

Conflicting International Obligations and the Risk of Torture and Unfair Trial

Critical Comments on *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence*; *Al-Sadoon and Mufdhi v United Kingdom*

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Abstract

This article reviews the decisions of UK courts in a case concerning two Iraqi detainees in British military custody who sought to restrain their transfer to Iraqi custody. The detainees claimed that the transfer would violate certain obligations owed to them by the UK under the European Convention on Human Rights, including the prohibition on torture and the right to a fair trial. The article argues that the case presented novel and complex legal questions for resolution, including whether there was a conflict between the UK's obligations under the ECHR and its obligation to respect Iraqi sovereign jurisdiction over its own nationals on its own territory. It is concluded that important elements of the UK courts' reasoning were less than satisfactory.

1. Introduction

The conflicts in Afghanistan and Iraq have presented us not only with serious political and sociological questions about the nature and possibility of 'state-building',¹ but complex legal problems concerning the relationship between different sets of norms in international law. Whereas 10 years ago the extraterritorial application of human rights treaties remained a relatively obscure concern, when the United Kingdom became an occupying power in Iraq — a few years after it made the European Convention on Human Rights directly justiciable in UK courts² — it precipitated an array of cases

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¹ See, for example, A. Giustozzi, 'Afghanistan: Crisis Without End – An Analytical Narrative on State Making', Crisis States Research Center, Working Paper 40, November 2008, available at <http://eprints.lse.ac.uk/22938/1/wp40.2.pdf> (visited 11 September 2009); A. Arato, *Constitution-Making Under Occupation: The Politics of Imposed Revolution in Iraq* (New York: Columbia University Press, 2009).

² *Human Rights Act 1998*, commenced 2 October 2000.

arising out of the conduct of British forces.³ These cases, heard first in British courts but now heading to Strasbourg, have been the occasion for substantial judicial deliberation concerning the meaning of ‘jurisdiction’ under European and universal human rights treaties,⁴ the extraterritorial reach of human rights treaties, and the relationship between a state’s obligations under international human rights law and other international law obligations — such as Security Council mandates⁵ and general principles of domestic jurisdiction. Doggedly litigated, the cases have thrown into the lap of common law judges the significant challenge of resolving novel questions that arise from applying uncertain principles to factually unusual circumstances, such as where UK troops hold Iraqi nationals on Iraqi territory in accordance with mandates derived from Security Council resolutions, Iraqi laws and Memoranda of Understanding with the Iraqi government.

Al-Sadoon and Mufdhi is one such case. The two applicants, Iraqi nationals who were held in a British detention facility in Iraq, sought to enjoin the British government from transferring them to Iraqi custody to face trial before the Iraqi High Tribunal (IHT). They claimed that for the United Kingdom to effect such a transfer would violate certain obligations it owed to them under the European Convention on Human Rights. The application was made close to the time when the UK’s Security Council mandate to perform security functions in Iraq was to expire, with the result that, from 1 January 2009, the UK forces were dependent on the express consent of the Iraqi government for their presence and for any operations. The case was heard before the Divisional Court and the Court of Appeal, both of which denied the application.⁶ A request for an interim order prohibiting the transfer was made to the European Court of Human Rights, and although that order was issued on 30 December 2008, the UK government breached it by proceeding with the transfer on 31 December. The government claimed that with the expiry of the Security Council Resolution it had no lawful option but to comply with Iraqi judicial authorities’ demand for the transfer of these two individuals.

³ For an overview, see Public Interest Lawyers, *British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review*, 30 June 2009.

⁴ See for example, *Al-Skeini and Others v United Kingdom* [2007] UKHL 26.

⁵ See for example, *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

⁶ See *R (Al-Sadoon and Mufdhi) v Secretary of State for Defence* [2008] EWHC 3098 (Divisional Court); [2009] EWCA Civ 7 (Court of Appeal).

The case raised three major questions for determination by UK courts (with proceedings on the merits pending before the European Court of Human Rights⁷):

- (a) Were the applicants within United Kingdom ‘jurisdiction’ for the purposes of Article 1 of the European Convention on Human Rights?
- (b) Did the applicants face a real risk of torture or inhuman treatment under Article 3 of the European Convention of Human Rights (ECHR), a flagrant denial of justice under Article 6, or a real risk of exposure to the death penalty?
- (c) If they did face one or more such risks, what consequences follow for the UK armed forces’ legal obligations as a foreign military present on Iraqi territory,⁸ where the sovereign authorities demand the transfer of two of its own nationals (also being held on the territory) to its custody?

Questions (a) and (b) raise legal issues that have become somewhat familiar (although far from settled) over the last 6 years, pertaining to the extraterritorial application of human rights treaties, and the application of *Soering*-type principles to the facts as found by the court.⁹ However, the peculiar factual circumstances of *Al-Saadoon and Mufdhi* raised some novel dimensions in the consideration of these issues. Question (c) raises a novel scenario concerning the interaction between non-refoulement/non-transfer obligations under human rights treaties,¹⁰ and the principles of non-intervention into the domestic jurisdiction of states. The courts’ answers to each of these questions will be considered in turn.

