IN THE GRAND CHAMBER OF THE
EUROPEAN COURT OF HUMAN RIGHTS

Application Number 27021/08

HILAL ABDUL-RAZZAQ ALI AL-JEDDA

Applicant

-v-

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Respondent

APPLICANT'S FINAL SUBMISSIONS

INTRODUCTION

1. These submissions set out the Applicant's case on the admissibility and merits of his complaint. They also include a summary of his claim under Article 41 of the Convention. They are structured by reference to the Court's questions as set out in the Annex sent to the parties on 3 February 2010. In summary, and by reference to those questions, it is the Applicant's case that:

    i. His internment by UK forces in Iraq was attributable to the UK, not the UN;

    ii. He was at all material times within jurisdiction of the UK within the meaning of Article 1 of the Convention, in accordance with the admissibility decision in *Al-Saadoon & Mufdhi v United Kingdom* (App No 61498/08, 30 June 2009);

    iii. UNSCR 1456 **[7]** did not impose an obligation on the UK to intern the Applicant, but merely conferred a power to do so. That power fell to be exercised compatibly with Article 5: the requirements of that Article were not qualified or displaced by UNSCR 1456 or by any other provision of international law;

    iv. Accordingly, there was a violation of Article 5(1) by the UK in this case.

2. The Applicant makes one further observation at the outset of his submissions. Since the decision of the House of Lords in the Applicant's case, the ECJ has given its decision in *Kadi* **[33]**, in which it took a different view from the House of Lords as to the hierarchy between obligations under the UN Charter and those which arise as a matter of fundamental human rights. The Supreme Court[1] very recently gave judgment in a case which again raised the question of the hierarchy of the UK's international obligations under Resolutions of the UNSC and under the Convention. The appeal was decided against the Government on other grounds, but it is pertinent to note the comments of Lord Hope, made in recognition of the significance of the decision in *Kadi:*

> *"I do not think that it is open to this court to predict how the reasoning of the House of Lords in Al- Jedda … would be viewed in Strasbourg. For the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail. The fact that the rights that G seeks to invoke in this case are now part of domestic law does not affect that conclusion. As Lord Bingham memorably pointed out in R (Ullah) v Special Adjudicator [2004] 2 AC 323, para 20, the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. It must be for the Strasbourg court to provide the authoritative guidance that is needed so that all the contracting states can adopt a uniform position about the extent to which, if at all, the Convention rights or any of them can be held to prevail over their obligations under the UN Charter."* (*Ahmed v HM Treasury* [2010] 2 WLR 378, §74, emphasis added; see also, §250) **[37]**

[1] Which replaced the Judicial Committee of the House of Lords with effect from 1 October 2009.

QUESTION 1: ATTRIBUTION

Preliminary observations

3. Until the Applicant's appeal in the House of Lords, the UK Government had never apparently contemplated, even less argued (in this or any other case), that the detention of persons held in the custody of UK forces in Iraq was attributable to any entity other than the UK itself. In November 2004 the Secretary of State for Defence was asked in Parliament whether Iraqi civilians apprehended by British service personnel have been treated in a manner consistent with the *UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* **[8]**. He responded:[2]

> *"The document … provides guidance to the armed forces of member states who are engaged in UN operations. We are confident that the procedures we have adopted would be effectively consistent with it, though it does not apply to UK forces in Iraq which are operating under Security Council UNSCR 1546 and are not engaged on UN Operations. Persons detained by UK forces are treated in accordance with the Geneva Conventions and other relevant international conventions, which include guidance on basic prisoner treatment."* (emphasis added)

4. Five months after the adoption of UNSCR 1546 and a year after the adoption of UNSCR 1511 **[6]**, the UK Government had therefore asserted:

   i. That there was a distinction, as a matter of law, between a State's armed forces which are "*operating under*" (or 'authorised by') a UNSCR and those which are "*engaged on UN Operations*". In the former situation, it was the State's own international obligations which were engaged, under the Geneva Conventions and other relevant international conventions. In the latter, the forces were obliged to comply with the standards imposed directly by the UN (as troops acting under its command).

   ii. The situation in Iraq, post-occupation, post-UNSCRs 1511 and 1546, was properly characterised as the former category: operating under a UNSCR, but not conducting UN operations.

5. The Government does not contend that there was any material change in the legal status of the UK forces in Iraq subsequent to the date of this statement.[3] Its change of position is derived solely from its reliance upon the decision of this Court in *Behrami & Saramati*. At the outset, it must be recalled that the UK Government's intervention in *Behrami & Saramati* referred to the existence of precisely the distinction which it now seeks to deny: namely, that there might be a difference between the position of forces acting under the

[2] *Hansard*, House of Commons, Written Answers, 10 November 2004, Col 720W, emphasis added. **[46]**

[3] Observations, §3.1, in which it is made clear that, in the Government's view, the legally significant changes to status were brought about by UNSCR 1511 (16 October 2003) and 1546 (8 June 2004).

command of KFOR and the situation where a "*national contingent in an international operation has exclusive control of a place of detention*", such as was "*the case in R (Al-Skeini)*".[4]

6. It is with some scepticism, therefore, that the Court should view the Observations of the Government to the effect that attributing his detention to the UK would "*introduce serious operational difficulties*", "*impair the effectiveness of the MNF*" and "*introduce real uncertainty*" (§§3.29-3.31). Those were not issues which had troubled the Government before the decision in *Behrami & Saramati* (or even after that decision in *Al-Skeini*) and certainly not sufficiently to compel it to make at any earlier stage the argument it now seeks to advance.

7. In any event, the suggested problems adverted to by the Government at §3.31 are far from intractable: in a multi-state operation, (a) responsibility will lie where effective command and control is vested and practically exercised;[5] and (b) there is the possibility of conduct which derives from the activity of an international organisation being attributable to both that organisation *and* the state;[6] (c) there is the further possibility that there may be multiple and concurrent state responsibility through the action of a "common organ" of two (or more) states; Article 4 of the ILC Articles on State Responsibility **[20]** contemplates that the conduct of a common organ can be considered an act of each of the states whose organ it is;[7] and Article 47 of those Articles recognises that there may be a plurality of responsible States. The conclusion drawn by the Government from the alleged problems it cites at §3.31 is that "*the Convention was not designed, or intended, to cover this type of multi-national military operation conducted under the overall control of international organisations such as the UN*." The Applicant resists this conclusion: on the contrary, the case-law of this Court establishes that Contracting States cannot escape their responsibilities under the Convention by transferring powers to international organisations or creating joint authorities against which Convention rights or an equivalent standard of protection cannot be secured.[8]

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[4] UK Government Submissions in *Saramati*, dated 22 September 2006, §27 fn19 **[36]**; Judgment, §114. Furthermore, in reaching the conclusion upon which the UK Government now seeks to rely, this Court in *Behrami & Saramati* was heavily influenced by Article 5 of the ILC *Draft Articles on the Responsibility of International Organisations* ("*ILC Draft Articles*") **[21]**: see §29, 121 and 141 of the judgment. The UK Government was fully aware of those *Articles* when it chose not to advance any argument as to attribution in *Al-Skeini* at any stage of the domestic proceedings in that case (up to the hearing in the House of Lords in April 2007), or in the Applicant's case until it reached the House of Lords.

[5] UN Secretary-General's report A/51.389, 20 September 1996, §§17-18 **[24]**, referred to below at §12

[6] See *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserik UA v. The Netherlands* (App. No. 13645/05)

[7] See Talmon, *International Responsibility for Acts of the CPA,* in Shiner and Williams, ed., *The Iraq War and International Law,* Hart, 2008, pp. 185-230. **[47]**

[8] See *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1.

The judgment of the House of Lords

8. The majority of the House of Lords (Lord Bingham, Baroness Hale and Lord Carswell) held that the detention of the Applicant was attributable to the UK, not the UN.[9] Lord Bingham considered at length the factual background to the operations in Iraq, the operations in Kosovo in *Behrami & Saramati*, and the conclusions of the Grand Chamber of this Court in that case. He concluded:

> "**22** *Against the factual background described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.*
>
> **23** *The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. Thus when the case of Mr Mousa reached the House as one of those considered in R(Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2008] 1 AC 153 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multi-national force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European court in para 43 of its judgment in Behrami and Saramati) the Security Council was not delegating its power by empowering the UK to exercise its functions but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.*
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> **24** *The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multi-national force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so."*

[9] [2008] 1 AC 332. **[38]**

9. Baroness Hale rejected the Secretary of State's arguments for the reasons which Lord Bingham had given, expressly agreeing with him that the analogy with the situation in Kosovo breaks down at almost every point. She went on to observe:

> *"The United Nations made submissions to the European Court of Human Rights in Behrami v France; Saramati v France, Germany and Norway (2007) 45 EHRR SE 85, concerning the respective roles of UNMIK and KFOR in clearing mines, which was the subject of the Behrami case. It did not deny that these were UN operations for which the UN might be responsible. It seems to me unlikely in the extreme that the United Nations would accept that the acts of the MNF were in any way attributable to the UN. My noble and learned friend, Lord Brown of Eaton-under-Heywood, has put his finger on the essential distinction. The UN's own role in Iraq was completely different from its role in Kosovo. Its concern in Iraq was for the protection of human rights and the observance of humanitarian law as well to protect its own humanitarian operations there. It looked to others to restore the peace and security which had broken down in the aftermath of events for which those others were responsible."* (§124)

10. The Applicant adopts and relies upon the reasoning of the majority of the House of Lords, and adds the following observations.

The ILC Draft Articles and the position of the UN

11. This Court in *Behrami & Saramati* approached the issue of attribution with reference to and in reliance upon the test set out in Article 5 of the *ILC Draft Articles:* see §29, 121 and 141 of the judgment. That Article, and the commentary thereto, make it clear that the decisive issues are whether or not the troops in question have been placed at the disposal of the international organisation and then whether they are under the effective control of that organisation. In the absence of those two features, responsibility as a matter of international law (and therefore attribution under the Convention) will remain with the Contracting State.

12. The application of the effective control test in the context of UN peacekeeping operations was an issue on which the ILC sought specific views from governments and international organisations. The UN Secretariat responded in terms which are set out at length in the Statement of Facts, at pp10-11.[10] In summary, the Secretariat explained that peacekeeping forces established by the UN were subsidiary organs of the UN, as a result of which their personnel were placed under UN command and subject to the instructions of the force commander: command and control is vested exclusively with the UN. In contrast, in authorised Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the state or states conducting the operation.

