

ECHR, Al-Skeini et al. v. UK

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N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

ECHR Grand Chamber: Case of Al-Skeini and others v. the United Kingdom

[Source: Al-Skeini and others v. the United Kingdom, European Court of Human

Rights, Grand Chamber, Application no. 55721/07, Judgment, Strasbourg, 7 July 2011; references omitted; available on <http://hudoc.echr.coe.int/sites/eng> ^[2]

[...]

PROCEDURE

1. The case originated in an application (no. 55721/07) 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 six Iraqi nationals, Mr Mazin Jum'Aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadil Fayay Muzban, Mr Jabbar Kareem Ali and Colonel Daoud Mousa (“the applicants”), on 11 December 2007.

[...]

3. The applicants alleged that their relatives fell within United Kingdom jurisdiction when killed and that there had been no effective investigation into the deaths, in breach of Article 2 of the Convention.

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

A. The occupation of Iraq 1 May 2003 to 28 June 2004

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

10. On 20 March 2003 a coalition of armed forces under unified command, led by the United States of America with a large force from the United Kingdom and small contingents from Australia, Denmark and Poland, commenced the invasion of Iraq. By 5 April 2003 the British had captured Basrah [...]. Major combat operations in Iraq were declared complete on 1 May 2003.

[...]

3. Legal and political developments in May 2003

12. [...] [T]he occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority to act as a “caretaker administration” until an Iraqi government could be established. It had power, inter alia, to issue legislation. On 13 May 2003 the United States Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the Coalition Provisional Authority with responsibility for the temporary governance of Iraq. [...]

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

14. The United Nations Security Council Resolution 1483 [...] was [...] adopted [...] on 22 May 2003. It provided as follows:

“The Security Council,

[...]

[...] recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority'),

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

[...]

5. Developments between July 2003 and June 2004

15. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority was required to consult with it on all matters concerning the temporary governance of Iraq.

[...]

17. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period (known as the “Transitional Administrative Law”). This provided a temporary legal framework for the administration of Iraq for the transitional period which was due to commence by 30 June 2004 with the establishment of an interim Iraqi government (“the Interim Government”) and the dissolution of the Coalition Provisional Authority.

[...]

6. The transfer of authority to the Interim Government

19. On 28 June 2004 full authority was transferred from the Coalition Provisional Authority to the Interim Government and the Coalition Provisional Authority ceased to exist. [...]

B. United Kingdom armed forces in Iraq May 2003 to June 2004

20. [...] The United Kingdom was given command of the Multinational Division (South East), which comprised the provinces of Al-Basrah, Maysan, Thi Qar and Al-Muthanna, an area of 96,000 square kilometres with a population of 4.6 million. There were 14,500 Coalition troops, including 8,150 United Kingdom troops, stationed in Multinational Division (South East). The main theatre for operations by United Kingdom forces in Multinational Division (South East) were the Al-Basrah and Maysan provinces, with a total population of about 2.75 million people. Just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities.

21. From 1 May 2003 onwards British forces in Iraq carried out two main functions. The first was to maintain security in the Multinational Division (South East) area, in particular in Al-Basrah and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations. The second main function of British troops was the support of the civil administration in Iraq in a variety of ways, from liaison with the Coalition Provisional Authority and Governing Council of Iraq and local government, to assisting with the rebuilding of the infrastructure.

[...]

23. United Kingdom military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1,050 violent attacks against Coalition forces in Multinational Division (South East) since 1 May 2003. The violent attacks consisted of five anti-aircraft attacks, 12 grenade attacks, 101 attacks using improvised explosive devices, 52 attempted attacks using improvised explosive devices, 145 mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. The same records show that, between May 2003 and March 2004, 49 Iraqis were known to have been killed in incidents in which British troops used force.

[...]

E. The deaths of the applicants' relatives

[...]

1. The first applicant

34. The first applicant is the brother of Hazim Jum'aa Gatteh Al-Skeini (“Hazim Al-Skeini”), who was 23 at the time of his death. Hazim Al-Skeini was one of two Iraqis from the Beini Skein tribe who were shot dead in the Al-Majidiyah area of Basrah just before midnight on 4 August 2003 by Sergeant A, the commander of a British patrol.