2. Factual Background

⁷ *Al-Saadoon and Mufdhi v. United Kingdom*, Application No. 61498/08, Decision as to Admissibility, 30 June 2009.

⁸ Unlike the US, the UK did not seek to negotiate a Status of Forces agreement with the Iraqi Government because of its express intention of withdrawing all troops during 2009.

⁹ In *Soering v United Kingdom* (Application No. 14038/88, Judgment, 7 July 1989), the European Court denied extradition (or expulsion) of a German national, Jens Soering, to the United States to face murder charges on grounds of violation of Art. 3 ECHR.

¹⁰ These obligations are widely accepted to apply irrespective of whether the transfer is across an international frontier or within the territory of a single state: See C. Droegge, ‘Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges’, 90 *International Review of the Red Cross* (2008).669-701.

At the time of the invasion of Iraq, the applicants were senior Ba’th Party officials in the district of Al-Zubair, which borders Kuwait. Faisal Attiyah Nassar Al-Saadoon was arrested by British forces on 30 April 2003 and Khalaf Hussain Mufdhi on 21 November 2003. Both were detained in Basra, at facilities controlled by UK forces. Initially detained as security detainees the then-occupying power, the applicants were suspected of involvement in the murder of two captive British soldiers in March 2003. After a British military investigation, in September 2004 representatives of the UK armed forces referred the case to the Central Criminal Court of Iraq (CCCI) — an Iraqi court constituted by the occupying powers to apply the existing Iraqi criminal code.¹¹ In May 2006, after hearing evidence from the British investigators, the CCCI issued an arrest warrant under the Iraqi Penal Code and authorized their continued detention by the UK armed forces. At this point, the UK forces reclassified the applicants as criminal detainees. At a later date, the CCCI concluded that the case against the applicants fell within the jurisdiction of the Iraqi High Tribunal (IHT) and the IHT accepted jurisdiction. The IHT was created by the occupying powers in December 2003¹² to try international crimes committed in Iraq by Iraqi nationals since 1968, and was principally concerned with cases arising from the conduct of the former Iraqi government. In December 2007, the IHT requested the two men be transferred to the custody of the IHT in Baghdad. It is this transfer that the applicants sought to prevent through litigation in British courts.

The legal authority by which the UK forces detained the applicants changed several times between 2003 and 2008. At first, they were held as security detainees pursuant to UK forces’ authority as occupying powers. After the formal end of the occupation and the recognition of the sovereign authority of the Iraqi Interim Government on 28 June 2004,¹³ UK forces’ independent power to detain for imperative reasons of security derived from Security Council Resolution 1546 and its annexes,¹⁴ and

¹¹ Coalition Provisional Authority (CPA) Order 13 of 22 April 2004.

¹² The IHT was created initially through a CPA Order, and then legislated into Iraqi law by the Transitional National Assembly, coming into force as an Iraqi enactment in October 2005. See Statute of the Iraqi High Tribunal, English translation available at <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf> (visited 11 September 2009).

¹³ See A. Roberts, *The End of Occupation in Iraq*, Harvard Program on Humanitarian Policy and Conflict Research Policy Paper, 2004, available at <http://www.ihlresearch.org/iraq/pdfs/briefing3461.pdf> (visited 11 September 2009).

¹⁴ The nature of this authority is discussed extensively in *Al-Jedda*, *supra* note 5.

the subsequent resolutions extending the Multinational Forces (MNF) mandate.¹⁵ In addition, UK forces had a power to detain criminal suspects after 28 June 2004, pursuant to Revised CPA Memorandum No. 3. The revised memorandum was promulgated as a regulation of the occupying power, but continued in force after 28 June 2004 to the extent that it was not revoked by the new sovereign government. Under section 5 of the Memorandum, MNF contingents were authorized to ‘retain criminal detainees in facilities that it maintains at the request of the appropriate Iraqi authorities’. A separate Memorandum of Understanding (MOU) was concluded between UK forces and the Ministries of Justice and the Interior of Iraq on 8 November 2004. This MOU set out the modalities by which prisoner transfers would be effected (section 3), and reserved the UK forces’ discretion to not accept a criminal suspect into its custody. Section 3.4 of the MOU allowed UK forces to reassume custody of a detainee previously transferred to Iraqi authorities if the person was wanted for war crimes against an MNF contingent or if the person’s internment was necessary for imperative reasons of security.¹⁶ The MOU rested upon the continuance of the MNF mandate provided in the Security Council resolutions. Between May 2006 and December 2008, the applicants were classified as criminal detainees by the British forces, and held pursuant to warrants issued by Iraqi courts.