13. The UN Secretariat has since reaffirmed that acts carried out by a State at the request of or authorised by the UN are attributable to the State, not the organisation, and that

[10] A/CN.4/545, 25 June 2004, pp17-18 **[22]** and A/51/389, 20 September 1996, §§17-18 **[24]**.

whilst a measure of accountability is introduced by periodic reports, the responsibility remains with the State. In 2005 the ILC asked:[11]

> *"In the event that a certain conduct, which a member state takes in compliance with a request on the part of an international organization, appears to be in breach of an international obligation both of that state and of that organization, would the organization also be regarded as responsible under international law? Would the answer be the same if the state's wrongful conduct was not requested, but only authorized by the organization?"*

The response of the Secretariat was unequivocal:

> *"As for the third question raised by the commission, we are not aware of any situation where the Organization was held jointly or residually responsible for an unlawful act by a state in the conduct of an activity or operation carried out at the request of the Organization or under its authorization. In the practice of the Organization, however, a measure of accountability was nonetheless introduced in the relationship between the Security Council and member states conducting an operation under Security Council authorization, in the form of periodic reports to the Council on the conduct of the operation. While the submission of these reports provides the Council with an important 'oversight tool' the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the state conducting the operation, for the ultimate test of responsibility remains 'effective command and control'."*

14. The Respondent Government has not to date addressed these statements of principle by the UN, notwithstanding that its case is predicated upon an interpretation of the intention of that very organisation when it passed UNSCRs 1511 and 1546. Instead, the Government expressly criticises Lord Bingham's reasoning (and in particular his interpretation of §43 of *Behrami & Saramati*) because it *"results in a situation where the Security Council had the competence to 'authorise' the United Kingdom to take all necessary measures to contribute to the maintenance of security and stability in Iraq … but that the United Nations did not retain ultimate authority and control over the measures."* (Observations, §3.36). As the UN Secretariat has made clear, that is precisely the situation which exists in Chapter VII-authorised operations conducted under national command and control. This Court has itself previously concluded that, even where a State is compelled to take action by the UNSC exercising its Chapter VII powers, the State is not (without more) absolved of responsibility under the Convention: *Bosphorus Airways v Ireland* (2006) 42 EHRR 1.[12]

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[11] A/CN.4/556, 12 May 2005, pp4, 46. **[23]**

[12] *Bosphorus* was considered by the Grand Chamber in *Behrami & Saramati*. Far from being doubted or reinterpreted, *Bosphorus* was affirmed and explained as a straightforward example of State action engaging the responsibility of the State under the ECHR. The conclusion was put in two ways, at §151. First, that the impugned act of seizing the aircraft was attributable to the Irish state as an act carried out by State authorities on State territory and following a decision of a State Minister; whereas the actions of UNMIK and KFOR could not be attributed to the Respondent States nor had they taken place on State territory nor by virtue of a decision of State authorities. The Irish actions were therefore distinguishable both in terms of responsibility of the State under Article 1 ECHR (i.e. the question of jurisdiction) and the Court's competence *ratione personae*. Secondly, that there was a fundamental distinction between (a) the international cooperation in the Irish seizure of the aircraft, and (b) the activities of a subsidiary UN organ (UNMIK) and a security force exercising delegated powers

15. The UK Government thus contends for a situation in which every Chapter VII 'authorisation' is to be construed as the imposition of UN authority and control, in circumstances where the UN made its contrary view quite clear over a decade ago. As Baroness Hale observed, in stark contrast to the position in Kosovo, "*It seems … unlikely in the extreme that the United Nations would accept that the acts of the MNF were in any way attributable to the UN.*" (§124)

16. The Government also relies upon the reports provided by the US to the UNSC as evidencing the "*ultimate authority and control*" which it says remained with the UN: see Observations, §3.21.5. But as the statements of the UN Secretariat make clear, reports from member States conducting UNSC-authorised operations are not sought with the intention or the effect of imposing authority and control. As is apparent from *Behrami & Saramati,* at §134, the purpose of the reports is key to their significance to the attribution issue: "*required to report to the UNSC so as to allow the UNSC to exercise its overall authority and control.*"[13] Again, the Government's argument runs counter to the express position of the very organisation which is said to have assumed authority and control in this case.

The decision in *Behrami & Saramati* and the situation in Kosovo

17. The Government asserts that the situation in Iraq is directly comparable to the situation which pertained in Kosovo which was considered in *Behrami & Saramati*. There is, it argues, no material distinction between what the UNSC intended by UNSCR 1244 **[4]** and what it intended by UNSCRs 1511/1546.

18. Central to the Government's argument is its interpretation of §43 of the judgment in *Behrami & Saramati*, where it was held: "*While this Resolution used the term 'authorise', that term and the term 'delegation' are used interchangeably. Use of the term 'delegation' in the present decision refers to the empowering by the UNSC of another entity to exercise its function as opposed to 'authorising' an entity to carry out functions which it could not itself perform.*"

19. The Government argues that the Grand Chamber was drawing a "*distinction between the Security Council empowering another entity to exercise the Security Council's own function under the Charter ('delegation') and 'authorising' an entity to carry out functions which the UNSC would have no legal power under the Charter to perform.*" (Observations, §3.35). This is a manifestation of the repeated assertion made by the UK Government that there is no such thing as a simple 'authorisation' under Chapter VII: there is delegation, or there is nothing. The majority of the House of Lords disagreed with that interpretation.[14]

20. The Applicant submits that the Government's interpretation of §43 is unsustainable in light of:

(KFOR). The Irish seizure was directly attributable to Ireland, whereas the UNMIK/KFOR activities were directly attributable to the UN.

[13] Emphasis added; see Lord Bingham, §24

[14] See Lord Bingham, §23, where he concludes that UNSCRs 1511 and 1546 were examples of authorisation, not delegation.

i. The clear statements by the UN Secretariat, above, to the effect that UNSC authorisation does not, without more, result in attribution of conduct to the UN, in accordance with the principle in Article 5 of the *ILC Draft Articles*.

ii. The precise wording used in that paragraph, which indicates that the Court was intending to draw a distinction between the interpretation to be put upon "*authorise*" in UNSCR 1244 and the usual meaning of that term in other Resolutions. See in particular the references to "*this Resolution*" and "*in the present decision*". If it had been the Court's intention to conclude that the use of 'authorise' in UNSCRs always meant 'delegate', it would have said so. Indeed, given the significance of that finding, especially in light of the views of the UN Secretariat, it is perhaps inconceivable that the Court would have done anything other than express such a conclusion in the clearest of terms.

iii. The fact that this Court had, when setting out the relevant aspects of UNSCR 1244, included the references at §5 and Annex 1, §3, to the international civil and security presences being "*under United Nations Auspices*". It had earlier set out the use of the same term in the Military Technical Agreement: see §36.

21. The distinction drawn by the Grand Chamber in §43 between the usual use of the term "authorise" and its interchangeable use with "delegation" in UNSCR 1244 was at the very crux of its subsequent reasoning. "*KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC*" and, "*as such*", KFOR's actions were "*directly attributable to the UN*": §151. The UNSC retained ultimate "*authority and control*" over the security mission: §§133, 135. UNMIK and KFOR were "*operations established by UNSCRs*", and it was inappropriate for the Grand Chamber to "*interfere with … the effective conduct*" of the UN's "*operations*": §149. The acts of the Respondent States were acts "*carried out on behalf of the UN*": §146.

22. The pivotal issue in applying the reasoning of the Court in *Behrami & Saramati* to the situation in Iraq is, therefore, whether there was a delegation by the UNSC in UNSCRs 1511/1546, or whether there was a simple authorisation. Adopting the terminology of the ILC, were the UK forces placed at the disposal of the UN and if so, did the UN acquire and exercise effective command and control over them?

23. It is submitted that, on a proper analysis, there is no warrant for the suggestion by the UK Government that the UN had assumed ultimate, still less effective, authority and control over the UK forces in Iraq.

24. The Government suggests that the Court in *Behrami & Saramati* at §133 asked the question whether the UNSC retained *ultimate* authority and control over KFOR in Kosovo, and seeks to transpose that question to the situation in Iraq. For reasons developed below, even applying such a test, it is plain that the conduct of the multinational forces remained attributable to the troop contributing nations, rather than the UN – the UNSC did not even retain *ultimate* authority and control in Iraq. But it is

important to consider why the Court in *Behrami & Saramati* asked the question of ultimate, rather than effective, authority and control, in circumstances where Article 5 of the draft Articles on the Responsibility of International Organisations provides for the effective control test, and that has been the consistent view of the UN Secretariat and UNSG (see §§11-16 above, and the Statement of Facts at pp10-11). The Applicant suggests, adopting the submissions of the Interveners JUSTICE and Liberty at §4, that the reason why the Court in *Behrami & Saramati* asked whether the UNSC retained *ultimate* authority over KFOR, was because the applicants in those cases had argued that KFOR was the entity which was responsible for the relevant acts of detention and demining (§73). They did not argue that the Respondent States had effective control over the impugned conduct in their own right as sovereign states; their responsibility could only arise through KFOR. This meant that the Court simply considered (a) which entity was responsible for the impugned conduct by reference to which entity had the mandate to perform the acts; and (b) the relationship between that entity and the UN. The Court did not address the question of whether the Respondent States did have effective control over the impugned conduct in question, because that issue was not argued and was impliedly conceded.

The situation in Iraq

25. In order to fully appreciate the stark contrasts between the position in Kosovo and that which pertained in Iraq, it is, in the Applicant's submission, necessary to look at the position both before and after UNSCRs 1511/1546, upon which the Government relies.[15]

The position prior to UNSCR 1511 [6]

26. The invasion of Iraq by the US-led coalition forces in March 2003 was not a UN operation. It is *"well known that the coalition forces invaded Iraq in the spring of 2003 after the abandonment of the efforts to obtain a further Security Council resolution which would give immediate backing to what the coalition states wished to do if Saddam Hussein did not comply with the Council's demands."*[16] That is the first stark contrast with the position in Kosovo where UNSCR 1244 was a prior and explicit coercive measure adopted by the UNSC acting under Chapter VII, as the "solution" to the identified threat to international peace and security in Kosovo: see *Behrami & Saramati* at §129.

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[15] The Government asserts that the position prior to those Resolutions is irrelevant, asserting that "*the relevant question must be whether the UNSCR mandating the force has been adopted before the relevant act of the national force; in this case, UNSCR 1546 (2004) was adopted before the Applicant was detained and his detention was authorised by it.*" (§3.38) That is a gross over-simplification of the analysis required. Whilst it is correct that the Court is ultimately concerned with the legal position at the time of the Applicant's detention, and therefore post-UNSCRs 1511/1546, those Resolutions cannot be interpreted in the legal and political vacuum for which the Government contends. It is, though, unsurprising that the Government is forced to adopt that position, because when the full context is considered, the *"analogy with the situation in Kosovo breaks down… at almost every point."* [2008] 1 AC 332, *per* Lord Bingham, at §24. **[38]**

[16] *Per* Lord Bingham, [2008] 1 AC 332, §8, citing [2007] QB 621, §51, per Brooke LJ. **[38]**

27. The respective roles and responsibilities of the coalition forces and the UN in Iraq were defined from as early as 8 May 2003, in a letter from the Permanent Representatives of the US and UK to the President of the Security Council **[9]**. The coalition forces had created the Coalition Provisional Authority ("CPA"), and through the CPA the coalition forces would work to provide for, *inter alia*, security in Iraq, including "*maintaining civil law and order ... and assuming immediate control of Iraqi institutions responsible for military and security matters.*"[17] In doing so, the letter affirmed that the States participating in the coalition would strictly abide by their own obligations under international law. The role of the UN was recognised as being vital in "*providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority.*" The US and UK affirmed that they were ready to "*work closely*" with representatives of the UN and its specialised agencies, and looked forward to the appointment of a special coordinator by the UN Secretary-General ("UNSG").

