

GRAND CHAMBER

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

*(Application no. 55721/07)*

JUDGMENT

STRASBOURG

7 July 2011

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

*...[omitted details of procedure]*

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

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

*1. Background: United Nations Security Council Resolution 1441*

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

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

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

## 3. Legal and political developments in May 2003

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

... [omitted text of letter]

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

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

### Section 1

#### The Coalition Provisional Authority

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

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

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

## Section 2

### The Applicable Law

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

13. The Coalition Provisional Authority administration was divided into regional areas. CPA South was placed under United Kingdom responsibility and control, with a United Kingdom Regional Coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. United Kingdom troops were deployed in the same area. The United Kingdom was represented at Coalition Provisional Authority headquarters through the office of the United Kingdom Special Representative. According to the Government, although the United Kingdom Special Representative and his office sought to influence Coalition Provisional Authority policy and decisions, United Kingdom personnel had no formal decision-making power within the Authority. All the Coalition Provisional Authority's administrative and legislative decisions were taken by Ambassador Bremer.

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

*“The Security Council,*

*Recalling* all its previous relevant resolutions,

*Reaffirming* the sovereignty and territorial integrity of Iraq,

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

*Stressing* the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon

as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,

*Encouraging* efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender, and, in this connection, recalls resolution 1325 (2000) of 31 October 2000,

...

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

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

...

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

(g) promoting the protection of human rights;

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

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

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

...

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

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

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

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

#### *5. Developments between July 2003 and June 2004*

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

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

*“The Security Council*

...

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

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

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

...

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

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

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

...

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

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

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

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

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

...

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

conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

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

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

...

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

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

17. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the “Transitional Administrative Law”). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government (“the Interim Government”) and the dissolution of the Coalition Provisional Authority.

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

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

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

...

8. *Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter referred to



as 'Iraqi security forces'), operating under the authority of the Interim Government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq;

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

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

#### *6. The transfer of authority to the Interim Government*

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

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

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

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

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

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

“The context in which operations have been conducted in Iraq has been exceptionally complex. It is not for this report to comment on the jus ad bellum aspects of the operation, nor of the public’s opinions of the invasion. It is, however, important to note that the Alliance’s post-invasion plans concentrated more on the relief of a humanitarian disaster (which did not, in the event, occur on anything like the scale that had been anticipated), and less on the criminal activity and subsequent insurgency that actually took place. One consequence of that was that we had insufficient troops in theatre to deal effectively with the situation in which we found ourselves. Peace support operations require significantly larger numbers of troops to impose law and order than are required for prosecuting a war: ours were very thinly spread on the ground. In his investigation (in April 2005) of the Breadbasket incident [alleged abuse of Iraqis detained on suspicion of looting humanitarian aid stores], Brigadier Carter described conditions in Iraq thus:

‘... May 2003, some 4 weeks or so after British Forces had started to begin the transition from offensive operations to stabilisation. The situation was fluid. Battlegroups had been given geographic areas of responsibility based generally around their initial tactical objectives. Combat operations had officially ended, and rules of engagement had changed to reflect this, but there was a rising trend of shooting incidents. Although these were principally between Iraqis, seeking to settle old scores or involved in criminal activity, there were early indications that the threat to British soldiers was developing ... The structure of the British Forces was changing. Many of the heavier capabilities that had been required for the invasion were now being sent home. Some Force elements were required for operations elsewhere, and there was pressure from the UK to downsize quickly to more sustainable numbers ... Local attitudes were also changing. Initially ecstatic with happiness, the formerly downtrodden Shia population in and around Basra had become suspicious, and by the middle of May people were frustrated. Aspirations and expectations were not being met. There was no Iraqi administration or governance. Fuel and potable water were in short supply, electricity was intermittent, and the hospitals were full of wounded from the combat operations phase. Bridges and key routes had been destroyed by Coalition bombing. Law and order had completely collapsed. The Iraqi Police Service had melted away; the few security guards who remained were old and incapable; and the Iraqi Armed Forces had been captured, disbanded or deserted. Criminals had been turned out onto the streets and the prisons had been stripped. The judiciary were in hiding. Every government facility had been raided and all loose items had been removed. Insecure buildings had been occupied by squatters. Crime was endemic and in parts of Basra a state of virtual anarchy prevailed. Hijackings, child kidnappings, revenge killings,

car theft and burglary were rife. In a very short space of time wealth was being comprehensively redistributed.’

