the outcome of this litigation. Given the facts set out in the previous paragraph, I consider that there is no reasonable prospect that the government of Iraq would accede to such a request. Furthermore, the process of drafting and passing such legislation would extend beyond the end of this year. And even raising the issue would in my considered opinion risk adversely affecting the passage of the legislation and finalising of the inter-governmental arrangement.
>
> There is no likelihood in my view of the UK being able to secure any agreement from the Iraqi authorities that we may continue to hold the claimants either indefinitely or pending the outcome of this litigation."

57. Judgment was delivered on 19 December 2008. The Divisional Court noted that the applicants had been subject to the jurisdiction and legal authority of the Iraqi courts since no later than 18 May 2006 (see paragraph 46 above). CPA Memorandum No. 3 (Revised) (see paragraph 20 above), which was the Iraqi law in force at the time, required the British forces to hand over "criminal detainees" to the Iraqi authorities as soon as practicable. This requirement was also reflected in the United Kingdom-Iraq MOU of 8 November 2004 (see paragraph 25 above). Nonetheless, the Divisional Court rejected the Government's argument that the actions of the

United Kingdom in respect of the applicants were attributable to the Iraqi authorities: the British forces were lawfully present in Iraq, pursuant to a United Nations mandate, as part of the MNF subject to the exclusive jurisdiction of the United Kingdom and independent of the Iraqi State. The British forces had physical custody and control of the applicants and had it in their power to refuse to transfer them to the custody of the IHT, even if to act in such a way would be contrary to the United Kingdom's international-law obligations. The applicants therefore fell within the United Kingdom's jurisdiction for the purposes of Article 1 of the Convention and the Human Rights Act 1998.

58. The Divisional Court then considered whether the applicants could rely on the principle against *refoulement* in *Soering v. the United Kingdom*, (7 July 1989, Series A no. 161). It rejected the Government's argument that the *Soering* principle could apply only to transfers across territorial boundaries, but it considered itself bound by the Court of Appeal's judgment in *R(B) v. Secretary of State for Foreign and Commonwealth Affairs* ([2004] EWCA Civ 1344: see paragraph 94 below), which held that where a fugitive was within the jurisdiction of the United Kingdom but on the territory of another sovereign State (for example, within an embassy or consulate), the United Kingdom was under an international-law obligation to surrender him unless there was clear evidence that the receiving State intended to subject him to treatment so harsh as to constitute a crime against humanity.

59. The Divisional Court considered expert evidence relating to the fairness of proceedings before the IHT. It found no cogent evidence to support the applicants' claims that detainees held by the Iraqi authorities were subjected to torture to extract confessions and that evidence obtained by torture would be used against them. It found that although, during the first two trials before the IHT in which Saddam Hussein was one of the defendants (the *Dujayl* and *Anfal* trials), there had been a number of fatal attacks on IHT staff and defence lawyers, the situation had improved and no lawyers, witnesses or IHT staff members had been kidnapped or killed in 2008. It did not, therefore, consider that IHT staff and counsel would be so concerned about their safety as to prevent the applicants from having a fair trial and it found that adequate security measures were taken to protect witnesses. There had been no permanent replacements of judges in current trials and there was not a sufficient risk of replacement of the judiciary to operate as a factor prejudicing the possibility of the applicants' receiving a fair trial. The court noted examples of concerns expressed by third parties relating to the independence of the IHT, but observed that these related to events during the *Dujayl* and *Anfal* trials in early 2007, with no more recent examples of such concerns. Taking everything together, it was satisfied that the IHT was sufficiently independent to meet the requirements of a fair trial. There was no real risk of defence counsel being prevented from doing a

proper job for the applicants in the event of a trial. The IHT Statute and its rules had been modelled on the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Criminal Court. The protection afforded to defendants included the presumption of innocence; the right to be informed of charges; the right to defence counsel; the right to be tried without undue delay; the right to be present during trial; the right to examine or confront witnesses; the privilege against self-incrimination; the right not to have silence taken into account in determining guilt; the right of disclosure of exculpatory evidence and witness statements; the exclusion of coerced evidence; the right to ensure that interrogations are videotaped; the right to pose questions directly to the witness; and the right to appellate review. The Divisional Court concluded with regard to the risk of a breach of Article 6 of the Convention:

> "The overall picture which emerges is that, although initially there were deeply unsatisfactory aspects of the IHT and trial environment, which cast doubt on the ability to provide defendants with a fair trial at that time, there have been many significant improvements since then.
>
> ... To date the claimants have appeared before the Iraqi courts and have denied the allegations made against them; and there can be no complaint about the way in which the courts have dealt with them. As to the future, looking at the various points individually and cumulatively, the evidence before us falls a long way short of establishing substantial grounds for believing there to be a real risk that a trial of the claimants would involve a flagrant breach of the principles guaranteed by Article 6. Thus, even if the Convention were to apply in the normal way, we would reject the claim that transfer of the claimants into the custody of the IHT would be contrary to Article 6."

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

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

However, the court found that although the death penalty was prohibited by the Convention, it was not yet contrary to internationally accepted norms, at least where it was imposed for serious crimes following

conviction at a trial that met minimum standards of fairness. It followed that "however repugnant the death penalty may be within our domestic legal system and under the Convention, its imposition would not be contrary to international law" and the risk that the applicants might be executed did not therefore operate to relieve the United Kingdom of its public international-law obligation to transfer them to the custody of the IHT.

61. The Divisional Court next examined the issues under Article 3 of the Convention. It found that the IHT had requested that, prior to trial, the applicants should be detained in Compound 4 of Rusafa Prison, which was run by the Iraqi Ministry of Justice; if the applicants were convicted and sentenced to over ten years of imprisonment, they would be sent to Fort Suse Prison, also run by the Ministry of Justice. The court referred to a report by the Provost Marshall, the British army officer responsible for conducting inspections of British overseas military detention facilities, who had inspected Rusafa Prison in April 2008 and found that Compound 4 "satisfied the requirements [of the Fourth Geneva Convention]" in respect of the applicants, providing "relative segregation, protection from elements and reasonable living conditions". Although the Provost Marshall's inspectors had received complaints from some detainees about the lack of visits and the quality of the food, no one had complained of mistreatment. The Divisional Court also referred to an inspection report by the United States International Criminal Investigative Training Assistance Programme on Compounds 1 to 6A at Rusafa Prison, which found no indication that detainees were subjected to intentional or overt acts of mistreatment. Conditions at Compound 4 were found to comply with basic human rights standards; detainees were allowed regular visits from legal representatives and relatives; force was used only as a last resort when necessary to prevent prisoners from harming themselves or others; corporal punishment was forbidden and the prisoners interviewed stated that they had never known it to be used; and there was a robust system for the reporting of any mistreatment. In addition, the court had reference to the fact that, in accordance with paragraph 4(c) of section 3 of the MOU of 8 November 2004 (see paragraph 25 above), the Iraqi authorities had provided an assurance that, following transfer to Iraqi facilities, the applicants would be treated humanely. Although the applicants had adduced expert evidence concerning the conditions at Rusafa Prison, this evidence did not establish any instances of actual mistreatment of prisoners. The evidence relating to Fort Suse Prison did not indicate that, if detained there, the applicants would be at risk of ill-treatment. The court therefore concluded that the evidence fell well short of establishing substantial grounds for believing that the applicants would face a real risk of treatment contrary to Article 3 of the Convention if transferred into the custody of the IHT.

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

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

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

3. The proceedings in the Court of Appeal

64. The applicants appealed against the Divisional Court's judgment, principally on the grounds that (1) the court had erred in concluding that there was a relevant public international-law context which could have the effect of modifying the principle in *Soering* (cited above); (2) even if the court had applied the right test, it had been wrong to hold that the death penalty and execution were not contrary to internationally accepted norms; (3) Article 3 of the Convention and international law prevented transfer in circumstances where substantial grounds had been shown for believing there to be a real risk of the applicants being condemned to death by hanging; (4) it was incorrect to conclude that any United Kingdom jurisdiction to try the applicants either did not exist or was subordinate to Iraqi claims; (5) the court had applied the incorrect test in respect of the applicants' claims concerning the fairness of any trial before the IHT; and (6) the court had erred in concluding that the evidence before it did not establish substantial grounds for believing there to be a real risk that the applicants' trial would involve a flagrant breach of the principles guaranteed by Article 3.

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

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

> "In the course of discussions on Sunday 21 December, Iraqi officials made clear that, even in relation to any proposed authorised tasks, they did not consider it acceptable for UK forces to exercise detention powers after 31 December 2008.

It remains my firm and considered view that, in all the circumstances, there is no likelihood of the UK being able to secure any agreement from the Iraqi authorities that we may continue to hold the claimants either indefinitely or pending the outcome of this litigation. Further, as I said in my first witness statement, even raising the issue would risk adversely affecting the conduct and outcome of the current negotiations."

67. The Court of Appeal dismissed the appeal at 2.30 p.m. on 30 December 2008, with the following short oral reasons.

"(i) On the facts the United Kingdom is not exercising jurisdiction over the appellants within the meaning of ECHR, Article 1. See in particular *Banković v. UK* (2001) 11 BHRC 4. In essence the United Kingdom detains the appellants only at the request and to the order of the IHT, and is obliged to return them to the custody of the IHT by force of arrangements made between the United Kingdom and Iraq, and the United Kingdom has no discretionary power of its own to hold, release or return the appellants. They are acting purely as agents of the IHT.

(ii) *R(B) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 shows that an obligation of this kind to return persons to the host State has to be respected, albeit that the holding State in question is subject to ECHR obligations, unless – paragraph 88 – to return the appellants would expose them to a crime against humanity. We are bound by that decision, being a decision of this court.

(iii) Neither the death penalty generally, nor the death penalty by hanging, is shown to be a crime against humanity or an act of torture.

(iv) Accordingly, even if the United Kingdom is exercising Article 1 jurisdiction, contrary to our opinion, it is obliged to return the appellants to the custody of the IHT. That is so before 31 December 2008; *a fortiori* after 31 December 2008, when there will be no UN mandate, no provision as between the United Kingdom and Iraq granting inviolability to the British base or allowing for any detention of the appellants by the United Kingdom forces, save to the order of the IHT. In short, the United Kingdom will have no colour of legal power whatever after 31 December to do anything other than return the appellants to the order of the IHT. There will be no power to move the appellants anywhere else, nor indeed to prevent the Iraqis taking the appellants from British custody. British troops could not be ordered to take any steps to prevent that happening. Before 31 December it is true that the base at Basra is inviolable under local arrangements made between the United Kingdom and Iraq, but that inviolability ceases tomorrow. That is why the United Kingdom is thereafter entirely legally powerless to take action other than in compliance with the wishes of the IHT or to resist any action taken by the Iraqi authorities.