28. Those respective roles and responsibilities were repeated in UNSCR 1483 **[5]**, adopted under Chapter VII, in which the UNSC recognised the "*specific authorities, responsibilities, and obligations under applicable international law of these states* [the US and UK] *as occupying powers under unified command (the Authority)*". The UN's roles were affirmed as before: humanitarian relief, restructuring and establishment of institutions for representative government. The UN "*called upon*" the CPA to work towards the restoration of security and stability, and upon the States concerned to comply fully with their obligations under international law, including the Geneva Conventions. UNSCR 1483 also set up the role of the Special Representative for Iraq, to be charged with reporting regularly to the UNSC. As the Secretary-General said in his 17 July 2003 Report **[10]**, at §95, "*Ultimately, the United Nations, as mandated in resolution 1483 (2003), is a resource at the disposal of the Iraqi people, whose interests are at the forefront of all our work.*" The absence of the coercion which characterised UNSCR 1244 could not be more explicit.

29. Notwithstanding that UNSCR 1483 was adopted under Chapter VII and expressly set out the roles of all parties concerned, the Government does not assert that it is of any relevance to the issues in the Applicant's case. That stance is, it is submitted, reflective of the fact that (1) the terms of UNSCR 1483 do not assist the Government in its argument and (2) the Government cannot now escape the concession it made in *Al-Skeini* that Mr Mousa was, in September 2003, within the jurisdiction of the UK for the purpose of Article 1 of the Convention; and that the UK was an occupying power in Iraq (it made the concession in *Al-Skeini* that it was in occupation of SE Iraq from around 1 May 2003 to 28 June 2004): it is hence forced to look beyond UNSCR 1483 for a legal basis for the argument it now seeks to advance.

[17] 8 May 2003 letter **[9]**, summarised at pp1-2 of the Statement of Facts. It should further be noted that the CPA actually promulgated legislation prior to UNSCR 1483 on 22 May 2003 authorising the letter of 8 May. For example, CPA Regulation No 1 was promulgated on 16 May 2003. **[1]**

UNSCR 1511 [6]

30. UNSCR 1511 is said by the Government to represent the moment at which the UN seized ultimate authority and control over all coalition forces in Iraq; the point at which the legal landscape was radically re-drawn, so as to shift all legal responsibility from the UK to the UN. But there is nothing in the language of the Resolution which can begin to bear the weight which the Government seeks to put upon it. On the contrary:

    i. Paragraph 1 recognised that the CPA would continue to exercise authority and control in accordance with UNSCR 1483 until a representative government was established. It was the CPA and not the UN which would be exercising that authority.

    ii. Paragraph 8 resolved that the UN should strengthen its vital role in Iraq, including by reference to those tasks it had already outlined in UNSCR 1483 (humanitarian relief, reconstruction, representative government). Had the UN intended to fundamentally alter the legal position by assuming ultimate control and authority for all the coalition forces in Iraq, it is inconceivable that it would not have referred to it here when expressly addressing the need to strengthen its role in Iraq.

    iii. Instead, at §13, the UNSC authorised a multinational force under unified command to take all necessary measures to contribute to the maintenance of peace and security. That unified command was, as it always had been, under the control and authority of the US and UK. If it had been the intention of the UNSC to use the term "*unified command*" to mean anything other than that which it meant in UNSCR 1483, it would have said so.

31. There is nothing in the language of UNSCR 1511 (and even less in its context) which justifies a comparison with UNSCR 1244. There is no "*delegation*" (neither prior and explicit nor subsequent and implicit); there are no "*UN auspices*"; there is no placing of UK forces at the disposal of the UN; there is no seizing of ultimate – still less effective - control and authority by the UNSC. There is an authorisation of certain member states of the UN: nothing more, nothing less.

UNSCR 1546 [7]

32. The Government asserts that UNSCR 1546 reaffirmed the fundamental shift in legal status which had already been effected by UNSCR 1511. So when it adopted UNSCR 1546, the UNSC was, on the Government's case, already exercising ultimate control and authority over the coalition forces. The Government's interpretation of UNSCR 1546, and indeed its interpretation of the preceding Resolutions, is untenable in light of the wording of UNSCR 1546. By way of illustration, see:

    i. The clear distinction in the Preamble between the "*multinational force*" and the "*United Nations presence in Iraq*", by referring to the role of the former in

providing security for the latter. If the UN had been exercising the ultimate authority and control over the multinational forces that the Government asserts, then they would have formed part of the UN presence in Iraq. See also, §13.

ii. The recognition in the Preamble that the UN should play a "*leading role in assisting the Iraqi people and government in the formation of institutions for representative government*", but notably not in matters of security. The role of the UN was further clarified at §7, again with no reference to matters of security.

iii. The reference again, at §9, to the multinational force being under "*unified command*", as before, without any suggestion that that command had been assumed by the UN.

iv. The recognition at §10 that the authorisation of the multinational force would facilitate, *inter alia* the UN fulfilling its role in assisting the Iraqi people, as per §7. Again, there is a sharp divide between that which the multinational force carries out under UN authorisation, and that which the UN is carrying out itself.

v. The 'welcoming' at §11 of the arrangements being put in place to establish a security partnership between the Iraqi Government and the multinational force and to ensure coordination between the two. The language used is reflective of the UNSC treating the multinational force as an external entity, such that its conduct can be 'welcomed', rather than directed.

vi. The repeated references to the presence of the multinational force being with the consent of the Government of Iraq, and for that reason being prepared to extend the authorisation given to that force, but only for so long as the consent remained: see for example, §§9, 12.

vii. The reporting to the UNSC was to be carried out not by the UNSG, but by the US on behalf of the multinational force: §31.

33. Moreover, the wording of the letter annexed to UNSCR 1546 from the US Secretary of State (Colin Powell) to the President of the UNSC, entirely undermines any suggestion that the multinational force was (or was soon to be) under UN authority and control:

> "*I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction. … In addition, the MNF is prepared to establish or support a force within the MNF to provide for the security of personnel and facilities of the United Nations. We have consulted closely with UN officials regarding the United Nations' security requirements and believe that a brigade-size force will be needed to support the United Nations' security effort. This force will be under the command and control of the MNF commander, and its missions will include static and*

perimeter security at UN facilities, and convoy escort duties for the UN mission's travel requirements." (emphasis added)[18]

34. In summary therefore, the Applicant submits that (a) the UNSC at no point exercised ultimate, still less effective, control or authority in Iraq over the conduct of the MNF; (b) the UNSC did not delegate its powers to the MNF; (c) the acts of the UK which are challenged under the Convention of attributable to the UK.

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[18] For further documentary support for the position the Applicant contends for, see:

- The UNSG's first report under UNSCR 1511 (after the UN had apparently assumed ultimate control and authority over the multinational force) in which he observed that the future role of the UN in Iraq was uncertain because: "*the Governing Council and the Coalition Provisional Authority had not expressed any clear or shared vision on the role to be played by the United Nations in the remainder of the political transition process and other key areas suggested in my report of 17 July. … On the political front in the immediate to medium term, it has yet to be established what role, if any, Iraqis and the Coalition Provisional Authority would like the United Nations to play in the formation of the transitional national assembly by 31 May 2004.*" S/2003/1149, §§13, 72 **[11]**;

- In his report of 8 December 2004, 6 months after UNSCR 1546, the UNSG said of the security role of the multinational force, in particular in relation to the UN, "*An agreement is being negotiated with the United States, as the State whose armed forces are vested with unified command of the multinational force, concerning protection by the multinational force of the United Nations presence in Iraq. Pending the conclusion of such an agreement, the United Nations and the United States have exchanged letters recording their mutual understanding of the security framework applicable in respect of UNAMI.*" S/2004/959, §21 **[12]**;

- The UNSG repeatedly raised concerns about human rights violations being committed by the multinational force, including in relation to persons held in its custody: see for example, S/2005/585 (7 September 2005) at §§50-52 **[13]**; S/2006/137 (3 March 2006) at §§7(b)(iii), 54, 46, 75, 81 **[14]**; S/2006/360 (2 June 2006) at §§47, 67 **[15]**. If the multinational force had been under the ultimate control and authority of the UN, it is inconceivable that the Secretary-General would have reached such conclusions without also recommending that the UNSC take action to rectify the situation. On the contrary, he pledged that UNAMI would "*work with the Iraqi authorities and the Multinational Force to find constructive solutions to this issue*", and called upon the Multinational Force to act in accordance with international humanitarian and human rights law: S/2006/360 (2 June 2006) at §§47, 67 **[15]**. Similarly, the UNAMI quarterly Human Rights Reports continually raised concerns about persons being held in the custody of the multinational force in terms which are irreconcilable with the suggestion that that detention was under the ultimate, still less effective, authority and control of the UN. For example, in its report for the period 1 January – 28 February 2006, UNAMI observed, at §24, that "*Internment for imperative reasons of security by MNF-1 should be used sparingly and in full conformity with international law.*" **[19]**

- The repeated statements by the US that it remained the commander of the unified command in Iraq, that the multinational force was UN authorised/endorsed, and that the US forces in Iraq would remain under US command. At no stage has the US suggested that its forces were under anything other than its own control, or that the UN had done anything other than authorise the action it was taking as part of the multinational force. See for example the statement of US Secretary of State, Colin Powell, in anticipation of UNSCR 1511 on 3 September 2003 (Washington, DC), that: "*the U.S. will remain the commander of the unified command and there will be an element in the resolution that calls upon the United States as the leader of the military coalition to report on a regular basis to the United Nations, since it is a United Nations-authorized multinational force, if the resolution passes.*" **[16]** See also the announcement by the US State Department on 27 May 2004, in anticipation of UNSCR 1546, that: "*Secretary of State Colin Powell says that after the transfer of sovereignty from the Coalition Provisional Authority (CPA) to an interim Iraqi government U.S. Forces will work with their Iraqi counterparts but remain under U.S. command.*" **[17]**

The consequences of the Government's argument

35. The Government has elected to make no observations as to the correctness or otherwise of Lord Bingham's comment that it has not been suggested that the UN, not the US, was responsible for the atrocities at Abu Ghraib (Observations, §3.40). Instead, it asserts that this cannot be determinative of the issues in this case as to whether the UN had delegated its powers to the MNF, and whether operational measures taken in full accordance with the UN mandate were attributable to the UN.

36. Whilst the issue may not be legally determinative, it is nonetheless highly probative of the effect of the argument advanced by the Government. Given its own heavy reliance upon the consequences which it says would flow from a finding that the detention of the Applicant was attributable to the UK (see Observations, §§3.29-3.31, and above, §§6-7), it is perhaps surprising that the Government did not consider it necessary to address the wider consequences of the very position it contends for.

