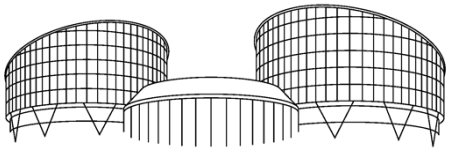

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HASSAN v. THE UNITED KINGDOM

(Application no. 29750/09)

JUDGMENT

STRASBOURG

16 September 2014

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

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In the case of Hassan v. the United Kingdom,

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

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Dragoljub Popović,
George Nicolaou,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Angelika Nußberger,
Paul Mahoney,
Faris Vehabović,
Robert Spano, *judges,*

and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 11 December 2013 and 25 June 2014,

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

PROCEDURE

1. The case originated in an application (no. 29750/09) 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 an Iraqi national, Mr Khadim Resaan Hassan ("the applicant"), on 5 June 2009.

2. The applicant was represented by Mr P. Shiner, a solicitor practising in Birmingham, together with Mr T. Otty, QC, and Mr T. Hickman, barristers practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms R. Tomlinson, Foreign and Commonwealth Office.

3. The applicant alleged that his brother was arrested and detained by British forces in Iraq and was subsequently found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the

United Kingdom authorities failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Its examination of the application was adjourned pending adoption of the judgment in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011. Subsequently, on 30 August 2011, the application was communicated to the Government.

5. On 4 June 2013 the Chamber decided to relinquish jurisdiction to the Grand Chamber. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

6. The applicants and the Government each filed further written pleadings on the admissibility and merits and third-party comments were received from Professor Françoise Hampson and Professor Noam Lubell, of the Human Rights Centre, University of Essex ("the Third Party").

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 11 December 2013 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms R. TOMLINSON, *Agent*,
Mr J. EADIE QC,
Mr C. STAKER, *Counsel*,
Mr M. ADDISON,
Ms A. MCLEOD, *Advisers*;

(b) *for the applicant*

Mr T. OTTY QC,
Mr T. CLEAVER, *Counsel*,
Mr P. SHINER,
Ms B. SHINER,
Ms L. SHINER, *Advisers*.

The Court heard addresses by Mr Eadie and Mr Otty and their answers to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The facts of the case, as submitted by the parties, may be summarised as follows. Where certain facts are in dispute, each party's version of events is set out.

A. The invasion of Iraq

9. 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 from their assembly point across the border with Kuwait. By 5 April 2003 British forces had captured Basrah and by 9 April 2003 United States troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003.

B. The capture of the applicant's brother by British forces

10. Prior to the invasion, the applicant was a general manager in the national secretariat of the Ba'ath Party and a general in the Al-Quds Army, the army of the Ba'ath Party. He lived in Umm Qasr, a port city in the region of Basrah, near the border with Kuwait and about 50 kilometres from Al-Basrah (Basrah City). After the British army entered into occupation of Basrah, they started arresting high ranking members of the Ba'ath Party. Other Ba'ath Party members were killed by Iraqi militia. The applicant and his family therefore went into hiding, leaving the applicant's brother, Tarek Resaan Hassan (henceforth, "Tarek Hassan"), and his cousin to protect the family home.

11. According to information given by the Government, members of a British army unit, the 1st Battalion The Black Watch, went to the applicant's house early in the morning of 23 April 2003, hoping to arrest him. The applicant was not there, but the British forces encountered Tarek Hassan, who was described in the contemporaneous report drawn up by the arresting unit ("the battalion record") as a "gunman", found on the roof of the house with an AK-47 machine gun. The battalion record indicated that the "gunman" identified himself as the brother of the applicant and that he was arrested at approximately 6.30 a.m. It further indicated that the house was found by the arresting soldiers to contain other firearms and a number of documents of intelligence value, related to local membership of the Ba'ath Party and the Al-Quds Army.

12. According to a statement made by the applicant and dated 30 November 2006, Tarek Hassan was arrested by British troops on 22 April 2003, in the applicant's absence. According to this statement, "When my sisters approached the British military authority they were told that I had to surrender myself to them before they would release my brother". In a later statement, dated 12 September 2008, the applicant did not mention his sisters but instead stated that he asked his friend, Saeed Teryag, and his neighbour Haj Salem, to ask British forces for information about Tarek Hassan. The applicant asked these friends because he could trust them; Haj Salem was a respected businessman and Saeed Teryag had

been to university and spoke English. According to the applicant, "[W]hen they approached the British military authorities the British told them I had to surrender myself to them before they would release my brother".

13. According to a summary of a telephone interview with the applicant's neighbour, Mr Salim Hussain Nassir Al-Ubody, dated 2 February 2007, Tarek Hassan was taken away by British soldiers on an unknown date in April at around 4.30 a.m., with his hands tied behind his back. Mr Al-Ubody stated that he approached one of the Iraqis who accompanied the soldiers to ask what they wanted, and was told that the soldiers had come to arrest the applicant. Three days later, the applicant telephoned Mr Al-Ubody and asked him to find a guard for his house and to find out from the British army what had happened to Tarek Hassan. Two days later, Mr Al-Ubody went to the British headquarters at the Shatt-Al-Arab Hotel. He asked an Iraqi translator if he could find out anything about Tarek Hassan. Two days later, when Mr Al-Ubody returned, the translator informed him that the British forces were keeping Tarek Hassan until the applicant surrendered. The translator further advised Mr Al-Ubody not to return, as this might expose him to questioning.

C. Detention at Camp Bucca

14. Both parties agreed that Tarek Hassan was taken by British forces to Camp Bucca. This Camp, situated about 2.5 kilometres from Umm Qasr and about 70 kilometres south of Al-Basrah was first established on 23 March 2003 as a United Kingdom detention facility. However, it officially became a United States facility, known as "Camp Bucca", on 14 April 2003. In April 2003 the Camp was composed of eight compounds, divided by barbed wire fencing, each with a single entry point. Each compound contained open-sided tents capable of housing several hundred detainees, a water tap, latrines and an uncovered area.

15. For reasons of operational convenience, the United Kingdom continued to detain individuals they had captured at Camp Bucca. One compound was set aside for internees detained by the United Kingdom on suspicion of criminal offences. In addition, the United Kingdom operated a separate compound at the Camp for its Joint Forward Interrogation Team (JFIT). This compound had been built by British forces and continued to be administered by them. Although detainees captured by both the United Kingdom and the United States armies were interrogated at the JFIT compound, and teams of United Kingdom and United States interrogators worked there, the United Kingdom JFIT team controlled the detention and interrogation of all prisoners held there. Elsewhere in the Camp, the United States army was responsible for guarding and escorting detainees and the United Kingdom was obliged to reimburse the United States for costs involved in maintaining United Kingdom captured detainees

held at the Camp. The British Military Provost Staff (military police) had an "overseeing responsibility" for United Kingdom detainees transferred to United States custody, except those detained in the JFIT compound. United Kingdom detainees who were ill or injured were treated in British field hospitals. The United Kingdom authorities were responsible for liaising with the International Committee of the Red Cross (ICRC) about the treatment of United Kingdom detainees and the notification of their families regarding the detention (see further paragraph 20 below). The United Kingdom also remained responsible for classifying detainees under Articles 4 and 5 of the Third Geneva Convention (see paragraph 33 below).

16. In anticipation of the United Kingdom using shared facilities to hold United Kingdom detainees, on 23 March 2003 the United Kingdom, United States and Australian Governments entered into a Memorandum of Arrangement ("MOA") relating to the transfer of custody of detainees, which provided as follows:

> "This arrangement establishes procedures in the event of the transfer from the custody of either the US, UK or Australian forces to the custody of any of the other parties, any Prisoners of War, Civilian Internees, and Civilian Detainees taken during operations against Iraq.
>
> The Parties undertake as follows:
>
> 1. This arrangement will be implemented in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law.
>
> 2. US, UK, and Australian forces will, as mutually determined, accept (as Accepting Powers) prisoners of war, civilian internees, and civilian detainees who have fallen into the power of any of the other parties (the Detaining Power) and will be responsible for maintaining and safeguarding all such individuals whose custody has been transferred to them. Transfers of prisoners of war, civilian internees and civilian detainees between Accepting Powers may take place as mutually determined by both the Accepting Power and the Detaining Power.
>
> 3. Arrangements to transfer prisoners of war, civilian internees, and civilian detainees who are casualties will be expedited, in order that they may be treated according to their medical priority. All such transfers will be administered and recorded within the systems established under this arrangement for the transfer of prisoners of war, civilian internees, and civilian detainees.
>
> 4. Any prisoners of war, civilian internees, and civilian detainees transferred by a Detaining Power will be returned by the Accepting Power to the Detaining Power without delay upon request by the Detaining Power.
>
> 5. The release or repatriation or removal to territories outside Iraq of transferred prisoners of war, civilian internees, and civilian detainees will only be made upon the mutual arrangement of the Detaining Power and the Accepting Power.
>
> 6. The Detaining Power will retain full rights of access to any prisoner of war, civilian internees and civilian detainees transferred from Detaining Power custody while such persons are in the custody of the Accepting Power.

7. The Accepting Power will be responsible for the accurate accountability of all prisoners of war, civilian internees, and civilian detainees transferred to it. Such records will be available for inspection by the Detaining Power upon request. If prisoners of war, civilian internees, or civilian detainees are returned to the Detaining Power, the records (or a true copy of the same) relating to those prisoners of war, civilian internees, and civilian detainees will also be handed over.

8. The Detaining Powers will assign liaison officers to Accepting Powers in order to facilitate the implementation of this arrangement.

9. The Detaining Power will be solely responsible for the classification under Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of potential prisoners of war captured by its forces. Prior to such a determination being made, such detainees will be treated as prisoners of war and afforded all the rights and protections of the Convention even if transferred to the custody of an Accepting Power.

10. Where there is doubt as to which party is the Detaining Power, all Parties will be jointly responsible for and have full access to all persons detained (and any records concerning their treatment) until the Detaining Power has by mutual arrangement been determined.

11. To the extent that jurisdiction may be exercised for criminal offenses, to include pre-capture offenses, allegedly committed by prisoners of war, civilian internees, and civilian detainees prior to a transfer to an Accepting Power, primary jurisdiction will initially rest with the Detaining Power. Detaining Powers will give favourable consideration to any request by an Accepting Power to waive jurisdiction.

12. Primary jurisdiction over breaches of disciplinary regulations and judicial offenses allegedly committed by prisoners of war, civilian internees, and civilian detainees after transfer to an Accepting Power will rest with the Accepting Power.

13. The Detaining Power will reimburse the Accepting Power for the costs involved in maintaining prisoners of war, civilian internees, and civilian detainees transferred pursuant to this arrangement.

14. At the request of one of the Parties, the Parties will consult on the implementation of this arrangement."

17. According to the witness statement of Major Neil B. Wilson, who served with the Military Provost Staff at Camp Bucca during the period in question, the usual procedure was for a detainee to arrive at the Camp with a military escort from the capturing unit. On arrival he would be held in a temporary holding area while his documents were checked and his personal possessions were taken from him. Medical treatment would be provided at this point if required. The detainee would then be processed through the arrivals tent by United Kingdom personnel with the aid of an interpreter. A digital photograph would be taken and this, together with other information about the detainee, would be entered on the database used by the United Kingdom authorities to record a wide range of military personnel information during the operations in Iraq, including detainee information, known as the AP3-Ryan database.

18. Examination of this database showed that there was no entry under the name Tarek Resaan Hassan but there was an entry, with a photograph,

for "Tarek Resaan Hashmyh Ali". In his witness statement the applicant explained that for official purposes Iraqis use their own first name, followed by the names of their father, mother, grandfather and great-grandfather. "Ali" was the applicant's great-grandfather's name and it appeared that Hassan (his grandfather's name) was omitted by mistake. Tarek Hassan was issued with a wristband printed with his United Kingdom internment serial number UKDF018094IZSM; with "DF" denoting "detention facility", "IZ" meaning allegiance to Iraq and "SM" standing for "soldier male". Screen shots from the AP3-Ryan database also show that Tarek Hassan was asked whether he consented to the national authorities being informed of his detention and that he did not consent to this.

19. Following the United Kingdom registration process, detainees would be transferred to the United States forces for a second registration. This involved the issue of a United States number, printed on a wrist band. Tarek Hassan's United States registration number was UK912-107276EPW46. The "UK" reference indicated that the United Kingdom was the capturing nation and "EPW" indicated that he was treated by the United States forces as an enemy prisoner of war; however, at this stage all detainees were classified as prisoners of war except those captured by British forces on suspicion of having committed criminal offences. After registration, detainees were usually medically examined, then provided with bedding and eating and washing kits and transferred by United States forces to the accommodation areas.

20. The Government submitted a witness statement by Mr Timothy Lester, who was charged with running the United Kingdom Prisoner of War Information Bureau (UKPWIB) in respect of Iraq from the start of military operations there in March 2003. He stated that the UKPWIB operated in Iraq as the "National Information Bureau" required by Article 122 of the Third Geneva Convention and monitored details of prisoners of war internees and criminal detainees in order to facilitate contact with their next-of-kin. The Third Geneva Convention also required the establishment of a "Central Prisoners of War Information Agency". This role was subsumed by the Central Tracing Agency of the International Committee of the Red Cross (ICRC). The ICRC collected information about the capture of individuals and, subject to the consent of the prisoner, transmitted it to the prisoner's country of origin or the power on which he depended. In practice, details of all prisoners taken into custody by British forces were entered by staff at the detention facility in Iraq and sent to Mr Lester in London, who then transferred the data to a spread-sheet and downloaded it to the ICRC's secure website. He stated that during the active combat phase he typically passed data to the ICRC on a weekly basis, and monthly thereafter. However, Tarek Hassan's details were not notified to the ICRC until 25 July 2003, because of a delay caused by the updating of UKPWIB computer system. In any event, it was noted on Tarek Hassan's record that he did not

consent to the Iraqi authorities being notified of his capture (see paragraph 18 above). In the absence of consent, Mr Lester considered it unlikely that the ICRC would have informed the Iraqi authorities and that those authorities would, in turn, have informed the Hassan family.