In this environment, the British Army was the sole agent of law and order within its area of operations. When the Association of Chief Police Officers’ lead for international affairs, Mr Paul Kernaghan, visited Iraq in May 2003, he said that he would not recommend the deployment of civilian police officers to the theatre of operations due to the poor security situation. The last time the Army had exercised the powers of an Army of Occupation was in 1945 – and it had spent many months preparing for that role; in May 2003, the same soldiers who had just fought a high-intensity, conventional war were expected to convert, almost overnight, into the only people capable of providing the agencies of government and humanitarian relief for the people of Southern Iraq. Battlegroups (comprising a Lieutenant Colonel and about 500 soldiers) were allocated areas of responsibilities comprising hundreds of square miles; companies (a Major with about 100 men under command) were given whole towns to run. The British invasion plans had wisely limited damaging as much of the physical infrastructure as possible; but with only military personnel available to run that infrastructure, and very limited local staff support, the task placed huge strains on the Army.

One of the effects of this lack of civil infrastructure was the conundrum British soldiers faced when dealing with routine crime. Our experience in Northern Ireland, and in peace support operations around the world, has inculcated the clear principle of police primacy when dealing with criminals in operational environments. Soldiers accept that they will encounter crime, and that they will occasionally be required to arrest those criminals; but (despite some experience of this syndrome in Kosovo in 1999) our doctrine and practice had not prepared us for dealing with those criminals when there was no civil police force, no judicial system to deal with offenders, and no prisons to detain them in. Even when a nascent Iraqi police force was re-established in 2003, troops on the ground had little confidence in its ability to deal fairly or reasonably with any criminals handed over to it. In hindsight, we now know that some soldiers acted outside the law in the way they dealt with local criminals. However diligent they were, commanders were unable to be everywhere, and so were physically unable to supervise their troops to the extent that they should; as a result, when those instances did occur, they were less likely to be spotted and prevented.”

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

### **C. The Rules of Engagement**

... [omitted]

### **D. Investigations into Iraqi civilian deaths involving British soldiers**

... [omitted]

### **E. The deaths of the applicants' relatives**

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

#### *1. The first applicant*

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

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

36. According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire from a number of different points in Al-Majidiyah. As the patrol got deeper into the village they came upon two Iraqi men in the street. One was about five metres from Sergeant A, who was leading the patrol. Sergeant A saw that he was armed and pointing the gun in his direction. In the dark, it was impossible to tell the position of the second man. Believing that his life and

those of the other soldiers in the patrol were at immediate risk, Sergeant A opened fire on the two men without giving any verbal warning.

... *[details of investigation omitted]*

## *2. The second applicant*

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

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

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

... *[details of investigation omitted]*

## *3. The third applicant*

43. The third applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the

Institute of Education in the Al-Maaqal area of Basrah, where the third applicant worked as a night porter and lived with his wife and family.

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

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

... *[details of investigation omitted]*

#### *4. The fourth applicant*

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

48. The fourth applicant was not present when his brother was shot, but he claims that the incident was witnessed by his neighbours. In his witness statement he stated that his understanding was that his brother was returning home from work at about 8.30 p.m. on the evening in question. He was driving a minibus along a street called Souq Hitteen, near where he and the fourth applicant lived. For no apparent reason, according to the applicant's statement, the minibus "came under a barrage of bullets", as a result of which Waleed was mortally wounded in the chest and stomach.

49. Lance Corporal S was a member of a patrol carrying out a check around the perimeter of a Coalition military base (Fort Apache), where three Royal Military Police officers had been killed by gunfire from a vehicle the previous day. According to the British soldier's account of the incident, Lance Corporal S became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at a slow speed with its headlights dipped. When the vehicle was signalled to stop, it appeared to be trying to evade the soldiers so Lance Corporal S pointed his weapon at the driver and ordered him to stop. The vehicle then stopped and Lance Corporal S approached the driver's door and greeted the driver (the fourth

applicant's brother). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When Lance Corporal S tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for Lance Corporal S's weapon. Lance Corporal S had to use force to pull himself free. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. Lance Corporal S fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned and again shouted into the rear of the vehicle. He appeared to be reaching for a weapon. Lance Corporal S believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about five aimed shots. As the vehicle sped off, Lance Corporal S fired another two shots at the rear of the vehicle. After a short interval, the vehicle screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died later that day or the following day.

