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Human rights — Scope of application — Requirement that individual be within the jurisdiction of the respondent State — European Convention on Human Rights, 1950, Article 1 — Application to activities of State outside own territory — Circumstances relevant to determining whether person detained by forces of State outside its territory within jurisdiction of that State — Detention on authorization of territorial sovereign — Obligations of detaining State to territorial sovereign

Human rights — Right to life — Capital punishment — Transfer of detainee to State where death penalty carried out by hanging — Protocol 13 to the European Convention on Human Rights — Effect on interpretation of Article 2

Human rights — Fair trial — European Convention on Human Rights, Article 6 — Transfer of detainee to face trial in other State — Whether real risk of flagrant breach of Article 6 standards

War and armed conflict — Occupation — Presence of forces from former occupying power after end of occupation — Iraq — Multi-National Force — Powers — Relationship to Government of Iraq — United Nations mandate

Al-Saadoon and Mufdhi *v.* United Kingdom[1]

(Application No 61498/08)

European Court of Human Rights, Fourth Section[2]

Decision on Admissibility. 30 *June* 2009

Judgment on the Merits and Just Satisfaction. 2 *March* 2010

(Garlicki, *President*; Bratza, Bonello, Mijović, Šikuta, Poalelungi and Vučinić, *Judges*)

Summary: *The facts*:—The applicants, who were Iraqi citizens, had been detained in Iraq in 2003 on security grounds by British forces acting as part of

[1] The parties' representatives are named at para. 2 of the judgment on the merits.
[2] For related proceedings in the English courts, see 147 ILR 538 below.

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the Multi-National Force ("MNF") in Iraq. Subsequent investigation suggested that they had been involved in the murder of prisoners of war and in 2006 the Basra Criminal Court issued an order authorizing their continued detention by the British MNF contingent as persons accused of criminal offences. Thereafter, they were held by the British contingent at the detention facility operated by that contingent and were classed as criminal detainees held on the authority of the Iraqi court. In 2007 the Iraqi Higher Tribunal, which had jurisdiction in respect of war crimes, formally requested their transfer to Iraqi custody. The United Kingdom Government decided to accede to that request but the transfer was not effected, because the applicants issued judicial review proceedings in England, claiming that there was a real risk that they would be executed if convicted in Iraq and that their transfer would, therefore, violate their rights under the European Convention on Human Rights.

British forces had initially entered Iraq in March 2003 as part of a coalition which displaced the then Government of Iraq. The United States of America and the United Kingdom then declared themselves occupying powers in Iraq and created the Coalition Provisional Authority ("CPA") to exercise the powers of government in Iraq on a temporary basis. The MNF was created, consisting of American, British and other armed forces, the presence of which was endorsed by the United Nations Security Council in Resolutions 1483 (2003) and 1511 (2003). By Resolution 1546 (2004) of 8 June 2004, the United Nations Security Council provided for the termination of the occupation of Iraq by the end of June 2004. Resolution 1546 noted that, following the end of the occupation, troops forming part of the MNF would remain in Iraq at the request of the Government of Iraq and under the authority of the Security Council. Resolution 1546 gave the MNF authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution". The letters in question were written by the Secretary of State of the United States of America and the Prime Minister of Iraq. In that correspondence, the United States Secretary of State said that the MNF would undertake a number of tasks, including "internment where this is necessary for imperative reasons of security in Iraq". The Prime Minister of Iraq accepted that the MNF should operate on the basis set out in the letter from the Secretary of State.

The mandate for the MNF expired on 31 December 2008, after which time those British forces remaining in Iraq had no power of detention. On 19 December 2008, the Divisional Court dismissed the claim for judicial review but gave leave to appeal. The claimants appealed to the Court of Appeal which dismissed their appeal on 30 December 2008, although the reasoned judgment was not given until later (see 147 ILR 538 below). The applicants then sought interim protection from the European Court of Human Rights. On 30 December 2008, the Acting President of the Fourth Section of the Court issued an order under Rule 39 of the Rules of Court that the transfer of the applicants should not take place until further notice. The United Kingdom Government nevertheless concluded that there was an international law obligation

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to proceed with the transfer before the expiry of the MNF mandate and the applicants were transferred to Iraqi custody on 31 December 2008.

