

GRAND CHAMBER

CASE OF AL-JEDDA v. THE UNITED KINGDOM

(Application no. 27021/08)

JUDGMENT

STRASBOURG

7 July 2011

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

... [omitted details of procedure]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The applicant, his arrest and internment

9. The applicant was born in Iraq in 1957. He played for the Iraqi basketball team until, following his refusal to join the Ba’ath Party, he left Iraq in 1978 and lived in the United Arab Emirates and Pakistan. He moved to the United Kingdom in 1992, where he made a claim for asylum and was granted indefinite leave to remain. He was granted British nationality in June 2000.

10. In September 2004 the applicant and his four eldest children travelled from London to Iraq, via Dubai. He was arrested and questioned in Dubai by United Arab Emirates intelligence officers, who released him after 12 hours, permitting him and his children to continue their journey to Iraq, where they arrived on 28 September 2004. On 10 October 2004 United States soldiers, apparently acting on information provided by the British intelligence services, arrested the applicant at his sister’s house in Baghdad. He was taken to Basrah in a British military aircraft and then to the Sha’aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by British forces. He was held in internment there until 30 December 2007.

11. The applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq. He was believed by the British authorities to have been

personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against coalition forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high tech detonation equipment into Iraq for use in attacks against coalition forces. No criminal charges were brought against him.

12. The applicant's internment was initially authorised by the senior officer in the detention facility. Reviews were conducted seven days and twenty-eight days later by the Divisional Internment Review Committee ("the DIRC"). This comprised the senior officer in the detention facility and Army legal and military personnel. Owing to the sensitivity of the intelligence material upon which the applicant's arrest and detention had been based, only two members of the DIRC were permitted to examine it. Their recommendations were passed to the Commander of the Coalition's Multinational Division (South East) ("the Commander"), who himself examined the intelligence file on the applicant and took the decision to continue the internment. Between January and July 2005 a monthly review was carried out by the Commander, on the basis of the recommendations of the DIRC. Between July 2005 and December 2007 the decision to intern was taken by the DIRC itself, which during this period included as members the Commander together with members of the legal, intelligence and other staffs. There was no procedure for disclosure of evidence nor for an oral hearing, but representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for consideration. The two Commanders who authorised the applicant's internment in 2005 and 2006 gave evidence to the domestic courts that there was a substantial weight of intelligence material indicating that there were reasonable grounds for suspecting the applicant of the matters alleged against him.
13. When the applicant had been detained 18 months, the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the Multi-National Force, the Iraqi Interim Government and the Ambassador for the United Kingdom. It met once and thereafter delegated powers to a Joint Detention Review Committee, which comprised Iraqi representatives and officers from the Multi-National Force.
14. On 14 December 2007 the Secretary of State signed an order depriving the applicant of British citizenship, on the ground that it was conducive to the public good. The Secretary of State claimed, *inter alia*, that the applicant had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.
15. The applicant was released from internment on 30 December 2007 and travelled to Turkey. He appealed against the deprivation of British citizenship. On 7 April 2009 the Special Immigration Appeals Commission dismissed the appeal, having heard both open and closed evidence, during a hearing where the applicant was represented by special advocates (see further *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 91-93,

ECHR 2009 ...). The Special Immigration Appeals Commission held that, for reasons set out in detail in a closed judgment, it was satisfied on the balance of probabilities that the Secretary of State had proved that the applicant had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosives device attacks against coalition forces around Fallujah and Baghdad. The applicant did not appeal against the judgment.