... *[details of investigation omitted]*

#### 5. *The fifth applicant*

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

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

... *[details of investigation omitted]*

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

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

The Report continued, under the heading “Delay”;

“The amount of time taken to resolve some of the cases with which this report is concerned has been unacceptable. ... The court martial in connection with the death of Ahmed Jabber Kareem did not convene until September 2005, 28 months after he died; by that time, three of the seven soldiers who had been accused of his murder had left the Army, and a further two were absent without leave.

In most cases, it is inappropriate for the Army to take administrative action against any officer or soldier until the disciplinary process has been completed, because of the risk of prejudicing the trial. When that disciplinary process takes as long as it has taken in most of these cases, then the impact of any subsequent administrative sanctions is significantly reduced – indeed, such sanctions are likely to be counterproductive. Moreover, the longer the disciplinary process takes, the less likely it is that the chain of command will take proactive measures to rectify the matters that contributed to the commission of the crimes in the first place.”

*... [details of fifth applicant’s civil proceedings omitted]*

#### *6. The sixth applicant*

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

64. According to the sixth applicant, on the night of 13/14 September 2003 his son had been working as a receptionist at the Ibn Al-Haitham Hotel in Basrah. Early in the morning of the 14 September, the applicant went to the hotel to pick his son up from work. On his arrival he noticed that a British unit had surrounded the hotel. The applicant’s son and six other



hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. The applicant expressed his concern to the lieutenant in charge of the operation, who reassured him that it was a routine investigation that would be over in a couple of hours. On the third day after his son had been detained, the sixth applicant was visited by a Royal Military Police unit. He was told that his son had been killed in custody at a British military base in Basrah. He was asked to identify the corpse. The applicant's son's body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.

65. One of the other hotel employees who were arrested on 14 September 2003 stated in a witness statement prepared for the United Kingdom domestic court proceedings that, once the prisoners had arrived at the base, the Iraqi detainees were hooded, forced to maintain stress positions, denied food and water and kicked and beaten. During the detention, Baha Mousa was taken into another room, where he could be heard screaming and moaning.

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

*... [omitted details of investigation]*

## **F. The domestic proceedings under the Human Rights Act**

*... [omitted]*

## **II. RELEVANT INTERNATIONAL LAW MATERIALS**

### **A. International humanitarian law on belligerent occupation**

*... [omitted]*

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

*... [omitted]*

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

*... [omitted]*

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

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

96. The Government accepted that the sixth applicant's son had been within United Kingdom jurisdiction but denied that the United Kingdom had jurisdiction over any of the other deceased. They contended that, since the second and third applicants' relatives had been killed after the adoption of United Nations Security Council Resolution 1511 (see paragraph 16 above), the acts which led to their deaths were attributable to the United Nations and not to the United Kingdom. In addition, the Government contended that the fifth applicant's case should be declared inadmissible for non-exhaustion of domestic remedies and that the fifth and sixth applicants no longer had victim status.

## A. Admissibility

... [omitted]

## B. The merits

### 1. Jurisdiction

#### (a) The parties' arguments

... [omitted]

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

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

130. Article 1 of the Convention reads as follows:

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

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

##### (α) The territorial principle

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

meaning of Article 1 only in exceptional cases (*Banković*, cited above, § 67).

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

(β) State agent authority and control

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

134. First, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others (*Banković*, cited above, § 73; see also *X v. Federal Republic of Germany*, no. 1611/62, Commission decision of 25 September 1965, *Yearbook of the European Convention on Human Rights*, vol. 8, pp. 158 and 169; *X v. the United Kingdom*, no. 7547/76, Commission decision of 15 December 1977; *WM v. Denmark*, no. 17392/90, Commission decision of 14 October 1993).

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

*X and Y v. Switzerland*, nos. 7289/75 and 7349/76, Commission's admissibility decision of 14 July 1977, DR 9, p. 57).