37. It is no answer to Lord Bingham's comment for the Government to observe that the acts in the present case were within the scope of the UN mandate. The responsibility of international organisations (and States) under international law (in accordance with the *ILC Draft Articles*) is for wrongful acts, not simply lawful acts. So if the UK is not responsible for the Applicant's detention under Article 5 of the Convention, it would equally not be liable for his torture or death under Articles 2 or 3. It would not matter that he was held by UK forces in a UK base and tortured by UK soldiers. There would be no attribution to the UK and thus no accountability for the actions, however heinous, of its personnel. And that would extend not just to accountability before this Court, but before any Court for breach of any human rights obligations. The ramifications of the Government's arguments, for the Convention and every other international human rights treaty, must not be underestimated.

QUESTION 2: JURISDICTION

38. The Government has effectively conceded that the Applicant was within the Article 1 jurisdiction of the UK, save in so far as it may be found that its actions in detaining him were attributable to the UN. It made an express concession that the Applicant was within its jurisdiction during the domestic proceedings.[19]

[19] Statement of Facts, p6. The concession was predicated on the similar concession made by the Government in the domestic courts in *Al-Skeini* that Baha Mousa was within the Article 1 jurisdiction of the UK because he was "*in the actual custody of British soldiers in a military detention centre in Iraq during the period of military occupation*": §6 of the Court of Appeal judgment, [2007] QB 140, and §3 of the House of Lords' judgment, [2008] 1 AC 153. See also, the recognition by the UK Government in its intervention before this Chamber in *Behrami v France; Saramati v France & Others* (2007) 45 EHRR SE 85 ("*Behrami & Saramati*") that there was a distinction to be drawn, when considering issues of jurisdiction and attribution, between the situation in that case, and the position of Mr Mousa in *Al-Skeini* "*where a contingent in an international operation had exclusive control of a place of detention.*"

39. Since those concessions, the Fourth Section of this Court has handed down its admissibility decision in *Al-Saadoon & Mufdhi v United Kingdom* (App No 61498/08, 30 June 2009), where it was held:

> *"88. The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction (see Hess v. the United Kingdom, no. 6231/73, Commission decision of 28 May 1975, Decisions & Reports vol. 2, p. 72). This conclusion is, moreover, consistent with the dicta of the House of Lords in Al-Skeini and the position adopted by the Government in that case before the Court of Appeal and House of Lords …."*

40. The Applicant submits that he was at all material times within the jurisdiction of the UK within the meaning of Article 1 of the Convention, as a person held in its custody in an internment facility under its exclusive and effective control. The Applicant further adopts the submissions made on Article 1 jurisdiction by the applicants in *Al Skeini and Ors v. UK* (App No 55721/07).

QUESTION 3: THE EFFECT OF UNSCR 1546 ON ARTICLE 5

Preliminary observations

41. The Government asserts that the Applicant's detention was effected pursuant to UNSCR 1546 which created an obligation on the UK to detain the applicant and, pursuant to Article 103 of the Charter **[18]**, that obligation overrides obligations arising under the Convention.

42. The Applicant submits that UNSCR 1546 did not require the UK to subject him to arbitrary detention in breach of Article 5 of the Convention. This is for the following reasons each of which is sufficient to establish this proposition:

    i. UNSCR 1546 creates a power and not an obligation to intern;

    ii. UNSCR 1546 cannot be interpreted as requiring the UK to derogate from its international human rights obligations. It provides the UK forces with discretion which must be exercised in accordance with Article 5 of the Convention. The principled and correct approach is that of the ECJ in *Kadi,* and the Advocate-General, rather than that of the CFI in *Kadi* and the House of Lords in the Applicant's case;

    iii. In any event, under the Convention, the UK cannot be absolved of its responsibility to comply with Article 5 by transferring powers to an international organization. The present situation is governed by the *Bosphorus* test.

The meaning of UNSCR 1546 [7]

43. UNSCR 1546 neither provides nor refers to any duty to intern. The primacy clause of Article 103 of the UN Charter therefore does not come into effect.

44. As the ICJ has stated, "*the language of a resolution of the Security Council should be carefully analysed*".[20] The Resolution "*reaffirms the authorization for the multinational force under unified command established under resolution 1511(2003)*" (§9) and "*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…*" (§10). The language of the resolution thus makes it clear that it provides authorization to the MNF to take the measures that it considers necessary to contribute to the maintenance of security and stability. It does not require a State to take action which is incompatible with its human rights obligations. It leaves room for discretion and choice. It is not for States or a Court to "*alter the content of the resolution at issue*"[21] or introduce a method of implementation "*not provided in the text of the Resolution itself*".[22]

45. Where it considers it appropriate, the UNSC may require States to take specific action. In *Kadi*, for example, the content of the resolution in issue involved a clear duty, namely, the freezing of assets of certain persons designated by the UNSC Sanctions Committee. The UNSC therefore on that occasion required Governments to act under "circumscribed powers" with "no autonomous discretion".[23] Likewise, in *Bosphorus* the UNSC resolution in issue required States to impound aircraft "*in which a majority or controlling interest is held by a person or undertaking in or operating from*" the Federal Republic of Yugoslavia.[24] The resolution imposed an express, clear and specific duty to impound.

46. By contrast, UNSCR 1546 provides for no specific obligation. Its plain and ordinary meaning is that it empowers the MNF to undertake a range of tasks, including measures to contribute to the maintenance of security and stability, leaving a clear discretion to the MNF as to whether, when and how to exercise that discretion. It provides therefore the legal basis for the power, but not the obligation, to intern.

47. The same holds true for the letters annexed to the Resolution. The letter addressed from the Prime Minister of the Interim Government of Iraq, Dr Ayad Allawi, to the President of the Security Council states, inter alia, that "*Security and stability continue to be essential to our political transition*" and seeks on behalf of the Interim Government, "*a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council…*" **[7]**

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[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* ICJ Reports 197, p. 16 at 114. **[29]**

[21] Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, para 214. **[33]**

[22] *Behrami & Saramati,* para 149.

[23] *Kadi*, op.cit., para 214.

[24] UNSC Resolution 820 (1993) , adopted on 17 April 1993, provided, *inter alia*, as follows:

"24. [The Security Council] Decides that all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the [FRY] and that these vessels, freight vehicles, rolling stock or aircraft may be forfeited to the seizing State upon a determination that they have been in violation of resolutions ... 713 (1991), 757 (1992), 787 (1992) or the present resolution;" **[3]**

48. The letter of the Secretary of State states as follows:

> *"I am writing to confirm that the MNF under unified command is prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism and protecting the territory of Iraq. The goal of the MNF will be to help the Iraqi people to complete the political transition and will permit the United Nations and the international community to work to facilitate Iraq's reconstruction.*
>
> *The ability of the Iraqi people to achieve their goals will be heavily influenced by the security situation in Iraq. As recent events have demonstrated, continuing attacks by insurgents, including former regime elements, foreign fighters, and illegal militias challenge all those who are working for a better Iraq. …*
>
> *Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security ands to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and security of weapons that threaten Iraq's security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq's security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions…"* **[7]**

49. It is thus clear that neither UNSCR 1546 nor the letters annexed to it imposed on the UK any specific duty to intern.

<u>The Objectives of UNSCR 1546</u>

50. In any event, UNSCR 1546 cannot be treated as imposing an obligation on British forces to act in breach of the UK's international human rights obligations. If the UNSC intended to achieve that end, it would have used clear and unequivocal language.

51. Respect for human rights is one of the paramount principles of the UN Charter. The Preamble to the Charter reaffirms "*faith in fundamental rights*". The objectives of the UN, as expressed in Article 1, include, among others, to maintain international peace and security and to promote and encourage respect for human rights **[18]**.[25] Article 55 states that "*the United Nations shall promote … (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion*".[26] **[18]**

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[25] As Lord Mance said in *Ahmed v HM Treasury* [2010] 2 WLR 378, §245, "*the United Nations is itself an institution committed to the promotion of human rights*". **[37]**

[26] According to leading academic opinion, this provision is not only a programmatic mandate but also requires the UN and States to promote and protect human rights. Professor Eibe Riedel states as follows: "*Article 55 fulfills a dual purpose. On the one hand it contains a "programme" to be fulfilled by UN organs, defining the objective in its Preamble and the object (human rights and fundamental freedoms and their respect and observance) in sect. (c). On the other hand, there is a wide consensus today that the article legally obligates not only the world Organisation but also the member States to respect and protect human rights*"

52. Under Article 24(2) of the Charter, the UNSC is required to act in accordance with the purposes and principles of the UN and is therefore bound by the objective and the obligation to promote and encourage human rights **[18]**. It is unsurprising, therefore, that UNSCR 1546 itself contains numerous references to respect for human rights, in both the Preamble and the body of the Resolution.[27] Paragraph 7 requires that, in implementing their mandate to assist the Iraqi people and government, the Special Representation of the UNSG and UNAMI shall "*promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq*". Far from displacing human rights obligations, UNSCR 1546 contains express commitments to act in accordance with international law, including obligations under international humanitarian law, and to promote respect for human rights.

53. The Government's position necessarily therefore involves a selective and impermissible reading of UNSCR 1546. A proper interpretation of the entirety of the Resolution renders it impossible to conclude that it was intended to abolish *a priori* the right to liberty, ("*one of the most fundamental of human rights*"[28]) and preclude any kind of judicial control. Taken to its logical conclusion, the Government's argument required the UK to take any action which was necessary to contribute to security and stability even if it was wholly incompatible with basic human rights. The present case is not a situation, like *Kadi* and *Bosphorus*, where the terms of the UN Resolution involve a degree of specificity as to what action is being required together with its human rights implications. In principle, any action interfering with any fundamental right would be authorised and required wherever it could be considered "necessary", whether that be the use of "rendition" flights or the imposition of the death penalty.[29]

(Professor Riedel's commentary in Bruno Simma (Ed.), The Charter of the United Nations, a Commentary, Second Edition, 2002, Oxford, Volume II, p. 920, para 8 (footnotes omitted)). **[48]**

[27] See, for example, in the Preamble, the references to "*the commitment of the Interim Government of Iraq to work towards a federal, democratic, pluralist, and unified Iraq, in which there is full respect for political and human rights*", and the affirmation of "*the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy including free and fair elections*" **[18]**. The UNSC also noted "*the commitment of all forces promoting the maintenance of security and stability in Iraq to act in accordance with international law, including obligations under international humanitarian law, and to cooperate with relevant international organizations*".

[28] *R (A) v Secretary of State for the Home Department*, [2005] 2 AC 68 at p.128 **[39]** per Lord Nicholls; *Kurt v. Turkey (*1998) 27 EHRR 373, §122.