35. In his witness statement, the first applicant explained that, during the evening in question, various members of his family had been gathering at a house in Al-Majidiyah for a funeral ceremony. In Iraq it is customary for guns to be discharged at a funeral. The first applicant stated that he [...] saw his brother fired upon by British soldiers as he was walking along the street towards the house. According to the first applicant, his brother was unarmed and only about ten metres away from the soldiers when he was shot and killed. Another man with him was also killed. He had no idea why the soldiers opened fire.

36. According to the British account of the incident, the patrol, approaching on foot and on a very dark night, heard heavy gunfire from a number of different points in Al-Majidiyah. As the patrol got deeper into the village they came upon two Iraqi men in the street. One was about five metres from Sergeant A, who was leading the patrol. Sergeant A saw that he was armed and pointing the gun in his direction. In the dark, it was impossible to tell the position of the second man. Believing that his life and those of the other soldiers in the patrol were at immediate risk, Sergeant A opened fire on the two men without giving any verbal warning.

37. The following day, Sergeant A produced a written statement describing the incident. [...] Brigadier Moore was satisfied that the actions of Sergeant A fell within the Rules of Engagement and so he did not order any further investigation.

[...]

2. The second applicant

39. The second applicant is the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant C shortly after midnight on 6 November 2003.

40. [...] She stated that on 5 November 2003, during Ramadan, Muhammad Salim went to visit his brother-in-law at his home in Basrah. At about 11.30 p.m. British soldiers raided the house. They broke down the front door. One of the British soldiers came face-to-face with the second applicant's husband in the hall of the house and fired a shot at him, hitting him in the stomach. The British soldiers took him to the Czech military hospital, where he died on 7 November 2003.

41. According to the British account of the incident, the patrol had received information

[...] that a group of men armed with long-barrelled weapons, grenades and rocket-propelled grenades had been seen entering the house. The order was given for a quick search-and-arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant C entered the house through the front door with two other soldiers and cleared the first room. As he entered the second room he heard automatic gunfire from within the house. When Sergeant C moved forward into the next room by the bottom of the stairs, two men armed with long barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning. Sergeant C believed that his life was in immediate danger. He fired one shot at the leading man, the second applicant's husband, and hit him in the stomach. He then trained his weapon on the second man who dropped his gun. The applicant's family subsequently informed the patrol that they were lawyers and were in dispute with another family of lawyers over the ownership of office premises, which had led to their being subjected to two armed attacks which they had reported to the police, one three days before and one only thirty minutes before the patrol's forced entry.

42. On 6 November 2003 the Company Commander produced a report of the incident. He concluded that the patrol had deliberately been provided with false intelligence by the other side in the feud. Having considered the report and spoken to the Company Commander, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. [...]

3. The third applicant

43. The third applicant is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003 at the Institute of Education in the Al-Maaqal area of Basrah, where the third applicant worked as a night porter and lived with his wife and family.

44. According to the third applicant's witness statement, at about 8 p.m. on the evening in question, he and his family were sitting round the dinner table when there was a sudden burst of machine-gunfire from outside the building. Bullets struck his wife in the head and ankles and one of his children on the arm. The applicant's wife and child were taken to hospital, where his child recovered but his wife died.

45. According to the British account of the incident, the third applicant's wife was shot during a fire-fight between a British patrol and a number of unknown gunmen. When the area was illuminated by parachute flares, at least three men with long-barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers. [...] After about seven to ten minutes the firing ceased and armed people were seen running away. A woman (the third applicant's wife) with a head injury and a child with an arm injury were found when the buildings were searched. Both were taken to hospital.

46. The following morning, the Company Commander produced a report concerning the incident, together with statements from the soldiers involved. After he had considered the report and statements, Colonel G came to the conclusion that the incident fell within the Rules of Engagement and did not require any further Special Investigation Branch investigation. [...]

4. The fourth applicant

47. The fourth applicant is the brother of Waleed Sayay Muzban, aged 43, who was shot and fatally injured on the night of 24 August 2003 by Lance Corporal S in the Al-Maqaal area of Basrah.

