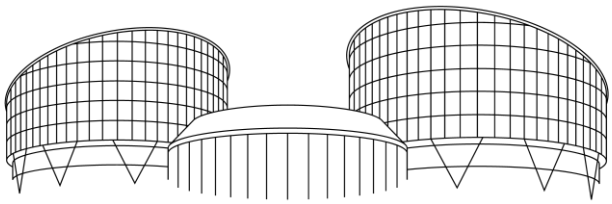

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF AL-JEDDA v. THE UNITED KINGDOM

(Application no. 27021/08)

JUDGMENT

STRASBOURG

7 July 2011

In the case of Al-Jedda v. the United Kingdom**,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Françoise Tulkens,
Josep Casadevall,
Dean Spielmann,
Giovanni Bonello,
Elisabeth Steiner,
Lech Garlicki,
Ljiljana Mijović,
Davíd Thór Björgvinsson,
Isabelle Berro-Lefèvre,
George Nicolaou,
Luis López Guerra,
Ledi Bianku,
Ann Power,
Mihai Poalelungi, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 9 and 16 June 2010 and 15 June 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 27021/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a joint Iraqi/British national, Mr Hilal Abdul-Razzaq Ali Al-Jedda ("the applicant"), on 3 June 2008.

2. The applicant, who had been granted legal aid, was represented by Public Interest Lawyers, solicitors based in Birmingham. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicant complained that he had been detained by British troops in Iraq in breach of Article 5 § 1 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 17 February 2009 the Court decided to give notice of the application to the Government. It also decided to

examine the merits of the application at the same time as its admissibility (Article 29 § 1 of the Convention). The parties took turns to file observations on the admissibility and merits of the case. On 19 January 2010 the Chamber decided to relinquish jurisdiction in favour of the Grand Chamber (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. Judge Peer Lorenzen, President of the Fifth Section, withdrew and was replaced by Judge Luis López Guerra, substitute judge.

6. The applicants and the Government each filed a memorial on the admissibility and merits, and joint third-party comments were received from the non-governmental organisations Liberty and JUSTICE ("the third-party interveners").

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 June 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr D. WALTON, *Agent*,
Mr J. EADIE QC,
Ms C. IVIMY,
Mr S. WORDSWORTH, *Counsel*,
Ms L. DANN,
Ms H. AKIWUMI, *Advisers*;

(b) *for the applicant*

Mr RABINDER SINGH QC,
Mr R. HUSAIN QC,
Ms S. FATIMA,
Ms N. PATEL,
Mr T. TRIDIMAS,
Ms H. LAW, *Counsel*,
Mr P. SHINER,
Mr D. CAREY,
Ms T. GREGORY,
Mr J. DUFFY, *Advisers*.

The Court heard addresses by Mr Eadie and Mr Rabinder Singh.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

A. The applicant, his arrest and internment

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

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

11. The applicant was held on the basis that his internment was necessary for imperative reasons of security in Iraq. He was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq with a view to the commission of atrocities there; for facilitating the travel into Iraq of an identified terrorist explosives expert; for conspiring with that explosives expert to conduct attacks with improvised explosive devices against Coalition Forces in the areas around Fallujah and Baghdad; and for conspiring with the explosives expert and members of an Islamist terrorist cell in the Gulf to smuggle high-tech detonation equipment into Iraq for use in attacks against Coalition Forces. No criminal charges were brought against him.

12. The applicant's internment was initially authorised by the senior officer in the detention facility. Reviews were conducted seven days and twenty-eight days later by the Divisional Internment Review Committee (DIRC). This comprised the senior officer in the detention facility and army legal and military personnel. Owing to the sensitivity of the intelligence material upon which the applicant's arrest and detention had been based, only two members of the DIRC were permitted to examine it. Their

recommendations were passed to the Commander of the Coalition's Multinational Division (South-East) ("the Commander"), who himself examined the intelligence file on the applicant and took the decision to continue the internment. Between January and July 2005 a monthly review was carried out by the Commander, on the basis of the recommendations of the DIRC. Between July 2005 and December 2007 the decision to intern the applicant was taken by the DIRC itself, which, during this period, included as members the Commander together with members of the legal, intelligence and other army staffs. There was no procedure for disclosure of evidence or for an oral hearing, but representations could be made by the internee in writing which were considered by the legal branch and put before the DIRC for consideration. The two Commanders who authorised the applicant's internment in 2005 and 2006 gave evidence to the domestic courts that there was a substantial weight of intelligence material indicating that there were reasonable grounds for suspecting the applicant of the matters alleged against him.

13. When the applicant had been detained for eighteen months, the internment fell to be reviewed by the Joint Detention Committee (JDC). This body included senior representatives of the Multinational Force, the Iraqi interim government and the ambassador for the United Kingdom. It met once and thereafter delegated powers to a Joint Detention Review Committee, which comprised Iraqi representatives and officers from the Multinational Force.

14. On 14 December 2007 the Secretary of State signed an order depriving the applicant of British citizenship, on the ground that it was conducive to the public good. The Secretary of State claimed, *inter alia*, that the applicant had connections with violent Islamist groups, in Iraq and elsewhere, and had been responsible for recruiting terrorists outside Iraq and facilitating their travel and the smuggling of bomb parts into Iraq.

15. The applicant was released from internment on 30 December 2007 and travelled to Turkey. He appealed against the deprivation of his British citizenship. On 7 April 2009 the Special Immigration Appeals Commission dismissed his appeal, having heard both open and closed evidence, during a hearing where the applicant was represented by special advocates (see, further, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 91-93, ECHR 2009). The Special Immigration Appeals Commission held that, for reasons set out in detail in a closed judgment, it was satisfied on the balance of probabilities that the Secretary of State had proved that the applicant had facilitated the travel to Iraq of a terrorist explosives expert and conspired with him to smuggle explosives into Iraq and to conduct improvised explosive device attacks against Coalition Forces around Fallujah and Baghdad. The applicant did not appeal against the judgment.

B. The domestic proceedings under the Human Rights Act

16. On 8 June 2005 the applicant brought a judicial review claim in the United Kingdom, challenging the lawfulness of his continued detention and also the refusal of the Secretary of State for Defence to return him to the United Kingdom. The Secretary of State accepted that the applicant's detention within a British military facility brought him within the jurisdiction of the United Kingdom under Article 1 of the Convention. He also accepted that the detention did not fall within any of the permitted cases set out in Article 5 § 1 of the Convention. However, the Secretary of State contended that Article 5 § 1 did not apply to the applicant because his detention was authorised by United Nations Security Council Resolution 1546 (see paragraph 35 below) and that, as a matter of international law, the effect of the Resolution was to displace Article 5 § 1. He also denied that his refusal to return the applicant to the United Kingdom was unreasonable. It was argued on behalf of the applicant that Article 103 of the Charter of the United Nations (see paragraph 46 below) had no application since, *inter alia*, Resolution 1546 placed no obligation on the United Kingdom and/or since the Charter of the United Nations placed an obligation on member States to protect human rights.

17. Both the Divisional Court in its judgment of 12 August 2005 and the Court of Appeal in its judgment of 29 March 2006 unanimously held that United Nations Security Council Resolution 1546 explicitly authorised the Multinational Force to take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the annexed letter from the US Secretary of State. By the practice of the member States of the United Nations, a State which acted under such an authority was treated as having agreed to carry out the Resolution for the purposes of Article 25 of the Charter of the United Nations and as being bound by it for the purposes of Article 103 (see paragraph 46 below). The United Kingdom's obligation under Resolution 1546 therefore took precedence over its obligations under the Convention. The Court of Appeal also held that, under section 11 of the Private International Law (Miscellaneous Provisions) Act 1995, since the applicant was detained in Iraq, the law governing his claim for damages for false imprisonment was Iraqi law (see *R. (on the application of Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin); [2006] EWCA Civ 327)

18. The applicant appealed to the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood: see *R. (on the application of Al-Jedda) (FC) (Appellant) v. Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007). The Secretary of State raised a new argument before the House of Lords, claiming that by virtue of United Nations Security Council Resolutions 1511 and 1546 the detention

of the applicant was attributable to the United Nations and was thus outside the scope of the Convention. Lord Bingham introduced the attribution issue as follows:

> "5. It was common ground between the parties that the governing principle is that expressed by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organisations ..."

He referred to the Court's reasoning in *Behrami v. France* and *Saramati v. France, Germany and Norway* ((dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007) (hereinafter "*Behrami and Saramati*") and to the factual situation in Iraq at the relevant time and continued:

> "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 [Coalition Provisional Authority] 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 [of Lords] as one of those considered in *R. (Al-Skeini and Others) v. Secretary of State for Defence) (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33 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 [United Nations Security Council Resolution] 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 Multinational Force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in paragraph 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function 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.
>
> 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 [United Nations Interim Administration Mission in Kosovo] a subsidiary organ of the UN. The Multinational 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.

25. I would resolve this first issue in favour of the appellant and against the Secretary of State."

Baroness Hale observed in this connection:

"124. ... I agree with [Lord Bingham] that the analogy with the situation in Kosovo breaks down at almost every point. The United Nations made submissions to the European Court of Human Rights in *Behrami v. France*, *Saramati v. France, Germany and Norway* ... concerning the respective roles of UNMIK [United Nations Interim Administration Mission in Kosovo] and KFOR [NATO-led Kosovo Force] in clearing mines, which was the subject of the *Behrami* [*and Saramati*] 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 [Multinational Force] 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 [as] 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."

Lord Carswell similarly agreed with Lord Bingham on this issue (§ 131). Lord Brown also distinguished the situation in Kosovo from that in Iraq, as follows:

"145. To my mind it follows that any material distinction between the two cases must be found ... in the very circumstances in which the [Multinational Force] came to be authorised and mandated in the first place. The delegation to KFOR [NATO-led Kosovo Force] of the UN's function of maintaining security was, the Court observed [in *Behrami and Saramati*], 'neither presumed nor implicit but rather prior and explicit in the Resolution itself'. Resolution 1244 decided (paragraph 5) 'on the deployment in Kosovo, under United Nations auspices, of international civil and security presences' – the civil presence being UNMIK [United Nations Interim Administration Mission in Kosovo], recognised by the Court in *Behrami* [*and Saramati*] (paragraph 142) as 'a subsidiary organ of the UN'; the security presence being KFOR. KFOR was, therefore, expressly formed under UN auspices. Paragraph 7 of the Resolution '[a]uthorise[d] member States and relevant international organisations to establish the international security presence in Kosovo as set out in point 4 of Annex 2 ...'. Point 4 of Annex 2 stated: 'The international security presence with substantial NATO participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.'

146. Resolution 1511, by contrast, was adopted on 16 October 2003 during the USA's and UK's post-combat occupation of Iraq and in effect gave recognition to those occupying forces as an existing security presence. ...

...

148. Nor did the position change when Resolution 1546 was adopted on 8 June 2004, three weeks before the end of the occupation and the transfer of authority from the CPA [Coalition Provisional Authority] to the interim government of Iraq on 28 June 2004. ... Nothing either in the Resolution [1546] itself or in the letters annexed suggested for a moment that the [Multinational Force] had been under or was now being transferred to United Nations authority and control. True, the [Security Council] was acting throughout under Chapter VII of the Charter [of the United Nations]. But it does not follow that the UN is therefore to be regarded as having assumed ultimate authority or control over the Force. The precise meaning of the term 'ultimate authority and control' I have found somewhat elusive. But it cannot automatically vest or remain in the UN every time there is an authorisation of UN powers under Chapter VII, else much of the analysis in *Behrami* [*and Saramati*] would be mere surplusage."

