**Trinity Term**
**[2010] UKSC 29**
*On appeal from: [2009] EWCA Civ 441*

# JUDGMENT

# R (on the application of Smith) (FC) (Respondent) *v* Secretary of State for Defence (Appellant) and another

**before**

**Lord Phillips, President**
**Lord Hope, Deputy President**
**Lord Rodger**
**Lord Walker**
**Lady Hale**
**Lord Brown**
**Lord Mance**
**Lord Collins**
**Lord Kerr**

## JUDGMENT GIVEN ON

## 30 June 2010

**Heard on 15, 16 and 17 March 2010**

*Appellant*
James Eadie QC
Pushpinder Saini QC
Sarah Moore
David Barr
(Instructed by Treasury Solicitor)

*Respondent*
Dinah Rose QC

Jessica Simor

(Instructed by Hodge Jones & Allen)

*Intervener*
Michael Beloff QC
Raza Husain QC
Elizabeth Prochaska
(Instructed by Equality and Human Rights Commission)

**LORD PHILLIPS**

*Introduction*

1. Private Jason Smith joined the Territorial Army in 1992, when he was 21 years old. In June 2003 he was mobilised for service in Iraq. On 26 June 2003, after a brief spell in Kuwait for purposes of acclimatisation, he arrived at Camp Abu Naji, which was to be his base in Iraq. From there he was moved to an old athletics stadium some 12 kilometres away, where about 120 men were billeted. By August temperatures in the shade were exceeding 50 degrees centigrade. On 9 August he reported sick, saying that he could not stand the heat. Over the next few days he was employed on various duties off the base. On the evening of 13 August he was found collapsed outside the door of a room at the stadium. He was rushed by ambulance to the medical centre at Camp Abu Naji but died almost immediately of hyperthermia, or heat stroke.

2. Private Smith's body was brought back to this country and an inquest was held. The inquest suffered from procedural shortcomings. His mother commenced judicial proceedings in which she sought an order quashing the coroner's inquisition. In bringing her claim Mrs Smith relied upon the Human Rights Act 1998. She contended that throughout the time that her son was in Iraq the United Kingdom owed him a duty to respect his right to life under article 2 of the European Convention on Human Rights and that the inquest also had to satisfy the procedural requirements of article 2. On more narrow grounds than these the Secretary of State conceded that Mrs Smith was entitled to the relief that she sought, and a new inquest is to be held. Two issues of public importance have been raised by her claim. Is a soldier on military service abroad in Iraq subject to the protection of the Human Rights Act 1998 ("the HRA") when outside his base? I shall call this "the jurisdiction issue". If so, must the death of such a soldier be the subject of an inquest that satisfies the procedures that article 2 of the European Convention on Human Rights ("the Convention") implicitly requires where there is reason to believe that a death may be attributable to default on the part of a public authority? I shall call this "the inquest issue". These issues are largely academic inasmuch as the Secretary of State has conceded that a fresh inquest must be held in relation to Private Smith's death that satisfies those Convention requirements – a concession which does not, of course, bind the Coroner. The courts below have nonetheless been prepared to entertain them because of their importance and this court has done the same.

***The jurisdiction issue***

3. Mrs Smith succeeded on this issue, both at first instance and before the Court of Appeal.

4. Section 6(1) of the HRA provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

Section 1 defines the Convention rights as including articles 2 to 12 and 14 of the Convention.

5. It is common ground that the HRA is capable of applying outside the territorial jurisdiction of the United Kingdom, but that section 6(1) will only be infringed by conduct that the Strasbourg Court would hold to have violated a Convention right. This was determined by the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153. It follows that, in order to decide whether conduct has infringed section 6(1) of the HRA it is necessary to consider the ambit of application of the Convention. More particularly, no claim can succeed under the HRA unless there has been a breach of a Convention right of a person *within the jurisdiction* of the United Kingdom that should have been secured pursuant to article 1.

6. Article 1 of the Convention provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

The jurisdiction issue is whether, on the true interpretation of article 1, British troops operating on foreign soil fall within the jurisdiction of the United Kingdom. There has recently grown a small body of authority, both in this country and at Strasbourg, dealing with the application of the Convention to the activities of armed forces on foreign soil. The Grand Chamber sat to consider this question in *Bankovic v United Kingdom* (2001) 11 BHRC 435, which has been recognised both in this country and at Strasbourg as a leading case on the scope of jurisdiction under article 1. I propose to start by considering that case.

*Bankovic*

7. Five of the applicants in *Bankovic* were close relatives of civilians killed by air strikes carried out on a radio and television centre in Belgrade by members of NATO, when intervening in the Kosovo conflict in 1999. The sixth applicant had himself been injured in the raids. The critical issue in relation to admissibility was whether the applicants and their deceased relatives came within the jurisdiction of the respondent States within the meaning of article 1 of the Convention.

8. The applicants founded their case on the reasoning of the Court in *Loizidou v Turkey* (1995) 20 EHRR 99. The Court held in that case that a Greek Cypriot, who claimed in relation to the dispossession of her property in Northern Cyprus, was potentially within the jurisdiction of Turkey for the purposes of article 1 by reason of the fact that Turkey exercised "effective control" of Northern Cyprus. The applicants in *Bankovic* accepted that they could not contend that the action of the member States in bombing Belgrade put them under an obligation in relation to the observance of all of the Convention rights in the area bombed, but argued that they should be held accountable for those rights that did fall within their control, and in particular the right to life of those whom they bombed.

9. The Court applied the principles agreed in the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") to the task of interpreting article 1. Thus it paid primary regard to the natural meaning of the words used, but also took into consideration the *travaux préparatoires* (the "*travaux"*) and State practice. This approach contrasted with the approach that the Strasbourg Court has adopted of treating the Convention as a "living instrument" when considering the manner in which it operates. The Court recognised this at paras 64 and 65 but commented that the scope of article 1 was determinative of "the scope and reach of the entire Convention system of human rights' protection". The Court was indicating that the meaning of article 1, and thus the scope of application of the Convention, could not change over time, and this seems plainly correct as a matter of principle. I shall describe this as "the original meaning principle".

10. The Court approached the natural meaning of "jurisdiction" on the premise that this had to be consonant with the meaning of that word under principles of public international law. Under these principles the jurisdictional competence of a State was primarily territorial. Thus:

> "…article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case…In keeping with the

> essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the Convention." (paras 61 and 67)

11. Thus the Court held that "jurisdiction" in article 1 was not limited to the territory over which a State exercises lawful authority. It extended in exceptional circumstances requiring special justification to other bases of jurisdiction. The difficulty in delineating article 1 jurisdiction arises in identifying and defining the exceptions to territorial jurisdiction.

12. The Court recognised that one such exception arose where a member State had taken effective control of part of the territory of another member State. I shall call this the principle of "effective territorial control". *Loizidou v Turkey* exemplified this jurisdiction. The Court justified this exception by remarking at para 80 that the inhabitants of Northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a contracting State, to fulfil the obligations that it had undertaken under the Convention. Thus the Court appeared to restrict the principle of effective territorial control to the territories of the contracting States.

13. The Court made the following comments about this head of jurisdiction:

> "71. In sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government."

> "80. …In short, the Convention is a multi-lateral treaty operating, subject to article 56 of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the contracting states. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human

> rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."

Article 56 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations the State is responsible. Thus, implicitly and paradoxically, the principle of effective territorial control does not appear to apply automatically to such territories – see also *Bui van Thanh v United Kingdom* (1990) 33 Yearbook of the European Convention on Human Rights 59 at p 61; *Loizidou v Turkey* at paras 86-87; *Yonghong v Portugal* Reports of Judgments and Decisions 1999 – IX, pp 385, 391-392.

14. The Court rejected the suggestion that extra-territorial acts could bring individuals within the jurisdiction for the purposes of some Convention rights but not others. It said at para 75:

> "…the court is of the view that the wording of article 1 does not provide any support for the applicants' suggestion that the positive obligation in article 1 to secure 'the rights and freedoms defined in Section I of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words 'within their jurisdiction' in article 1 and it even goes so far as to render those words superfluous and devoid of any purpose. Had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous articles 1 of the four Geneva Conventions of 1949."

I shall describe this as the "whole package principle".

15. The Court singled out for special mention as an example of an exceptional case of extra-territorial jurisdiction that fell within article 1, the case of *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745. I shall consider this decision in due course.

16. The Court noted a number of other examples of States exercising extra-territorial jurisdiction, implying, I believe, that those affected would be within the jurisdiction of the State in question within the meaning of article 1:

> "Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state."

17. The applicants in *Bankovic* also relied on two admissibility decisions that proceeded on a different basis of article 1 jurisdiction that has been described as "state agent authority", namely *de facto* control by state agents of persons as opposed to territory, *Issa v Turkey* (Application No 31821/96) (unreported) 30 May 2000 and *Őcalan v Turkey* (Application No 46221/99) (unreported) 14 December 2000. The Grand Chamber swept these aside with the comment that in neither case was the issue of jurisdiction raised by the respondent Government, adding that the merits of those cases had yet to be decided. The respondent Governments in *Bankovic*, including the United Kingdom, had in fact accepted the existence of jurisdiction in those cases on the basis that it was

> "the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that state or who have been brought within that state's control."

Mr Eadie QC, for the Secretary of State, has not in this Court accepted any general principle whereby article 1 jurisdiction can be based on the exercise of control by State agents over individuals as opposed to territory. It is convenient at this point to consider the treatment by the Strasbourg Court of the question of jurisdiction on the substantive hearings in those two cases.

*Őcalan and Issa*

18. In *Őcalan* (2005) 41 EHRR 985 the applicant, a Turk, was handed over to Turkish officials aboard a Turkish aircraft at Nairobi. At the substantive hearing, following that before the Court (2003) 37 EHRR 238, the Grand Chamber recorded at para 91 that it was

> "common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that state for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey."

19. The substantive hearing in *Issa* (2004) 41 EHRR 567 took place before the Second Section, three members of which had been party to the decision in *Bankovic.* The applicants, Iraqi nationals, alleged that their relatives had been unlawfully arrested, detained, ill-treated and killed by Turkish troops in the course of a military operation in Northern Iraq. The claim failed because they were unable to prove this. The Court had, however, permitted Turkey to challenge the existence of article 1 jurisdiction, albeit that no challenge on this ground had been made at the admissibility hearing. The Court at paras 68-69 referred to the substantive decision in *Loizidou v Turkey* (1996) 23 EHRR 513, para 52 for the proposition that:

> "According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration."

20. The Court went on to say, at para 71:

> "Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State."(Citations omitted).

This clearly advances state agent authority as an alternative to effective territorial control as a basis of article 1 jurisdiction.

*Al- Skeini*

21. The implications of the Strasbourg Court's decision in *Bankovic* received detailed analysis in *Al-Skeini* in the Divisional Court, the Court of Appeal and the House of Lords. This Court ought to consider the conclusions of the House of Lords to be definitive unless these have plainly been invalidated by subsequent decisions of the Strasbourg Court.

22. The claimants were relatives of six Iraqi civilians who had been killed by or in the course of operations by British soldiers in the period following completion of major combat operations in Iraq and before the assumption of authority by the Iraqi Interim Government. Five of these were shot in separate incidents in Basra. The sixth, Mr Baha Mousa, was beaten to death by British troops while detained in a British military detention unit. The claimants sought independent enquiries into these deaths, relying upon the HRA. Two preliminary issues were before the Court. Did the HRA apply outside the territorial jurisdiction and were the six Iraqi citizens within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention? The House, Lord Bingham dissenting, answered the first question in the affirmative.

23. So far as concerns the second question, the ambit of article 1 had been exhaustively considered by the Divisional Court [2004] EWHC 2911 (Admin); [2007] QB 140 which had analysed chronologically all the relevant Strasbourg authorities, including *Bankovic.* The court concluded that these established that the primary meaning of "within their jurisdiction" in article 1 was within the territorial jurisdiction of the contracting States, subject to a number of exceptions. There was no general exception whereby those subject to the exercise of state agent authority fell within the article 1 jurisdiction of the State. Insofar as *Issa* had held to the contrary, it should be disregarded as inconsistent with the decision in *Bankovic.*

24. The Court of Appeal [2005] EWCA Civ 1609; [2007] QB 140 differed on the last point, holding that *Issa* was authoritative and demonstrated that article 1 jurisdiction was established by the exercise of control over individuals by State agents, both within and outside the jurisdiction of contracting States.

25. The House of Lords preferred the reasoning of the Divisional Court. The majority approached the issue of article 1 jurisdiction on the footing that this was essentially a matter for the Strasbourg court and the House should not construe article 1 as having any further reach than that established by that Court. As to that pre-eminence should be given to the decision of the Grand Chamber in *Bankovic.* The House was, however, faced with the fact that, so far as Mr Baha Mousa was concerned, the Secretary of State had accepted that, because he died as a result of

misconduct that took place at a detention centre within a British military base, he met his death "within the jurisdiction" of the United Kingdom for the purposes of article 1.

26. The claimants sought to rely on a principle of state agent authority, arguing that if such authority was exercised over individuals, this brought them within the jurisdiction for purposes of article 1. The majority was troubled by the fact that some statements of the Court in *Issa* were hard to reconcile with *Bankovic,* and particularly with the whole package principle. Insofar as *Issa* could not be reconciled with *Bankovic,* the majority held that it should be disregarded. Thus Lord Rodger held, at para 79:

> "…the whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction. If that is so, then it suggests that the obligation under article 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in section 1 of the Convention."

27. Lord Brown carried out a detailed analysis of the Strasbourg jurisprudence. He recognised some narrow categories where the Strasbourg Court had found article 1 jurisdiction in circumstances where the State had not got territorial control – irregular extradition such as *Őcalan* and activities of embassies and consulates. These exceptions apart, Lord Brown considered the whole package principle to be of importance:

> "128. There is one other central objection to the creation of the wide basis of jurisdiction here contended for by the appellants under the rubric 'control and authority', going beyond that arising in any of the narrowly recognised categories already discussed and yet short of that arising from the effective control of territory within the Council of Europe area. *Bankovic* (and later *Assanidze*) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be 'divided and tailored'. As *Bankovic* had earlier pointed out, at para 40:
>
> > 'the applicant's interpretation of jurisdiction would invert and divide the positive obligation on contracting states to secure the substantive rights in a manner never contemplated by article 1 of the Convention.'

> When, moreover, the Convention applies, it operates as 'a living instrument.' *Öcalan* provides an example of this, a recognition that the interpretation of article 2 has been modified consequent on 'the territories encompassed by the member states of the Council of Europe [having] become a zone free of capital punishment': para 195. (Paras 64 and 65 of *Bankovic*, I may note, contrast on the one hand 'the Convention's substantive provisions' and 'the competence of the Convention organs', to both of which the 'living instrument' approach applies and, on the other hand, the scope of article 1 – 'the scope and reach of the entire Convention' – to which it does not.) Bear in mind too the rigour with which the court applies the Convention, well exemplified by the series of cases from the conflict zone of south eastern Turkey in which, the state's difficulties notwithstanding, no dilution has been permitted of the investigative obligations arising under articles 2 and 3.
>
> 129. The point is this: except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population."

28. Applying *Bankovic,* the majority held that the five Iraqi citizens who had been killed in Basra were not within the jurisdiction of the United Kingdom for the purposes of article 1.

29. Lord Brown indicated that he would recognise the United Kingdom's jurisdiction over Mr Baha Mousa only on the basis of an analogy with the extra-territorial exception made for embassies. However, in a subsequent admissibility decision in *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE 95 the Strasbourg Court has held that detainees in British detention centres in Iraq fell within United Kingdom jurisdiction by reason of

> "the total and exclusive *de facto,* and subsequently *de jure,* control exercised by the United Kingdom authorities over the premises in question. " (para 88)

30. A more recent example of where the Strasbourg Court has equated control over individuals with article 1 jurisdiction is the decision of the Grand Chamber in *Medvedyev and others v France* (Application No 3394/03) judgment delivered on 29 March 2010. On the high seas a French warship boarded a merchant vessel,

crewed by the applicants who were suspected of being engaged in drug smuggling and compulsorily escorted it on a 13 day voyage into Brest. The court held at para 67 that as the vessel and its crew were, at least *de facto,* under the control of France, they were effectively under France's jurisdiction for the purposes of article 1. This decision, when added to that in *Issa* suggests that the Strasbourg Court may be prepared to found article 1 jurisdiction on state agent authority, even though this principle does not seem consistent with the approach in *Bankovic.*

*Gentle*

31. The possibility that British soldiers serving abroad were within the article 1 jurisdiction of the United Kingdom because they were under the authority of the United Kingdom was shortly dismissed by Lord Bingham in *R (Gentle) v Prime Minister* [2008] AC 1356. He said, at para 8:

> "(3) The obligation of member states under article 1 of the Convention is to secure 'to everyone within their jurisdiction' the rights and freedoms in the Convention. Subject to limited exceptions and specific extensions, the application of the Convention is territorial: the rights and freedoms are ordinarily to be secured to those within the borders of the state and not outside. Here, the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the defendants they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted: *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, paras 79, 129."

The other members of the House expressed general agreement with Lord Bingham. Article 1 jurisdiction was not, however, at the heart of the case, to the extent that the Court of Appeal, whose decision was upheld, had not found it necessary to decide the point. *Gentle* nonetheless lends support to the analysis of the House of Lords in *Al-Skeini.* The claimants in *Al-Skeini* have taken their case to Strasbourg and this will give the Strasbourg Court a further opportunity to clarify this difficult area of its jurisprudence.

*Submissions*

32. For the Secretary of State, Mr Eadie submitted that Private Smith was only within the jurisdiction of the United Kingdom when he was within territory that was under the effective control of the United Kingdom. On this basis he conceded that article 2 had applied during those periods when Private Smith was within the

military base, which included the time of his death. When, however, he was not within territory controlled by the United Kingdom, he was not within article 1 jurisdiction. His position in those circumstances did not fall within any of the recognised exceptions to the general principle that article 1 jurisdiction was territorial. In so submitting he relied in particular on *Bankovic, Al-Skeini* and *Gentle.*

33. For Mrs Smith Miss Dinah Rose QC made it clear that her case was not based on Private Smith having been on territory under the *de facto* control of the United Kingdom, nor upon Private Smith himself having been under the *de facto* control of the Army, as a State agent, but upon the fact that Private Smith was subject to the jurisdiction of the United Kingdom as a matter of both domestic and international law. He was so subject by reason of his status as a member of the Armed Forces. Miss Rose submitted that soldiers were in the same position as other State agents, such as diplomats, consular agents and judges. When exercising State powers outside the territory of the State they themselves remained subject to the jurisdiction of the State.

34. Mr Beloff QC appeared for the Intervener, the Equality and Human Rights Commission. He supported Miss Rose's submissions. He submitted that the authorities dealing with control of territory, or control of persons, did not touch on the basis of jurisdiction asserted in this case. That was personal jurisdiction, which, to quote from para 17 of his written case,

> "does not depend on a person's location. It is founded on the reciprocal rights and obligations of nationals and their state, wherever they may be."

Mr Beloff accepted that the precise question of whether article 1 jurisdiction could be founded on this basis had not arisen before the Strasbourg Court.

*The decision of the Court of Appeal.*

35. The Court of Appeal held that article 1 required the existence of a jurisdictional link and that this requirement was satisfied in the case of Private Smith, for the reasons set out in para 29 of its judgment. Members of the armed forces were:

> "…subject to United Kingdom military law without territorial limit and may be tried by court martial whether the offence is committed in England or elsewhere. They are also subject to the general

> criminal and civil law. Soldiers serve abroad as a result of and pursuant to the exercise of United Kingdom jurisdiction over them. Thus the legality of their presence and of their actions depends on their being subject to United Kingdom jurisdiction and complying with United Kingdom law. As a matter of international law, no infringement of the sovereignty of the host state is involved in the United Kingdom exercising jurisdiction over its soldiers serving abroad."

36. The Court was also influenced by what it perceived as the illogicality of holding that Private Smith was within the jurisdiction when on military premises, but not when outside them:

> "…it is accepted that a British soldier is protected by the 1998 Act and the Convention when he is at a military base. In our judgment, it makes no sense to hold that he is not so protected when in an ambulance or in a truck or in the street or in the desert. There is no sensible reason for not holding that there is a sufficient link between the solider as victim and the United Kingdom whether he is at a base or not. So too, if he is court-martialled for an act committed in Iraq, he should be entitled to the protection of article 6 of the Convention wherever the court martial takes place."

*The meaning of "jurisdiction"*

37. Article 31 of the Vienna Treaty lays down a number of general rules of interpretation. The first is that:

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

"Jurisdiction" has more than one ordinary meaning. The meanings given by the Shorter Oxford Dictionary include the following:

> "1. Exercise of judicial authority, or of the functions of a judge or legal tribunal; power of administering law or justice. Also, power or authority in general.

"2. The extent or range of judicial or administrative power; the territory over which such power extends".

38. Jowett's Dictionary of English Law, 2nd ed (1977), after giving the primary meaning of "legal authority" goes on to state:

"Jurisdiction also signifies the district or geographical limits within which the judgments or orders of a court can be enforced or executed. This is sometimes called territorial jurisdiction."

39. Thus the phrase "within the jurisdiction" can bear the natural meaning "subject to the authority of" but can equally bear the natural meaning "within the territory over which authority is exercised".

40. There are different varieties of authority that can be described as "jurisdiction". Oppenheim's International Law, 9th ed (1992), vol 1, describes these and their relationship to territorial jurisdiction:

"§ 136 **State jurisdiction in general** State jurisdiction concerns essentially the extent of each state's right to regulate conduct or the consequences of events. In practice jurisdiction is not a single concept. A state's jurisdiction may take various forms. Thus a state may regulate conduct by legislation; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts. The extent of a state's jurisdiction may differ in each of these contexts.

The jurisdiction concerns both international law and the internal law of each state. The former determines the permissible limits of a state's jurisdiction in the various forms it may take, while the latter prescribes the extent to which, and manner in which, the state in fact asserts its jurisdiction.

§ 137 **Territorial jurisdiction** As all persons and things within the territory of a state fall under its territorial authority, each state normally has jurisdiction - legislative, curial and executive – over them. Territoriality is the primary basis for jurisdiction; …

> § 138 **Jurisdiction over citizens abroad** International law does not prevent a state from exercising jurisdiction, within its own territory, over its nationals travelling or residing abroad, since they remain under its personal authority. Accordingly, it may legislate with regard to their conduct when abroad, levy taxes in respect of their assets or earnings abroad, or legislate in respect of their foreign property. In all such cases, however, the state's power to enforce its laws depends upon its national being in, or returning to, its territory or having there property against which they can be enforced."