D. The screening process

21. According to the Government, where the status of a prisoner was uncertain at the time of his arrival at Camp Bucca, he would be registered as a prisoner of war by the United Kingdom authorities. Any detainee, such as Tarek Hassan, captured in a deliberate operation was taken immediately to the JFIT compound for a two-stage interview. According to the Government, there were United Kingdom and United States interrogation teams working in the JFIT compound, and both teams interviewed both United Kingdom- and United States-captured detainees. The first interview may have been undertaken simply by whichever team was available when the detainee arrived. The aim of the interview process was to identify military or paramilitary personnel who might have information pertinent to the military campaign and, where it was established that the detainee was a non-combatant, whether there were grounds to suspect that he was a security risk or a criminal. If no such reasonable grounds existed, the individual was classified as a civilian not posing a threat to security and ordered to be released immediately.

22. A print-out from the JFIT computer database indicated that in Camp Bucca Tarek Hassan was assigned JFIT no. 494 and registration no. UK107276. His arrival was recorded as 23 April 2003 at 16.40 and his departure was recorded as 25 April 2003 at 17.00, with his "final destination" recorded as "Registration (Civ Cage)." Under the entry "Release/Keep" the letter "R" was entered. Under the heading "TQ", which stood for "tactical questioning", there was the entry "231830ZAPR03-Steve" and under the heading "Intg 1" was the entry "250500ZAPR03". According to the Government, the first of these entries meant that Tarek Hassan was first subjected to tactical questioning on 23 April 2003 at 18.30 Zulu ("Zulu" in this context meant Coordinated Universal Time, also known as Greenwich Mean Time). On 23 April, 18.30 Zulu would have been 21.30 Iraqi time. The second entry indicated that Tarek Hassan was again subject to questioning on 25 April 2003 at 5.00 Zulu, or 8.00 local time and then released into the civilian pen at Camp Bucca at 20.00 local time on 25 April 2003.

23. The Government provided the Court with a copy of a record of an interview between Tarek Hassan and United States agents, dated 23 April 2003, 18.30 Zulu, which stated as follows:

> "EPW [Enemy Prisoner of War] was born in BASRA on August 3, 1981. He currently resides in his home with his father, mother, older brother (Name: Qazm;

born in the 1970s), and his little sister (age; unexploited). Home is across from the Khalissa school in the Jamiyat region in N. BASRA. EPW left middle school as a recruit to play soccer. He currently plays in the Basra Soccer Club and his position is attacker/forward. His team receives money from the government and the Olympic committee to pay for team expenses. EPW has no job since soccer is his life and they pay for all of his soccer expenses.

EPW knows that he was brought in because of his brother, Qazm. Qazm is a Othoo Sherba in the Ba'ath party and he fled his home four days ago to an unknown destination. Qazm joined the Ba'ath party in 1990 and is involved in regular meetings and emergency action planning (nothing else exploited). Before the war, Qazm received a pickup from the Ba'ath party. When the coalition forces entered BASRA, Qazm gave the pickup to a neighbour (name not exploited) to safeguard it and Qazm went to a hotel in downtown BASRA (name of hotel is unknown). Qazm made a few phone calls during that time, but never mentioned where he was staying. A problem arose when the original owners of the pickup, the local petroleum company, came to reclaim the vehicle they had lent the Ba'ath party. Qazm became frustrated with the whole mess and fled soon after that.

EPW seems to be a good kid who was probably so involved with soccer that he didn't follow his brother's whereabouts all that much. But it seems they have a close knit family and EPW could know more about his brother's activities in the Ba'ath party, and some of his friends involved in the party, too. Using any type of harsh approach is not going to be effective. EPW loves his family and soccer. EPW will cooperate, but he needs someone he can trust if he's going to tell information about his brother that is going to harm him. EPW seems to be innocent of anything himself, but may help with information about others around him."

24. A record of the second questioning was provided by the Government in the form of a Tactical Questioning Report. This document indicated that it related to "PW 494" with the "date of information" recorded as "250445ZAPR03", that is 4.45 Zulu or 7.45 local time on 25 April 2003. The report stated:

"1. EPW [Enemy Prisoner of War] is 22 years old, single, living with his 80 year old father (who is a Sheik) and his mother in the Jamiyet district of BASRAH. He works as a handyman and has not done his military service due to his status as a student. He stated that an AK 47 was present in their house at the time of his arrest but it was only kept for personal protection. The EPW and his father are not Ba'ath Party members.

2. EPW says he was arrested at his house by United States troops [sic] who were looking for his brother, Kathim. His brother is a Ba'ath Party member, an Uthoo Shooba. He joined the party in 1990 when he became a law student in the school of law in the Shaat Al Arab College. His brother is still a student, in his last year of study, married but with no children. He has alternated study with periods of work as a car trader. His brother was in fear of his life because of fear of reprisals against Ba'ath Party members and so had run away possibly to SYRIA or IRAN. The EPW last spoke with his brother 5 days ago by phone. His brother did not disclose his location.

JFIT COMMENT: EPW appears to be telling the truth and has been arrested as a result of mistaken identity. He is of no intelligence value and it is recommended that he is released to the civilian pen. **JFIT COMMENT ENDS.**"

E. Evidence relating to Tarek Hassan's presence in the civilian holding area at Camp Bucca and his possible release

25. The applicant submitted a summary of an interview dated 27 January 2007 with Fouad Awdah Al-Saadoon, the former chairman of the Iraqi Red Crescent in Basrah and a friend of the applicant's family. He had been arrested by British troops and detained at Camp Bucca, in a tent holding approximately 400 detainees. He stated that on 24 April 2003 at around 6 p.m. Tarek Hassan was brought to the tent. Mr Al-Saadoon stated that Tarek Hassan seemed scared and confused but did not mention that Tarek Hassan complained of having been ill-treated. Tarek Hassan was not interrogated during the time they were together in Camp Bucca. Since Mr Al-Saadoon was in ill-health, Tarek Hassan brought him food and cared for him. Mr Al-Saadoon was released on 27 April 2003, in a batch of 200 prisoners, since the United Kingdom authorities had decided to release all detainees aged 55 or older. The detainees were released at night, on a highway between Al-Basrah and Al-Zubair and had to walk 25 miles to the nearest place they could hire cars. Following his release, he informed the applicant's family that he had seen Tarek Hassan at Camp Bucca. According to the applicant, this was the only information received by the family about his brother's whereabouts following the latter's arrest. In response to this statement, the Government submitted that Mr Al-Saadoon might have been mistaken about the date, because it appeared from the interrogation records that Tarek Hassan was released to the civilian holding area on 25 April 2003. They also emphasised that stringent efforts were made to return individuals to their place of capture or to an alternate location if requested, and that 25 miles was much greater than the distance between Al-Basrah and Al-Zubair.

26. According to the witness statement, provided by the Government, of Major Neil Wilson, who commanded a group of soldiers from the Military Provost Staff who advised on detention issues within the United Kingdom area of operations in Iraq during the relevant period, the decision to release United Kingdom captured detainees held at Camp Bucca, other than those facing criminal charges, was taken by a tribunal convened by United Kingdom military legal officers. Details were then passed to the United States guards, before those released were processed out of the Camp, with their details checked and entered on the AP3-Ryan database. According to the orders made by the United Kingdom's Military Divisional Headquarters based in Basrah and applying at that time, the United States forces were responsible for the repatriation of all prisoners to the areas within their field of operation and the United Kingdom forces were responsible for returning prisoners to areas within their field of operation, namely South East Iraq, regardless of which force had captured the prisoners. The ICRC was to have access to all those being released. Again according to the applicable orders,

prisoners repatriated by British forces were to be loaded on to buses with armed guards on-board and armed military escort vehicles to the front and rear. Release was to be to specific repatriation points in daylight hours, with sufficient food and water to last the individuals being released until they got home. According to the evidence of Major Wilson, efforts were made to return individuals to their point of capture. There were four drop-off points within the United Kingdom field of operation, including "Al-Basrah GR TBC [grid reference to be confirmed]". Umm Qasr was not listed as a drop-off point but could be entered as a point of release on the records of individuals being processed for release.

27. The Government also submitted a military order dated 27 April 2003 (FRAGO 001/03), the purpose of which was to ensure the release from detention of the maximum possible number of civilians and prisoners of war prior to the cessation of hostilities (which was subsequently announced on 1 May 2003). The annex to the order set out the procedures to be followed. A number of individuals would continue to be detained on security grounds or because they were suspected of being criminals; they had already been identified by JFIT, with the decision recorded on the AP3-Ryan database, and a list given to the United States authorities to ensure they were not released. The remaining population would stay within the individual compounds and await release processing by the United Kingdom authorities. At the processing tent, a three-point check would be made of each detainee's wrist-band, face and digital profile held on AP3-Ryan. The following information was then required to be entered into the database: "(1) Releasing Force Element; (2) Release Date; (3) Releasing Nation; (4) Selected Place of Release." The text of the order itself referred to four drop-off points (Al-Basrah, Najef, Al-Kut and An Nasariah (the latter three towns were to the north of Al-Basrah), but the annex listed in addition Um Qasr (south of Al-Basrah and 2.5 kilometres from the Camp) as a drop-off point. The United Kingdom forces would then retain the detainee's identity card and pass him back to the United States authorities for final processing, including the issue of food and water and the return of personal belongings. Four holding areas would be established, "one for each release location", from which the detainees would then be transported to the agreed repatriation points and released in daylight hours. The order also required a final audit to be conducted to check that all United Kingdom detainees listed on the AP3-Ryan database had either been released or continued to be detained. Should the record be identified of any person who had neither been released nor detained, a board of inquiry had to sit to determine what had happened.

28. In addition, the Government submitted a witness statement dated 29 October 2007 by Warrant Officer Class 2 Kerry Patrick Madison, who had responsibility for the management of the AP3-Ryan database. He stated that by 22 May 2003 AP3-Ryan showed that the United Kingdom forces

had captured and processed 3,738 detainees in Iraq since the start of hostilities and had released all but 361. Annexed to Warrant Officer Madison's statement were a number of screen prints showing entries on the database relating to Tarek Hassan. They showed that an entry was made on AP3-Ryan on 4 May 2003 at 1.45 p.m. recording the release of "Tarek Resaan Hashmyh Ali" at 00.01 on 2 May 2003. The releasing authority was stated to be "United Kingdom (ARMD) DIV SIG REGT"; the place of release was stated to be "Umm Qasr"; the method of release was "By Coach" and the ground of release was recorded as "End of Hostilities". A further entry was made in the United Kingdom AP3-Ryan system on 12 May 2003 at 10.13 p.m. recording that: "PW was found to be absent from the internment facility when 100% check was conducted. PW was released on AP3 on 12 May 03". According to the Warrant Officer Madison, some 400 individuals' records included the statement "PW was released on AP3 on 12 May 03", when they had in fact been released earlier and it was therefore likely that the Camp's computer release records were brought up to date on 12 May following a physical check. The United States computer system did not record any release until 17 May 2003 but again, according to the Government, this was probably explained by a reconciliation of the United States Camp Bucca database with a physical check of occupants of the Camp by the United States authorities on 17 May.

F. The discovery of Tarek Hassan's body

29. According to the applicant, Tarek Hassan did not contact his family during the period following his purported release. On 1 September 2003 one of the applicant's cousins received a telephone call from a man unknown to them, from Samara, a town north of Baghdad. This man informed them that a dead man had been found in the nearby countryside, with a plastic ID tag and piece of paper with the cousin's telephone number written on it in the pocket of the sport's top he was wearing. According to the applicant, Tarek Hassan was wearing sportswear when he was captured by British forces. The applicant's cousin called him and, together with another brother, the applicant went to the forensic medical station of the Tekrit General Hospital in Samara. There they saw the body of Tarek Hassan with eight bullet wounds from an AK-47 machine gun in his chest. According to the applicant, Tarek Hassan's hands were tied with plastic wire. The identity tag found in his pocket was that issued to him by the United States authorities at Camp Bucca. A death certificate was issued by the Iraqi authorities on 2 September 2003, giving the date of death as 1 September 2003, but the sections reserved for the cause of death were not completed. A police report identified the body as "Tariq Hassan" but gave no information about the cause of death.

G. Correspondence with Treasury Solicitors and legal proceedings

30. The applicant remained in hiding in Iraq until October 2006, when he crossed the border to Syria. In November 2006, through a representative in Syria, he made contact with solicitors in the United Kingdom. The applicant's solicitors wrote to the Government's Treasury Solicitors on 21 December 2006 requesting explanations for the arrest and detention of Tarek Hassan and the circumstances that resulted in his death. It took some time to identify the applicant's brother, because he was entered in the Camp Bucca databases under the name "Tarek Resaan Hashmyh Ali" (see paragraph 18 above). However, in a letter dated 29 March 2007 Treasury Solicitors stated that a check of the United Kingdom's prisoner of war computer records had produced a record of Tarek Resaan Hashmyh Ali being detained at Camp Bucca. In a further letter dated 5 April 2007 Treasury Solicitors stated that further computer records had been recovered which "confirm the handover" of Tarek Hassan from the United Kingdom authorities to the United States authorities at Camp Bucca and which recorded his release on 12 May 2003.