19. Lord Rodger dissented on this point. He found that the legal basis on which the members of the NATO-led Kosovo Force (KFOR) were operating in Kosovo could not be distinguished from that on which British forces in the Multinational Force were operating during the period of the applicant's internment. He explained his views as follows:

"59. There is an obvious difference between the factual position in Kosovo that lay behind the *Behrami* [*and Saramati*] case and the factual position in Iraq that lies behind the present case. The forces making up KFOR went into Kosovo, for the first time, as members of KFOR and in terms of Security Council Resolution 1244. By contrast, the Coalition Forces were in Iraq and, indeed, in occupation of Iraq, for about six months before the Security Council adopted Resolution 1511, authorising the creation of the [Multinational Force], on 16 October 2003.

...

61. It respectfully appears to me that the mere fact that Resolution 1244 was adopted before the forces making up KFOR entered Kosovo was legally irrelevant to the issue in *Behrami* [*and Saramati*]. What mattered was that Resolution 1244 had been adopted before the French members of KFOR detained Mr Saramati. So the Resolution regulated the legal position at the time of his detention. Equally, in the present case, the fact that the British and other Coalition Forces were in Iraq long before Resolution 1546 was adopted is legally irrelevant for present purposes. What matters is that Resolution 1546 was adopted before the British forces detained the appellant and so it regulated the legal position at that time. As renewed, the provisions of that Resolution have continued to do so ever since.

...

87. If one compares the terms of Resolution 1244 and Resolution 1511, for present purposes there appears to be no relevant legal difference between the two Forces. Of course, in the case of Kosovo, there was no civil administration and there were no bodies of troops already assembled in Kosovo whom the Security Council could authorise to assume the necessary responsibilities. In paragraph 5 of Resolution 1244 the Security Council accordingly decided 'on the deployment in Kosovo, under United Nations auspices, of international civil and security presences'. Because there were no suitable troops on the ground, in paragraph 7 of Resolution 1244 the Council had actually to authorise the establishing of the international security presence and then to authorise it to carry out various responsibilities.

88. By contrast, in October 2003, in Iraq there were already forces in place, especially American and British forces, whom the Security Council could authorise to assume the necessary responsibilities. So it did not need to authorise the establishment of the [Multinational Force]. In paragraph 13 the Council simply authorised 'a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq' – thereby proceeding on the basis that there would indeed be a Multinational Force under unified command. In paragraph 14 the Council urged member States to contribute forces to the [Multinational Force]. Absolutely crucially, however, in paragraph 13 it spelled out the mandate which it was giving to the [Multinational Force]. By 'authorising' the [Multinational Force] to take the measures required to fulfil its 'mandate', the Council was asserting and exercising control over the [Multinational Force] and was prescribing the mission that it was to carry out. The authorisation and mandate were to apply to all members of the [Multinational Force] – the British and American, of course, but also those from member States who responded to the Council's call to contribute forces to the [Multinational Force]. The intention must have been that all would be in the same legal position. This confirms that – as I have already held, at paragraph 61 – the fact that the British forces were in Iraq before Resolution 1511 was adopted is irrelevant to their legal position under that Resolution and, indeed, under Resolution 1546."

20. The second issue before the House of Lords was whether the provisions of Article 5 § 1 of the Convention were qualified by the legal regime established pursuant to United Nations Security Council Resolution 1546 and subsequent resolutions. On this point, the House of Lords unanimously held that Article 103 of the Charter of the United Nations gave primacy to resolutions of the Security Council, even in relation to human rights agreements. Lord Bingham, with whom the other Law Lords agreed, explained:

"30. ... while the Secretary of State contends that the Charter [of the United Nations], and UNSCRs [United Nations Security Council Resolutions] 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006), impose an obligation on the UK to detain the appellant which prevails over the appellant's conflicting right under Article 5 § 1 of the European Convention, the appellant insists that the UNSCRs referred to, read in the light of the Charter, at most authorise the UK to take action to detain him but do not oblige it to do so, with the result that no conflict arises and Article 103 [of the Charter] is not engaged.

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of UNSCRs 1511 and 1546 given above in paragraphs 12 and 15, the Resolutions use the language of authorisation, not obligation, and the same usage is found in UNSCRs 1637 (2005) and 1723 (2006). In ordinary speech to authorise is to permit or allow or license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.

32. First, it appears to me that during the period when the UK was an Occupying Power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi interim government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety. [Lord Bingham here referred to Article 43 of the Hague Regulations and Articles 41, 42 and 78 of the Geneva Convention (IV) relative to the Protection of

Civilian Persons in Time of War: for the text of these Articles, see paragraphs 42 and 43 of this judgment below.]

These three Articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons, and it would seem to me that if the Occupying Power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the Occupying Power there must be an obligation to detain such a person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] *ICJ Reports* 116, paragraph 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later Resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

33. There are, secondly, some situations in which the Security Council can adopt resolutions couched in mandatory terms. One example is UNSCR 820 (1993), considered by the European Court (with reference to an EC regulation giving effect to it) in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [[GC], no. 45036/98, ECHR 2005-VI] (2005) 42 EHRR 1, which decided in paragraph 24 that 'all States shall impound all vessels, freight vehicles, rolling stock and aircraft in their territories ...'. Such provisions cause no difficulty in principle, since member States can comply with them within their own borders and are bound by Article 25 of the UN Charter to comply. But language of this kind cannot be used in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under Article 43 of the Charter which entitle them to call on member States to provide them. Thus in practice the Security Council can do little more than give its authorisation to member States which are willing to conduct such tasks, and this is what (as I understand) it has done for some years past. Even in UNSCR 1244 (1999) relating to Kosovo, when (as I have concluded) the operations were very clearly conducted under UN auspices, the language of authorisation was used. There is, however, a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorised by the Security Council as where it is required: see, for example, Goodrich, Hambro and Simons (eds.), *Charter of the United Nations: Commentary and Documents*, 3rd edn. (1969), pp. 615-16; *Yearbook of the International Law Commission* (1979), Vol. II, Part One, paragraph 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp. 150-51. The most recent and perhaps clearest opinion on the subject is that of Frowein and Krisch in Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edn. (2002), p. 729:

> 'Such authorisations, however, create difficulties with respect to Article 103. According to the latter provision, the Charter – and thus also SC [Security Council] Resolutions – override existing international law only in so far as they create "obligations" (cf. Bernhardt on Article 103 MN 27 et seq.). One could conclude that in case a State is not obliged but merely authorised to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with State practice at least as regards authorisations of military action. These authorisations have not been opposed on the ground of conflicting treaty

obligations, and if they could be opposed on this basis, the very idea of authorisations as a necessary substitute for direct action by the SC would be compromised. Thus, the interpretation of Article 103 should be reconciled with that of Article 42, and the prevalence over treaty obligations should be recognised for the authorisation of military action as well (see Frowein/Krisch on Article 42 MN 28). The same conclusion seems warranted with respect to authorisations of economic measures under Article 41. Otherwise, the Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace – it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of Article 103 to all action under Articles 41 and 42 and not only to mandatory measures.'

This approach seems to me to give a purposive interpretation to Article 103 of the Charter, in the context of its other provisions, and to reflect the practice of the UN and member States as it has developed over the past sixty years.

34. I am further of the opinion, thirdly, that in a situation such as the present 'obligations' in Article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the Articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to international peace and security. As is well known, a large majority of States chose not to contribute to the Multinational Force, but those which did (including the UK) became bound by Articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in Article 103 to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decision of the International Court of Justice (*Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom*) [1992] *ICJ Reports* 3, paragraph 39, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] *ICJ Reports* 325, 439-40, paragraphs 99-100 per Judge *ad hoc* Lauterpacht) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (*The Charter of the United Nations: A Commentary*, 2nd edn., ed Simma, [2002,] pp. 1299-300).''

Lord Bingham concluded on this issue:

"39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the

appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR [United Nations Security Council Resolution] 1546 and successive resolutions, but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense."

21. Baroness Hale commenced by observing:

"122. ... There is no doubt that prolonged detention in the hands of the military is not permitted by the laws of the United Kingdom. Nor could it be permitted without derogation from our obligations under the European Convention on Human Rights. Article 5 § 1 of the Convention provides that deprivation of liberty is only lawful in defined circumstances which do not include these. The drafters of the Convention had a choice between a general prohibition of 'arbitrary' detention, as provided in Article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter. They were well aware of Churchill's view that the internment even of enemy aliens in war time was 'in the highest degree odious'. They would not have contemplated the indefinite detention without trial of British citizens in peacetime. I do not accept that this is less of a problem if people are suspected of very grave crimes. The graver the crime of which a person is suspected, the more difficult it will be for him to secure his release on the grounds that he is not a risk. The longer therefore he is likely to be incarcerated and the less substantial the evidence which will be relied upon to prove suspicion. These are the people most in need of the protection of the rule of law, rather than the small fry in whom the authorities will soon lose interest."

Baroness Hale agreed with Lord Bingham that the Convention rights could be qualified by "competing commitments under the United Nations Charter", but continued:

"126. That is, however, as far as I would go. The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. We can go no further than the UN has implicitly required us to go in restoring peace and security to a troubled land. The right is qualified only to the extent required or authorised by the Resolution. What remains of it thereafter must be observed. This may have both substantive and procedural consequences.

127. It is not clear to me how far UNSC [United Nations Security Council] Resolution 1546 went when it authorised the [Multinational Force] to 'take all necessary measures to contribute to the maintenance of security and stability in Iraq, in accordance with the letters annexed to this Resolution expressing, *inter alia*, the Iraqi request for the continued presence of the Multinational Force and setting out its tasks' (paragraph 10). The 'broad range of tasks' were listed by Secretary of State Powell as including 'combat operations against members of these groups [seeking to influence Iraq's political future through violence], internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security'. At the same time, the Secretary of State made clear the commitment of the forces which made up the MNF [Multinational Force] to 'act consistently with their obligations under the law of armed conflict, including the Geneva Conventions'.

128. On what basis is it said that the detention of this particular appellant is consistent with our obligations under the law of armed conflict? He is not a 'protected person' under the Fourth Geneva Convention because he is one of our own citizens. Nor is the UK any longer in belligerent occupation of any part of Iraq. So resort must be had to some sort of post-conflict, post-occupation, analogous power to intern anyone where this is thought 'necessary for imperative reasons of security'. Even if the UNSC Resolution can be read in this way, it is not immediately obvious why the prolonged detention of this person in Iraq is necessary, given that any problem he presents in Iraq could be solved by repatriating him to this country and dealing with him here. If we stand back a little from the particular circumstances of this case, this is the response which is so often urged when British people are in trouble with the law in foreign countries, and in this case it is within the power of the British authorities to achieve it.

129. But that is not the way in which the argument has been conducted before us. Why else could Lord Bingham and Lord Brown speak of 'displacing or qualifying' in one breath when clearly they mean very different things? We have been concerned at a more abstract level with attribution to or authorisation by the United Nations. We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the Resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings. With that caveat, therefore, but otherwise in agreement with Lord Bingham, Lord Carswell and Lord Brown, I would dismiss this appeal."