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

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

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the

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

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

140. The "effective control" principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63) which the States decided, when drafting the Convention, to apply to territories overseas for whose international relations they were responsible. Article 56 § 1 provides a mechanism whereby any State may decide to extend the application of the Convention, "with due regard ... to local requirements," to all or any of the territories for whose international relations it is responsible. The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1. The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible (see *Loizidou* (preliminary objections), cited above, §§ 86-89 and *Quark Fishing Ltd v. the United Kingdom* (dec.), no. 15305/06, ECHR 2006-...).

(δ) The Convention legal space (“*espace juridique*”)

141. The Convention is a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), cited above, § 75). It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering*, cited above, § 86).

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

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

143. In determining whether the United Kingdom had jurisdiction over any of the applicants’ relatives when they died, the Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba’ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 89 above).

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

provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters”.

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

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

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

148. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority remained in power, although it was required to consult with the Governing Council (see paragraph 15 above). In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483. It also authorised “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq” (see paragraph 16 above). United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed “the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq” (see paragraph 18 above). In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist (see paragraph 19 above).

*(iii) Conclusion as regards jurisdiction*

149. It can be seen, therefore, that following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the



exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

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

*2. Alleged breach of the investigative duty under Article 2*

*... [omitted]*

**CONCURRING OPINION OF JUDGE ROZAKIS**

When citing the general principles relevant to a State party's jurisdiction under Article 1 of the Convention (see paragraphs 130 et seq. of the Grand Chamber's judgment), the Court reiterates its established case-law that apart from the territorial aspect determining the jurisdictional competence of a State party to the Convention, there are "exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries" (see paragraph 132). It then proceeds to discuss such exceptional circumstances. In paragraphs 133 to 137, under the title "State agent authority and control", it refers to situations where State agents operating extraterritorially, and exercising control and authority over individuals, create a jurisdictional link with their State and its obligations

under the Convention, making that State responsible for the acts or omissions of its agents, in cases where they affect the rights or freedoms of individuals protected by the Convention. Characteristic examples of such exceptional circumstances of extraterritorial jurisdiction are mentioned in the judgment (see paragraphs 134 to 136), and concern the acts of diplomatic and consular agents, the exercise of authority and control over foreign territory by individuals which is allowed by a third State through its consent, invitation or acquiescence, and the use of force by State agents operating outside its territory.

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

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

## CONCURRING OPINION OF JUDGE BONELLO

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

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

issue legislation”: “The CPA shall exercise powers of government temporarily”.<sup>1</sup>

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

### **Extra-territorial jurisdiction or Functional jurisdiction?**

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

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

6. The late Lord Rodger in the House of Lords had my full sympathy when he lamented that, in its application of extra-territorial jurisdiction “the judgments and decisions of the European Court do not speak with one voice”. The differences, he rightly noted, are not merely ones of emphasis. Some “appear much more serious”.<sup>2</sup>

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

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<sup>1</sup> Paragraph 12 of the Grand Chamber’s judgment.

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

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

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

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

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

12. Jurisdiction means no less and no more than “authority over” and “control of”. In relation to Convention obligations, jurisdiction is neither territorial nor extra-territorial: it ought to be functional - in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction.

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

14. If the perpetrators of an alleged human rights violation are within the authority and control of one of the Contracting Parties, it is to me totally consequential that their actions by virtue of that State’s authority, engage the jurisdiction of the Contracting Party. I resist any helpful schizophrenia by which a nervous sniper is within the jurisdiction, his act of shooting is within the jurisdiction, but then the victims of that nervous sniper happily

choke in blood outside it. Any hiatus between what logical superglue has inexorably bonded appears defiantly meretricious, one of those infelicitous legal fictions a court of human rights can well do without.

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

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

17. The failure to espouse an obvious functional test, based exclusively on the programmatic agenda of the Convention, has, in the past, led to the adoption of a handful of sub-tests, some of which may have served defilers of Convention values far better than they have the Convention itself. Some of these tests have empowered the abusers and short-changed their victims. For me the primary questions to be answered boil down to these: when a State ratifies the Convention, does it undertake to promote human rights wherever it can, or does it undertake to promote human rights inside its own confines and to breach them everywhere else? Did the Contracting Party ratify the Convention with the deliberate intent of discriminating between the sanctity of human rights within its own territory and their paltry insignificance everywhere else?