3. The Question of ‘Jurisdiction’

The first major question before the British courts was whether the applicants were persons within the jurisdiction of the UK for the purposes of the ECHR. The Divisional Court concluded that they were, while the Court of Appeal concluded that they were not. Tellingly, the two courts’ divergent reasoning reflects much of the current state of confusion about the meaning of ‘jurisdiction’ in UK courts. In *Al-Skeini*, the House of Lords read the concept of jurisdiction very narrowly, concluding that despite the fact that the UK was an occupying power under international law, it did not exercise sufficient

¹⁵ The last of these was Security Council Resolution 1790, which had a new letter from the Prime Minister of Iraq to the President of the Security Council annexed to it. This letter stated that ‘the Government of Iraq will be responsible for arrest, detention and imprisonment tasks’ and that when those tasks are carried out by the MNF ‘there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq’. SC Resolution 1790 lapsed on 31 December 2008 and was not renewed.

¹⁶ Section 3.4 also required Iraqi authorities to provide assurances of humane treatment and cooperation with the International Committee of the Red Cross in respect of detainees transferred to Iraqi custody.

control over the relevant parts of Iraqi territory to owe obligations under the ECHR to persons killed during certain military operations in Southern Iraq.¹⁷ However, where UK forces had physical custody of an individual in detention, that person was ‘within jurisdiction’ for the purposes of the ECHR. As is relatively well-known, their Lordships in *Al-Skeini* reached this conclusion based on a reading of *Bankovic* that emphasized that extraterritorial application of the Convention is ‘exceptional’ and which concluded that the clearest examples of being ‘within jurisdiction’ derived from cases concerning persons who were physically present within embassies, consulates, vessels and aircraft. By analogy, being detained in a UK military detention facility was sufficient to bring one of the *Al-Skeini* litigants (Baha Mousa) within jurisdiction. In *Al-Jedda*, the UK government conceded that the applicant — who was detained as a security detainee in a UK-run detention facility — was within jurisdiction.¹⁸

There was no question that the applicants in the present case were in the physical custody of UK forces within a UK military detention centre. However, contrary to its concession in *Al-Jedda*, the government contended that they were nevertheless *not* within the jurisdiction of the UK because, as criminal detainees, the applicants were being held pursuant to the legal authority of Iraqi courts. However, the Divisional Court rejected this argument on the grounds that under both the Security Council mandate and the MOU, UK forces retained the discretionary power to refuse to transfer the detainees or to release them, and were not acting merely as instrumentalities of Iraqi sovereign authority.¹⁹ As such, the applicants could be considered within the jurisdiction of the UK and any consequences of the decision to transfer them would be an act attributable to the UK. Indeed, the court noted that if the applicants had suffered abuse at the hands of their UK captors (as Baha Mousa did), it would be a disturbing result to conclude that the

¹⁷ In reaching this conclusion, their Lordships developed what might be called the ‘all or nothing’ thesis: that if the UK forces did not exercise sufficient control to guarantee all the rights promised by the ECHR, then they did not owe any obligations because their level of control was not ‘effective’. It is difficult to see how this thesis has any basis in the jurisprudence of the ECtHR.

¹⁸ *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58. See, for the influence of the *Bankovic* principle upon subsequent British cases: T. Thienel, ‘Foreign Acts of Torture and the Admissibility of Evidence: The Judgment of the House of Lords in *A. and others v Secretary of State for the Home Department (No. 2)*’, 4 *Journal of International Criminal Justice (JICJ)* (2006) 1-9 and H.W. King, ‘Unravelling the Extra-territorial Riddle: An Analysis of *R (Hassan) v Secretary of State for Defence*’, 7 *JICJ* (2009) 633-643.

¹⁹ Divisional Court, *supra* note 6, § 82.

Convention would not be engaged.²⁰ In the Court of Appeal, their Lordships accepted the government's argument, concluding that 'the United Kingdom was not before December 31 2008 exercising any power or jurisdiction in relation to the appellants other than as *agent for the Iraqi court*. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign state.'²¹

Apart from overlooking the discretion retained by UK forces through the MOU, the Court of Appeal's conclusion also underscores the confused and confusing interpretation of 'jurisdiction' under the ECHR which has developed in British courts — in part due to *Bankovic*. Famously, *Bankovic* insisted that the meaning of 'jurisdiction' in Article 1 of the ECHR should be read consistently with the 'ordinary and essential' meaning of jurisdiction in public international law.²² This has led to an inquiry into whether a state *exercises* jurisdiction with respect to a person claiming rights under the Convention. Yet whether a state exercises jurisdiction under general principles of public international law may be quite distinct from whether a person should be considered 'within' jurisdiction for the purposes of the protective provisions of a human rights treaty. The latter may connote that the individual is within the factual power of the state, even if that factual power does not stem from a legal competence to act under a recognized head of jurisdiction in international law.²³ Otherwise, as the Divisional Court recognized, the underlying illegality of a state's conduct (such as an unauthorized incursion into another state's territory to abduct an individual) may operate to render the state unaccountable for further illegal acts — such as mistreatment of a person who is in the custody and control of that state, even if the custody itself did not derive from a recognized 'exercise' of jurisdiction.