41. Most human rights can only be the subject of protection, or interference, by the State if the individual who enjoys them is within the administrative, or executive, authority of the State. This is obviously true of the rights that protect the person, namely those protected by articles 2, 3 4 and 5 and is also true of articles 8, 9, 10, 11 and 12. Save in exceptional circumstances those requiring State protection of these rights will be within the territorial jurisdiction of the State in question. In respect of these rights it produces a perfectly sensible result to interpret "within their jurisdiction" in article 1 as meaning within the territorial jurisdiction of the Member States.

42. Public international law recognises that both legislative and judicial authority can be exercised over individuals whether they are inside or outside the territorial jurisdiction of the State. The exercise of these types of jurisdiction may well have potential impact on some human rights, but not on others. The Strasbourg Court appears to have recognised, at least implicitly, that the exercise of these types of jurisdiction can bring those who are subject to them "within the jurisdiction" for purposes of article 1, whether or not they are within the territorial jurisdiction of the State, in relation to those rights that are affected. In such circumstances there can be no question of the "whole package principle" applying. I shall give a number of examples.

43. Article 6 protects the right to a fair trial. The English court exercises extra-territorial jurisdiction in defined circumstances in relation to civil claims. If a foreigner resident abroad is impleaded by a resident of this country in the English court, it is hard to believe that the Strasbourg Court would hold the English claimant entitled to the benefit of article 6 but the foreign defendant not so entitled. Both would be within the judicial jurisdiction of the English court and there would seem a strong case for equating that with article 1 jurisdiction in the context of the application of article 6. Such an approach would seem implicitly to have been accepted by the Strasbourg Court in plenary session in *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745. The applicants in that case had been tried in criminal proceedings in Andorra by a Tribunal, presided over by a French judge. Andorra was not party to the Convention. The applicants complained, none the less, of violation of their article 6 rights to a fair trial. The Court held that the judge

had not been sitting in his capacity as a French judge, but as an Andorran judge, but appears to have accepted that had this not been so the applicants would have fallen within the jurisdiction of France for the purposes of article 1 in relation to their article 6 rights. This would not, however, have entitled them to claim against France the benefit of protection of the rest of the Convention rights.

44. What of the property rights protected by article 1 of the First Protocol? Many foreign residents own property in this country. Are they within the jurisdiction for the purposes of article 1? In *Carson v United Kingdom (*Application No 42184/05) judgment 16 March 2010 the Grand Chamber ruled admissible claims against the United Kingdom by 13 persons entitled to British State pensions for violation of article 14 of the Convention in combination with article 1 of the First Protocol. All the claimants had earned pensions by working in Britain, but had emigrated to South Africa, Australia or Canada on retirement. The report states, in para 1 that they were all British nationals, but para 21 states that one of them remained an Australian national. The basis of the claim was discrimination against the claimants in that their pensions were not linked to United Kingdom inflation, in contrast to the position of pensioners resident within the United Kingdom. Neither before the English courts nor before the Strasbourg Court was there any discussion of the basis upon which the claimants were treated as within the jurisdiction of the United Kingdom for the purposes of article 1. One possible answer is that because their pension rights were governed by legislation, they fell within the legislative jurisdiction of the United Kingdom in relation to those rights. There could be no question, however, of the United Kingdom having to afford them protection in relation to the whole package of Convention rights.

45. In *X v United Kingdom* (1979) 15 DR 137, the Commission ruled inadmissible on the merits a claim by a British citizen, who was employed by the European Commission and resident in Brussels, for violation of article 1 of the Convention in combination with article 3 of the First Protocol. She complained that she had no right to vote in United Kingdom elections whereas members of the diplomatic service and the Armed Forces stationed outside the United Kingdom retained their right to vote. The Commission held that the discrimination was justified in that these persons were not voluntarily abroad but had been sent abroad to serve their country. They fell to be regarded as resident-citizens, in contrast to the applicant who was living abroad voluntarily. It was not, however, suggested that the applicant did not fall within the article 1 jurisdiction of the United Kingdom. The basis for this jurisdiction was perhaps that, in relation to voting rights, nationals fall within the jurisdiction of their own State, whether or not they are within the territorial jurisdiction.

46. There are other cases that suggest that where one State delegates to another State authority to control a particular area of government that engages one of the Convention rights, those subject to the exercise of the latter State's authority will

be deemed to be within the jurisdiction of the latter State for the purposes of article 1 in relation to that right: *Drozd; X and Y v Switzerland* (1977) 9 DR 57; *Gentilhomme, Schaff-Benhadji and Zerouki v France* (Application Nos 48205/99, 48207/99, 48209/99) (unreported) 14 May 2002. A recent decision of the Strasbourg Court provides a variation on this theme. In *Stephen v Malta (No 1)* (2009) 50 EHRR 144 the applicant was a British subject who had been arrested and detained in Spain pursuant to an arrest warrant that had been issued by a Maltese Court that had not been competent to issue it. The Strasbourg Court, of its own motion, considered article 1 jurisdiction. It remarked at para 45:

> "the question to be decided is whether the facts complained of by the applicant can be attributed to Malta"

The Court gave an affirmative answer to this question and held that the applicant's complaints under article 5 engaged the responsibility of Malta under the Convention. No principled explanation was given for this departure from the territorial approach to article 1 jurisdiction other than the passage quoted above which, if applied generally, would render that approach nugatory.

47. These cases might be thought to support a general principle that there will be jurisdiction under article 1 whenever a State exercises authority, be it legislative, judicial or executive, which affects a Convention right of a person, whether that person is within the territory of that State or not. So far as the exercise of executive authority is concerned, one can postulate that this requires effective control, either of territory or of individuals, before article 1 jurisdiction is established. The fact remains, however, that the Strasbourg Court has not propounded any such general principle. Nor can such a principle readily be reconciled with the proposition, approved in *Bankovic,* that article 1 jurisdiction is essentially territorial in nature and that other bases of jurisdiction are exceptional and require special justification in the particular circumstances of each case.

48. There are compelling reasons for following the approach of the Grand Chamber in *Bankovic*, quite apart from the reasons that led the House of Lords to treat it as a landmark decision. The *travaux* to which the Court referred demonstrate that the contracting States were concerned with the manner in which those *within their territories* were treated. It is not credible that the change to the phrase *within their jurisdiction* was intended to effect a fundamental extension to the scope of the Convention without this being clearly reflected in the *travaux*. The question then is whether, applying the original meaning principle, it is right to include a State's armed forces abroad as falling within the jurisdiction of the State for purposes of article 1 by reason of the special status that they enjoy. That is the proposition that Miss Rose advances and it is one that is, as the Grand Chamber

pointed out in *Bankovic,* not reflected by State practice. It is, furthermore, almost wholly unsupported by Strasbourg jurisprudence.

49. I say "almost" having regard to the following passage in the admissibility decision of the Commission in *Cyprus v Turkey* (1975) 2 DR 125:

> "8…The Commission further observes that nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged."

50. I am not aware of any other Strasbourg jurisprudence that suggests that armed forces remain under the jurisdiction of a State when abroad and the reasoning of the Commission in this case was far wider than that of the Court when dealing with Turkey's jurisdiction in Northern Cyprus in *Loizidou v Turkey* (1995) 20 EHRR 99.

51. Miss Rose drew attention to Strasbourg jurisprudence that holds that those affected by the conduct of a State's diplomatic and consular officials abroad can fall within the jurisdiction of the State, which was applied by the Court of Appeal in *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344; [2005] QB 643. She submitted that it followed from this that such officials were themselves within the jurisdiction of their States and that the same principle should apply to the armed forces.

52. I have some difficulty with the logic of the proposition that State agents whose acts bring those affected by them within article 1 jurisdiction must, in consequence, themselves also be within the article 1 jurisdiction of the State whose agents they are but, more fundamentally, it does not seem to me that the analogy between diplomatic and consular officials and members of the armed forces is compelling.

53. More compelling were the points made by Miss Rose in relation to the unique status of members of the armed forces. When the Convention was agreed men who were British citizens were liable to conscription under the National Service (Armed Forces) Act 1948 and, in consequence of conscription, rendered

subject to the executive authority of the armed forces and to the legislative and judicial regimes that applied to the armed forces. A similar situation no doubt existed in the case of other contracting States. Today the same is true of those who volunteer to serve in the armed forces – see the description of the relevant legislation set out by Lord Mance in his judgment at para 190. Under domestic law and in accordance with public international law, members of the armed forces remain under the legislative, judicial and executive authority of the United Kingdom, whether serving within or outside United Kingdom territory. From the viewpoint of domestic law they can thus be said to be within the jurisdiction of the United Kingdom wherever they are. It is not attractive to postulate that, when they are outside the territorial jurisdiction in the service of their country they lose the protection afforded by the Convention and the HRA. That, however, is not the question. The question is whether, in concluding the Convention, the contracting States agreed that article 1 jurisdiction should extend to armed forces when serving abroad as an exception to the essentially territorial nature of that jurisdiction. What were the practical implications of so doing?

54. It is not wholly realistic to consider the perceived implications of the application of the Convention in 1953 by reference to the requirements of the Convention, that have been identified by the Strasbourg Court since 1953. In particular, it is perhaps not realistic to apply to conditions in 1953 the positive obligations in relation to article 2 that have quite recently been laid down by the Strasbourg Court. It is nonetheless instructive to consider the implications of applying the Convention to armed forces serving abroad.

55. It is not practicable for a State to secure many of the Convention rights and freedoms for troops in active service abroad. Article 2 is, however, plainly capable of being engaged. The safety of the lives of those fighting abroad can depend critically on the acts or omissions of State agents, covering the equipment with which they are supplied, the missions on which they are sent, and strategic and tactical decisions taken by commanders in the field. If the troops are within the article 1 jurisdiction of the State the question arises of how far these matters fall within the substantive obligations imposed by article 2. Insofar as they do, the question then arises of whether the procedural obligation arises every time a serviceman is killed in circumstances which may involve a shortcoming in the performance of those substantive obligations. These are questions that I shall explore when addressing the Inquest Issue.

56. The Convention was agreed in the aftermath of a global conflict in which millions of troops had been deployed. In 1944 the United Kingdom had over 4.5 million troops serving. British casualties in the war numbered about 330,000. By 1950 the number of British troops in service had reduced to about 700,000, many of whom were conscripts. While the Convention was being negotiated the Korean War was in progress. British casualties in that war numbered about 700.

57. Derogation is permitted under article 15 "in time of war or other public emergency threatening the life of the nation", although there can be no derogation from article 2 except in respect of deaths resulting from lawful acts of war. No derogation was made, and troops were deployed abroad in circumstances falling short of those permitting derogation under article 15.

58. The contracting States might well not have contemplated that the application of article 2 to troop operations abroad would have involved obligations such as those I have discussed above, but whatever the implications might have seemed, it is unlikely that they would have appeared a desirable consequence of the Convention. So far as this country is concerned, it is significant that when the Crown Proceedings Act 1947 rendered the Crown susceptible to civil suit an exception was made in relation to the armed forces. Only in 1987 did the Crown Proceedings (Armed Forces) Act remove that exception. This does not lie happily with the proposition that the United Kingdom bound itself to the observance of the Convention obligations toward its armed forces abroad when it ratified the Convention in 1951.

59. Today the size of the forces maintained by contracting States is a fraction of those that they maintained when the Convention was agreed. Every death of a British serviceman abroad is now reported in the British press. The bodies of British servicemen who die on active service are flown back and buried in this country, and it is this fact which makes it mandatory to hold an inquest in each case. The care that is taken to avoid casualties and the procedures that are followed when casualties occur are to be commended, but they would not have seemed practicable in 1953.

60. In *Al-Skeini* at para 107 Lord Brown expressed the view that the House should not construe article 1 as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. I endorse that comment. We are here dealing with the scope of the Convention and exploring principles that apply to all contracting States. The contention that a State's armed forces, by reason of their personal status, fall within the jurisdiction of the State for the purposes of article 1 is novel. I do not believe that the principles to be derived from the Strasbourg jurisprudence, conflicting as some of them are, clearly demonstrate that the contention is correct. The proper tribunal to resolve this issue is the Strasbourg Court itself, and it will have the opportunity to do so when it considers *Al-Skeini.* For these reasons I would hold that the Court of Appeal should not have held that Private Smith was within the jurisdiction of the United Kingdom within the meaning of article 1 at times when he was not within premises under the effective control of the army. This conclusion, and the reasoning that has led to it, accords with the comprehensive analysis of the relevant jurisprudence in the judgment of Lord Collins.

61. For these reasons I would allow the appeal against the Court of Appeal's order on the jurisdiction issue.

***The Inquest Issue***

*The nature of the issue*

62. The Inquest Issue arises on the premise that Private Smith was within the jurisdiction of the United Kingdom within the meaning of article 1 at the time of the events that led to his death, so that he was entitled to the protection of article 2 of the Convention.

63. Article 2 of the Convention provides:

> "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."

In *R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182 the Appellate Committee of the House of Lords, in a considered opinion, summarised the Strasbourg jurisprudence as to the effect of this provision:

> "2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.
>
> 3. The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated" (references omitted).

The Inquest Issue is concerned with the procedural obligation.

64. The procedural obligation requires a State, of its own motion, to carry out an investigation into a death that has the following features:

i) It must have a sufficient element of public scrutiny of the investigation or its results.

ii) It must be conducted by a tribunal that is independent of the state agents who may bear some responsibility for the death.

iii) The relatives of the deceased must be able to play an appropriate part in it.

iv) It must be prompt and effective. This means that it must perform its essential purposes. These are to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of state agents or bodies for deaths occurring under their responsibility.

These features are derived from the Strasbourg jurisprudence, as analysed in *Middleton* and *R (L (A Patient)) v Secretary of State for Justice* [2008] UKHL 68; [2009] AC 588. I shall describe an investigation that has these features as an "article 2 investigation".

65. The procedural obligation implicit in article 2 was first recognised by the Strasbourg Court in *McCann v United Kingdom* (1995) 21 EHRR 97. Since then the Court has repeatedly found such an obligation to have existed, but always in the context of a case in which the respondent State has been held to have been in breach of a substantive obligation imposed by article 2. This is no doubt because complaints of violation of the procedural obligation of article 2 are only likely to be brought by relatives before the Strasbourg Court where these are ancillary to complaints of substantive breaches of article 2. It has been stated on a number of occasions that the procedural obligation under article 2 is parasitic upon the existence of the article 2 substantive right and cannot exist independently – see, for example, Lord Bingham's observations at para 6 of *Gentle.*

66. The Inquest Issue has been formulated in the agreed Statement of Facts and Issues as follows:

> "Whether the fresh inquest into Private Smith's death must conform with the procedural obligation implied into Article 2 of the Convention."

In the first inquest the Coroner gave a narrative verdict which included the finding that Private Smith's death

> "was caused by a serious failure to recognise and take appropriate steps to address the difficulty that he had in adjusting to the climate."

Subsequently, on 5 January 2007 the Coroner gave a ruling holding that the requirements of article 2 did not apply to the inquest because any shortcomings related to a failure to follow the procedures that should have applied and not to any defects in those procedures, so that there was no question of any substantive breach of article 2.

67. The basis upon which Mrs Smith has successfully challenged this ruling has raised an important issue of principle. Both Miss Rose and Mr Beloff have contended that an article 2 investigation must be held whenever a member of the armed services dies on active service and the Court of Appeal has so found.

68. The argument has proceeded on the following basis. There are two different types of inquest. The first has the features that the Court of Appeal identified in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1 (a "*Jamieson* inquest"). The second has the features that the House of Lords identified in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182 (a "*Middleton* inquest"). If the requirements of article 2 apply, the coroner must conduct a *Middleton* inquest. The *Middleton* inquest will address any alleged failures on the part of the State to comply with the substantive obligations imposed by article 2.

69. Before addressing the Inquest Issue directly I propose to explain a number of reservations that I have in relation to the procedural obligation:

i) I do not see how the procedural obligation can work if it is limited to an obligation to hold an article 2 investigation if, and only if, there are grounds for suspecting a breach by the State of a substantive article 2 obligation.

ii) I question the extent of the distinction between a *Jamieson* inquest and a *Middleton* inquest.

iii) There is a major difficulty in identifying the substantive obligations that article 2 imposes on a State in relation to the safety of its armed forces.

iv) I question the extent to which an inquest, even a *Middleton* inquest, will necessarily be an appropriate process for discharging the procedural obligation.

*The duty to investigate death*

70. The duty to hold an article 2 investigation arises where there are grounds for suspecting that a death may involve breach by the State of one of the substantive obligations imposed by article 2. This raises the question of how the State is to identify that there are grounds for such suspicion. Any effective scheme for protecting the right to life must surely require a staged system of investigation of deaths, under which the first stage takes place automatically in relation to every death, whether or not there are grounds for suspecting that there is anything untoward about the death. Where the first stage shows that the death has not, or may not have, resulted from natural causes, there will be a requirement for a further stage or stages of the investigation. The requirement for an article 2 investigation will only arise if the preceding stage of the investigation discloses that there is a possibility that the State has not complied with a substantive article 2 obligation.

71. In the United Kingdom such a staged system of investigating deaths exists. All deaths are required to be registered under the Births and Deaths Registration Act 1953. Registration requires a death certificate certifying the cause of death from a doctor or coroner. Where there is doubt as to whether the death is due to natural causes, it will be reported to a coroner. He then decides whether further enquiries need to be carried out. These may take the form of a post-mortem examination or an inquest. Section 8 of the Coroners Act 1988 requires a coroner to hold an inquest where the body of a person is lying within his district and there is reasonable cause to suspect that the deceased has died a violent or an unnatural death, has died a sudden death of which the cause is unknown or has died in prison or in such place or in such circumstances as to require an inquest under any other Act.

72. The inquest was designed to perform a fact finding role. It was not intended necessarily to be the final stage of the investigation. Its mandate expressly excludes determining civil or criminal liability. It is, however, being used as the appropriate process for determining whether there has been a violation of the State's article 2 obligations.

*Jamieson and Middleton Inquests*

73. *Jamieson* involved an application for judicial review brought by the brother of a man who had hanged himself in his prison cell. The report of the case suggests that the evidence adduced at the inquest of the prisoner covered in detail the circumstances that led up to his suicide. It was the applicant's case that the prison authorities were aware of the danger that his brother would commit suicide and failed to take the steps that they should have done to prevent this. He submitted to the coroner that he should direct the jury to consider whether the death of his brother was caused or contributed to by "lack of care". The coroner refused to do so and it was this decision that was challenged by judicial review. The issue thus related, not to the scope of the investigation that had taken place, but as to the verdict that the jury were permitted to give.

74. Sir Thomas Bingham MR, giving the judgment of the Court of Appeal, traced the statutory history of the coroner's role and drew particular attention to the following statutory provisions, which are still in force. Under section 8(1) of the Coroners Act 1988 a coroner has to hold a inquest when a body is lying within his district and there is reason to think that the deceased has died a violent or unnatural death, or has died a sudden death of which the cause is unknown, or has died in prison or in such circumstances as to require an inquest under any other Act. Section 11(5)(b)(i) and (ii) requires the coroner's jury to set out in an inquisition who the deceased was and "how, when and where" he came by his death. The Coroners Rules 1984 provide:

> "36(1) The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely—(a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Registration Acts to be registered concerning the death. (2) Neither the coroner nor the jury shall express any opinion on any other matters.
>
> 40. No person shall be allowed to address the coroner or the jury as to the facts.
>
> 41. Where the coroner sits with a jury, he shall sum up the evidence to the jury and direct them as to the law before they consider their verdict and shall draw their attention to rules 36(2) and 42.

> 42. No verdict shall be framed in such a way as to appear to determine any question of—(a) criminal liability on the part of a named person, or (b) civil liability.
>
> 43. A coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly."

75. In upholding the coroner's ruling, the Court of Appeal set out a number of general principles, which included the following:

> "(1) An inquest is a fact-finding inquiry conducted by a coroner, with or without a jury, to establish reliable answers to four important but limited factual questions. The first of these relates to the identity of the deceased, the second to the place of his death, the third to the time of death. In most cases these questions are not hard to answer but in a minority of cases the answer may be problematical. The fourth question, and that to which evidence and inquiry are most often and most closely directed, relates to how the deceased came by his death. Rule 36 requires that the proceedings and evidence shall be directed solely to ascertaining these matters and forbids any expression of opinion on any other matter.
>
> (2) Both in section 11(5)(b)(ii) of the Act of 1988 and in rule 36(1)(b) of the Rules of 1984, 'how' is to be understood as meaning 'by what means.' It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how…the deceased came by his death,' a more limited question directed to the means by which the deceased came by his death.
>
> (3) It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame."

76. *Middleton* also involved an inquest on a prisoner who had hanged himself in his cell. Similar allegations of neglect were made and once again the evidence covered the circumstances leading up to the deceased's suicide. The jury handed the coroner a note stating that the Prison Service had failed in its duty of care to

the deceased, but the coroner concluded that this could not be appended to the inquisition. The verdict was challenged on the ground (not open in *Jamieson*) that it did not comply with the procedural obligations of article 2. Lord Bingham, delivering the considered decision of the Committee, held that where article 2 was engaged it might be necessary, in accordance with section 3 of the Human Rights Act, to give the relevant statutory provisions a different meaning to that which the Court of Appeal had laid down in *Jamieson.* The change was not a big one:

> "35. Only one change is in our opinion needed: to interpret 'how' in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply 'by what means' but 'by what means and in what circumstances'.
>
> 36. This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others (paras 30-31 above). In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues."

77. The decision in *Middleton* has been given statutory effect by section 5 (2) of the Coroners and Justice Act 2009. That section provides:

> "5 Matters to be ascertained
>
> (1) The purpose of an investigation under this Part into a person's death is to ascertain—
>
> (a) who the deceased was;
> (b) how, when and where the deceased came by his or her death;
> (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.
>
> (2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c 42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.
>
> (3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than—

(a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
(b) the particulars mentioned in subsection (1)(c).

This is subject to paragraph 7 of Schedule 5."

78. It seems to me that the only difference that the decision of the House in *Middleton* would have made to either the *Jamieson* inquest or the *Middleton* inquest would have been to the form of the verdict. In each case the Coroner appears to have permitted exploration of the relevant circumstances despite the fact that he did not permit these to be reflected in the verdict. I question whether there is, in truth, any difference in practice between a *Jamieson* and a *Middleton* inquest, other than the verdict. If there is, counsel were not in a position to explain it. Coroners appear frequently to have exercised considerable latitude as to the scope of the inquiry – the inquest into the shootings in Gibraltar that were the subject of *McCann v United Kingdom* (1995) 21 EHRR 97 exemplifies this. The form of the verdict will, no doubt be dictated by the evidence that emerges at the inquest, but I have difficulty with the concept that the inquest itself may in midstream undergo a significant change in character from a *Jamieson* to a *Middleton* inquest. How far it is appropriate to widen the scope of an inquest in order to consider allegations of breach of obligations imposed by article 2 is a matter to which I shall revert.