22. Lord Carswell started his speech by observing:

"130. Internment without trial is so antithetical to the rule of law as understood in a democratic society that recourse to it requires to be carefully scrutinised by the courts of that society. There are, regrettably, circumstances in which the threat to the necessary stability of the State is so great that in order to maintain that stability the use of internment is unavoidable. The Secretary of State's contention is that such circumstances exist now in Iraq and have existed there since the conclusion of hostilities in 2003. If the intelligence concerning the danger posed by such persons is correct, – as to which your Lordships are not in a position to make any judgment and do not do so – they pose a real danger to stability and progress in Iraq. If sufficient evidence cannot be produced in criminal proceedings – which again the House [of Lords] has not been asked to and cannot judge – such persons may have to be detained without trial. Article 42 of the Fourth Geneva Convention permits the ordering of internment of protected persons 'only if the security of the Detaining Power makes it absolutely necessary', and under Article 78 the Occupying Power must consider that step necessary 'for imperative reasons of security'. Neither of these provisions applies directly to the appellant, who is not a protected person, but the degree of necessity which should exist before the Secretary of State detains persons in his position – if he has power to do so, as in my opinion he has – is substantially the same. I would only express the opinion that where a State can lawfully intern people, it is important that it adopt certain safeguards: the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons."

He continued:

"135. It was argued on behalf of the appellant that the Resolution did not go further than authorising the measures described in it, as distinct from imposing an obligation to carry them out, with the consequence that Article 103 of the Charter [of the United Nations] did not apply to relieve the United Kingdom from observing the terms of Article 5 § 1 of the Convention. This was an attractive and persuasively presented argument, but I am satisfied that it cannot succeed. For the reasons set out in paragraphs 32 to 39 of Lord Bingham's opinion I consider that Resolution 1546 did operate to impose an obligation upon the United Kingdom to carry out those measures. In particular, I am persuaded by State practice and the clear statements of authoritative academic opinion – recognised sources of international law – that expressions in Security Council resolutions which appear on their face to confer no more than authority or power to carry out measures may take effect as imposing obligations, because of the fact that the United Nations have no standing forces at their own disposal and have concluded no agreements under Article 43 of the Charter which would entitle them to call on member States to provide them.

136. I accordingly am of [the] opinion that the United Kingdom may lawfully, where it is necessary for imperative reasons of security, exercise the power to intern conferred by Resolution 1546. I would emphasise, however, that that power has to be exercised in such a way as to minimise the infringements of the detainee's rights under Article 5 § 1 of the Convention, in particular by adopting and operating to the fullest practicable extent safeguards of the nature of those to which I referred in paragraph 130 above."

C. The applicant's claim for damages under Iraqi law

23. Following the Court of Appeal's ruling on the applicable legal regime (see paragraph 17 above), which was upheld by the House of Lords, the applicant brought a claim for damages in the English courts claiming that, from 19 May 2006 onwards, his detention without judicial review was unlawful under the terms of the Iraqi Constitution, which came into force on that date (see paragraph 38 below).

24. This claim was finally determined by the Court of Appeal in a judgment dated 8 July 2010 ([2010] EWCA Civ 758). The majority found that, in the circumstances, the review procedure under Coalition Provisional Authority Memorandum No. 3 (Revised) (see paragraph 36 below) provided sufficient guarantees of fairness and independence to comply with Iraqi law.

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

1. United Nations Security Council Resolution 1441 (2002)

25. On 8 November 2002 the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1441. The Resolution decided, *inter alia*, that Iraq had been and remained in material breach of its obligations under previous United

Nations Security Council resolutions to disarm and to cooperate with United Nations and International Atomic Energy Agency weapons inspectors. Resolution 1441 decided to afford Iraq a final opportunity to comply with its disarmament obligations and set up an enhanced inspection regime. It requested the Secretary-General of the United Nations immediately to notify Iraq of the Resolution and demanded that Iraq cooperate immediately, unconditionally, and actively with the inspectors. Resolution 1441 concluded by recalling that the United Nations Security Council had "repeatedly warned Iraq that it w[ould] face serious consequences as a result of its continued violations of its obligations". The United Nations Security Council decided to remain seised of the matter.

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

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

3. Legal and political developments in May 2003

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

> "The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council Resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. ...
>
> In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction.
>
> The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, *inter alia*, provide for security in and for the provisional administration of Iraq, including by: deterring hostilities; ... maintaining

civil law and order, including through encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; eliminating all terrorist infrastructure and resources within Iraq and working to ensure that terrorists and terrorist groups are denied safe haven; ... and assuming immediate control of Iraqi institutions responsible for military and security matters and providing, as appropriate, for the demilitarisation, demobilisation, control, command, reformation, disestablishment, or reorganisation of those institutions so that they no longer pose a threat to the Iraqi people or international peace and security but will be capable of defending Iraq's sovereignty and territorial integrity.

...

The United Nations has a vital role to play in providing humanitarian relief, in supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority. The United States, the United Kingdom and Coalition partners are ready to work closely with representatives of the United Nations and its specialised agencies and look forward to the appointment of a special coordinator by the Secretary-General. We also welcome the support and contributions of member States, international and regional organisations, and other entities, under appropriate coordination arrangements with the Coalition Provisional Authority.

We would be grateful if you could arrange for the present letter to be circulated as a document of the Security Council.

(Signed) Jeremy Greenstock
Permanent Representative of the United Kingdom

(Signed) John D. Negroponte
Permanent Representative of the United States"

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

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

3. As the Commander of Coalition Forces, the Commander of US Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq's

territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally."

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

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

"*The Security Council*,

Recalling all its previous relevant resolutions,

...

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

...

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

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

...

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

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

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

...

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

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

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

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

...

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

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

...

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

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

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

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

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

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

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

(g) promoting the protection of human rights;

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

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

...

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

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

26. *Calls upon* member States and international and regional organisations to contribute to the implementation of this Resolution;

27. *Decides* to remain seised of this matter."

4. Developments between July 2003 and June 2004

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

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

"*The Security Council*

...

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

...

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

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

1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and *underscores*, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognised and set forth in Resolution 1483 (2003), which

will cease when an internationally recognised, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia*, through steps envisaged in paragraphs 4 through 7 and 10 below;

...

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

...

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

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

...

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

26. *Decides* to remain seised of the matter."

32. Reporting to the United Nations Security Council on 16 April 2004, the United States Permanent Representative said that the Multinational Force had conducted "the full spectrum of military operations, which range from the provision of humanitarian assistance, civil affairs and relief and reconstruction activities to the detention of those who are threats to security". In a submission made by the CPA to the United Nations Office of the High Commissioner for Human Rights on 28 May 2004 it was stated that the United States and United Kingdom military forces retained legal responsibility for the prisoners of war and detainees whom they respectively held in custody.

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

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

...

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

34. On 5 June 2004, the Prime Minister of the interim government of Iraq, Dr Allawi, and the US Secretary of State, Mr Powell, wrote to the President of the Security Council, as follows:

"Republic of Iraq,

Prime Minister Office.

Excellency:

On my appointment as Prime Minister of the interim government of Iraq, I am writing to express the commitment of the people of Iraq to complete the political transition process to establish a free, and democratic Iraq and to be a partner in preventing and combating terrorism. As we enter a critical new stage, regain full sovereignty and move towards elections, we will need the assistance of the international community.

The interim government of Iraq will make every effort to ensure that these elections are fully democratic, free and fair. Security and stability continue to be essential to our political transition. There continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security. The government is determined to overcome these forces, and to develop security forces capable of providing adequate security for the Iraqi people.

Until we are able to provide security for ourselves, including the defence of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek 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. ...

...

We are ready to take sovereign responsibility for governing Iraq by 30 June. We are well aware of the difficulties facing us, and of our responsibilities to the Iraqi people. The stakes are great, and we need the support of the international community to

succeed. We ask the Security Council to help us by acting now to adopt a Security Council resolution giving us necessary support.

I understand that the Co-sponsors intend to annex this letter to the Resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(Signed) Dr Ayad Allawi"

"The Secretary of State,

Washington.

Excellency:

Recognising the request of the government of Iraq for the continued presence of the Multinational Force (MNF) in Iraq, and following consultations with Prime Minister Ayad Allawi of the Iraqi interim government, 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.

...

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure Force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. ...

...

In order to continue to contribute to security, the MNF must continue to function under a framework that affords the Force and its personnel the status that they need to accomplish their mission, and in which the contributing States have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

The MNF is prepared to continue to pursue its current efforts to assist in providing a secure environment in which the broader international community is able to fulfil its important role in facilitating Iraq's reconstruction. In meeting these responsibilities in the period ahead, we will act in full recognition of and respect for Iraqi sovereignty.

We look to other member States and international and regional organisations to assist the people of Iraq and the sovereign Iraqi government in overcoming the challenges that lie ahead to build a democratic, secure and prosperous country.

The co-sponsors intend to annex this letter to the Resolution on Iraq under consideration. In the meantime, I request that you provide copies of this letter to members of the Council as quickly as possible.

(Signed) Colin L. Powell"

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

"*The Security Council*,

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

Recalling all of its previous relevant resolutions on Iraq,

...

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

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

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

Recognising the request conveyed in the letter of 5 June 2004 from the Prime Minister of the interim government of Iraq to the President of the Council, which is annexed to this Resolution, to retain the presence of the Multinational Force,

...

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

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

...

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

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

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

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

...

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

(a) play a leading role to:

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

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

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

(b) and also:

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

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

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

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

...

9. *Notes* that the presence of the Multinational Force in Iraq is at the request of the incoming interim government of Iraq and therefore *reaffirms* the authorisation for the Multinational Force under unified command established under Resolution 1511 (2003), having regard to the letters annexed to this Resolution;

10. *Decides* that the Multinational Force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this Resolution expressing, *inter alia*, the Iraqi request for the continued presence of the Multinational Force and setting out its tasks, including by preventing and deterring terrorism, so that, *inter alia*, the United Nations can fulfil its role in assisting the Iraqi people as outlined in paragraph 7 above and the Iraqi people can implement freely and without intimidation the timetable and programme for the political process and benefit from reconstruction and rehabilitation activities;

...

15. *Requests* member States and international and regional organisations to contribute assistance to the Multinational Force, including military forces, as agreed with the government of Iraq, to help meet the needs of the Iraqi people for security and stability, humanitarian and reconstruction assistance, and to support the efforts of UNAMI;

...

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

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

32. *Decides* to remain actively seised of the matter."

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

Section 6: MNF Security Internee Process

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

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

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

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

(5) Security internees who are placed in internment after 30 June 2004 must in all cases only be held for so long as the imperative reasons of security in relation to the internee exist and in any case must be either released from internment or transferred to the Iraqi criminal jurisdiction no later than eighteen months from the date of induction into an MNF internment facility. Any person under the age of 18 interned at any time shall in all cases be released not later than twelve months after the initial date of internment.

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

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

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

..."

5. The end of the occupation and subsequent developments

37. On 28 June 2004 full authority was transferred from the CPA to the Iraqi interim government, and the CPA ceased to exist. Subsequently, the Multinational Force, including the British forces forming part of it,

remained in Iraq pursuant to requests by the Iraqi government and authorisations from the United Nations Security Council.

38. On 19 May 2006 the new Iraqi Constitution was adopted. It provided that any law which contradicted its provisions was deemed to be void. Article 15 of the Constitution required, *inter alia*, that any deprivation of liberty must be based on a decision issued by a competent judicial authority and Article 37 provided that no one should be kept in custody except according to a judicial decision.