[29] For example, suppose it were considered 'necessary' to contribute to Iraq's security and stability that information be obtained from or used against a detainee in a British military facility, in either case through the use of inhuman or degrading treatment, or perhaps by using a "rendition" flight to a detention facility in a third country. That information might be part of "*the continued search for and securing of weapons that threaten Iraq's security*", to which the letter of the Secretary of State referred. But such action would again be contrary to an international human rights obligation of the United Kingdom: see *inter alia* Article 3 of the Convention. But on the logic of the Government's argument, such activities could fall within a "*necessary measure*" displacing human rights. Or consider the death penalty – which could be claimed to be a "*necessary measure*", with the added backcloth of Geneva Convention IV, Article 68 **[27]** (which gives the occupying State the power to "*impose the death penalty ... in cases where the person is guilty of espionage, or serious acts of sabotage against the military installations*

54. The Court has often had to consider 'clashes' between express State obligations or entitlements relied on under an international law instrument and human rights obligations arising under the ECHR. Most recently, the Fourth Section of this Court rejected the UK Government's argument in *Al-Saadoon v UK* that it was obligated as a matter of international law to return two Iraqi detainees to a real risk of the death penalty. The Court noted that it must,

> *"have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Its approach must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, Soering…§87; Loizidou v. Turkey (preliminary objections),… §72; McCann and Others,… §146).*
>
> *It has been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (Bosphorus, … §153). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see Bosphorus…). For example, in Soering… the obligation under Article 3 of the Convention not to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment was held to override the United Kingdom's obligations under the Extradition Treaty it had concluded with the United States in 1972."* (§§127-128)[30]

55. Even in *Bosphorus Hava Yollari v Ireland*, where the relevant UNSCR *required* states to impound aircraft, there was no qualification or displacement, but rather: (i) the principle of 'equivalent protection' of rights was applied as a precondition; and (ii) the EU Regulation (implementing the UNSC resolution) played only the limited role of securing the 'legality' component of ECHR Article 1P (see §145 of the Court's judgment), but was not <u>of itself</u> an answer to the question of proportionality (contrary to the logic of the Government's Observations, and the approach of the House of Lords in this case).

56. A further reason why UNSCR 1546 in this case cannot properly be taken as having been intended to override international human rights obligations is because the trigger for action is a broad and inclusive one. The Resolution refers to taking *"all"* measures which are *"necessary"* in order to *"contribute to the maintenance of security and stability"*. In this formulation, *"contributing"* is a broad concept, as are *"security and stability"*. The tasks are also said in UNSCR 1546 to be those *"including"* – but not limited to – *"preventing and*

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of the Occupying Power or of intentional offences which have causes the death or one or more persons."). But neither the Geneva Convention IV, Article 68, nor UNSCR 1546 **[7]** could be claimed to be relevant international instruments displacing or qualifying the absolute prohibition on the death penalty even in times of war: Protocol XIII, just as the absolute protection provided by Article 3 prevented the removal of the applicant in *Soering* to the US under an Extradition Treaty, and the applicant in *Chahal* under the Refugee Convention.

[30] See also, *Chahal v United Kingdom* (1996) 23 EHRR 413.

deterring terrorism".[31] Shorn of any consideration of human rights duties, as the Government has to submit that these provisions are, the UNSC would have been requiring at a stroke an extremely wide-ranging series of unspecified and potentially draconian actions. That is a consequence which strongly militates against that as having in truth been the intention.

57. UNSCR 1546 cannot, in its terminology or in its context, properly be read as having intended to require the UK to act in breach of the Convention. The rule of priority of Article 103 of the Charter therefore simply does not come into effect.

The judgment of the ECJ in *Kadi* [33]

58. The Applicant submits that the rationale of the ECJ in *Kadi* also applies to the Convention. The key aspects of that judgment for present purposes are:

    i. The European Community is based on the rule of law so that neither its Member States nor its institutions can avoid review of the conformity of their acts with the EC Treaty which serves as the basic constitutional charter of the Community (§281);

    ii. "*[A]n international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system*" (§282);

    iii. Observance of Community law is ensured by the Court of Justice by virtue of the exclusive jurisdiction conferred on it by Article 220 EC. The Court's jurisdiction "*forms part of the very foundations of the Community*" (§282);

    iv. Fundamental human rights form an integral part of the general principles of law whose observance the Court ensures (§283);

    v. "*[R]espect for human rights is a condition of the lawfulness of Community acts*"; "*measures incompatible with respect for human rights are not acceptable in the Community*" (§284).

59. On the basis of the above, the ECJ concluded that:

> "*It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.*" (§285)

60. The ECJ made it clear that the review by the Community judicature was of the Community act intended to give effect to an international agreement, not of the agreement itself. Thus, any judgment given by the ECJ deciding that a Community measure intended to implement a UNSCR is contrary to a higher rule of law in the Community legal order would not entail any challenge to the validity, efficacy or

[31] See UNSCR 1546, para 10.

primacy of that resolution in international law (§§286-288). The ECJ also accepted that the European Community must respect international law in the exercise of its powers (§§291-292) and that, in interpreting the contested EC regulation, account had to be taken of the UNSCR which that regulation was designed to implement (§297). It then continued as follows:

> *"[298] It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.*
>
> *[299] It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations."*

61. The essential findings of the ECJ may be summarized as follows:

    i. Community measures adopted to give effect to UNSCRs are subject to review by the ECJ on grounds of compatibility with human rights as protected by Community law;

    ii. The ECJ's review concerns the internal lawfulness of such measures under Community law and not the lawfulness of the UNSC resolutions to which they are intended to give effect;

    iii. The Member States acting under UNSCR 1546 had a "free choice" as to the "procedure applicable", which meant that the procedure had to be lawful.

    The same principles can, it is submitted, be transposed to the Convention and its interpretation and enforcement by this Court.

62. Moreover, in *Kadi* the proper application of the Convention rights in the context of a duty arising under a UNSC resolution was a necessary part of the ECJ Grand Chamber's reasoning. The Grand Chamber was asked to accept that Article 8 and Article 1P1 were to be treated as having been overridden by the express terms of the UNSCR, by reference to Articles 25 and Article 103. That was the very argument accepted by the CFI, which in turn had strongly informed the decision of the Court of Appeal in the Applicant's case. But the ECJ Grand Chamber steadfastly refused to accept the argument.

63. There are, in particular, four arguments which make compelling the application of the rationale of the ECJ in *Kadi* to the Convention:

i. The special character of the Convention as "a constitutional instrument of European public order";[32]

ii. The principles to be applied in the interpretation of the Convention, which do not permit general, open-ended, derogations from the rights enshrined in the Convention;

iii. The existing case law of this Court, in particular, the judgment in *Bosphorus;*

iv. The purpose and effect of Article 103 of the UN Charter which, correctly interpreted, does not preclude this Court from finding an infringement of Article 5.

64. Each of these points will be developed in turn. At the outset, however, it is necessary to deal with the Government's assertion that *Kadi* is distinguishable from the present case because it concerned "*review of the internal lawfulness of a Community act*".[33] There are two aspects to this assertion: that *Kadi* only concerned Community acts and that it only concerned the internal lawfulness of those acts under Community law.

65. It is true that in *Kadi* the ECJ examined the validity of a Community regulation and did not examine directly any Member State action implementing UNSC resolutions. But this is a technical point and results from the fact that the challenge was brought against a Community measure and not a national one. It does not affect the substance or scope of the ECJ's ruling.

66. The UNSC resolutions in issue had been implemented at the EU level via a CFSP common position[34] and a corresponding EC Council regulation adopted under Articles 60, 301 and 308 EC. The Court found that the Community had competence to adopt the contested regulation and proceeded to annul it for breach of the right to be heard, the right to judicial protection, and the right to property. The inevitable consequence of the ruling is that any measure or action undertaken at national level pursuant to the contested regulation would also be vitiated by the same illegality: under Article 249 of the EC Treaty, regulations are binding in their entirety and directly applicable in all Member States. It is true that, because the contested regulation was annulled on procedural grounds, the ECJ decided to maintain its effects (and therefore the effects of any resulting action at the national level) for a period of three months. But this does not change the fact that, by necessity, the Court's ruling referred to the lawfulness, under Community law, of both Community acts and Member State action implementing them.

67. The essence of the judgment in *Kadi* is that obligations arising from UNSC resolutions do not displace the requirements of human rights as guaranteed in Community law. Where action to implement UNSC resolutions therefore falls within the scope of Community

[32] See *Loizidou v Turkey (Preliminary Objections)*, App No 15318/89, (1995) 20 EHRR 99, §93.

[33] See §4.36 of the Government's observations.

[34] The Common Foreign Security Policy (CFSP) is the agreed foreign policy of the European Union (EU) for mainly security and defence diplomacy and actions. Under the CFSP Member States are required to comply with and uphold common positions which have been adopted unanimously at the Council.

law, neither the Community institutions nor the Member States may derogate from EC standards of fundamental human rights. As is well-established, those standards themselves draw inspiration from the Convention, to which all Member States of the EU are party.

68. As for the observation that *Kadi* only concerned the "internal lawfulness" of the contested regulation under Community law, it does little other than to point out, as the ECJ stated in its judgment, that the ECJ's review concerns only the validity of Community measures under Community law and not as such the lawfulness of the UNSC resolutions to which they give effect. It does not follow from this, however, that the rationale in *Kadi* should not be applied to the Convention. The Applicant's submission is precisely that the standards of the Convention apply to state action implementing UNSCR 1546 and that this Court can review the internal lawfulness of such action with the requirements of the Convention.

The Constitutional character of the Convention

69. It is clear that respect for the rule of law, the starting point of the ECJ's reasoning in *Kadi*, also underpins the Convention: see *Golder v UK*.[35] The task of this Court is to ensure that the rights enshrined in the Convention are respected. In *Bankovic*, it held:[36]

> *"[80] The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of* ***European*** *public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the* ***engagements undertaken*** *by the Contracting Parties."* (emphasis in the original)[37]

70. By comparison with the founding treaties of the EU, the Convention goes further in one key respect. The EU treaties, as they currently stand, do not provide for a binding catalogue of fundamental rights.[38] Instead Article 6(2) of the Treaty on European Union identifies the Convention together with the constitutional traditions of the Member

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[35] (1975) 1 E.H.R.R. 524.

[36] *Bankovic v Belgium*, App No 52207/99 (2007) 44 EHRR SE5.

[37] The Court has repeatedly referred to the "*special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms*": *Loizidou v Turkey (Preliminary Objections)*, §93; *Soering v UK*, §87; *Al-Saadoon,* §127. In *Austria v Italy* (1962) 4 Yearbook 11, 138, this Court stated that: "*the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves*".The special character of the Convention is also clear from its Preamble. The framers of the Convention set up a system for the protection of human rights "*reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world*" and "*being resolved… to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*"

[38] The EU Charter of Fundamental Rights was approved by the Biarritz European Council in October 2000 and was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on 7 December 2000 in Nice but it was not given binding force by the Nice Treaty. The Lisbon Treaty, which does contain a catalogue of fundamental rights, was not in force at the material time.

States as the main sources for the protection of human rights in the EU. In its case law, the ECJ has long accepted that the Convention bears "*special significance*" and that its underlying principles "*must be taken into consideration in Community law*".[39] It would be very surprising if the Convention which has served as a model to the EU failed to provide in this Court the minimum standard of protection guaranteed by the ECJ in reliance upon it.