*The substantive obligations of article 2 in relation to armed forces.*

79. If armed forces on active service abroad are within a State's jurisdiction for purposes of article 1, the question arises of the scope of the substantive obligations imposed by article 2. Would the Strasbourg Court hold that they extend to the adequacy of the equipment with which the forces are provided; to the planning and execution of military manoeuvres? These questions are not easy to address, but an affirmative answer certainly cannot be excluded.

80. *McCann* involved the shooting by an SAS unit of three members of the provisional IRA who were suspected of being about to detonate a bomb in Gibraltar. The Court held that article 2 imposed substantive duties in relation to the planning, execution and control of the operation, and a procedural obligation to investigate these matters in the light of the casualties. The Court adopted a similar approach to deaths that resulted from the operations of the Russian military when conducting substantial military operations against insurgents: *Isayeva, Yusupova and Basayeva v Russia* (Application Nos 57947-49/00) and *Isayeva v Russia* (Application No 57950/00), decisions of 24 February 2005. There would seem no reason why the Court might not adopt a similar approach to operations resulting in

the death of a State's own soldiers. The facts of this case do not require the Court to define the extent of the positive duty that article 2 imposes on a State in relation to its armed forces.

*How appropriate is an inquest for the discharge of article 2 procedural obligations?*

81. As I have pointed out, inquests were designed to perform a fact finding function as a stage in an overall scheme of investigation that would commence before the inquest and might continue after it. An inquest will not be the appropriate vehicle for all inquiries into State responsibility for loss of life. An inquest would not have been the appropriate means of determining whether the death of a victim of new variant CJD, contracted from eating BSE infected beef, involved government responsibility, nor for determining the issues of State responsibility for the "Bloody Sunday" killings. An inquest can properly conclude that a soldier died because a flack jacket was pierced by a sniper's bullet. It does not seem to me, however, that it would be a satisfactory tribunal for investigating whether more effective flack jackets could and should have been supplied by the Ministry of Defence. If the article 2 obligation extends to considering the competence with which military manoeuvres have been executed, a coroner's inquest cannot be the appropriate medium for the inquiry.

*Must an article 2 investigation be held whenever a member of the armed services dies on active service?*

82. Miss Rose argued that the State was under a positive obligation to take all reasonable steps to protect the lives of military recruits, who were subject to the authority and control of the State. It followed that any death of a serviceman on active service potentially engaged the responsibility of the State. All the evidence was likely to be under the control of the State. Where a soldier died on active service, whether he was a conscript, a regular or a reservist this triggered the obligation to hold an independent investigation. This was certainly the case where the circumstances of a soldier's death indicated the possibility of a systemic or operational failing by military personnel.

83. The Court of Appeal considered a number of cases of deaths in the custody of the State, of one kind or another, where the article 2 procedural duty had been held to arise. It held at para 90:

> "The question in the instant appeal is whether what may be called the custody principles apply to a case like this where the deceased lost his life while serving as a soldier in the Territorial Army."

The Court went on to give an affirmative answer to this question, at least in the circumstances of a death from causes such as those that resulted in Private Smith's death.

84. The obligation to hold an article 2 investigation is triggered by circumstances that give ground for suspicion that the State may have breached a substantive obligation imposed by article 2. That in its turn raises the question of the scope of the substantive obligations that a State owes in relation to its armed forces, which I have raised above. Whatever the scope of those obligations I do not consider that the death of a soldier on active service of itself raises a presumption that there has been a breach of those obligations. Troops on active service are at risk of being killed despite the exercise of due diligence by those responsible for doing their best to protect them. Death of a serviceman from illness no more raises an inference of breach of duty on the part of the State than the death of a civilian in hospital. For these reasons I reject the submission that the death of a serviceman on active service, assuming that this occurs within the article 1 jurisdiction of a State, automatically gives rise to an obligation to hold an article 2 investigation.

*Inquiries into the deaths of servicemen.*

85. I have already referred to the fact that, whatever the requirements of the Convention may be, the United Kingdom has a staged system of investigation into deaths. Where a death occurs in circumstances involving a public authority, an in-house investigation will often precede the inquest and provide valuable information to assist the inquest. In the present case the Special Investigations Branch of the Military Police carried out an investigation into Private Smith's death and two Boards of Inquiry made reports. It was because the first of these was not disclosed to the coroner that a second inquest is to be held. I would expect that in the case of every military death in service some form of internal investigation is held.

86. As the bodies of servicemen who die or are killed on active service abroad are brought back to this country, any internal investigation that has taken place will be followed by a public inquest that will satisfy many of the requirements of an article 2 investigation. It will often be only in the course of the inquest that it will become apparent that there is an issue as to whether there has been a breach by the State of its positive article 2 obligations. Only at that stage will it be appreciated that the exercise that is in progress is one called for by article 2 and one that must,

if possible, satisfy the requirements of that article. Whether the inquest will be the appropriate medium to do this will depend on the nature of the obligation that is alleged to have been broken. The decision in *Middleton*, and section 5(2) of the 2009 Act that gives effect to it, requires the coroner to adapt the verdict, insofar as this is possible, in order to satisfy the requirements of article 2.

*Must the second inquest satisfy the procedural requirements of article 2?*

87. The Coroner ruled at the end of the first inquest that it was not necessary to satisfy the procedural requirements of article 2. Collins J and the Court of Appeal have held that the Coroner was mistaken. I agree. This is not, however, because Private Smith's death on active service, of itself, gave rise to a suspicion of breach by the State of its substantive article 2 obligations. It is because the evidence that was placed before the Coroner has raised the possibility that there was a failure in the system that should have been in place to protect soldiers from the risk posed by the extreme temperatures in which they had to serve. On the facts disclosed it was arguable that there was a breach of the State's substantive obligations under article 2. This was enough to trigger the need to give a verdict that complied with the requirements of article 2. I am not convinced that the Coroner's narrative verdict failed to do this. It summarised the facts leading to Private Smith's death and ended:

> "Jason George Smith's death was caused by a serious failure to recognise and take appropriate steps to address the difficulty that he had in adjusting to the climate".

88. The new inquest is likely to receive more detailed evidence of the circumstances surrounding Private Smith's death. In conducting that inquest the Coroner should certainly attempt to satisfy the requirements of an article 2 investigation.

89. For these reasons I would dismiss the appeal on the second issue.

**LORD HOPE**

90. I agree with Lord Phillips that a member of the State's armed forces is not, by reason of his or her personal status according to the military law and discipline of the United Kingdom, within the jurisdiction of the state for the purposes of article 1 of the European Convention on Human Rights. To hold otherwise would be to go beyond the categories that have hitherto been recognised by the

Strasbourg Court in cases that do not arise from the effective control of territory within the Council of Europe area.

91. But, as to the reasons for this view, I am in full and respectful agreement too with the judgment of Lord Collins. It is perhaps worth noting, in support of his conclusion that there are no policy grounds for extending the scope of the Convention to members of the armed services serving abroad simply because they are under the authority and control of the United Kingdom, that in an interview which he gave shortly after his retirement as President of the European Court of Human Rights, Luzius Wildhaber questioned how the Court could function effectively as a court when there was no prospect of it acquiring reliable evidence concerning the situation beyond the frontiers of Member States. He suggested that expecting the Court to act in such circumstances risked turning it into a campaigning organisation making allegations without solid evidence. He saw this as a compelling reason to be very careful about extending the notion of extra-territoriality too far and to be wary about departing too much from the *Bankovic* judgment: *Reflections of a Former President of the European Court of Human Rights* [2010] EHRLR 169, 174.

92. It is one thing, therefore, to recognise a Member State's jurisdiction over persons within an area beyond the frontiers of the Member States over which their armed forces have established total and exclusive *de facto* control such as a military base, a military hospital or a detention centre, on the analogy with the extra-territorial exception made for embassies: *Al-Saadoon and Mufdhi v United Kingdom* (Application No 61498/08) (unreported) 30 June 2009, para 88. It is quite another to extend that jurisdiction to areas outside premises of that kind over which the armed forces may be operating but over which they do not have exclusive control, where the safeguarding of Convention rights cannot be guaranteed and where reliable evidence about the circumstances of alleged violations could be hard to come by because the state over whose territory these operations are being conducted is not a party to the Convention. A decision that the extra-territorial jurisdiction should extend that far in this case would be likely to have profound consequences for other Member States and, it would seem from what Luzius Wildhaber has said, for the Court itself. A decision of that kind is best left to Strasbourg.

93. I would in any event respectfully endorse the view expressed by Lord Brown of Eaton-under-Heywood in *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, para 107, for the further reasons he gives in this case, that article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach. I also would hold that Private Smith was not within the jurisdiction of the United Kingdom within the meaning of article 1 when he was outside his base while serving in Iraq. There is nothing that I would wish to add on the first issue.

94. The second issue in this appeal is whether the fresh inquest into Private Smith's death would have to comply with the procedural investigatory obligation guaranteed by article 2 of the Convention. At first sight this question is academic because the Secretary of State agrees that he will not submit to the new coroner in the fresh inquest that the scope of the investigation, or the nature of the verdict, should be less broad than would be appropriate if the inquest must satisfy the obligation of the United Kingdom under that article: see the Court of Appeal's judgment [2009] 3 WLR 1099, para 62. This is on the assumption that, as Private Smith died on base, he was within the jurisdiction of the United Kingdom within the meaning of article 1 when he died and because the findings of the coroner at the first inquest indicate a possible breach of the positive obligation to establish processes to deal with the risk of heatstroke and hyperthermia. But, as Ms Rose QC for the respondent pointed out, a concession as to the scope of the inquest would not bind the coroner. The question whether the procedural obligation was triggered by Private Smith's death was argued before Collins J, in the Court of Appeal and before this Court on the basis that it raised an important issue of principle. Its importance is not limited to cases where members of the armed forces are serving in places such as Iraq and Afghanistan. It extends to cases where at the time of their death they were serving in the United Kingdom – in Northern Ireland, for example – or within the territory of another Council of Europe Member State.

95. In the ideal world this would be an empty question. The coroner would have complete freedom to determine the scope of his own inquiry and to adapt the form and content of his verdict according to the needs of each case. That however is not how the scheme for the conduct of inquests has been designed in English law. As Lord Bingham of Cornhill explained in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 34-35, the scheme which has been enacted by and under the authority of Parliament must be respected, save to the extent that a change of interpretation is required to honour the international obligations of the United Kingdom under the Convention: see also *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, para 27. The crucial difference is to be found in the way the word "how" in section 11(5)(b)(ii) of the Coroners Act 1988 and rule 36(1)(b) of the Coroners Rules 1984 is to be interpreted. Tempting though it may be to depart from *Middleton* by declaring that there is really no material difference between the functions of the coroner and the jury in the two types of inquest as Lord Phillips has indicated, I think for all the reasons that were given in that case we should not do so. The temptation to do this, adopting what the sheriff may do when he is making his determination according to the Scottish model, was confronted and resisted in *Middleton*, and I think that we must follow the decision that was taken in that case. On the other hand I would not wish to limit the scope that is available to the coroner under rule 43 of the Coroners Rules 1984. How far he may go in pursuing lines of inquiry in order to determine whether he should make a report under that rule with a view to preventing the recurrence of similar fatalities must depend on his judgment as to what is appropriate in the circumstances.

96. It is only in cases where the article 2 procedural duty applies, therefore, that the *Middleton* approach is available to the coroner. It will then be necessary for him to conduct an inquiry which is "effective", as that expression was explained by the Grand Chamber in *Ramsahai v The Netherlands* (2007) 46 EHRR 983, paras 324-325; see also *R (L (A Patient)) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2009] AC 588, para 78, per Lord Rodger of Earlsferry. But that approach is not available in all cases. It arises only in the comparatively few cases where the state's responsibility for the death is or may be engaged: *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, para 48 Lord Brown of Eaton-under-Heywood. In all other cases the proceedings must be conducted according to the regime for conducting inquests in England and Wales as summarised in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1. Section 5 of the Coroners and Justice Act 2009 has retained the distinction between these two forms of inquest. It is only where necessary to avoid a breach of any of the Convention rights that it permits the *Middleton* approach: see section 5(2).

97. The scheme which Parliament has enacted in section 5 of the 2009 Act is deceptively simple. In practice however it gives rise to a variety of problems to which the Court's attention was drawn by counsel. We cannot resolve them all in this case. But at the root of most, if not all, of them lies the problem of determining whether the case in hand is one which attracts the procedural obligation that is imposed by article 2. In broad terms, it is triggered by any death occurring in circumstances in which it appears that any one or more of the substantive obligations that article 2 imposes not to take life without justification, and to establish a framework of laws, precautions, procedures and means of enforcement which will to the greatest extent practicable protect life, has been, or may have been, violated in circumstances in which it appears that agents of the state are, or may be, in some way implicated: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, paras 2 and 3. The procedural obligation depends on the existence of the substantive right. It cannot exist independently: *R (Gentle) v Prime Minister* [2008] AC 1356, para 6.

98. Some situations in which the procedural obligation is triggered are now well recognised. The suicide of an individual while in the custody of the state is the prime example. It has been extended to the case where a prisoner attempted to commit suicide while in custody and suffered brain damage: *R (L (A Patient)) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2009] AC 588. This is because it has been recognised that prisoners as a class present a particular risk of suicide and because those who have custody of them, as agents of the state, are or may be in some way implicated. A *Middleton* inquest is required in all these cases, because it is at least possible that the prison authorities failed to take the steps to protect the prisoner's life that the substantive right requires. As Lord Rodger of Earlsferry said in *L's* case, para 59, suicide is in

this respect like any other violent death in custody. The procedural obligation extends to prisoners as a class irrespective of the particular circumstances in which the death occurred. The fact that they are under the care and control of the authorities by whom they are held gives rise to an automatic obligation to investigate the circumstances. The same is true of suicides committed by others subject to compulsory detention by a public authority, such as patients suffering from mental illness who have been detained under the Mental Health Acts: *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2009] AC 681. This approach has the merit of clarity. Everyone knows from the outset that the inquest in these cases must follow the guidance that was given in *Middleton*, paras 36-38.

99. The issue before the Court is whether it is possible to achieve equal clarity in the case of an inquest into the death of a soldier. Soldiers who die while in military custody are, of course, in the same position as any other prisoner. Their case has the benefit of the substantive obligation, so the procedural obligation applies. So too does the case of members of the other armed services who die in such circumstances. The question is how far, if at all, the detainees' approach can be applied to other situations which servicemen and servicewomen encounter in the service of their country, at home or abroad. Death may occur from natural causes as well as a result of neglect or injury. And fatal injuries may occur due to the mishandling of equipment during training or in other situations when personnel are not engaged in combat as well as in the face of the enemy. The conflicts in Iraq and Afghanistan have brought the issue into greater prominence. But the situation that we face today is in principle no different from that which members of the armed forces serving both at home and abroad have faced for many years.

100. The single characteristic which currently unites all our service personnel is that they have volunteered for the branch of the service to which they belong. This applies to those who have made their profession in the armed services as well as those, like Private Smith, who chose to serve part-time in reserve forces such as the Territorial Army. Mandatory military service no longer exists in this country. For this reason I would be reluctant to follow the guidance of the Strasbourg Court that is to be found in cases such as *Chember v Russia*, (Application No 7188/03) (unreported) 3 July 2008. The applicant in that case was called up for two years mandatory military service in the course of which he was subjected to ill-treatment and harassment. The court was careful to stress in para 49 that many acts that would constitute degrading or inhuman treatment in respect of prisoners may not reach the threshold of ill-treatment when they occur in the armed forces, provided they contribute to the specific mission of the armed forces in which they form part, for example training for battle-field conditions: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647. But the description which it gave in para 50 of the duty that the State owes to persons performing military service was directed specifically to

cases where it decides to call up ordinary citizens to perform military service. That description cannot be applied to those who serve in the armed forces as volunteers.

101. It is true, of course, that those who join the armed services as volunteers accept the obligation to comply with military discipline. They are trained to obey orders, and they are subject to sanctions if they do not do so. Private Smith did not choose to go to Iraq. He received a notice of compulsory call up. But it was a condition of the service for which he volunteered that he would obey instructions of this kind. I do not think that his situation can be distinguished from that of any other member of the armed services who is deployed on active service. There is a close analogy with men and women who volunteer for service in the emergency services. Fire-fighters, in particular, may face situations of great danger where their lives are at risk. But they follow instructions because that is a necessary part of the job they have chosen to do.

102. It is tempting to select examples of cases where the cause of a soldier's death may be attributed to failures on the part of the State and to conclude that this fact in itself gives rise to the need for a *Middleton* inquest. But I would resist this temptation. The examples that Lord Rodger gives illustrate the difficulty. He says that he would apply the reasoning as to a prisoner committing suicide to a raw recruit to the armed forces who committed suicide during initial military training in barracks in this country: para 118. We have no evidence that raw recruits to the armed services are in this respect especially vulnerable, but this reference calls to mind the tragic cases of the four young soldiers who died at Deep Cut Barracks between 1995 and 2002 which according to the Ministry of Defence were all cases of suicide. Those soldiers were still in training, but they were not raw recruits. The training they were undergoing at Deep Cut was a course of further training, additional to the initial training which they had received in an Army Training Regiment. Where does one draw the line between the raw recruit and the more seasoned soldier who is still in training? And what about schoolchildren who commit suicide as a result of bullying from which, as they must attend school, there is no escape? Or students who do so because of the pressures they encounter in colleges or universities? To extend the substantive article 2 obligation to volunteers while they are undergoing basic or advanced training would go further than has so far been indicated as necessary by Strasbourg.

103. Then there is the example that Lord Rodger gives of deaths as a result of friendly fire from other British forces: para 126. Trooper David Clarke, the son of the second claimant in *R (Gentle) v Prime Minister* [2008] AC 1356, was killed by friendly fire while on armed service with the Queen's Royal Lancers in Iraq. He was driving a Challenger 2 tank when it was fired on by another Challenger 2 tank from a different unit whose crew had mistaken it for an enemy vehicle. That was an example of friendly fire by British forces. But a number of other servicemen, including several soldiers serving with the Queen's Own Highlanders, were killed

during the same campaign when their armoured vehicle was fired on by a US Black Hawk Helicopter. Are cases of accidental deaths due to friendly fire by allied forces to be distinguished from those which are due to accidents caused by British forces? And why should deaths due to friendly fire be distinguished from deaths due to injuries sustained as a result of the actions of opposing forces that could also have been avoided if mistakes had not been made by the soldiers themselves or by their commanders? The risk of death due to friendly fire in the confusion and heat of battle is one of the risks that a soldier must face as part of the mission for which he has volunteered. The same is true of the risk of death while in training due, for example, to mistakes made while handling weapons or other equipment or to exposure to the elements.

104. The Court of Appeal applied the principle that extends the protection of article 2 to detained mental patients to the case of soldiers such as Private Smith who die of heatstroke while on active service in Iraq: [2009] 3 WLR 1099, paras 104-105. The essence of its reasoning is to be found in these sentences taken from para 105:

> "[The soldiers] are under the control of and subject to army discipline. They must do what the army requires them to do. If the army sends them out into the desert they must go. In this respect they are in the same position as a conscript. Once they have signed up for a particular period they can no more disobey an order than a conscript can."

On this basis it saw no reason why they should not have the same protection as is afforded by article 2 to a conscript. I think that this reasoning goes further than the Strasbourg Court has gone in the case of conscripts, as its reference in *Chember v Russia* (Application No 7188/03) 3 July 2008, para 49, to risks inherent in the specific mission of the armed forces shows. But it seems to me to be objectionable on other grounds. Members of our armed services are not conscripts. They have chosen to accept the demands of military discipline. Moreover, if the fact that they must obey orders is to be treated as the criterion, there is no logical stopping place. Every situation where death occurs in circumstances where they were obeying orders, from the training ground to battle conditions, would have to be treated in the same way. I would reject the analogy with those who are in the custody of the state. The volunteer soldier's duty to obey orders is not comparable with the state of the detainee who is held against his will in the State's custody.

105. In my opinion the substantive obligation under article 2 does not extend automatically to all service personnel in a volunteer army while they are on active service at home or within the article 1 jurisdiction overseas. Like Lord Mance, I

regard the proposition that *all* deaths of military personnel on active service require to be investigated by a *Middleton* type inquiry as going too far: para 214. As I said in *R (Gentle) v Prime Minister* [2008] AC 1356, para 19, the guarantee in the first sentence of article 2(1) is not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which is properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do. But one must not overlook the fact that there have been many cases where the death of service personnel indicates a systemic or operational failing on the part of the State. These may range from a failure to provide them with the equipment which is needed to protect life to mistakes made in the way they were deployed due to bad planning or inadequate appreciation of the risks that had to be faced. These are cases where the investigator should, as article 2 requires, take all reasonable steps to secure the evidence relating to the incident, to find out, if possible, what caused the death, and to identify the defects in the system which brought it about and any other factors that may be relevant: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 36.

106. Private Smith's death, which occurred on base, seems to me to fall into this category. This was a place over which the armed forces had exclusive control, so the jurisdictional requirement was satisfied. And all the signs are that this was a death which might have been prevented if proper precautions had been taken. There is a sufficient indication of a systemic breach in an area that was within its jurisdiction for the purposes of article 1 to engage the responsibility of the State to carry out an effective investigation into the circumstances. There is something that ought to be inquired into, if only to ensure that tragedies of this or a similar kind do not happen again. I would hold that this is enough to trigger the article 2 procedural obligation so as to require the coroner to conduct a *Middleton* inquiry in his case.

107. I recognise that the case by case approach which I favour, coupled with the lack of definition in this area of the law, creates a very real problem for the parties as well as for coroners. It risks creating satellite litigation as decisions as to whether a case falls on one side of the boundary are opened up for challenge, resulting in delays and increased costs. The solution to this highly unsatisfactory situation lies in a reform of the law which restricts inquiries in England and Wales which are of that kind to cases where there are grounds for thinking that the substantive obligation under article 2 has been violated. It does not lie in extending the potential reach of article 2 to a broadly defined category of cases which may well deserve sympathy but which lie outside the well-defined circumstances in which the positive obligation has hitherto been held to apply. The balance of advantage until the law is reformed lies, I would suggest, in holding the line at cases where there are grounds for thinking that there was a failure by the State in fulfilling its responsibility to protect life and not extending it to cases which,

although involving the element of compulsion that is inherent in service life, are truly outside that category.

108. I would allow the appeal against the Court of Appeal's order on the first issue. I would dismiss the appeal on the second issue.

**LORD RODGER**

109. The present appeal arises out of the death of Private Jason Smith on 13 August 2003, while serving in Iraq. He died of heat stroke. On the day in question the effects were first noticed when Private Smith was seen lying on the floor in the Stadium at Al Amarah where his accommodation was. He was taken to the medical facility at Camp Abu Naji where he died shortly afterwards. Because he died at the Camp, which was the centre of British operations in the area, the Secretary of State concedes that he died within the jurisdiction of the United Kingdom for purposes of article 1 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). The Secretary of State further concedes that the circumstances of his death are such as to call for an independent inquiry under article 2 of the Convention.