It is not clear whether the tension between the meaning of 'exercising jurisdiction' in general public international law and jurisdiction *qua* effective control (over persons or territory) in human rights treaties, can be satisfactorily resolved. But nor is it clear to the

²⁰ *Ibid.*

²¹ Court of Appeal, *supra* note 6, § 33.

²² *Bankovic and others v Belgium and others* (GC), EHRR RJD 2001-XII 333, at §§ 61, 67.

²³ The jurisprudence of the Human Rights Committee on the meaning of 'jurisdiction' in Art. 2(1) of the ICCPR emphasizes the question of the factual power of the state vis-à-vis the individual or territory. This line of thinking was broadly approved by the International Court of Justice in its *Wall* Advisory Opinion (*Legal Consequence of the Building of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004), at §§ 109-111.

present author that they truly need to be; the insistence on some singular concept of jurisdiction is part of what has given rise to these confusing precedents. Instead, it may be far more satisfactory to regard the meaning of jurisdiction across these different realms of international law as cognate principles reflecting different functions: one regulates the freedom of states vis-à-vis other states, the other regulates the conduct of states vis-à-vis natural persons with whom the state has a certain kind of relationship of power (factual or legal). There may be some overlap between these realms, such as where a person is within the jurisdiction of their state of nationality for the purposes of a human rights treaty, even if they are outside the state's control or custody.²⁴ This is not an intellectually neat framework, but it does have the advantage of avoiding such peculiar conclusions as those reached by the UK Court of Appeal in *Al-Saadoon and Mufdhi*, where the UK was held to owe no human rights obligations to two individuals held in custody by their armed forces for almost 6 years.

On 30 June 2009, the European Court of Human Rights ruled on the admissibility of the applicants' petition, including on the question whether they were 'within the jurisdiction' of the UK for the purposes of the Convention.²⁵ The court concluded that the British had established complete de facto control *over the premises* of the detention centre, initially through the use of military force, and that this control was subsequently recognized *de jure* through Revised CPA Order No. 17 of 24 June 2004. That Order provided that all premises currently used by the MNF should be inviolable and subject to the exclusive control and authority of the MNF. This provision remained in force until midnight on 31 December 2008. In light of the UK's 'total and exclusive *de facto*, and subsequently also *de jure*, control of the premises, the detention facility and persons detained there were within the United Kingdom's jurisdiction.'²⁶ The court's reasoning thus takes a different approach than the Divisional Court *and* the Court of Appeal, emphasizing the nature of control over the premises of detention retained by the UK rather than the legal authority under which the UK forces held the detainees. The questions of whether there was an obligation to transfer the detainees to Iraqi custody and

²⁴ As was the case in the Human Rights Committee's jurisprudence on the denial of passport renewals by Uruguay in the 1990s. See: *Varela Nunez v Uruguay*, No. 108/1981; *Samuel Lichtensztejn v Uruguay*, No. 77/1980; *Pereira Montero v Uruguay*, No. 106/1981.

²⁵ Application No. 61498/08, *supra* note 7, §§ 87-89.

²⁶ *Ibid.*, § 88.

whether this affected the UK's obligations under the European Convention, were deferred to the merits stage.

4. The Question of the Real Risk of Torture, a Flagrant Denial of Justice or the Death Penalty

Since the Divisional Court had concluded that the applicants were within jurisdiction, it proceeded to carefully evaluate the claim that they would face serious human rights violations if transferred to Iraqi custody.²⁷ The applicants made three claims: that they faced a real risk of torture in Iraqi custody; that they faced the risk of a flagrant denial of a fair trial before the IHT; and that they faced a real risk of the death penalty. Each of these claims relied upon an application of the *Soering* principle.²⁸

The problem of torture in Iraqi-run detention facilities is serious and notorious.²⁹ Generally, torture occurs in pre-trial or preventive detention by Interior Ministry forces, with Ministry of Justice places of detention regarded as giving rise to fewer instances and better oversight of treatment. Nevertheless, the problem of torture is systematic.³⁰ The UK government led evidence indicating that it was given assurances that the detainees would be held in specific Ministry of Justice facilities, and also led evidence (based on MNF and Iraqi Human Rights Ministry monitoring reports)³¹ that the particular facilities in which they would be held would treat them in conformity with norms prohibiting torture and inhuman treatment.³² The court concluded that these assurances — given by Iraqi Deputy Minister of Justice Posho Ibrahim Ali Daza'ayee — were reliable,³³ and that the expert evidence established a satisfactory level of treatment in the facilities where the

²⁷ The Court of Appeal considered these questions in the alternative, but did not strictly need to because it had found that the applicants were not within jurisdiction. The Court of Appeal largely adopted the factual findings of the Divisional Court on the questions concerning the risk of mistreatment, the risk of an unfair trial and the death penalty.

²⁸ See Divisional Court decision, *supra* note 6, §§ 45-46.