The prohibition of open-ended derogations under the Convention

71. As considered above, the Government's argument results in a principle under which UNSC resolutions, whatever their content, could entirely displace any and all Convention rights and obligations. The Government invites this Court in effect to introduce a general, blanket, derogation from all Convention rights. This runs counter not only to the language, purpose and object of the Convention but also strikes at the very *raison d'etre* for its existence.

72. The Convention does not expressly provide a power to derogate from Article 5, or any other article, in order to give effect to UNSC resolutions. Nor can such a power be read by implication. Article 15 permits a State to derogate from certain Convention rights, including Article 5, but only in times of war or public emergency and under certain strict conditions. This is further confirmed by Article 57. This provision allows a State to enter a reservation where a national law in force at the time of signing or ratification is not in conformity with a provision of the Convention but expressly prohibits reservations of a general character.

73. Whilst the Court accepts that States may, in certain circumstances, limit or restrict Convention rights, it has rejected the existence of any general implied limitation. In *Deweer v Belgium*, it stated that "*it is not the function of the Court … to elaborate a general theory of such limitation*".[40] Rather, it is necessary "*to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties*".[41] By contrast, the case law accepts that "*clauses which allow interference with Convention rights must be interpreted restrictively*".[42]

74. The Government's position also runs counter to the principle of effectiveness which is a fundamental principle guiding the interpretation of the Convention. According to the case law, "*the object and purpose of the Convention as an instrument for the protection of*

[39] See e.g. Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, §18 **[34]**; Case C–260/89 *ERT* [1991] ECR I–2925, §41. **[35]**

[40] (1980) 2 EHRR 439, §49.

[41] *Wemhoff v Germany*, App No 2122/64, judgment of 27 June 1968, Series A No 7 (1979-80) 1 EHRR 55, §8.

[42] Case *Stoll v Switzerland,* App No 69698/01, judgment of 10 December 2007, §61.

individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective" and not merely *"theoretical and illusory"*.[43]

75. It would clearly be incompatible with the principle of effectiveness to exclude *a priori* the application of the Convention in relation to all action undertaken by a Contracting Party pursuant to a UNSC resolution. If it were accepted that international law obligations displaced the substantive provisions of the Convention, the scope of application of the Convention would be reduced substantially and protection would be denied in some of the cases where it is most needed. It would leave the door wide open to States to sacrifice constitutional principles of human rights to international imperatives formed under no democratic control whatsoever.

The judgment in *Bosphorus*

76. The Government contends that the judgment in *Bosphorus* is not applicable in this case. Before examining in detail the Government's arguments it is helpful to summarise the Court's findings in that case:

i. The Convention does not prohibit Contracting Parties from transferring sovereign powers to an international or supra-national organization. Where such transfer occurs, the organization does not become responsible under the Convention unless it is itself a Contracting Party (§152).

ii. Under Article 1 ECHR, however, a Contracting Party remains responsible for all acts and omissions of its organs regardless of whether such act or omission was a consequence of domestic law or of the necessity to comply with international obligations. If Contracting Parties were absolved of their responsibilities, the guarantees offered by the Convention would become illusory and its safeguards would be undermined (§§153-154).

iii. State action undertaken in compliance with such international obligations is justified as long as the relevant organization protects fundamental rights, 'as regards both the substantive guarantees offered and the mechanisms controlling their observance', in a manner which can be considered to be at least equivalent to that provided by the Convention. 'Equivalent' here means 'comparable' and not 'identical': the imposition of the latter requirement would run counter to the interest of international cooperation, the growing importance of which the ECtHR recognizes (§155).

iv. The existence of such equivalent standards raises a presumption that the State has not departed from the requirements of the Convention (§156). This presumption is limited and it is rebuttable.

v. It is limited in that it applies only where the State does no more than implement legal obligations flowing from its membership of the organization. The State remains fully

[43] See e.g. *Loizidou v Turkey (Preliminary Objections)*, op.cit., §72; *Podkolzina v Latvia,* App No. 46726/99, judgment of 9 April 2002, §35.

responsible under the Convention for all acts falling outside its strict international obligations (§157).

vi. The presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was 'manifestly deficient'. In such a case, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order in the field of human rights (§156).

vii. In *Bosphorus* itself, the EU regulation (implementing the UNSCR) played only the limited role of securing the 'legality' component of Article 1P1 of the Convention (see §55 above).

77. The Government argues that the judgment in *Bosphorus* concerned the impact on existing Convention obligations of the transfer by a Contracting State of sovereign powers to the EC and does not apply to the present case which involves a binding UNSCR issued under Chapter VII. This assertion is wrong for the following reasons.

78. First, *Bosphorus* establishes a general test governing the liability of a State for conduct which is obligatory pursuant to membership of an international organization. It is not restricted to transfer of sovereign powers to the EC. This is borne out by the Court's rationale. The reason why States remain responsible for conduct which they are required to undertake by virtue of their membership of an international organization is that, otherwise, "*the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards*".[44] According to the reasoning of the Court what matters is not the type of international organization to which the Contracting Parties transfer their powers but the need to ensure the effective protection of Convention rights by preventing States from "washing their hands" and absolving themselves from their responsibilities by transferring power to another body. The rationale which underlies *Bosphorus* is the same as that which underlies *Kadi* and which is in fact shared by all courts in democratic societies, namely that monitoring of the observance of the rule of law by an independent judiciary is the "*surest safeguard of liberty*".[45] This applies *a fortiori* in the present case where at stake is the right to liberty, one of the most fundamental precepts of the rule of law.

79. Secondly, the distinction drawn by the Government between, on the one hand, the impact of EC measures on "*existing Convention obligations*" which in the Government's view was in issue in *Bosphorus* and, on the other hand, the impact on the Convention of "*pre-existing obligations under the UN Charter*" which, according to the Government, is in issue in these proceedings (Observations, §4.47), is a false one.

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[44] *Bosphorus*, §154.

[45] *Boumediene v Bush* 128 S.Ct. 2229 at 2247 (US Supreme Court, 2008). **[31]**

80. In *Bosphorus*, as in the present case, the issue under examination was the impact of an obligation arising from a UNSCR on obligations arising under the Convention. The fact that in *Bosphorus* the Court focused on EC obligations rather than UN obligations and thus did not examine the case by reference to Article 103 of the UN Charter is immaterial. The EC law obligations in issue emanated from a Chapter VII UNSCR. Article 103 was accordingly engaged. This Court could not have reached the conclusion that it did in *Bosphorus* if it considered that UNSCRs adopted under Chapter VII had any special status which immunized State action implementing such a resolution from the control of the Court or put it beyond the scope of the Convention.

81. Thirdly, the fallacy of the Government's argument is exposed by considering its consequences. If the Government's assertion were to be accepted, it would mean that, where action to implement a UNSCR is adopted by the EC institutions, the equivalence test established in *Bosphorus* would be applicable, but where such action is adopted individually by the EU Member States, it would be beyond the control of the Court and the States would not need to abide by the standards of the Convention. This is manifestly incorrect. It is clear that, insofar as the application of the Convention is concerned, action undertaken by Contracting Parties to the Convention who are members of the EU to implement UNSCRs should be treated in the same way whether it is undertaken by States individually or under the auspices of the EU.

82. Fourthly, contrary to the Government's assertion, whether an international obligation undertaken by a Contracting Party pre-exists the Convention is not material. The fact that the Court refers to "*subsequent*" treaty commitments does not mean that the *Bosphorus* approach is not applicable to commitments undertaken prior to the entry into force of the Convention. In *Capital Bank AD v Bulgaria*,[46] Bulgaria argued that the prohibition of judicial review of the decision of the Bulgarian National Bank to revoke the applicant's licence was permissible because it was introduced at the demand of the IMF (see §§95, 110). The Court found that the Respondent had not produced any evidence to show that the IMF had expressly imposed such a requirement. It then proceeded to state that, even assuming that that limitation on the applicant's access to a court was imposed pursuant to any binding international obligations undertaken by Bulgaria, "*the Contracting States' responsibility continues even after they assume international obligations subsequent to the entry into force of the Convention.*" (§111). By "*obligations*", the Court referred to the specific obligations that Bulgaria undertook by an agreement concluded with the IMF in May 1997 for the establishment of a currency board in Bulgaria after the financial crisis in 1996-97 (see §43). These were obligations "*subsequent*" to the entry into force of the Convention. By contrast, the basic obligations undertaken by Bulgaria under the IMF Agreement pre-existed the Convention since Bulgaria joined the IMF on 25 September 1990, before it ratified the Convention on 7 September 1992. The Court nonetheless applied the Convention.

[46] *Capital Bank AD v Bulgaria*, App No 49429/99, judgment of 24 November 2005.

83. Finally, *Bosphorus* is not an isolated judgment. The principle that other international obligations must, in this Court, yield to the Convention can be seen in many decisions both before and after *Bosphorus*.[47] Even if it were to be accepted, contrary to the Applicant's submissions, that UNSCR 1546 required the UK forces to detain the applicant, Article 5 would not be displaced.

84. The Government argues that, in applying the *Bosphorus* test of equivalent protection in this case, full account should be taken of the interests pursued by UNSCR 1546 and the threat to peace and security posed by widespread terrorist action in Iraq. This however can by no means justify the grave breach of the right to liberty suffered by the Applicant. The Government's argument amounts in effect to asserting that the MNF should be beyond the law. It is clear that the UN system does not offer any general mechanisms for controlling observance of human rights which might possibly be viewed as comparable to those offered by the Convention.

85. The same holds true, more specifically, to the legal regime of internment provided pursuant to UNSCR 1546. This regime is contained in CPA Memorandum No 3 (Revised) **[2]**, section 6, which governs the MNF internee process. The regime set up by the Memorandum does not come anywhere near to meeting the standards of Article 5(1) and cannot be considered as "*equivalent*" however loosely the concept of equivalence is interpreted.

86. There is no escape from the fact that section 6 of the Memorandum enables a person to be detained for an indefinite period without any charges being brought against him and is characterized by a distinct lack of legal standards, process rights, and judicial remedies in manifest breach of Article 5(1). The Applicant like any internee could claim no rights and has no means of challenging his detention before any independent body.

87. This also has consequences for the Applicant's rights under Article 5(4). As the House of Lords recognised, Article 5(4) was neither displaced nor qualified by UNSCR 1546, because in the House of Lords' view, the latter only qualified the former to the minimum extent necessary: see Lord Bingham §§37, 39, Baroness Hale §§125-126, Lord Carswell §§130, 136, Lord Brown §139. By analogy, in *Ireland v UK* (1978) 2 EHRR 25, (where the UK derogated from Article 5(1)), the UK nevertheless was responsible for a separate violation of Article 5(4): §§84, 200. That was because it had not built into the process – as it could have done – the right of access to a court able to order release if grounds for the detention could not be substantiated. See now *A v UK* (2009) 26 BHRC 1, §§202-203, 218-220.

[47] See *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v Netherlands,* App No 13645/05, decision of 20 January 2009; *Capital Bank AD v Bulgaria*, op.cit; *Soering v UK*, §83; *Al-Saadoon v UK*, §§126-7, 137.