The applicants maintained that their transfer violated their rights under Articles 2, 3, 6, 13 and 34 of the European Convention on Human Rights and Article 1 of Protocol No 13 thereto.[3]

Decision on Admissibility (30 June 2009)

Held (unanimously):—The complaints concerning conditions of detention and the risk of ill-treatment and extra-judicial killing in Iraq were inadmissible. The question of the admissibility of the Article 13 claim and the issues arising under Article 34 were joined to the merits. The remainder of the application was admissible.

(1) The applicants were within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention during the relevant period. While jurisdiction was primarily territorial and only exceptionally were persons outside the territory of a State to be regarded as falling within the jurisdiction of that State for Convention purposes, the detention facility in which the applicants were held until 31 December 2008 was within the total and exclusive control of the United Kingdom, thus bringing those held therein within the jurisdiction of the United Kingdom. The question whether the United Kingdom owed obligations to Iraq in respect of the applicants was not relevant to the question of jurisdiction and had to be considered by reference to the merits (paras. 84-9).

(2) The applicants' complaint that they would be at risk of ill-treatment and extra-judicial killing in Iraqi custody was inadmissible for failure to exhaust domestic remedies (paras. 90-3).

(3) The complaint that the transfer of the applicants exposed them to a real risk of treatment which would breach their rights under Articles 2, 3 and 6 of the Convention and Article 1 of Protocol 13 raised serious issues of fact and law and could not be regarded as manifestly ill-founded. It was accordingly admissible (para. 110).

(4) The complaint that the transfer of the applicants was a breach of the Court's indication under Rule 39 of the Rules of Court and consequently a violation of Articles 34 and 13 of the Convention was such that those issues had to be joined to the merits (para. 120).

Judgment on the Merits and Just Satisfaction (2 March 2010)

Held:—(1) (unanimously) The United Kingdom had violated the applicants' rights under Article 3 of the Convention.

[3] The relevant parts of Articles 2 and 3 of the Convention and Protocol 13 appear at para. 100 of the judgment. The relevant part of Article 6 appears at para. 146 and of Articles 13 and 34 at para. 151.

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(a) For those States that were bound by it, Protocol 13, which required the abolition of the death penalty in all circumstances, ranked alongside the rights in Articles 2 and 3 of the Convention and its provisions were to be strictly construed. The extent of ratification of the Protocol, together with consistent State practice, was strongly indicative that Article 2 had, in effect, been amended so as to remove the exception for the imposition of the death penalty. Accordingly, the provisions of Article 2 no longer operated as a bar to interpreting the term "inhuman or degrading treatment or punishment" in Article 3 as including the imposition of the death penalty. The responsibility of a Contracting State could be engaged by the transfer of a person from its jurisdiction to that of a non-Convention State in circumstances where there was a real risk that the person would be subjected to inhuman or degrading treatment or punishment. While the Convention was to be interpreted in the light of other rules of international law, its special character and significance had to be respected and a State was not entitled to rely upon commitments subsequent to the Convention to relieve it of its responsibility under the Convention (paras. 115-28).

(b) In the present case, at the time of the applicants' transfer there had been a real risk that they would be subjected to the death penalty. The applicants had a well-founded fear of execution which must have caused them intense psychological suffering. At the latest from 1 February 2004, when Protocol 13 entered into force for the United Kingdom, Article 1 of the Protocol and Article 2 of the Convention dictated that the United Kingdom should not have entered into any arrangement or agreement which involved it in detaining individuals with a view to transferring them to stand trial on capital charges or in any other way subjecting them to a real risk of being sentenced to death and executed. Accordingly, even if the United Kingdom had incurred an international law obligation to transfer the applicants to Iraq, it would not have rendered the transfer compatible with the United Kingdom's obligations under the Convention and Protocol 13. In any event, it had not been established that the obligations of the United Kingdom to Iraq were such that compliance with its Convention obligations would require the United Kingdom to act in contravention of the sovereignty of Iraq (paras. 129-45).

(2) (unanimously) It had not been established that, at the date of transfer, there was a real risk that the applicants would be subjected to a flagrantly unfair trial. There was accordingly no breach of Article 6 (paras. 149-50).