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

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

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

> "70. The volume of reports on human rights violations in Iraq justifies serious concern. Accounts of human rights violations continue to appear in the press, in private security reports and in reports by local human rights groups. Individual accounts provided to UNAMI [United Nations Assistance Mission for Iraq] and admissions by the authorities concerned provide additional indications about this situation. In many cases, the information about violations has been widely publicised. Effective monitoring of the human rights situation remains a challenge, particularly because the current security situation makes it difficult to obtain evidence and further investigate allegations. In most instances, however, the consistency of accounts points to clear patterns.
>
> ...
>
> 72. ... One of the major human rights challenges remains the detention of thousands of persons without due process. According to the Ministry of Justice, there were approximately 10,000 detainees at the beginning of April, 6,000 of whom were in the custody of the Multinational Force. Despite the release of some detainees, their number continues to grow. Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency."

Similar concerns were repeated in his reports of September and December 2005 (S/2005/585, § 52; S/2005/766, § 47) and March, June, September and December 2006 (S/2006/137, § 54; S/2006/360, § 47; S/2006/706, § 36; S/2006/945, § 45). By the end of 2006, he reported that

there were 13,571 detainees in Multinational Force detention centres. In his report of March 2006 he observed:

> "At the same time, the internment of thousands of Iraqis by the Multinational Force and the Iraqi authorities constitutes *de facto* arbitrary detention. The extent of such practices is not consistent with the provisions of international law governing internment for imperative reasons of security."

In June 2007 he described the increase in the number of detainees and security internees as a pressing human rights concern (S/2007/330, § 31).

41. Similar observations were contained in the reports of the United Nations Assistance Mission for Iraq (UNAMI), which paragraph 7 of Resolution 1546 mandated to promote the protection of human rights in Iraq. In its report on the period July to August 2005, UNAMI expressed concern about the high number of persons detained, observing that "[i]nternees should enjoy all the protections envisaged in all the rights guaranteed by international human rights conventions". In its next report (September to October 2005), UNAMI repeated this expression of concern and advised that "[t]here is an urgent need to provide [a] remedy to lengthy internment for reasons of security without adequate judicial oversight". In July-August 2006 UNAMI reported that of the 13,571 detainees in Multinational Force custody, 85 individuals were under United Kingdom custody while the rest were under United States authority. In the report for September to October 2006, UNAMI expressed concern that there had been no reduction in the number of security internees detained by the Multinational Force. In its report for January to March 2007, UNAMI commented:

> "71. The practice of indefinite internment of detainees in the custody of the MNF [Multinational Force] remains an issue of concern to UNAMI. Of the total of 16,931 persons held at the end of February, an unknown number are classified as security internees, held for prolonged periods effectively without charge or trial. ... The current legal arrangements at the detention facilities do not fulfil the requirement to grant detainees due process. ..."

UNAMI returned to this subject in its report for April to June 2007, stating, *inter alia*:

> "72. In UNAMI's view, the administrative review process followed by the MNF through the Combined Review and Release Board (CRRB) requires improvement to meet basic due process requirements. Over time, the procedures in force have resulted in prolonged detention without trial, with many security internees held for several years with minimal access to the evidence against them and without their defence counsel having access to such evidence. While the current review process is based on procedures contained in the Fourth Geneva Convention, UNAMI notes that, irrespective of the legal qualification of the conflict, both in situations of international and internal armed conflict the Geneva Conventions are not of exclusive application to persons deprived of their liberty in connection with the conflict. Alongside common Article 3 to the four Geneva Conventions and customary international law, international human rights law also applies. Accordingly, detainees during an internal armed conflict must be treated in accordance with international human rights law. As

such, persons who are deprived of their liberty are entitled to be informed of the reasons for their arrest; to be brought promptly before a judge if held on a criminal charge, and to challenge the lawfulness of their detention."

The report also referred to an exchange of correspondence between the US authorities and UNAMI, on the question whether the International Covenant for the Protection of Civil and Political Rights applied in relation to the Multinational Force's security internment regime. While the US authorities maintained that it did not, UNAMI concluded:

"77. There is no separation between human rights and international humanitarian law in Security Council resolutions adopted under Chapter VII [of the Charter of the United Nations]. In fact, the leading Resolutions on Iraq, such as Resolution 1546 of June 2004, cite in the preamble: 'Affirming the importance of the rule of law, national reconciliation, respect for human rights including the rights of women, fundamental freedoms, and democracy.' This arguably applies to all forces operating in Iraq. The letter from the government of Iraq attached to SC res. [Security Council Resolution] 1723 also states that 'The forces that make up MNF will remain committed to acting consistently with their obligations and rights under international law, including the law of armed conflict'. International law includes human rights law."

II. RELEVANT INTERNATIONAL LAW MATERIALS

A. Relevant provisions of international humanitarian law

42. Articles 42 and 43 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) ("the Hague Regulations") provide as follows:

Article 42

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43

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

43. The Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) ("the Fourth Geneva Convention") defines "protected persons" as follows:

Article 4

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. ..."

It contains the following provisions in relation to security measures and internment:

Article 27

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

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

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

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

Article 41

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

In applying the provisions of Article 39, second paragraph, to the cases of persons required to leave their usual places of residence by virtue of a decision placing them in assigned residence elsewhere, the Detaining Power shall be guided as closely as possible by the standards of welfare set forth in Part III, section IV of this Convention."

Article 42

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

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

Article 43

"Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or who have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power."

Article 64

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

Article 78

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

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.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention."

The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, provides in Article 75 § 3:

"Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist."

B. Relevant provisions of the Charter of the United Nations of 1945

44. The Preamble to the Charter of the United Nations states, *inter alia*:

"We, the peoples of the United Nations,

Determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, ..."

Article 1 sets out the purposes of the United Nations, as follows:

"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

...

3. To achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; ..."

Article 24 provides, *inter alia*:

"1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of

international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII."

Article 25 of the Charter provides:

"The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

45. Chapter VII of the Charter is entitled "Action with respect to threats to the peace, breaches of the peace and acts of aggression". Article 39 provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

46. Articles 41 and 42 read as follows:

Article 41

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Article 42

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of members of the United Nations."

Articles 43 to 45 provide for the conclusion of agreements between member States and the Security Council for the former to contribute to the latter the land and air forces necessary for the purpose of maintaining international peace and security. No such agreements have been concluded.

Chapter VII continues:

Article 48

"1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

Article 49

"The members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

Article 103 of the Charter reads as follows:

"In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

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

47. Article 30 is entitled "Application of successive treaties relating to the same subject matter" and its first paragraph reads as follows:

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. ..."

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

48. The International Court of Justice has held Article 103 of the Charter of the United Nations to mean that the Charter obligations of United Nations member States prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the Charter of the United Nations or was only a regional arrangement (see *Nicaragua v. United States of America*, *ICJ Reports* 1984, p. 392, at § 107). The International Court of Justice has also held that Article 25 of the Charter means that United Nations member States' obligations under a Security Council resolution prevail over obligations arising under any other international agreement (see *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America and Libyan Arab Jamahiriya v. United Kingdom*, *ICJ Reports* 1992, vol. 1, p. 16, at § 42, and p. 113 at § 39 (hereinafter "*Lockerbie*").

49. In its Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970),* the International Court of Justice observed,

in connection with the interpretation of United Nations Security Council resolutions:

> "114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."

50. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)* of 19 December 2005, the International Court of Justice considered whether, during the relevant period, Uganda was an "Occupying Power" of any part of the territory of the Democratic Republic of the Congo, within the meaning of customary international law, as reflected in Article 42 of the Hague Regulations (§§ 172-73 of the judgment). The International Court of Justice found that Ugandan forces were stationed in the province of Ituri and exercised authority there, in the sense that they had substituted their own authority for that of the Congolese government (§§ 174-76). The International Court of Justice continued:

> "178. The Court thus concludes that Uganda was the Occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.
>
> 179. The Court, having concluded that Uganda was an Occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.
>
> 180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."

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

51. The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (Joined Cases C-402/05 P and C-415/05 P) (hereinafter "*Kadi*") concerned a complaint about the freezing of assets under European Community regulations adopted to reflect United Nations Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which dictated, *inter alia*, that all States were to take measures to freeze the funds and other financial assets of individuals and entities associated with Osama bin Laden, the al-Qaeda network and the Taliban. Those individuals, including the applicants, were identified by the Sanctions Committee of the United Nations Security Council. The applicants argued that the regulations were *ultra vires* because the assets freezing procedure violated their fundamental rights to a fair trial and to respect for their property, as protected by the Treaty establishing the European Community.

52. The Court of First Instance rejected the applicant's claims and upheld the regulations, essentially finding that the effect of Article 103 of the Charter of the United Nations was to give United Nations Security Council resolutions precedence over other international obligations (save *jus cogens*), which included the Treaty establishing the European Community. Thus, the Court of First Instance concluded that it had no authority to review, even indirectly, United Nations Security Council resolutions in order to assess their conformity with fundamental rights.

53. Mr Kadi appealed to the European Court of Justice where his case was considered together with another appeal by the Grand Chamber, which gave judgment on 3 September 2008. The European Court of Justice held that European Community law formed a distinct, internal legal order and that it was competent to review the lawfulness of a Community regulation within that internal legal order, despite the fact that the regulation had been enacted in response to a United Nations Security Council resolution. It followed that, while it was not for the "Community judicature" to review the lawfulness of United Nations Security Council resolutions, they could review the act of a member State or Community organ that gave effect to that resolution; doing so "would not entail any challenge to the primacy of the resolution in international law". The European Court of Justice recalled that the European Community was based on the rule of law, that fundamental rights formed an integral part of the general principles of law and that respect for human rights was a condition of the lawfulness of Community acts. The obligations imposed by an international agreement could not have the effect of prejudicing the "constitutional principles of the European Community Treaty", which included the principle that all Community acts had to respect fundamental rights. The regulations in

question, which provided for no right to challenge a freezing order, failed to respect fundamental rights and should be annulled.

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

54. In *Munaf v. Geren* (2008) 128 SCt 2207, the United States Supreme Court examined claims for habeas corpus relief from two American citizens who voluntarily travelled to Iraq and allegedly committed crimes there. They were each arrested in October 2004 by American forces operating as part of the Multinational Force, given hearings before Multinational Force Tribunals composed of American officers, who concluded that they posed a threat to Iraq's security, and placed in the custody of the United States military operating as part of the Multinational Force. It was subsequently decided to transfer the detainees to the custody of the Iraqi authorities to stand trial on criminal charges before the Iraqi courts, and the detainees sought orders from the Federal Courts prohibiting this, on the ground that they risked torture if transferred to Iraqi custody. It was argued on behalf of the US government that the Federal Courts lacked jurisdiction over the detainees' petitions because the American forces holding them operated as part of a Multinational Force. The Supreme Court observed that:

> "The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate 'physical custody' of American soldiers who answer only to an American chain of command. The MNF-I itself operates subject to a unified American command. '[A]s a practical matter', the Government concedes, it is 'the President and the Pentagon, the Secretary of Defence, and the American commanders that control what ... American soldiers do', ... including the soldiers holding Munaf and Omar. In light of these admissions, it is unsurprising that the United States has never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so."

The Supreme Court concluded that it considered "these concessions the end of the jurisdictional inquiry". It held that American citizens held overseas by American soldiers subject to a US chain of command were not precluded from filing habeas corpus petitions in the Federal Courts. However, it further decided that Federal District Courts could not exercise their habeas corpus jurisdiction to enjoin the United States of America from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign State to that sovereign State for criminal prosecution. The petitioners' allegations that their transfer to Iraqi custody was likely to result in torture were a matter of serious concern but those allegations generally had to be addressed by the political branches, not the judiciary.