²⁹ See, eg, Alice Fordham, 'In Iraq's Prisons, A Culture of Abuse,' *The Christian Science Monitor*, 13 September 2009, <http://www.csmonitor.com/2009/0912/p08s01-wome.html>. (visited 13 September 2009)

³⁰ See generally Human Rights Watch, *The New Iraq? Torture and Ill-Treatment in Iraqi Custody*, 24 January 2005, available at <http://www.hrw.org/en/reports/2005/01/24/new-iraq> (visited 11 September 2009). See also various Human Rights Reports of the United Nations Assistance Mission in Iraq, 2004-2008, at <http://www.uniraq.org/docsmaps/undocuments.asp#HRReports> (visited 11 September 2009).

³¹ The system of inspections was instituted during 2005, after several high profile reports of torture of detainees.

³² See Divisional Court decision, *supra* note 6, §§ 181-192.

³³ The judgment of reliability was based on evidence from a UK Embassy official who stated that Mr. Daza'ayee was 'was trustworthy and reliable and has a long history of fulfilling his promises'. (§ 168).

Iraqi government promised to hold the detainees. Accordingly, no real risk of torture or cruel treatment was established in the court's view.

Despite referring to European Court of Human Rights jurisprudence concerning the reliance upon assurances of humane treatment,³⁴ the court did not reflect upon whether the systematic problem of torture in Iraq should have cast doubt on the reliability of the assurances of humane treatment. While the expert evidence concerning conditions in Ministry of Justice facilities is consistent with other country information, the question remains whether the applicants' status as high-ranking former Ba'ath Party officials and Sunnis may render them susceptible to mistreatment in a context where security agencies are heavily infiltrated with sectarian militia. While it may be true that the assurances were given by an official regarded as reliable by UK embassy staff, the ability of the Ministry of Justice to deliver on assurances in the weak institutional reality of contemporary Iraq is open to question. Moreover, although the assurances included a promise of access-at-will to the detainees by UK officials, no evidence was led as to whether and how UK officials might monitor the treatment of the detainees. All of these factors seem relevant to the evaluation of whether the assurances can be relied upon, particularly in light of the European Court's cautionary attitude towards assurances obtained from states where torture is 'endemic or persistent'.³⁵

The applicants additionally claimed that any trial conducted by the IHT would fall so far short of internationally-recognized fair trial standards that it would amount to a flagrant denial of Article 6 rights. They based their contention on the record of the court in its first trial, the *Al-Dujail* case (in which defendants included former President Saddam Hussein) and its second trial, the *Anfal* case. Both of these cases were attended by various procedural and substantive irregularities, and it seems clear that the *Dujail* case failed to meet essential fair trial guarantees. The IHT in that case failed to ensure the defendant's right to equality of arms, failed to ensure the safety of defence counsel,³⁶ and also suffered direct interference with its independence through the removal of several

³⁴ The Divisional Court referred to *Ismoilov v Russia* (Application No. 2947/06, judgment of 28 April 2008) and *Ryabkin v Russia* (Application No. 8320/04, judgment of 19 June 2008.)

³⁵ See *Ismoilov*, § 127.

³⁶ 4 defence counsel were killed and 1 other badly injured during the *Dujail* trial.

judges due to the intervention of the De-Baathification Commission.³⁷ There is also some suggestion that a judge was removed from deliberations just before the issuance of the trial judgment, because he was deemed too ‘soft’ on the defendants.³⁸ Both the trial and appeal judgments in the *Dujail* case contained serious errors of law, and the appeal court in particular failed to engage in a genuine review.³⁹ In the result, 4 defendants were executed after an unfair trial. There is some evidence that certain institutional problems were remedied in the *Anfal* trial, but those proceedings were marred by a blatant instance of executive interference in the independence of the court. After in-court comments perceived to be ‘too lenient’ to defendant Saddam Hussein by the presiding judge, the Iraqi Council of Ministers removed the judge from the case under powers granted in Article 4(4) of the IHT Statute.⁴⁰ The unfettered discretion of the ministers to transfer a judge off a particular case also suggests that the IHT Statute does not adequately protect the independence and impartiality of its judges.

The UK government responded to these concerns by tendering the evidence of a US advisor to the IHT, who had worked with the IHT on a daily basis since May 2007.⁴¹ The applicants tendered evidence from William Wiley, a former adviser to the IHT’s Defence Office, who worked at the court between March 2006 and March 2008. Mr. Wiley was closely involved with proceedings in the both the *Dujail* and *Anfal* trials. In his evidence, Wiley largely echoed the findings of Human Rights Watch’s report on the *Dujail* trial and concluded that the IHT could not meet fair trial standards. The government’s witness, Mr. Spillers, contended that the IHT’s functioning had greatly improved since March 2008; that during 2008 no defence attorneys or witnesses had been kidnapped or killed; that the court’s provision of security for defence witnesses had improved; and that the independence of the IHT was no longer threatened by the De-

³⁷ See generally, Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal*, <http://www.hrw.org/en/reports/2006/11/19/judging-dujail> (visited 11 September 2009).