48. [...] In his witness statement he stated that his understanding was that his brother was returning home from work at about 8.30 p.m. on the evening in question. He was driving a

minibus [...] near where he and the fourth applicant lived. For no apparent reason, according to the applicant's statement, the minibus “came under a barrage of bullets”, as a result of which Waleed was mortally wounded in the chest and stomach.

49. Lance Corporal S was a member of a patrol carrying out a check around the perimeter of a Coalition military base [...]. [...] Lance Corporal S became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at a slow speed with its headlights dipped. [T]he vehicle was signalled to stop, [...] and Lance Corporal S approached the driver's door and greeted the driver (the fourth applicant's brother). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When Lance Corporal S tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for Lance Corporal S's weapon. Lance Corporal S had to use force to pull himself free. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. Lance Corporal S fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned and again shouted into the rear of the vehicle. He appeared to be reaching for a weapon. Lance Corporal S believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about five aimed shots. As the vehicle sped off, Lance Corporal S fired another two shots at the rear of the vehicle. After a short interval, the vehicle screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip. He was given first aid and then taken to the Czech military hospital where he died later that day or the following day.

50. The Special Investigation Branch commenced an investigation on 29 August 2003. [...] Lance Corporal S was not, however, questioned. Since he was suspected by the Special

Investigation Branch of having acted contrary to the Rules of Engagement, it was Special Investigation Branch practice not to interview him until there was enough evidence to charge him. [...]

51. On 29 August 2003 Colonel G sent his initial report concerning the incident to Brigadier Moore. [...] Colonel G produced a further report dated 12 September 2003, in which he dealt with the various queries and concluded that a Special Investigation Branch investigation was no longer required. After discussing the matter again with his Deputy Chief of Staff and having taken further legal advice, Brigadier Moore concluded that the case fell within the Rules of Engagement.

52. [...] The Special Investigation Branch investigation was terminated on 23 September 2003. [...]

53. Following the fourth applicant's application for judicial review [...], the case was reviewed by senior investigation officers in the Special Investigation Branch and the decision was taken to re-open the investigation. [...]

54. [...] Advice was obtained from an independent senior counsel, who advised that there was no realistic prospect of conviction, since there was no realistic prospect of establishing that Lance Corporal S had not fired in self-defence. The file was sent to the Attorney General, who decided not to exercise his jurisdiction to order a criminal prosecution.

5. The fifth applicant

55. The fifth applicant is the father of Ahmed Jabbar Kareem Ali, who died on 8 May 2003, aged 15.

56. [...] [O]n 8 May 2003 his son did not return home at 1.30 p.m. as expected. The fifth applicant went to look for him at Al-Saad Square, where he was told that British soldiers had arrested some Iraqi youths earlier in the day. The applicant [...] was contacted the following morning by A, another young Iraqi, who told that applicant that he, the applicant's son and two others had been arrested by British soldiers the previous day, beaten up and forced into the waters of the Shatt Al-Arab. [...] Having spent several days waiting and searching, the applicant found his son's body in the water on 10 May 2003.

57. [...] The applicant decided to bury his son, since in accordance with Islamic practice burial should take place within 24 hours of death.

58. About 10 to 15 days after his son's funeral, [...] the applicant met with Special Investigation Branch officers at the Presidential Palace and was informed that an investigation would be commenced.

59. [...] At least a month after the incident, the investigators went to Al-Saad Square and retrieved clothing belonging to the applicant's son and to the other young men who had been arrested at the same time. At the end of the 40-day mourning period, the applicant consented to his son's body being exhumed for post mortem examination, but it was not possible at that point to establish either whether Ahmed had been beaten prior to death or what had been the cause of death. The applicant contends that he was never given an explanation as to the post mortem findings and that he was not kept fully informed of the progress of the investigation in general, since many of the documents he was given were in English or had been badly translated into Arabic.

60. The applicant claims that eighteen months elapsed after the exhumation of his son's body during which time he had no contact with the investigators. In August 2005 he was informed that four soldiers had been charged with manslaughter and that a trial would take

place in England. The court martial was held between September 2005 and May 2006. By that time, three of the seven soldiers who had been accused of his homicide had left the Army, and a further two were absent without leave. [...] The applicant and A gave evidence to the court-martial in April 2006. [...] [A] was not able to identify the defendants as the soldiers involved. The defendants denied any responsibility for the death and were acquitted because A's evidence was found to be inconsistent and unreliable.