G. Relevant materials of the International Law Commission

55. The International Law Commission was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification". It consists of thirty-four experts on international law, elected to the Commission by the United Nations General Assembly from a list of candidates nominated by governments of member States.

56. In Article 5 of its Draft Articles on the Responsibility of International Organisations (adopted in May 2004), the International Law Commission stated as follows:

> "*Conduct of organs or agents placed at the disposal of an international organisation by a State or another international organisation*
>
> The conduct of an organ of a State or an organ or agent of an international organisation that is placed at the disposal of another international organisation shall be considered under international law an act of the latter organisation if the organisation exercises effective control over that conduct."

The International Law Commission further stated, in paragraphs 1 and 6 to 7 of its commentary on this Article:

> "1. When an organ of a State is placed at the disposal of an international organisation, the organ may be fully seconded to that organisation. In this case the organ's conduct would clearly be attributable only to the receiving organisation ... Article 5 deals with the different situation in which the lent organ or agent still acts to a certain extent as organ of the lending State or as organ or agent of the lending organisation. This occurs for instance in the case of military contingents that a State placed at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent. In this situation the problem arises whether a specific conduct of the lent organ or agent has to be attributed to the receiving organisation or to the lending State or organisation.
>
> ...
>
> 6. Practice relating to peacekeeping forces is particularly significant in the present context because of the control that the contributing State retains over disciplinary matters and criminal affairs. This may have consequences with regard to attribution of conduct. ...
>
> Attribution of conduct to the contributing State is clearly linked with the retention of some powers by that State over its national contingent and thus on the control that the State possesses in the relevant respect.
>
> 7. As has been held by several scholars, when an organ or agent is placed at the disposal of an international organisation, the decisive question in relation to attribution of a given conduct appears to be who has effective control over the conduct in question. ..."

57. The report of the Study Group of the International Law Commission entitled "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (April 2006) stated, in respect of Article 103 of the Charter of the United Nations (footnotes omitted):

"**(a) What are the prevailing obligations?**

331. Article 103 does not say that the Charter prevails, but refers to obligations under the Charter. Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25 that obliges member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine. The question has sometimes been raised whether also [Security] Council resolutions adopted *ultra vires* prevail by virtue of Article 103. Since obligations for member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with. Hence no conflict exists. The issue is similar with regard to non-binding resolutions adopted by United Nations organs, including the Security Council. These are not covered by Article 103.

...

(b) What does it mean for an obligation to prevail over another?

333. What happens to the obligation over which Article 103 establishes precedence? Most commentators agree that the question here is not of validity but of priority. The lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103. This was how Waldock saw the matter during the ILC [International Law Commission] debates on Article 30 [of the Vienna Convention on the Law of Treaties]: '[T]he very language of Article 103 makes it clear that it presumes the priority of the Charter, not the invalidity of treaties conflicting with it.'

334. A small number of authors have received a more extensive view of the effects of Article 103 – namely the invalidity of the conflicting treaty or obligation – on the basis of the view of the Charter as a 'constitution'. A clear-cut answer to this question (priority or invalidity?) cannot be received from the text of Article 103. Yet the word 'prevail' does not grammatically imply that the lower-ranking provision would become automatically null and void, or even suspended. The State is merely prohibited from fulfilling an obligation arising under that other norm. Article 103 says literally that in case of a conflict, the State in question should fulfil its obligation under the Charter and perform its duties under other agreements in as far as compatible with obligations under the Charter. This also accords with the drafting materials of the Charter, which state that:

'it would be enough that the conflict should arise from the carrying out of an obligation under the Charter. It is immaterial whether the conflict arises because of intrinsic inconsistency between the two categories of obligations or as the result of the application of the provisions of the Charter under given circumstances.'"

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

58. In 2007 the Danish government initiated the Copenhagen Process on the Handling of Detainees in International Military Operations. The Process is aimed at developing a multilateral approach to the treatment of detainees in military situations and it has attracted the involvement of at least twenty-eight States and a number of international organisations, including the United Nations, the European Union, NATO, the African Union and the International Committee of the Red Cross. The "non-paper", prepared for the first Copenhagen Conference on 11 to 12 October 2007, stated by way of introduction:

> "The past decade has seen a significant change in the character of international military operations. They have developed from traditional peacekeeping operations under Chapter VI/VI ½ of the UN Charter, through peacemaking operations under Chapter VII, to a new type of operation in which military forces are acting in support of governments that need assistance to stabilise their countries or in support of the international administration of territory. In such operations, military forces may have to perform tasks which would normally be performed by national authorities, including detaining people in the context of both military operations and law enforcement.
>
> At the same time, the countries which are to be assisted frequently have difficulties fulfilling their human rights and humanitarian law obligations due to the internal problems. Normal *modus operandi*, including the transfer of detainees to local authorities, may therefore often not be possible as it may contradict the legal and political commitment of the troop-contributing countries. The handling of detainees thereby becomes a challenge in itself. If a sustainable solution to these challenges is not reached, it may have an impact on the ability of the military forces of other States to engage in certain types of operations. States therefore cannot disregard these challenges when contributing to ongoing or future operations of this nature.
>
> The main challenge is a basic one: how do troop-contributing States ensure that they act in accordance with their international obligations when handling detainees, including when transferring detainees to local authorities or to other troop-contributing countries? Solving this challenge is not simple, as it involves addressing a number of complicated and contested legal issues as well as complicated practical and political aspects. ..."

The "non-paper" continued, under the heading "The legal basis [of detention]":

> "The legal basis for military forces to detain persons typically derives from the mandate of a given operation. The types of operations relevant for this non-paper are typically based on a Chapter VII resolution of the United Nations Security Council [UNSC]. A UNSC resolution may contain or refer to text on detention, and supplementary regulation may be found, for example, in standard operating procedures, rules of engagement and status-of-forces agreements, although the latter would also represent an agreement with the territorial State. The wording in these instruments on detention, however, is not always clear, if the issue is addressed at all.

In these circumstances, the mandate to detain is often based on the traditional wording of UNSC resolutions giving a military force the mandate to 'take all necessary measures' in order to fulfil the given task. When a UN resolution is unclear or contains no text on the mandate to detain, the right to self-defence may contain an inherent yet limited right to detain. However, this may leave the question open as to the scope of the mandate, e.g., what type of detention is possible in self-defence and whether it is possible only to detain persons for reasons of security or also to detain e.g. common criminals.

There is therefore a need for the Security Council to address this issue and clearly establish the legal basis for the right of the force to detain in a given operation. A clear mandate on detention will improve the possibilities for soldiers on the ground to take the right decisions on detention matters and to avoid different interpretations on the understanding of an ambiguous SC resolution. This need is further underlined by the fact that the right to detain might subsequently be challenged in court, and that officials/soldiers of troop-contributing States may be subject to prosecution for unlawful confinement under the grave breaches regime of Geneva Convention (IV)."

THE LAW

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

59. The applicant complained that he was held in internment by United Kingdom armed forces in Iraq between 10 October 2004 and 30 December 2007, in breach of Article 5 § 1 of the Convention. He did not pursue before the Court his complaint under Article 5 § 4 of the Convention, concerning the lack of judicial review of the detention, since proceedings on this issue were still pending before the domestic courts at the time the application was lodged (see paragraphs 23-24 above).

60. The Government contended that the internment was attributable to the United Nations and not to the United Kingdom, and that the applicant was not, therefore, within United Kingdom jurisdiction under Article 1 of the Convention. Further, and in the alternative, they submitted that the internment was carried out pursuant to United Nations Security Council Resolution 1546, which created an obligation on the United Kingdom to detain the applicant which, pursuant to Article 103 of the Charter of the United Nations, overrode obligations under the Convention.

A. Admissibility

61. The Court considers that the question whether the applicant's detention fell within the jurisdiction of the respondent State is closely linked

to the merits of his complaint. It therefore joins this preliminary question to the merits.

62. It notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Jurisdiction

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

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

The Government disagreed.

(a) The parties' submissions

(i) The Government

64. The Government denied that the detention of the applicant fell within the United Kingdom's jurisdiction. They submitted that he was detained at a time when United Kingdom forces were operating as part of a Multinational Force authorised by the United Nations Security Council and subject to the ultimate authority of the United Nations. In detaining the applicant, the British troops were not exercising the sovereign authority of the United Kingdom but the international authority of the Multinational Force, acting pursuant to the binding decision of the United Nations Security Council. The Government emphasised that the above approach to the questions of attribution and jurisdiction followed from the Court's reasoning and decision in *Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, 2 May 2007 (hereinafter "*Behrami and Saramati*") They submitted that Lord Bingham, with whom Baroness Hale and Lord Carswell agreed (see paragraph 18 above), failed to give proper effect to that decision of the Grand Chamber. Lord Rodger, however, had found the position as regards Iraq to be indistinguishable from that in Kosovo, as considered by the Court in *Behrami and Saramati*. The Government agreed with and relied upon his detailed reasoning and conclusion (see paragraph 19 above).

65. The Government emphasised that in *Behrami and Saramati* the Court had held that the effect of United Nations Security Council Resolution 1244 (1999) had been to delegate to willing organisations and United Nations member States the power to establish an international security presence in Kosovo. The United Nations Security Council had been

acting under Chapter VII of the Charter of the United Nations when it authorised the NATO-led Kosovo Force (KFOR). Similarly, in its resolutions authorising the Multinational Force in Iraq (Resolutions 1511 and 1546; see paragraphs 31 and 35 above), the Security Council referred expressly to Chapter VII, made the necessary identification of a threat to international peace and security and, in response to this threat, authorised a Multinational Force under unified command to take "all necessary measures to contribute to the maintenance of security and stability of Iraq".

66. The Government continued by pointing out that in *Behrami and Saramati* (cited above), the Court had identified that the "key question" to determine whether the delegation in question was sufficiently limited to meet the requirements of the Charter, and for the acts of the delegate entity to be attributable to the United Nations, was whether "the [Security Council] retained ultimate authority and control so that operational command only was delegated" (see *Behrami and Saramati*, cited above, §§ 132 and 133). The Court had further identified (ibid., § 134) five factors which established that the United Nations had retained "ultimate authority and control" over KFOR. In the Government's submission, the five factors applied equally in respect of the United Nations Security Council's authorisation of the Multinational Force to use force in Iraq. Firstly, Chapter VII of the Charter allowed the United Nations Security Council to delegate its powers under Chapter VII to an international security presence made up of forces from willing member States. Secondly, the relevant power, conferred by Chapter VII, was a delegable power. Thirdly, the delegation to the Multinational Force was not presumed or implicit, but prior and explicit in Resolutions 1511, 1546 and subsequent resolutions. The applicant was detained several months after the adoption of Resolution 1546. Fourthly, Resolution 1546 fixed the mandate with adequate precision, setting out the tasks to be undertaken by the Multinational Force. Resolution 1546 in fact defined the tasks to be carried out by the authorised international force with greater precision than Resolution 1244. Fifthly, the Multinational Force, through the United States of America, was required to report to the Security Council on a quarterly basis. Further, the mandate for the Multinational Force was subject to review and control by the Security Council by reason of the requirement that the mandate be reviewed by the Security Council after no less than twelve months and that it expire after certain specified events. The Security Council therefore retained greater control over the Multinational Force than it did over KFOR under Resolution 1244.