B. The domestic proceedings under the Human Rights Act

... [omitted details of House of Lords decision]

D. Background: the occupation of Iraq 1 May 2003 to 28 June 2004

1. United Nations Security Council Resolution 1441 (2002)

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

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

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

3. Legal and political developments in May 2003

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

... [omitted text of letter]

28. As mentioned in the above letter, the occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority to act as a “caretaker administration” until an Iraqi government could be established. It had power, *inter alia*, to issue legislation. On 13 May 2003 the United States Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the Coalition Provisional Authority with responsibility for the temporary governance of Iraq. In CPA Regulation No. 1, dated 16 May 2003, Ambassador Bremer provided *inter alia* that the Coalition Provisional Authority “shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration” and that:

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

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

The Coalition Provisional Authority administration was divided into regional areas. CPA South was placed under United Kingdom responsibility and control, with a United Kingdom Regional Coordinator. It covered the southernmost four of Iraq’s eighteen provinces, each having a governorate coordinator. United Kingdom troops were deployed in the same area.

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

“The Security Council,

Recalling all its previous relevant resolutions,

...

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

...

Welcoming also the resumption of humanitarian assistance and the continuing efforts of the Secretary-General and the specialized agencies to provide food and medicine to the people of Iraq,

Welcoming the appointment by the Secretary-General of his Special Adviser on Iraq,

...

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

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

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

...

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

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

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

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

...

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

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

...

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

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

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

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

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

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

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

(g) promoting the protection of human rights;

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

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

...

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

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

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

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

4. Developments between July 2003 and June 2004

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

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

“*The Security Council*

...

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out

their work on behalf of the people of Iraq, and welcoming Member State contributions in this regard under resolution 1483 (2003),

...

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

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

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

...

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

...

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

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

...

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

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

32. Reporting to the United Nations Security Council on 16 April 2004, the United States Permanent Representative said that the Multi-National Force had conducted “the full spectrum of military operations, which range from the provision of humanitarian assistance, civil affairs and relief and reconstruction activities to the detention of those who are threats to security...” In a submission made by the Coalition Provisional

Authority to the United Nations High Commissioner for Human Rights on 28 May 2004 it was stated that the United States and United Kingdom military forces retained legal responsibility for the prisoners of war and detainees whom they respectively held in custody.

33. On 3 June 2004 the Iraqi Foreign Minister told the United Nations Security Council:

“We seek a new and unambiguous draft resolution that underlines the transfer of full sovereignty to the people of Iraq and their representatives. The draft resolution must mark a clear departure from Security Council resolutions 1483 (2003) and 1511 (2003) which legitimised the occupation of our country.

...

However, we have yet to reach the stage of being able to maintain our own security and therefore the people of Iraq need and request the assistance of the multinational force to work closely with Iraqi forces to stabilize the situation. I stress that any premature departure of international troops would lead to chaos and the real possibility of civil war in Iraq. This would cause a humanitarian crisis and provide a foothold for terrorists to launch their evil campaign in our country and beyond our borders. The continued presence of the multinational force will help preserve Iraq’s unity, prevent regional intervention in our affairs and protect our borders at this critical stage of our reconstruction.”

34. On 5 June 2004, the Prime Minister of the Interim Government of Iraq, Dr Allawi, and the United States Secretary of State, Mr Powell, wrote to the President of the Security Council, as follows:

... *[omitted details of correspondence]*

35. Provision for the new regime was made in United Nations Security Council Resolution 1546, adopted on 8 June 2004. It provided as follows, with the above letters from Dr Allawi and Mr Powell annexed:

“The Security Council,

Welcoming the beginning of a new phase in Iraq’s transition to a democratically elected government, and looking forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004,

Recalling all of its previous relevant resolutions on Iraq,

...

Recalling the establishment of the United Nations Assistance Mission for Iraq (UNAMI) on 14 August 2003, and *affirming* that the United Nations should play a leading role in assisting the Iraqi people and government in the formation of institutions for representative government,

Recognizing that international support for restoration of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* Member State contributions in this regard under resolution 1483 (2003) of 22 May 2003 and resolution 1511 (2003),

Recalling the report provided by the United States to the Security Council on 16 April 2004 on the efforts and progress made by the multinational force,

Recognizing the request conveyed in the letter of 5 June 2004 from the Prime Minister of the Interim Government of Iraq to the President of the Council, which is annexed to this resolution, to retain the presence of the multinational force,

...