31. The applicant commenced proceedings in the High Court on 19 July 2007 seeking declarations in respect of breaches of his brother's rights under Articles 2, 3 and 5 of the Convention, as set out in Schedule 1 to the Human Rights Act 1998, financial compensation and an order requiring the Government to initiate an independent and public investigation into the fate of the deceased after he was detained by British forces on 22 April 2003. The claim was heard on 19 and 20 January 2009 and was rejected in a judgment delivered by Walker J on 25 February 2009 ([2009] EWHC 309 (Admin)). The judge held that, in the light of the judgment of the House of Lords in *Al-Skeini* (see further the summary of the House of Lords' judgment in *Al-Skeini v. the United Kingdom,* cited above, §§ 83-88), it could not be said that Tarek Hassan was within the United Kingdom's jurisdiction under Article 1 of the Convention at any time. In *Al-Skeini* the House of Lords had recognised a number of exceptions to the general rule that a State did not exercise jurisdiction extra-territorially, but these did not include detention of a person unless this took place within a military prison or other comparable facility controlled by the Contracting State. The judge's analysis of the MOA (see paragraph 16 above) indicated that Camp Bucca was a United States rather than a United Kingdom military establishment, for the following reasons:

> "... It is plain that the detaining power [the United Kingdom] relinquishes, until such time as it requires return of the individual in question, responsibility for maintaining and safeguarding those transferred. Accountability in that regard is the responsibility of the accepting power [the United States]. As regards adjudications concerning the individual's contact after transfer to the accepting power the detaining power relinquishes to the accepting power primary jurisdiction. Overall this amounts to a

legal regime in which the detaining power has no substantial control over the day to day living conditions of the individual in question."

32. The applicant was advised that an appeal would have no prospect of success.

II. RELEVANT INTERNATIONAL AND DOMESTIC LAW AND PRACTICE

A. Relevant provisions of the Third and Fourth Geneva Conventions

33. The following Articles of the Third Geneva Convention of 12 August 1949, Relative to the Treatment of Prisoners of War ("the third Geneva Convention") and the Fourth Geneva Convention of 12 August 1949, Relative to the Protection of Civilian Persons in Time of War ("the Fourth Geneva Convention"), are of particular relevance to the issues in the present case.

Article 2, common to all four Geneva Conventions

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof...

Article 4(A) of the Third Geneva Convention

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Article 5 of the Third Geneva Convention

(1) The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

(2) Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 12 of the Third Geneva Convention

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

Article 21 of the Third Geneva Convention

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to

the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary. ...

Article 118 of the Third Geneva Convention

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. ...

Article 42 of the Fourth Geneva Convention

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 ...

Article 43 of the Fourth Geneva Convention

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.

Article 78 of the Fourth Geneva Convention

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.

Article 133(1) of the Fourth Geneva Convention

Internment shall cease as soon as possible after the close of hostilities.

Article 132(2) of the Fourth Geneva Convention

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

B. The Vienna Convention on the Law of Treaties, 1969, Article 31

34. Article 31 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") provides as follows:

Article 31, General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

C. Case-law of the International Court of Justice concerning the inter-relationship between international humanitarian law and international human rights law

35. In its Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), the International Court of Justice stated as follows:

> "25. The Court observes that the protection of the International Covenant for the Protection of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life, however, is not such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

36. In its Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), the International Court of Justice rejected Israel's argument that the human

rights instruments to which it was a party were not applicable to occupied territory, and held:

> "106. ... the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the [International Covenant on Civil and Political Rights]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

37. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda*), (19 December 2005) the International Court of Justice held as follows:

> "215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF [Uganda People's Defence Force] is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.
>
> 216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that
>
> 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.' (I.C.J. Reports 2004, p. 178, para. 106.)
>
> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories (ibid., pp. 178-181, paras. 107-113)."

D. The Report of the Study Group of the International Law Commission on Fragmentation of International Law

38. The Report of the Study Group of the International Law Commission on the topic "Fragmentation of international law: difficulties arising from

diversification and expansion of international law" was adopted by the International Law Commission at its fifty-eighth session, in 2006. The Analytical Study of the Study Group on the same topic, dated 13 April 2006, (A/CN.4/L.682) stated at § 104:

> The example of the laws of war focuses on a case where the rule itself identifies the conditions in which it is to apply, namely the presence of an 'armed conflict'. Owing to that condition, the rule appears more 'special' than if no such condition had been identified. To regard this as a situation of *lex specialis* draws attention to an important aspect of the operation of the principle. Even as it works so as to justify recourse to an exception, what is being set aside does not vanish altogether. The [International Court of Justice] was careful to point out that human rights law continued to apply within armed conflict. The exception - humanitarian law - only affected one (albeit important) aspect of it, namely the relative assessment of "arbitrariness". Humanitarian law as *lex specialis* did not suggest that human rights were abolished in war. It did not function in a formal or absolute way but as an aspect of the pragmatics of the Court's reasoning. However desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances. *Legality of Nuclear Weapons* was a 'hard case' to the extent that a choice had to be made by the [International Court of Justice] between different sets of rules none of which could fully extinguish the others. *Lex specialis* did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure 'the survival of a State'."

E. The House of Lords' judgment in *Al-Jedda*

39. In their judgment of 12 December 2007 in the *Al-Jedda* case (*R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58), the majority of the House of Lords considered that Mr Al-Jedda's internment was authorised by United Nations Security Council Resolution 1546. They further held that Article 103 of the United Nations Charter operated to give the United Kingdom's obligations pursuant to that resolution primacy over its obligations under Article 5 of the Convention (see further *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§ 18-22, ECHR 2011). Lord Bingham, however, made it clear that, despite this conclusion, Article 5 had some continued application:

> "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 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."

Similarly, Baroness Hale observed:

"125. ... I agree with Lord Bingham, for the reasons he gives, that the only way is by adopting such a qualification of the Convention rights.

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 resolution 1546 went when it authorised the [Multi-National 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' (para 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 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."

F. Derogations relating to detention under Article 15 of the European Convention on Human Rights and Article 4 of the International Covenant on Civil and Political Rights

40. Leaving aside a number of declarations made by the United Kingdom between 1954 and 1966 in respect of powers put in place to quell uprisings in a number of its colonies, the derogations made by Contracting States under Article 15 of the Convention have all made reference to emergencies arising within the territory of the derogating State.

41. Article 4 of the International Covenant for the Protection of Civil and Political Rights ("ICCPR") contains a derogation clause similar to Article 15 of the Convention. According to the information available to the Court, since ratifying the ICCPR, 18 States have lodged declarations derogating from their obligations under Article 9, which provides for "the right to liberty and security of person". Of these, only three declarations could possibly be interpreted as including a reference, by the authorities of the derogating State, to a situation of international armed conflict or military aggression by another State. The States which filed these derogations were Nicaragua, between 1985 and 1988, where the declaration referred to the United States' "unjust, unlawful and immoral aggression against the Nicaraguan people and their revolutionary government"; Azerbaijan, between April and September 1993, where the declaration referred to the "escalating aggression by the armed forces of Armenia"; and Israel, where the declaration made on 3 October 1991 and currently applicable reads as follows:

> "Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.
>
> These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.
>
> In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.
>
> The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.
>
> In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

None of the States explicitly expressed the view that derogation was necessary in order to detain persons under the Third or Fourth Geneva Conventions.

42. As regards State practice, in her book, "Captured in War : Lawful Internment in Armed Conflict" (Hart Publishing, Editions A. Pedone, Paris and Oxford 2013) Els Debuf referred to a study she had undertaken of the

derogations notified to the concerned authorities for the Convention and the ICCPR, as reflected in the United Nations' and the Council of Europe's online databases (last verified on 1 October 2010). She noted as follows:

> "Our research of these databases – focused on international armed conflicts and occupations in which States parties to the ICCPR and ECHR were involved since their date of ratification – has provided us with the following information ... . Neither Afghanistan nor the Soviet Union derogated from the ICCPR during the conflict that opposed the two States from 1979 to 1989. Likewise, neither Afghanistan, Australia, Canada, Denmark, France, Germany, Italy, the Netherlands, New Zealand, the UK or the US derogated from the right to liberty under the ICCPR or the ECHR in relation to the international phase of the recent conflict in Afghanistan (2001-2002); the same is true for the conflict that opposed Iraq to the US, UK and other States from 2003 to 2004. The following States have also interned persons on the basis of the Third and the Fourth Geneva Conventions without derogating from the right to liberty in the ICCPR or ECHR: the UK and Argentina in the conflict over the Falklands/Malvinas islands in 1982; the US during its military operations in Grenada in 1983; India and Bangladesh in the conflicts with Pakistan in the 1970's (Pakistan is not a party to the ICCPR); Iran and Iraq during the 1980-1988 war; Israel and the Arab States in any of the international armed conflicts opposing them in the Middle East (1948-today) [but note the derogation filed by Israel, set out in paragraph 40 above]; the States parties to the ECHR that participated under the umbrella of the UN in the Korean War from 1950 to 1953; Iraq, Kuwait, the US and the UK during the 1991 Gulf War (Saudi-Arabia, which interned many prisoners of war during that conflict, is not a party to the ICCPR); Angola, Burundi, the Democratic Republic of the Congo (DRC), Namibia, Rwanda, Uganda and Zimbabwe in the DRC (1998-2003); Ethiopia in the conflict opposing it to Eritrea from 1998 to 2000 (Eritrea had not yet ratified the ICCPR at the time); Eritrea and Djibouti in the short border conflict in 2008; Georgia and Russia in the blitz war of August 2008; Russia did not derogate from the ICCPR in relation to the conflict with Moldova over Transdnistria in 1992 (Russia was not yet a party to the ECHR and Moldova was not yet a party to either the ICCPR or the ECHR at the time). Neither Cyprus nor Turkey derogated from the ICCPR or the ECHR to intern on the basis of GC III-IV in Northern-Cyprus (note that Turkey did not consider the ICCPR or the ECHR to apply extra-territorially); Turkey did derogate from the ECHR as far as persons within mainland Turkey were concerned but since it did not specify the articles from which it intended to derogate it is unclear whether it thought it necessary to do so in order to intern persons on the basis of GC III and IV. Similarly, Azerbaijan derogated from the ICCPR (it was not a party to the ECHR yet at the time) to take measures that were necessary as a result of the conflict with Armenia (1988-1994), but it is unclear whether it did so to intern persons on the basis of the Geneva Conventions; Armenia did not derogate from the ICCPR (it was not yet a party to the ECHR at the time). Likewise, Nicaragua derogated from article 9 ICCPR, saying it was obliged to do so following the US involvement in the conflict with the Contras in the 1980s. It is unclear whether Nicaragua thought it necessary to derogate from the ICCPR to intern on the basis of the Geneva Conventions, in its notices of derogation it insisted that article 9§1 was only derogated from for offences against national security and public order."

THE LAW

I. THE COURT'S ASSESSMENT OF THE EVIDENCE AND ESTABLISHMENT OF THE FACTS

A. The parties' submissions

1. The applicant

43. The applicant contended that the evidence of his sisters, friend and neighbour demonstrated that his brother was captured and detained by British forces with the purpose of inducing the applicant to surrender himself. The first reference made by the Government to the battalion record, which referred to Tarek Hassan's arrest (see paragraph 11 above), was in its observations to the Grand Chamber in September 2013. No good explanation for the recent appearance of this material had been provided, which was surprising given the emphasis placed on the document by the Government. The applicant made no admissions as to whether or not he accepted it was genuine. He underlined, also, that it was the sole document to make any reference to Tarek Hassan's having been found in possession of an AK-47 machine gun and positioned on the roof. Neither of the records of his interviews (see paragraphs 23-24 above) referred to his having been detained as a suspected combatant or having posed any threat, real or suspected, to British forces at any time.

44. The applicant further contended that the Camp Bucca computer detention records recorded three different release dates, none of which appeared reliable (see paragraph 28 above). Similarly, the place of release was a matter of speculation based on unclear and inconsistent evidence (see paragraphs 27-28 above). It could not even be said with any certainty that Tarek Hassan was not still being detained after the search of Camp Bucca on 12 May 2003, given in particular the release date entered on the United States records. The applicant pointed out that his brother was found dead with the United States Camp Bucca identity tag still on him (see paragraph 29 above) and that he had not contacted his family at any point after he had been captured by United Kingdom forces, which strongly suggested that he had had no opportunity to do so.

2. The Government

45. The Government submitted that the applicant had not established an adequate justification for the delay in raising his complaints with the United Kingdom authorities. The delay had imposed an inevitable impediment to the effective investigation of Tarek Hassan's death. No adverse inferences should be drawn from the Government's inability to provide an explanation

for Tarek Hassan's death in circumstances where the evidence provided a satisfying and convincing explanation of his arrest, detention and release.

46. The Government denied the allegation that Tarek Hassan was detained as a means of putting pressure on the applicant to surrender. They contended that the evidence submitted by the applicant in support of this claim was imprecise and hearsay and that such a purpose on the part of the United Kingdom authorities would have been inconsistent with Tarek Hassan's subsequent release from Camp Bucca as soon as his status had been established as a civilian who did not pose a threat to security. Instead, they contended that it was reasonable for the British forces to suspect Tarek Hassan of being a combatant, since he was found, armed, on the roof of the house of a general of the Al-Quds Army, which house contained other firearms and a number of documents of intelligence value relating to local members of the Ba'ath Party (see paragraph 11 above). The Government further pointed out that, apart from the applicant's witness statement, there was no independent evidence of the cause of death because this information had not been entered on the death certificate (see paragraph 29 above). In any event, they emphasised that Samara was some 700 kilometres from Camp Bucca, in an area that had never been occupied by British forces, and that the AK-47 machine gun was not a weapon used by British forces.