67. A further question which the Court had considered in *Behrami and Saramati* was whether the level of control exercised by the troop-contributing nations in detaining Mr Saramati was such as to detach the troops from the international mandate of the Security Council. In the present case, the Government submitted, the applicant's detention was effected and authorised throughout by Multinational Force personnel acting as such,

including United Kingdom forces. The "structural" involvement of the United Kingdom in retaining some authority over its troops, as did all troop-contributing nations, was compatible with the effectiveness of the unified command and control exercised over the Multinational Force. There was no evidence that the United Kingdom interfered with respect to the applicant's detention in such a way that the acts of the United Kingdom troops in detaining him were detached from the Security Council mandate. In the Government's view, no relevant distinction could be drawn between the operational chain of command in the Multinational Force and that which operated in the case of KFOR (see *Behrami and Saramati*, cited above, § 135). In the Government's submission, the continued detention of the applicant after June 2006 was required to be authorised by the co-chairs of the Joint Detention Committee, namely the Prime Minister of Iraq and the General Officer Commanding Multinational Force (a United States General), and was in fact so authorised. That authorisation was in accordance with applicable Iraqi law and the United Nations mandate conferred by Resolution 1546, which recorded that the Multinational Force was present in Iraq at the request of the government of Iraq and which expressly referred to arrangements put in place for a "security partnership" between the Iraqi government and the Multinational Force. United Kingdom troops played no part in the authorisation.

68. The Government contended that to apply the Convention to the acts of United Kingdom troops, and those of other Contracting States who contributed troops to the Multinational Force, in the context of the Multinational Force's multinational and unified command structure, and in the context of its close coordination and cooperation with Iraqi forces, would have introduced serious operational difficulties. It would have impaired the effectiveness of the Multinational Force in its operations, which ranged from combat operations conducted together with Iraqi forces to the arrest of suspected criminals and terrorists. It would also have given rise to intractable issues as to how the Convention would apply to operations conducted jointly by forces from Contracting and non-Contracting States including, for example, questions as to what degree of involvement of personnel in joint actions would be required to engage the responsibility of the Contracting State. Moreover, in addition to United Nations peacekeeping forces (which were subsidiary organs of the United Nations) there were currently seven international military forces which had been authorised by the United Nations Security Council to contribute to the maintenance of security in foreign States, including the International Security Assistance Force in Afghanistan. To conclude that the acts of United Kingdom troops deployed as part of the Multinational Force in Iraq were attributable to the United Kingdom would introduce real uncertainty about the operation of the Convention to United Nations mandated operations and would risk in future deterring Contracting Parties from

contributing troops to forces authorised by the United Nations Security Council, to the detriment of its mission to secure international peace and security.

(ii) The applicant

69. The applicant pointed out that the Government had made an express concession during the domestic proceedings that the applicant was within the Article 1 jurisdiction of the United Kingdom since he was detained in a British-run military prison. However, following the Grand Chamber's decision in *Behrami and Saramati* (cited above), the Government had argued for the first time before the House of Lords that the United Kingdom did not have jurisdiction because the detention was attributable to the United Nations and not the United Kingdom. The applicant underlined that, until the proceedings before the House of Lords, the Government had never argued in any case that the detention of individuals held in the custody of United Kingdom forces in Iraq was attributable to any entity other than the United Kingdom. The Court should therefore treat with some scepticism the Government's argument that attributing the detention to the United Kingdom would "introduce serious operational difficulties". In any event, the problems adverted to by the Government were far from intractable. In a multi-State operation, responsibility lies where effective command and control is vested and practically exercised. Moreover, multiple and concurrent attribution was possible in respect of conduct deriving from the activity of an international organisation and/or one or more States. The applicant resisted the Government's conclusion that "the Convention was not designed, or intended, to cover this type of multinational military operation conducted under the overall control of an international organisation such as the United Nations". On the contrary, the applicant contended that the Court's case-law established that Contracting States could not escape their responsibilities under the Convention by transferring powers to international organisations or creating joint authorities against which Convention rights or an equivalent standard could not be secured.

70. The applicant emphasised that the majority of the House of Lords held that his detention was attributable to the United Kingdom and not the United Nations. He adopted and relied upon their reasoning and conclusions. He submitted that there was no warrant for the Government's suggestion that the United Nations had assumed ultimate, still less effective, authority and control over the United Kingdom forces in Iraq. The position was clearly distinguishable from that considered by the Court in *Behrami and Saramati* (cited above).

71. The invasion of Iraq by the United States-led Coalition Forces in March 2003 was not a United Nations operation. This was the first, stark contrast with the position in Kosovo, where United Nations Security Council Resolution 1244 was a prior and explicit coercive measure adopted

by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations as the "solution" to the identified threat to international peace and security in Kosovo (see *Behrami and Saramati*, cited above, § 129). The respective roles and responsibilities of the Coalition Forces and the United Nations in Iraq were defined as early as 8 May 2003, in a letter from the Permanent Representatives of the United States of America and the United Kingdom to the President of the Security Council (see paragraph 27 above). The Coalition Forces would work through the Coalition Provisional Authority (CPA), which they had created, to provide for security in Iraq. The role of the United Nations 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". Those respective roles and responsibilities were repeated in United Nations Security Council Resolution 1483 (see paragraph 29 above). The applicant submitted that it was wrong of the Government to underplay the significance of Resolution 1483, which was adopted under Chapter VII of the Charter and expressly set out the roles of all parties concerned.

72. In the applicant's submission, the language of United Nations Security Council Resolution 1511 did not support the Government's interpretation that, through it, responsibility shifted from the United Kingdom to the United Nations. Paragraph 1 of Resolution 1511 recognised that the CPA, and not the United Nations, would continue to exercise authority and control until a representative government could be established. Paragraph 8 resolved that the United Nations would strengthen its vital role, by reference to the tasks outlined in Resolution 1483, namely humanitarian relief, reconstruction, and working towards the establishment of a representative government. Had the United Nations intended fundamentally to alter the legal position by assuming ultimate control and authority for the Coalition Forces in Iraq it was, in the applicant's view, inconceivable that it would not have referred to this when expressly addressing the need to strengthen its role in Iraq. At paragraph 13 of Resolution 1511, where the United Nations Security Council authorised a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of peace and security, this was a simple authorisation and not a delegation. There was no seizing of effective, or even ultimate, control and authority by the United Nations Security Council. The unified command over the Multinational Force was, as it had always been, under the control and authority of the United States of America and the United Kingdom. Similarly, Resolution 1546 drew a clear distinction between the respective roles of the United Nations and the Multinational Force. Moreover, the wording of the letter from the US Secretary of State to the President of the United Nations Security Council, annexed to Resolution 1546, entirely undermined any suggestion that the Multinational Force was, or was soon to be, under United Nations authority and control.

(iii) The third-party interveners

73. The non-governmental organisations Liberty and JUSTICE, third-party interveners submitted that, as a matter of law, conduct stemming from the work of an international organisation could be attributable to (a) the international organisation alone; (b) a State or States Parties to the international organisation and sufficiently involved in the conduct; or (c) both the international organisation and the State or States Parties. Whether the conduct in question fell to be characterised as (a), (b) or (c) would, most often, be essentially a matter of fact and dependent on the specific circumstances of each individual case. In this context, the highly fact-sensitive decision in *Behrami and Saramati* (cited above) needed to be handled with care. Moreover, it would appear that the Court's approach in *Behrami and Saramati* followed from the way in which the case was argued before it. Since the applicants argued that KFOR was the entity responsible for the relevant acts of detention and de-mining, the Court did not consider whether the States had effective control over the conduct in their own right as sovereign States.

(b) The Court's assessment

74. Article 1 of the Convention reads as follows:

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

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

75. The Court notes that, before the Divisional Court and the Court of Appeal in the first set of domestic proceedings brought by the applicant, the Government accepted that he fell within United Kingdom jurisdiction under Article 1 of the Convention during his detention in a British-run military prison in Basra, south-east Iraq. It was only before the House of Lords that the Government argued, for the first time, that the applicant did not fall within United Kingdom jurisdiction because his detention was attributable to the United Nations rather than to the United Kingdom. The majority of the House of Lords rejected the Government's argument and held that the internment was attributable to British forces (see paragraphs 16-18 above).

76. When examining whether the applicant's detention was attributable to the United Kingdom or, as the Government submit, the United Nations, it is necessary to examine the particular facts of the case. These include the terms of the United Nations Security Council resolutions which formed the framework for the security regime in Iraq during the period in question. In performing this exercise, the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the Charter of the United Nations and other international instruments. It must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (see *Behrami and Saramati*, cited above, § 122). The principles underlying the Convention cannot be interpreted and applied in a vacuum and the Court must take into account relevant rules of international law (ibid.). It relies for guidance in this exercise on the statement of the International Court of Justice in paragraph 114 of its Advisory Opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)* (hereinafter "*Namibia*") (see paragraph 49 above), indicating that a United Nations Security Council resolution should be interpreted in the light not only of the language used but also the context in which it was adopted.

77. The Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their Coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. At the time of the invasion, there was no United Nations Security Council resolution providing for the allocation of roles in Iraq in the event that the existing regime was displaced. Major combat operations were declared to be complete by 1 May 2003 and the United States of America and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations (see paragraph 42 above). As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States of America to the President of the United Nations Security Council (see paragraph 27 above), the United States of America and the United Kingdom, having displaced the previous regime, created the CPA "to exercise powers of government temporarily". One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States of America and the United Kingdom through the CPA was the provision of security in Iraq. The letter further stated that "[t]he United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall, *inter alia*, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters". The letter acknowledged that the United Nations had "a vital role to play in providing humanitarian relief, in

supporting the reconstruction of Iraq, and in helping in the formation of an Iraqi interim authority" and stated that the United States of America, the United Kingdom and Coalition partners were ready to work closely with representatives of the United Nations and its specialised agencies and would also welcome the support and contributions of member States, international and regional organisations, and other entities, "under appropriate coordination arrangements with the Coalition Provisional Authority". In its first legislative act, CPA Regulation No. 1 of 16 May 2003, the CPA declared that it would "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability" (see paragraph 28 above).

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

occupation, the acts of its armed forces were in any way attributable to the United Nations.

79. In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council, again acting under Chapter VII of the Charter, underscored the temporary nature of the exercise by the CPA of the authorities and responsibilities set out in Resolution 1483, which would cease as soon as an internationally recognised, representative Iraqi government could be sworn in. In paragraphs 13 and 14, the Security Council authorised "a Multinational Force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq" and urged member States "to contribute assistance under this United Nations mandate, including military forces, to the Multinational Force referred to in paragraph 13" (see paragraph 31 above). The United States of America, on behalf of the Multinational Force, was requested periodically to report on the efforts and progress of the Force. The Security Council also resolved that the United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission for Iraq, should strengthen its role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.

80. The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. The Multinational Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of member States to contribute personnel. The unified command structure over the Force, established from the start of the invasion by the United States of America and the United Kingdom, was not changed as a result of Resolution 1511. Moreover, the United States of America and the United Kingdom, through the CPA which they had established at the start of the occupation, continued to exercise the powers of government in Iraq. Although the United States of America was requested to report periodically to the Security Council about the activities of the Multinational Force, the United Nations did not, thereby, assume any degree of control over either the Force or any other of the executive functions of the CPA.