(3) (by six votes to one, Judge Bratza dissenting) The complaint under Article 13 was admissible. The transfer of the applicants to Iraqi custody in spite of the order of the Court under Rule 39 constituted a violation of Articles 13 and 34 of the Convention. There was a breach of Article 34 if a State failed to take all steps which could reasonably have been taken to comply with an interim measure of the Court. The United Kingdom had not taken such steps. There was no indication that, following the issuance of the order under Rule 39, the United Kingdom Government had made any attempt to explain

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the situation to the Iraqi Government and reach a temporary solution (paras. 160-6).

(4) Where the Court found a violation of the Convention, Article 46[4] required the State to take the measures necessary to put an end to the violation. The United Kingdom was therefore obliged to take steps to put an end to the suffering of the applicants by taking all possible steps to obtain an assurance from the Iraqi authorities that the applicants would not be subjected to the death penalty (paras. 167-71).

(5) (unanimously) The findings of violation constituted sufficient just satisfaction for the non-pecuniary damage suffered by the applicants. The United Kingdom should pay to the applicants 40,000 euros in respect of costs and expenses together with interest (paras. 172-8).

Per Judge Bratza (dissenting in part): The United Kingdom should have attempted to negotiate alternative arrangements for the trial of the applicants or to secure the necessary safeguards that they would not be subjected to the death penalty. It was the failure to do so in the period prior to the applicants' case being referred to the Iraqi courts that gave rise to the breach of Article 3. By 31 December 2008, however, the situation had changed and there was no legal basis on which the United Kingdom could have continued to hold the applicants. That fact constituted a clear objective impediment to compliance with the Rule 39 order. The majority had, therefore, erred in finding that the transfer on that date violated Articles 13 and 34 of the Convention (pp. 101-6).

The judgment of the Court on the merits commences at p. 24. The following is the text of the decision of the Court on admissibility:

DECISION ON ADMISSIBILITY

[Paragraphs 1-68 of the decision summarized the factual background, the proceedings in the United Kingdom courts and the relevant legal materials. These paragraphs are not reproduced here as these matters are dealt with in greater detail in paragraphs 1-99 of the judgment, at pp. 24-71 below, and in the Court of Appeal decision reported at 147 ILR 538 below.]

COMPLAINTS

69. The applicants complained that their transfer to Iraqi custody gave rise to breaches of their rights under Articles 2, 3, 6 and 34 of the Convention and Article 1 of Protocol No 13.

[4] The text of Article 46 is set out at para. 167 of the judgment.

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THE LAW

I. *Jurisdiction*

70. The applicants contended that throughout their detention and until their transfer on 31 December 2008 they fell 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.

The Government denied that the applicants fell within the United Kingdom's jurisdiction at the relevant time.

1. *The parties' submissions*

a. The applicants

71. The applicants accepted that jurisdiction under Article 1 of the Convention was essentially territorial and regional and that only in exceptional circumstances would the acts of a Contracting State performed or producing effects outside its territory constitute an exercise of jurisdiction. The Court had recognised a number of specific extra-territorial exceptions, principally (1) the activities of a State's diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State ("the diplomatic exception"); (2) where a State had effective control of an area outside its national territory ("the effective control over an area exception"); (3) where a State exercises authority over persons or property through its agents operating on the territory of another State ("the State agent authority exception").

72. The applicants emphasised that jurisdiction under Article 1 was not limited to the extra-territorial jurisdiction which a State was entitled to exercise under international law. Although the "diplomatic exception" was predicated on the extra-territorial jurisdiction which a State was entitled to exercise over, for example, its embassies and consulates abroad, recognised both in customary international law and in treaty provisions, the "effective control over an area" and "State agent authority" exceptions did not depend on the lawfulness of a State's actions but instead on their context and their *de facto* effects (the applicants referred to statements in *El Mahi and Others* v. *Denmark* (dec), no 5853/06, 11 December 2006; *Issa and Others* v. *Turkey*, no 31821/96, §§ 69 and 71, 16 November 2004; *Loizidou* v. *Turkey (Preliminary Objections)* [GC], judgment of 23 March 1995, § 62, Series A no 310; *Ilaşcu and Others* v. *Moldova and Russia* [GC], no. 48787/99, §§ 320-1, ECHR 2004-VII). Thus, it was no answer to a claim of "effective control

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over an area" or "State agent authority" jurisdiction for a State to say that it could not have been exercising the necessary control because as a matter of international law it did not have the power to do so. The question was not whether the State was entitled to act as it did, but whether as a matter of fact it acted with the necessary degree of control over the area or individual.