B. The Court's evaluation of the facts

47. At the outset, the Court recalls that the domestic proceedings were dismissed on the ground that the applicant's brother did not fall within the jurisdiction of the United Kingdom at any material time (see paragraph 31 above). It was not therefore necessary for the national courts to establish the facts in any detail. The Court is generally sensitive to the subsidiary nature of its role and cautious in taking on the role of a first-instance tribunal of fact (see *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000). However, in the present circumstances it is unavoidable that it must make some findings of fact of its own on the basis of the evidence before it.

48. In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions the Court's approach to the issues of evidence and proof. In the proceedings before it, there are no procedural barriers to the admissibility of

evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (see *El Masri v. "the former Yugoslav Republic of Macedonia*" [GC], no. 39630/09, § 151, ECHR 2012).

49. Furthermore, it is to be recalled that Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio* (the principle, that is, that the burden of proof lies on the person making the allegation in question). The Court reiterates its case-law under Articles 2 and 3 of the Convention to the effect that where the events in issue lie within the exclusive knowledge of the authorities, as in the case of persons under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. The burden of proof in such a case may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation the Court can draw inferences which may be unfavourable for the respondent Government. The Court has already found that these considerations apply to disappearances examined under Article 5 of the Convention, where, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she was officially summoned by the authorities, entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible and satisfactory explanation as to what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty. Furthermore, the Court reiterates that, again in the context of a complaint under Article 5 § 1 of the Convention, it has required proof in the form of concordant inferences before the burden of proof is shifted to the respondent Government (see *El Masri,* cited above, §§ 152-153).

50. It is not in dispute in the present case that the applicant's brother was captured by United Kingdom forces on 23 April 2003, subsequently detained at Camp Bucca and that he died shortly before his body was found in Samara on 1 September 2003. The disagreement over the facts centres on two issues: first, whether Tarek Hassan was arrested and detained as a means of exerting pressure on the applicant to surrender himself and,

secondly, in what circumstances Tarek Hassan left Camp Bucca. In addition, since the applicant alleges that Tarek Hassan's body had marks of ill-treatment on it, the question arises whether he was ill-treated while in detention.

51. As to the first point, the Court notes that the only evidence before it which supports the claim that Tarek Hassan was taken into detention in an attempt to force the applicant to surrender himself are the two statements made by the applicant and the note of a telephone interview with the applicant's neighbour, both prepared for the purposes of the domestic proceedings (see paragraphs 12-13 above). In the applicant's first statement he alleged that his sisters had been told by the British military authority that Tarek Hassan would not be released until the applicant gave himself up. In the second statement, the applicant claimed that this information was given to his neighbour and his friend. In neither of the applicant's statements, nor that of his neighbour, Mr Al-Ubody, is the representative of the United Kingdom military who made the alleged assertion identified, by name or rank. Given the lack of precision, the hearsay nature of this evidence and the internal inconsistencies in the applicant's statements, the Court does not find the evidence in support of the applicant's claim to be strong.

52. For their part, the Government were not able to present the Court with any witness evidence relating to Tarek Hassan's capture. However, they provided the Court with the operational log of the Black Watch Battalion which was created contemporaneously with the events in question (see paragraph 11 above). It records that, when British forces arrived at the house, Tarek Hassan was positioned on the roof, armed with an AK-47 machine gun and that other firearms and documents of intelligence value were found in the house. In addition, the Government provided records of interviews at Camp Bucca with Tarek Hassan and screen shots of entries relating to him on the AP3-Ryan database (see, respectively, paragraphs 23-24 and 18, 22 and 28 above). The Court has no grounds on which to question the authenticity of these records. They show that Tarek Hassan was registered at Camp Bucca on 23 April 2003, taken to the JFIT compound at 16.40 on 23 April 2003 and released to the civilian holding area of Camp Bucca on 25 April 2003 at 8 p.m. local time. The computer records further show that he was questioned once on 23 April 2003 21.30 local time and again on 25 April at 8 a.m. local time. Records of both interviews have been provided to the Court. They show that Tarek Hassan's identity as the applicant's brother was known and that it was established in the course of questioning that he had no personal involvement with the Ba'ath Party or the Al-Quds Army.

53. In the Court's view, the capture and questioning records are consistent with the Government's submission that Tarek Hassan was captured as a suspected combatant or a civilian posing a threat to security. This view is supported by other evidence which tends to show that

Tarek Hassan may well have been armed with, or at least in the possession of, an AK-47 machine gun at the moment of his capture, namely the applicant's assertion that his younger brother had been left to protect the family home (see paragraph 10 above) and Tarek Hassan's reported explanation, during his interrogation by British agents, of the presence of the weapon as being for personal protection (see paragraph 24 above). The Camp Bucca records further indicate that he was cleared for release as soon as it had been established that he was a civilian who did not pose a threat to security.

54. The Court accepts that Tarek Hassan's capture was linked to his relationship with his brother, but only to the extent that the British forces, having been made aware of the relationship by Tarek Hassan himself and finding Tarek Hassan armed at the moment of capture (see paragraph 11 above), may have suspected that he also was involved with the Ba'ath Party and Al-Quds Army. The Court does not find that the evidence supports the claim that Tarek Hassan was taken into custody to be held until the applicant should surrender. If that had been the intention of the United Kingdom forces, he would not have been cleared for release immediately after the second interview and less than 38 hours after his admission to Camp Bucca (see paragraph 22 above).

55. As regards the date and place of Tarek Hassan's release, the principal evidence consists of entries from AP3-Ryan (see paragraph 28 above). One entry made on 4 May 2003 recorded that Tarek Hassan had been released on 2 May 2003, by coach, to Umm Qasr, on the ground of the "End of Hostilities". Another entry on 12 May 2003 found that Tarek Hassan was not present in the Camp when a full check of detainees was made. The Court considers, on the basis of these entries, taken together with the decision made following the second screening interview not to continue to detain Tarek Hassan, that he was in all probability released early in May 2003. This view is further supported by the evidence provided by the Government concerning the policy decision taken by United Kingdom forces to release all detainees prior to or immediately following the cessation of hostilities announced on 1 May 2003, save those suspected of criminal offences or of activities posing a risk to security (see paragraph 27 above). As to the place of release, the Court notes that Camp Bucca was situated only about 2.5 kilometres from Umm Qasr. Although the main text of the relevant military order relating to the release of detainees from Camp Bucca did not list Umm Qasr as a drop-off point (listing only four towns to the north of the Camp), the annex to the order did describe Umm Qasr as a release area. It is impossible to be certain in the absence of more conclusive evidence, but given the town's proximity to the Camp, its mention in the annex, the United Kingdom policy of releasing detainees following the end of hostilities and the computer entries concerning Tarek Hassan's release,

the Court finds that it is probable that Tarek Hassan was released in or near Umm Qasr on 2 May 2003.

56. The Court is of the view that, in this case, since the evidence concerning Tarek Hassan's detention and release was, for the most part, accessible only to the Government, the onus is on them to provide a plausible and satisfactory explanation as to what happened to Tarek Hassan in the Camp and to show that he was released and that the release followed a safe procedure (see paragraph 49 above). The computer records show that by 22 May 2003 the United Kingdom had captured and processed some 3,738 detainees in Iraq since the start of hostilities and had released all but 361 (see paragraph 28 above). In the light of the time that had elapsed before the applicant lodged his claim and the large number of United Kingdom detainees that were released from Camp Bucca around the end of April and the beginning of May 2003, it is unsurprising that no eye witness able to remember Tarek Hassan's release has been traced. In the circumstances of the present case, the Court finds that the evidence referred to above is sufficient to satisfy the burden of proof on the Government.

57. Finally, there is no evidence before the Court to suggest that Tarek Hassan was ill-treated while in detention. The interview records show that he was questioned on two occasions, shortly after having been admitted to the Camp, and found to be a civilian, of no intelligence value and not posing any threat to security. The witness statement submitted by the applicant, of Mr Al-Saadoon, who claimed to have seen Tarek Hassan in the civilian holding area in Camp Bucca in the period after he was questioned and before he was released, makes no mention of any sign of injury on Tarek Hassan or any complaint by him of ill-treatment. Moreover, apart from the applicant's witness statement, there is no evidence before the Court as to the cause of Tarek Hassan's death or the presence of marks of ill-treatment on his body, since the death certificate contains no information on either point. Assuming the applicant's description of his brother's body to be accurate, the lapse of four months between Tarek Hassan's release and his death does not support the view that his injuries were caused during his time in detention.

58. Having established the facts of the case, the Court must next examine the applicant's complaints under the Convention.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

A. The parties' submissions

1. The applicant

59. The applicant complained that the circumstances of Tarek Hassan's death gave rise to, at least, a *prima facie* violation of Articles 2 and 3 of the Convention, entailing an obligation on the Government to undertake an effective investigation. Article 2 of the Convention reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Article 3 of the Convention provides:

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

60. The applicant emphasised that it was incumbent on the United Kingdom authorities, which had sole knowledge of what happened to Tarek Hassan following his arrest, to establish that he was alive when he left detention and that he was not released into a situation which exposed him to the risk of death or serious mistreatment. His disappearance and death following detention by the United Kingdom gave rise to a *prima facie* case that Tarek was either killed by or with the involvement of United Kingdom personnel or exposed to a real risk of death or mistreatment by United Kingdom personnel by being released in a remote or otherwise dangerous environment, or being transferred into the hands of a third party. This engaged two issues under Articles 2 and 3. First, if the Government were unable to provide a plausible alternative explanation of the events leading to Tarek Hassan's death, then the United Kingdom should be held liable for it. Secondly, there was an arguable case of a violation of Articles 2 and 3, engaging the procedural obligation to investigate.

2. The Government

61. The Government submitted that, in a case such as the present, no duty to investigate could arise under Article 2 or 3 unless there was at least

an arguable case that the United Kingdom was responsible for ill-treating Tarek Hassan or causing his death, or that Tarek Hassan's death occurred in territory that was controlled by the United Kingdom. This was not, on the evidence, a case in which the death occurred in the custody of the State. Such deaths might warrant a lower threshold or trigger for the investigative duty, but this was not the case here. Tarek Hassan's death occurred many months after his release and in circumstances where there was nothing pointing to United Kingdom State involvement in the death.

B. The Court's assessment

62. According to the Court's case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 163, ECHR 2011). In addition, Article 3 places a duty on the State to carry out an effective official investigation where an individual makes a "credible assertion" that he has suffered ill-treatment in breach of that provision at the hands of State officials, or, in the absence of an express complaint, where there are other sufficiently clear indications that torture or ill-treatment might have occurred (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000 IV and *Members (97) of the Gldani Congregation of Jehovah's Witnesses v. Georgia*, no. 71156/01, § 97, 3 May 2007, and the cases cited therein).

63. In the present case, with reference to the facts as assessed above by the Court, there is no evidence to suggest that Tarek Hassan was ill-treated while in detention, such as to give rise to an obligation on the respondent State under Article 3 to carry out an official investigation. Nor is there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for Tarek Hassan's death, which occurred some four months after he was released from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 can arise.

64. In conclusion, the Court considers that the complaints under Articles 2 and 3 of the Convention are manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 §§ 1, 2, 3 AND 4 OF THE CONVENTION

65. The applicant alleged that his brother's capture by United Kingdom forces and detention in Camp Bucca gave rise to breaches of his rights under Article 5 §§ 1, 2, 3 and 4 of the Convention, which provide, as relevant:

> "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:
>
> ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Government denied that Tarek Hassan fell within United Kingdom jurisdiction at any material time. In the alternative, they denied that his capture and detention, during an international armed conflict, gave rise to any violation of the provisions of Article 5.

A. Jurisdiction

66. The applicant contended that at all material times his brother was within the jurisdiction of the United Kingdom, within the meaning of Article 1 of the Convention, which provides:

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

1. The parties' submissions

(a) The applicant

67. The applicant submitted that Tarek Hassan fell within the United Kingdom's jurisdiction under Article 1 by virtue of the application of the "effective control of an area" principle, as articulated by the Court in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 138-140, ECHR 2011. He further submitted that the implication to be drawn from the judgment in *Al-Skeini* was that the United Kingdom had effective control over South East Iraq following the removal from power of the Ba'ath regime, which had been achieved by 1 May 2003. He pointed out that by 9 April 2003 coalition troops had taken control of Baghdad and that by mid-April 2003, well before the capture of Tarek Hassan, statements made by the British Prime Minister and by the director of operations for the United States Joint Chiefs of Staff indicated that the coalition forces considered the war effectively over. With regard to the criteria identified by the Court as relevant to the question whether a State exercised effective control of an area, namely "the strength of the state's military presence in the area" and "the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region", there was no evidence of any significant practical difference between 23 April and 1 May 2003, and no good reason why there should be a difference in the legal position.

68. In the alternative, the applicant argued that jurisdiction was clearly established under the principle of State agent authority. It was the applicant's submission that, according to the Court's case-law, jurisdiction on this ground was not dependent on control over a building, area or vehicle but might also arise simply where there was physical control or authority over a person. Such authority and control over individuals did not have to be exclusive or total in order for jurisdiction to arise. Nor was it necessary for the State to be in a position to secure all the Convention rights to the person under its control. On this basis, the Court should reject the Government's argument that bipartite or joint control was not sufficient for the purposes of Article 1 of the Convention.