81. The final resolution of relevance to the present issue was Resolution 1546 (see paragraph 35 above). It was adopted on 8 June 2004, twenty days before the transfer of power from the CPA to the Iraqi interim government and some four months before the applicant was taken into detention. Annexed to the Resolution was a letter from the Prime Minister of the interim government of Iraq, seeking from the Security Council a new

resolution on the Multinational Force mandate. There was also annexed a letter from the US Secretary of State to the President of the United Nations Security Council, confirming that "the Multinational Force [under unified command] [wa]s prepared to continue to contribute to the maintenance of security in Iraq" and informing the President of the Security Council of the goals of the Multinational Force and the steps which its Commander intended to take to achieve those goals. It does not appear from the terms of this letter that the US Secretary of State considered that the United Nations controlled the deployment or conduct of the Multinational Force. In Resolution 1546 the Security Council, acting under Chapter VII of the Charter of the United Nations, reaffirmed the authorisation for the Multinational Force established under Resolution 1511. There is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multinational Force than it had exercised previously.

82. In Resolution 1546 the Security Council also decided that, in implementing their mandates in Iraq, the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI) should play leading roles in assisting in the establishment of democratic institutions, economic development and humanitarian assistance. The Court notes that the Secretary-General and UNAMI, both clearly organs of the United Nations, in their quarterly and bi-monthly reports to the Security Council for the period during which the applicant was detained, repeatedly protested about the extent to which security internment was being used by the Multinational Force (see paragraphs 40 and 41 above). It is difficult to conceive that the applicant's detention was attributable to the United Nations and not to the United Kingdom when United Nations organs, operating under the mandate of Resolution 1546, did not appear to approve of the practice of indefinite internment without trial and, in the case of UNAMI, entered into correspondence with the United States embassy in an attempt to persuade the Multinational Force under American command to modify the internment procedure.

83. In the light of the foregoing, the Court agrees with the majority of the House of Lords that the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999. The comparison is relevant, since in its decision in *Behrami and Saramati* (cited above) the Court concluded, *inter alia*, that Mr Saramati's detention was attributable to the United Nations and not to any of the respondent States. It is to be recalled that the international security presence in Kosovo was established by United Nations Security Council Resolution 1244, adopted on 10 June 1999, in which, "determined to resolve the grave humanitarian situation in Kosovo", the Security Council "decide[d] on the deployment in Kosovo, under United Nations auspices, of international civil and security presences". The Security Council therefore

authorised "member States and relevant international organisations to establish the international security presence in Kosovo" and directed that there should be "substantial North Atlantic Treaty Organization participation" in the Force, which "must be deployed under unified command and control". In addition, Resolution 1244 authorised the Secretary-General of the United Nations to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo. The United Nations, through a Special Representative appointed by the Secretary-General in consultation with the Security Council, was to control the implementation of the international civil presence and coordinate closely with the international security presence (see *Behrami and Saramati*, cited above, §§ 3, 4 and 41). On 12 June 1999, two days after the Resolution was adopted, the first elements of the NATO-led Kosovo Force (KFOR) entered Kosovo.

84. It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was common ground between the parties before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law Commission in Article 5 of its Draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises effective control over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations.

85. The internment took place within a detention facility in Basra City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout (see paragraph 10 above; see also *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 136, ECHR 2011, and *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, § 88, 30 June 2009; see also the judgment of the United States Supreme Court in *Munaf v. Geren*, paragraph 54 above). The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multinational Force, the Court does not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.

86. In conclusion, the Court agrees with the majority of the House of Lords that the internment of the applicant was attributable to the United

Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

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

(a) The parties' submissions

(i) The Government

87. The Government contended that the United Kingdom was under an obligation to detain the applicant, pursuant to United Nations Security Council Resolution 1546. They emphasised that between 22 May 2003 and 28 June 2004, British forces operated in Iraq under a legal regime derived from the law of belligerent occupation, as modified by the United Nations Security Council in Resolutions 1483 and 1511 (see paragraphs 29 and 31 above). Thus, the Preamble to Resolution 1483 in terms recognised the "specific authorities, responsibilities and obligations" of the Occupying Powers, including those under the Geneva Conventions of 1949. In the Government's submission, customary international law, as reflected in Article 43 of the Hague Regulations (see paragraph 42 above), required the Occupying Power to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety" in the occupied territory. In its judgment in *Democratic Republic of the Congo (DRC) v. Uganda*, the International Court of Justice described this as including a duty "to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party" (see paragraph 50 above). In addition, Article 27 of the Fourth Geneva Convention placed a responsibility on the Occupying Power to take steps to protect the civilian population "against all acts of violence or threats thereof" and Article 64 referred to a general obligation to ensure the "orderly government" of the occupied territory (see paragraph 43 above). The Occupying Power could also protect its forces and administration from acts of violence. It had broad powers of compulsion and restraint over the population of the occupied territory. Article 78 of the Fourth Geneva Convention recognised the power to detain where "the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons". In the Government's submission, the "specific authorities, responsibilities and obligations" of an Occupying Power, as recognised in United Nations Security Council Resolution 1483, included the power to detain persons in an occupied territory on security grounds. This power was derived from the duty of governance imposed upon an Occupying Power by customary international law. It was also derived from the domestic law of

the occupied territory as modified by the Occupying Power (as, for example, in CPA Memorandum No. 3 (Revised): see paragraph 36 above).

88. The Government further submitted that United Nations Security Council Resolution 1546, like Resolution 1511, recognised in its Preamble that international support for the restoration of security and stability was "essential" to the well-being of the people of Iraq. Resolution 1546 reaffirmed the mandate of the Multinational Force, having regard to the request from the Prime Minister of the Iraqi interim government for the Multinational Force to remain in Iraq after the end of the occupation (see paragraph 35 above). Paragraph 10 of Resolution 1546 specifically provided the Multinational Force with "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". It was clear from the text of Resolution 1546 that the annexed letters were integral to it and defined the scope of the powers conferred by the Security Council. The letter from US Secretary of State Colin Powell expressly referred to internment as one of the tasks which the Multinational Force was to continue to perform. In the Government's view, therefore, Resolution 1546 could not have been clearer in terms of authorising the Multinational Force to use preventive detention where "necessary for imperative reasons of security in Iraq". It was also clear from Resolution 1546 and the letters annexed thereto that what was authorised by the Security Council was a regime of detention modelled on the "specific authorities, responsibilities and obligations" that had existed during the period of occupation. This was also the view taken by Lord Bingham in the House of Lords when he considered the Resolution (see paragraph 20 above). By participating in the Multinational Force and thus taking up the authorisation conferred by the Security Council, the United Kingdom agreed to assist in the achievement of the specific objectives to maintain security and stability in Iraq set out in Resolution 1546. As Lord Bingham put it, the United Kingdom was "bound to exercise its power of detention where this was necessary for imperative reasons of security". The facts of the applicant's case, and in particular the findings of the Special Immigration Appeals Commission with regard to the applicant's involvement in attacks against Coalition Forces (see paragraph 15 above), demonstrated the importance of such an obligation.

89. The Government pointed out that Article 25 of the Charter of the United Nations created an obligation for United Nations member States to "accept and carry out the decisions of the Security Council". The effect of Article 103 of the Charter was that the obligation under Article 25 had to prevail over obligations under other international treaties (see paragraph 46 above). This was confirmed by the decision of the International Court of Justice in the *Lockerbie* case (see paragraph 48 above). As Lord Bingham pointed out, it was also confirmed by leading commentators such as Judges Simma, Bernhardt and Higgins (see paragraph 35 of the House of Lords

judgment, at paragraph 20 above). As a matter of principle, the primacy accorded by Article 103 of the Charter was unsurprising: one of the core objectives of the United Nations was to maintain and restore international peace and security and Article 103 was central to the Security Council's ability to give practical effect to the measures it had decided upon.

90. In the Government's submission, the effect of Article 103 was not confined to the decisions of the Security Council obliging States to act in a certain way. It also applied to the decisions of the Security Council authorising action. The practice of the Security Council, at least since the early 1990s, had been to seek to achieve its aims, and to discharge its responsibility, in respect of the maintenance of international peace and security by authorising military action by States and organisations such as NATO. As the Court had mentioned in its decision in *Behrami and Saramati* (cited above, § 132), no agreements had ever been made under Article 43 of the Charter of the United Nations by member States undertaking to make troops available to the United Nations. In the absence of any such agreement, no State could be required to take military action. Unless the Security Council could proceed by authorisation, it would be unable to take military measures at all, thus frustrating an important part of the Chapter VII machinery. However, if a resolution authorising military action did not engage Article 103 of the Charter, the result would be that any State acting under that authorisation would breach any conflicting treaty obligations, which would fatally undermine the whole system of the Charter for the protection of international peace and security. It was plain that this was not the way that States had regarded the legal position under any of the numerous resolutions issued by the Security Council authorising military action. It had also been the view of the most authoritative commentators; as Lord Bingham observed at paragraph 33 of the House of Lords judgment, there is "a strong and to my mind persuasive body of academic opinion which would treat Article 103 as applicable where conduct is authorised by the Security Council as where it is required".

91. In consequence, it was the Government's case that the application of Article 5 of the Convention was displaced by the legal regime established by United Nations Security Council Resolution 1546 by reason of the operation of Articles 25 and 103 of the Charter of the United Nations, to the extent that Article 5 was not compatible with that legal regime. The Convention was a part of international law and derived its normative force from international law. It was concluded only five years after the Charter of the United Nations and if there had been any intention to seek to disapply Article 103 to the provisions of the Convention, this would have been clearly stated. Moreover, the Court had never suggested in its case-law that it considered that Article 103 did not apply to displace obligations under the Convention which were incompatible with an obligation under a United Nations Security Council resolution. On the contrary, in *Behrami and*

Saramati (cited above, §§ 147 and 149), the Grand Chamber explicitly recognised that the Convention should not be applied in such a way as to undermine or conflict with actions taken under Chapter VII by the Security Council.

92. The Government contended that the applicant's reliance on the judgment of the European Court of Justice in *Kadi* (see paragraph 53 above) was misplaced, since the European Court of Justice did not decide that case on the point of principle currently before this Court. Nor was the Court's judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI) (hereinafter "*Bosphorus*") of assistance to the applicant, since in that case the Court was able to come to the conclusion that there had been no violation of the Convention without having to address any distinct argument based on Article 103 of the Charter of the United Nations. The Government also rejected the applicant's argument that the Convention recognised a limit to the protection of human rights, applicable in this case, by way of the power of derogation under Article 15 in time of national emergencies. The proposition that it would have been possible for the United Kingdom to derogate under Article 15 in respect of an international conflict was not supported by *Banković and Others*, cited above, § 62).

(ii) The applicant

93. The applicant submitted that United Nations Security Council Resolution 1546 did not require the United Kingdom to hold him in internment in breach of Article 5 of the Convention. In Resolution 1546 the Security Council conferred on the United Kingdom a power, but not an obligation, to intern. As the International Court of Justice stated in the *Namibia* case, "the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect" (see paragraph 49 above). Where appropriate, the Security Council could require States to take specific action. It did so in the resolutions under consideration in the *Kadi* and *Bosphorus* cases (cited above), where States were required, "with no autonomous discretion", respectively to freeze the assets of designated persons or to impound aircraft operating from the Federal Republic of Yugoslavia. In contrast, the language of Resolution 1546 and the letters annexed thereto made it clear that the Security Council was asked to provide, and did provide, an authorisation to the Multinational Force to take the measures that it considered necessary to contribute to the maintenance of security and stability in Iraq. It did not require a State to take action incompatible with its human rights obligations, but instead left a discretion to the State as to whether, when and how to contribute to the maintenance of security. Respect for human rights was one of the paramount principles of the Charter of the United Nations and if the Security Council had intended to impose an obligation on British forces to

act in breach of the United Kingdom's international human rights obligations, it would have used clear and unequivocal language. It followed that the rule of priority under Article 103 of the Charter of the United Nations did not come into effect.