Welcoming the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition, especially for upcoming elections, and to provide security for the United Nations presence in Iraq, as described in the letter of 5 June 2004 from the United States Secretary of State to the President of the Council, which is annexed to this resolution,

Noting the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations,

...

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

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

1. *Endorses* the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq...;

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

...

7. *Decides* that in implementing, as circumstances permit, their mandate to assist the Iraqi people and government, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall:

(a) play a leading role to:

(i) assist in the convening, during the month of July 2004, of a national conference to select a Consultative Council;

(ii) advise and support the Independent Electoral Commission of Iraq, as well as the Interim Government of Iraq and the Transitional National Assembly, on the process for holding elections;

(iii) promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq;

(b) and also:

(i) advise the Government of Iraq in the development of effective civil and social services;

(ii) contribute to the coordination and delivery of reconstruction, development, and humanitarian assistance;

(iii) promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq; and

(iv) advise and assist the Government of Iraq on initial planning for the eventual conduct of a comprehensive census;

...

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

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

...

15. *Requests* Member States and international and regional organizations to contribute assistance to the multinational force, including military forces, as agreed with the Government of Iraq, to help meet the needs of the Iraqi people for security and stability, humanitarian and reconstruction assistance, and to support the efforts of UNAMI;

...

30. *Requests* the Secretary-General to report to the Council within three months from the date of this resolution on UNAMI operations in Iraq, and on a quarterly basis thereafter on the progress made towards national elections and fulfilment of all UNAMI's responsibilities;

31. *Requests* that the United States, on behalf of the multinational force, report to the Council within three months from the date of this resolution on the efforts and progress of this force, and on a quarterly basis thereafter;

32. *Decides* to remain actively seized of the matter.”

36. On 18 June 2003 the Coalition Provisional Authority had issued Memorandum No. 3, which set out provisions on criminal detention and security internment by the Coalition Forces. A revised version of Memorandum No. 3 was issued on 27 June 2004. It provided as follows:

“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 no 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.

(6) Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30th June 2004 who is over the age of 18 should be retained in internment for longer than 18 months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members of the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internee may continue to be held in internment but in any case the application must be finalized not later than two months from the expiration of the initial 18 month internment period.

(7) Access to internees shall be granted to the Ombudsman. Access will only be denied the Ombudsman for reasons of imperative military necessity as an exceptional and temporary measure. The Ombudsman shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private and to record information regarding an internee.

(8) Access to internees shall be granted to official delegates of the ICRC. Access will only be denied the delegates for reasons of imperative military necessity as an exceptional and temporary measure. The ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private. They shall also be permitted to record information regarding an internee and may pass messages to and from the family of an internee subject to reasonable censorship by the facility authorities. ...”

5. The end of the occupation and subsequent developments

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

38. On 19 May 2006 the new Iraqi Constitution was adopted. It provided that any law which contradicted its provisions was deemed to be void. Article 15 of the Constitution

required, *inter alia*, that any deprivation of liberty must be based on a decision issued by a competent judicial authority and Article 37 provided that no-one should be kept in custody except according to a judicial decision.

39. The authorisation for the presence of the Multi-National Force in Iraq under United Nations Security Council Resolution 1546 was extended by Resolution 1637 of 8 November 2005 and Resolution 1723 of 28 November 2006 until 31 December 2006 and 31 December 2007 respectively. These resolutions also annexed an exchange of letters between the Prime Minister of Iraq and the United States Secretary of State, Condoleezza Rice, referring back to the original exchange of letters annexed to Resolution 1546.