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

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

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

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

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

> "It is common ground that the death penalty is a punishment available under Iraqi law for the offences with which the appellants are charged. The Divisional Court held (paragraph 148) that that was enough to give rise prima facie to a real risk of its being applied to the appellants. Accordingly, following the approach commended by the Strasbourg Court in *Saadi v. Italy* (application no. 37201/06, judgment of 28 February 2008), in particular at paragraph 129, the burden effectively shifted to the Secretary of State to show that such a risk was not in fact made out.
>
> Mr Lewis QC for the Secretary of State relied on evidence to the effect that the family of one of the victims had written to President Aref of the IHT to seek clemency for the appellants if they were found guilty. President Aref had earlier invited letters of this kind through the British embassy, indicating that it would be helpful if the embassy could waive claims to civil compensation and that he would then pass such letters to the trial chamber for their consideration. Ms Abda Sharif, Legal Adviser and Head of the Justice and Human Rights Section at the British embassy in Baghdad, has given evidence of legal advice to the effect that the impact of a plea of clemency by the families of the victims in Iraq is likely to be that the Iraqi court 'will not impose the death penalty in any particular case'. Ms Sharif says that President Aref has confirmed that such a plea for clemency is likely to be an important factor for any court in assessing what sentence would be imposed on the claimants. She also produces a letter from President Aref, given to her at a meeting on 21 October 2008, in which the court's procedures for considering sentence are described in some detail. The Divisional Court observed (paragraph 155):
>
> > 'That letter represents President Aref's considered written position. It is striking that the letter gives no indication whatsoever that the death penalty would not be or even probably would not be imposed.'
>
> Mr Lewis relied on the evidence of Mr Spillers, an American attorney who was the Rule of Law Liaison to the IHT between July 2008 and 22 December 2008. Mr Spillers had also met President Aref, on 27 October 2008. The President explained the factors which would influence the IHT against imposing a death sentence. These were 'an admission of the crime by the claimants, a request for forgiveness from the family of the victims, a request for forgiveness of the court for the acts, and a request for leniency from the family of a victim' (Divisional Court, paragraph 156). Mr Spillers reported the President as indicating that an assurance that the death penalty would not be imposed was 'implicit' in his account of these factors.
>
> Mr Spillers has provided a further statement since the Divisional Court's judgment was delivered. He describes the outcome of the IHT proceedings in what has been

called the *1991 Uprising* case. The fifteen defendants were all former high-ranking members of Saddam Hussein's regime charged with crimes against humanity. Three were acquitted. Ten received very substantial terms of imprisonment. Only the remaining two were sentenced to death, including one ('Chemical Ali') who was already under sentence of death following an earlier trial.

...

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

71. In support of its conclusion that the applicants did not fall within the United Kingdom's jurisdiction for the purposes of the Convention and the Human Rights Act 1998, the Court of Appeal observed as follows.

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

32. Until 31 December 2008 the United Kingdom forces at Basra enjoyed the guarantees of immunity and inviolability provided by CPA Order No. 17 (Revised). But those measures prohibited invasive sanctions; they did not confer executive power. In my judgment, from at least May 2006 until 31 December 2008, the British forces at Basra were not entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented to by Iraq, or otherwise authorised by a binding resolution or resolutions of the Security Council. So much flows from the fact of Iraq's sovereignty and is not contradicted – quite the reverse – by any of the United Nations measures in the case. Thus the MNF mandate was extended by the Security Council at Iraq's express request. The letter requesting its extension (which was attached to Resolution 1790 (2007)) expressly stated at paragraph 4, '[t]he government of Iraq will be responsible for arrest, detention and imprisonment tasks'. The various material Security Council Resolutions (1483 (2003), 1546 (2004) and 1790 (2007)) all emphasise the primacy of Iraqi sovereignty. As regards criminal detentions, CPA Memorandum No. 3 (Revised) makes it [plain] that so far as criminal detainees may be held by any national contingent of the MNF, they are held, in effect, to the order of the Iraqi authorities.

33. In these circumstances the United Kingdom was not before 31 December 2008 exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign State.

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

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

terms as those authorities have agreed. And it must have been plain, as soon as it was known when the mandate would come to an end, that this would be the true state of affairs.

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

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

Conclusion on the Jurisdiction Question

37. It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State Party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical. Drawing on the *Banković* judgment and their Lordships' opinions in *Al-Skeini*, I suggest that there are four core propositions, though each needs some explanation. (1) It is an exceptional jurisdiction. (2) It is to be ascertained in harmony with other applicable norms of international law. (3) It reflects the regional nature of the Convention rights. (4) It reflects the indivisible nature of the Convention rights. The first and second of these propositions imply (as perhaps does the term jurisdiction itself) an exercise of sovereign legal authority, not merely *de facto* power, by one State on the territory of another. That is of itself an exceptional state of affairs, though well recognised in some instances such as that of an embassy. The power must be given by law, since if it were given only by chance or strength its exercise would by no means be harmonious with material norms of international law, but offensive to them; and there would be no principled basis on which the power could be said to be limited, and thus exceptional. ... It is impossible to reconcile a test of mere factual control with the limiting effect of the first two propositions I have set out, and, indeed, that of the last two, as I shall explain.

38. These first two propositions, understood as I have suggested, condition the others. If a State Party is to exercise Article 1 jurisdiction outside its own territory, the regional and indivisible nature of the Convention rights requires the existence of a regime in which that State enjoys legal powers wide enough to allow its vindication, consistently with its obligations under international law, of the panoply of Convention rights – rights which may however, in the territory in question, represent an alien political philosophy.

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

circumstances, the limiting conditions imposed by the four propositions I have set out will be undermined."

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

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

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

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

73. The Court of Appeal rejected the applicants' argument, based on *Öcalan v. Turkey* ([GC], no. 46221/99, ECHR 2005-IV), that where the proposed *refoulement* was to a State where after the trial the applicant might suffer the death penalty, no flagrant breach of the right to a fair trial under Article 6 of the Convention needed to be shown, only a real risk of an unfair trial. The court observed that *Öcalan* was not a *refoulement* case and that in *Bader and Kanbor v. Sweden* (no. 13284/04, ECHR 2005-XI), the Court had held that it was necessary in a deportation or extradition case for the applicant to establish a risk of suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty, before the Court could find a violation of Article 2 or 3 of the Convention. The Court of Appeal accepted the Divisional Court's

assessment of the evidence about the fairness of proceedings before the IHT and therefore also dismissed the complaint under Article 6.

74. Finally, the Court of Appeal rejected the applicants' argument under international law that execution by hanging fell to be regarded as a crime against humanity, inhuman or degrading treatment or a form of torture. While terrible errors occurred from time to time, where for example the hanged man's neck was not broken so that he suffocated, or the drop was too long so that he was decapitated, such evidence was anecdotal and partial. There was other evidence, such as that considered by the Royal Commission on Capital Punishment, in its report of 1949-53, which found that hanging was "speedy and certain". The court concluded that, since the evidence before it regarding this method of execution was very limited, it was in no position to arrive at any overall finding as to the effects of hanging for the purpose of making an assessment of its compatibility or otherwise with norms of customary international law.

4. The House of Lords

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

76. On 7 January 2009 the applicants' request for legal aid to petition the House of Lords was refused, primarily on the basis that the transfer (see paragraph 80 below) meant that no effective remedy would be available.

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

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

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

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

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

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

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

I. The applicants' trial before the IHT and the further approaches made by the United Kingdom authorities to the Iraqi authorities concerning the application of the death penalty to the applicants

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

83. On 24 February 2009 Catherine Duncan (Legal Adviser at the British embassy in Baghdad) reminded President Aref of his previous statements on the death penalty.

84. The applicants' trial before the IHT commenced on 11 May 2009. Each was represented by an Iraqi lawyer. The applicants were originally charged with killing the two British soldiers when they had clearly surrendered, an offence carrying a maximum penalty of the death sentence.

85. On 30 June 2009 this Court declared the application admissible and put further questions to the parties (see paragraphs 7-8 above). In particular, it requested the United Kingdom Government to inform it of the representations, if any, which had been made to the Iraqi authorities since the time of the applicants' transfer with a view to ensuring that they would not be subjected to the death penalty if convicted.

86. On 21 July 2009, after the close of the evidence in the case, the prosecution read two letters to the trial chamber of the IHT. The first, dated 16 July 2009, was from the United Kingdom Government conveying their opposition to the death penalty and enclosing the letter received in August 2008 from the family of one of the murdered soldiers (see paragraphs 52 and 54 above). The second letter was from the sister of the other soldier, with whom the Government had made contact, also asking for clemency for the defendants. The Chief Trial Judge then read out a statement of charges against each applicant. The charges had been reduced from killing the soldiers to negligently handing them over to other Ba'ath Party officials who killed them, instead of protecting them and sending them for medical treatment as required by the Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field of 12 August 1949. This charge did not carry a death sentence.

87. At the next hearing, on 29 July 2009, a further charge was added, namely torture or inhuman treatment of the soldiers, contrary to the Geneva Conventions. According to Articles 13 and 24 §§ 1 and 5 of Law no. (10)

2005 on the Iraqi Higher Criminal Court, the penalty for this offence "shall be determined by the court taking into account the gravity of the crime as well as the individual circumstances, judicial precedents and relevant sentences issued by international criminal courts". The Government informed the Court by a letter of 31 July 2009 that the President of the trial chamber had informed a British official in Baghdad that "[i]n his view, a death sentence was not the appropriate penalty in this case".

88. On 9 September 2009 the IHT gave its verdict. It decided to cancel the charges against the applicants, due to insufficient evidence, and ordered their immediate release. Shortly thereafter the prosecutor lodged an appeal against this decision to the Court of Cassation.

89. By a letter of 12 January 2010, the Government informed the Court that the Court of Cassation had decided that the investigation had been incomplete and had ordered that the case be remitted for reinvestigation by the Iraqi authorities and retrial. The applicants remain in custody.

II. RELEVANT NATIONAL AND INTERNATIONAL LEGAL MATERIALS

A. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ("the Fourth Geneva Convention")

90. The Fourth Geneva Convention provides, *inter alia*:

Article 27

"Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

Article 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 other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

..."

Article 42

"The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be."

Article 70

"Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war. ..."

Article 77

"Protected persons who have been accused of offences or convicted by the courts in occupied territory, shall be handed over at the close of occupation, with the relevant records, to the authorities of the liberated territory."

Article 78

"If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. ..."

B. The Geneva Conventions Act 1957

91. This statute was enacted to give effect in United Kingdom domestic law to the provisions of the 1949 Geneva Conventions. It provides, *inter alia*:

"1(1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence."

The term "grave breach" is defined in each of the four Geneva Conventions of 1949 and in Additional Protocol I as certain acts (including wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial) committed against "protected persons" (as defined precisely in each Convention), including prisoners of war, civilians and the wounded.

C. Joint Doctrine Publications 2006

92. The purpose of the Ministry of Defence's Joint Doctrine Publication (JDP) 1-10 "Prisoners of War, Internees and Detainees" (May 2006) is as follows:

> "1. ... to provide high-level joint doctrinal guidance on how to deal with persons who fall into the hands of UK Armed Forces during military operations, whether Prisoners of War (PW), civilian internees or those detained as a result of suspected or actual criminal activity.
>
> 2. This Edition of JDP 1-10 is written primarily for the benefit of the United Kingdom operational Commander responsible for UK Forces' compliance with domestic United Kingdom law, international law and the Law of Armed Conflict (LOAC). It should prove useful to those involved in operational planning when the issues covered in this publication may arise. It is also intended to assist those responsible for all aspects of force protection and area security, personnel whose duties involve liaison with local civil authorities, UK Governmental Departments (Foreign and Commonwealth Office (FCO), Home Office, Department for International Development (DFID)), Non-Governmental Organisations (NGOs) and International Organisations (IOs), such as the International Committee of the Red Cross (ICRC)."

Chapter 1 of JDP 1-10.3 "Detainees" (July 2006) concerns the handling of detainees. It commences by stating as follows (footnotes omitted):

> "101. UK Armed Forces may be empowered under the Host Nation's (HN) law to participate in the arrest of criminal suspects or may be involved in the arrest of persons indicted for war crimes. This chapter details the arrangements for the handling of such persons when they are being temporarily detained by UK Armed Forces during military operations abroad that do not amount to International Armed Conflict.
>
> 102. Detainees are a category of prisoner distinct from PW and internees. Detainees are those individuals who, during operations abroad not amounting to International Armed Conflict, are held by UK Armed Forces because they have committed, or are suspected of committing, criminal offences.
>
> 103. Detainees are a category of prisoner who can only be held during operations other than International Armed Conflict. It should be noted that, during International

Armed Conflict, those who have committed or are suspected of committing criminal offences are categorised and treated as internees.

104. The provisions for the handling of detainees will vary according to the national laws of the territory in which UK Forces are operating, the nature of the operation and the legal framework under which UK Forces are operating. This is a complex area and specialist staff and policy advice will invariably be called for at the earliest stages of planning.