Article 103 of the UN Charter [18]

88. The applicant submits that Article 103 is not engaged because UNSCR 1546 did not impose an obligation on the UK to intern the applicant and, in any event, UNSCR 1546 cannot be interpreted as requiring the UK to derogate from its international human rights obligations. Should, however, the Court take the view that UNSCR 1546 created a specific obligation on the UK to intern the applicant, it is submitted that, in any event, Article 103 does not preclude this Court from finding a violation of Article 5 . The transposition of the reasoning in *Kadi* to the Convention is fully in conformity with Article 103 of the UN Charter.

89. Article 103 states as follows:

> "*In the event of a conflict between the obligations of the Member of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*". **[18]**

90. Article 103 does not remove the jurisdiction of this Court. Nor does it preclude this Court from finding a violation of Article 5 where the substantive requirements of that provision have been breached: this is an issue of interpretation of the Convention which is for this Court to decide. The rule of priority of Article 103 only comes into play once a violation of the Convention has been established by the Court. In the absence of such a violation, there is no "*conflict*" between the obligations of the UK under the Charter and its obligations under the Convention. Moreover, Article 103 only comes into play for the purposes of international law: not for the purpose of diluting the protection given by fundamental rights under the ECHR, any more than the power to remove the applicant in *Chahal* or the duty to extradite the applicant in *Soering* (pursuant to an extradition treaty) was apt to displace or qualify Article 5.

91. The opposite interpretation is untenable. It cannot be the intention of the UN Charter (itself an international agreement, albeit a multilateral one) to abolish *a priori* any human rights protection and create a no go area for any court thus leading to "*a regrettable vacuum in the system of human-rights protection*" (cf. *Bankovic*, para 80). Furthermore, the effect of Article 103 is to create obligations in international law. It does not deal with the consequences of such obligations in either domestic law or regional systems of law, such as the Convention; nor does it affect the powers of institutions set up by international organizations, such as this Court. The allocation and scope of such powers is a matter for the internal law of the organization in issue. The task of this Court is to determine whether the Convention has been violated. In so far as any liability under the Convention is incurred, it is the liability of a Contracting Party under the Convention. The purpose of Article 103 is, by contrast, to create obligations for the State in issue once a violation of the Convention has been established in international law generally. Contrary therefore to the Government's observations, the application of the Convention to action intended to fulfil obligations

arising from the UN Charter does not "directly entail a challenge to the primacy of the resolution in international law".

92. The Court is invited to consider the logical consequences of the Government's argument about the priority to be given to Article 103 over the Convention. That argument could not stop at internment on the territory of a non-Contracting State: the logic of the argument would mean that internment would be permissible within the territory of the UK (or another State Party to the Convention) if that is what a UNSCR required. Nor could the argument stop at internment. Suppose that a UNSCR required a state to torture an individual, contrary to the absolute and non-derogable terms of Article 3 of the Convention, or required the imposition of the death penalty, contrary to the 13th Protocol? Even if it could be said that the UNSC has no power to authorise torture, since the prohibition of torture is a part of the *ius cogens* (peremptory norms of international law which permit of no derogation), that could not be said of the death penalty example.

93. On the basis of the above analysis, the Applicant answers the specific questions put by the Court as follows:

i. **WAS THE UK UNDER ANY OBLIGATION, ARISING OUT OF INTERNATIONAL HUMANITARIAN LAW AND/OR UNSCR 1546 TO INTERN THE APPLICANT?**

94. UNSCR 1546 **[7]** created a power and not an obligation to intern. It authorized UK forces, as part of the MNF, to undertake a broad range of tasks to contribute to the maintenance of security in Iraq, including internment where this was necessary for imperative reasons of security. It left a clear discretion to the MNF as to whether when and how to exercise the power to intern and did not establish an obligation to intern the applicant.

95. The Applicant was arrested after the occupation of Iraq ended on 28 June 2004. The legal basis for his detention was UNSCR 1546 and not the laws of occupation. The Government concedes that the laws of occupation did not apply independently of UNSCR 1546 but asserts that the resolution must be construed alongside the law of occupation including Article 43 of the Hague Regulations **[25]** and Article 78 of Geneva Convention IV **[27]**.

96. It is however clear that UNSCR 1546 did not displace the UK's international human rights obligations. UNSCR 1546 expressly referred to action "*in accordance with international law, including obligations under international humanitarian law*". The Government's approach would involve action being "*in accordance with international law, but limited to obligations under international humanitarian law*". UNSCR 1546 did not state that it overrode or excluded human rights obligations. Even if it were accepted that it did, the UK would still be under a Convention obligation to comply with Article 5.

97. As a matter of international law, international human rights and international humanitarian law coexist: In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9th July, 2004 ICJ No 131 **[30]**, Israel argued that the applicability of international humanitarian law displaced its international human rights obligations such as those arising under ICCPR: see §102. That argument failed. As the ICJ explained: (a) the protection of a human rights convention such as the ICCPR did not cease in time of armed conflict, except through derogation of the kind found in ICCPR Art 4 (§106); (b) obligations under the ICCPR and Convention on the Rights of the Child (CRC) applied to the occupied territories (§§111&113). It is therefore not the case that international humanitarian law displaces in any way international human rights law.

98. This Court has also made it clear that Article 5 does apply where persons are detained in the context of a military occupation. When Turkey went into military occupation of Northern Cyprus, that occupation was within the scope of the Hague Regulations and the Geneva Conventions. This, however, did not prevent Turkey from being subject to the ECHR. In *Cyprus v Turkey* (App No 25781/94, judgment of 10 May 2001), the Court found Turkey to be in breach of, inter alia, Article 5: see paras 147-150 of the judgment; see further *Cyprus v Turkey* (App Nos 6780/74 and 6950/75, 10 July 1976) (1976) 4 EHRR 482.

99. The applicant notes that the Government does not seek to rely on the law of armed conflict generally applicable outside the context of occupation. There is thus no basis to suggest that any other provision of international law concerning the law of armed conflict or the obligations of an occupying power displaced the requirements of Article 5 in this case.

100. The Court is asked to note that it ought not to be taken as accepted that British internment in Iraq was compatible with international humanitarian law, even were the parameters of that law to be treated as qualifying or displacing the requirements of Article 5. In addition to questions concerning (a) justification based on imperative reasons of security and (b) procedural safeguards, there are (c) further points relating to IHL as summarized in Annex 1 attached. The Court has not been asked to resolve those questions in these proceedings, though they are matters which may be and are being raised in appropriate domestic forums in other cases.

ii. **IF THERE WAS AN OBLIGATION TO INTERN, WHAT WAS THE EFFECT ON THE UK'S OBLIGATIONS UNDER ARTICLE 5? IN PARTICULAR, WERE THE REQUIREMENTS OF ARTICLE 5 DISPLACED OR QUALIFIED? IF QUALIFIED, IN WHAT WAY WERE THEY QUALIFIED?**

101. UNSCR 1546 did not require the UK to derogate from its international human rights obligations. It follows that it did not displace or qualify the requirements of Article 5 of the Convention.

102. In any event, even if it were to be accepted that UNSCR 1546 established a specific obligation on the UK to intern the applicant, the UK, under the judgment in *Bosphorus,* is not absolved of its responsibility to comply with Article 5 by transferring powers to an international organization. The *Bosphorus* test applies not only where a UNSC Resolution under Chapter VII is implemented by an EC measure but also where it is implemented by action undertaken individually by an EC Member State.

103. UNSCR 1546 cannot be treated as requiring the UK to derogate from its international human rights obligations, and must be interpreted subject to Article 5. It is intended to preserve those obligations and should be interpreted in accordance with them. The answer to question 3(C) is therefore: "yes". In any event, it is Article 5 that has primacy under the Convention scheme (quite irrespective of the position in international law generally), just as Article 3 had primacy in the face of contrary treaty obligations and provisions in *Soering.*

104. In discharging their obligations under UNSC resolutions, Contracting Parties to the Convention must exercise their discretion in accordance with their obligations under the Convention and seek to give effect to its provisions. This obligation flows from Article 1 of the Convention. It is however clear that, in this case, the UK made no effort whatsoever to consider the implications of Article 5. It began instead from an assumption of inherent incompatibility and took for granted that UNSCR 1546 displaced the requirements of the Convention. At the core of the Government's argument lies the assumption that the UNSCR can only be implemented in a way which is incompatible with the Convention. That assumption is, it is submitted, demonstrably wrong.

105. Since UNSCR 1546 did not displace the requirements of the Convention, the UK was under an obligation to comply with Article 5. The Resolution did not "qualify" the standards of the Convention. The application of Article 5 has to be seen in the context of the specific threat to peace and security posed by terrorist action in Iraq but that does not justify or render proportionate the internment of the applicant.

QUESTION 4: HAS THERE BEEN A VIOLATION OF ARTICLE 5(1)

106. For all the reasons set out above, it is submitted that there has been a violation of the Applicant's Article 5(1) right by the UK. Internment by the executive strikes at the very heart of the right to personal liberty which is guaranteed by that provision and is fundamentally inconsistent with the rule of law.

ARTICLE 41 CLAIM FOR JUST SATISFACTION

107. The Applicant makes a claim for just satisfaction pursuant to Article 41. He seeks a declaration that his right under Article 5(1) has been breached, an award for non-pecuniary damage and his legal costs and expenses (as set out in the Schedule at Annex 1).

Non-pecuniary damages

108. The Applicant, who is now 52 years of age, was detained by the UK Government in breach of his Article 5(1) right between 10 October 2004 and 30 December 2007, a period of 3 years, 2 months and 20 days. The Applicant has never been tried, even less convicted, of any criminal offence relating to the alleged basis on which he was detained. The allegations against him have never been tested in any court of law, but were nonetheless the sole basis of his detention for in excess of 3 years.

109. Whilst this Court has dealt frequently with the question of just satisfaction for breaches of Article 5(1), few of those cases have concerned detention for periods in excess of 3 years. There can be no doubt that such a period demands an award for non-pecuniary damage, and that the finding of a violation will not in itself amount to just satisfaction within the meaning of Article 41. By way of illustration of the appropriate award in this case, the Applicant refers the Court to three decisions, concerning detention for periods of 12 weeks, 13 months and 3 years 2 months respectively:

    i. *Jecius v Lithuania,* App No 34578/97, 31 July 2000. The Court found that the Applicant had been detained in breach of Article 5(1) for a total of 12 weeks, comprising: 5 weeks of preventive detention, permitted by domestic law, on the basis that he was suspected of being likely to engage in banditry, criminal association and intimidation; and 7 weeks of detention on remand for an allegation of murder, in breach of procedural requirements of domestic law. The Court awarded the applicant 60,000 LTL for the total period of unlawful detention. In 2000, that award equated to approximately £15,189; adjusted to take into account inflation, it would now equate to approximately £19,162.

    ii. *Tsirlis & Koloumpas v Greece*, App No 19233/91, 29 May 1997. The applicants were held in breach of Article 5(1) for periods of 12 and 13 months respectively. The Court awarded the applicant, Tsirlis**,** 8,000,0000 GRD for the breach of Article 5(1). In 1997, that award equated to approximately £20,521; adjusted to take into account inflation, it would now equate to approximately £28,000.

    iii. *Assanidze v Georgia*, App No 71503/01, 8 April 2004. In October 2000 the applicant was convicted of being a member of a criminal association and of attempting to kidnap a senior State official. He was sentenced to 12 years' imprisonment. On 29 January 2001 the applicant was acquitted of all charges on appeal, but continued to be detained some 3 years later, at the time of this Court's judgment on 8 April 2004. For the period of detention since his acquittal (3 years, 2 months and 10 days), the Court awarded the applicant 150,000 Euros for pecuniary and non-pecuniary damage, notwithstanding the lack of evidence of the applicant's income prior to his arrest (the Court instead concluding that it was inevitable that some pecuniary loss had flowed from his detention which prevented him from seeking employment). In 2004, that award equated to £131,115; adjusted to take into account inflation, it would now equate to approximately £150,000.