69. The applicant submitted that, following his brother's arrest during the night of 22/23 April 2003, when the latter was taken into the custody of United Kingdom soldiers, it could not realistically be disputed that the United Kingdom had authority and control, and therefore Article 1 jurisdiction, over him. In relation to the period after his admission to Camp Bucca, the United Kingdom continued to exercise authority and control over his detention. In particular, he was identified as a United Kingdom detainee on both the United Kingdom AP3-Ryan database and the United States Camp Buca database. The United Kingdom authorities were responsible for preparing a capture report and a detention report. Immediately upon his

arrival at the Camp, he was taken to the JFIT compound, which was entirely controlled by United Kingdom forces, and he remained there until 25 April. Even following his transfer from the JFIT compound, he remained under United Kingdom control, since the United Kingdom authorities continued to assume responsibility over the well-being of United Kingdom detainees in Camp Bucca; they liaised with the ICRC about their treatment and the notification of their detention to their families; retained full rights of access and had a resident monitoring team at Camp Bucca to ensure compliance with domestic and international standards. The United Kingdom Provost Staff (military police) had an overseeing responsibility for United Kingdom detainees, on whom they checked daily, and United Kingdom detainees requiring medical attention would be treated in United Kingdom field hospitals. The United Kingdom also remained responsible for classifying detainees under Articles 4 and 5 of the Third Geneva Convention. There was nothing to suggest that the United States authorities asserted any basis of their own for detaining Tarek Hassan. The evidence of Major Wilson was that decisions as to whether to release a United Kingdom detainee were made by the United Kingdom. In Tarek Hassan's case, it was JFIT which recommended he be released. Moreover, if a decision was made by the United Kingdom authorities to release a detainee, he could not simply be released by the United States, but had to be processed out of the Camp by the United Kingdom. In the applicant's view, it was clear that in guarding and escorting United Kingdom detainees at Camp Bucca, the United States were acting as agents for the United Kingdom. This was confirmed by the fact that the United Kingdom would reimburse the United States for the costs involved in maintaining detainees. Holding detainees at the United States base was simply a matter of United Kingdom operational convenience. The position was no different in substance from the United Kingdom contracting-out the duties of guarding their detainees to private contractors. The United Kingdom could not contract out of its responsibility under the Convention for detainees and could not absolve itself of responsibility by placing detainees in the temporary custody of another organisation.

(b) The Government

70. The Government emphasised that, according to the Court's case-law, the exercise of extra-territorial jurisdiction remained exceptional. Furthermore, the concept of jurisdiction was not subject to the "living instrument" doctrine. In *Al-Skeini*, cited above, the Court found that the United Kingdom had jurisdiction in relation to the deaths of the applicants' relatives because of a combination of two fact-specific circumstances. The first key element was the fact that the United Kingdom had, from 1 May 2003 until 24 June 2004, assumed authority and responsibility for the maintenance of security in South East Iraq as an occupying power. The

second element was the fact that the deaths occurred during the course of security operations carried out by British forces pursuant to that assumption of authority and responsibility. In the absence of either of these factors, there would have been no jurisdictional link. In particular, the Court did not find jurisdiction on the basis of the "effective control of an area" doctrine and referred expressly to the findings of the Court of Appeal in the domestic *Al-Skeini* proceedings, that it would have been "utterly unreal" to suggest that in May 2003 the United Kingdom was in effective control and was obliged to secure to everyone in Basrah the rights and freedoms guaranteed by the Convention. On 23 April 2003, when the applicant's brother was arrested, the United Kingdom had not yet assumed responsibility for security operations in South East Iraq; this did not take place until 1 May 2003.

71. The Government acknowledged that the Court had held that one situation where there might be jurisdiction under Article 1 was where the Contracting State's agents operating outside its territory exercised "total and exclusive control" or "full and exclusive control" over an individual, for example where an individual was in the custody of the Contracting State's agents abroad. However, they submitted that this basis of jurisdiction did not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State in question were operating in territory of which they were not the occupying power. In such a case, the conduct of the Contracting State would, instead, be subject to all the requirements of international humanitarian law. Thus, anything occurring before 1 May 2003, including Tarek Hassan's capture, transfer to United States custody in Camp Bucca and questioning by British forces on 25 April 2003, was not within the United Kingdom's jurisdiction for the purposes of Article 1 of the Convention.

72. In addition, the Government contended that Tarek Hassan did not fall within United Kingdom jurisdiction following his admission to Camp Bucca on the separate ground that, at that time, he was transferred to the custody of the United States and ceased to be exclusively, or even primarily, under United Kingdom control. According to the Government, the Court's case-law required that a Contracting State's agents operating outside its territory exercise "total and exclusive control" or "full and exclusive control" over an individual in order for jurisdiction to be established; bipartite or joint control was not sufficient to establish jurisdiction for the purposes of Article 1. These conclusions were not affected by the fact that under paragraph 4 of the MOA (see paragraph 16 above) the United Kingdom could have requested the return of Tarek Hassan to its custody from the United States. There was no evidence that the United Kingdom had ever made such a request. Moreover, the fact that provision for making such a request was included in the MOA provided the clearest indication that, for as long as the person concerned remained under United States custody and

control, he was not within the jurisdiction of the United Kingdom. This position of principle was supported by Article 12 of the Third Geneva Convention (see paragraph 33 above). The first paragraph of Article 12 stated that the "Detaining Power is responsible for the treatment given" to prisoners of war. However, the second paragraph made it clear that, following the transfer of a prisoner of war by the Detaining Power to another State Party to the Convention, "responsibility for the application of the Convention rests on the Power accepting them while they are in its custody". Thus, during the time that Tarek Hassan was detained at Camp Bucca, responsibility for the application of the Third and Fourth Geneva Conventions in respect of him rested on the United States.

73. In any event, the Government contended that from 25 April 2003, when Tarek Hassan was determined to be a civilian who should be released, and was moved to the civilian holding area in Camp Bucca, neither the United Kingdom nor the United States purported to exercise a legal right to detain him. He stayed at the Camp only because the security situation rendered it irresponsible simply to have released him immediately. He was no longer being detained, but was in Camp Bucca awaiting transport to his place of capture. Similarly, while he was being transported by coach by United Kingdom forces to the place of his release, he was a free person and was not in the custody or control, or under the jurisdiction, of the United Kingdom.

2. The Court's assessment

74. The Court recalls that in *Al-Skeini*, cited above, §§ 130-142, it summarised the applicable principles on jurisdiction within the meaning of Article 1 of the Convention exercised outside the territory of the Contracting State as follows:

> "130. ... As provided by [Article 1 of the Convention] the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction' (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001‑XII). 'Jurisdiction' under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004‑VII).
>
> (α) The territorial principle
>
> 131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković*, cited above, §§ 61 and 67; *Ilaşcu*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (*Ilaşcu*, cited above, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004‑II). Conversely, acts of the Contracting States performed, or producing

effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases (*Banković*, cited above, § 67).

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

(β) State agent authority and control

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

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

135. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002; and also *X and Y v. Switzerland*, nos. 7289/75 and 7349/76, Commission's admissibility decision of 14 July 1977, DR 9, p. 57).

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005‑IV, the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'. In *Issa and Others v. Turkey*,

no. 31821/96, 16 November 2004, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86-89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* [GC], no. 3394/03, § 67, ECHR 2010-..., the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.

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

(γ) Effective control over an area

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

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

140. The 'effective control' principle of jurisdiction set out above does not replace the system of declarations under Article 56 of the Convention (formerly Article 63)

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

(δ) The Convention legal space ('*espace juridique'*)

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

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

75. In *Al-Skeini*, cited above, the Court found that the applicants' relatives fell within United Kingdom jurisdiction because during the period 1 May 2003-28 June 2004 the United Kingdom had assumed authority for the maintenance of security in South East Iraq and the relatives were killed in the course of security operations carried out by United Kingdom troops pursuant to that assumption of authority (*Al-Skeini* §§ 143-150). In the light of this finding, it was unnecessary to determine whether jurisdiction also arose on the ground that the United Kingdom was in effective military control of South East Iraq during that period. However, the statement of facts in *Al-Skeini* included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south-eastern area which it occupied, and this was also the finding of the Court of Appeal, which heard evidence on this question in the domestic *Al-Skeini* proceedings (see *Al-Skeini,* cited above, §§ 20-23 and § 80). The present case concerns an earlier period, before the United Kingdom and its coalition partners had declared that the active hostilities phase of the conflict had ended and that

they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the South East of the country (see *Al-Skeini*, cited above, §§ 10-11). However, as in *Al-Skeini,* the Court does not find it necessary to decide whether the United Kingdom was in effective control of the area during the relevant period, because it finds that the United Kingdom exercised jurisdiction over Tarek Hassan on another ground.

76. Following his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction under the principles outlined in paragraph 136 of *Al-Skeini,* set out above. The Government, in their observations, acknowledged that where State agents operating extra-territorially take an individual into custody, this is a ground of extra-territorial jurisdiction which has been recognised by the Court. However, they submitted that this basis of jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State are operating in territory of which they are not the occupying power, and where the conduct of the State will instead be subject to the requirements of international humanitarian law.

77. The Court is not persuaded by this argument. *Al-Skeini* was also concerned with a period when international humanitarian law was applicable, namely the period when the United Kingdom and its coalition partners were in occupation of Iraq. Nonetheless, in that case the Court found that the United Kingdom exercised jurisdiction under Article 1 of the Convention over the applicants' relatives. Moreover, to accept the Government's argument on this point would be inconsistent with the case-law of the International Court of Justice, which has held that international human rights law and international humanitarian law may apply concurrently (see paragraphs 35-37 above). As the Court has observed on many occasions, the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, for example, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI). This applies equally to Article 1 as to the other articles of the Convention.

78. With regard to the period after Tarek Hassan entered Camp Bucca, the Government raise an alternative ground for excluding jurisdiction, namely that his admission to the Camp involved a transfer of custody from the United Kingdom to the United States. However, notwithstanding the Government's textual arguments based on the terms of the MOA and on Article 12 of the Third Geneva Convention (see paragraphs 16, 33 and 72 above), the Court is of the view that, having regard to the arrangements operating at Camp Bucca, during this period Tarek Hassan continued to fall under the authority and control of United Kingdom forces. He was admitted

to the Camp as a United Kingdom prisoner. Shortly after his admission, he was taken to the JFIT compound, which was entirely controlled by United Kingdom forces (see paragraph 15 above). In accordance with the MOA which set out the various responsibilities of the United Kingdom and the United States in relation to individuals detained at the Camp, the United Kingdom had responsibility for the classification of United Kingdom detainees under the Third and Fourth Geneva Conventions and for deciding whether they should be released (see paragraph 16 above). This is what happened following Tarek Hassan's interrogation at the JFIT compound, when the United Kingdom authorities decided that he was a civilian who did not pose a threat to security and ordered that he should be released as soon as practicable. While it is true that certain operational aspects relating to Tarek Hassan's detention at Camp Bucca were transferred to United States forces, in particular the tasks of escorting him to and from the JFIT compound and guarding him elsewhere in the Camp, the United Kingdom retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5.

79. Finally, the Court notes the Government's argument that once Tarek Hassan had been cleared for release and taken to the civilian holding area, he was no longer a detainee and therefore fell outside United Kingdom jurisdiction. In the Court's view, however, it appears clear that Tarek Hassan remained in the custody of armed military personnel and under the authority and control of the United Kingdom until the moment he was let off the bus that took him from the Camp.

80. In conclusion, therefore, the Court finds that Tarek Hassan fell within the jurisdiction of the United Kingdom from the moment of his capture by United Kingdom troops, at Umm Qasr on 23 April 2003, until his release from the bus that took him from Camp Bucca to the drop-off point, most probably Umm Qasr on 2 May 2003 (see paragraph 55 above).

B. The merits of the complaints under Article 5 §§ 1, 2, 3 and 4

1. The parties' submissions

(a) The applicant

81. The applicant did not accept that Tarek Hassan's arrest and detention fell within the active combat phase of an international armed conflict, since by 9 April 2003 coalition troops had taken control of Baghdad and removed the Ba'ath Party from power. However, even if the arrest and detention of Tarek Hassan had taken place in the active combat phase, this would not displace the application of the Convention. Article 15 created a specific power to take measures derogating from the Convention to the extent strictly required by the exigencies of "war or other public emergency threatening the life of the nation". There had been no derogation in this case

and there could be no implied displacement of Convention rights. It was important to remember the historical context in which the Convention was drafted, namely the aftermath of a global conflict. With the memory of war still fresh, the drafters addressed their minds to the question whether the fundamental rights the Convention recognised should apply differently in wartime and decided that they should only (i) insofar as necessary to deal with the exigencies of a war or public emergency, (ii) provided the State's other obligations under international law were respected and (iii) provided the State derogated formally and openly. The result was Article 15. If the drafters had intended to create a regime under which human rights would automatically be displaced or re-written in times of international conflict, they would have done so.