6. Reports to the Security Council on the internment regime in Iraq

40. On 7 June 2005, as required by Resolution 1546, the Secretary General of the United Nations reported to the Security Council on the situation in Iraq (S/2005/373). Under the heading "Human Rights activities" he stated, *inter alia*:

"70. The volume of reports on human rights violations in Iraq justifies serious concern. Accounts of human rights violations continue to appear in the press, in private security reports and in reports by local human rights groups. Individual accounts provided to UNAMI and admissions by the authorities concerned provide additional indications about this situation. In many cases, the information about violations has been widely publicized. Effective monitoring of the human rights situation remains a challenge, particularly because the current security situation makes it difficult to obtain evidence and further investigate allegations. In most instances, however, the consistency of accounts points to clear patterns.

...

72. ... One of the major human rights challenges remains the detention of thousands of persons without due process. According to the Ministry of Justice, there were approximately 10,000 detainees at the beginning of April, 6,000 of whom were in the custody of the Multinational Force. Despite the release of some detainees, their number continues to grow. Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency."

... *[omitted reports detailing similar concerns over time]*

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. Relevant provisions of international humanitarian law

... *[omitted]*

B. Relevant provisions of the United Nations Charter 1945

... *[omitted]*

C. Relevant provisions of the Vienna Convention on the Law of Treaties 1969

... *[omitted]*

D. Relevant case-law of the International Court of Justice

... *[omitted]*

E. Relevant case-law of the European Court of Justice

... *[omitted]*

F. Relevant case-law of the United States Supreme Court

... *[omitted]*

G. Relevant materials of the International Law Commission

... *[omitted]*

H. The Copenhagen Process on “The Handling of Detainees in International Military Operations”

... *[omitted]*

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

59. The applicant complained that he was held in internment by United Kingdom armed forces in Iraq between 10 October 2004 and 30 December 2007, in breach of Article 5 § 1 of the Convention. He did not pursue before the Court his complaint under Article 5 § 4 of the Convention, concerning the lack of judicial review of the detention, since proceedings on this issue were still pending before the domestic courts at the time the application was lodged (see paragraphs 23-24 above).
60. The Government contended that the internment was attributable to the United Nations and not to the United Kingdom, and that the applicant was not, therefore, within United Kingdom jurisdiction under Article 1 of the Convention. Further and in the alternative they submitted that the internment was carried out pursuant to United Nations Security Council Resolution 1546, which created an obligation on the United Kingdom to detain the applicant which, pursuant to Article 103 of the United Nations Charter, overrode obligations under the Convention.

... [omitted discussion on admissibility]

B. The merits

1. Jurisdiction

63. The applicant submitted that he fell within the United Kingdom's jurisdiction under Article 1 of the Convention, which reads as follows:

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

The Government disagreed.

(a) The parties' arguments

...[omitted]

(b) The Court's assessment

74. Article 1 of the Convention reads as follows:

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

As provided by this Article, the engagement undertaken by a Contracting State is confined to “securing” (“*reconnaître*” in the French text) the listed rights and freedoms to persons within its own “jurisdiction” (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161; *Banković*, cited above, § 66). “Jurisdiction” under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give

rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004 VII).

75. The Court notes that, before the Divisional Court and the Court of Appeal in the first set of domestic proceedings brought by the applicant, the Government accepted that he fell within United Kingdom jurisdiction under Article 1 of the Convention during his detention in a British-run military prison in Basrah, South East Iraq. It was only before the House of Lords that the Government argued, for the first time, that the applicant did not fall within United Kingdom jurisdiction because his detention was attributable to the United Nations rather than to the United Kingdom. The majority of the House of Lords rejected the Government's argument and held that the internment was attributable to British forces (see paragraphs 16-18 above).
76. When examining whether the applicant's detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question. In performing this exercise, the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Charter and other international instruments. It must, nevertheless, examine whether there was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Saramati*, cited above, § 122). The principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law (*ibid.*). It relies for guidance in this exercise on the statement of the International Court of Justice in § 114 of its advisory opinion "*Legal consequences for States of the continued presence of South Africa in Namibia*" (see paragraph 49 above), indicating that a Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.
77. The Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. At the time of the invasion, there was no United Nations Security Council resolution providing for the allocation of roles in Iraq in the event that the existing regime was displaced. Major combat operations were declared to be complete by 1 May 2003 and the United States and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 42 above). As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States to the President of the United Nations Security Council (see paragraph 27 above), the United States and the United Kingdom, having displaced the previous regime, created the Coalition Provisional Authority "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States and the United Kingdom through the Coalition Provisional Authority was the provision of security in Iraq. The letter further stated that "The United States, the United Kingdom and Coalition partners,