³⁸ See J. Burns, ‘Western Lawyers Say Iraq Discarded Due Process in Hussein Trial’, *New York Times*, 24 September 2008, at <http://www.nytimes.com/2008/09/25/world/middleeast/25trial.html> (visited 11 September 2009).

³⁹ See N. Bhuta, ‘Fatal Errors: The Trial and Appeal Judgments in the *Dujail* Case’, 6 *Journal of International Criminal Justice* (2008) 39-65.

⁴⁰ See Human Rights Watch, ‘Removal of Judge a Grave Threat to Independence of Genocide Court’, 19 September 2006, at <http://www.hrw.org/en/news/2006/09/18/removal-judge-grave-threat-independence-genocide-court> (visited 11 September 2009).

⁴¹ Divisional Court decision, *supra* note 6, § 105.

Baathification Commission because those judges who may have been subject to ‘De-Baathification’ are no longer on the court. The Divisional Court accepted Mr. Spillers’ evidence and concluded that there had been ‘significant improvements’ to the functioning of the IHT.⁴²

The Divisional Court’s analysis of these questions was of course limited by the evidence before it. In particular, the applicants did not adduce evidence concerning the functioning of the IHT after March 2008, and thus could not directly meet Mr. Spillers’ claims that there had been vast improvements since the end of Mr. Wiley’s work at the IHT. However, the Divisional Court failed to adequately confront the concerns about the independence of the IHT. It did not reflect on the fact that the IHT Statute confers upon the Executive the power to remove judges at will — and that the Executive has exercised this power. Nor did the Divisional Court truly grasp the implications of the De-Baathification Commission’s activities. To accept Mr. Spillers’ claim that those judges at risk of being removed have been removed is to beg the question of whether this *demonstrates* that interference with the service of IHT judges has been extensive and that a climate of fear may have been established. Indeed, the widespread removal or threatening of judges by the De-Baathification Commission was often based on little more than allegation, allowing the mere *threat* of De-Baathification to function as a means of intimidation.⁴³ Hence, the facts suggest that the IHT lacks the structural independence needed to qualify as an independent tribunal; if its presumption of independence is thereby lifted, it is difficult to see how it can conduct a fair trial. To be tried before a court which cannot benefit from a presumption of independence is a flagrant violation of fair trial rights.⁴⁴

Finally, the applicants claimed that there was a real risk that the death penalty would be imposed upon them if they were convicted by the IHT. Iraq has not abolished the death penalty and it is widely applied for serious crimes such as homicide.⁴⁵ The IHT

⁴² Divisional Court, *supra* note 6, §§ 140-141.

⁴³ See the discussion in *Judging Dujail*, at 39-40, where one judge describes De-Baathification as a ‘sword at the necks’ of judges.

⁴⁴ See the discussion in *Bajinja and Ors v The Government of Rwanda and Secretary of State for the Home Department*, [2009] EWHC 770, § 121 (Divisional Court).

⁴⁵ A recent briefing paper by Amnesty International concluded that Iraq now has 1000 people on death row, with over 60 sentenced to death this year. Amnesty contends that Iraqi criminal trials fail to meet fair trial standards, and that the death penalty is often imposed based on confessions given in police custody.

has itself imposed capital sentences on at least one defendant in all of its cases thus far. The United Kingdom has ratified Protocol 13 to the Convention, and has incorporated Protocol 13's abolition of the death penalty into domestic law. The Divisional Court accepted the applicant's contention that they would face a substantial risk of being condemned to death if convicted by the IHT, and that their transfer would breach their rights under Protocol 13.⁴⁶ The court was then required to confront the question of whether the applicants' Convention right not to be subjected to the death penalty related to wider international law principles concerning Iraq's sovereignty over its territory and its nationals, and whether these principles somehow modified or abridged the applicants' specific convention right.

5. The Question of Non-refoulement, the Death Penalty and 'Diplomatic Asylum'

If *Al-Saadoon* had been an extradition case, where the applicants were in the UK's sovereign territory, there is little question that the substantial risk of the death penalty would have precluded their return to Iraq. However, in this case, the applicants were Iraqi nationals on Iraqi territory, subject to the custody and control of British forces acting pursuant to a Security Council resolution and also under Iraqi laws. Does this scenario alter the application of *Soering*-type principles of non-refoulement?⁴⁷ No court has confronted this exact question.⁴⁸

How one answers this question depends in part on how one frames it. The Divisional Court approached the question as one of *competing* international law obligations. On the one hand, the Convention imposed upon the UK an obligation not to transfers persons to face the death penalty. On the other hand, the court concluded that because these were Iraqi nationals on Iraqi territory and wanted for crimes committed in

Accused often claim that the confessions are extracted by torture. See Amnesty International, *A Thousand People Face the Death Penalty in Iraq*, 1 September 2009, MDE 14/020/2009.

⁴⁶ Divisional Court, *supra* note 6, § 159. The Court of Appeal accepted this conclusion, at § 22 (*supra* note 6).