Detainees should be handed over to the appropriate local authorities at the earliest opportunity, provided that there is no reason to believe they will suffer abuses of their human rights."

Section IV of JDP 1-10.3 is entitled "Transfers" and states:

"113. Except for their repatriation or return to their country of residence after the cessation of hostilities, detainees must not be transferred to a State that is not a party to the GCs [Geneva Conventions]. Moreover, they may only be transferred to a State that is a party if the detaining State has satisfied itself that the receiving State is willing and able to apply the GCs. In the event of transfers taking place, the receiving State becomes responsible for the application of the GCs. Should that State fail to carry out its obligations in any important respect, it is the duty of the State which made the transfer either to take effective measures to correct the situation or to request the return of the persons affected. ... In no circumstances may a detainee be transferred to a State where he has reason to fear persecution on account of his political opinions or religious beliefs.

114. It should be borne in mind that the application of the European Convention on Human Rights to those held in UK facilities in some circumstances may impose additional restrictions on their transfer, in particular if they are likely to be tried for an offence which carries the death penalty."

Section V of JDP 1-10.3 deals with "Handover to the Host Nation Authorities". It provides:

"116. Detainees must be handed over to the HN authorities as soon as practicable in order that detainees can be dealt with according to the local criminal justice system. ...

117. There may be cases where handover to the HN cannot take place immediately:

a. If the HN lacks sufficient criminal justice infrastructure to take custody of the detainee, for example, courts, police, custodial facilities and lawyers.

b. If there are reasonable grounds to suspect the handover would compromise the safety of the detainee."

D. "Diplomatic asylum"

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

"1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the

receiving State. They also have a duty not to interfere in the internal affairs of that State.

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

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

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

"In a case such as *Soering* the Contracting State commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another State. The same is not necessarily true where a State permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the Convention can require States to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Banković* to principles of international law. Furthermore, there must be an implication that obligations under a Convention are to be interpreted, insofar as possible, in a manner that accords with international law. What has public international law to say about the right to afford 'diplomatic asylum'?

Oppenheim [Oppenheim's International Law edited by the late Sir Robert Jennings QC and Sir Arthur Watts QC 9th edition vol 1] deals with this topic at paragraph 495, from which we propose to quote at a little length:

'**Paragraph 495: So-called diplomatic asylum**

The practice of granting diplomatic asylum in exceptional circumstances is of long-standing, but it is a matter of dispute to what extent it forms part of general international law.

There would seem to be no general obligation on the part of the receiving State to grant an ambassador the right of affording asylum to a refugee, whether criminal or other, not belonging to this mission. Of course, an ambassador need not deny entrance to refugees seeking safety in the embassy. But as the International Court of Justice noted in the *Asylum* case ... in the absence of an established legal basis, such as is afforded by treaty or established custom, a refugee must be surrendered to the territorial authorities at their request and if surrender is refused, coercive measures may be taken to induce it. Bearing in mind the inviolability of embassy premises, the permissible limits of such measures are not clear. The embassy may be surrounded by soldiers, and ingress and egress prevented; but the legitimacy of forcing an entry in order forcibly to remove the refugee is doubtful, and measures involving an attack on the envoy's person would clearly be unlawful. Coercive measures are in any case justifiable only in an urgent case, and after the envoy has in vain been requested to surrender the refugee.

It is sometimes suggested that there is, exceptionally, a right to grant asylum on grounds of urgent and compelling reasons of humanity, usually involving the refugee's life being in imminent jeopardy from arbitrary action. The practice of States has afforded instances of the grant of asylum in such circumstances. The grant of asylum 'against the violent and disorderly action of irresponsible sections of the population' is a legal right which, on grounds of humanity, may be exercised irrespective of treaty; the territorial authorities are bound to grant full protection to a diplomatic mission providing shelter for refugees in such circumstances. There is some uncertainty how far compelling reasons of humanity may justify the grant of asylum in other cases. The International Court's judgment in the *Asylum* case suggests that the grant of asylum may be justified where 'in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims'. However, the Court went on to emphasise that 'the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals'. Thus it would seem not to be enough to show that a refugee is to be tried for a 'political' offence: it must be shown that justice would be subordinated to political dictation and the usual judicial guarantees disregarded. Even where permissible, asylum is only a temporary expedient and may only be afforded so long as the reasons justifying it continue to subsist.'

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

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

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

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

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

> 'There exists no universally accepted international agreement to assure a uniform response by States to grant refuge in a mission in an emergency. Most countries, with the exception of those in Latin America, deny outright the claim to diplomatic asylum because it encroaches upon the State's sovereignty.
>
> Some countries give limited recognition to the practice, allowing 'temporary safe stay' on a case-by-case basis to persons under threat of life and limb. It should be recognised that a State has the permissible response of granting temporary sanctuary to individuals or groups in utter desperation who face repressive measures in their home countries. Moreover, this should be considered a basic human right, to be invoked by those fleeing from the persecution for reasons of race, religion, or nationality, or for holding a political opinion in an emergency situation involving the threat of violence.'

Discussion

We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction; see Article 55 of the 1963 Vienna Convention. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending State to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum.

It may be that there is a lesser level of threatened harm that will justify the assertion of an entitlement under international law to grant diplomatic asylum. This is an area where the law is ill-defined. So far as Australian law was concerned, the applicants had escaped from lawful detention under the provisions of the Migration Act 1958. On the face of it international law entitled the Australian authorities to demand their return. We do not consider that the United Kingdom officials could be required by the Convention and the Human Rights Act to decline to hand over the applicants unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury."

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

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

> "1. The right to life, 'an inalienable attribute of human beings' and 'supreme value in the international hierarchy of human rights' is unanimously guaranteed in legally binding standards at universal and regional levels.
>
> 2. When these international standards guaranteeing the right to life were drawn up, exceptions were made for the execution of the death penalty when imposed by a court of law following a conviction of a crime for which this penalty was provided for by law (cf., for example, Article 2 § 1 of the ... Convention ...).
>
> 3. However, as illustrated below, there has since been an evolution in domestic and international law towards abolition of the death penalty, both in general and, more specifically, for acts committed in time of war.
>
> 4. At the European level, a landmark stage in this general process was the adoption of Protocol No. 6 to the Convention in 1982. This Protocol, which to date has been ratified by almost all States Parties to the Convention, was the first legally binding instrument in Europe – and in the world – which provided for the abolition of the death penalty in time of peace, neither derogations in emergency situations nor reservations being permitted. Nonetheless, under Article 2 of the said Protocol, 'A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war'. However, according to the same Article, this possibility was restricted to the application of the death penalty in instances laid down in the law and in accordance with its provisions.
>
> 5. Subsequently, the Parliamentary Assembly established a practice whereby it required from States wishing to become a member of the Council of Europe that they committed themselves to apply an immediate moratorium on executions, to delete the death penalty from their national legislation, and to sign and ratify Protocol No. 6. The Parliamentary Assembly also put pressure on countries which failed or risked failing to meet the commitments they had undertaken upon accession to the Council of Europe. More generally, the Assembly took the step in 1994 of inviting all member States who had not yet done so, to sign and ratify Protocol No. 6 without delay (Resolution 1044 (1994) on the abolition of capital punishment).
>
> 6. This fundamental objective to abolish the death penalty was also affirmed by the Second Summit of Heads of State and Government of member States of the Council of Europe (Strasbourg, October 1997). In the Summit's Final Declaration, the Heads of State and Government called for the 'universal abolition of the death penalty and [insisted] on the maintenance, in the meantime, of existing moratoria on executions in Europe'. For its part, the Committee of Ministers of the Council of Europe has indicated that it 'shares the Parliamentary Assembly's strong convictions against recourse to the death penalty and its determination to do all in its power to ensure that capital executions cease to take place'. The Committee of Ministers subsequently adopted a Declaration 'For a European Death Penalty-Free Area'.

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

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

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

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

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

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

13. The CDDH and its Committee of Experts for the Development of Human Rights (DH-DEV) elaborated the draft protocol and the explanatory report thereto in the course of 2001. The CDDH transmitted the draft protocol and explanatory report

to the Committee of Ministers on 8 November 2001. The latter adopted the text of the Protocol on 21 February 2002 at the 784th meeting of the Ministers' Deputies and opened it for signature by member States of the Council of Europe on 3 May 2002."

F. The Parliamentary Assembly of the Council of Europe's (PACE) Resolution 1560

96. On 26 June 2007 PACE adopted the following resolution on the "Promotion by Council of Europe member States of an international moratorium on the death penalty":

"1. The Parliamentary Assembly confirms its strong opposition to the death penalty in all circumstances. The death penalty is the ultimate form of cruel, inhuman and degrading punishment: it violates the right to life. The Assembly takes pride in its decisive contribution to making the member States of the Council of Europe a *de facto* death penalty-free zone, and strongly regrets the fact that one European country – Belarus – still carries out executions.

2. The Assembly has also on several occasions taken a strong stand against executions in other parts of the world, and in particular in the Council of Europe observer States which retain the death penalty, namely Japan and the United States of America.

3. It notes with satisfaction that the death penalty is on the decline worldwide, as shown by a 25% decrease in executions and death sentences between 2005 and 2006.

4. It also draws attention to the fact that more than 90% of known executions in 2006 took place in only six countries: China, Iran, Pakistan, Iraq, Sudan, and the United States of America – a Council of Europe observer State. Based on available public records, which may cause the number of executions to be underestimated in countries lacking free media or an accountable government, China alone accounts for more than two thirds of all executions worldwide. Iran's execution rate nearly doubled from 2005 to 2006. Iraq also witnessed a dramatic increase in executions in 2006, bringing the number up to 65. Saudi Arabia, among the worst offenders in 2005, saw a decrease in 2006 to 39 executions, but witnessed an upsurge in early 2007 (48 executions through to the end of April).

5. The small number of countries that still resort to executions on a significant scale is becoming increasingly isolated in the international community. Between 1977 and 2006, the number of abolitionist countries rose from 16 to 89. This number increases to 129 when including those countries which have not carried out any executions for the past ten years or more and which can therefore be considered as abolitionist in practice. The time is now ripe to give new impetus to the campaign in favour of a death penalty-free world.

6. The Assembly therefore strongly welcomes Italian efforts in the United Nations General Assembly in advocating for a moratorium on the death penalty, as well as the support of the European Union for this initiative, and expects it to be proceeded with in such a manner as to guarantee the best possible success within the United Nations.

7. A moratorium on executions is but one step in the right direction, the ultimate goal remaining the complete abolition of the death penalty in all circumstances.

8. In the meantime, a moratorium is an important step as it saves lives immediately and has the potential of demonstrating to the public in retentionist countries that an end to State-sponsored killings does not lead to any increase in violent crime. On the contrary, a moratorium on executions can bring about a change of atmosphere in society fostering greater respect for the sanctity of human life, and thus contribute to reversing the trend towards ever-increasing hate and violence.

9. Finally, a universal moratorium on the death penalty represents a concrete and highly symbolic political act, which could help change an international climate which is all too often characterised by violent actions which take their victims – by no means exclusively in a context of conflict – from among civilian populations. A universal moratorium on the death penalty would also make a significant contribution to the establishment of a shared and operational body of principles and rules leading towards a more effective rule of law at international level.

10. The Assembly calls on all member and observer States of the Council of Europe to actively support the initiative for the abolition of the death penalty in the UN General Assembly and to make the best use of their influence in order to convince countries that are still on the sidelines to join in. In this context, it warmly welcomes the resolution in the same spirit, adopted by the European Parliament on 26 April 2007, on the initiative for a universal moratorium on the death penalty.

11. At the Luxembourg meeting of 18 June 2007, the General Affairs and External Relations Council (GAERC) of the European Union unanimously made a formal commitment to tabling – at the next session of the General Assembly of the United Nations – a resolution calling for a moratorium on executions all over the world.