working through the Coalition Provisional Authority, shall *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters”. The letter acknowledged that the United Nations had “a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority” and stated that the United States, the United Kingdom and Coalition partners were ready to work closely with representatives of the United Nations and its specialized agencies and would also welcome the support and contributions of Member States, international and regional organizations, and other entities, “under appropriate coordination arrangements with the Coalition Provisional Authority”. In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the Coalition Provisional Authority declared that it would “exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability...” (see paragraph 28 above).

78. The first Security Council resolution after the invasion was Resolution 1483, adopted on 22 May 2003 (see paragraph 29 above). In the preamble, the Security Council noted the letter of 8 May 2003 from the Permanent Representatives of the United States and the United Kingdom and recognised that the United States and the United Kingdom were Occupying Powers in Iraq, under unified command (the Coalition Provisional Authority), and that specific authorities, responsibilities, and obligations applied to them under international humanitarian law. The Security Council noted further that other States that were not Occupying Powers were working or might in the future work under the Coalition Provisional Authority, and welcomed the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources “under the Authority”. Acting under Chapter VII of the United Nations Charter, the Security Council called upon the Occupying Powers, through the Coalition Provisional Authority, “to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...”. The United Kingdom and United States were encouraged “to inform the Council at regular intervals of their efforts under this resolution”. The preamble to Resolution 1483 recognised that the United Nations was to “play a vital role in humanitarian relief, the reconstruction of Iraq and the restoration and establishment of national and local institutions for representative governance”. The Secretary-General was requested to appoint a Special Representative for Iraq, whose independent responsibilities were to include, *inter alia*, reporting regularly to the Security Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq and coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq. Resolution 1483 did not assign any security role to the United Nations. The Government does not contend that, at this stage in the invasion and occupation, the acts of its armed forces were in any way attributable to the United Nations.
79. In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council, again acting under Chapter VII, underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in

Resolution 1483, which would cease as soon as an internationally recognised, representative Iraqi government could be sworn in. In paragraphs 13 and 14, the Security Council authorised “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq” and urged Member States “to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13” (see paragraph 31 above). The United States, on behalf of the multinational force, was requested periodically to report on the efforts and progress of the force. The Security Council also resolved that the United Nations, acting through the Secretary General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.

80. The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multi-National Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of Member States to contribute personnel. The unified command structure over the force, established from the start of the invasion by the United States and United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States and the United Kingdom, through the Coalition Provisional Authority which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States was requested to report periodically to the Security Council about the activities of the Multi National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.
81. The final resolution of relevance to the present issue was no. 1546 (see paragraph 35 above). It was adopted on 8 June 2004, twenty days before the transfer of power from the Coalition Provisional Authority to Interim Government and some four months before the applicant was taken into detention. Annexed to the resolution was a letter from the Prime Minister of the Interim Government of Iraq, seeking from the Security Council a new resolution on the Multi-National Force mandate. There was also annexed a letter from the United States Secretary of State to the President of the United Nations Security Council, confirming that “the Multi-National Force [under unified command] is prepared to continue to contribute to the maintenance of security in Iraq” and informing the President of the Security Council of the goals of the Multi-National Force and the steps which its Commander intended to take to achieve those goals. It does not appear from the terms of this letter that the Secretary of State considered that the United Nations controlled the deployment or conduct of the Multi-National Force. In Resolution 1546 the Security Council, acting under Chapter VII, reaffirmed the authorisation for the Multi-National Force established under Resolution 1511. There is no indication in Resolution 1546 that

the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously.