73. The applicants submitted that they were within both the "effective control over an area" and "State agent authority" jurisdiction of the United Kingdom. They had been arrested by United Kingdom forces in 2003 and held as security internees while criminal investigations were carried out by the United Kingdom authorities. In 2004 it was the United Kingdom authorities who referred the applicants' cases to the Iraqi courts and in 2006 it was the United Kingdom authorities who held a meeting to determine whether or not to change their classification to that of "criminal detainees" following a decision of the Iraqi court. As the Divisional Court had found (see paragraph [57 of the Merits judgment at p. 45 below]), the situation was distinguishable from that in *Drozd and Janousek* v. *France and Spain*, judgment of 26 June 1992, Series A no 240 or *Gentilhomme and Others* v. *France*, nos 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002, where the actions complained of lay altogether outside the control of the respondent Contracting States.

74. It was difficult to conceive of an arrangement which more demanded a legally binding agreement than where one State intended to divest itself of its sovereign authority over its own military personnel so as to render them merely agents of a foreign State. There was, however, no evidence that, as a matter of domestic or international law, United Kingdom armed forces had been loaned to the State of Iraq or acted under Iraq's exclusive direction and control. The only possible basis for the relationship of agency asserted by the Government was the MoU (see paragraph [25 of the Merits judgment at p. 33 below]), but this was not legally binding. In any event, even if the United Kingdom had entered into an express international agreement with the Iraqi Government providing for an agency relationship or any other form of attribution of responsibility for the applicants, it could not rely on this as obviating its obligations under the Convention. The Court's case-law established that "where States establish international organisations, or *mutatis mutandis*, international agreements, to pursue co-operation in certain fields . . . [it] would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution" (see *TI* v. *the United Kingdom* (dec), no 43844/98, ECHR 2000-III; *Waite and Kennedy* v. *Germany* [GC],

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no 26083/94, § 67, ECHR 1999-I; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* [GC], no 45036/98, § 154, ECHR 2005-III).

b. The Government

75. The Government submitted that the fundamental principle governing the scope of a Contracting State's jurisdiction under Article 1 was that such jurisdiction was "essentially" or "primarily" territorial. Any extension of jurisdiction outside the territory of a Contracting State was "exceptional" and required special justification in the particular circumstances of each case (see *Banković and Others* v. *Belgium and 16 other Contracting States* (dec.) [GC], application no 52207/99, §§ 61, 67 and 74, ECHR 2001-XII). In determining whether there were "exceptional circumstances" giving rise to "special justification" for concluding that jurisdiction had been established extra-territorially on the facts of a particular case, the Grand Chamber in *Banković* and the Court in its subsequent case-law had had regard to a number of interrelated principles, namely: (1) jurisdiction was not to be equated with the responsibility of a State in international law for the act in question; it was a prior condition which must be satisfied before responsibility could be established; (2) jurisdiction under Article 1 was an autonomous concept, but Article 1, in common with the Convention as a whole, had to be interpreted in light of and in harmony with other principles of international law; (3) the obligation of Contracting States under Article 1 was to secure all the rights and obligations in Part I of the Convention; (4) jurisdiction under Article 1 could not be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question; (5) the Convention was a constitutional instrument of European public order which operated, subject to Article 56, in an essentially regional context and notably in the "legal space" (*espace juridique*) of the Contracting States; it was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States; (6) the "living instrument" principle did not apply to Article 1 jurisdiction and could not operate to expand the narrowly defined categories of cases in which jurisdiction was recognised extra-territorially.

76. The Court had recognised that jurisdiction might exceptionally exist where the State exercised "authority and control" over an individual notwithstanding that he was not within either the territory of the Contracting State or territory effectively controlled by it. In *Banković* the Court had identified as examples cases involving diplomatic and consular officials and cases involving vessels such as ships and aircraft. These were not the only examples, but they exemplified the nature of the "authority and control" which, when exercised extra-territorially by a

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State agent over an individual, might exceptionally constitute an exercise of jurisdiction. As identified by the Court in *Banković*, the exceptional feature of such cases was that they involved an exercise of jurisdiction which derived from well-established principles of international law.