12. The Assembly recalls that, whilst 60 States have so far ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1989 to promote the universal abolition of the death penalty, 10 Council of Europe member and observer States have not yet done so, namely Albania, Armenia, France, Japan (observer), Latvia, Mexico (observer), Poland (signed but not ratified), the Russian Federation, Ukraine, and the United States of America (observer). For countries which have *de facto* and *de jure* abolished the death penalty (Albania, Armenia, France, Latvia, Mexico (observer), Poland and Ukraine), or which maintain a moratorium (Russian Federation), the ratification of the Second Optional Protocol to the ICCPR would be a valuable gesture of political support for abolition, and would contribute to further isolating the remaining retentionist countries.

13. The Council of Europe's own instruments against the death penalty are also still lacking ratifications. In particular, Protocol No. 6 to the European Convention on Human Rights concerning the abolition of the death penalty (ETS No. 114) has still not been ratified by the Russian Federation, despite the commitment to do so undertaken upon its accession to the Council of Europe in 1996. Protocol No. 13 to the Convention concerning the abolition of the death penalty in all circumstances (ETS No. 187), including in time of war or imminent threat of war, has still not been signed by Azerbaijan and the Russian Federation, and has still not been ratified by Armenia, France, Italy, Latvia, Poland and Spain. For the sake of the strong and

unified signal to be sent by the Council of Europe as a whole, the Assembly calls on the countries concerned to sign and ratify these instruments without further delay.

14. The Assembly notes in this context that Italy's Chamber of Deputies approved on 2 May 2007, in a second reading, the constitutional bill containing amendments to Article 27 of the Constitution concerning the abolition of the death penalty; the bill is presently before the senate for its second reading and final adoption under the current procedure for constitutional revision. The bill aims to delete from Article 27 § 4 the following words: 'unless in the cases provided for by military laws in case of war', thus eliminating any reference to the death penalty in the Italian Constitution and making it possible to ratify Protocol No. 13 to the Convention.

15. Also, the Assembly reiterates its view, noted in Recommendation 1760 (2006) on the position of the Parliamentary Assembly as regards the Council of Europe member and observer States which have not abolished the death penalty, that the death penalty should be abolished in Abkhazia, South Ossetia and the Transnistrian Moldavan Republic, and that the sentences of all prisoners currently on death row in these territories should be immediately commuted to terms of imprisonment in order to put an end to the cruel and inhuman treatment of those who have been kept on death row for years in a state of uncertainty as to their ultimate fate.

16. The Assembly fully supports the Conference to establish a European Day against the Death Penalty, to be held in Lisbon on 9 October 2007, and expects all member States of the Council of Europe also to show their unstinting support. Given its pioneering work on the abolition of the death penalty in Europe and beyond, the Assembly must play a central role, including through involvement in the drafting of the joint declaration, which its President should co-sign at the inaugural conference. The Assembly will stand ready to contribute to publicity and promotion, including through coordination of supporting events in member States' national parliaments."

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

97. In *Chitat Ng v. Canada* (Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994), the United Nations Human Rights Committee found that Mr Ng's extradition to the United States of America, where he risked execution, gave rise to a violation by Canada of the International Covenant on Civil and Political Rights (ICCPR). The Committee made the following request:

"18. The Human Rights Committee requests the State Party to make such representations as might still be possible to avoid the imposition of the death penalty and appeals to the State Party to ensure that a similar situation does not arise in the future."

98. In *Roger Judge v. Canada* (Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998, 20 October 2003), the Committee found that Mr Judge's deportation to the United States, where he had been sentenced to

be executed, gave rise to violations by Canada of the ICCPR, and continued:

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

99. In its judgment of 11 October 2002 in *Boumediene and Others*, the Human Rights Chamber for Bosnia and Herzegovina found a number of violations of the Convention arising from the transfer of the claimants, who had been detained in Bosnia and Herzegovina, to the custody of the US security services who subsequently removed them to the US Naval Base at Guantánamo Bay. The Human Rights Chamber then ordered Bosnia and Herzegovina, *inter alia*, to take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the United States via diplomatic contacts that the applicants would not be subjected to the death penalty.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 2 AND 3 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 13

100. The applicants alleged that their transfer to the custody of the Iraqi High Tribunal (IHT) exposed them to a real risk of the death penalty, in breach of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13. The Government disagreed.

Article 2 § 1 provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3 provides:

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

Protocol No. 13 provides:

> **"Preamble**
>
> The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention ...

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1: Abolition of the death penalty

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

Article 2: Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention."

A. The parties' submissions

1. The applicants

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

102. The applicants reasoned that in accordance with Article 30 of the Vienna Convention on the Law of Treaties of 1969, Article 2 should be interpreted in the light of Article 1 of Protocol No. 13. Thus, for those States which had ratified the Protocol, the exception in the second part of the second sentence of Article 2 § 1 should be abrogated, with the effect that the passing or execution of a death penalty would breach Article 2 as well as

Article 1 of Protocol No. 13. Support for this approach could be found in *Soering v. the United Kingdom* (7 July 1989, §§ 102-04, Series A no. 161), and *Öcalan v. Turkey* ([GC], no. 46221/99, §§ 164-65, ECHR 2005-IV). Moreover, the position across Europe had developed significantly since *Öcalan*, with Protocol No. 13 in force in over 85% of the Council of Europe member States. Hanging was an ineffectual and extremely painful method of killing, such as to amount to inhuman and degrading treatment in breach of Article 3.

103. In any event, the Court in *Öcalan* (cited above, §§ 166-69) had held that passing the death penalty following a trial which failed to meet "the most rigorous standards of fairness ... both at first instance and on appeal" would breach both Articles 2 and 3. It was argued by the Government in the domestic proceedings, and accepted by the Court of Appeal, that the threshold in foreign cases was met only by the imposition of the death penalty following a flagrantly unfair trial. However, this conclusion was not borne out by the Court's case-law; in *Bader and Kanbor v. Sweden* (no. 13284/04, § 47, ECHR 2005-XI), the Court referred also to the risk of the imposition of the death penalty following an unfair trial. To the extent that *Bader and Kanbor* was authority for the Government's position, that decision was inconsistent with the reasoning of the Grand Chamber in *Öcalan*.

104. There was no obligation under either Iraqi domestic law or international law which required either for the applicants' cases to be referred to the Iraqi criminal courts or for them to be reclassified as criminal detainees. The laws and regulations applicable in Iraq, whether adopted by the Coalition Provisional Authority (CPA) or by the Iraqi government, could not be determinative of the issues before the Court, which was concerned with the United Kingdom's obligations under the Convention. In any event, CPA Memorandum No. 3 (Revised) was expressly limited to persons taken into detention after June 2004 and "not considered security internees", whereas the applicants were taken into detention before that date and had at all times been held as security internees.

105. Moreover, there was no evidence that the Iraqi authorities had in any way sought the referral of the applicants' case. The applicants were alleged to have been agents of the former Iraqi regime who had, three days into the active hostilities between Iraq and the United Kingdom, killed agents of the United Kingdom State. Their alleged offence was an international crime, as much contrary to United Kingdom law as it was to Iraqi law. It was the United Kingdom, not Iraq, which detained them, investigated their alleged offences and thereafter sought their prosecution. The minutes of the meetings of the Divisional Internment Review Committee (DIRC: see paragraph 44 above) indicated that the case was only accepted by the Iraqi authorities following considerable persuasion and assistance by the United Kingdom authorities. The Government's repeated

suggestion that the decision to detain and prosecute the applicants before the Iraqi courts was an unfettered exercise of Iraqi sovereignty, with which the United Kingdom Government could not contemplate interfering, was unsustainable given the content of the DIRC minutes. The Government's observations focused on the requirement under international law to respect Iraqi sovereignty and failed to mention the United Kingdom's sovereignty. Equally, while the Government placed repeated reliance on the relevant United Nations Security Council resolutions (UNSCRs), they had failed to refer to the obligations clearly expressed therein that the States concerned had to comply with their international obligations, including under humanitarian and human rights law. The United Kingdom Ministry of Defence's Joint Doctrine Publication on "Detainees" (see paragraph 92 above) also recognised that detainees held by British armed forces abroad should not be transferred to the authorities of the territorial State where there was a reason to believe that they would suffer abuses of their human rights. However, the DIRC minutes also showed that the decision to refer the case was taken with high-level authorisation in circumstances where the United Kingdom authorities were fully aware of the risk to the applicants of the death penalty.

106. The applicants further submitted that the Government had not established that, even if there had been an obligation under Iraqi or international law to transfer the applicants to Iraqi jurisdiction, it had to compel the disapplication of the Convention. The national courts had followed the Court of Appeal's approach in *R(B)* (see paragraph 94 above) but there was no authority in the Court's case-law to show that the *R(B)* approach was correct. Indeed, the Government's contention that its other international obligations should have the effect of entirely displacing its obligations under the Convention was irreconcilable with the judgment in *Soering* (cited above). The requirement on the Court was to interpret the Convention as far as possible in conformity with other international obligations, while heeding its special character as a human rights treaty. While the applicants accepted that the death penalty was not contrary to *universal* norms of customary international law, there was a clear *opinion juris* and State practice supporting a *regional* customary international-law prohibition on exposure to the death penalty by European States. Thus, in addition to the obligation under the Convention, the United Kingdom was under a customary international-law obligation not to expose the applicants to a risk of the death penalty. The Court had also to consider this obligation when interpreting the respondent State's Convention obligations in this case.

107. If the applicants' cases had not been referred to the Iraqi courts and if the applicants had not been reclassified as criminal detainees, they would have remained as security internees. As such, they could have remained in internment only for so long as they presented an imperative threat to

security and could have been released as soon as the threat was perceived as no longer existing. The United Kingdom had released numerous security internees; it appeared from the DIRC minutes that sixty-nine former internees were released from the detention facility where the applicants were held between April and October 2007 and the statistics provided on the Ministry of Defence website showed a total of one hundred and sixty-two former internees set at liberty in 2007. In the alternative, it would have been open to the United Kingdom authorities to prosecute the applicants on war crimes charges. This would have been permitted during the period of the occupation under Article 70 of the Fourth Geneva Convention (see paragraph 90 above). Even once the occupation had come to an end in June 2004 the United Kingdom retained universal jurisdiction over alleged war crimes, by virtue of section 1 of the Geneva Conventions Act 1957 (see paragraph 91 above). The memorandum of understanding (MOU) of 8 November 2004 (see paragraph 25 above) specifically envisaged that the United Kingdom would be entitled to take custody with a view to trying them for war crimes: section 3(4)(a)(i) required that, in relation to any criminal suspect transferred by the United Kingdom to the Iraqi authorities, Iraq would inform the United Kingdom before releasing them and would comply with any request for the United Kingdom to reassume custody if they were "wanted for prosecution by any State that has contributed forces to the MNF [Multinational Force] for breaches of the laws and customs of war". Any suggestion that the United Kingdom had no ongoing legal power to detain or try persons suspected of war crimes was therefore at odds with the agreement concluded with Iraq. Such a trial could have taken place on a United Kingdom base in Iraq, in a neutral third State or in the United Kingdom. However, it does not appear that any consideration was given to this method of reconciling the desire to prosecute the applicants and the need to safeguard their human rights, nor any attempt made to negotiate such an outcome with the Iraqi authorities.

2. The Government

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

opposition to the death penalty to the IHT's President and to the Iraqi authorities (see paragraphs 27-35 and 50-54 above).