82. The applicant did not accept that there was any evidence of State practice by High Contracting Parties to the effect that the Convention need not be complied with in detaining actual or suspected combatants in the course of international armed conflict. Even if there were, there was no evidence of accompanying *opinio juris*. Moreover, even if there were both, the function of the Court under Article 19 was to ensure the observance of the Convention, not to apply it only where States were in the habit of applying it. Nor did the Court's case-law, for example *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, § 185, ECHR 2009, assist the Government's case. In *Varnava* the Court held that the relevant rules of international humanitarian law expanded the obligations on States under Article 2; it did not support the proposition that fundamental rights were automatically curtailed in wartime. Inherent in the concept of "interpreting a provision in so far as possible in the light of general principles of international law" was recognition that there was a range of possible meanings and that some proposed interpretations would fall outside that range. The Government's "displacement" argument was essentially that Convention rights must be read as if they contained a wide "wartime" exception which they did not actually contain. Such an approach was not supported by *Varnava.* Finally, the applicant submitted that the Government's reliance on the International Court of Justice's advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was hard to understand, since in that opinion the International Court of Justice expressly found that derogation was the only means of displacing a provision of international human rights law (see paragraph 36 above).

83. The Court had often applied the Convention in situations of armed conflict and recognised that in principle it was not displaced (the applicant referred to the following cases: *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85 and 319, 6 April 2004; *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, § 191, ECHR 2009; *Al-Jedda,* cited above, § 105; *Al-Skeini,* cited above, §§ 164-167). This was, moreover, supported by the advisory opinion of the International Court of Justice in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* § 106 (see paragraph 36 above). In the applicant's submission, the International Court of Justice was recognising in this passage that there might be some rights that fall within the scope of international humanitarian law but to which no human rights convention extended. In the applicant's view, the position was that at most, the provisions of international humanitarian law might influence the interpretation of the provisions of the Convention. For example, they might be relevant in determining what acts were strictly required by the exigencies of the situation for the purposes of a derogation from Article 2. In the context of Article 5, this might, in an appropriate case, inform the Court's interpretation of "competent legal authority" and "offence" in Article 5 § 1(c). However, it was not right that Article 5 was displaced in circumstances in which the Geneva Conventions were engaged. The Convention was a treaty aimed at protecting fundamental rights. Its provisions should not be distorted, still less ignored altogether, to make life easier for States which failed to use the mechanism within the Convention that expressly dictated how they were to reconcile its provisions with the exigencies of war.

84. The applicant further contended that, in any event, the Government had not identified anything that United Kingdom forces were required to do by the Geneva Conventions that would have obliged them to act contrary to Article 5. The Iraq war was a non-international armed conflict following the collapse of Saddam Hussein's forces and the occupation by coalition forces. There was considerably less treaty law applicable to non-international armed conflicts than to international armed conflicts. International humanitarian law stipulated minimum requirements on States in situations of armed conflict but did not provide powers. In reality, the Government's submission that the Convention should be "displaced" was an attempt to re-argue the question of Article 1 jurisdiction which was decided in *Al-Skeini* (cited above). If the Government's position were correct, it would have the effect of wholly depriving victims of a contravention of any effective remedy, since the Third and Fourth Geneva Conventions were not justiciable at the instance of an individual. Such a narrowing of the rights of individuals in respect of their treatment by foreign armed forces would be unprincipled and wrong.

85. Finally, even if the Court were to decide that Article 5 should be interpreted in the light of the Third and Fourth Geneva Conventions, Tarek Hassan was arrested and detained as a means of inducing the applicant to surrender. The detention was arbitrary, it did not fall within any

of the lawful categories under Article 5 § 1 and it was not even permissible under international humanitarian law.

(b) The Government

86. The Government submitted that the drafters of the Convention did not intend that an alleged victim of extra-territorial action in the active phase of an international armed conflict, such as a prisoner of war protected by the Third Geneva Convention, who might nonetheless wish to allege a breach of Article 5, would benefit from the protections of the Convention. There was nothing to suggest any such intent within the Convention or its *travaux préparatoires,* or indeed in the wording or *travaux préparatoires* of the 1949 Geneva Conventions, which would have been at the forefront of the minds of those drafting the Convention as establishing the relevant applicable legal regime. Furthermore, such intent would be inconsistent with the practical realities of conduct of active hostilities in an international armed conflict, and also with such Convention jurisprudence as there was bearing on the issue.

87. It was the Government's primary contention that the relevant events took place outside the jurisdiction of the United Kingdom. In the alternative, if the Court were to find that the United Kingdom had jurisdiction over Tarek Hassan during his detention, the Government contended that Article 5 had to be interpreted and applied in conformity and harmony with international law. Where provisions of the Convention fell to be applied in the context of an international armed conflict, and in particular the active phase of such a conflict, the application had to take account of international humanitarian law, which applied as the *lex specialis*, and might operate to modify or even displace a given provision of the Convention. Thus, in *Cyprus v. Turkey,* nos. 6780/74 and 6950/75, Report of the Commission of 10 July 1976, volume 1, the Commission did not consider it necessary to address the question of breach of Article 5 where persons were detained under the Third Geneva Convention in the context of the taking of prisoners of war. Moreover, it had been the consistent approach of the International Court of Justice that international humanitarian law applied as *lex specialis* in the context of an international armed conflict in circumstances where a given human rights treaty also applied. This view was supported by the Report of the Study Group of the International Law Commission on the "Fragmentation of International Law" (see paragraph 38 above) and by academic writers, such as the authors of Fleck's "The Handbook of International Humanitarian Law" and Gill and Fleck's "The Handbook of the International Law of Military Operations".

88. The Government argued that the right to liberty under Article 5 of the Convention had to be considered in the context of the fundamental importance of capture and detention of actual or suspected combatants in armed conflict. It could not be, and it was not so, that a Contracting State,

when its armed forces were engaged in active hostilities in an armed conflict outside its own territory, had to afford the procedural safeguards of Article 5 to enemy combatants whom it took as prisoners of war, or suspected enemy combatants whom it detained pending determination of whether they were entitled to such status. In addition, insofar as the issue arose in the present case, the same principle had to apply in relation to the detention of civilians where this was "absolutely necessary" for security reasons, in accordance with Article 42 of the Fourth Geneva Convention (see paragraph 33 above). In the present case, since Tarek Hassan was captured and initially detained as a suspected combatant, Article 5 was displaced by international humanitarian law as *lex specialis,* or modified so as to incorporate or allow for the capture and detention of actual or suspected combatants in accordance with the Third and/or Fourth Geneva Conventions, such that there was no breach by the United Kingdom with respect to the capture and detention of Tarek Hassan.

89. In the alternative, if the Court were to find that Article 5 applied and was not displaced or modified in situations of armed conflict, the Government submitted that the list in Article 5 § 1 of permissible purposes of detention had to be interpreted in such a way that it took account of and was compatible with the applicable *lex specialis,* namely international humanitarian law. The taking of prisoners of war pursuant to the Third Geneva Convention, and the detention of civilians pursuant to the Fourth Geneva Convention, had to be a lawful category of detention under Article 5 § 1; it fell most readily as a "lawful detention" within Article 5 § 1(c). In this special context, the concept of "offence" within that provision could correctly be interpreted to include participation as an enemy combatant and/or challenging the security of the Detaining Power within Article 42 of the Fourth Geneva Convention. The key question for the purposes of Article 5 § 1 would then be whether the detention of Tarek Hassan was a "lawful detention" in the context of an international armed conflict; the Government submitted that it evidently was. Tarek Hassan was encountered by British forces as a "gunman", armed with an AK-47 machine gun, on the roof of a house belonging to a general of the Al-Quds Army, where firearms as well as intelligence material were found. He was captured as a suspected combatant and British forces were lawfully entitled under international humanitarian law to capture and detain him until his status was finally determined.

90. The Government recognised that difficult issues might arise as to the applicability of Article 15 in relation to a case such as the present. Consistently with the practice of all other Contracting Parties which had been involved in such operations, the United Kingdom had not derogated; there had been no need to do so, since the Convention could and did accommodate detention in such cases, having regard to the *lex specialis,* international humanitarian law. The inclusion of Article 15 in the

Convention in no sense indicated that, in time of war or public emergency threatening the life of the nation, obligations under the Convention would at all times be interpreted in exactly the same way as in peacetime. Any argument that, unless there had been a derogation under Article 15, Article 5 should be interpreted and applied regardless of the context and the detailed rules of international humanitarian law governing detention of suspected combatants would risk diminishing the protections available to combatants or civilians (in effect, by precipitating derogations by concerned States). It would also be inconsistent with a seemingly universal State practice in terms of the detention of actual or suspected combatants in international armed conflicts, as well as the jurisprudence of the Court and the International Court of Justice, which had made it clear that the application of international humanitarian law as *lex specialis* was a general principle, and not one that depended on whether there had been a derogation under an applicable human rights treaty.

(c) The third party

91. In the third party submissions filed in the present case, the Human Rights Centre of the University of Essex emphasised that, as the Court had held in its case-law, the Convention should be interpreted in harmony with other rules of public international law, of which it forms part. Such a principle was desirable and necessary, to avoid States being faced with irreconcilable legal obligations and controversial results. This was particularly important with relation to the detention regime applicable in international armed conflicts, since this regime was specifically designed for the situation in question and since the Third and Fourth Geneva Conventions enjoyed universal ratification. There was one sentence in the Court's judgment in *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 107, ECHR 2011, which might be read as suggesting that the Court would only take account of international humanitarian law where it imposed an obligation, and not where it authorised a course of conduct, namely where it was stated: "... the Court does not find it established that international humanitarian law places an obligation on an Occupying Power to use indefinite internment without trial". However, it was the view of the third party that, in the context of the judgment, it appeared that the Court was not looking at international humanitarian law in its own right but as a source of possible rules which could be read into a Security Council resolution. The United Kingdom Government could have chosen to raise international humanitarian law as an independent basis for detention but chose instead to rely exclusively on the Security Council resolution. The sentence quoted from *Al-Jedda* did not indicate that the Court would take account of international humanitarian law only where it imposed an obligation on States.

92. The third party pointed out that, in common with many areas of international law which had been developed as comprehensive regimes for particular fields of activity, the law of armed conflict and international humanitarian law (hereafter, "international humanitarian law") had developed its own internal coherence and understandings. The key underlying assumption was that this law represented a balance between military necessity and humanitarian considerations. This meant that there could be no appeal to military necessity outside the treaty rule, which itself took account of military exigencies. A second underlying principle was that this field of law was based not on rights, but on the obligations of parties to a conflict. Thirdly, the rules applicable to an individual depended on his status as a member of a group, for example a combatant or a civilian. Fourth, while reference was often made to the "principles" of international humanitarian law, the principles themselves were not legal rules; the rules were to be found in treaty provisions which represented the articulation of those principles in legally binding form. It was clear, therefore, that the internal coherence of international humanitarian law was significantly different from that of human rights law.

93. Of the relationships between various fields of international law, that between international humanitarian law and international human rights law was not alone in being problematical, but it had received the most attention. By virtue of the express terms of certain human rights treaties, they continued to apply in situations of "war or other public emergency", while the rules on international armed conflicts applied whenever there was an armed conflict between two or more States, including where one State occupied part or all of the territory of another. This meant that certain human rights treaties remained applicable, possibly in a modified way, in circumstances in which the law of armed conflict was also applicable. The International Court of Justice had addressed the relationship on three occasions (see paragraphs 35-37 above). Certain elements emerged clearly from this case-law. First, that the applicability of international humanitarian law did not displace the jurisdiction of a human rights body. That resulted from the finding that human rights law remained applicable in all circumstances. Secondly, where international humanitarian law was applicable, a human rights body had two choices. Either it had to apply human rights law through the lens of international humanitarian law or it had to blend human rights law and international humanitarian law together. That was the only possible interpretation of certain matters being the province of both bodies of rules, whilst others were regulated by international humanitarian law. The reference to *lex specialis* was unhelpful, which might account for the fact that the International Court of Justice did not refer to it in the *Congo* judgment (see paragraph 37 above). Use of this term had served to obfuscate the debate rather than provide clarification.

94. The International Court of Justice had provided apparently conflicting guidance on the question of the need for derogation before a State could rely on international humanitarian law. If the basis for using international humanitarian law at all was that human rights bodies should take account of other areas of international law, that might be thought to point to its use whether or not a State had derogated and whether or not it invoked international humanitarian law. On the other hand, where the State had done neither, the human rights body might wish to refer to the applicability of international humanitarian law, whilst saying that the State had chosen to be judged by the higher standard of peacetime human rights law, although such an approach might run the risk of appearing disconnected from reality. Where the State had not derogated but had relied on international humanitarian law, it would be open to the human rights body either to take account of international humanitarian law or to insist that the only way of modifying international human rights obligations was by derogation.

95. As regards the interplay between the two regimes, there could be no single applicable rule. Any given situation was likely to require elements of both bodies of law working together, but the balance and interplay would vary. Accordingly, there might be situations, such as the detention of prisoners of war, in which the combination of criteria lead to the conclusion that international humanitarian law would carry more weight, and determination of human rights violations regarding issues such as grounds and review of detention would be based on the relevant rules of international humanitarian law. Even in such contexts, however, human rights law would not be under absolute subjection to international humanitarian law. For example, if there were allegations of ill treatment, human rights law would still assist in determining issues such as the specificities of the acts which constituted a violation. From the perspective of the human rights body, it would be advantageous to use human rights law as the first step to identify the issues that needed to be addressed, for example, periodicity of review of lawfulness of detention, access to information about reasons of detention, legal assistance before the review mechanism. The second step would be to undertake a contextual analysis using both international humanitarian law and human rights law, in the light of the circumstances of the case at hand. On condition that the human rights body presented its analysis with sufficient coherence and clarity, the decisions generated would provide guidance to both States and armed forces ahead of future action. It went without saying that the approaches and the result had to be capable of being applied in practice in situations of armed conflict.

2. The Court's assessment

(a) The general principles to be applied

96. Article 5 § 1 of the Convention sets out the general rule that "[e]veryone has the right to liberty and security of the person" and that "[n]o one shall be deprived of his liberty" except in one of the circumstances set out in sub-paragraphs (a) to (f).