110. Despite these concessions, the Secretary of State asks this Court to decide points relating to the United Kingdom's jurisdiction for purposes of article 1 and to the circumstances in which an inquest which complies with the requirements in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 ("a *Middleton* inquest") has to be held. The precise basis and extent of the Secretary of State's concession on the first point are not altogether clear to me. So far as the second point is concerned, the parties appeared to agree that coroners and lawyers found it difficult to know whether, in a case involving the death of a soldier on active service overseas, any inquest should be a *Middleton* inquest, or whether it should start a "*Jamieson* inquest" (one whose more limited scope is described in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1), but evolve into a *Middleton* inquest if the coroner's investigation seemed to require it.

111. For the reasons given by Lord Collins, to which I could not possibly add anything of value, I would allow the appeal on the first issue.

112. It follows that, leaving aside the position when they are on a United Kingdom base, soldiers on active service overseas are not within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention. It follows also that their deaths will not give rise to any requirement to carry out an article 2

investigation. Nevertheless, the Secretary of State asks for a decision on the point. As counsel for the respondent pointed out, an issue could certainly arise in relation to a soldier who had been killed in combat in this country – Northern Ireland providing recent examples.

113. Unfortunately, counsel's submissions left me, at least, unclear about how exactly a decision one way or the other, as to the form of the inquest, would affect such practical matters as how the coroner or parties prepared for the inquest or what would happen if the coroner decided, half-way through, that it should become a *Middleton* inquest. There is, therefore, a limit to the guidance that this Court can usefully give in a case where the point is moot and in which we have not been told of any particular practical problems that have arisen.

114. Ms Rose QC and Mr Beloff QC submitted, however, that the Court should lay down – and it would have to be a matter of law – that all inquests into the death of a soldier on active service should be *Middleton* inquests. Then everyone would know where they stood and such matters as legal aid, representation of relatives and the form of any eventual verdict would be clear from the outset. The submission is superficially attractive – and, doubtless for that reason, a somewhat similar argument has been tried before. In *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, 214, Lord Brown of Eaton-under-Heywood dealt with it in this way:

> "*Middleton* clearly accepted that *Jamieson* was correctly decided. Were it otherwise, the House could simply have overruled it without recourse to the Human Rights Act 1998 at all, let alone section 3. It is plain that the House was not intending the *Middleton* approach thereafter to apply in all cases. In the first place, an article 2 investigative obligation only arises in the comparatively few cases where the state's responsibility is or may be engaged. Secondly, even where the obligation does arise, it will often be satisfied without resort to a *Middleton* inquest—in some cases by criminal proceedings, in particular 'where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death' (para 30 of the committee's opinion delivered by Lord Bingham of Cornhill); in others, like *McCann,* where 'short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest' at para 31 of the opinion. All this is clear from the committee's opinion which in terms recognises at para 36 that only sometimes will a change of approach be called for."

115. The key point is that the decision in *Middleton* involved using section 3 of the Human Rights Act 1998 to place an extended construction on section 11(5)(b)(ii) of the Coroners Act 1988 and rule 36 of the Coroners Rules 1984 (SI 1984/552). This was justified only because the extended construction was necessary in order to meet the requirements of article 2. So counsel's submission really implied that, as a class, the deaths of British soldiers on active service in, say, Iraq or Afghanistan, would trigger the article 2 investigative obligation. I would reject that approach.

116. In *R (L(A Patient)) v Secretary of State for Justice* [2009] AC 588 a young man had tried to hang himself in Feltham Young Offender Institution. The Secretary of State argued that, since the obligation on the prison authorities to protect a prisoner from himself is not absolute and so only arises in particular circumstances, a suicide can occur without there having been any breach of the authorities' article 2 obligation to protect him. So there did not need to be an independent investigation unless there was some positive reason to believe that the authorities had indeed been in breach of their obligation to protect the prisoner. I rejected that argument in these words, at p 619:

> "59. That argument is mistaken. Whenever a prisoner kills himself, it is at least *possible* that the prison authorities, who are responsible for the prisoner, have failed, either in their obligation to take general measures to diminish the opportunities for prisoners to harm themselves, or in their operational obligation to try to prevent the particular prisoner from committing suicide. Given the closed nature of the prison world, without an independent investigation you might never know. So there must be an investigation of that kind to find out whether something did indeed go wrong. In this respect a suicide is like any other violent death in custody. In affirming the need for an effective form of investigation in a case involving the suicide of a man in police custody, the European court held that such an investigation should be held 'when a resort to force has resulted in a person's death': *Akdogdu v Turkey*, para 52.
>
> 60. In *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, another case of a suicide in custody, at p 191, para 3, Lord Bingham of Cornhill summarised the jurisprudence of the European court as imposing an obligation to hold an independent investigation if 'it appears that one or other of the … substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way, implicated.' Mr Giffin suggested that Lord Bingham's formulation was inconsistent with there being a requirement for an independent investigation in all cases of suicide in custody. I do not agree. In summarising the case law, Lord

> Bingham was recognising that, where the circumstances of a prisoner's death in custody indicate that the substantive obligations of the state may have been violated, any violation, whether due to a systemic or operational failure, will necessarily have involved members of the prison service in one capacity or another. An independent investigation is therefore required to see whether there was, in fact, a violation."

117. The starting-point for the reasoning in this passage is that the prison authorities are under both an obligation to take general measures to diminish the opportunities for prisoners to harm themselves and an operational obligation, in certain limited circumstances, to try to prevent a particular prisoner from committing suicide. The authorities are under these obligations because "persons in custody are in a vulnerable position and … the authorities are under a duty to protect them": *Edwards v United Kingdom* (2002) 35 EHRR 487, 507, para 56. Therefore the mere fact that a prisoner has committed suicide indicates that there may have been a failure on the part of the prison authorities to perform their article 2 obligations to prevent those in custody from doing so.

118. I would apply precisely the same reasoning if, say, a raw recruit to the armed forces committed suicide during initial military training. It is obvious – and past experience shows - that recruits, who are usually very young and away from their families and friends for the first time, may be unable to cope with the stresses of military discipline and training. In these circumstances I would regard such recruits as vulnerable individuals for whom the military authorities have undertaken responsibility. So the authorities must have staff trained, and structures in place, to deal with the potential problems which may, quite predictably, arise. Therefore, if a suicide occurred in such circumstances, this would suggest that there might have been a failure on the part of the authorities to discharge their obligation to protect the recruits. There would need to be an independent inquiry – especially since recruits are trained in a closed environment.

119. I would take much the same view of Private Smith's death in this case. It may well be that, in the circumstances in Iraq at the time, a soldier could die of heatstroke without there having been any violation of the Army's obligations under article 2. Nevertheless, the likelihood of extreme heat and its possible effects on soldiers were known to the military authorities. There was an obvious need to take appropriate precautions. So, where, as here, a soldier suffers so badly from heatstroke, while in his living accommodation, that he dies shortly afterwards, it is at least possible that the Army authorities failed in some aspect of their article 2 obligation to protect him. For that reason I am satisfied that, given his concession on jurisdiction, the Secretary of State was correct to concede the need for a *Middleton* inquest into Private Smith's death.

120. I would, however, take an entirely different view of the death of a trained soldier in action – e g, when a roadside bomb blows up the vehicle in which he is patrolling, or when his observation post is destroyed by a mortar bomb. The fact that the soldier was killed in these circumstances raises no prima facie case for saying that the United Kingdom army authorities have failed in their obligation to protect him and that there has, in consequence, been a breach of his article 2 Convention rights.

121. In the first place, even if an active service unit is, in some ways a closed world, it would be quite wrong to construct any argument around the idea that ordinary members of the forces are "vulnerable" in the same way as prisoners or detained patients or, even, conscripts doing military national service in Russia or Turkey. I have already accepted that, in the initial stages of their training, recruits to the United Kingdom forces may indeed be vulnerable in this sense. But those who pass through training and are accepted into the forces are often the reverse of vulnerable: their training and discipline make them far more self-reliant and resilient than most members of the population and, so far from being isolated, they form part of a group whose members are supportive of one another.

122. Even more importantly, any suggestion that the death of a soldier in combat conditions points to some breach by the United Kingdom of his article 2 right to life is not only to mistake, but - much worse - to devalue, what our soldiers do. It is not just that their job involves being exposed to the risk of death or injury. That is true of many jobs, from steeplejacks to firemen, from test-pilots to divers. Uniquely, the job of members of the armed forces involves them being deployed in situations where, as they well know, opposing forces will actually be making a determined effort, and using all their resources, to kill or injure them. While steps can be taken, by training and by providing suitable armour, to give our troops some measure of protection against these hostile attacks, that protection can never be complete. Deaths and injuries are inevitable. Indeed it is precisely because, in combat, our troops are inevitably exposed to these great dangers that they deserve and enjoy the admiration of the community. The long-established exemption from inheritance tax of the estates of those who die on active service is an acknowledgment of the fact that members of the armed forces can be called upon to risk death in this way in the defence of what the government perceives to be the national interest.

123. I have deliberately referred to "our soldiers" and "our troops" because it may well be that not all Council of Europe countries look on their armed forces in the same way. For historical or cultural reasons, some may be reluctant to see their armed forces engage in combat or carry out dangerous peace-keeping operations. So they may have a very different attitude to the risks to which their forces should be exposed. Correspondingly, members of their forces may not attract the level of

public esteem that members of our forces, who are regularly expected to face very real threats of death or injury, enjoy.

124. At present our troops are exposed to great dangers in Afghanistan. Inevitably, many have been killed and many more have been wounded. To suggest that these deaths and injuries can always, or even usually, be seen as the result of some failure to protect the soldiers, whether by their immediate companions or by more senior officers or generals or ministers, is to depreciate the bravery of the men and women who face these dangers. They are brave precisely because they do the job, knowing full well that, however much is done to protect them, they are going to be up against opposing forces who are intent on killing or injuring them and who are sometimes going to succeed.

125. This is the background to any inquest into the death of a soldier on active service. In most cases the starting-point is that the soldier died as a result of a deliberate attack by opposing forces – by, say, a mortar bomb, or a roadside bomb, or by sniper fire. Usually, at least, that will also be the end-point of the coroner's investigation because it will be an adequate description not only of how the soldier was killed, but also of the circumstances in which he was killed. Of course, it will often – perhaps even usually – be possible to say that the death might well not have occurred if the soldier had not been ordered to carry out the particular patrol, or if he had been in a vehicle with thicker armour-plating, or if the observation post had been better protected. But, even if that is correct, by itself, it does not point to any failure by the relevant authorities to do their best to protect the soldiers' lives. It would only do so if – contrary to the very essence of active military service – the authorities could normally be expected to ensure that our troops would not be killed or injured by opposing forces. On the contrary, in order to achieve a legitimate peacekeeping objective, a commander may have to order his men to carry out an operation when he knows that they are exhausted or that their equipment is not in the best condition. Indeed the European Convention on Human Rights owes its very existence to countless individuals who carried out operations in just such circumstances.

126. For these reasons, I am satisfied that, where a serviceman or woman has been killed by opposing forces in the course of military operations, the coroner will usually have no basis for considering, at the outset, that there has been a violation of any substantive obligation under article 2. So a *Middleton* inquest will not be called for – and indeed it would not be lawful, in such circumstances, to return the wider verdict which is required where a potential violation of article 2 is under consideration. Of course, as his investigation proceeds, the coroner may uncover new information which does point to a possible violation of article 2. To take an extreme example, it may emerge from the evidence that the soldier actually died as a result of friendly fire from other British forces. At that point, the legal position will change because there will be reason to believe that the military

authorities may indeed have failed in their article 2 duty to protect the soldier's life. So the coroner will conduct the inquest in the manner required to fulfil the United Kingdom's investigatory obligation under article 2.

127. But the coroner is not concerned with broad political decisions which may seem to have a bearing, and may indeed actually have a bearing, on what happened. This is clear from *Nachova v Bulgaria* (2005) 42 EHRR 933, 957, para 110, where the Grand Chamber described "the essential purpose" of an article 2 investigation as being "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." Once it is established, say, that a soldier died because the blast from a roadside bomb penetrated the armour-plating on his vehicle, it may well be inferred that he would not have died if the plating had been stronger. And that simple fact may be worth pointing out as a possible guide for the future. But questions, say, as to whether it would have been feasible to fit stronger protection, or as to why the particular vehicles were used in the operation or campaign, or as to why those vehicles, as opposed to vehicles with stronger protection, were originally purchased by the Ministry of Defence, or as to whether it would have been better to have more helicopters available etc, all raise issues which are essentially political rather than legal. That being so, a curious aspect of counsel's submissions before this Court was the complete absence of any reference to Parliament as the forum in which such matters should be raised and debated and in which ministers should be held responsible. Of course, in consequence of pressure brought to bear by Parliament, the government might set up an independent inquiry with wide terms of reference to look into all aspects of a situation, including the political aspects. But we are concerned with the scope of a coroner's inquest whose function is different. Many of the issues about the deaths of soldiers which are, understandably, of the greatest concern to their relatives are indeed of this much broader nature. In short, they raise questions of policy, not of legality, and so would fall outside the scope of any article 2 investigation which a coroner might be obliged to carry out.

128. For these reasons I agree that the contentions advanced by Ms Rose and Mr Beloff should be rejected.

## LORD WALKER

129. In common with other members of this Court I feel some disquiet about our engaging in protracted deliberation and the preparation of lengthy judgments on two issues which (as all parties agree) do not actually affect what is to happen in consequence of the tragic death of Pte Smith. It is not the function of this Court to deliver advisory opinions, and in this case we may be going some way beyond

what would be regarded as a proper exercise of judicial power in a country with a written constitution providing for the separation of powers (for instance the position in Australia is very fully discussed in a paper "A Human Rights Act, the Courts and the Constitution" presented to the Australian Human Rights Commission by the Hon Michael McHugh AC on 5 March 2009).

130. The fact that every death of a soldier in Afghanistan brings tragedy to his or her family, and sorrow to the whole nation, may not be a sufficient reason for stretching our jurisdiction to the limits. That is underlined by the second issue, as to coroners' inquests, which has led to the submission of further detailed evidence which, informative as it is, has no possible bearing on the second inquest which is to be held on the death of Pte Smith.

131. On the two issues argued before the Court I respectfully agree with Lord Collins on the first issue, and with Lord Phillips and Lord Rodger on the second issue. I would particularly associate myself with paras 118-127 of Lord Rodger's judgment.

## LADY HALE

132. Mrs Smith must wonder why she is in this court. She did not ask to be here. All she wants is a proper inquiry, in which she can play a proper part, into how it was that her son Jason came to die of heatstroke while serving with the British army in Iraq. She wants to understand what happened to him, but she also wants others to understand it too, so that anything which reasonably can be done will be done to prevent other families suffering as hers has suffered. She had to begin these proceedings because of shortcomings in the first inquest, which are now conceded both by the Coroner and by the Ministry of Defence. The Ministry failed to produce the principal board of inquiry report into Private Smith's death, insisted upon wholesale redaction of the documents which were disclosed, and the coroner wrongly held that he had no power to order disclosure if the Ministry would not agree. As the judge commented, "it has seemed to the family that the Army was concerned to cover up any shortcomings and to protect its reputation. That may not be a correct conclusion, but it is not surprising that it has been reached" (para 5).

133. But all that is now behind her. A new inquest is to be held and those points are conceded. More than that, Mrs Smith wished to establish that her son had died "within the jurisdiction" of the United Kingdom, so that he and she were covered by the guarantees in article 2 of the European Convention on Human Rights. This imposes upon the state a duty, not only to avoid taking life, but also to take positive steps to protect the right to life in a variety of ways. One of these is to

hold a proper inquiry, in which the family of the deceased may play a proper part, if it appears that the state may have failed in its responsibility to protect life. But both of these points have also been conceded. The Ministry of Defence accept that Private Smith was within the jurisdiction of the United Kingdom when he died. They will also not object to an inquest which examines, not only the precise cause of his death, but also the circumstances in which it took place. This is as far as they or anyone else can go, because it will be for the coroner to decide, on the basis of that inquiry, what sort of verdict should be delivered. But if the evidence were to warrant it, the verdict could clearly be one which identified any breach that there may have been of the United Kingdom's obligations under article 2.

134. That is all that is needed to decide this case. The Ministry of Defence have appealed to this court because both the trial judge and the Court of Appeal accepted the invitation of both parties to decide more than they needed to decide. Of course they meant to be helpful. But because the Ministry of Defence did not like what they said, Mrs Smith has had to wait for more than two years for the case to be over so that the fresh inquest can be arranged. Perhaps worse, it is not at all clear what this court is doing. The trial judge ordered that the first inquisition and verdict be quashed and a new inquest held "that complies with the procedural obligations implicit in Article 2 of the European Convention on Human Rights, as set out in the Court's judgment". (He also dismissed a competing claim by the Ministry of Defence but there was no appeal against that.) The Court of Appeal dismissed the Ministry's appeal. So the judge's order stands. As I understand it, the most we might be asked to do is to delete the words "as set out in the Court's judgment". He made no declarations as to the rights of the parties so we are not asked to change those. So we are merely making observations on two extremely important and interesting questions but we are not deciding anything.

135. In those circumstances I doubt whether any of the important and interesting things which are said about those questions in this court can be part of the essential grounds for our decision and thus binding upon other courts in future. In the words of Sir Frederick Pollock, cited by Lord Denning in *Close v Steel Company of Wales Ltd* [1962] AC 367, at 388-389:

> "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."

Lest it be thought that Lord Denning took an unusual view of the circumstances in which he was bound by previous authority, he also referred to Lord Selborne LC, in *Caledonian Railway Company v Walker's Trustees* (1882) 7 App Cas 259, at 275:

> "A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House."

Pithier still was the Earl of Halsbury LC in *Quinn v Leathem* [1901] AC 495, at 506:

> ". . . a case is only an authority for what it actually decides."

Technically, therefore, I believe that our views are not binding, but they are of course persuasive. So it is only polite to the powerful arguments advanced by counsel, and to the patience with which Mrs Smith has listened to them, to indicate where I currently stand on each of the two broader issues.

136. On the jurisdiction issue, I remain of the view to which I was inclined in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356, that British soldiers serving in Iraq were within the jurisdiction of the United Kingdom when they were killed, in one case by "friendly fire" and in the other by a road side bomb. I am quite clear that this was not part of the principle, or essential ground, upon which the House of Lords decided the case: this was that taking care to discover whether or not the war was legal in international law had nothing to do with the duty in article 2 to protect life. This can easily be tested. It would have made no difference to the decision on the issue in the case where the soldiers' deaths had taken place: whether they were clearly "within the jurisdiction" of the United Kingdom or whether they were not. The House did hear some argument on the point, but nothing as full as the argument which this court has heard. Although I am sorry to disagree with colleagues whose opinions are worthy of the deepest respect, I agree with the opinions of Lord Mance and Lord Kerr, and for the very full reasons which they give, and there is nothing which I can usefully add.

137. On the second issue, I agree that this is a question for a coroner to determine on the evidence that emerges at the inquest, but I also agree with Lord Phillips and Lord Rodger that we already know enough to raise the serious possibility that the United Kingdom may in some way have been in breach of its obligations under article 2. So the scope of the inquiry must be wide enough to look into this and, depending on the conclusions drawn from the evidence, the verdict must be able to reflect this.

138. I do not believe that we are either allowing or dismissing an appeal on either issue, but if we are I would dismiss it on both.

**LORD BROWN**

139. Are our armed services abroad, in Iraq, Afghanistan or wherever else they may be called upon to fight, within the United Kingdom's jurisdiction within the meaning of article 1 of the European Convention on Human Rights? That is the critical first issue for decision on this appeal. If they are, then the United Kingdom is required to secure to them all the Convention rights and freedoms. Some will say that this is no less than they deserve. They are brave men and women, undoubtedly entitled to these rights and freedoms whilst serving (sometimes, as recently in Northern Ireland, on active service) at home. Why should they not enjoy the same rights when, whether they like it or not, they are called upon to face dangers abroad? When abroad, they are, after all, still subject to UK military law and, indeed, remain generally under the legislative, judicial and executive authority of the UK. Others, however, will say that to accord Convention rights and freedoms to our services whilst engaged in armed combat with hostile forces abroad makes no sense at all. It could serve only to inhibit decision-making in the field and to compromise our services' fighting power.

140. For my part I can readily see the force of both arguments and do not pretend to have found this an easy case to decide. In the end, however, I have concluded that, save in an exceptional case like that of Private Smith himself whose death resulted from his treatment on base, Convention rights do not generally attach to our armed forces serving abroad. Having regard to the number and length of other judgments in the case, my own reasoning will be brief. Sometimes less is more.

141. I take as my starting point the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153 where I sought to analyse the existing Strasbourg jurisprudence on the reach of article 1. Nothing that I have since heard or read has persuaded me that that analysis is wrong. It was known, of course, at the time this case was argued before us, that the application in *Al-Skeini* was to be heard in Strasbourg on 9 June 2010, with the judgment of the Grand Chamber expected some 3-6 months later, and, obviously, if the application succeeds, it is likely to transform our understanding of the scope of article 1 in cases of this sort. Meanwhile, however, *Al-Skeini* must be assumed to be correct and, in turn, the decision of the Grand Chamber in *Bankovic v Belgium* (2001) 11 EHRC 435 must be regarded as Strasbourg's ruling judgment on the point.

142. There has been some suggestion (see, for example, paras 29 and 30 of Lord Phillips' judgment) that, since *Bankovic*, a wider concept of article 1 jurisdiction based upon state agent authority has been gaining ground in Strasbourg. In *Al-Skeini* (at paras 124-131) I dealt at length with one post-*Bankovic* Strasbourg decision said to support such an approach – *Issa v Turkey (Merits)* (2004) 41 EHRR 567 – and concluded that it should not be understood to detract in any way from the clearly restrictive approach to article 1 jurisdiction adopted in *Bankovic.* Reference is now made to more recent Strasbourg decisions, in particular *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE 95 and *Medvedyev v France* (Application No 3394/03) (unreported) 29 March 2010. To my mind, however, neither casts any real doubt on the *Bankovic/Al-Skeini* analysis. In *Al-Saadoon* the Court at para 62 cited para 132 of my own judgment in *Al-Skeini* – recognising the UK's jurisdiction over Mr Mousa "essentially by analogy with the extra-territorial exception made for embassies (an analogy recognised too in *Hess v United Kingdom* (1975) 2 DR 72, a Commission decision in the context of a foreign prison which had itself referred to the embassy case of *X v Federal Republic of Germany*)" – and, at paras 88-89, concluded that:

> " . . . given the total and exclusive *de facto,* and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicant, were within the United Kingdom's jurisdiction (see *Hess v United Kingdom* . . .). This conclusion is, moreover, consistent with the dicta of the House of Lords in *Al-Skeini* . . . (see para 62 above). In the Court's view, the applicants remained within the United Kingdom's jurisdiction until their physical transfer to the custody of the Iraqi authorities on 31 December 2008."