82. The Security Council in Resolution 1546 also decided that, in implementing their mandates in Iraq, the Special Representative of the Secretary General and the United Nations Assistance Mission for Iraq (UNAMI) should play leading roles in assisting in the establishment of democratic institutions, economic development and humanitarian assistance. The Court notes that the Secretary General and UNAMI, both clearly organs of the United Nations, in their quarterly and bi-monthly reports to the Security Council for the period during which the applicant was detained, repeatedly protested about the extent to which security internment was being used by the Multi-National Force (see paragraphs 40 and 41 above). It is difficult to conceive that the applicant's detention was attributable to the United Nations and not to the United Kingdom when United Nations organs, operating under the mandate of Resolution 1546, did not appear to approve of the practice of indefinite internment without trial and, in the case of UNAMI, entered into correspondence with the United States Embassy in an attempt to persuade the Multi-National Force under American command to modify the internment procedure.
83. In the light of the foregoing, the Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in the decision in *Behrami and Saramati* (cited above) the Court concluded, *inter alia*, that Mr Saramati's detention was attributable to the United Nations and not to any of the respondent States. It is to be recalled that the international security presence in Kosovo was established by United Nations Security Council Resolution 1244 (10 June 1999) in which, "determined to resolve the grave humanitarian situation in Kosovo", the Security Council "decide[d] on the deployment in Kosovo, under United Nations auspices, of international civil and security presences". The Security Council therefore authorised "Member States and relevant international organizations to establish the international security presence in Kosovo" and directed that there should be "substantial North Atlantic Treaty Organization participation" in the force, which "must be deployed under unified command and control". In addition, United Nations Security Council Resolution 1244 authorised the Secretary General of the United Nations to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. The United Nations, through a Special Representative appointed by the Secretary General in consultation with the Security Council, was to control the implementation of the international civil presence and coordinate closely with the international security presence (see *Behrami and Saramati*, cited above, §§ 3, 4 and 41). On 12 June 1999, two days after the Resolution was adopted, the first elements of the NATO-led Kosovo Force (KFOR) entered Kosovo.
84. It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission, in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an

organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.

85. The internment took place within a detention facility in Basrah City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout (see paragraph 10 above; see also *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 136 and *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, § 88, ECHR 2010 ...; see also the judgment of the United States Supreme Court in *Munaf v. Geren*, paragraph 54 above). The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multi-National Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.

86. In conclusion, the Court agrees with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

2. *Alleged breach of Article 5 § 1 of the Convention*

(a) **The parties' arguments**

... [omitted]

(b) **The Court's assessment**

97. Article 5 § 1 of the Convention provides:

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

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

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

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

98. The applicant was detained in a British military facility for over three years, between 10 October 2004 and 30 December 2007. His continuing internment was authorised and reviewed, initially by British senior military personnel and subsequently also by representatives of the Iraqi and United Kingdom Governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. The internment was authorised “for imperative reasons of security”. At no point during the internment was it intended to bring criminal charges against the applicant (see paragraphs 11-13 above).
99. The Court emphasises at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to “everyone”. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State “in time of war or other public emergency threatening the life of the nation” to take measures derogating from its obligations under Article 5 “to the extent strictly required by the exigencies of the situation” (see, *inter alia*, *Ireland v. the United Kingdom*, 18 January 1978, § 194, Series A no. 25 and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162 and 163, ECHR 2009 ...).
100. It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time (see *Lawless v. Ireland* (no. 3), 1 July 1961, §§ 13 and 14, Series A no. 3; *Ireland v. the United Kingdom*, cited above, § 196; *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; *Jėčius v. Lithuania*, no. 34578/97, §§ 47-52, ECHR 2000-IX). The Government do not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15. Instead, they argue that there was no violation of Article 5 § 1 because the United Kingdom’s duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. They contend that, as a result of the operation of Article 103 of the United Nations Charter (see paragraph 46 above), the obligations under the Security Council Resolution prevailed over those under the Convention.