97. 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*, 18 January 1978, § 196, Series A no. 25; *Guzzardi v. Italy,* 6 November 1980, § 102, Series A no. 39; *Jėčius v. Lithuania*, no. 34578/97, §§ 47-52, ECHR 2000-IX; and *Al-Jedda,* cited above, § 100). Moreover, the Court considers that there are important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. It does not take the view that detention under the powers provided for in the Third and Fourth Geneva Conventions is congruent with any of the categories set out in subparagraphs (a) to (f). Although Article 5 § 1(c) might at first glance seem the most relevant provision, there does not need to be any correlation between security internment and suspicion of having committed an offence or risk of the commission of a criminal offence. As regards combatants detained as prisoners of war, since this category of person enjoys combatant privilege, allowing them to participate in hostilities without incurring criminal sanctions, it would not be appropriate for the Court to hold that this form of detention falls within the scope of Article 5 § 1(c).

98. In addition, Article 5 § 2 requires that every detainee should be informed promptly of the reasons for his arrest and Article 5 § 4 requires that every detainee should be entitled to take proceedings to have the lawfulness of his detention decided speedily by a court. Article 15 of the Convention provides that "[i]n time of war or other public emergency threatening the life of the nation", a Contracting State may take measures derogating from certain of its obligations under the Convention, including Article 5. In the present case, the United Kingdom did not purport to derogate under Article 15 from any of its obligations under Article 5.

99. This is the first case in which a respondent State has requested the Court to disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. In particular, in *Al-Jedda,* cited above, the United Kingdom Government did not contend that Article 5 was modified or displaced by the powers of detention provided for by the Third and Fourth Geneva Conventions. Instead they argued that the United Kingdom

was under an obligation to the United Nations Security Council to place the applicant in internment and that, because of Article 103 of the United Nations Charter, this obligation had to take primacy over the United Kingdom's obligations under the Convention. It was the Government's case that an obligation to intern the applicant arose from the text of United Nations Security Council Resolution 1546 and annexed letters and also because the Resolution had the effect of maintaining the obligations placed on occupying powers under international humanitarian law, in particular Article 43 of the Hague Regulations (see *Al-Jedda*, cited above, § 107). The Court found that no such obligation arose. It was only before the Commission, in *Cyprus v. Turkey,* nos. 6780/74 and 6950/75, Report of the Commission of 10 July 1976, volume 1, that a question arose similar to that in the present case, namely whether it was compatible with the obligations under Article 5 of the Convention to detain a person under the Third and Fourth Geneva Conventions in the absence of a valid derogation under Article 15 of the Convention. In its report, the Commission refused to examine possible violations of Article 5 with regard to detainees accorded prisoner of war status, and took account of the fact that both Cyprus and Turkey were parties to the Third Geneva Convention (see § 313 of the Report). The Court has not, until now, had the opportunity to review the approach of the Commission and to determine such a question itself.

100. The starting point for the Court's examination must be its constant practice of interpreting the Convention in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969 (see *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 29, and many subsequent cases). Article 31 of the Vienna Convention, which contains the "general rule of interpretation" (see paragraph 34 above), provides in paragraph 3 that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties.

101. There has been no subsequent agreement between the High Contracting Parties as to the interpretation of Article 5 in situations of international armed conflict. However, in respect of the criterion set out in Article 31 § 3(b) of the Vienna Convention (see paragraph 34 above), the Court has previously stated that a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention (see, *mutatis mutandis, Soering v. the United Kingdom*, 7 July 1989, §§ 102-103, Series A no. 161 and *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 120, ECHR 2010). The practice of the High Contracting Parties is not to derogate

from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. As the Court noted in *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 62, ECHR 2001-XII, although there have been a number of military missions involving Contracting States acting extra-territorially since their ratification of the Convention, no State has ever made a derogation pursuant to Article 15 of the Convention in respect of these activities. The derogations that have been lodged in respect of Article 5 have concerned additional powers of detention claimed by States to have been rendered necessary as a result of internal conflicts or terrorist threats to the Contracting State (see, for example, *Brannigan and McBride v. the United Kingdom*, 26 May 1993, Series A no. 258-B; *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009; see also paragraphs 40-41 above). Moreover, it would appear that the practice of not lodging derogations under Article 15 of the Convention in respect of detention under the Third and Fourth Geneva Conventions during international armed conflicts is mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights. Similarly, although many States have interned persons pursuant to powers under the Third and Fourth Geneva Conventions in the context of international armed conflicts subsequent to ratifying the Covenant, no State has explicitly derogated under Article 4 of the Covenant in respect of such detention (see paragraph 42 above), even subsequent to the advisory opinions and judgment referred to above, where the International Court of Justice made it clear that States' obligations under the international human rights instruments to which they were parties continued to apply in situations of international armed conflict (see paragraphs 35-37 above).

102. Turning to the criterion contained in Article 31 § 3(c) of the Vienna Convention (see paragraph 34 above), the Court has made it clear on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (see paragraph 77 above). This applies no less to international humanitarian law. The four Geneva Conventions of 1949, intended to mitigate the horrors of war, were drafted in parallel to the European Convention on Human Rights and enjoy universal ratification. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present application, were designed to protect captured combatants and civilians who pose a security threat. The Court has already held that Article 2 of the Convention should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict" (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, § 185, ECHR 2009), and it considers that these observations apply equally in relation to Article 5. Moreover, the International Court of Justice has held that the protection offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict (see paragraphs 35-37 above). In its judgment *Armed Activities on the Territory of the Congo,* the International Court of Justice observed, with reference to its advisory opinion concerning *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* that "[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law" (see paragraphs 36 and 37 above). The Court must endeavour to interpret and apply the Convention in a manner which is consistent with the framework under international law delineated by the International Court of Justice.

103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international

humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, *Kurt v. Turkey*, 25 May 1998, § 122, *Reports of Judgments and Decisions* 1998-III; *El-Masri*, cited above, § 230; see also *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, *Reinprecht v. Austria*, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. While the applicant in addition relies on Article 5 § 3, the Court considers that this provision has no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1(c) of Article 5.

107. Finally, although, for the reasons explained above, the Court does not consider it necessary for a formal derogation to be lodged, the provisions of Article 5 will be interpreted and applied in the light of the relevant provisions of international humanitarian law only where this is specifically pleaded by the respondent State. It is not for the Court to assume that a State intends to modify the commitments which it has undertaken by ratifying the Convention in the absence of a clear indication to that effect.

(b) Application of these principles to the facts of the case

108. The Court's starting point is to observe that during the period in question in Iraq, all parties involved were High Contracting Parties to the Four Geneva Conventions, which apply in situations of international armed conflict and partial or total occupation of the territory of a High Contracting Party (see Article 2, common to the four Geneva Conventions, set out in paragraph 33 above). It is clear, therefore, that whether the situation in South East Iraq in late April and early May 2003 is characterised as one of

occupation or of active international armed conflict, the four Geneva Conventions were applicable.

109. The Court refers to the findings of fact which it made after analysis of all the available evidence (see paragraphs 47-57 above). In particular, it held that Tarek Hassan was found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value were retrieved (see paragraphs 51-54 above). The Court considers that, in these circumstances, the United Kingdom authorities had reason to believe that he might be either a person who could be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention (see Articles 4A and 21 of the Third Geneva Convention and Articles 42 and 78 of the Fourth Geneva Convention, all set out in paragraph 33 above). Almost immediately following his admission to Camp Bucca, Tarek Hassan was subject to a screening process in the form of two interviews by United States and United Kingdom military intelligence officers, which led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security (see paragraphs 21-24 above). The Court has also found that the evidence points to his having been physically released from the Camp shortly thereafter (see paragraphs 55-56 above).

110. Against this background, it would appear that Tarek Hassan's capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it is unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.

111. It follows from the above analysis that the Court finds no violation of Article 5 §§ 1, 2, 3 or 4 in the circumstances of the present case.

FOR THESE REASONS, THE COURT,

1. *Declares,* unanimously, the complaints under Articles 2 and 3 of the Convention inadmissible;

2. *Holds*, unanimously, that the applicant's brother was within the jurisdiction of the United Kingdom between the time of his arrest and the time of his release from the bus that took him from Camp Bucca;

3. *Declares*, unanimously, the complaints under Article 5 §§ 1, 2, 3 and 4 of the Convention admissible;

4. *Holds*, by thirteen votes to four, that there has been no violation of Article 5 §§ 1, 2, 3 or 4 of the Convention.

Done in English and French and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 September 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle
Deputy Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, is annexed to this judgment.

D.S.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE SPANO JOINED BY JUDGES NICOLAOU, BIANKU AND KALAYDJIEVA

I.

1. This case concerns Tarek Hassan, a 22-year-old Iraqi and avid football player, who was captured by British soldiers on the morning of 23 April 2003 during the invasion of Iraq, while at his home in Umm Qasr, a port city in the region of Bashrah. After going through a screening process at Camp Bucca, where he was deemed to be a civilian posing no security threat, he was detained for over a week, at which point he was finally released in or near Umm Qasr on 2 May 2003 (see paragraphs 47-58 of the judgment).

2. I fully agree with the Court's conclusions that Tarek Hassan fell within the jurisdiction of the United Kingdom from the moment of his capture by British troops until his release from the bus that took him from Camp Bucca to the drop-off point (see paragraph 80 of the judgment). However, as it is clear that Tarek Hassan was deprived of his liberty, the principal question that arises in this case is whether his internment by the United Kingdom was permitted under Article 5 § 1 of the Convention.

3. The Government have not argued that the capture and subsequent detention of Tarek Hassan were implemented with the intention of bringing criminal charges against him. The majority thus concludes correctly (see paragraphs 96-97) that his deprivation of liberty was not permitted under any of the grounds for such a limitation of his fundamental rights that are provided exhaustively in sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention. In particular, the Government's submission that the capture and detention was permissible under Article 5 § 1 (c) cannot be accepted, as the Government do not argue that Tarek Hassan was, at least, suspected of being a civilian taking a direct part in hostilities and thus not enjoying combatant privilege, his actions possibly being criminal under the laws of Iraq or the United Kingdom as the detaining power. Furthermore, the facts as they are assessed by the Court (see paragraphs 47-58) do not allow for such a characterisation of the events of 23 April 2003. It follows that the Government's limited argument is that Tarek Hassan's capture and detention for nine days at Camp Bucca was based only on him being either a prisoner of war or a civilian posing a threat to security.

4. On this basis, and for the first time in the Court's history, a Member State to the Convention invites the Court to "disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law" (see para-

graph 99). A majority of the Court today resolves this issue through the following statement (see paragraph 104 of the judgment):

> " ... By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15... It can only be in cases of international armed conflict, where the taking of prisoners of war and detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers ..."

5. It is imperative to appreciate the scope and consequences of this sweeping statement by the Court.

Firstly, the majority finds that it is permissible under the Convention, and without the State having derogated under Article 15, to intern prisoners of war for the duration of hostilities, and also civilians who pose a threat to security, so long as procedural safeguards under international humanitarian law are in place. It is important to understand what this entails under the Geneva Conventions in the light of the majority's finding. Article 4 A of the Third Geneva Convention sets out the categories of protected persons enjoying prisoner of war status. When that status is in doubt at the outset, Article 5 § 2 of the Third Geneva Convention provides that whether a person shall enjoy combatant privilege shall be determined by a "competent tribunal". However, this only applies in principle to the initial determination of prisoner of war status, the recognition of which affords the person in question certain privileges while being interned and excludes, in general, the possibility that his acts can be considered criminal and prosecuted accordingly. However, as prisoner of war status is solely tied to the existence of hostilities, the detainee does not enjoy any right under the Third Geneva Convention to have his detention reviewed further at frequent intervals. Consequently, and most importantly, a person classified as a prisoner of war has no right under the Geneva Conventions to be released whilst hostilities are on-going. As regards civilians interned for security reasons, they are entitled under Article 43 of the Fourth Geneva Convention 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". Hence, so long as reasons pertaining to the "security of the Detaining Power", remain, and are considered "imperative" (Articles 42 and 78 of the Fourth Geneva Convention),

the civilian detained on such grounds may remain interned indefinitely and not be released.

Secondly, as the majority correctly acknowledges, albeit implicitly, the legal principle underlying the existence of this novel understanding of the exhaustive grounds of detention under Article 5 § 1 cannot be limited to acts on the territory of States not parties to the Convention in circumstances where a Contracting State exercises extra-territorial jurisdiction under Article 1. It must, conceptually and in principle, also be applicable within the Convention's *legal space*; this effectively has the consequence that today's holding must logically mean that where a Contracting State is engaged in international armed conflict with another Contracting State, it is permitted under the Convention for the belligerents to invoke their powers of internment under the Third and Fourth Geneva Conventions without having to go through the openly transparent and arduous process of lodging a derogation from Article 5 § 1, the scope and legality of which is then subject to review by the domestic courts, and if necessary, by this Court under Article 15.

6. In sum, the majority's resolution of this case constitutes, as I will explain more fully below, an attempt to reconcile norms of international law that are *irreconcilable* on the facts of this case. As the Court's judgment does not conform with the text, object or purpose of Article 5 § 1 of the Convention, as this provision has been consistently interpreted by this Court for decades, and the structural mechanism of derogation in times of war provided by Article 15, I respectfully dissent from the majority's finding that there has been no violation of Tarek Hassan's fundamental right to liberty.

II.