It seems to me clear that the Court was there adopting, rather than doubting, the *Al-Skeini* analysis. The decision of the Grand Chamber in *Medvedyev* is sufficiently described at para 30 of Lord Phillips' judgment and paras 180-182 of Lord Mance's judgment. I cannot see how it supports an argument for article 1 jurisdiction generally in respect of a state's armed services abroad.

143. All that said, I recognise that whilst there is nothing in *Al-Skeini* (or, indeed, *Bankovic*) which supports the respondent's argument on the present appeal, neither is there anything in the cases wholly inconsistent with it. True, as para 61 of *Bankovic* stated, article 1 reflects an "essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case." And true it is too that the particular basis of exceptional jurisdiction being contended for here has not previously been recognised by the Court, the Commission's express reference to armed forces remaining under a state's article 1 jurisdiction when abroad (for example in their 1975 admissibility decision in *Cyprus v Turkey* 2 DR 125 cited at para 49 of Lord

Phillips' judgment) being conspicuously omitted from more recent such formulations. Nevertheless, as I recognised at the outset, our armed forces abroad *are* subject not only to UK military law but also to the UK's general criminal and civil law and (as the Court of Appeal [2009] 3 WLR 1099 pointed out at para 29 of its judgment): "As a matter of international law, no infringement of the sovereignty of the host state is involved in the United Kingdom exercising jurisdiction over its soldiers serving abroad".

144. Plainly, therefore, it can respectably be argued that special justification exists for accepting an extra-territorial basis of article 1 jurisdiction in their particular case. Arguably, moreover, this would eliminate at a stroke various apparent anomalies otherwise resulting from the position contended for by the Secretary of State – for example, Convention rights attaching to a soldier in, say, a tented desert base camp (or military ambulance) but not when out with a patrol group, or, indeed, to a soldier like Private Smith who dies on base but not perhaps if his hyperthermia had resulted from inadequate care and water off base.

145. The two principal reasons why for my part I would reject the respondent's argument are these. First, because, if our armed forces abroad are within the reach of the Convention but, as *Al-Skeini* decides, the local population are not, those responsible for the planning, control and execution of military operations will owe article 2 (and article 3) duties to our servicemen but not to the civilians whose safety is also imperilled by such operations. That would seem to me an odd and unsatisfactory situation (not to mention a situation unlikely to win the hearts and minds of the local population) and to sit uneasily with the growing Strasbourg case law on internal armed conflict – which, it should be noted, has not hitherto been suggested to extend also to international armed conflict situations. Cases like *Ergi v Turkey)* (1998) 32 EHRR 388 (extending the principles established in *McCann v United Kingdom* (1995) 21 EHRR 97 to situations of armed conflict), *Isayeva, Yusupova and Bazayeva v Russia* (Application Nos 57947-49/00*) (Isayeva I)* and *Isayeva v Russia* (Application No 57950/00) *(Isayeva II)* (decisions of 24 February 2005) show, in the context respectively of Turkish army operations against the PKK in Turkey and Russian army operations against Chechnyan separatist fighters in Chechnya, the ECtHR closely scrutinising the planning, control and execution of military operations and asking whether all this has been done in such a way as to minimise, to the greatest extent possible, recourse to lethal force. The exigencies of armed conflict notwithstanding, Strasbourg requires the state to have taken all feasible precautions to avoid or at least minimise incidental loss of life. In all three cases substantive breaches of article 2 were found established. In *Isayeva I*, for instance, the Court criticised the failure of the operational command to timeously communicate the fact that civilians may have been in the vicinity of the forces on active deployment, the absence of provision of forward air controllers to direct the military aircraft participating in the attack, and the deployment of missiles with a blast radius of between 300 to 800 metres which the Court regarded as

disproportionate weaponry; in *Isayeva II* it criticised the Russian military's failure to adequately anticipate the arrival of Chechnyan fighters, the absence of any preemptive measures to warn or evacuate the populace, the failure to accurately quantify the operational risk of deploying aircraft armed with heavy combat weapons, and the decision to utilise what again the Court regarded as disproportionate and indiscriminate weaponry.

146. As can be seen, Strasbourg's concern in these cases is essentially for the safety of civilians caught up in the conflict – conflict, of course, occurring within the legal space (espace juridique*)* of the respective contracting states. Assuming *Al-Skeini* is right, such civilians have no article 2 rights if they are outside the Council of Europe area. It is, however, the respondent's case that the soldiers do. Is it really to be suggested that even outside the area of the Council of Europe Strasbourg will scrutinise a contracting state's planning, control and execution of military operations to decide whether the state's own forces have been subjected to excessive risk (risk, that is, which is disproportionate to the objective sought)? May Strasbourg say that a different strategy or tactic should have been adopted – perhaps the use of airpower or longer-range weaponry to minimise the risk to ground troops notwithstanding that this might lead to higher civilian casualties? Such problems would to my mind be inescapable were Strasbourg to find armed forces abroad within the reach of article 1 and then adopt with regard to their article 2 rights the approach hitherto taken in situations of internal armed conflict.

147. My second principal reason for not holding the UK's armed forces abroad to be within the state's article 1 jurisdiction is that this would be to go further than the ECtHR has yet gone, to construe article 1 as reaching further than the existing Strasbourg jurisprudence clearly shows it to reach. As the ECtHR itself pointed out in *Bankovic* (para 65), "The scope of article 1 . . . is determinative of the very scope of the contracting parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection". Article 1 is in this respect to be contrasted with the Convention's substantive provisions and with the competence of the Convention organs, to both of which (as the Court had noted at para 64) the "living instrument" approach applies. It was for these reasons that all of us in *Al-Skeini* decided that it was for the ECtHR to give the definitive interpretation of article 1 and that domestic courts should not construe it as having any wider reach than that established by Strasbourg's existing jurisprudence. The first five appellants there failed because, as Lady Hale put it (at para 91), she did not think "that Strasbourg would inevitably hold that the deceased . . . were within the jurisdiction of the UK when they met their deaths".

148. That is similarly my conclusion in the present case – not, of course, with regard to Private Smith himself whose death, it is conceded, occurred in circumstances which did fall within the United Kingdom's jurisdiction, but rather with regard to our armed forces generally whilst serving abroad. For these reasons,

together with those given by Lord Phillips and Lord Collins, I would accept the appellant's argument upon the first issue.

149. The second issue before us, although ostensibly raised with regard to Pte Smith's death, in reality invites our ruling as to which deaths amongst the UK's armed forces abroad require inquests that comply with the article 2 investigatory obligation. Plainly Pte Smith's does. Equally plainly, if the majority of us are right on the first issue, that would not be so in respect of most of our armed forces abroad (at any rate when not serving within the territory of another Council of Europe state). If, however, the majority of us are wrong on the jurisdiction issue in respect of our forces in, for example, Iraq and Afghanistan, and in any event with regard to our armed forces on, for example, active service in Northern Ireland, together with isolated cases such as that of Pte Smith, then I am in full agreement with Lord Phillips' judgment on this issue and there is little that I wish to add.

150. I agree that the obligation to hold an article 2 investigation arises only when there is "ground for suspicion that the State may have breached a substantive obligation imposed by article 2" (Lord Phillips at para 84) which would certainly not ordinarily be the case where a soldier dies on active service abroad. I agree also with Lord Rodger's judgment on this point. As I earlier observed in *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, 214 (para 48): "An article 2 investigative obligation only arises in the comparatively few cases where the state's responsibility is or may be engaged".

151. I agree also with Lord Phillips' judgment at para 81 that an inquest will not always be the appropriate vehicle for discharging an article 2 investigatory obligation although I note what was said in the considered opinion of the Committee delivered by Lord Bingham in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, 206 (para 47) that: "in the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2".

152. I further agree with Lord Phillips that in practice the only real difference between a *Jamieson* inquest (*R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1) and a *Middleton* inquest is likely to be with regard to its verdict and findings, rather than its inquisitorial scope. As I pointed out in *Hurst* (paras 27 and 51), the scope of the inquiry is essentially a matter for the coroner. Such indeed had been eloquently recognised in *Jamieson* itself in the Court's judgment given there by Sir Thomas Bingham MR (at para 14 of the Court's general conclusions, p 26):

> "It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled."

153. As, however, I also pointed out in *Hurst* (para 51), the verdict and findings are *not* a matter for the coroner. These are severely circumscribed when an inquest is confined to ascertaining "by what means" the deceased came by his death (a *Jamieson* inquest); not so where the inquest is to fulfil the article 2 investigatory obligation when it must also ascertain "in what circumstances" the deceased came by his death (a *Middleton* inquest). Sometimes, of course, as in *McCann v United Kingdom* (1995) 21 EHRR 97 (the "*Death on the Rock*" case), "short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest" (*Hurst* at para 48, citing Lord Bingham in *Middleton* at para 31). Other times, perhaps generally indeed, an article 2 obligation will require the coroner or jury to state conclusions upon the important underlying issues in a way that plainly goes beyond the sort of restricted verdict available in a *Jamieson* inquest and in such cases a *Middleton* inquest is required. Even then, however, as noted at para 37 of *Middleton,* the conclusions must be "conclusions of fact as opposed to expressions of opinion. . . . Nor must the verdict appear to determine any question of civil liability."

154. Although, as I recognised in *Hurst* (para 51), the coroner may sometimes choose to widen the scope of the inquiry if he recognises that article 2 conclusions of fact (and thus a *Middleton* verdict and findings) are required, more probably (as Lord Hope envisages at para 95 of his judgment) the coroner is likely to decide the scope of inquiry with a view rather to the exercise of his rule 43 power to make a written report to a responsible authority aimed at avoiding similar fatalities in future.

155. To my mind, guidance beyond these broad generalities is quite impossible. This is really not an area of the law in which advisory opinions are likely to prove especially helpful.

**LORD MANCE**

*Issue 1 - Jurisdiction: (a) general*

156. The first issue before the Supreme Court is "whether a soldier on military service in Iraq is subject to the jurisdiction of the United Kingdom within the meaning of article 1 of the European Convention on Human Rights so as to benefit from the rights guaranteed by the Human Rights Act 1998 while operating in Iraq". If, or at least to the extent that, such a soldier is subject to United Kingdom jurisdiction within article 1, he will be entitled to rights guaranteed by the 1998 Act.

157. During the period leading up to his death, Private Smith spent time both at locations (particularly the Al Amarah stadium) constituting part of the United Kingdom army bases in Iraq and elsewhere. He became ill on 13 August 2003 at the stadium after performing various duties off base (particularly supervising fuel distribution in circumstances where only coalition troops were acceptable to locals in that role and were, it appears, correspondingly stretched in terms of man-power). He was taken then by ambulance to an United Kingdom accident and emergency medical centre at Abu Naji, where he sustained a cardiac arrest and died, the cause of death being heatstroke.

158. The Secretary of State for Defence accepts that, in so far as the events leading to his death occurred on base, they occurred within United Kingdom jurisdiction for the purposes of article 1 of the Convention and that the conduct leading to them is subject to examination for compliance with article 2 of the Convention accordingly. But he submits that, in so far as they occurred elsewhere, the converse applies. This is because, in his submission, jurisdiction under article 1 is primarily territorial and the only relevant exception, covering United Kingdom bases in Iraq, arises from the analogy of United Kingdom embassies, consulates, vessels and aircraft and places of detention abroad.

159. Some members of the Court describe this issue as academic. But it has a potential relevance in relation to the fresh inquest which has now to be held. Before the Court of Appeal, the Secretary of State noted that Mrs Smith's case regarding the circumstances leading to Private Smith's death had been extended to include "circumstances that took place outside the British army base and hospital", and argued originally that, as "these matters took place outside the jurisdiction of the UK", they "can form no part of the consideration in this case of whether the UK is in arguable breach of its obligations under article 2" (skeleton, para 16). By the end of the hearing, the Secretary of State had conceded that he would "not submit to the new coroner in the fresh inquest that the scope of that inquest is

restricted in any way by any decision by him on the applicability (or not) of the enhanced article 2 investigative obligation" (appellant's note and Court of Appeal judgment, para 62.) However, by letters dated respectively 22 January and 12 February 2010 the coroner has (correctly) affirmed that it is not for the parties to agree the scope of the new inquest, but for the coroner to do this in the light of the judgment of this Court, and the Secretary of State has (correctly) accepted this to be so. For this reason, the scope and application of article 1 and article 2 are of potential relevance to the future conduct of the fresh inquest.

160. It was on the analogy of embassies, consulates, vessels and aircraft and places of detention that the House of Lords held in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153 that Mr Mousa (an Iraqi citizen who had died, allegedly as a result of torture, in United Kingdom custody in a United Kingdom base in Iraq) was within this country's jurisdiction under article 1. The respondent, Private Smith's mother, supported by the Equality and Human Rights Commission, submits that the present case, concerning the relationship between a state and its own armed forces occupying Iraq, falls within another or a more general exception to the general principle of territoriality.

*(b) Gentle*

161. The Secretary of State submits that the House of Lords decision in *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] AC 1356 is binding authority in his favour, negativing the application of any such exception in the present context. He refers, in particular, to Lord Bingham's speech at para 8(3):

> "Subject to limited exceptions and specific extensions, the application of the Convention is territorial: the rights and freedoms are ordinarily to be secured to those within the borders of the state and not outside. Here, the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the defendants they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted: . . . *Al-Skeini* . . . paras 79, 129. The claimants seek to overcome that problem, in reliance on authorities such as *Soering v United Kingdom* (1989) 11 EHRR 439, by stressing that their complaint relates to the decision-making process (or lack of it) which occurred here, even though the ill-effects were felt abroad. There is, I think, an obvious distinction between the present case and the *Soering* case, and such later cases as *Chahal v United Kingdom* (1996) 23 EHRR 413 and *D v United Kingdom* (1997) 24 EHRR 423, in each of which action relating to an individual in the UK was likely to have an immediate and direct impact on that individual

> elsewhere. But I think there is a more fundamental objection: that the claimants' argument, necessary to meet the objection of extra-territoriality, highlights the remoteness of their complaints from the true purview of article 2."

Paras 79 and 129 in *Al-Skeini*, to which Lord Bingham referred, concern jurisdiction based on effective control. Lord Bingham evidently considered that no other exceptional head of jurisdiction applied. However, in so far as argument was addressed to this point, it appears to have been extremely brief (see pp 1361B-C and 1363G-H). The passage quoted from Lord Bingham's speech constituted the last of three reasons why article 2 could not embrace the process of deciding on the lawfulness of a resort to arms; and it is noticeable that, at its conclusion, in dismissing the submission based on *Soering*, Lord Bingham reverted to his previous two reasons.

162. Other members of the House focused in their express reasoning on Lord Bingham's first two reasons. But Lord Hoffmann, Lord Hope, Lord Scott, Lord Brown and I myself at paras 16, 28, 29, 71 and 74 all also agreed in general terms with Lord Bingham's reasons. Lord Rodger said only that his reasons were "essentially" the same as Lord Bingham's and Lord Hoffmann's (para 45), and Lady Hale regarded her reasons as being "in substantial agreement" with Lord Bingham's (para 61), although she expressly disagreed with him on the question whether a British soldier "serving under the command and control of his superiors" was within the United Kingdom's jurisdiction within the meaning of article 1 (para 60). Lord Carswell left that point open (para 66), and decided the case on the basis (again part of Lord Bingham's first two reasons) that article 2 did not involve a duty not to go to war contrary to the UN Charter or to investigate the lawfulness of an armed conflict. In the above circumstances, it is open to doubt whether the first part of the passage in para 8(3) quoted above from Lord Bingham's speech was part of the ratio decidendi. But, even if it technically was, it was not the product of the detailed argument and citation which we have now had, and it would, in my view, be wrong to refuse to reconsider it *de novo*.

*(c) Bankovic and the concept of jurisdiction*

163. Leaving *Gentle* aside, the submissions of all parties have, realistically, taken as their general starting point the decisions of the European Court of Human Rights in *Bankovic v United Kingdom* (2001) 11 BHRC 435 and *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE 95 and of the House of Lords in *Al-Skeini*. Dicta in the House of Lords basing jurisdiction in *Al-Skeini* on "the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question" were referred to with approval by the European Court of Human Rights in *Al-Saadoon.* The decision in

*Al-Skeini* is shortly to be reviewed in that court. But for present purposes the Supreme Court can and should accept it.

164. This starting point avoids the need for any entirely open review of the concept of jurisdiction under article 1. Just how vexed that concept and how controversial the decisions in *Bankovic* and *Al-Skeini* are appears from extensive literature which they have generated: see e.g. Lawson, *Life after Bankovic: on the Extraterritorial Application of the European Convention on Human Rights*; O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Bankovic"* (both in F Coopman and M Kamminga, *Extraterritorial Application of Human Rights Treaties*; Antwerp-Oxford 2004); Loucaides, *Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic case* (2006) 4 EHRLR 391; Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties* (2008) HRLR 8(3), 411; and King, *The Extraterritorial Human Rights Obligations of States* (2009) HRLR 521. Arguments that the European Court of Human Rights was guilty of a "non sequitur" in assimilating the concept of jurisdiction in article 1 to the concept in general international law and in relying upon this to restrict the extra-territorial application of the Convention to exceptional circumstances only (see Milanovic, p 435) do not arise for consideration. Nor do similar arguments that the Court in *Bankovic* was wrong in failing to recognise, as a separate and equal head of jurisdiction having extra-territorial effect, the existence of "effective authority over individuals" or of "actual authority or control over a given territory or person", whether lawfully or unlawfully exercised, (Lawson, p 120, Loucaides, p 399 and Milanovic, p 435). Whatever the merits of giving the Convention a wider reach might be *de lege ferenda*, we are (like, in fact more so than, the House of Lords in *Al-Skeini*: see per Lord Rodger, para 69) only concerned with its reach *de lege lata*. Criticisms of the House of Lords' approach in *Al-Skeini* to jurisdiction based on territorial control (see King, pp 534-536 and 545-547) and suggestions that the House ought (in the light of cases such as *Issa v Turkey* (2004) 41 EHRR 567) to have recognised a "cause and effect" notion of jurisdiction (King, p 553) are also out of place in the light of the reasoning in *Bankovic* and *Al-Skeini*.

165. The argument on the present appeal assumes the correctness of the general principles stated in *Bankovic* and *Al-Saadoon* and applied in *Al-Skeini*. According to these jurisdiction in article 1 refers primarily to territorial jurisdiction, "other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case" (*Bankovic*, para 61). The Court in *Bankovic* explained this conclusion as follows:

> "59. As to the 'ordinary meaning' of the relevant term in article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is

primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states (Mann, *'The Doctrine of Jurisdiction in International Law*', RdC, 1964, vol 1; Mann, '*The Doctrine of Jurisdiction in International Law, Twenty Years Later*', RdC, 1984, vol 1; Bernhardt, *Encyclopaedia of Public International Law* edition 1997, vol 3, pp 55-59 '*Jurisdiction of States'* and edition 1995, vol 2, pp 337-343 "*Extra-territorial Effects of Administrative, Judicial and Legislative Acts*"; Oppenheim's *International Law*, 9th ed 1992 (Jennings and Watts), vol 1, § 137; Dupuy, *Droit International Public*, 4th ed 1998, p 61; and Brownlie, *Principles of International Law*, 5th ed 1998, pp 287, 301 and 312-314).

60. Accordingly, for example, a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to that state's and other states' territorial competence (Higgins, *Problems and Process* (1994), p 73; and Nguyen Quoc Dinh, *Droit International Public*, 6th ed 1999 (Daillier and Pellet), p 500). In addition, a state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying state in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt, cited above, vol 3 at p 59 and vol 2, pp 338-340; Oppenheim, cited above, at § 137; Dupuy, cited above, at pp 64-65; Brownlie, cited above, at p 313; Cassese, *International Law*, 2001, p 89; and, most recently, the "*Report on the Preferential Treatment of National Minorities by their Kin-States*" adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001)."

166. The Court found support for a primarily territorial approach to article 1 not only in general international law and the works cited in paras 59 and 60, but also in the *travaux préparatoires* (*Bankovic***,** paras 19-21 and 63). During the negotiation of the Convention, the words "all persons residing within the territories of the signatory States" in article 1 were replaced by "all persons within their jurisdiction". The Court noted that this was expressly on the basis that "there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States". However, it is not without significance that the replacement phrase adopted the word "jurisdiction", rather than "territories"; and also that the Court itself has recognised, by the exceptions which it has endorsed,

that the Convention is not exclusively confined in its application to persons within the territories of the signatory States. Lawson (cited above) points out (p 88) that the original proposal was to replace "residing in" by "living in", but that the drafting sub-committee - noting that the aim was "to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention" - proposed the replacement of "residing within" by "within the jurisdiction" (or, in French, *relevant de leur jurisdiction*). The use of the more flexible notion "within the jurisdiction", with its potentially wider jurisprudential connotations, was clearly deliberate, even if it is "not unlikely that the drafters … did not give much thought at all to any extraterritorial impact of the Convention" (Lawson, p 90; and see also Loucaides, above, p 397).

167. Jurisdiction in general international law exists in the form of (a) jurisdiction to prescribe or legislate (and, as a subsidiary aspect, adjudicate), which is primarily territorial but generally also regarded as extending to a state's nationals wherever they are, and (b) jurisdiction to enforce what is prescribed, which is usually only territorial (and does not usually exist, for example, against the persons of a state's nationals, while they remain abroad): see Dr F A Mann in the writings cited in *Bankovic* at para 59, particularly RdC, 1964, pp 13, 22 et seq. and 127 et seq, and RdC, 1984, Chaps I and II, the *Reinstatement of the Law Third: Restatement of the Foreign Relations Law of the United States*, para 401 and *Alcom Ltd v Republic of Colombia* [1984] AC 580, 600C, per Lord Diplock. In drawing on the conception of jurisdiction in general international law (while also reminding itself of "the Convention's special character as a human rights treaty": para 57), the Court was (as Lord Rodger noted in *Al-Skeini*, para 64) relating the scope of the Convention to the existence of a pre-existing relationship between the relevant state and the victim. For the Convention to apply, the mutual relationship must be one under which the state possessed and was able to enforce lawful authority and power over the victim and the victim was in return under and entitled to the state's protection. Jurisdiction in international law is, as Dr Mann said (RdC, 1964, p 13), "concerned with the state's right of *regulation* or, in the incomparably pithy language of Mr Justice Holmes, with the right 'to apply the law to the acts of men'". This means that there must be, translated to the international legal sphere, a similar bond of reciprocal allegiance to that identified domestically as existing between sovereign and subject in *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377:

> "duplex et reciprocum ligamen; quia sicut subditus regi tenetur ad obedientiam, ita rex subdito tenetur ad protectionem; merito igitur ligeantia dicitur ab ligando, quia continet in se duplex ligamen".