⁴⁷ For an argument that there is no difference, see Droege, *supra* note 9, at 694.

⁴⁸ In the United States Supreme Court decision of *Munaf v Geren* 553 U.S. _ (2008) the majority concluded that Iraq had a 'sovereign right' to prosecute Omar and Munaf for crimes committed on its soil and violations of its own laws. Omar and Munaf were accused of terrorist acts in Iraq and were sought by Iraqi courts, but were held in US custody. They had petitioned the US Supreme Court for habeas corpus and an injunction restraining their transfer due to the risk of torture. The majority held that to release Omar and Munaf would 'impermissibly interfere with Iraq's "exclusive jurisdiction" to punish offenses against its laws committed within its borders.' (at page 20 of the Slip Opinion).

Iraq, Iraq had a sovereign *right* to demand their transfer into Iraqi custody. The UK had a corresponding international law *duty* to respect Iraq's territorial sovereignty and its entitlement to non-intervention into matters within its own jurisdiction.⁴⁹ If framed in this way, there appears to be a conflict between the UK's human rights obligations and the norms of non-intervention: the former imposes a duty against transfer, while the latter appears to impose a duty to comply with a demand for transfer.

The Divisional Court's answer to the apparent conflict of norms (and indeed, the way it framed the whole issue) was conditioned by the earlier UK court decision of *B and Ors v Secretary of State for the Foreign and Commonwealth Office*.⁵⁰ In that case, 2 juvenile Afghan asylum seekers escaped from long-term immigration detention in Australia, and entered the British Consulate in Melbourne claiming refuge from the risk of prolonged arbitrary detention.⁵¹ They were later returned to the custody of Australian immigration authorities (against their will), and brought suit in UK courts claiming that their Convention rights had been violated by the transfer. The court accepted their contention that they were 'within jurisdiction' by virtue of being inside the UK consulate. However, the court in *B* also accepted that the UK's obligations to the children was conditioned by the fact that they were within Australian territory and were fugitives from Australian laws. The court treated the claim for protection under the ECHR in a UK consulate as analogous to 'diplomatic asylum' in general international law, and held that (like diplomatic asylum):

the duty to provide refuge can only arise under the [European] Convention where this is compatible with public international law. Where a fugitive is facing risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the [state in which

⁴⁹ Divisional Court, *supra* note 6, §§ 68-74.

⁵⁰ Court of Appeal [2004] EWCA Civ 1344.

⁵¹ At the time, Australia maintained a policy of mandatory immigration detention for all asylum seekers, including children, until the applicant gained a visa, or was deported. As a result, the children in this case had been detained continuously for 18 months in a remote desert detention facility. The High Court of Australia repeatedly upheld the immigration detention regime, and concluded that the government could hold asylum seekers indefinitely if unable to deport them: see *Al-Kateb v Goodwin*, [2004] HCA 37. The United Nations Human Rights Committee has repeatedly concluded that the detention regime amounted to arbitrary detention: see *D & E v Australia*, CCPR/C/87/D/1050/2002, 9 August 2006. The regime of mandatory detention was abolished in late 2007.

the consulate is established] requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of [that state] can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the [requesting] State. Should it be clear ... that the [requesting] State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending State to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment.⁵²

The Divisional Court in *Al-Saadoon and Mufdhi* considered itself bound by this holding,⁵³ and proceeded to apply it to the situation it faced. It held that the UK's duty to transfer the applicants to Iraqi custody would 'fall away'⁵⁴ only if the treatment to which they would be exposed was 'so harsh as to constitute a crime against humanity or ... there is an immediate likelihood of their experiencing serious injury'⁵⁵ Because the court concluded that the applicants did not face a real risk of torture or of a flagrant denial of a fair trial,⁵⁶ the only question was whether the risk of the imposition of the death penalty amounted to sufficiently harsh conduct as to 'trump' the duty to transfer. Given that the death penalty is not uniformly prohibited in international law, the court concluded that the 'the risk that the claimants may be subject to the death penalty does not, therefore, operate to relieve the United Kingdom of its obligations to transfer the claimants into the custody of the Iraqi court.'⁵⁷ In the Court of Appeal, the applicants'

⁵² *B and Ors v Secretary of State for the Foreign and Commonwealth Office*, [2004] EWCA Civ 1344, § 88.

⁵³ Although it expressed doubts about the approach in *B*: at § 92.

⁵⁴ Divisional Court, *supra* note 6, § 94.

⁵⁵ *Ibid.*, § 195.

⁵⁶ It should be noted that court does not expressly indicate whether the risk of an unfair trial would satisfy the requirement of being treatment so harsh as to constitute a crime against humanity, but the implication is that torture, at least, would.