94. The applicant argued that the rationale of the European Court of Justice and the Advocate General in *Kadi* (see paragraph 53 above) applied equally to the Convention. In *Kadi*, the European Court of Justice held that European Community measures adopted to give effect to United Nations Security Council resolutions were subject to review on grounds of compatibility with human rights as protected by Community law. This review concerned the internal lawfulness of such measures under Community law and not the lawfulness of the United Nations Security Council resolutions to which they were intended to give effect. The same principles applied in the present case since, in the applicant's submission, member States acting under United Nations Security Council Resolution 1546 had a "free choice" as to the "procedure applicable", which meant that the procedure had to be lawful. The essence of the judgment in *Kadi* was that obligations arising from United Nations Security Council resolutions do not displace the requirements of human rights as guaranteed in Community law. It was true that the European Court of Justice examined the validity of a Community regulation and did not examine directly any member State action implementing United Nations Security Council resolutions. But this was a technical point, resulting from the fact that the challenge was brought against a Community measure and not a national one; it did not affect the substance or scope of the European Court of Justice's ruling.

95. In the applicant's view, the Government's argument would result in a principle under which United Nations Security Council resolutions, whatever their content, could entirely displace any and all Convention rights and obligations. It would introduce a general, blanket derogation from all Convention rights. Article 15 permitted a State to derogate from certain Convention rights, including Article 5, but only in times of war or public emergency and under strict conditions, subject to the Court's review. Moreover, it would be clearly 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 United Nations Security Council resolution. If it were accepted that international law obligations displaced substantive provisions of the Convention, the scope of application of the Convention would be substantially reduced and protection would be denied in some cases where it was most needed. Such a position would be contrary to the principle expressed by the Court in its judgment in *Bosphorus* (cited above).

(iii) The third-party interveners

96. The non-governmental organisations Liberty and JUSTICE, third-party interveners, pointed out that the Court's case-law, particularly the judgment in *Bosphorus* (cited above), supported the view that international law obligations were not, prima facie, able to displace substantive obligations under the Convention, although they might be relevant when considering specific components of Convention rights. One way in which the Court had considered them relevant was encapsulated in the presumption of "equivalent protection" provided by a framework for the protection of fundamental rights within an international organisation of which the Contracting State is a member.

(b) The Court's assessment

97. Article 5 § 1 of the Convention provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

98. The applicant was detained in a British military facility for over three years, between 10 October 2004 and 30 December 2007. His continuing internment was authorised and reviewed, initially by British senior military personnel and subsequently also by representatives of the Iraqi and United Kingdom governments and by non-British military personnel, on the basis of intelligence material which was never disclosed to him. He was able to make written submissions to the reviewing authorities but there was no provision for an oral hearing. The internment was

authorised "for imperative reasons of security". At no point during the internment was it intended to bring criminal charges against the applicant (see paragraphs 11-13 above).

99. The Court emphasises at the outset that Article 5 enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (see, *inter alia*, *Ireland v. the United Kingdom*, 18 January 1978, § 194, Series A no. 25, and *A. and Others v. the United Kingdom*, cited above, §§ 162 and 163).

100. It has long been established that the list of grounds of permissible detention in Article 5 § 1 does not include internment or preventive detention where there is no intention to bring criminal charges within a reasonable time (see *Lawless v. Ireland* (*no. 3)*, 1 July 1961, §§ 13 and 14, Series A no. 3; *Ireland v. the United Kingdom*, cited above, § 196; *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; and *Jėčius v. Lithuania*, no. 34578/97, §§ 47-52, ECHR 2000-IX). The Government do not contend that the detention was justified under any of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15. Instead, they argue that there was no violation of Article 5 § 1 because the United Kingdom's duties under that provision were displaced by the obligations created by United Nations Security Council Resolution 1546. They contend that, as a result of the operation of Article 103 of the Charter of the United Nations (see paragraph 46 above), the obligations under the United Nations Security Council resolution prevailed over those under the Convention.

101. Article 103 of the Charter of the United Nations provides that the obligations of the members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.

102. In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first sub-paragraph of Article 1 of the Charter of the United Nations, the third sub-paragraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms". Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.

103. In this respect, the Court notes that Resolution 1546 was preceded by letters to the President of the Security Council from the Prime Minister of the interim government of Iraq and the US Secretary of State (see paragraph 34 above). In his letter, the Iraqi Prime Minister looked forward to the passing back of full sovereignty to the Iraqi authorities. He requested the Security Council, however, to make a new resolution authorising the Multinational Force to remain on Iraqi territory and to contribute to maintaining security there, "including through the tasks and arrangements" set out in the accompanying letter from the US Secretary of State. In his letter, the US Secretary of State recognised the request of the government of Iraq for the continued presence of the Multinational Force in Iraq and confirmed that the Multinational Force under unified command was prepared to continue to contribute to the maintenance of security in Iraq, including by preventing and deterring terrorism. He added that, under the agreed arrangement, the Multinational Force stood:

> "ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure Force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of

> security, and the continued search for and securing of weapons that threaten Iraq's security. ...".

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

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

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

Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.

106. Furthermore, it is difficult to reconcile the argument that Resolution 1546 placed an obligation on member States to use internment with the objections repeatedly made by the United Nations Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI) to the use of internment by the Multinational Force. Under paragraph 7 of Resolution 1546 both the Secretary-General, through his Special Representative, and UNAMI were specifically mandated by the Security Council to "promote the protection of human rights ... in Iraq". In his quarterly reports throughout the period of the applicant's internment, the Secretary-General repeatedly described the extent to which security internment was being used by the Multinational Force as a pressing human rights concern. UNAMI reported on the human rights situation every few months during the same period. It also repeatedly expressed concern at the large numbers being held in indefinite internment without judicial oversight (see paragraphs 40-41 above).

107. The Court has considered whether, in the absence of express provision in Resolution 1546, there was any other legal basis for the applicant's detention which could operate to disapply the requirements of Article 5 § 1 of the Convention. The Government have argued that the effect of the authorisations in paragraphs 9 and 10 of Resolution 1546 was that the Multinational Force continued to exercise the "specific authorities, responsibilities and obligations" that had vested in the United States of America and the United Kingdom as Occupying Powers under international humanitarian law and that these "obligations" included the obligation to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence. Some support for this submission can be derived from the findings of the domestic courts (see, for example, Lord Bingham at paragraph 32 of the House of Lords judgment; see paragraph 20 above). The Court notes in this respect that paragraph 2 of Resolution 1546 clearly stated that the occupation was to end by 30 June 2004. However, even assuming that the effect of Resolution 1546 was to maintain, after the transfer of authority from the CPA to the interim government of Iraq, the position under international humanitarian law which had previously applied, the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial. Article 43 of the Hague Regulations requires an Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (see paragraph 42 above). While the International Court of Justice in its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda)* interpreted this obligation to include the duty to protect the

inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law, including the provisions of the International Covenant for the Protection of Civil and Political Rights, to which it was a signatory (see paragraph 50 above). In the Court's view, it would appear from the provisions of the Fourth Geneva Convention that under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see paragraph 43 above).

108. A further legal basis might be provided by the agreement, set out in the letters annexed to Resolution 1546, between the Iraqi government and the United States government, on behalf of the other States contributing troops to the Multinational Force, including the United Kingdom, that the Multinational Force would continue to carry out internment in Iraq where the Multinational Force considered this necessary for imperative reasons of security (see paragraph 34 above). However, such an agreement could not override the binding obligations under the Convention. In this respect, the Court recalls its case-law to the effect that a Contracting State is considered to retain Convention liability in respect of treaty commitments and other agreements between States subsequent to the entry into force of the Convention (see, for example, *Al-Saadoon and Mufdhi*, cited above, §§ 126-28).

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

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

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

A. Damage

112. The applicant submitted that his unlawful detention, for a period of three years, two months and 20 days, merited non-pecuniary damage in the region of 115,000 euros (EUR). He relied on awards made by the Court in cases such as *Jėčius v. Lithuania* (no. 34578/97, ECHR 2000-IX); *Tsirlis and Kouloumpas v. Greece* (29 May 1997, *Reports of Judgments and Decisions* 1997-III); and *Assanidze v. Georgia* ([GC], no. 71503/01, ECHR 2004-II) and also domestic case-law concerning the level of damages for unlawful detention.

113. The Government emphasised that the applicant was detained by British troops, operating as part of the Multinational Force in Iraq, because he was reasonably believed to pose a grave threat to the security of Iraq. The detention was authorised throughout under the mandate conferred by United Nations Security Council Resolution 1546 and was also in compliance with Iraqi law. Allegations that the applicant was engaged in terrorist activities in Iraq were subsequently upheld by the Special Immigration Appeals Commission (see paragraph 15 above). In these circumstances, the Government submitted that a finding of a violation would be sufficient just satisfaction. In the alternative, a sum of not more than EUR 3,900 should be awarded. This would be commensurate with the awards made to the applicants in *A. and Others v. the United Kingdom* ([GC], no. 3455/05, ECHR 2009), which also concerned the preventive detention of individuals suspected of terrorism.

114. The Court recalls that it is not its role under Article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Varnava and Others v. Turkey* [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, § 224, ECHR 2009, and the cases cited therein). In the present case, the Court has regard

to the factors raised by the Government. Nonetheless, it considers that, in view of the very long period of time during which the applicant was detained, monetary compensation should be awarded, in the sum of EUR 25,000.

B. Costs and expenses

115. The applicant, emphasising the complexity and importance of the case, claimed for over 450 hours' legal work by his solicitors and four counsel in respect of the proceedings before the Court, at a total cost of 85,946.32 pounds sterling (GBP).

116. The Government acknowledged that the issues were complex, but nonetheless submitted that the claim was excessive, given that the applicant's legal advisers were familiar with all aspects of the claim since they had acted for the applicant in the domestic legal proceedings, which had been publicly funded. Furthermore, the hourly rates claimed by the applicant's counsel, ranging between GBP 500 and GBP 235, and the hourly rates claimed by the applicant's solicitors, ranging between GBP 180 and GBP 130, were unreasonably high. Nor had it been necessary to engage two Queen's Counsel and two junior counsel to assist.

117. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 40,000 for the proceedings before the Court.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Joins to the merits* unanimously the questions whether the applicant's detention was attributable to the respondent State and whether he fell within the respondent State's jurisdiction;

2. *Declares* unanimously the application admissible;

3. *Holds* unanimously that the detention was attributable to the respondent State and that the applicant fell within the respondent State's jurisdiction;

4. *Holds* by sixteen votes to one that there has been a violation of Article 5 § 1 of the Convention;

5. *Holds* by sixteen votes to one
(a) that the respondent State is to pay the applicant, within three months, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage;
(b) that the respondent State is to pay the applicant, within three months, EUR 40,000 (forty thousand euros), plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement; and
(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 7 July 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle
Deputy Registrar

Jean-Paul Costa
President

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

J.-P.C.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE POALELUNGI

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

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

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

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

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

moreover, expressly referred to in the letter of Colin Powell annexed to Resolution 1546. I consider that it is clear from the text of the Resolution, and from the context where the Multinational Force was already present and using internment in Iraq, that member States were authorised to continue interning individuals where necessary.

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