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

110. The Government were opposed to capital punishment and the United Kingdom was bound by the prohibition on the death penalty in Article 1 of Protocol No. 13. They had communicated their concerns about the reintroduction of the death penalty to the Iraqi authorities (see paragraphs 27-35 above). Nonetheless, the availability of the death penalty in Iraqi law and/or its imposition by the Iraqi courts would not, as such, be contrary to international law. Nor could they accept that execution by hanging *per se* resulted in additional suffering, over and above that inherent in the carrying out of the death penalty, such as to raise an issue under Article 3. In these circumstances, any risk of its imposition would not justify the United Kingdom in refusing to comply with its obligation under international law to surrender Iraqi nationals, detained at the request of the Iraqi courts, to those courts for trial. The Convention had to be interpreted in the light of and in harmony with other principles of international law and the relevant international law principle in this case could not be more fundamental: the principle that all States must recognise the sovereignty of other States.

111. The Court had to give effect to limitations on the exercise of a Contracting State's jurisdiction, generally accepted by the community of nations, stemming from the fact that the State was acting on the territory of a third State. From the early stages of the occupation period, the United Nations Security Council (UNSC) sought to uphold the sovereignty of Iraq and to establish a government of Iraq by Iraq; this could be seen in UNSCR 1483 of 22 May 2003, for example (see paragraph 14 above). The actions of the occupiers were limited by international law in so far as concerned the powers of internment. Pursuant to Article 78 of the Fourth Geneva Convention (see paragraph 90 above), which applied directly during the occupation period, internment was only permissible where necessary for imperative reasons of security. That restriction was reflected in the applicable domestic law, namely section 7(1) of CPA Memorandum No. 3 of 18 June 2003 (see paragraph 13 above). The sovereignty of Iraq, the government of Iraq by Iraq and the limited powers of third States in Iraq were reflected all the more strongly in the UNSCRs in the post-occupation phase: see UNSCR 1546 (paragraph 19 above). It followed from Iraq's sovereignty that the United Kingdom was not entitled to intern or detain

Iraqi nationals on Iraq's territory except as permitted by Iraq or otherwise authorised by a binding UNSCR. CPA Order No. 48, enacted pursuant to UNSCR 1483, provided for the establishment of the IHT precisely so that the Iraqi judicial authorities could investigate and try Iraqi nationals accused of war crimes in Iraq. Once informed of the evidence against the applicants, the Iraqi authorities wished to investigate and try them. This was why arrest warrants were issued and why the IHT repeatedly requested the transfer of the applicants to its custody.

112. The United Kingdom had no option other than to transfer the applicants. It was operating in a foreign sovereign State which was demanding the applicants' return. As of midnight on 31 December 2008 the United Kingdom would have had no legal basis of any kind for detaining the applicants and no physical means of continuing to detain them or preventing the Iraqi authorities from entering the base and removing them. The other options would have been equally unworkable. If the United Kingdom had released the applicants, this would have amounted to a violation of Iraqi sovereignty and would have impeded the Iraqi authorities in carrying out their international-law obligation to bring alleged war criminals to justice. It would have been impossible to try the applicants in the United Kingdom. The United Kingdom could not simply remove from Iraq two Iraqi nationals suspected of war crimes committed in Iraq. Removal would have been dependent on the permission of Iraq and would otherwise have been in violation of Iraqi sovereignty. Extradition would also have required the consent of the Iraqi authorities. For these reasons, the case was clearly distinguishable from such cases as *Soering*, cited above, or *Chahal v. the United Kingdom* (15 November 1996, *Reports of Judgments and Decisions* 1996-V), where the remedy sought by the applicant was to remain on the Contracting State's territory and where the Contracting State had a discretion whether or not to extradite or deport him.

3. The third parties

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

114. The group of interveners (see paragraph 6 above) similarly maintained that, in accordance with Convention principles and jurisprudence and the general principles of customary international law as declared in the Vienna Convention on the Law of Treaties of 1969, the

European Convention on Human Rights was not generally displaced by other international legal obligations, including bilateral treaties. The primary factors to be taken into account in resolving the question of an apparent conflict of obligations were: (1) the form of the legal instrument concerned; (2) the degree of compatibility the putatively conflicting obligation maintained with the Convention; for example whether a treaty providing for a transfer of competencies provided for equivalent protection in relation to Convention rights; and (3) the nature of the Convention rights affected. The Convention was a multilateral treaty containing *erga omnes partes* human rights obligations. A State entering into a conflicting agreement with a non-Convention State continued to owe legal obligations to the other States Parties to the Convention. The Convention jurisprudence, particularly in cases concerning extradition, affirmed that other treaties did not displace the obligations under the Convention. In a line of cases, the Court had considered treaties providing for the transfer of competencies to international organisations and held such transfers to be generally permissible, but only provided that Convention rights continued to be secured in a manner which afforded protection at least equivalent to that provided under the Convention. The interveners submitted that similar principles should apply where a subsequent international obligation of a Contracting State, by treaty or otherwise, provided for joint or cooperative activity with another State, that impacted on the protection of Convention rights within the Contracting State's jurisdiction.

B. The Court's assessment

1. General principles

(a) Protocol No. 13 to the Convention and the abolition of the death penalty

115. The Court takes as its starting point the nature of the right not to be subjected to the death penalty. Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member States of the Council of Europe. In the Preamble to Protocol No. 13 the Contracting States describe themselves as "convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings".

116. Sixty years ago, when the Convention was drafted, the death penalty was not considered to violate international standards. An exception was therefore included to the right to life, so that Article 2 § 1 provides that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". However, as recorded in the explanatory report to Protocol No. 13, there has subsequently been an evolution towards the complete *de facto* and *de jure* abolition of the death penalty within the member States of the Council of Europe (see paragraph 95 above; see also paragraph 96 above). Protocol No. 6 to the Convention, which abolishes the death penalty except in respect of "acts committed in time of war or of imminent threat of war", was opened for signature on 28 April 1983 and came into force on 1 March 1985. Following the opening for signature of Protocol No. 6, the Parliamentary Assembly of the Council of Europe established a practice whereby it required States wishing to join the Council of Europe to undertake to apply an immediate moratorium on executions, to delete the death penalty from their national legislation and to sign and ratify Protocol No. 6. All the member States of the Council of Europe have now signed Protocol No. 6 and all save Russia have ratified it.

117. In October 1997 the Council of Europe Heads of State and Government called for the "universal abolition of the death penalty" (see paragraph 95 above). Resolution II adopted at the European Ministerial Conference on Human Rights on 3 to 4 November 2000 invited the Committee of Ministers "to consider the feasibility of a new additional protocol to the Convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of imminent threat of war". Protocol No. 13, which abolishes the death penalty in all circumstances, was opened for signature on 3 May 2002 and came into force on 1 July 2003. At the date of adoption of the present judgment, Protocol No. 13 has been ratified by forty-two member States and signed but not ratified by a further three (Armenia, Latvia and Poland). Azerbaijan and Russia are alone in not having signed the Protocol. It was signed by the United Kingdom on 3 May 2002, ratified on 10 October 2003 and came into force in respect of that State on 1 February 2004.

118. The Court considers that, in respect of those States which are bound by it, the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed (see, *mutatis mutandis*, *Soering*, cited above, § 88, and *McCann and Others v. the United Kingdom*, 27 September 1995, § 147, Series A no. 324).

(b) The effect of signature and ratification of Protocol No. 13 on the interpretation of Articles 2 and 3 of the Convention

119. In *Öcalan* (cited above), the Court examined whether the practice of the Contracting States could be taken as establishing an agreement to abrogate the exception in Article 2 § 1 permitting capital punishment in certain conditions. It noted, with reference to § 103 of the *Soering* judgment (cited above), that if Article 2 were to be read as permitting capital punishment, Article 3 could not be interpreted as prohibiting it, since that would nullify the clear wording of Article 2 § 1. The Grand Chamber in *Öcalan* (§ 163) agreed on this point with the Chamber, which had held as follows:

> "... The Court reiterates that it must be mindful of the Convention's special character as a human rights treaty and that the Convention cannot be interpreted in a vacuum. It should so far as possible be interpreted in harmony with other rules of public international law of which it forms part (see, *mutatis mutandis*, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Loizidou v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2231, § 43). It must, however, confine its primary attention to the issues of interpretation and application of the provisions of the Convention that arise in the present case.
>
> ... It is recalled that the Court accepted in *Soering* that an established practice within the member States could give rise to an amendment of the Convention. In that case the Court accepted that subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 and hence remove a textual limit on the scope for evolutive interpretation of Article 3 (ibid., pp. 40-41, § 103). It was found, however, that Protocol No. 6 showed that the intention of the States was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. The Court accordingly concluded that Article 3 could not be interpreted as generally prohibiting the death penalty (ibid., pp. 40-41, §§ 103-04).
>
> ... The applicant takes issue with the Court's approach in *Soering*. His principal submission was that the reasoning is flawed since Protocol No. 6 represents merely one yardstick by which the practice of the States may be measured and that the evidence shows that all member States of the Council of Europe have, either *de facto* or *de jure*, effected total abolition of the death penalty for all crimes and in all circumstances. He contended that as a matter of legal theory there was no reason why the States should not be capable of abolishing the death penalty both by abrogating the right to rely on the second sentence of Article 2 § 1 through their practice and by formal recognition of that process in the ratification of Protocol No. 6.
>
> ... The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (see *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V).

> ... It reiterates that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Soering*, cited above, p. 40, § 102). Moreover, the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since the Court's judgment in *Soering* in 1989.
>
> ... Equally the Court observes that the legal position as regards the death penalty has undergone a considerable evolution since *Soering* was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States and a moratorium in the remaining State that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe, which requires that new member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by the member States of the Council of Europe have become a zone free of capital punishment.
>
> ... Such a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is had to the fact that all Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2."

Having thus concluded that the use of the death penalty except in time of war had become an unacceptable form of punishment, the Grand Chamber in *Öcalan* went on to examine the position as regards capital punishment in all circumstances:

> "164. The Court notes that, by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition. At the date of this judgment, three member States have not signed this Protocol and sixteen have yet to ratify it. However, this final step towards complete abolition of the death penalty – that is to say both in times of peace and in times of war – can be seen as confirmation of the abolitionist trend in the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.
>
> 165. For the time being, the fact that there is still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, since no derogation may be made from that provision, even in times of war. However, the Grand Chamber agrees with the Chamber that it is not necessary

> for the Court to reach any firm conclusion on these points since, for the following reasons, it would be contrary to the Convention, even if Article 2 were to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial."

120. It can be seen, therefore, that the Grand Chamber in *Öcalan* did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (compare *Soering*, cited above, §§ 102-04).

121. In accordance with its constant case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be "degrading" because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. In considering whether a punishment or treatment was "degrading" within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 127, ECHR 2009 and the authorities cited therein).

122. Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the prohibition of

torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Saadi v. Italy* [GC], no. 37201/06, § 127, ECHR 2008).

(c) State responsibility under the Convention for the imposition and execution of the death penalty in another State

123. The Court further reiterates that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country (see *Saadi*, cited above, § 125). Similarly, Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there (see *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008; and, *mutatis mutandis*, *Soering*, cited above, § 111; *S.R. v. Sweden* (dec.), no. 62806/00, 23 April 2002; *Ismaili v. Germany* (dec.), no. 58128/00, 15 March 2001; *Bader and Kanbor*, cited above, § 42; and *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009).

124. In this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of the above Articles. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the Contracting State, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill-treatment (see *Saadi*, cited above, § 126).

125. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (ibid., § 130). The existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion (ibid., § 133). Where the expulsion or transfer has already taken place at the date of the Court's examination, it is not precluded, however, from having regard to information which comes to light subsequently (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 107(2), Series A no. 215; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99,

§ 69, ECHR 2005-I; and, *mutatis mutandis*, *A. and Others*, cited above, § 177).

(d) The extent to which conflicting international obligations affect responsibility under the Convention

126. The Government contended that they were under an obligation under international law to surrender the applicants to the Iraqi authorities. In this connection, the Court notes that the Convention must be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 1969, of which Article 31 § 3 (c) indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". More generally, the Court reiterates that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 55-57, ECHR 2001-XII). The Court has also long recognised the importance of international cooperation (see *Al-Adsani*, cited above, § 54, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI).