101. Article 103 of the United Nations Charter provides that the obligations of the Members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.
102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.
103. In this respect, the Court notes that Resolution 1546 was preceded by letters to the President of the Security Council from the Prime Minister of the Interim Government of Iraq and the United States Secretary of State (see paragraph 34 above). In his letter, the Iraqi Prime Minister looked forward to the passing back of full sovereignty to the Iraqi authorities. He requested the Security Council, however, to make a new resolution authorising the Multi-National Force to remain on Iraqi territory and to contribute to maintaining security there, "including through the tasks and arrangements" set out in the accompanying letter from the United States Secretary of State. In his letter, the United States Secretary of State recognised the request of the Government of Iraq for the continued presence of the Multi-National Force in Iraq and confirmed that the Multi-National Force under unified command was prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism. He added that, under the agreed arrangement, the Multi-National Force stood:

"ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat

operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security ...".

104. These letters were annexed to United Nations Security Council Resolution 1546 (see paragraph 35 above). The Preamble to the Resolution looked forward to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign Iraqi Government; recognised the request of the Iraqi Prime Minister in the annexed letter to retain the presence of the Multi-National Force; welcomed the willingness of the Multi-National Force to continue efforts to contribute to the maintenance of security and stability in Iraq and also noted "the commitment of all forces ... to act in accordance with international law, including obligations under international humanitarian law...". In paragraph 9 of the Resolution the Security Council noted that the Multi National Force remained in Iraq at the request of the incoming Government and reaffirmed the authorisation for the Multi-National Force first established under Resolution 1511, "having regard to letters annexed to this resolution". In paragraph 10 it decided that the Multi-National Force:

"shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism ..."

105. The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution. In paragraph 10 the Security Council decides that the Multi-National Force shall have authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed", which *inter alia* set out the Multi-National Force's tasks. Internment is listed in Secretary of State Powell's letter, as an example of the "broad range of tasks" which the Multi-National Force stood ready to undertake. In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the Convention forms part of international law, as the Court has frequently observed (see, for example, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001 XI). In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.

106. Furthermore, it is difficult to reconcile the argument that Resolution 1546 placed an obligation on Member States to use internment with the objections repeatedly made by the United Nations Secretary General and the United Nations Assistance Mission for Iraq to the use of internment by the Multi-National Force. Under paragraph 7 of

Resolution 1546 both the Secretary General, through his Special Representative, and the United Nations Assistance Mission for Iraq were specifically mandated by the Security Council to “promote the protection of human rights ... in Iraq”. In his quarterly reports throughout the period of the applicant’s internment the Secretary General repeatedly described the extent to which security internment was being used by the Multi-National Force as a pressing human rights concern. The United Nations Assistance Mission for Iraq reported on the human rights situation every few months during the same period. It also repeatedly expressed concern at the large numbers being held in indefinite internment without judicial oversight (see paragraphs 40-41 above).

107. The Court has considered whether, in the absence of express provision in Resolution 1546, there was any other legal basis for the applicant’s detention which could operate to disapply the requirements of Article 5 § 1. The Government have argued that the effect of the authorisations in paragraphs 9 and 10 of Resolution 1546 was that the Multi-National Force continued to exercise the “specific authorities, responsibilities and obligations” that had vested in the United States and the United Kingdom as Occupying Powers under international humanitarian law and that these “obligations” included the obligation to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence. Some support for this submission can be derived from the findings of the domestic courts (see, for example, Lord Bingham at § 32 of the House of Lords judgment: paragraph 20 above). The Court notes in this respect that paragraph 2 of the Resolution clearly stated that the occupation was to end by 30 June 2004. However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the Coalition Provisional Authority to the Interim Government of Iraq, the position under international humanitarian law which had previously applied, the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial. Article 43 of the Hague Regulations requires an Occupying Power to take “all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country” (see paragraph 42 above). While the International Court of Justice in its judgment *Armed Activities on the Territory of the Congo* interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law, including the provisions of the International Covenant for the Protection of Civil and Political Rights, to which it was a signatory (see paragraph 50 above). In the Court’s view it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see paragraph 43 above).