[...]

6. The sixth applicant

63. The sixth applicant is a Colonel in the Basrah police force. His son, Baha Mousa, was aged 26 when he died whilst in the custody of the British Army, three days after having been arrested by soldiers on 14 September 2003.

64. [...] [H]is son had been working as a receptionist at the Ibn Al-Haitham Hotel in Basrah. Early in the morning of the 14 September, the applicant went to the hotel to pick his son up from work. On his arrival he noticed that a British unit had surrounded the hotel. The applicant's son and six other hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. The applicant expressed his concern to the lieutenant in charge of the operation, who reassured him that it was a routine investigation that would be over in a couple of hours. On the third day after his son had been detained, the sixth applicant was visited by a Royal Military Police unit. He was told that his son had been killed in custody at a British military base in Basrah. He was asked to identify the corpse. The applicant's son's body and face were covered in blood and bruises; his nose was broken and part of the skin of his face had been torn away.

65. One of the other hotel employees who were arrested on 14 September 2003 stated [...]

that, once the prisoners had arrived at the base, the Iraqi detainees were hooded, forced to maintain stress positions, denied food and water and kicked and beaten. During the detention, Baha Mousa was taken into another room, where he could be heard screaming and moaning.

66. Late on 15 September 2003 Brigadier Moore, who had taken part in the operation in which the hotel employees had been arrested, was informed that Baha Mousa was dead and that other detainees had been ill-treated. The Special Investigation Branch was immediately called in to investigate the death. [...] Baha Mousa was found to have 93 identifiable injuries on his body and to have died of asphyxiation. Eight other Iraqis had also been inhumanely treated, with two requiring hospital treatment. The investigation was concluded in early April 2004 [...].

68. On 19 July 2005 seven British soldiers were charged with criminal offences in connection with Baha Mousa's death. On 19 September 2006, at the start of the court-martial, one of the soldiers pleaded guilty to the war crime of inhumane treatment but not guilty to manslaughter. On 14 February 2007 charges were dropped against four of the seven soldiers and on 13 March 2007 the other two soldiers were acquitted. On 30 April 2007 the soldier convicted of inhumane treatment was sentenced to a year's imprisonment and dismissal from the Army.

[...]

71. In a written statement given in Parliament on 14 May 2008 the Secretary of State for Defence announced that there would be a public inquiry into the death of Baha Mousa. [...] At the time of adoption of the present judgment, the Inquiry had concluded the oral hearings but had not yet delivered its report.

[...]

II. RELEVANT INTERNATIONAL LAW MATERIALS

[...]

C. The duty to investigate alleged violations of the right to life in situations of armed conflict and occupation under international humanitarian law and international human rights law

92. Article 121 of the Third Geneva Convention provides that an official enquiry must be held by the detaining power following the suspected homicide of a prisoner of war. Article 131 of the Fourth Geneva Convention provides:

“Every death or serious injury of an internee, caused or suspected to have been caused by a sentry, another internee or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power. A communication on this subject shall be sent immediately to the Protection Power. The evidence of any witnesses shall be taken, and a report including such evidence shall be prepared and forwarded to the said Protection Power. If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all necessary steps to ensure the prosecution of the person or persons responsible.”

The Geneva Conventions also place an obligation on each High Contracting Party to investigate and prosecute alleged grave breaches of the Conventions, including the wilful killing of protected persons (Articles 49 and 50 of the First Geneva Convention; Articles 50-51 of the Second Geneva Convention; Articles 129 and 130 of the Third Geneva Convention; Articles 146 and 147 of the Fourth Geneva Convention).

93. In Report no. E/CN.4/2006/53 on Extrajudicial, Summary or Arbitrary Executions (8 March 2006), the United Nations Special Rapporteur, Philip Alston, observed in connection with the right to life under Article 6 of the International Covenant on Civil and Political Rights in situations of armed conflict and occupation [...]:

“36. Armed conflict and occupation do not discharge the State's duty to investigate and prosecute human rights abuses. [...] It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate - this would eviscerate the non-derogable character of the right to life - but they may affect the modalities or particulars of the investigation. In addition to being fully responsible for the conduct of their agents, in relation to the acts of private actors States are also held to a standard of due diligence in armed conflicts as well as peace. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting an autopsy may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

[...]