18. I am unwilling to endorse *à la carte* respect for human rights. I think poorly of an esteem for human rights that turns casual and approximate depending on geographical coordinates. Any State that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both

mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.

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

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

### **Exceptions?**

21. I consider the doctrine of functional jurisdiction to be so linear and compelling that I would be unwilling to acquiesce to any exceptions, even more so in the realm of the near-absolute rights to life and to freedom from torture and degrading or inhuman treatment or punishment. Without ever reneging on the principle of the inherent jurisdiction of the occupying power that usually flows from military conquest, at most the Court could consider very limited exceptions to the way in which Article 2 and Article 3 are applied in extreme cases of clear and present threats to national security that would otherwise significantly endanger the war effort. I would not, personally, subscribe to any exceptions at all.

### **Conclusion**

22. Applying the functional test to the specifics of these cases, I arrive at the manifest and inescapable conclusion that all the facts and all the victims of the alleged killings said to have been committed by United Kingdom servicemen fall squarely within the jurisdiction of the United Kingdom, which had, in Basrah and its surroundings, an obligation to ensure the observance of Articles 2 and 3 of the Convention. It is uncontested that the servicemen who allegedly committed the acts that led to the deaths of the victims were under United Kingdom authority and control; that it was

within the United Kingdom's authority and control whether to investigate those deaths or not; that it was within the United Kingdom's authority and control whether to punish any human rights violations, if established; and that it was within the United Kingdom's authority and control whether to compensate the victims of those alleged violations or their heirs. Concluding that the United Kingdom had *all this* within its full authority and control, but still had no jurisdiction, would for me amount to a finding as consequential as a good fairy tale and as persuasive as a bad one.

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

### **Presumption of jurisdiction**

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

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

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

the perpetrators of those atrocities, but with the other, disowning any authority and control over atrocities committed by them and over their victims.

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

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

#### **Futility of the case-law**

29. The undeniable fact is that this Court has never, before today, had to deal with any case in which the factual profiles were in any way similar to those of the present applications. This Court has, so far, had several occasions to determine complaints which raised issues of extra-territorial jurisdiction, but all of a markedly different nature. Endeavouring to export doctrines of jurisdiction hammered out in a case of a solitary air-strike over a radio station abroad (*Banković*) to allegations of atrocities committed by the forces of an occupying power, which has assumed and kept armed control of a foreign territory for well over three years, is anything but consequent. I find the jurisdictional guidelines established by the Court to regulate the capture by France of a Cambodian drug-running ship on the high seas, for the specific purpose of intercepting her cargo and bringing the crew to justice (*Medvedyev*), to be quite distracting and time-wasting when the issue relates to a large territory outside the United Kingdom, conquered and held for over three years by the force of arms of a mighty foreign military set-up, recognised officially by international law as an “occupying power”, and which had established itself indefinitely there.

30. In my view, this relentless search for eminently tangential case-law is as fruitful and fulfilling as trying to solve one crossword puzzle with the clues of another. The Court could, in my view, have started the exercise by



accepting that this was judicial *terra incognita*, and could have worked out an organic doctrine of extra-territorial jurisdiction, untrammelled by the irrelevant and indifferent to the obfuscating.

### **Indivisibility of Human Rights**

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

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

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

### **A vacuum of jurisdiction?**

34. In spite of the fact that, as a leading partner in the Coalition Provisional Authority, the United Kingdom Government were “vested with all executive, legislative and judicial authority”<sup>3</sup> over that part of vanquished Iraq assigned to them, the United Kingdom went a long and eloquent way in its attempt to establish that it did not exercise jurisdiction over the area assigned to it. It just stopped short of sharing with the Court who did. Who was the mysterious, faceless rival which, instead of it, exercised executive, legislative and judicial authority for three years and more over the area delegated to the United Kingdom? There unquestionably

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<sup>3</sup> See paragraph 12 of the Grand Chamber’s judgment.

existed a highly volatile situation on the ground, pockets of violent insurgency and a pervasive, sullen resistance to the military presence.

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

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

### **Human rights imperialism**

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

38. Personally, I would have respected better these virginal blushes of some statesmen had they worn them the other way round. Being bountiful with military imperialism but bashful of the stigma of human rights imperialism, sounds to me like not resisting sufficiently the urge to frequent the lower neighbourhoods of political inconstancy. For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists.

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