168. A state's international jurisdiction, based on this reciprocal bond, respects the matching jurisdiction of other states based on their mutual relationship with those within their territories and their nationals. In international law, each state owes duties to protect those within its jurisdiction. If state A infringes the

fundamental human rights of a person subject to state B's jurisdiction, then, although that person may have no direct right against state A, it may become state B's duty to pursue the matter at the international level against state A. In the same vein, the Court in *Bankovic* noted that the Convention was designed to "ensure the observance of *the engagements undertaken* by the Contracting Parties" (para 80) - engagements which cannot be regarded as having been undertaken to benefit everyone in the world at large. Consistently with the above, in Dr Mann's writings, jurisdiction in international law is thus associated with sovereignty: it is "an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by the state's sovereignty" (RdC, 1964, pp 24-31, esp p 30; see also RdC, 1984, p 20).

169. In *Bankovic* itself, the only connection with the United Kingdom consisted in the act of bombing Belgrade which was alleged to constitute a breach of the Convention (a pure "cause and effect" notion of jurisdiction). In that context, it is unsurprising that the Court should emphasise that "the Convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states" (para 80) and should underline the significance of a pre-existing reciprocal relationship under which sovereignty of one sort or another was legitimately possessed and exercised. In *Al-Skeini* (see paras 6, 61, 90, 97 and 132) the House of Lords decided that the United Kingdom as an occupying power did not, except within its military bases, have sufficient effective control over any territory of Iraq to bring such territory within its jurisdiction under article 1 of the European Convention on Human Rights. The present appeal raises a different question, whether the United Kingdom had sufficient authority under international law over its own forces in Iraq for them to be regarded as within its jurisdiction under article 1.

*(d) The respondent's case*

170. For present purposes, the respondent accepts the approach taken by the Court in *Bankovic* and *Al-Saadoon* and by the House in *Al-Skeini*. But she relies on its underlying rationale – the limitation of jurisdiction by reference to the limitations of sovereignty and the need to avoid conflicts of jurisdiction. This rationale appears with clarity in both paras 59 and 60 cited above. The suggested bases of extra-territorial jurisdiction "are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States". "[A] State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence"; and in addition "a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects".

171. In the respondent's submission, the relationship between the United Kingdom and its armed forces in Iraq meets all these requirements for recognising that it involved in August 2003 the legitimate and effective exercise of jurisdiction, in the prescriptive, the adjudicatory and the enforcement senses. The United Kingdom was in August 2003 exercising its authority lawfully in Iraq, with the consent of the Coalition Provisional Authority ("CPA"), over United Kingdom troops including Private Smith, a United Kingdom citizen. By CPA Order No 17 issued in June 2003, the CPA formalised the status and arrangements governing the presence of the multinational force (MNF), which included the United Kingdom's armed forces, in Iraq. The MNF was given, inter alia, the right to enter into, remain in and depart from Iraq (section 13), freedom of movement without delay throughout Iraq (section 7), freedom of radio-communications (section 6), the right to use without cost such areas for headquarters, camps or other premises as might be necessary as well as to use, free of cost or where this was not practicable at the most favourable rate, water, electricity and other public utilities and facilities (section 9). Importantly, by section 2 the MNF, its personnel, property, funds and assets were immune from Iraqi legal process and all MNF personnel were expressed to be "subject to the exclusive jurisdiction of their Sending States". Further, the respondent submits, the CPA was in issuing CPA Order No 17 operating with the legal mandate of the Security Council, which by Resolution 1483 adopted on 22 May 2003 under Chapter VII of the UN Charter, had recognised "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command ('the Authority')", and called upon the Authority (in practice the CPA) "consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory".

172. The respondent therefore submits that there would be no interference with Iraqi sovereignty and no attempt to impose Convention standards on Iraq or anyone other than the British state, by recognising the existence of Convention obligations as between the United Kingdom and nationals like Private Smith serving in its armed forces in Iraq. There would be no question of Private Smith being brought within the Convention merely by virtue of the fact that he was a victim of an alleged breach of article 2. On the contrary, the relationship of command and control under which Private Smith served gave the United Kingdom a broad protective capability and responsibility, which meant that a wide range of Convention rights could be effectively secured for his benefit. Further, this being an exceptional head of jurisdiction, it was, in the respondent's further submission, no objection if or that there might be some Convention rights which could not be secured; the objection, identified by the House in *Al-Skeini*, to any application of the Convention based on "tailoring" and restricting Convention rights did not apply to the exceptional heads of jurisdiction. In this connection, the Secretary of State points to para 130 in Lord Brown's speech in *Al-Skeini*, to which I return below (para 193).

173. These are forceful submissions, but they require closer analysis of the status of the United Kingdom's armed forces in Iraq. Paras 59 and 60 of the Court's judgment in *Bankovic* recognise that state A may exercise jurisdiction on or in the territory of state B either (a) with the consent, invitation or acquiescence of state B or (b) as an occupying state "at least in certain respects". I will consider in turn these alternative bases of jurisdiction (a) and (b). But first I examine three specific cases of the exceptional extraterritorial jurisdiction contemplated in paras 59 and 60 of *Bankovic*. These were identified and analysed by Lord Brown in *Al-Skeini* at paras 118 to 122.

*(e) Cases of exceptional extra- territorial jurisdiction*

174. The first involves the forcible removal by state A from state B and with state B's consent of a person wanted for trial in state A (*Al-Skeini*, paras 118-119). Within this category, Lord Brown put *Őcalan v Turkey* (2005) 41 EHRR 985, where the European Court of Human Rights said:

> "91. The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport.
>
> It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that state for the purposes of article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in *Sánchez Ramirez v France* (1996) 86-A DR 155 and *Freda v Italy* (1980) 21 DR 250, and, by converse implication, *Banković v Belgium* [(2001) 11 BHRC 435]."

175. Lord Brown commented that, in circumstances where "the forcible removal was effected with the full cooperation of the relevant foreign authorities and with a view to the applicant's criminal trial in the respondent state", it was unsurprising that "the Grand Chamber in *Őcalan* had felt able to distinguish *Bankovic* 'by converse implication'". The inference from para 91 in *Őcalan* is that, if (a) state A exercises authority over an individual in state B by consent of state B, and (b) it does so in order to lead to exercise of state A's ordinary domestic jurisdiction over that individual, then it is throughout exercising jurisdiction over that individual under article 1. The present case is not precisely on all fours (not least, because the

United Kingdom's authority over its armed forces was to be exercised in Iraq), but, if the case could be analysed in terms of consent, that could hardly be critical in principle.

176. A second exceptional category was considered by Lord Brown in para 121 with reference back to para 109(4)(iii), where he introduced the category in these terms:

> "Certain other cases where a state's responsibility 'could, in principle, be engaged because of acts … which produced effects or were performed outside their own territory' (para 69). *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, at para 91, is the only authority specifically referred to in *Bankovic* as exemplifying this class of exception to the general rule. *Drozd*, however, contemplated no more than that, if a French judge exercised jurisdiction extraterritorially in Andorra in his capacity as a French judge, then anyone complaining of a violation of his Convention rights by that judge would be regarded as being within France's jurisdiction."

In para 121, Lord Brown further explained this category:

> "Another category, similarly recognised in *Bankovic*, was *Drozd* (see para 109(4)(iii) above ) into which category can also be put cases like *X and Y v Switzerland* (1977) 9 DR 57 and *Gentilhomme, Schaff-Benhadji and Zerouki v France* (Application Nos 48205/99, 48207/99 and 48209/99) (unreported) 14 May 2002. In *X and Y v Switzerland*, Switzerland was held to be exercising jurisdiction where, pursuant to treaty provisions with Liechtenstein, it legislated for immigration matters in both states, prohibiting X from entering either. In *Gentilhomme,* France operated French state schools in Algeria, again pursuant to a treaty arrangement."

177. *Drozd* concerned complaints brought by defendants tried in Andorra against France and Spain as being allegedly responsible for non-observance of the Convention by persons from these countries nominated to sit as judges in Andorra. Its significance is that the European Court of Human Rights found it necessary to consider whether the judges' acts could be attributed to France and Spain, "even though they were not performed on the territory of those states" (*Drozd*, para 91). As the Court explained in *Bankovic* (para 69) "the impugned acts could not, in the circumstances, be attributed to the respondent states because the judges in question were not acting in their capacity as French or Spanish judges and as the Andorran

courts functioned independently of the respondent states" (para 69). Rix LJ in the Divisional Court in *Al-Skeini* (paras 158-166 and 256-257) subjected *Drozd* to close scrutiny, and was puzzled by its reasoning. He noted that, if the judges sitting in Andorra had been acting in their capacities as French and Spanish judges, then "in this most important legal sphere, in one sense the heart of what is meant by 'jurisdiction', there would have been a form of extension of French and Spanish jurisdiction into the territory of Andorra", and regarded *Drozd* as "too much of a special case to provide any firm foundation for a submission that personal jurisdiction exercised extraterritorially by state agents or authorities is a broad principle of jurisdiction under article 1" (para 257). Special case though it was, *Drozd* points to the possibility that certain relationships, such as those between a national judge and those under his or her authority, may attract the operation of the Convention, irrespective of whether they take place within the territory of the judge's state.

178. *Gentilhomme* is of interest, not just because it recognises the operation by France in Algeria of French schools with the consent of Algeria as capable of amounting to an exercise of jurisdiction by France in Algeria within the scope of article 1, but also because, on the facts, France was held not responsible. The complainants' children had, under French law, dual French and Algerian nationality but, under Algerian law, were only recognised as having Algerian nationality. The complaint related to the refusal to admit them to the French schools in Algeria. However, this was the result of a decision taken by Algeria unilaterally, with which France had no option but to comply although that decision was in breach of a declaration of cultural co-operation which the two countries had signed on 19 March 1962. The Court held that the conduct complained of could not be attributed to France, and the complaint was accordingly incompatible with the Convention *ratione personae*. The possibility of exercising jurisdiction abroad by consent, invitation or acquiescence of the overseas state, to which the Court had referred in *Bankovic*, "est subordonnée à la competence territoriale de cet autre Etat, et, en principe, 'un Etat ne peut concrètement exerciser sa jurisdiction sur le territoire d'un autre Etat sans le consentement, l'invitation ou l'acquiescement de ce dernier' (*Bankovic*, paras 59-60)". This appears clearly to indicate that exceptional jurisdiction may be tailored, in extent and in the liability to which it is capable of giving rise, by reference to the scope of the authority for the exercise of which abroad consent is given.

179. The third exceptional category involves "the activities of [a state's] diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state" (*Bankovic*, para 73, *Al-Skeini*, paras 109(4)(ii) and 122). As regards the activities of diplomatic or consular agents abroad, the critical feature is, again, the consent of the foreign state, in accordance with general principles of international law, to the exercise within its territory of the authority of the sending state by representatives of that state. As Lord Brown noted in para 122,

"jurisdiction" within article 1 has been held to exist both in relation to nationals of the sending state and even in relation to foreigners. In relation to nationals, the existence of such jurisdiction is more obvious than it is, perhaps, in relation to foreigners. The present case is concerned with the existence of jurisdiction in Iraq in relation to British soldiers.

180. As to a state's "activities … on board craft and vessels registered in, or flying the flag of, that state", the relevant consideration is, once again, that the state has under international law recognised authority and control over such craft and vessels - since "the view that a ship is a floating part of state territory has long fallen into disrepute" (Brownlie's *Principles of Public International Law*, 7th ed (2008), p 318). The recent decision of a seventeen member Grand Chamber in *Medvedyev v France* (Application No 3394/03) (29 March 2010) is not without interest in this connection. The *Winner*, a Cambodian vessel was engaged on drug trafficking in the high seas (Cape Verde). Belying its name, it was detected and boarded by the French authorities, who detained the crew on board and took them on the vessel to France for trial. France was, but Cambodia was not, party to the relevant international drug trafficking conventions, which did not in the circumstances authorise the arrest by France of the Cambodian vessel. Nevertheless, Cambodia had given France specific ad hoc authorisation "to intercept, inspect and take legal action against the ship".

181. A majority of the Court considered that the crew were within the jurisdiction of France for the purposes of article 1 on the simple basis "of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France (contrast *Bankovic*, cited above)" (para 67). *Bankovic* was cited in para 64, where the Court noted that it was "only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of article 1", and that "This excluded situations, however, where – as in the *Bankovic* case – what was at issue was an instantaneous extraterritorial act, as the provisions of article 1 did not admit of a 'cause-and-effect' notion of 'jurisdiction' (*Bankovic*, para 75)".

182. Having accepted that France had jurisdiction under article 1, the majority in *Medvedyev* went on to hold the detention of the crew unjustified, on the basis that, although international as well as domestic law was capable of shaping a "procedure prescribed by law" within article 5.1 (para 79), Cambodia's ad hoc authorisation did not meet the requirements under article 5.1 of "clearly defined" and "foreseeable" law (paras 99-100). Presumably foreshadowing that conclusion, the majority appear in para 67 to have endorsed the possibility of a purely factual (albeit unlawfully exercised) concept of jurisdiction under article 1. In contrast, seven judges, dissenting from the majority's conclusion under article 5.1, accepted

that article 1 applied on the simple basis that "the *Winner* – with the agreement of the flag state – was undeniably within the jurisdiction of France for the purposes of article 1" (para 10). That state B may authorise state A to exercise jurisdiction which would otherwise belong to state B for the purposes of article 1 is on any view consistent with the principles in *Bankovic*, paras 59-60, as well as with the three specific categories of extraterritorial jurisdiction which I have been considering.

*(f) The present case*

183. The present case falls directly within none of these specific categories. But all three categories depend upon the exercise by state A abroad of state power and authority over individuals, particularly nationals of state A, by consent, invitation or acquiescence of the foreign state B. They exemplify in this respect one underlying theme of paras 59 and 60 in *Bankovic*. The first question is whether the present case represents an example of the exercise by state A (here the United Kingdom) of its lawful authority and power over its nationals in state B (Iraq) with the consent of state B. If it does not, then it will be necessary to consider the alternative possibility mentioned in *Bankovic*, para 60, namely that the United Kingdom had, as an occupying power, jurisdiction under international law over its armed forces wherever they were in Iraq.

*(g) Exercise of jurisdiction by consent*

184. The answer to the first question depends upon the position of the CPA. The CPA's origin, role and status were examined in *Al-Skeini*, particularly by Rix LJ in the Divisional Court at [2004] EWHC 2911 (Admin); [2007] QB 140, paras 9-39. Following their invasion of Iraq, the United States and United Kingdom became occupying powers within and subject to the provisions of the Hague Convention 1907 and the Fourth Geneva Convention 1949 (Rix LJ, para 11). The CPA was the creation of a "freedom message" issued in that capacity by United States General Tommy Franks on 16 April 2003 (Rix LJ, para 14). The formation and purpose of the CPA ("to exercise powers of government temporarily" and "to transfer responsibility for administration to representative Iraqi authorities as soon as possible") were reported by letter by the two governments' permanent representatives to the Security Council, The Security Council on 22 May 2003 adopted Resolution 1483 under Chapter VII of the UN Charter, that is as a measure taken to maintain or restore international peace and security. Resolution 1483 noted the contents of the letter and, as stated in para 171 above, recognised "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command ('the Authority')" and called upon the Authority (in practice the CPA) "consistent with the Charter of the United Nations and other relevant international law, to promote

the welfare of the Iraqi people through the effective administration of the territory" (para 4). But it also supported a transformative process in Iraq, through "the formation, by the people of Iraq with the help of the Authority, … of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Administration" (Resolution 1483, para 9). The CPA had by regulation R1 dated 16 May 2003 already declared that there were vested in the CPA "all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions…." (anticipating in this respect by some 6 days the effect of Resolution 1483, a draft of which was by then publicly available). In June 2003 the CPA issued CPA Order No 17, which formalised the status and arrangements covering the United Kingdom's occupying forces (para 171 above).

185. To complete the picture, on 13 July 2003, following two national conferences and widespread consultation, the Iraqi Governing Council ("IGC") announced its formation and was recognised formally by the CPA by regulation R6, in line with para 9 of Security Council Resolution 1483, as the principal body of an Iraqi interim administration, with which the CPA would "consult and co-ordinate on all matters involving the temporary governance of Iraq". The Security Council by Resolution 1500 on 14 August 2003 welcomed the establishment of the IGC "as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq". In its later Resolution 1511 of 16 October 2003, the Security Council, again acting under Chapter VII, "reaffirm[ed] the sovereignty and territorial integrity of Iraq, and underscore[ed] in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003) ….". The IGC eventually dissolved itself on 1 June 2004, and on 28 June 2008 the CPA transferred authority to the Iraqi Interim Government, which became the sole sovereign authority of Iraq (Rix LJ, para 38).

186. The CPA was thus exercising, and was recognised by the Security Council as having under international law, responsibility for the temporary governance and administration of Iraq throughout the relevant period from the end of May to August 2003. In the Court of Appeal in *Al-Skeini* [2005] EWCA Civ 1609; [2007] QB 140, para 123, Brooke LJ said that "the CPA, which was not an instrument of the UK government, had the overall executive, legislative and judicial authority in Iraq whenever it deemed it necessary to exercise such authority to achieve its objectives". In the House of Lords (para 83) Lord Rodger expressed himself as being in agreement with paras 120 to 128 of Brooke LJ's judgment when concluding that the United Kingdom lacked effective control of Basra and its surrounding areas. The CPA expressly endorsed and authorised the presence of the

United Kingdom's armed forces in Iraq, and it had the support of Security Council Resolution 1483 in so acting. But that does not necessarily mean that the CPA equates with the state of Iraq for the purposes of consenting to the presence of foreign troops under international law. The CPA, although separate from the United Kingdom government, was the creature of the occupying forces, and Security Council Resolutions 1483 and 1511 were careful to refer to the CPA in terms consistent with this. An analysis which relies upon the Security Council's recognition of the CPA's role and upon CPA Order No 17 as a basis for saying that the state of Iraq consented to the presence and activities of United Kingdom forces in Iraq may be regarded as essentially circular: the CPA owed its existence, rights and responsibilities to the presence and activities of the occupying forces, and the Security Council's Resolution was drafted on a basis which can be said merely to recognise this truth. On the other hand, if that is so, then it is also true there was during the period May to August 2003 no other body which could claim to represent the state of Iraq, and a correspondingly reduced risk of any objectionable clash of sovereignty.

*(g) Exercise of jurisdiction over occupying forces*

187. This brings me to the other head of extra-territorial jurisdiction mentioned in *Bankovic*, para 60, although not the subject of detailed analysis there or in *Al-Skeini*: that is jurisdiction as an occupying force. The laws of war apply whatever the legitimacy or otherwise of the *casus belli*. They would not otherwise have much point. In the present case, "the specific authorities, responsibilities, and obligations under applicable international law" of the occupying forces, as well as the role of the CPA, were also endorsed by Security Council Resolution 1483. The European Court of Human Rights recognised in para 60 in *Bankovic* that occupation can give jurisdiction "at least in certain respects", and referred to inter alia *Oppenheim's International Law* (vol I – Peace) (9th ed) (1992) para 137. This states that: "International law, however, gives every state a right to claim exemption from local jurisdiction, chiefly for itself, its Head of State, its diplomatic envoys, its warships and its armed forces abroad". In relation to the words "and its armed forces", footnote 19 refers to paras 556-558, which, in relation to belligerent occupation of foreign territory, refer in turn by footnote 4 to paras 166-172b of volume II – Disputes,War and Neutrality of the same work (7th ed) (1952). Para 166 states that, in modern international law:

> "although the occupant in no wise acquires sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being military authority over it. As he thereby prevents the legitimate sovereign from exercising his authority, and claims obedience for himself from the inhabitants, he must administer the country, not only in the interest of his own military

> advantage, but also, at any rate so far as possible, for the public benefit of the inhabitants."

Para 169 continues:

> "As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the territory and its inhabitants; ….
>
> In carrying out [the administration] the occupant is totally independent of the constitution and law of the territory, since occupation is an aim of warfare, and the maintenance and safety of his forces and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions. But, although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must ensure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty".

188. It has been observed that the transformative aspect of Resolution 1483 (para 184 above) and the transformation in Iraqi society and governance which the CPA actually implemented do not reconcile easily with the traditional principles governing occupation stated in *Oppenheim*: see Adam Roberts, *The End of Occupation* (2005) ICLQ 27 and *Transformative Military Occupation: Applying the Laws of War and Human Rights* (2006) 100 AJIL 580, 604-618 and Nehal Bhuta, *The antimonies of transformative occupation* (2005) EJIL 721. It seems clear that neither the occupying states nor the Security Council viewed the situation as one in which there was, after the overthrow of Saddam Hussein, any legitimate sovereign. It also seems improbable that the wide-ranging and in certain respects "fundamental" measures introduced by the CPA for the temporary governance of Iraq (as described by Rix LJ in the Divisional Court in *Al-Skeini* at paras 19 to 26) would fit with the traditional "duty of administering the country according to the existing laws and the existing rules of administration" to which *Oppenheim* refers in para 169. However, I think it unnecessary to consider how far and on what basis the occupation of Iraq may have had features going beyond that

of traditional belligerent occupation. What is important for present purposes is that the status even of a traditional occupying state is recognised and regulated by international law, and that it is one in which "as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power", and in which the occupant has the right to claim immunity for its armed forces from local jurisdiction. In the context of *Bankovic*, the European Court may in para 60 have been thinking primarily of jurisdiction exercised by a state through occupying forces over local inhabitants. But to the extent that such jurisdiction exists, it does so only because of the state's pre-existing authority and control over its own armed forces. An occupying state cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in each case in the sense of article 1 of the Convention. That is not of course to equate a state's jurisdiction over third parties with its pre-existing and more widely based jurisdiction over its own armed forces (see further para 191 below).