A. Admissibility

[...]

B. The merits

1. Jurisdiction

[...]

143. In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court takes as its starting point that, on 20 March 2003, the United Kingdom together with the United States of America and their coalition partners, through their armed forces, entered Iraq with the aim of displacing the Ba'ath regime then in power. This aim was achieved by 1 May 2003, when major combat operations were declared to be complete and the United States and the United Kingdom became Occupying Powers within the meaning of Article 42 of the Hague Regulations.

144. As explained in the letter dated 8 May 2003 sent jointly by the Permanent Representatives of the United Kingdom and the United States to the President of the United Nations Security Council, the United States and the United Kingdom, having displaced the previous regime, created the Coalition Provisional Authority “to exercise powers of government temporarily”. One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the United States and the United Kingdom through the Coalition Provisional Authority was the provision of security in Iraq, including the maintenance of civil law and order. The letter further stated that “The United States, the United Kingdom and Coalition partners, working through the Coalition Provisional Authority, shall inter alia, provide for security in and for the provisional administration of Iraq, including by ... assuming immediate control of Iraqi institutions responsible for military and security matters”.

[...]

146. [...] [T]he Security Council in Resolution 1483, adopted on 22 May 2003 [...] gave further recognition to the security role which had been assumed by the United States and

the United Kingdom when, in paragraph 4, it called upon the Occupying Powers “to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...”.

147. During this period the United Kingdom had command of the military division Multinational Division (South East), which included the province of Al-Basrah, where the applicants' relatives died. From 1 May 2003 onwards the British forces in Al-Basrah took responsibility for maintaining security and supporting the civil administration. Among the United Kingdom's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations.

148. In July 2003 the Governing Council of Iraq was established. The Coalition Provisional Authority remained in power, although it was required to consult with the Governing Council. [...] United Nations Security Council Resolution 1546, adopted on 8 June 2004, endorsed “the formation of a sovereign Interim Government of Iraq ... which will assume full responsibility and authority by 30 June 2004 for governing Iraq”. In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government from the Coalition Provisional Authority, which then ceased to exist.

(iii) Conclusion as regards jurisdiction

149. It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority

and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.

150. Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on 8 May 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.

2. Alleged breach of the investigative duty under Article 2

151. The applicants did not complain before the Court of any substantive breach of the right to life under Article 2. Instead they complained that the Government had not fulfilled its procedural duty to carry out an effective investigation into the killings.

Article 2 of the Convention provides 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.”

[...]

(b) The Court's assessment

(i) General principles

[...]

162. [...] [T]he Court's approach must be guided by the knowledge that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective. Article 2, which protects the right to life and sets out the circumstances when

deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention. No derogation from it is permitted under Article 15, “except in respect of deaths resulting from lawful acts of war”. Article 2 covers both intentional killing and also the situations in which it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c).

163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, 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, inter alia, agents of the State. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life.

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict. It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised

violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed, concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.

[...]

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

168. The Court takes as its starting point the practical problems caused to the investigatory authorities by the fact that the United Kingdom was an Occupying Power in a foreign and hostile region in the immediate aftermath of invasion and war. These practical problems included the breakdown in the civil infrastructure, leading inter alia to shortages of local pathologists and facilities for autopsies; the scope for linguistic and cultural misunderstandings between the occupiers and the local population; and the danger inherent in any activity in Iraq at that time. As stated above, the Court considers that in circumstances such as these the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators.

169. Nonetheless, the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was particularly important that the investigating authority was, and was seen to be, operationally independent of the military chain of command.