127. The Court must in addition have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Its approach must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, *Soering*, cited above, § 87; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 72, Series A no. 310; and *McCann and Others*, cited above, § 146).

128. It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *Bosphorus*, cited above, § 153). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (ibid., § 154 and the cases cited therein). For example, in *Soering* (cited above), the obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the

United Kingdom's obligations under the Extradition Treaty it had concluded with the United States in 1972.

2. Application of the above principles to the present case

129. The Court reiterates that the first applicant was arrested by soldiers from the United Kingdom contingent of the MNF on 30 April 2003 and the second applicant on 21 November 2003. They were held in British-run detention facilities as security internees. However, from an early stage in the applicants' internment the British authorities were investigating their involvement in the murders of Staff Sergeant Cullingworth and Sapper Allsopp (see paragraphs 40-43 above).

130. On 28 June 2004 the occupation of Iraq came to an end. In August 2004 the death penalty was reintroduced into the Iraqi Penal Code in respect of a number of offences, including murder (see paragraph 23 above).

131. On 16 December 2005 the United Kingdom authorities referred the applicants' cases to the Iraqi criminal courts (see paragraph 45 above). On 18 May 2006 the Basra Criminal Court made an order authorising their continued detention by British forces and on 21 May 2006 the United Kingdom authorities decided to reclassify the applicants as "criminal detainees" (see paragraph 46 above). From 27 December 2007 the IHT requested that the applicants be transferred to its custody to stand trial on charges carrying the death penalty (see paragraph 48 above). On 31 December 2008 the United Kingdom authorities physically transferred the applicants to the custody of the Iraqi police (see paragraph 80 above).

132. The applicants' trial before the IHT commenced on 11 May 2009. They were originally charged with killing the two British soldiers when they had clearly surrendered, an offence carrying a maximum penalty of the death sentence. On 21 July 2009, following the close of evidence, the original capital charges against the applicants were withdrawn and an offence which did not carry the death penalty was substituted. A week later an additional charge was added, which could in principle have been punishable by death. In January 2010 the Court of Cassation decided to remit the case for renewed investigation and retrial (see paragraphs 82-89 above).

133. The Court notes that the Divisional Court and the Court of Appeal concluded, shortly before the physical transfer took place, that substantial grounds had been shown for believing there to be a real risk of the applicants' being condemned to the death penalty and executed (see paragraphs 60 and 70 above). In coming to this conclusion, the domestic courts took into account the facts that the death penalty was available for the offences with which the applicants were charged; that there was clear evidence that persons convicted of such offences were liable in practice to be sentenced to death; that no assurance that the death penalty would not be applied had been given by the Iraqi authorities; and that the other factors

relied on by the Government, for example the letter from the family of one of the victims requesting clemency, were not sufficiently cogent nor certain to negate the risk.

134. The Court, having itself examined the evidence, sees no reason to depart from the findings of the national courts on this issue. Moreover, it considers that, despite the additional letter submitted by the United Kingdom Government to the IHT in July 2009, informing the IHT that the family of the other murdered soldier did not want the death penalty to be imposed (see paragraph 86 above), the Iraqi authorities have still not given any binding assurance that it will not. The applicants' case has recently been remitted for reinvestigation and retrial and it is impossible to predict the outcome. In these circumstances the Court does not consider that the risk of the applicants' being executed has been entirely dispelled.

135. Moreover, it considers that, given the nature of the evidence and allegations against the applicants, from August 2004, when the death penalty was reintroduced in Iraq, there were substantial grounds for believing that they would run a real risk of being sentenced to death if tried and convicted by an Iraqi court. Indeed, the minute of the meeting of the DIRC of 27 July 2004 recorded that the United Kingdom Secretary of State was already at that stage concerned about the death penalty (see paragraph 44 above). Similar expressions of concern were reported in the minutes of 31 August 2004 and 31 January and 3 May 2005.

136. The applicants must themselves have been aware of this risk. The Court considers that, at least from May 2006, when the Iraqi criminal courts accepted jurisdiction over their cases, the applicants were subjected to a well-founded fear of execution. It is reasonable to assume that this fear caused the applicants intense psychological suffering. It must have continued throughout their appeals to the Iraqi courts against the referral of their cases to the IHT (see paragraph 47 above) and the refusal of the English domestic courts to prevent their physical transfer to the Iraqi authorities. It undoubtedly intensified around 31 December 2008, when the risk became more concrete and the transfer took place, and continues to this day.

137. Protocol No. 13 came into force in respect of the United Kingdom on 1 February 2004. The Court considers that, from that date at the latest, the respondent State's obligations under Article 2 of the Convention and Article 1 of Protocol No. 13 dictated that it should not enter into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting individuals within its jurisdiction to a real risk of being sentenced to the death penalty and executed. Moreover, it considers that the applicants' well-founded fear of being executed by the Iraqi authorities during the period May 2006 to July 2009 must have given rise to a significant degree of mental suffering and that to subject them to such

suffering constituted inhuman treatment within the meaning of Article 3 of the Convention.

138. The Government have contended that, in accordance with well-established principles of international law, they had no option but to respect Iraqi sovereignty and transfer the applicants, who were Iraqi nationals held on Iraqi territory, to the custody of the Iraqi courts when so requested. In this respect, however, the Court refers to its case-law, summarised in paragraphs 126 to 128 above, to the effect that it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention. This principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty and the grave and irreversible harm risked by the applicants.

139. The domestic courts considered themselves bound by the principles of international law concerning "diplomatic asylum", as applied by the Court of Appeal in the *R(B)* case (see paragraphs 58, 72 and 94 above), to find that the duty to provide refuge extraterritorially could operate only where there was clear evidence that the territorial State intended to subject the individual to treatment so harsh as to constitute a crime against humanity. It is not necessary in this judgment for the Court to examine generally the principles of "diplomatic asylum" or to establish when, if ever, the surrender of an individual by a Contracting State's diplomatic or consular agents could give rise to a violation of the Convention. It merely notes in passing that the Commission in its admissibility decision in *M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1992, Decisions and Reports 73, p. 193, appeared to assume, albeit without detailed reasoning, that the *Soering* principle against *refoulement* would apply where an individual sought and was refused refuge in a Contracting State's embassy.

140. The Court considers in any event that the facts of the present case are such as clearly to distinguish it from a situation of "diplomatic asylum", for the following reasons. Diplomatic and consular premises have a particular status under international law. When a State sets up a diplomatic mission it agrees to respect the laws of the territorial State and not to interfere in its internal affairs (Vienna Convention on Diplomatic Relations of 1961, Article 41 § 1: see paragraph 93 above); this is one of the conditions on which the territorial State consents to the establishment of the mission. Thus, when an individual seeks refuge at an embassy, the obligations owed by the sending State to the territorial State are known and apply *ab initio* (although there may be other conflicting obligations, for example under the Convention). In contrast, in the present case, the applicants did not choose to seek refuge with the authorities of the United Kingdom; instead, the respondent State's armed forces, having entered Iraq, took active steps to bring the applicants within the United Kingdom's

jurisdiction, by arresting them and holding them in British-run detention facilities (see *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 84-89, 30 June 2009). In these circumstances, the Court considers that the respondent State was under a paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicants' rights under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13.

141. In any event, the Government have not satisfied the Court that the need to secure the applicants' rights under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 inevitably required them to act in contravention of Iraqi sovereignty. It does not appear from the evidence before the Court that, despite the concerns voiced at ministerial level as early as July 2004 about the risk of the imposition of the death penalty if the applicants were tried by the Iraqi courts (see paragraph 44 above), any real attempt was made to negotiate with the Iraqi authorities to prevent it. According to the evidence of Mr Watkins before the Divisional Court and Court of Appeal (see paragraphs 56 and 66 above), it was the judgment of the United Kingdom Government towards the end of 2008 that it would not be politic even to raise with the Iraqi government the possibility of removing the applicants to the United Kingdom or continuing to detain them in Iraq after 31 December 2008. However, it would appear from the minute of the DIRC meeting of 28 September 2004 that the Iraqi prosecutors initially had "cold feet" about bringing the case themselves, because the matter was "so high profile" (see paragraph 44 above). This could have provided an opportunity to seek the consent of the Iraqi government to an alternative arrangement involving, for example, the applicants being tried by a United Kingdom court, either in Iraq or in the United Kingdom. It does not appear that any such solution was ever sought.

142. The Government accept, moreover, that no attempt was made, during the negotiations for the United Kingdom-Iraq MOU of 8 November 2004 or at any other time, to seek a general assurance from the Iraqi authorities that, in the light of the United Kingdom's binding obligations under the Convention and Protocol No. 13, no individual transferred from the physical custody of the British armed forces could be subjected to the death penalty. Similarly, the Government do not contend that, before the decision was made to refer the applicants' cases to the Iraqi courts, any request was made to the Iraqi authorities for a binding assurance that, if the cases were referred, the applicants would not be at risk of capital punishment. Indeed, it would appear that it was only after the applicants had lodged an application for judicial review before the Divisional Court that a first effort was made to seek clemency on their behalf. However, as the domestic courts found, no binding guarantee was obtained.

143. In summary, therefore, the Court considers that, in the absence of any such binding assurance, the referral of the applicants' cases to the Iraqi

courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom's obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 since, throughout the period in question, there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed.

144. The outcome of the applicants' case before the IHT is currently uncertain. While the applicants remain at real risk of execution since their case has been remitted for reinvestigation, it cannot at the present time be predicted whether or not they will be retried on charges carrying the death penalty, convicted, sentenced to death and executed. Whatever the eventual result, however, it is the case that through the actions and inaction of the United Kingdom authorities the applicants have been subjected, since at least May 2006, to the fear of execution by the Iraqi authorities. The Court has held above that causing the applicants psychological suffering of this nature and degree constituted inhuman treatment. It follows that there has been a violation of Article 3 of the Convention.

145. In the circumstances, and in view of the above finding, the Court does not consider it necessary to decide whether there have also been violations of the applicants' rights under Article 2 of the Convention and Article 1 of Protocol No. 13.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

146. The applicants alleged that, at the moment they were transferred to Iraqi custody, there were substantial grounds for believing that they were at a real risk of being subjected to an unfair trial before the IHT in breach of their rights under Article 6 § 1 of the Convention, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

The Government denied that there was any risk of an unfair trial.

A. The parties' submissions

147. The applicants alleged that the fairness of trials before the IHT had been the subject of widespread and ongoing criticism from numerous non-governmental organisations and international bodies, focusing both on the IHT's lack of independence and its general ability to conduct a trial meeting even the most basic international requirements. They referred to reports by the International Center for Transitional Justice (*Dujail: Trial and Error?* (November 2006)); the United Nations Human Rights Council's Working Group on Arbitrary Detentions (Opinion 31/2006, in relation to the trial and detention of Saddam Hussein); Human Rights Watch (*The Poisoned Chalice: A Human Rights Watch Briefing Paper on the Decision of the Iraqi*

High Tribunal in the Dujail Case (June 2007)); and the statements of their expert witness who had given evidence before the domestic courts (see paragraph 59 above). With reference to these reports, the applicants alleged in particular that IHT personnel and witnesses appearing before it were subject to extreme security risks, including the risk of assassination and that defendants were left without effective representation because of the risk to counsel. The applicants alleged that there was no tradition of judicial independence in Iraq and that the judges of the IHT were subject to continual political interference. These shortcomings explained the conviction rate of approximately 80% of accused persons tried before the IHT.

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

B. The Court's assessment

149. In *Mamatkulov and Askarov* (cited above, §§ 90 and 91), the Grand Chamber confirmed the principle first laid down in *Soering* (cited above, § 113), that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of a fair trial in the requesting country. As with cases under Article 3, the Court considers that, where the removal has already taken place, the existence of the risk of a flagrant breach of Article 6 must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal, although the Court is not precluded from having regard to information which comes to light subsequently (see paragraph 125 above).