189. In providing for the occupying forces to have immunity from Iraqi legal process, CPA Order No 17 reflected the general principle of state immunity, under international and common law, precluding civil suits in one state against a *foreign* state or its servants in respect of sovereign activities of that foreign state: see eg *Littrell v United States of America (No 2)* [1995] 1 WLR 82, *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270 (the position relating to torture not being relevant on this appeal) and, under general international law, para 137 of *Oppenheim* (para 187 above). No such general immunity today exists under English law as between the United Kingdom and those *within its territory or having its nationality*, whether the conduct occurs within or outside the United Kingdom. Soldiers can bring proceedings in England against the Ministry of Defence in respect of any breach of the state's common law duty of care towards them: Crown Proceedings (Armed Forces) Act 1987, section 1. That such liability is capable of arising in respect of operations or activity anywhere in the world appears implicit in section 1 of the 1987 Act (read in the light of section 10 of the Crown Proceedings Act 1947 which it repealed) as well as in section 2 of the 1987 Act. The United Kingdom government is thus already liable to receive claims at common law by soldiers serving in Iraq based, for example, on allegations of failure to take proper care in relation to their safety, other than in the context of active operations against an enemy. A distinction between actual operations against an enemy (during the course of which no common law duty of care exists) and other activities of combatant services in time of war was drawn in *Shaw Savill and Albion Co Ltd v Commonwealth of Australia* (1940) CLR 344, *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75, 110, per Lord Reid (using the term "battle damage" to describe the former category), *Mulcahy v Minister of Defence* [1996] QB 732 and *Bici v Ministry of Defence* [2004] EWHC 786 (QB), paras 90-100. It is unnecessary to examine it or its scope here. I can also leave undecided the question whether the doctrine of act of state might in limited circumstances

make even a claim by a British subject non-justiciable: see *Nissan v Attorney General* [1970] AC 179; *Bici v Ministry of Defence* (above), para 88.

190. In providing for the United Kingdom to have "exclusive jurisdiction", CPA Order No 17 also mirrored in effect the domestic position, whereby British soldiers are subject to United Kingdom military law wherever they serve. This was so under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 ("the Service Acts"), backed up by rules and regulations, including the Queen's Regulations 1975, in force in 2003; and it remains so since their replacement from 31 October 2009 by the Armed Forces Act 2006. Although the Service Acts are largely silent on their territorial scope, it is not in dispute that their provisions governed service overseas as well as domestically: see *Al-Skeini*, per Lord Bingham at paras 15(4) and 26. This is, for example, reflected in provisions for courts-martial to have jurisdiction over offences committed abroad (Naval Discipline Act 1957, section 48(1)) and to sit abroad (Army Act, section 91): see also Halsbury's Laws of England, Armed Forces, vol 2(2), para 303, footnote 4, noting that the jurisdiction of army and air force courts-martial to try offences committed outside the United Kingdom "is to be inferred from the fact that each of the offence-creating provisions … provides that the offence in question is committed by "any person subject to military or air force law" without any limiting words as to where the offence must be committed". Section 70(1) of the Army Act has made it an offence for any person subject to military law to commit a civil law offence anywhere in the world. Section 367 of the 2006 Act now provides expressly that "Every member of the regular forces is subject to service law at all times."

*(h) Conclusion on issue of jurisdiction*

191. In the light of the above, it is in my view possible to give a clear answer to the question whether the United Kingdom had jurisdiction under international law over its armed forces wherever they were in Iraq. If the United Kingdom did not, then no state did. The invasion clearly and finally ousted any previous government. The United Kingdom was the only power exercising and having under international law authority over its soldiers. In so far as there was any civil administration in Iraq, it consented to this. If the CPA's consent is disregarded as coming from what was, in effect, an emanation of the two occupying powers, then the United Kingdom was, and was by Security Council Resolution 1483 recognised as, an occupying power in Iraq. *Bankovic* indicates that one basis on which the UK could be regarded as having had jurisdiction over its forces in Iraq would have been by consent of the state of Iraq. It would be strange if the position were different in the *absence* of any Iraqi government to give such consent, or therefore to object, to the exercise of such jurisdiction by the UK over its occupying forces. As an occupying power, the UK was necessarily in complete control of the armed forces by which it achieved such occupation, and had under

international law "an almost absolute power" as regards their safety *(Oppenheim*, para 169, above), as well as duties regarding the effective administration of Iraq and the restoration of security and stability, to be performed through such forces. The United Kingdom did not have such effective control over the whole of the area of Southern Iraq or even Basra as could cause such area to be equated with territory of the United Kingdom, or therefore to require the United Kingdom to ensure the full range of Convention rights to all within it. It is, however, a different matter to suggest that the United Kingdom ceased to have jurisdiction over its armed forces (with the consequence that it ceased to owe them any further Convention duty) whenever they were out of base; and the United Kingdom's jurisdiction over its own armed forces within article 1 does not mean that it had jurisdiction within article 1 over all or any other persons with whom those armed forces came into contact off base.

192. The actual feasibility of the United Kingdom assuring and providing protection for its armed forces in Iraq depends on the circumstances, including the circumstances and place in which such forces are serving. But to distinguish fundamentally between the existence of the protective duties on the part of the United Kingdom towards its armed forces at home and abroad also appears to me as unrealistic under the Convention as it is at common law. The relationship between the United Kingdom and its armed forces is effectively seamless. Members of the armed forces serve under the same discipline and conditions wherever they are, and they are required to go wherever they are ordered. The relationship is not territorial, it depends in every context and respect on a reciprocal bond, of authority and control on the one hand and allegiance and obedience on the other. The armed forces serve on that basis. The compact is that they will receive the support and protection of the country they serve. I recognise that these considerations could apply even in a case where the United Kingdom did not have under international law a recognised role, like that of an occupying power which it had in Iraq. That may, on another day, lead back to re-examination of statements (such as that in *Medvedyev*: see para 182 above) which contemplate the possibility that article 1 may embrace purely factual, though unlawfully exercised, jurisdiction. That possibility does not however require consideration on this appeal. Where, as here, the United Kingdom was present in Iraq, both with the consent of the only civil administrative authority that existed and in any event as an occupying power recognised as such under international law by the Security Council, there is in my view an irresistible case for treating the United Kingdom's jurisdiction over its armed forces as extending to soldiers serving in Iraq for the purposes of article 1 of the Convention. In *Al-Skeini* (para 53) Lord Rodger said, in the context of interpreting the scope of the Human Rights Act 1998, that "where a public authority has power to operate outside of the United Kingdom and does so legitimately – for example, with the consent of the other state – in the absence of any indication to the contrary … it would only be sensible to treat the public authority, so far as possible, in the same way as when it operates at home". Similar thinking applies to the scope of a state's jurisdiction under article 1 of the

Convention, and is not only consistent with, but positively supported by, the Court's reasoning in *Bankovic*. In the present case, Lord Collins, whose judgment I have read after formulating my own, identifies a number of cases where commonsense in his view justifies a recognition of extra-territorial jurisdiction within article 1 - albeit necessarily of a limited nature tailored to the context (see paras 281, 301 and 306). I agree, but in my view commonsense also suggests a similar analysis of the relationship between the United Kingdom and the British army.

193. Is such a conclusion precluded on the basis that Convention rights cannot properly be tailored? I do not believe so. We are concerned with an exceptional head of jurisdiction. In *Al-Skeini*, Lord Brown said this at para 130:

> "Realistically the concept of the indivisibility of the Convention presents no problem in the categories of cases discussed in paras 119-126 above: those concern highly specific situations raising only a limited range of Convention rights".

This passage might, on one view, be read as suggesting that there is something inherent in the exceptional categories of cases discussed in paras 119 to 126 which means that it could never realistically be suggested that the state was in such cases under any general Convention obligation to secure the Convention rights. But it is not obvious why. The true explanation must be that in circumstances falling within one of the exceptional categories the state's Convention duties are limited to those falling within the scope of the relationship giving rise to the exception in question. The consul cannot be expected to guarantee the full range of Convention rights, any more than can a state exercising authority by consent in other circumstances, such as those existing where it takes someone into custody (*Öcalan*), or operates a school (*Gentilhomme*) or mans a court (*Drozd*), abroad by consent of the foreign state. The United Kingdom could not guarantee the full range of Convention rights to foreign litigants using its courts. Yet, once a person brings a civil action in the courts or tribunals of a state, there indisputably exists … a 'jurisdictional link' for the purposes of article 1": *Markovic v Italy* (2006) 44 EHRR 1045, para 54. Thus the Convention was applied, unsurprisingly in my view without anyone suggesting that it might not, as the measure of the legitimacy of claims by such nationals against the United Kingdom for refusal to up-rate their pensions to the same level as those of persons residing in the United Kingdom who had made equivalent National Insurance contributions: *Carson v United Kingdom* (Application No 42184/05), 16 March 2010, where the claims in fact failed on the basis that persons residing within and outside the territory of the United Kingdom were not in an analogous situation. I add, without needing to explore this further, that, even in relation to territorially based jurisdiction, factual inability to enforce all the Convention rights, due to temporary loss of control to rebel forces, may, it appears,

qualify the extent of the jurisdiction enjoyed and of the duties attaching to it: *Ilaşcu v Moldova and Russia* (2005) 40 EHRR 1040 (GC), paras 332-333.

194. The United Kingdom's jurisdiction over its armed forces is essentially personal. The United Kingdom cannot and cannot be expected to provide in Iraq the full social and protective framework and facilities which it would be expected to provide domestically. But the United Kingdom could be expected to take steps to provide proper facilities and proper protection against risks falling within its responsibility or its ability to control or influence when despatching and deploying armed forces overseas.

195. Will there be consequences beyond or outside any that the framers of the Convention can have contemplated, if Convention rights, and in particular those under article 2, continue to apply as between the United Kingdom and members of its armed forces serving abroad? That the obligation on states under article 1 to secure the Convention rights to "everyone within their jurisdiction" is, in principle, capable of applying to members of the armed forces as it does to anyone else is clear: see *Engel v The Netherlands* (1976) 1 EHRR 647, paras 54, 59, and *Şen v Turkey* (Application No 45824/99), 8 July 2003, para 1. The factors which justify exposing soldiers to the risk of death differ fundamentally from those that apply where civilian lives are at risk. But there is nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations, in matters such as, for example, the adequacy of equipment, planning or training. See also on these points *Gentle*, per Lord Hope, para 19.

196. Mr Eadie QC for the Secretary of State accepted in his submissions that it could be argued that to send a soldier out of the United Kingdom (or no doubt, in the light of *Al-Skeini,* out of base) on a mission with inadequate equipment or training could involve a breach of the Convention, by analogy with the principle recognised in *Soering v United Kingdom* (1989) 11 EHRR 439 and referred to in *Bankovic*, para 68; and that coroners' inquests in respect of deaths on active service in Iraq or Afghanistan have addressed such issues. The jurisprudence of the European Court of Human Rights includes cases where that court has examined closely and criticised the conduct of armed forces in domestic contexts. Such cases start with *McCann v United Kingdom* (1995) 21 EHRR 97, relating to the shooting by SAS officers of members of the Provisional IRA suspected of planning to attack the Royal Anglian Regiment in Gibraltar, and include *Isayeva, Yusupova and Bazayeva v Russia* (Application Nos 57947-49/00), 24 February 2005, and *Isayeva v Russia* (Application No 57950/00), 24 February 2005, relating to the conduct of military operations by the Russian armed forces against Chechen separatist fighters which led to the deaths of civilians. In such cases, it appears that the exigencies of military life go to the standard and performance, rather than the existence of, any Convention duty. Outside the sphere of "combat operations" or

"battle damage" (para 34 above), this has been held also to be the position at common law, in which connection Elias J said in *Bici v Ministry of Defence*, para 104 that "Troops frequently have to carry out difficult and sensitive peace keeping functions, such as in Northern Ireland, whilst still being subject to common law duties of care. The difficulties of their task are reflected in the standard of the duty rather than by denying its applicability". The European Court of Human Rights has (as Lord Hope noted in *Gentle*, paras 18-19) itself also acknowledged that "when interpreting and applying the rules of the Convention" it is necessary to "bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed services" (*Engel*, para 54, and *Şen*, p 1(b)).

197. Reluctance about accepting the application of article 2 to the armed forces serving abroad may be due to concerns on several scores: first, the improbability that the founding fathers of the Convention perceived that "jurisdiction" under article 1 would extend to such matters, second, the apparent absence from the Convention of any immunities paralleling those of "combat operations" or "battle damage" (or, perhaps, act of state) recognised at common law (para 189 above), and, third, the extent to which the Court has in practice shown itself ready to re-examine and re-assess minutely, after the event and in the cold light of day, the factual conduct and decision-making of member states in difficult circumstances, as evidenced perhaps by some decisions already mentioned, including in particular *McCann* and, recently, *Medvedyev*. But none of these matters seem to me to justify giving to the concept of jurisdiction a different or more limited meaning to that which, in my view, follows from the guidance which the Court has already given, particularly in *Bankovic*.

198. As to the first such matter, the scope and application of the Convention, as revealed over the years, would probably surprise its founding fathers in many respects, and it seems particularly unrealistic to measure the scope of article 1 (fixed though it is, rather than "living") by reference to the now revealed positive meaning of article 2 (cf Lord Phillips's comment to like effect in para 54). As to the second and third matters, it would have been foreseeable when the Convention was concluded that combat operations against an enemy might take place in the territory of a Contracting State - a context in which the Secretary of State accepts the application of the Convention. The armed forces have not infrequently also been involved in combat operations in bases under attack in Afghanistan or, previously, Iraq. On the approach accepted in *Al-Skeini* and in *Al-Saadoon and Mufdhi v United Kingdom* (2009) 49 EHRR SE95, the United Kingdom is already required to ensure that its armed forces enjoy whatever protection the Convention, and in particular article 2, may require in such situations. The possible existence of *Soering* type liability for sending troops out from the United Kingdom with inadequate equipment or training is also acknowledged by the Secretary of State (para 196 above). If (as to which I express no view) the Convention contains no homologue of the common law immunity in respect of "combat operations" or

"battle damage", that is, therefore, a concern that already exists in contexts recognised as falling within Contracting States' jurisdiction under article 1 of the Convention. It is not a guide to the scope of article 1. In fact, the Convention does contain at least one provision aimed at addressing this concern. Under article 15 of the Convention states are, in time of war or other public emergency, permitted, to the extent strictly required by the exigencies of the situation, to derogate from article 2 in respect of deaths resulting from lawful acts of war. By article 15 the Contracting States were catering for the natural concern that military operations against an enemy should not be unduly hampered.

199. Finally, the Secretary of State submits, even if a soldier in Private Smith's position might be thought to be entitled to the protection of the Convention (and of article 2 in particular) at all times while serving overseas, whether or not he was on a British base, a domestic court should decline so to decide, but should leave the matter to be taken (whether in relation to this or another case) to Strasbourg. The principle here relied upon is that the role of United Kingdom courts, when interpreting the Convention, is to keep in step with Strasbourg - neither lagging behind, nor leaping ahead: doing no more, but certainly no less (*R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20, per Lord Bingham) or no less, but certainly no more (*Al-Skeini*: paras 90 and 106, per Lady Hale and Lord Brown). However, it is our duty to give effect to the domestically enacted Convention rights, while taking account of Strasbourg jurisprudence, although caution is particularly apposite where Strasbourg has decided a case directly in point or, perhaps, where there are mixed messages in the existing Strasbourg case-law and, as a result, a real judicial choice to be made there about the scope or application of the Convention. But neither is the case here. Strasbourg has not decided any case directly in point, and both the messages contained in its existing jurisprudence and considerations of general principle seem to me to point in a clear direction. In my judgment the armed forces of a state are, and the European Court of Human Rights would hold that they are, within its jurisdiction, within the meaning of article 1 and for the purposes of article 2 wherever they may be. On that basis, it is incumbent on us under the Human Rights Act 1998, s.6, to give effect to that conclusion. I would dismiss the appeal on the first issue.

*Issue 2 - article 2*

200. The second issue is "whether the fresh inquest into Private Smith's death must conform with the procedural obligation implied into article 2 of the Convention". In essence: what kind of inquest should the coroner hold, leading to what kind of verdict, in respect of Private Smith's death? Again, since questions of jurisdiction are involved, this issue cannot simply be answered by reference to the Secretary of State's concession (para 159 above) that he will not object to the fullest type of inquest and (presumably) verdict. The reference to the procedural obligation implied into article 2 is significant. Article 2 has two aspects; one

substantive, the other procedural. The latter is "implied in order to make sure that [the former is] effective in practice"; and "is parasitic upon the existence of the substantive right, and cannot exist independently": *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] AC 1356, paras 5-6, per Lord Bingham; and see *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105 and *Edwards v United Kingdom* (2002) 35 EHRR 487, para 69.

201. In its substantive aspect, article 2 requires states "not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life": *R (Middleton) v West Somerset Coroner* [2004] UKHL 10; [2004] 2 AC 182, para 2 of the opinion of the Appellate Committee given by Lord Bingham. Where there is such an established and appropriate framework, casual errors of judgment or acts of negligence (or "operational" as opposed to systematic failures) by state servants or agents will not by themselves amount to breach of the substantive obligation inherent in article 2 (a principle established in the context of medical negligence): *Powell v United Kingdom* (2000) 30 EHRR CD 362, *Takoushis v Inner North London Coroner* [2005] EyWCA Civ 1440; [2006] 1 WLR 461, paras 51 to 58; *Byrzykowski v Poland* (2006) 46 EHRR 675, paras 104-106; and *Savage v South Essex Partnership NHS Foundation Trust (MIND intervening)* [2008] UKHL 74; [2009] AC 681.

202. In its procedural aspect, article 2 requires member states "to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated": *Middleton*, para 3. "Thus to make good [a] procedural right to the inquiry" which the respondent seeks, she "must show … at least an arguable case that the substantive right arises on the facts ….": *Gentle*, para 6, per Lord Bingham.

203. The framework of "procedures and means of enforcement" required under the substantive aspect of article 2 must include, where appropriate, means of civil redress and criminal prosecution. The present focus is however on the procedural aspect of article 2, and on its requirement (based clearly on the potential involvement of the state in the death) for an effective public investigation by an independent official body into certain types of death, that is those occurring in circumstances potentially engaging the substantive right which article 2 contains.

204. English law has long required a coroner's inquest in respect of certain types of death. Pending the coming into force of the relevant sections of the Coroners and Justice Act 2009, the position is governed by the Coroners Act 1988. Section 8(1) requires a coroner to hold an inquest in respect of any body lying within his

district where there is reasonable cause to suspect that the deceased (a) has died a violent or an unnatural death, (b) has died a sudden death of which the cause is unknown or (c) has died in prison (or in a place or circumstances requiring an inquest under any other Act). Section 8(3) requires the coroner to summon a jury, in various cases, including where it appears that (c) applies, or the death occurred while the deceased was in police custody, or resulted from an injury caused by a police officer in the purported execution of his duty or was caused by an accident, poisoning or disease requiring notice under section 19 of the Health and Safety at Work etc Act 1974, or in circumstances the continuation or possible recurrence of which is prejudicial to public health or safety. Such an inquest is designed to lead to a verdict, certified by an "inquisition" setting out, "so far as such particulars have been proved (i) who the deceased was; and (ii) how, when and where the deceased came by his death": section 11(3) to (5) and rule 36 of the Coroners Rules 1984.

205. There is a clear overlap (particularly when sections 8(1)(c) and 8(3) apply) between the circumstances in which the 1988 Act requires a coroner's inquest and those in which the procedural obligation inherent in article 2 arises. But the two do not necessarily coincide. The domestic duty to hold an inquest can quite often arise in circumstances not engaging the procedural obligation under article 2. The procedural obligation inherent in article 2 may be satisfied by other forms of investigation than an inquest, for example a public inquiry or even criminal proceedings. Where the domestic duty to hold an inquest and the procedural obligation inherent in article 2 coincide, the difficulty arose under English law that the coroner's duty to seek to ascertain "how" the deceased came by his death was interpreted as limiting him to considering "by what means" the deceased died, rather than looking more widely at the circumstances in which this occurred: *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1.

206. In *Middleton*, which concerned the suicide in prison of a long-term prisoner, the House of Lords addressed this difficulty, by acknowledging that a broader inquiry was required under article 2, if the investigation was to ensure the proper accountability of state agents for deaths occurring under their responsibility. Accordingly, it held, pursuant to section 3(1) of the Human Rights Act 1998, that the word "how" must in such a context be given the expanded meaning of "in what broad circumstances", so as to give effect to the requirements to be read into article 2 of the Convention. The House thus distinguished between a traditional *Jamieson* inquest and an article 2 compliant *Middleton* inquest.

207. In *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, it was argued that *Middleton* had established the expanded meaning of "how" for all contexts, including those not engaging article 2, and that the traditional *Jamieson* inquest had therefore been entirely superseded. The House categorically rejected the argument. The question arose in *Hurst* was whether it

would serve any useful purpose to reopen an inquest. Lady Hale and I took the view that the distinction between the scope of investigation, (rather than verdict) possible in a *Jamieson* as opposed to a *Middleton* inquest was not as stark as we understood Lord Brown (with whom Lord Bingham agreed) to be suggesting: compare paras 19 and 23, per Lady Hale and paras 74-76, per Lord Mance, with paras 51 and 56-57, per Lord Brown. I drew attention (para 74) to the possibility of a coroner's report to a responsible person or authority under rule 43 of the Coroners Rules 1984. Lord Rodger (to whom I must have been mistaken in referring in para 74) was at pains to stress the distinction in scope at paras 6-7, noting that on the *Jamieson* approach the allegations of failure by the police to heed prior warnings of hostility on the part of the deceased's killer towards the deceased would be outside the scope of the "wider enquiry" that would have been required on a *Middleton* approach. The potential limitations of the *Jamieson* approach on the scope of investigation were encapsulated by Sir Thomas Bingham MR in that case, [1995] QB 1, 23G, in a reference to rule 36 of the 1984 Rules as requiring "that the proceedings and evidence … shall be directed solely to ascertaining" the deceased's identity, the place and time of death and "how the deceased came by his death". The Coroners and Justice Act 2009 (not yet in force) might appear to perpetuate the distinction by underlining that it is only when necessary under article 2 that the purpose of ascertaining "how, when and where the deceased came by his or her death" is expanded so as "to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death".

208. It is in these circumstances of relevance that Lord Phillips questions the extent of the distinction, and in particular whether there is any difference in practice between a *Jamieson* and a *Middleton* inquest, other than the verdict (paras 69(ii) and 78), and to note that he has on this point the support of Lord Walker (though he also agrees with Lord Rodger on this point) as well as of Lord Collins and Lord Kerr. Lord Hope expressly (para 95) and, as I read him, Lord Rodger implicitly (paras 112-115) see a continuing distinction between the scope of investigation under a *Jamieson* and a *Middleton* inquest. For my part, I would have wished to be able to go as far as Lord Phillips, but I do feel some difficulty about questioning whether there is in practice any real distinction at all (save in the verdict expressed), having regard to *Hurst* and the 2009 Act and also having regard to my relative ignorance as to the extent to which such a distinction between the two types of inquest is in fact meaningful in day-to-day practice (as the courts in *Jamieson*, *Middleton* and *Hurst* must on the face of it have thought). However, it seems unnecessary on this appeal to pursue this aspect further. Everyone agrees that coroners have a considerable discretion as to the scope of their enquiry, although the verdict that they may deliver differs according to the type of inquest being held. The practical solution is no doubt for coroners to be alert to the possibility that a *Middleton* type verdict may be, or become, necessary, and to be ready to adapt the scope of their investigation accordingly.