170. It was not in issue in the first, second and fourth applicants' cases that their relatives were shot by British soldiers, whose identities were known. The question for investigation

was whether in each case the soldier fired in conformity with the Rules of Engagement. In respect of the third applicant, Article 2 required an investigation to determine the circumstances of the shooting, including whether appropriate steps were taken to safeguard civilians in the vicinity. As regards the fifth applicant's son, although the Court has not been provided with the documents relating to the court-martial, it appears to have been accepted that he died of drowning. It needed to be determined whether British soldiers had, as alleged, beaten the boy and forced him into the water. In each case eye-witness testimony was crucial. It was therefore essential that, as quickly after the event as possible, the military witnesses, and in particular the alleged perpetrators, should have been questioned by an expert and fully independent investigator. Similarly, every effort should have been taken to identify Iraqi eye witnesses and to persuade them that they would not place themselves at risk by coming forward and giving information and that their evidence would be treated seriously and acted upon without delay.

171. It is clear that the investigations into the shooting of the first, second and third applicants' relatives fell short of the requirements of Article 2, since the investigation process remained entirely within the military chain of command and was limited to taking statements from the soldiers involved. Moreover, the Government accept this conclusion.

172. As regards the other applicants, although there was an investigation by the Special Investigation Branch into the death of the fourth applicant's brother and the fifth applicant's son, the Court does not consider that this was sufficient to comply with the requirements of Article 2. It is true that the Royal Military Police, including its Special Investigation Branch, had a separate chain of command from the soldiers on combat duty whom it was required to investigate. However, [...] the Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. [...] The Court considers [...] that the fact that the Special Investigation Branch was not “free to decide for itself when to start and cease an investigation” and did not report “in the first

instance to the [Army Prosecuting Authority]” rather than to the military chain of command, meant that it could not be seen as sufficiently independent from the soldiers implicated in the events to satisfy the requirements of Article 2.

173. It follows that the initial investigation into the shooting of the fourth applicant's brother was flawed by the lack of independence of the Special Investigation Branch officers. [...] [T]he investigation was terminated while still incomplete. It was subsequently reopened, some nine months later [...]. The Court considers that the long period of time that was allowed to elapse before Lance Corporal S was questioned about the incident, combined with the delay in having a fully independent investigator interview the other military witnesses, entailed a high risk that the evidence was contaminated and unreliable by the time the Army Prosecuting Authority came to consider it. Moreover, it does not appear that any fully independent investigator took evidence from the Iraqi neighbours who the applicant claims witnessed the shooting.

174. While there is no evidence that the military chain of command attempted to intervene in the investigation into the fifth applicant's son's death, the Court considers that the Special Investigation Branch investigators lacked independence for the reasons set out above. In addition, no explanation has been provided by the Government in respect of the long delay between the death and the court-martial. It appears that the delay seriously undermined the effectiveness of the investigation, not least because some of the soldiers accused of involvement in the incident were by then untraceable [...]. Moreover, [t]here appears to be at least prima facie evidence that the applicant's son, a minor, was taken into the custody of British soldiers who were assisting the Iraqi police to take measures to combat looting and that, as a result of his mistreatment by the soldiers, he drowned. In these circumstances, the Court considers that Article 2 required an independent examination, accessible to the victim's family and to the public, of the broader issues of State responsibility for the death, including the instructions, training and supervision given to soldiers undertaking tasks such

as this in the aftermath of the invasion.

175. In the light of the foregoing, the Court does not consider that the procedural duty under Article 2 has been satisfied in respect of the fifth applicant. Although he has received a substantial sum in settlement of his civil claim, together with an admission of liability on behalf of the Army, there has never been a full and independent investigation into the circumstances of his son's death. [...]

176. In contrast, the Court notes that a full, public inquiry is nearing completion into the circumstances of the sixth applicant's son's death. In the light of this inquiry, the Court notes that the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under Article 2. The Court therefore accepts the Government's objection in respect of the sixth applicant. 77. In conclusion, the Court finds a violation of the procedural duty under Article 2 of the Convention in respect of the first, second, third, fourth and fifth applicants.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Rejects* the Government's preliminary objections regarding attribution and non-exhaustion of domestic remedies;
2. *Joins* to the merits the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and sixth applicants retained victim status;
3. *Declares* the application admissible;

4. *Holds* that the applicants' deceased relatives fell within the jurisdiction of the respondent State and dismisses the Government's preliminary objection as regards jurisdiction;

5. *Holds* that the sixth applicant can no longer claim to be a victim of a violation of the procedural obligation under Article 2 of the Convention;

6. *Holds* that there has been a breach of the procedural obligation under Article 2 of the Convention to carry out an adequate and effective investigation into the deaths of the relatives of the first, second, third, fourth and fifth applicants and dismisses the Government's preliminary objection as regards the victim status of the fifth applicant;

[...]