150. However, in the present case the Court accepts the national courts' finding that, at the date of transfer, it was not established that the applicants would risk a flagrantly unfair trial before the IHT. Now that the trial has taken place, there is no evidence before the Court to cast doubt on that assessment. It follows that the Court finds no violation of Article 6 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 13 AND 34 OF THE CONVENTION

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

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

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

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

The Government rejected these contentions.

A. The parties' submissions

1. The applicants

152. The applicants submitted that the consequences of transferring them to the Iraqi authorities in breach of the Court's Rule 39 indication could not have been more serious, both as to their right to individual petition and their right to an effective remedy. Both this Court's judgment in *Paladi v. Moldova* ([GC], no. 39806/05, § 92, 10 March 2009) and the judgment of the International Court of Justice (ICJ) in *LaGrand* (judgment of 27 June 2001, *ICJ Reports* 2001, p. 466), on which the Government relied, made it clear that the obligation was to take all reasonable steps to comply with an indication of interim measures. Nonetheless, the Government had conceded that at no stage did they make any approach to the Iraqi authorities to investigate the possibility of detaining the applicants at the British detention facility at Basra for the matter of the few weeks or months that it would take for the legal issues to be resolved. Moreover, the Government had failed to inform either the Court or the applicants' representatives on the morning of 31 December 2008 that they did not intend to comply with the Rule 39 indication. The Court was informed only when the transfer had taken place.

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

2. The Government

154. The Court had held in *Paladi* (cited above), that it was for a respondent Government to demonstrate that there was an objective impediment which prevented its compliance with an interim measure indicated under Rule 39 of the Rules of Court. In the Government's submission, the question whether there was such an objective impediment had to be assessed in each case with reference to the legal or factual scenario. As the Court had confirmed in its case-law, the Convention had to be interpreted in the light of and in harmony with other principles of international law. This was no less the case when it came to the interpretation of Article 34 and Rule 39. Indeed, much of the reasoning behind the Court's decision in *Mamatkulov and Askarov* (cited above), as to the binding nature of Rule 39 indications was based on consideration of other principles of international law, including the judgment of the ICJ in *LaGrand*, cited above. In that judgment, in a passage cited by the Court in *Paladi*, the ICJ emphasised that its Order of provisional measures "did not require the United States to exercise powers it did not have", although it did impose the obligation to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the conclusion of the proceedings.

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

156. The Government dismissed as irrelevant the submissions by the third parties to the effect that the obligation to comply with a Rule 39 indication was not discharged by a competing international obligation (see paragraphs 158-59 below). The present case did not involve conflicting obligations where a State could choose to act either in accordance with treaty A or treaty B. The simple point, which the interveners did not address, was that the Government could not comply with the Rule 39

indication; they did not have the relevant powers nor any discretion as to how to act. The applicants alleged that the Government could have done more, but this was to ignore the extreme sensitivity of the important and urgent negotiations that were taking place with Iraq at that time (see paragraphs 56 and 66 above).

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

3. The third parties

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

159. The group of interveners (see paragraph 6 above) reasoned that, given the purpose and significance of interim measures in protecting Convention rights, the obligation under Article 34 to abide by these measures should be strictly and consistently applied. A State had to take all steps available to it to comply with the order and, in deciding whether and to what extent to comply with interim measures, could not substitute its own judgment for that of the Court. The judgments in *Soering* and *Mamatkulov and Askarov* demonstrated that a competing international obligation did not permit the disregard of interim measures.

B. The Court's assessment

1. General principles

160. Interim measures under Rule 39 of the Rules of Court are indicated only in limited spheres. In practice, the Court will make such an indication only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life

(Article 8) or other rights guaranteed by the Convention (see *Mamatkulov and Askarov*, cited above, § 104). Under the Convention system, interim measures play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention (ibid., § 125).

161. Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the interim measure indicated by the Court (see *Paladi*, cited above, § 88). In examining a complaint under Article 34 concerning the alleged failure of a Contracting State to comply with an interim measure, the Court will not re-examine whether its decision to apply interim measures was correct. It is for the respondent Government to demonstrate to the Court that the interim measure was complied with or, in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation (ibid., § 92).

2. Application of the above principles to the present case

162. As stated above, the Court's approach in interpreting the Convention must be guided by the fact that its object and purpose as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. It has found that the decisions of the United Kingdom authorities to refer the applicants' cases to the Iraqi courts in December 2005 and to transfer them physically to Iraqi custody on 31 December 2008, without having first received any binding assurance that they would not be subjected to the death penalty, put them at real risk of being executed. It has further found that, as a matter of principle, it was not open to the respondent State to enter into an agreement or arrangement with another State which conflicted with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13. Finally, it has found that the Government have failed to establish that there were no realistic or practicable means available to them by which to safeguard the applicants' fundamental human rights. In these circumstances, the "objective impediment" claimed by the Government, namely the absence, on 31 December 2008, of any available course of action consistent with respect for Iraqi sovereignty other than the transfer of the applicants, was of the respondent State's own making.

163. Moreover, the Government have not satisfied the Court that they took all reasonable steps, or indeed any steps, to seek to comply with the

Rule 39 indication. They have not informed the Court, for example, of any attempt to explain the situation to the Iraqi authorities and to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination.

164. It is true that from June 2008 the Government began to make approaches to the Iraqi authorities, initially to ascertain from the President of the IHT what steps would be effective under Iraqi law and practice to reduce the risk of the applicants receiving the death sentence (see paragraphs 50-54 above). Subsequently, in July 2008 the Government contacted the Iraqi prosecutors and requested them to inform the IHT that the Government were opposed to the death penalty and that neither of the families of the two murdered soldiers wished it to be imposed (see paragraph 86 above). These contacts may or may not have contributed to the IHT's decisions to amend the charges against the applicants (see paragraphs 86-88 above); this is not a matter on which the Court is able to speculate. However, as the domestic courts also found, the Government's approaches to the Iraqi authorities prior to the transfer of the applicants on 31 December 2008 were not sufficient to secure any binding assurance that the death penalty would not be applied and the applicants remained at real risk when the United Kingdom decided not to comply with the Court's indication under Rule 39. The Government's efforts in 2009 to persuade the Iraqi authorities not to use the death penalty came after the applicants had left United Kingdom jurisdiction and therefore at a time when the United Kingdom authorities had lost any real and certain power to secure their safety. Moreover, to date no binding assurance that the death penalty will not be applied has been given and the applicants' fate remains uncertain.

165. In conclusion, the Court does not consider that the authorities of the Contracting State took all steps which could reasonably have been taken in order to comply with the interim measure taken by the Court. The failure to comply with the interim measure and the transfer of the applicants out of the United Kingdom's jurisdiction exposed them to a serious risk of grave and irreparable harm.

166. In the admissibility decision of 30 June 2009 (see paragraph 7 above) the Court joined the question of the admissibility of Article 13 to the merits. Having now examined the merits, and having found in connection with Article 34 that there was no objective justification for the transfer, it reaches the conclusion on similar grounds that the effectiveness of any appeal to the House of Lords was unjustifiably nullified as a result of the Government's transfer of the applicants to the Iraqi authorities. The Court therefore finds the complaint under Article 13 admissible and it finds violations of Articles 13 and 34 of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

167. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

168. The applicants asked the Court to order the Government to take a number of measures which might assist in mitigating the damage caused by their transfer to Iraqi custody. In particular, the applicants requested the Court to order the Government to use their best endeavours to secure by diplomatic representations the applicants' immediate return to United Kingdom custody. Further or alternatively, the Government should be ordered to use their best endeavours to ensure that the applicants received a fair trial before the IHT, were enabled to remain in contact with their English legal representatives and were not sentenced to the death penalty if convicted. They referred, *inter alia*, to *Ilaşcu and Others v. Moldova and Russia* ([GC], no. 48787/99, § 490, ECHR 2004-VII) where the Court ordered the respondent States to take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.

169. The Government submitted that this was not a case permitting of *restitutio in integrum.* The applicants were in Iraqi custody. The Government had no means whatsoever of securing their return to the custody of British forces and no power to detain them in Iraq even if they were returned. The judgment of those involved in negotiating with Iraq prior to the transfer was that there was no prospect of the Iraqi authorities agreeing to the applicants' continued detention by British forces (see paragraphs 56 and 66 above). Careful further consideration had been given to these matters and it was the Government's considered view that the diplomatic representations sought would be inappropriate, could harm bilateral relations and would be ineffective. Likewise, it was the Government's considered view that it would not be appropriate to make the further representations sought as to the full and continuing cooperation of the Iraqi government, and in particular the IHT, with the United Kingdom Government, as regards access by the applicants to their representatives in the United Kingdom and the IHT's manner of operating.

170. The Court notes that where it finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned any sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by

the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Assanidze v. Georgia* [GC], no. 71503/01, § 202, ECHR 2004-II; and *Ilaşcu and Others*, cited above, § 490).

171. In the present case, the Court has found that through the actions and inaction of the United Kingdom authorities the applicants have been subjected to mental suffering caused by the fear of execution amounting to inhuman treatment within the meaning of Article 3. While the outcome of the proceedings before the IHT remains uncertain, that suffering continues. For the Court, compliance with their obligations under Article 3 of the Convention requires the Government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

172. Article 41 of the Convention provides as follows:

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

A. Non-pecuniary damage

173. The applicants claimed that they were entitled to a substantial award in respect of non-pecuniary damage, given the fundamental nature of the rights that had been violated and the United Kingdom's failure to comply with the Rule 39 indication. They submitted that there was no comparable case, but in the light of awards made in cases under Article 2 involving loss of life caused or contributed to by the State, they were each entitled to compensation in the region of 50,000 pounds sterling (GBP) for exposure to a real risk of the death penalty, together with a further GBP 25,000 in respect of the breaches of Articles 13 and 34.

174. The Government submitted that, in the event that the Court found a violation, that finding would be sufficient just satisfaction. They denied that the applicants were suffering from fear and distress and referred to the report of the Provost Marshall, the British army officer responsible for conducting inspections of British overseas military detention facilities (see

also paragraph 61 above), who had visited the applicants in Rusafa Prison on 24 April 2008 and found that they appeared healthy and looked well. Furthermore, it would be inappropriate to award compensation where the damages claimed arose out of a situation where the applicants had been transferred into the custody of the authorities of a host State for investigation and trial for alleged war crimes, in accordance with international law. The sums sought were in any event excessive. The cases relied on by the applicants had involved awards of damages to a relative in respect of an actual killing.

175. In all the circumstances of the present case, the Court considers that the findings of a violation of Articles 3, 13 and 34 and the indication made under Article 46 constitute sufficient just satisfaction for the non-pecuniary damage suffered by the applicants.

B. Costs and expenses

176. The applicants claimed a total of GBP 48,131.58 in respect of the costs and expenses of bringing the application before the Court, inclusive of value-added tax (VAT) at 15%. They claimed for a total of 377 hours and 10 minutes' work by legal advisers, including 189 hours and 24 minutes spent by solicitors, charged at GBP 180 per hour for the senior solicitor and GBP 130 per hour for the junior solicitor; 20 hours' work by one QC and 5 hours' work by another, charged at GBP 350 per hour; 5 hours' work by a second QC; and a total of 162 hours and 45 minutes spent on the application by three other barristers.

177. The Government acknowledged that the application raised a number of complex issues. Nonetheless they considered that the total time spent by the applicants' legal team was excessive and that the use of eight different lawyers must have contributed to duplication and extra costs. They submitted that a total figure of 250 hours would be more reasonable. Furthermore, the hourly sum of GBP 350 for two of the counsel was too high; an hourly rate of GBP 250 would be more appropriate.