108. A further legal basis might be provided by the agreement, set out in the letters annexed to Resolution 1546, between the Iraqi Government and the United States Government, on behalf of the other States contributing troops to the Multi-National Force including the United Kingdom, that the Multi-National Force would continue to carry out

internment in Iraq where the Multi-National Force considered this necessary for imperative reasons of security (see paragraph 34 above). However, such an agreement could not override the binding obligations under the Convention. In this respect, the Court recalls its case-law to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States subsequent to the entry into force of the Convention (see, for example, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, §§ 126-128, ECHR 2010 ...).

109. In conclusion, therefore, the Court considers that United Nations Security Council Resolution 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In these circumstances, in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention.

110. In these circumstances, where the provisions of Article 5 § 1 were not displaced and none of the grounds for detention set out in sub paragraphs (a) to (f) applied, the Court finds that the applicant's detention constituted a violation of Article 5 § 1.

...[omitted details of award and costs]

PARTIALLY DISSENTING OPINION OF JUDGE POALELUNGI

I agree with the majority that the detention was attributable to the United Kingdom and that the applicant fell within the United Kingdom's jurisdiction. However, I do not agree that there has been a violation of Article 5 § 1 in the present case.

Article 103 of the United Nations Charter provides that the Member States' obligations under the Charter must prevail over any other obligations they may have under international law. This provision reflects, and is essential for, the United Nations' primary role within the world order of maintaining international peace and security.

On 8 June 2004, in paragraph 10 of Resolution 1546, the Security Council decided that the multinational force should "have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution ...". One of the letters annexed was from United States Secretary of State Colin Powell, confirming that the Multi-National Force stood ready to continue to undertake a broad range of tasks, including internment where necessary for imperative reasons of security.

It is true that paragraph 10 of Resolution 1546 uses the language of authorisation rather than obligation. However, as is explained in the extract from Lord Bingham's opinion set out in paragraph 20 of the present judgment, the Security Council cannot use the language of obligation in respect of international military or security operations, since the United Nations has no standing forces at its disposal and has concluded no agreements under Article 43 of the Charter which would entitle it to call on Member States to provide them. The Security Council can, therefore, only authorise States to use military force. As Lord Bingham also concluded, the primacy clause in Article 103 of the Charter must also apply where a Member State chooses to take up such an authorisation and contribute to an international peace-keeping operation under a Security Council mandate. To conclude otherwise would seriously undermine the effectiveness of the United Nations' role in securing world peace and would also run contrary to State practice. Indeed, I do not understand the majority of the Grand Chamber in the present case to disagree with this analysis.

The point at which the majority part ways with the domestic courts is in finding that the language used in Resolution 1546 did not indicate sufficiently clearly that the Security Council authorised Member States to use internment. I regret that I find the judgment of the House of Lords more persuasive on this issue. I consider that it is unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a military force might be required to use to contribute to peace and security under

its mandate. Internment is a frequently used measure in conflict situations, well established under international humanitarian law, and was, moreover, expressly referred to in the letter of Colin Powell annexed to Resolution 1546. I consider that it is clear from the text of the Resolution, and from the context where the Multi-National Force was already present and using internment in Iraq, that Member States were authorised to continue interning individuals where necessary.

It follows that I also agree with the House of Lords that the United Kingdom's obligation to intern the applicant, pursuant to the Security Council authorisation, took precedence over its obligations under Article 5 § 1 of the Convention.