Discussion

I. Classification of the situation and applicable law

1. (Paras 10-23 and 143-150)
 - a. How would you classify the situation in Iraq starting on 20 March 2003? (GC I-IV, Art. 2 ^[31]) Do you agree with the Court's assessment?
 - b. Considering the situation on the ground, what in your opinion was the law applicable to the use of force in the areas under British control? Do the rules on conduct of hostilities apply to uses of force during occupation or shall they be regulated by human rights law applicable to law enforcement operations? In the present cases?
2. Is international human rights law applicable in armed conflicts? In occupied territories? If yes, how do you determine whether that law or IHL prevails if they are contradictory?

II. The duty to investigate alleged violations of the right to life

3. (Paras 151-177)
 - a. Which component of the right to life is alleged to have been violated in the present case? Why must the state conduct an investigation after the use of lethal force by state authorities?
 - b. What requirements for such an investigation are set by the ECHR? (ECHR, Art. 2)
4. (Paras 164, 168 and 169)
 - a. Does the Court examine the applicability of IHL and its relation to international human rights law in the present case? Do you think it should have done so?
 - b. How does the Court take account of the situation of armed conflict in Iraq?
 - c. How would you assess the relation between IHL and international human rights law in the present case?
5. (Para. 150) Which provisions of IHL, if any, have been violated by the British soldiers in the different cases examined by the Court? Did the death of the third applicant's wife during an exchange of fire between British troops and unknown gunmen violate IHL? Did the killing of the fifth applicant's son by drowning him violate IHL? Did the killing of the sixth applicant's son while detained in a British military detention facility violate IHL? What principles of IHL are at stake in each case? Could these deaths involve grave breaches of IHL? (GC IV, Arts 27 ^[4], 131 ^[5] and 147 ^[6]; P I, Arts 48 ^[7], 51 ^[8], 57 ^[9], 75 ^[10] and 85 ^[11]; CIHL, Rules 1 ^[12], 14 ^[13]-15 ^[14] and 89 ^[15])
6. (Paras 168-177)
 - a. Does IHL contain any general obligation to investigate into deaths caused by the use of lethal force by state authorities? Does it contain an obligation to investigate into the deaths of soldiers killed on the battlefield? Of civilians killed in the conduct of hostilities? Incidentally killed during an attack directed at a legitimate target? Of civilians killed during a law enforcement operation in an occupied territory? Of persons who die in detention or internment? Does IHL contain an obligation to conduct investigations into alleged violations of IHL? Into alleged grave breaches of IHL? (GC I, Arts 49 ^[16] and 50 ^[17]; GC II, Arts 50

and 51 ^[19]; GC III, Arts 121 ^[20], 129 ^[21] and 130 ^[22]; GC IV, Arts 131 ^[5], 146 ^[23] and 147 ^[6]; P I, Art. 87 ^[24])

- b. Are the obligations to investigate the same under IHL and under Art. 2 of the ECHR? What are the aims of the investigations under IHL and under the ECHR? Does IHL give any information on the requirements the investigation has to meet? May the ECHR be used to specify these missing requirements under IHL? Do you think the Court would have reached the same conclusion if it had applied the relevant provisions of IHL? (GC I, Arts 49 ^[16] and 50 ^[17]; GC II, Arts 50 ^[18] and 51 ^[19]; GC III, Arts 121 ^[20], 129 ^[21] and 130 ^[22]; GC IV, Arts 131 ^[5], 146 ^[23] and 147 ^[6]; P I, Art. 87 ^[24]; ECHR, Art. 2)
- c. In cases (discussed under a.) IHL does not prescribe an investigation, does the obligation to investigate under the ECHR prevail?
- d. In which of the different cases examined by the Court did an obligation to investigate exist under IHL? In which did it not exist, but the obligation under the ECHR should in your view apply? In which cases should in your view no obligation to investigate exist?

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[12] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1

[13] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14

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[15] https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule89

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