178. In the light of the complex issues raised by this case and based on its practice in comparable cases, the Court awards 40,000 euros in respect of costs and expenses, together with any tax that may be chargeable to the applicants.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares admissible* unanimously the remaining complaint under Article 13 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

3. *Holds* unanimously that it is not necessary to decide whether there have been violations of Article 2 of the Convention or Article 1 of Protocol No. 13;

4. *Holds* unanimously that there has been no violation of Article 6 of the Convention;

5. *Holds* by six votes to one that there have been violations of Articles 13 and 34 of the Convention;

6. *Holds* unanimously
   (a) that the findings of a violation constitute sufficient just satisfaction for the non-pecuniary damage suffered by the applicants;
   (b) that the respondent State is to pay to the applicants jointly EUR 40,000 (forty thousand euros), in respect of costs and expenses, plus any tax that may be chargeable to the applicants, to be converted into pounds sterling at the rate applicable at the date of settlement;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 2 March 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion of Judge Bratza is annexed to this judgment.

L.G.
T.L.E.

PARTLY DISSENTING OPINION OF JUDGE BRATZA

1. I share the view of the Chamber that there has been a violation of Article 3 of the Convention in the present case and that, having regard to this finding, it is not necessary to decide whether there have additionally been violations of Article 2 of the Convention or Article 1 of Protocol No. 13.

2. It was expressly accepted by the Divisional Court and by the Court of Appeal that, taking the evidence as a whole, substantial grounds had been shown for believing that there was a real risk that the applicants would be condemned to the death penalty and executed if they were transferred into the custody of the Iraqi High Tribunal (IHT), no sufficient guarantees having been obtained that such a penalty would not be sought or imposed for the offences with which they were charged. This conclusion is not affected by the fact that, in the result, the charges of murder against the applicants were reduced and replaced by charges which did not carry the death penalty or that, in September 2009, the IHT set aside all the charges against the applicants on the ground of insufficiency of evidence. The Court has previously held that it is not precluded from having regard to information which comes to light subsequent to the surrender or expulsion of a person, such information being of potential value in confirming or refuting the appreciation made by the Contracting State of the well-foundedness or otherwise of an applicant's fears (see *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 107, Series A no. 215, and *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 69, ECHR 2005-I). However, since the nature of a Contracting State's responsibility under Article 3 in cases of the present kind lies in the acts of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or might have been known to the Contracting State at the time of surrender or expulsion. Moreover, as pointed out in the judgment, the applicants' case has in any event been recently remitted by the Court of Cassation for reinvestigation and retrial, with the consequence that the risk faced by them at the time of their surrender has not been finally dispelled.

3. In concluding that the Government were in breach of their obligations under Article 3 in the present case, the Chamber has focused not merely on the circumstances in December 2008 when the applicants were physically transferred to the custody of the Iraqi authorities without any assurance that they would not be subjected to the death penalty, but on the acts and omissions of the United Kingdom authorities in the period following the applicants' arrest and detention as security internees in 2003 and prior to the referral of their cases to the Iraqi courts without the necessary assurances.

4. I fully endorse this latter basis for attaching responsibility to the Government under Article 3. The applicants were initially classified as

"security internees", their notices of internment recording that they were suspected of being senior members of the Ba'ath Party under the former regime and of orchestrating anti-Multinational Force (MNF) violence by former regime elements and that, if released, they would represent an imperative threat to security. It was the Special Investigation Branch of the United Kingdom's Royal Military Police which, following an investigation into the deaths of the two British servicemen carried out between March 2003 and October 2004, found evidence implicating the applicants in their killing. In June 2004 the occupation of Iraq came to an end and in August of that year the death penalty was reintroduced into the Iraqi Penal Code in respect of a number of offences, including murder. It is clear from the evidence before the Court, notably the internal Divisional Internment Review Committee minutes referred to in paragraph 44 of the judgment, that extensive negotiations took place between the United Kingdom and Iraqi authorities in the period from July 2004 until the formal reference of the cases against the applicants to the Chief Investigation Judge of the Central Criminal Court of Iraq (CCCI) in December 2005. It is apparent from that evidence that, at least in the initial stages, there were hesitations on the part of the Iraqi authorities about undertaking the prosecution of the applicants in such a high-profile case. At the same time, there were continuing concerns on the part of the United Kingdom authorities that if the applicants were to be transferred to the Iraqi courts for trial the death penalty could be imposed. These concerns were, in particular, reflected in the minute of 3 May 2005 in which guidance was sought "on the safeguards that could be imposed before transferring the case to the CCCI especially in light of the potential death penalty difficulties".

5. Despite this clear appreciation of the risk that the death penalty would be imposed if the applicants were transferred to an Iraqi court and convicted of murder and despite the opportunities which were offered by the discussions at that time, it does not appear that any efforts were made by the United Kingdom authorities either to negotiate alternative arrangements for the trial of the two applicants which would not involve the risk of the death penalty or to secure the necessary safeguards before the applicants' cases were formally referred to the Iraqi courts in December 2005. In particular, as noted in the judgment (see paragraph 141), despite the binding obligations of the United Kingdom under the Convention and Protocol No. 13, no attempt was made to seek either a general assurance that individuals transferred from the physical custody of the British armed forces to the Iraqi authorities would not be subjected to the death penalty or a specific assurance that the two applicants would not be at risk of capital punishment if their cases were referred to the Iraqi courts for trial. The first efforts which, indeed, appear to have been made to obtain such an assurance on the applicants' behalf were made in mid-2008, after the applicants' cases had been referred, after they had been reclassified by the United Kingdom

authorities as "criminal detainees" in May 2006 and after the IHT had made its first of several repeated requests for the transfer of the applicants in December 2007.

6. It was, in my view, this failure on the part of the United Kingdom authorities in the period prior to the referral of the applicants' cases to the Iraqi courts, which itself led to the eventual surrender of the applicants to those courts in December 2008, that gave rise to a breach of the State's obligations under Article 3 of the Convention.

7. By the time of the applicants' eventual surrender, the situation had radically changed. The United Nations mandate for the presence of the MNF, including the British contingent, expired on 31 December 2008. Following the expiry of the mandate, there remained under international law, as the Court of Appeal held, "no trace or colour of any power or authority whatever for the MNF, or any part of it, to maintain any presence in Iraq save only and strictly at the will of the Iraqi authorities" (§ 34; see paragraph 71 of the judgment) and there existed "no sensible room for doubt but that the terms on which British forces would be permitted to remain in Iraq by the Iraqi authorities would not encompass any role or function which would permit, far less require, British (or any other) forces to continue to hold detainees" (§ 35; see paragraph 71 of the judgment). Had they done so, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such persons so detained (§ 36; see paragraph 71 of the judgment).

8. The judgment of the Chamber rejects the Government's argument that by 31 December 2008 they had no option but to respect Iraqi sovereignty and transfer the applicants, who were Iraqi nationals held on Iraqi territory, to the custody of the Iraqi courts, when so requested. Reliance is placed in the judgment on the Court's case-law to the effect that it is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention and that the obligation under Article 3 not to surrender a fugitive to another State where substantial grounds exist for believing that he would be subjected to treatment or punishment contrary to that Article overrides any treaty obligations which might have been concluded after the entry into force of the Convention.

9. While I in no way question these general principles laid down in the Court's case-law, I am not persuaded that they have any direct application to the special circumstances of the present case, where the two applicants were held by a contingent of a multinational force on foreign sovereign territory, whose mandate to remain on that territory had expired and who had no continuing power or authority to detain or remove from the territory nationals of the foreign sovereign State concerned.

10. It is these considerations which have led me to dissent from the majority of the Chamber in their finding that there have also been violations of Articles 13 and 34 of the Convention.

11. The general principles governing Article 34 have been set out most recently in the Court's *Paladi* judgment (see *Paladi v. Moldova* [GC], no. 39806/05, 10 March 2009). Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with interim measures indicated by the Court under Rule 39 of the Rules of Court. It is for the respondent Government to demonstrate to the Court that the interim measure was complied with, or in an exceptional case, that there was an objective impediment which prevented compliance and that the Government took all reasonable steps to remove the impediment and to keep the Court informed about the situation. The question whether there is such an "objective impediment" has to be assessed in each case with reference to the legal and factual circumstances which prevailed at the time Rule 39 was applied, the respondent State not being required to take measures which are not within its powers.

12. The circumstances of the present case were in my view exceptional. An application for interim measures was lodged with the Court by the applicants on 22 December 2008, some nine days before the United Kingdom's mandate expired and three days after the Divisional Court had delivered judgment in the applicants' judicial review proceedings challenging the legality of their proposed transfer to the Iraqi authorities. Although the referral of the applicants' cases to the Iraqi courts had taken place in December 2005 and the IHT had first requested the applicants' transfer into its custody in December 2007, it was not until 12 June 2008 that the applicants commenced the judicial review proceedings. The proceedings were undoubtedly of some complexity and were dealt with by the domestic courts with expedition: the hearing before the Divisional Court took place over three days from 18 to 20 November 2008 and the lengthy judgment of the court was delivered one month later. The applicants' appeal to the Court of Appeal was fixed for a substantive hearing on 29 and 30 December 2008, less than ten days after the appeal had been lodged and on the second day of the hearing the appeal was dismissed by the Court of Appeal, which gave short reasons for its decision, indicating that its full judgment would follow. As set out in paragraph 67 of the present judgment, it was the unanimous view of the Court of Appeal that after 31 December 2008, the United Kingdom was entirely legally powerless to take action other than in compliance with the wishes of the IHT or to resist any action taken by the Iraqi authorities. The Court of Appeal accordingly lifted the injunction which had prevented the applicants' transfer until 4.30 p.m. on the same day. Shortly after being informed of the ruling of the Court of Appeal, interim measures were applied by the Court under Rule 39 of the Rules of Court, informing the Government that the applicants should not be removed or transferred from the custody of the United Kingdom until further notice.

13. The majority of the Chamber have found the Government's non-compliance with the Rule 39 indication to be unjustified on two principal grounds. It is said that there was no "objective impediment" to compliance with the interim measures since the absence on 31 December 2008 of any available course of action consistent with respect for Iraqi sovereignty other than the transfer of the applicants was of the respondent State's own making. Secondly, it is said that the Government have not satisfied the Court that they took all reasonable steps, or indeed any steps, to seek to comply with the Rule 39 indication, not having informed the Court of any attempt to explain the situation to the Iraqi authorities or to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination.

14. I am not convinced by either of these points. As to the former, the question whether there was an objective impediment to compliance with an interim measure must be assessed at the time when the measure was applied, in this case 30 December 2008. At that time there existed, as the Court of Appeal found, an objective legal impediment to continuing to detain the applicants and refusing to surrender them to the Iraqi authorities. The fact that, had the United Kingdom obtained the necessary assurances from those authorities some four years before, the applicants could have been safely transferred in December 2008, while undoubtedly relevant in the context of the complaint under Article 3 of the Convention, does not in my view affect the question which falls to be examined under Article 34. As to the latter point, while there are strong reasons to believe that the relevant assurances could have been obtained before the referral of the applicants' case to the Iraqi courts, the lack of success of the efforts made after June 2008 would clearly suggest that there was no realistic prospect of obtaining such assurances or achieving a temporary solution at a time when the expiry of the mandate was imminent, a point confirmed by the evidence of Mr Watkins before the Divisional Court and the Court of Appeal (see paragraphs 56 and 66 of the judgment).

15. For these reasons, while agreeing that in the circumstances of this case the surrender of the applicants violated their rights under Article 3, I would not find it either necessary or appropriate to hold that there had additionally been a violation of Article 34 of the Convention.

16. The claim under Article 13 is, as appears from paragraph 166 of the judgment, essentially accessory to that under Article 34, it being argued that the transfer of the applicants in non-compliance with the interim measures had nullified the effectiveness of any appeal to the House of Lords. For substantially the same reasons as I have indicated above, I would not find an additional violation of Article 13 in the present case.

17. As to the applicants' complaints under Article 6 of the Convention, I share the conclusion and reasoning of the Chamber and have nothing to add.