7. Article 5 § 1 of the Convention enshrines one of the most fundamental of all human rights, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. As the Grand Chamber of this Court recently confirmed in the case of *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, 7 July 2011, § 99, 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 (see *Al-Jedda v. the United Kingdom*, loc. cit). No deprivation of liberty will be compatible with Article 5 § 1 unless it falls within one of those grounds or unless it is provided for by a lawful derogation under Article 15 of the Convention, which allows for a State "in time of war or other public emergency threatening the life of the nation" to take measures derogating from its obligations under Article 5 "to the extent strictly required by the exigencies of the situation" (see, *inter alia*, *Ireland v. the United Kingdom*,

18 January 1978, § 194, Series A no. 25, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162 and 163, ECHR 2009-...). Furthermore, and as the majority correctly acknowledges in paragraph 97, 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 *Al-Jedda v. the United Kingdom*, cited above, § 100).

8. The Convention applies equally in both peacetime and wartime. That is the whole point of the mechanism of derogation provided by Article 15 of the Convention. There would have been no reason to include this structural feature if, when war rages, the Convention's fundamental guarantees automatically became silent or were displaced in substance, by granting the Member States additional and unwritten grounds for limiting fundamental rights based solely on other applicable norms of international law. Nothing in the wording of that provision, when taking its purpose into account, excludes its application when the Member States engage in armed conflict, either within the Convention's *legal space* or on the territory of a State not Party to the Convention. The extra-jurisdictional reach of the Convention under Article 1 must necessarily go hand in hand with the scope of Article 15 (see *Bankovič and Others v. Belgium and Others* [GC], no. 52207/99, § 62, 12 December 2001).

9. It follows that if the United Kingdom considered it likely that it would be "required by the exigencies of the situation" during the invasion of Iraq to detain prisoners of war or civilians posing a threat to security under the rules of the Third and Fourth Geneva Conventions, a derogation under Article 15 was the only legally available mechanism for that State to apply the rules on internment under international humanitarian law without the Member State violating Article 5 § 1 of the Convention. It bears reiterating that a derogation under Article 15 will not be considered lawful under the first paragraph of that provision if the measures implemented by the Member State are "inconsistent with its other obligations under international law". In reviewing the legality of a declaration lodged by a Member State to the Convention within the context of an international armed conflict, the domestic courts, and, if need be, this Court, must thus examine whether the measures in question are in conformity with the State's obligations under international humanitarian law.

III.

10. The majority's finding that the "grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions", is primarily based on an application of

Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, from which the Court concludes as follows:

Firstly, State practice indicates that States do not derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts (see paragraph 101 of the judgment).

Secondly, the Convention must be interpreted in harmony with other rules of international law of which it forms part. The provisions in the Third and Fourth Geneva Conventions relating to internment, at issue in the present case, were designed to protect captured combatants and civilians who pose a security threat. Thus, the lack of formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law (see paragraphs 102-103).

Thirdly, even in situations of international armed conflict, the safeguards of the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law, the grounds of permitted deprivation of liberty under Article 5 § 1 should be "accommodated, as far as possible", with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions (see paragraph 104).

I shall discuss each argument in turn.

IV.

11. The rationale relating to *State practice* is flawed for three reasons.

12. *Firstly*, the State practice in question is based on a fundamental premise, invoked by the Government in this case (see paragraph 86), which relates to the scope of the Convention's extra-territorial reach. The premise is the following: Article 5 does not apply to situations of international armed conflict for the simple reason that Article 1 jurisdiction under the Convention is not extra-territorial in the sense of being applicable in such conflict situations.

In *Al-Skeini v. the United Kingdom* [GC], 55721/07, § 137, 7 July 2011, the Court confirmed, in clear and unequivocal terms, its prior rulings in the cases of *Öcalan v. Turkey* [GC] (no. 46221/99, 12 May 2005), *Issa and Others v. Turkey* (no. 31821/96, 16 November 2004), *Al-Saadoon and Mufdhi v. the United Kingdom* ((dec.), no. 61498/08, 30 June 2009), and *Medvedyev and Others v. France* [GC] (no. 3394/03, 23 March 2010), to the effect that Member States' obligations under the Convention remain in place "whenever" the State, through its agents, "exercises control and authority over an individual" on the territory of another State. The Court made no distinction between situations arising in peacetime or in internal or international conflict. Further, the Court explicitly stated (see *Al-Skeini*, cited

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

Moreover, it is to no avail for the Member States to rely on the above-cited Grand Chamber decision in *Bankovič and Others*, at least in situations where extra-territorial jurisdiction during international armed conflict is based on *State agents' authority and control in the form of the arrest and detention of an individual*, as in the present case, a factual setting that is materially different from that with which the Court was confronted in *Bankovič and Others* (cited above). In this regard, I would recall that the United Kingdom itself, along with other Governments, argued explicitly in the *Bankovič* case (see § 37) that the arrest and detention of the applicants outside the territory of the respondent State, as described in the admissibility decisions in the *Issa* and *Öcalan* cases (*Issa and Others v. Turkey*, (dec.), no. 31821/96, 30 May 2000, and *Öcalan v. Turkey* (dec.), no. 46221/99, 14 December 2000) constituted, according to the Governments, "a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil". That is exactly the situation in the present case, a situation that, as the United Kingdom argued before this Court just under two years before the start of the Iraq war, would fall clearly within its extra-territorial jurisdiction under Article 1 of the Convention.

13. *Secondly*, the subsequent practice rule of Article 31 § 3 (b) of the Vienna Convention has to date been applied by the Court in several cases of central importance to the protection of human rights, namely the abolition of the death penalty (see *Soering v. the United Kingdom*, no. 14038/88, 7 July 1989, §§ 102-103, and *Al-Saadoon and Mufdi v. the United Kingdom*, cited above, § 120), the binding nature of interim measures and the validity of reservations entered by States. Beyond these literal uses, Article 31 § 3 (b) has also found expression in the Court's characterization of the Convention as a "living instrument" (see Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford University Press, Oxford 2010, at p. 38). However, the Court has, for obvious reasons, been rather cautious in its application of the subsequent practice rule, as Article 31 § 3 (b) of the Vienna Convention must be

understood to cover only subsequent practice common to all Parties, as well as requiring that the practice be concordant, common and consistent. Subsequent practice of States Parties which does no fulfil these criteria may only constitute a supplementary means of interpretation of a treaty (see *Report of the International Law Commission on the Work of the Eighteenth Session* (Geneva, 4 May to 19 July 1966), 1966 (2) Yearbook of the International Law Commission 173, p. 222). Bearing this in mind, it may be questioned whether the State practice referred to by the majority in the present case can be considered to fulfil, in substance, the criteria underlying the subsequent practice rule of Article 31 § 3 (b) of the Vienna Convention as developed in international law.

Furthermore, and most importantly in my view, in assessing whether a State practice fulfils the criteria flowing from Article 31 § 3 (b), and thus plausibly modifies the text of the Convention (see paragraph 101 of the judgment), there is, on the one hand, a fundamental difference between a State practice clearly manifesting a concordant, common and consistent will of the Member States to collectively modify the fundamental rights enshrined in the Convention, towards a more *expansive or generous understanding of their scope than originally envisaged*, and, on the other, a State practice that *limits or restricts those rights*, as in the present case, in direct contravention of an exhaustive and narrowly tailored limitation clause of the Convention protecting a fundamental right.

14. *Thirdly*, the Court draws further support for its reliance on State practice, in not derogating under Article 15 in respect of detentions under the Third and Fourth Geneva Conventions during international armed conflict, on the practice of States to refrain from derogating under Article 4 of the International Covenant on Civil and Political Rights (ICCPR) with regard to such activities. Such reliance is however clearly inapposite in my view, as there is a fundamental distinction to be made between the wording and scope of Article 5 § 1 of the Convention, on the one hand, and Article 9 of the ICCPR and of Article 9 of the Universal Declaration on Human Rights, on the other. The former is *exhaustive*, as regards permissible grounds of detention, whereas the latter is not, as they are limited to a general prohibition against *arbitrary* forms of detention. Baroness Hale of Richmond expressed this viewpoint in very clear and eloquent terms in her speech in the House of Lords' judgment in the *Al-Jedda* case (cited at paragraph 39 of the Court's judgment), where she stated (§ 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..."

15. In the light of the above, the arguments from *State practice*, relied upon heavily by the majority, cannot, in my view, sustain its finding in this case.

V.

16. As regards the majority's *second rationale*, it is certainly true that the Convention must be interpreted in harmony with other rules of international law of which it forms part. But the doctrine of consistent interpretation of the Convention with other norms of international law has its limits, as does any other harmonious method of legal interpretation. Article 5 § 1 is worded exhaustively, as regards the permitted grounds for deprivation of liberty, and the Court has consistently held, without exception till today, that these grounds should be interpreted narrowly. There is simply no available scope to "accommodate", to use the language of the majority (see paragraph 104), the powers of internment under international humanitarian law *within*, *inherently* or *alongside* Article 5 § 1. That is the very *raison d'être* of Article 15, which explicitly opens up the possibility for States in times of war or other public emergencies threatening the life of the nation to derogate from Article 5, amongst other provisions. The majority's support for a contrary understanding of Article 5 renders Article 15 effectively obsolete within the Convention structure as regards the fundamental right to liberty in times of war.

17. Furthermore, the majority concludes that the provisions of the Third and Fourth Geneva Conventions relating to internment, at issue in the present case, were "designed to protect captured combatants and civilians who pose a security threat". Thus, the lack of formal derogation under Article 15 "does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case" (see paragraph 103). In support of this approach (see paragraph 102), the majority relies on the observations in paragraph 185 of *Varnava and Others v. Turkey* [GC], nos. 16064/90 et al., ECHR 2009), where the Court stated that Article 2 of the Convention should be "interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict". Moreover, the majority refers to the "co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict" (see paragraph 104).

International human rights law and international humanitarian law exhibit quite extensive differences both methodologically and structurally,

entailing distinct judicial approaches in the evaluation of individual rights. As worded in the third-party submissions, filed in the present case by the Human Rights Centre of the University of Essex, it is thus clear that the "internal coherence of international humanitarian law [is] significantly different from that of human rights law" (see paragraph 92 of the judgment). Thus, in my view, the underlying differences in the system of protection under the Convention, on the one hand, and international humanitarian law, on the other, constitute a particularly persuasive ground for dismissing the *automatic assimilation* of these distinct regimes of international law, at least where the relevant provision of the Convention is not legally amenable to such an approach.

I also note that the above-mentioned observations from the case of *Varnava and Others v. Turkey* (cited above), which the majority refers to, must be read in this light. The Grand Chamber in *Varnava and Others* thus explicitly included the caveat, "in so far as possible", when referring to the need to interpret the Convention in the light of international humanitarian law. Moreover, and no less importantly, *Varnava and Others* dealt with the interpretation of Article 2 within the context of the States' positive obligations to protect life under that provision in a "zone of international conflict" (§ 185). It is evident that the positive component of Article 2 is flexible enough to take account of the relevant rules of international humanitarian law so as to create a more robust and coherent regime of protection under the Convention. For obvious reasons, the subject matter in the present case under Article 5 § 1 is quite the opposite.

As regards the majority's reference to the "co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict", it suffices to observe that the former does not contain the safeguards manifested in the exhaustive and limited grounds of permissible deprivation of liberty contained in Article 5 § 1. On the contrary, indefinite and preventive internment in wartime flatly contradicts the very nature of the grounds found in sub-paragraphs (a) to (f), a view expressed far better than I can by Baroness Hale of Richmond in her above-cited speech in the *Al-Jedda* case in the House of Lords.

VI.

18. Finally, as regards the *third argument* set out in the Court's judgment, the majority reasons that "even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law" (see paragraph 104). Thus, the majority correctly rejects the Government's invitation to *disapply* Article 5 of the Convention. However, the majority goes on to declare that "[by] reason of the co-existence of the safeguards provided by international humanitarian law,

the grounds of permitted deprivation of liberty of Article 5 § 1 should be "accommodated, as far as possible", with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions (see paragraph 104).

This method of "*accommodation*" of Convention rights is a novelty in the Court's case-law. Its scope is ambiguous and its content wholly uncertain, at least as a legitimate method of *interpretation* of a legal text. Whatever this purported method entails, it bears reiterating that there is simply no available room to "accommodate" the powers of internment under international humanitarian law within, inherently or alongside Article 5 § 1 (see paragraph 16 above). Furthermore, as the *disapplication* option is off the table, since no derogation from the Convention has occurred, this novel method of *accommodation* cannot be implemented in such a manner as to have effectively the same legal effects as *disapplication*. However, by concluding, as the majority does, that the grounds of permitted deprivation of liberty under Article 5 § 1 should be "accommodated, as far as possible", with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions, the majority, in essence, does nothing else on the facts of this case. It effectively disapplies or displaces the fundamental safeguards underlying the exhaustive and narrowly interpreted grounds for permissible detention under the Convention by judicially creating a new, unwritten ground for a deprivation of liberty and, hence, incorporating norms from another and distinct regime of international law, in direct conflict with the Convention provision. Whatever *accommodation* means, it cannot mean this!

VII.

19. *In conclusion*, on the facts of this case, the powers of internment under the Third and Fourth Geneva Conventions, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5 § 1 of the Convention. The Court does not have any legitimate tools at its disposal, as a *court of law*, to remedy this clash of norms. It must therefore give priority to the Convention, as its role is limited under Article 19 to "[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". By attempting to *reconcile the irreconcilable*, the majority's finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the Convention, as reflected in its purpose and its historical origins in the atrocities of the international armed conflicts of the Second World War.