77. In contrast, where a State was present in the territory of another sovereign State and there was no question of its taking effective control of the territory of that State and the State then acted in such a way as to affect individuals there, the existence of a basis in international law for its acts was of central importance to the question whether there was, exceptionally, special justification for concluding that it was exercising Article 1 jurisdiction over the affected individuals. The Court of Appeal had been correct to hold that the exercise of mere *de facto* power over an individual in non-State territory was insufficient in itself to constitute an exercise of Article 1 jurisdiction. The Court in *Banković* had rejected the argument that the mere exercise of military force over an individual was sufficient to constitute an exercise of jurisdiction over that individual for the purposes of Article 1.

78. In the present case, as repeatedly recognised in UNSC Resolutions, Iraq was a sovereign State, exercising sovereign powers within its own territory over its own nationals. In *Banković* (cited above, § 60) the Court had referred to the well-established principle of international law that a State may not exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence. Since 18 May 2006 the Iraqi courts, applying Iraqi law, had decided that the applicants should be detained. The transfer of the applicants into the custody of the Iraqi authorities on 31 December 2008 took place in circumstances where the United Kingdom forces had the power to detain Iraqi nationals only at the request of the Iraqi courts. The United Kingdom was obliged to return Iraqi nationals to the Iraqi authorities if the Iraqi courts so requested. Moreover, even that limited power to detain was to cease within a matter of hours. The United Kingdom forces were not to retain any power to detain Iraqi nationals after 31 December 2008 and, within hours of the actual transfer, the base would have ceased to be inviolable and the Iraqi authorities would have had the right to come physically to the base where the applicants were detained and remove them (see paragraph [38 of the Merits judgment at p. 38 below]). The Convention could not be interpreted to require a Contracting State to resist, by military force if necessary, the lawful demands of the police or other officials of a non-Contracting State acting within the non-Contracting State's territory.

79. In the circumstances, the United Kingdom was not exercising any public powers through the effective control of any part of the territory or the inhabitants of Iraq, such as would exceptionally justify the

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extra-territorial application of the Convention (see *Banković*, cited above, § 71). Nor did the actions of the United Kingdom forces, in detaining the applicants at the United Kingdom base at the request of the Iraqi courts and transferring them, also at the request of the Iraqi courts, involve the exercise of any recognised extra-territorial authority by the United Kingdom (see *Banković*, cited above, § 73). The applicants were detained and transferred by United Kingdom forces solely on the basis of decisions taken unilaterally by the Iraqi courts. The position was thus analogous to those considered by the Court in *Drozd and Janousek* or *Gentilhomme*, both cited above.

80. The question before the Court was whether the applicants were within the United Kingdom's jurisdiction, not whether the acts of the United Kingdom forces were generally attributable to the United Kingdom. The arguments of the applicants and the third parties on general principles of attribution did not address these key facts.

81. Finally, the Government pointed out that a finding that a Contracting State was under an obligation to secure the Convention rights and freedoms when acting territorially and outside the regional space of the Convention gave rise to real conceptual, practical and legal difficulties. However, the non-application of the Convention did not entail that Contracting States were free to act with impunity extra-territorially. States were bound by other international law and domestic law obligations, under, for example, the Geneva and Hague Conventions.

c. The third parties

82. The Equality and Human Rights Commission submitted that the Court of Appeal had been incorrect in finding that legal authority was a condition precedent to the existence of jurisdiction under Article 1 of the Convention. The Court's case-law provided that *de facto* control and authority might, even in the absence of any legal authority, be sufficient to establish jurisdiction; examples were the *de facto* control exercised by Turkey in northern Cyprus (see *Loizidou*, cited above, and also *Cyprus* v. *Turkey* [GC], no 25781/94, ECHR 2001-IV; *Banković*, cited above, §§ 70-3) and the acts of the Turkish agents who arrested Abdullah Öcalan in Kenya (*Öcalan*, [[GC], no 46221/99, ECHR 2005-IV], § 91). The second strand of the Court of Appeal's reasoning, the issue whether the applicants' detention was attributable to the Iraqi or the British authorities, was a question of fact and evidence (see *Behrami* v. *France and Behrami and Saramati v. France, Germany and Norway* (dec.) [GC], nos 71412/01 and 78166/01, ECHR 2007).

83. The group of interveners observed that public international law required that the concept of "jurisdiction" be interpreted in the light

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