110. The Applicant considers that the Court may also find some assistance in the domestic decisions of the UK courts concerning compensation for unlawful detention. The leading authority is *Thompson & Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 **[40]**, at 515D-F, where the Court of Appeal set down the following guideline starting points: the first hour of unlawful detention would attract damages in the region of £500 and, on the basis of a subsequent sliding hourly rate, the first 24 hours would merit approximately £3000 in total. Each subsequent 24 hour period would attract further damages again on a sliding scale. Adjusted to reflect inflation, the £3000 award in *Thompson* would now equate to approximately £4100.

111. The *Thompson* guidelines have been regularly applied by the domestic courts since 1997. Three recent decisions illustrate their application in cases of longer periods of detention, such as the Applicant's:

    i. *R (Beecroft) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin), 4 December 2008 **[41]**. The claimant had been lawfully detained for immigration reasons for approximately 12 days. She was subsequently unlawfully detained for a period of approximately 6 months. The High Court awarded the claimant £32,000 in basic damages. In reaching his decision, the Judge relied heavily on the *Thompson* guidance, noting that it was also considered to be the leading authority by the principal practitioner text on damages. He also referred to an earlier award in *R (Johnson) v Secretary of State for the Home Department* [2004] EWHC 1550, where the parties had agreed damages of £15,000 for a period of nearly two months' unlawful detention in the immigration context (that equating to approximately £17,000 when adjusted for inflation).[48]

    ii. *R (Miller) v The Independent Assessor* [2009] EWCA Civ 609, 19 June 2009 **[42]**. The claimant was wrongly convicted of murder and sentenced to life imprisonment. His conviction was subsequently quashed and he was released after having served 4 years and 1 month of his sentence. He sought damages for the miscarriage of justice he had suffered. The Independent Assessor awarded him £55,000. The Court of Appeal quashed the award on the basis that it could not possibly be sufficient for a period of detention in excess of 4 years the entirety of

[48] The Judge also made reference to the decisions of the Court of Appeal and House of Lords in *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [1999] QB 1043, [2001] 2 AC 19 **[44]**. In *Evans* the claimant had served a lawful custodial sentence of two years for various offences, including the serious offence of robbery. On what was subsequently held to be the correct method of calculating the conditional release date, she should have been released from prison 59 days earlier than the date on which she was released. In the Court of Appeal the damages for the extra period of unlawful custody were assessed at £5,000 at 1998 prices. The Judge in *Beecroft* derived less assistance from the decision in *Evans* than he did from *Thompson*¸ noting that that had also been the view of the Judge in the earlier case of *R(E) v Secretary of State for the Home Department* [2006] EWHC 2500 **[45]**. In *E,* the Judge had not found *Evans* particularly helpful in a case where the circumstances could be more fairly assimilated to those of wrongful arrest and detention for an alleged crime. The Judge in *Beecroft* considered the position to be the same in the case before him, and noted that that was "*the paradigm case to which the observations in Thompson specifically related*": see *Beecroft* at §§6-7.

which had been unlawful, and remitted the matter for reconsideration by the Independent Assessor.[49]

iii. *Muuse v Secretary of State for the Home Department* [2009] EWHC 1886 (QB), 17 July 2009 **[43]**. The claimant had been lawfully held on remand for offences of assault and breaching a restraining order, to which he subsequently pleaded guilty. Due to time served on remand, the sentencing judge ordered the claimant's immediate release. However, instead of being released, the claimant was held for a further 128 days apparently in relation to possible deportation proceedings. The claimant sought damages for that period of unlawful detention. The defendant accepted that the detention had amounted to false imprisonment and that *Thompson* formed the starting point for the consideration of quantum: §§1, 98. The High Court awarded the claimant £25,000 in basic damages.[50]

In all the circumstances, the Applicant submits that his detention, for a period of 3 years, 2 months and 20 days, the entirety of which was unlawful and which took place in Iraq, merits non-pecuniary damages in the region of £100,000.

112. In relation to costs and expenses: the applicants have incurred the costs and expenses in bringing their Application. These are particularised in the Schedule at Annex 2. The applicants seek an award for the payment of these costs and expenses from the Government (the costs of the domestic legal proceedings were funded by the Legal Services Commission). This is a uniquely complex and important case which has been acknowledged by both parties in their request for an Oral Hearing. Historical familiarity with the legal arguments does not obviate the need for time and effort in re-reading and re-drafting and updating; such tasks are obviously and necessarily time-consuming given the scale and scope of the issues raised by this case.

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[49] In reaching its decision, the Court of Appeal relied heavily upon *Thompson,* which it referred to as a guideline case. The Court of Appeal also made passing reference to the decision in *Evans*, amongst others, noting that the House of Lords had in that case refused to interfere with the award of the Court of Appeal: §21.

[50] The Court referred to *Thompson, Beecroft* and *Miller*. It was also referred to *Evans* by the Home Secretary, but took the view that the facts of that case were far removed from the matters before it.

ANNEX 1

LEGAL SUBMISSIONS REGARDING INTERNMENT and IHL

RELEVANT IHL

1. The foundation of the law of occupation, described as "Military Authority over the Territory of a Hostile State", is contained in Section III of the Annex to the Fourth Hague Convention. Article 43 states:

> "*The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*" **[25]**

2. The obligation to maintain local law coupled with the obligation to introduce occupation law to maintain public order and safety, albeit only when it is absolutely necessary, is the basis upon which subsequent developments in IHL with the Fourth Geneva Convention (GCIV) formalised the power of the occupier to introduce military courts for criminal law purposes and other forms of internment procedure. See Article 66 of GCIV and Article 78 of GCIV.[51] The presumption of Article 43 of the Annex to the Hague Convention is that local law will continue to apply, unless something is done by the occupying power to change it, and even then, no changes can take place unless the high threshold for necessity is met. This presumption is in keeping with the three key principles of the modern law of occupation, namely (1) it is temporary, (2) it does not result in the alteration of sovereignty and (3) the occupier holds the territory on trust for the occupied population pending the re-establishment of the latter's right to self-determination.

3. Article 64 of GCIV repeats the requirement that local law will continue to apply, unless "provisions" are made to the contrary:

> "*The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.*
>
> *Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.*
>
> *The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*"

4. The relevant parts of Article 78 GC IV provide:

[51] Relevant extracts from GCIV can be found at **[27]**

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

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be ***prescribed*** *by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power." (Emphasis added)*

5. Thus, under international humanitarian law, the power to intern is circumscribed in a number of ways.

   a. It can only be used if necessary for imperative reasons of security (see Art. 42 and Art. 78(1)).

   b. According to Article 78(2) "a *regular* procedure" to intern must be "*prescribed* by the Occupying Power in accordance with the provisions of the present Convention" (emphasis added). This condition effectively requires the promulgation of law by the Occupying Power which expressly suspends the relevant local law and sets out the power to intern and the circumstances in which that power will be exercised, together with the procedural right to be afforded to the internee. This cannot be done by relying on internal procedures. This is confirmed by the third paragraph of Article 64 which deals with any alteration of the legal rights of the protected persons by the Occupying Power. It provides:

      "*The Occupying Power may, however, subject the population of the occupied territory to provisions*[52] *which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."*

   c. Fulfilment of Article 78(2) is therefore a pre-condition to the lawful exercise of the power to intern under Article 78(1).[53] This would require some form of public enactment which (i) expressly suspends the relevant local law; (ii) sets out the power to intern and the circumstances in which that power will be exercised; and (iiii) sets out the procedural rights of the internee (including rights of appeal/review/representation etc.).

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[52] Although 'subject the population to provisions' doesn't expressly require domestic legislative promulgation, it is submitted that this is the correct interpretation.

[53] It is noted that this conditionality is similar to that contained within Article 5 ECHR "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". Both the ECHR right and the IHL power therefore recognise the primacy of domestic promulgation in the context of deprivation of liberty.

6. Assuming that the above criteria were fulfilled, a lawfully interned person could be interrogated, but he would effectively enjoy a right to silence. The only exception to that right is the obligation of a POW under Article 17 of the Third Geneva Convention (GCIII) **[26]** to provide his name, rank and number, but no more. The right to silence under international humanitarian law can be found in the following provisions:

    a. Article 44 of the Annex to the Hague Regulations **[25]** expresses one of the first unequivocal statements of the right to silence under international law, providing that "A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence."

    b. As indicated above, Article 17(3) of GCIII provides that, subject to the requirement to provide name, rank and number on pain of penalty, "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."

    c. Article 31 GCIV deals with the interrogation of protected persons (i.e. civilians): "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."

    d. The recognition of a right to silence in customary international humanitarian law is further demonstrated by Article 75(4)(f) AP1 **[28]** which provides, in that context of defining the minimum standards of a fair trial procedures, that "no one shall be compelled to testify against himself or confess guilt".

    e. These specific provisions dealing with the right not to answer questions must be read in conjunction with the more general provisions requiring humane treatment, for which see Articles 3 and 27(1) of GCIV.

BREACHES OF IHL IN IRAQ

Detention to interrogate prior to internment is unlawful

7. First, there is no power under Hague Article 43 or GCIV Article 78 to detain a person in order to determine *whether* they should be interned. Equally there is no power to detain a person for the purposes of 'tactical questioning' pending a decision on internment. Either the threshold is reached, or they must be released. In this regard, there is no reason why international humanitarian law should be less exacting in the requirement that Treaty law should be construed narrowly with regard to the liberty of the person.

Internment without the enactment of express law by an occupier is unlawful

8. Secondly, it is by no means apparent that the UK had ever promulgated for itself any power binding on persons in Iraq that allowed for local law to be suspended and for internment to take place. The Applicant's legal representatives are aware of CPA Memorandum No.3 (18 June 2003 and then 27 June 2004 **[2]**) but would not accept that this was adequate for those purposes.

The use or threat of force for the purposes of interrogation is unlawful

9. Finally, the degree to which IHL recognises a right to silence means that British army practices of 'conditioning' for the purposes of interrogation, which include a range of methods to prolong 'Shock of capture' are also unlawful. Given that there is a right to silence for POWs and other protected persons, the only thing that an occupier can lawfully do is ask an internee questions. Otherwise the humane treatment obligations under GC IV, Article 3 and 27(1) apply to all dealings that a detaining power has with a detainee.