⁵⁷ Divisional Court, *supra* note 6, § 163.

argument that the death penalty per se could amount to a violation of Article 3 ECHR or a crime against humanity was rejected.⁵⁸

The reasoning of the British courts here appears to me to be unsatisfactory on a number of levels. First, the equation of a claim to protection under the ECHR by individuals in British military custody for 6 years, with ‘diplomatic asylum’ seems inappropriate. Indeed, the entire analogy between someone wandering into a foreign embassy and claiming asylum, and 2 individuals in British military custody (accused of war crimes against British soldiers) seems flawed. Hence, it is suggested that the case of *B and ors* should not be regarded as controlling situations arising from the foreign military operations, where individuals come within the jurisdiction of a contracting state because they are detained by that state. Second, it is difficult to find any basis for the court’s conclusion in *B* that someone must fear a ‘crime against humanity’ before the UK’s obligations under the ECHR require it to decline to transfer him or her to the custody of the state in which the military activities are taking place. The risk of single act of torture may not fit the definition of a crime against humanity (in the sense of a widespread or systematic attack against a civilian population) but is surely a serious enough violation of international law to justify declining a transfer.

More fundamentally, I would question whether refusing to transfer an individual where they are at risk of violation of a *commonly binding* human rights norm genuinely amounts to a ‘conflict’ with the norms of jurisdictional sovereignty in all cases. What is to be considered within the ‘exclusive jurisdiction’ of a state is, of course, a question of international law.⁵⁹ Where both the UK and Iraq are bound by a treaty prohibiting torture,⁶⁰ and where the interpretation of the treaty obligation includes protection against transfer to prevent the risk of torture,⁶¹ it is difficult to see how the question of how to deal with a person facing such a risk is a matter within the reserved domain of the requesting state — even if the person is on the requesting state’s territory but in custody of another state’s military. It should not matter that the operative obligation upon the UK

⁵⁸ Court of Appeal decision, *supra* note 6, §§ 64-71.

⁵⁹ *Morocco and Tunis Nationality Decrees*, (1923) PCIJ Series B, No.4, p.24.

⁶⁰ Iraq has ratified the ICCPR, but not the Convention against Torture.

⁶¹ See Human Rights Committee, General Comment 31, §§ 10 and 12, where the committee emphasizes that non-refoulement obligations apply to all persons within the control of the state, including within the control of their armed forces.

here would derive from the ECHR (which does not bind Iraq), as there is equivalent common norm between the UK and Iraq under the ICCPR. Hence, if this reasoning is followed, one does not reach a ‘conflict’ of norms of the kind presumed by the UK courts following *B*. A similar analysis would apply where the individual faces a risk of the application of the death penalty after an unfair trial, as the common norm protects the right to life. There is no need, in my view, to have recourse to the idiosyncratic notion that the feared treatment must amount to a ‘crime against humanity’ in order to permit one state to refuse to handover the individual.

Of course, in respect of the application of the death penalty per se, there is no common normative standard between the UK and Iraq. The UK is abolitionist (as Protocol 13 requires), and Iraq is not. Does this mean there is a conflict between the UK’s treaty obligation and Iraq’s demand for the custody of its two nationals, held within its own territory? In the abstract, this seems possible. But one question never raised in these proceedings is whether it is truly correct to contend that Iraq exercises *exclusive* adjudicative jurisdiction over the applicants. Certainly, Iraq has a very strong link with them (by virtue of their nationality and the *locus delicti*), and all other things being equal it could reasonably claim to be the proper forum for their prosecution. It is noteworthy, however, that the crime (wanton killing of someone *hors de combat*) is one which attracts universal jurisdiction under the Geneva Conventions, and which the UK could prosecute under its *Geneva Conventions Act*.⁶² Had the UK initiated their own prosecutions, they would have a colorable claim to adjudicative jurisdiction and could arguably have reached a compromise with the Iraqi government to try the applicants in the UK. But this would have required a degree of political will which appeared to be missing.

6. Conclusion

With a merits determination pending before the European Court of Human Rights, it remains to be seen how that court will deal with the UK government’s contention that it had no choice in international law but to accede to the Iraqi demands after the expiration of the Security Council mandate on 31 December 2008. As this note has tried to show,

⁶² *Geneva Conventions Act* 1957, ss.1 and 1A. Of course, given that the victims were British nationals, there was an additional jurisdictional link with the UK.

the issues are indeed complex and novel, and there remain several interpretive possibilities for framing the legal questions. It has been argued here that the approach of the UK courts unnecessarily widens the scope of potential ‘conflicts’ between human rights norms and the principle of non-intervention, and that the discussion of ‘diplomatic asylum’ is a distraction. It has also been argued that the UK courts’ analysis of the risks of torture and of an unfair trial faced by the applicants leaves much to be desired, appearing to discount the fragile and highly politicized state of Iraqi institutions.

7. Post-script

According to news reports, on 11 September 2009, charges against Al-Saadoon and Mufdhi were dismissed by the IHT. It is not clear on what basis this dismissal occurred. The dismissal is being appealed by the Prosecutor. Ironically, it appears that the UK might have had a better prospect of successfully (and fairly) prosecuting the deaths of its two soldiers if it had chosen to try Al-Saadoon and Mufdhi itself.