209. In the present case, the coroner (whose verdict has been set aside on different grounds) concluded that, on the facts as he saw them in the first inquest, a traditional *Jamieson* type of inquest was all that was required. Collins J and the Court of Appeal disagreed. They concluded that a *Middleton* type inquest was required. The Court of Appeal's reasoning was that Private Smith was in a position analogous to that of a prisoner, a person detained on mental or other grounds or a conscript, and that a *Middleton* type inquest was required in respect of any death of such a person in prison or custody or while serving in the army. The Secretary of State appeals to the Supreme Court against the Court of Appeal's reasoning and conclusion.

210. The state's procedural duty under article 2 to provide for or ensure an effective public investigation by an independent official body of certain deaths or near deaths has been developed in the case-law of the European Court of Human Rights and explored in domestic case-law, including that of the House of Lords in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653, *Middleton* (above) and *R (L(A Patient)) v Secretary of State for Justice* [2008] UKHL 68; [2009] AC 588. Certain categories of case in which the substantive right contained in article 2 has been held to be potentially engaged, with the result that the procedural obligation has been held to exist, are clearly recognisable:

(i) *Killings by state agents*: *McCann v United Kingdom* (1995) 21 EHHR 97, para 161 (article 2 "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 alios*, agents of the State") and *Jordan v United Kingdom* (2001) 37 EHRR 52; and see *Amin*, paras 20 and 25, per Lord Bingham.

(ii) *Deaths in custody*: *Salman v Turkey* (2000) 34 EHHR 425, esp para 99 (unexplained death in custody, because persons in custody are in a vulnerable position and the authorities are under a duty to protect them); *Edwards v United Kingdom* (2002) 35 EHRR 487 (violent death of a prisoner at the hands of his cell-mate); *Akdogdu v Turkey* (Application No 46747/99), 18 October 2005, (suicide in prison); *R (D) v Secretary of State for the Home Department* [2005] EWHC 728 (Admin); [2006] EWCA Civ 143, considered by the House of Lords in *L* (a case of suicide in prison).

(iii) *Conscripts*: Á*lvarez Ramón v Spain* (Application No 51192/99), 3 July 2001; *Kilinç v Turkey* (Application No 40145/98),7 June 2005; *Savage v South East Essex NHS Foundation Trust (MIND intervening)* [2008] UKHL 74; [2009] AC 681, paras 35-37, per Lord Rodger.

(iv) *Mental health detainees*: *Savage* - although concerned not with any duty to investigate under article 2, but with responsibility in a claim for damages for the suicide of a mental health detainee who succeeded in absconding and committed suicide - highlights the analogy between the state's duties

towards persons in custody and persons in detention for mental health reasons as well as conscripts.

(v) *Other situations where the State has a positive substantive obligation to take steps to safeguard life.* Such situations exist not only where the right to life is inherently at risk, but also where the State is on notice of a specific threat to someone's life against which protective steps could be taken: *Osman v United Kingdom* (1998) 29 EHRR 245; *Öneryildiz v Turkey* (2004) 41 EHRR 325 (state allegedly tolerated and, for political reasons, encouraged slum settlements close to a huge uncontrolled rubbish tip, without making any effort to inform the settlers of dangers posed by the tip, which in the event exploded, killing some 39 residents). In *Őneryildiz* the Court said that, where lives had actually been lost "in circumstances potentially engaging the responsibility of the State", the procedural aspect of article 2 entailed a further duty on the State "to ensure … an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished" (para 91), and that "the applicable principles are rather to be found in those the Court has already had occasion to develop in relation notably to the use of lethal force, *principles which lend themselves to application in other categories of cases*" (para 93, italics added for emphasis). The Court explained that, just as in homicide cases the true circumstances of the death often in practice were, or might be, "largely confined within the knowledge of state officials or authorities", so in its view "such considerations are indisputably valid in the context of dangerous activities, when lives have been lost as a result of events occurring under the responsibility of the public authorities, which are often the only entities to have sufficient relevant knowledge to identify and establish the complex phenomena that might have caused such incidents" (para 93). It added that: "… the requirements of article 2 go beyond the state of official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law" (para 95). In *Őneryildiz* itself, it was not the preliminary investigation following the tragedy that was at fault, but rather the operation of the judicial system in response to the tragedy and investigation: paras 96, 115, 117-118 and 150-155.

211. The procedural obligation incumbent on the state to investigate deaths which, either of their inherent nature or in their particular circumstances, involve the state's potential responsibility under article 2 may be distinguished from the general substantive obligation under article 2 to establish an appropriate regulatory, investigatory and judicial system. The distinction was drawn clearly in respect of a third party killing in *Menson v United Kingdom* (2003) 37 EHRR CD 220. The Court there said:

> "The Court observes that the applicants have not laid any blame on the authorities of the respondent State for the actual death of Michael Menson; nor has it been suggested that the authorities knew or ought to have known that Michael Menson was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against that risk. The applicants' case is therefore to be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see, for example, *McCann v United Kingdom* (1995) [21 EHRR 97]; *Jordan v United Kingdom* (2001) [37 EHRR 52]; *Shanaghan v United Kingdom*, (Application No 37715/97), judgment of 4 May 2001, ECHR 2001-III (extracts), or in which the factual circumstances imposed an obligation on the authorities to protect an individual's life, for example where they have assumed responsibility for his welfare (see, for example, *Edwards v United Kingdom* (2002) [35 EHRR 487]), or where they knew or ought to have known that his life was at risk (see, for example, *Osman v United Kingdom* (1998) [29 EHRR 245]."

The Court went on:

> "However, the absence of any direct state responsibility for the death of Michael Menson does not exclude the applicability of article 2. It recalls that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *LCB v United Kingdom* (1998) [27 EHRR 212], para 36), article 2 para 1 imposes a duty on that state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, para 115).
>
> With reference to the facts of the instant case, the Court considers that this obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in Michael Menson's case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see *mutatis mutandis*, the *Edwards* judgment, above-cited, para 69)."

212. *Analysis:* Both the substantive and the procedural limbs of article 2 are therefore capable of giving rise to obligations of investigation on the part of state authorities, including the courts. The present appeal concerns the circumstances in which article 2 gives rise to a particular procedural obligation on the part of the state of its own motion to initiate an effective public investigation by an independent official body following a death or near death. This in turn depends upon whether the circumstances involve a potential breach of the substantive obligation which article 2 contains. The questions are how general is this obligation and whether it was potentially engaged by the circumstances giving rise to Private Smith's sad death.

213. *The present case:* The Court of Appeal treated Private Smith's death as analogous to the killing or suicide of a prisoner, detainee or conscript. It said (para 105):

> "The question is therefore whether the principles apply to soldiers on active service in Iraq. We conclude that they do. They are under the control of and subject to army discipline. They must do what the army requires them to do. If the army sends them out into the desert they must go. In this respect they are in the same position as a conscript. Once they have signed up for a particular period they can no more disobey an order than a conscript can. The army owes them the same duty of care at common law. We recognise that they may not be quite as vulnerable as conscripts but they may well be vulnerable in much the same way, both in stressful situations caused by conflict and in stressful situations caused, as in Private Smith's case, by extreme heat. We see no reason why they should not have the same protection as is afforded by article 2 to a conscript."

214. The scope of this reasoning is uncertain. It is unclear in particular whether the Court of Appeal was suggesting that all deaths of military personnel in service require to be investigated by a *Middleton* type inquiry. Certainly, it was the respondent's submission before the Supreme Court that all soldiers' deaths on active service must be regarded as being potentially the state's responsibility, because of "the degree of control in a closed system", and, therefore, as requiring full investigation by a *Middleton* type inquiry. In my judgment, that submission goes too far. Death on military service was an everyday risk in the environment of Iraq, as it is today in Afghanistan. Military service against hostile forces in a harsh environment is a situation *par excellence* where soldiers' lives are likely to be lost without their employing state having even potential responsibility. I do not think that courts should subscribe to a view that all military service involves "lions led by donkeys" (Alan Clark's words in his 1961 work, *The Donkeys: a History of the British Expeditionary Force in 1915*, the inspiration for Joan Littlewood's *Oh, What a Lovely War!*). That may or may not have been a fair description of Earl

Haig's strategy in the First World War. But, whatever debate may arise about the adequacy of equipment or funding for the armed forces in today's world, I do not think that it should open on an *assumption* that modern generals or modern ministers of defence are necessarily or even potentially in breach of their article 2 duties. There needs to be something more than that.

215. The European Court of Human Right's jurisprudence summarised in para 210 above, is focused on deaths where, because of the nature or context (whether general or specific) of the death, the state can, without more, be said realistically to have some form of responsibility and in particular where it may alone have sufficient relevant knowledge to identify and establish the cause of the death or near death. Whether it can be said that such responsibility potentially exists in other cases depends upon their particular circumstances. The significance of a state having exclusive knowledge of the relevant events appears to be that this tends to open up a possibility of state involvement and a corresponding need for public investigation to exclude or establish that possibility. Nothing in the case-law, and nothing in principle, establishes or indicates that the duty extends to every death of every soldier on active service.

216. There are two particular differences between the present case and any situation previously considered. First, the present case concerns a volunteer Territorial Army soldier, who, the Supreme Court was told, would also have volunteered to go to Iraq (before, then, being served with compulsory call-up papers "to protect his position", presumably in respect of such matters as employment). I accept that a person who volunteers for active service puts himself or herself in a position where he or she is under extreme discipline, bound to obey orders in a harsh physical environment, the concomitant being that the army authorities must protect him or her against risks potentially arising from obeying such orders. But it does not follow that every death by heatstroke engages, without more, the state's potential responsibility.

217. Second, the case concerns death, not by killing, suicide or violence, but by heat associated with the admittedly harsh physical environment in which Private Smith was placed. It was incumbent on the army authorities to address the risks of heat in active service in Iraq, and put adequate systems in place to meet them. But, again, not every death by heat on active service in Iraq can or should be treated without more as involving a potential failure by the state to fulfil that responsibility or a defective system of protection, or therefore, in my view, as requiring the same level of scrutiny and investigation as a death by killing or suicide of a person in custody or a conscript. Some further examination of the particular facts is called for, before such a conclusion.

*Conclusion on issue 2*

218. In my view, therefore, the coroner's general approach was correct. Only if there were sufficient indicia of such a failure or deficiency was it incumbent on the state of its own motion to ensure an effective public investigation by an independent official body, and incumbent therefore on the coroner to expand the inquest to become a *Middleton* type inquest. The coroner in the first inquest (whose inquisition has now been set aside) concluded that there were insufficient indicia. Death resulting from negligence by members of the armed forces in the application of an established and appropriate system of protection is not axiomatically to be equated with state responsibility for the death under article 2: see para 215 above. But the sequence of events set out in Mrs Smith's case (paras 4 to 35), including the coroner's own recommendations after giving judgment, are suggestive of systematic rather than simply operational errors and persuade me that there is here a sufficient case of state responsibility for Private Smith's death for us to be able to rule now that the fresh inquest should be of the *Middleton* type. The Secretary of State's agreement serves merely to confirm the appropriateness of this on the particular facts. I would therefore answer the second issue (identified in para 200 above) affirmatively.

219. It also follows that I would maintain the declaration contained in para 1 of Collins J's Order dated 12 May 2008 (deleting only its final words "as set out in the Court's judgment", since it is the judgments in this Court that will now be determinative).

**LORD COLLINS**

***Preliminary***

*The academic nature of the debate on the first issue*

220. As the Court of Appeal recognised, the question of jurisdiction under article 1 on this appeal is academic. After Private Smith collapsed in the stadium where he was billeted, he was taken by ambulance to the medical centre at the camp, where he died of heatstroke. The Secretary of State conceded that the relevant circumstances leading to Private Smith's death took place within the geographical area of a British army camp and a British army hospital, and that a soldier who dies on a United Kingdom base dies within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention: [2008] 3 WLR 1284, at [7] (Collins J); [2009] 3 WLR 1099, at [8], [14] (CA).

221. These concessions flowed from the decision of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 (see [6], [61], [132] for the concessions) that the Secretary of State was right to concede the correctness of the Divisional Court's reasoning that Mr Mousa's death in a British military detention centre in Iraq was within the scope of the Convention because the camp was to be assimilated to exceptional cases of extraterritoriality such as embassies and consulates: [2007] QB 140, at [287] (Div Ct).

222. Nevertheless the Court of Appeal decided to hear argument on, and rule upon, the question whether a British soldier in the Territorial Army, who is on military service in Iraq, is subject to the jurisdiction of the United Kingdom within the meaning of article 1 of the Convention, so as to benefit from the rights guaranteed by the Human Rights Act 1998, while operating in Iraq, or whether he is only subject to the jurisdiction for those purposes when he is on a British military base or in a British hospital.

223. The reason why the Court of Appeal took this course is that Collins J had decided the broader question, and because both the Secretary of State and the Equality and Human Rights Commission had characterised the question as being of great general significance or importance. The question is plainly one of importance, but it is unfortunate that it has been decided in the courts below, and will be decided in this court, in a case in which the point does not arise for decision and in which it is conceded to be academic. There is an obvious danger in giving what are in substance advisory opinions on hypothetical facts divorced from any concrete factual situation: see *R (Weaver) v London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)* [2009] EWCA Civ 587, [2010] 1 WLR 363, at [90]. That is particularly so in the present case.

224. In some of the cases on article 1 the Strasbourg court has considered relevant the degree of control or authority exercised by the respondent state in the foreign territory and the existence of the consent of the territorial state to the exercise of authority by the respondent state: see eg *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, at [62]; *Banković v Belgium* (2001) 11 BHRC 435, at [60], [71]; *Őcalan v Turkey* (2003) 37 EHRR 238, at [93]; (2005) 41 EHRR 985, at [91]; *Issa v Turkey* (2004) 41 EHRR 567, at [69]; *Al-Saadoon and Mufdhi v United Kingdom (admissibility)* (2009) 49 EHRR SE 95, at [85].

225. The degree of authority and control exercised by United Kingdom forces in Iraq, and the legal authority under which they operated, have varied from time to time over a lengthy period which is still continuing. The invasion of Iraq by coalition forces led by the United States of America (with a substantial force from

the United Kingdom and smaller contingents from Australia and Poland) began on 20 March 2003. Major combat operations ceased at the beginning of May 2003.

226. Private Smith was in Iraq from 18 June 2003 and died on 13 August 2003. It was accepted by the Secretary of State that between 1 May 2003 and 28 June 2004 (when the occupation formally ended) the United Kingdom was an occupying power for the purposes of the Hague Regulations on the Laws and Customs of War on Land, 1949, and the Fourth Geneva Convention on the Protection of Civilians in Time of War, 1949, in those areas of Southern Iraq where British troops exercised sufficient authority. On the relationship between international human rights law and international humanitarian law (such as the Geneva Conventions) contrast Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation* (2005) 99 AJIL 119, 141 with Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights* (2006) 100 AJIL 580, 594.

227. The Coalition Provisional Authority ("CPA") was established on 16 April 2003 by the United States Government as a "caretaker administration" until an Iraqi government could be established. On 13 May 2003 the United States Secretary for Defense appointed Ambassador Paul Bremer as Administrator of the CPA with responsibility for the temporary governance of Iraq. The CPA administration was divided into regional areas. CPA South remained under United Kingdom responsibility and control. It covered the southernmost four of Iraq's eighteen provinces, and United Kingdom troops were deployed in the area. The CPA was not a subordinate organ or authority of the United Kingdom. The United Kingdom was represented at CPA headquarters through the office of the United Kingdom Special Representative, who had no formal decision-making power within the CPA. All the CPA's administrative and legislative decisions were taken by Ambassador Bremer. By CPA Order No 17, issued in June 2003, all coalition personnel were expressed to be subject to the "exclusive jurisdiction of their Sending States" (section 2(3)) and immune from legal process and arrest or detention (section 2(1), (3)), and coalition facilities were to be inviolable (section 9(1)):

> "… While any areas on which such headquarters, camps or other premises are located remain Iraqi territory, they shall be inviolable and subject to the exclusive control and authority of the MNF, including with respect to entry and exit of all personnel. The MNF shall be guaranteed unimpeded access to such MNF premises. Where MNF Personnel are co-located with military personnel of Iraq, permanent, direct and immediate access for the MNF to those premises shall be guaranteed.".

228. On 22 May 2003 the UN Security Council adopted Resolution 1483 under Chapter VII of the UN Charter. The Security Council re-affirmed the sovereignty and territorial integrity of Iraq and recognised "the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command." The Resolution supported the formation of an Iraqi interim administration as a transitional administration run by Iraqis until an internationally recognised, responsible government was established to assume the responsibilities of the CPA (article 9). In July 2003 the Governing Council of Iraq was established, which the CPA was to consult on all matters concerning the temporary governance of Iraq. UN Security Council Resolution 1500 (2003) of 14 August 2003 welcomed the establishment of the Governing Council of Iraq, and Resolution 1511 (2003) of 16 October 2003 determined that the Governing Council of Iraq and its ministers were the principal bodies of the Iraqi interim administration which embodied the sovereignty of the State of Iraq during the transitional period until an internationally recognised, representative government was established and assumed the responsibilities of the CPA; called upon the CPA to return governing responsibilities and authorities to the people of Iraq as soon as practicable; and invited the Governing Council of Iraq to produce a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution. It authorised the coalition to take all necessary measures to contribute to the maintenance of security and stability in Iraq and provided that the requirements and mission of the coalition would be reviewed within one year of the date of the Resolution and that in any case the mandate of the coalition was to expire upon the completion of the political process to which the resolution referred.

229. On 8 March 2004 the Governing Council of Iraq promulgated the Law of Administration for the State of Iraq for the Transitional Period, which 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. Security Council Resolution 1546 (2004) was adopted on 8 June 2004. It endorsed the formation of a sovereign Interim Government of Iraq to assume full responsibility and authority by 30 June 2004 for governing Iraq, and welcomed "that, also by 30 June 2004, the occupation will end and [the CPA] will cease to exist, and that Iraq will reassert its full sovereignty" (article 2). It noted that the presence of the coalition force was at the request of the incoming Interim Government (as set out in correspondence between the Iraqi Prime Minister and the United States Secretary of State annexed to the resolution) and reaffirmed the authorisation for the force to remain in Iraq, with authority to take all necessary measures to contribute to the maintenance of security and stability there. Provision was again made for the mandate to be reviewed within 12 months and to expire upon completion of the political process previously referred to.

230. On 28 June 2004 the occupation came to an end when full authority was transferred from the CPA to the Interim Government and the CPA ceased to exist. Subsequently the coalition forces, including the United Kingdom force, remained in Iraq pursuant to the request and consent of the Iraqi Government and authorisations from the Security Council. All of the relevant Security Council resolutions from 1483 (2003) onwards reaffirmed the sovereignty of Iraq.

231. Consequently the legal position of the United Kingdom forces has changed over the period since the invasion. Between March 2003 and June 2004 the United Kingdom was a belligerent occupant. The effective government of Iraq from April 2003 until June 2004 was the CPA, together with (from July 2003) the Governing Council of Iraq. From June 2004 the United Kingdom forces have been present at the request of, and with the consent of, the Iraqi Government.

232. The consequence of the way in which these proceedings have been dealt with is that the court is being asked to determine whether the article 2 obligation existed in relation to a British soldier who died in Iraq in August 2003, when the United Kingdom forces were belligerent occupants in part of Iraq with a very small force. In 2003, in the area of Southern Iraq for which the United Kingdom had responsibility there were about 8,000 British troops for a population of 2,760,000: *R (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), [2007] QB 140, at [42] (Div Ct). The United Kingdom was not in effective control of Basra and surrounding areas: [2007] UKHL 26, [2008] AC 153, [83], per Lord Rodger, approving Brooke LJ [2005] EWCA Civ 1609, [2007] QB 140, [124] (CA). The Court of Appeal recognised in the present case that at the time of Private Smith's death the army was neither in effective control of Iraqi territory nor acting through the consent, invitation or acquiescence of the local sovereign or its government: [2009] 3 WLR 1099 [37]-[38].

233. The case for Mrs Smith and for the Equality and Human Rights Commission on Private Smith was not put on the basis of Private Smith having been on territory under the control of the United Kingdom, or of the army as a State agent. Their case was that Private Smith was subject to the jurisdiction of the United Kingdom as a member of the armed forces. But the question whether the elements of authority and control by the United Kingdom and/or consent of the territorial sovereign are relevant cannot be avoided, and it is regrettable that the issues fall to be decided either without any relevant factual background, or on the hypothesis that the death occurred (as Private Smith's death did) in 2003, when United Kingdom forces were not in effective control, and when they were there as belligerent occupants without the consent of the territorial sovereign, and that the only issue is whether jurisdiction over armed forces is sufficient for article 1 purposes.

234. The next preliminary matter is that the first question raised on this appeal has already been the subject of a decision of the House of Lords. In *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356, the appellants submitted that all British servicemen on active service overseas fall within the article 1 jurisdiction of the United Kingdom. The appellants specifically relied upon the fact that the soldiers were United Kingdom nationals under the command and control of the United Kingdom and that they were under the authority of British law when in Iraq. The argument was firmly rejected by Lord Bingham, who said at [8(3)]:

> "Here the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the defendants they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted [citing *Al-Skeini* [79] and [129]]".

235. Lady Hale took a different view ([60]), and Lord Carswell left the point open ([66]), but Lords Hoffmann ([16]), Hope ([28]), Scott ([29]), Rodger ([45]), Brown ([71]) (but perhaps with a reservation at [70]) and Mance ([74]) agreed generally with Lord Bingham's opinion. It would be a sterile exercise to consider whether this holding was part of the ratio, since on any view this important question was not subject to extensive argument, and it would be wrong for this court to dispose of the matter simply on the basis that the issue was covered by precedent. But it has to be said that the views of Lord Bingham in this area (as in many others) are entitled to the greatest possible respect.

***The application of the Convention and the meaning of jurisdiction***

236. The problem presented on this appeal is not a problem unique to the application of modern human rights instruments. In the United States there are many decisions on the application of constitutional rights to United States citizens and aliens abroad. See (among many others) Henkin, *The Constitution as Compact and as Conscience*: *Individual Rights Abroad and at our Gates*, 27 Wm & Mary L Rev 11, 17-24 (1985); Lowenfeld, *US Law Enforcement Abroad: The Constitution and International Law* 83 AJIL 880 (1989) and 84 AJIL 444 (1990); Brilmayer and Norchi, *Federal Extraterrioriality and Fifth Amendment Due Process*, 105 Harv L Rev 1217 (1992). The trend in the United States is to extend the protection of the Constitution to United States citizens abroad (but not, generally, aliens) whose rights are violated by United States authorities. It has been said that "when the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and

liberty should not be stripped away just because he happens to be in another land": *Reid v Covert*, 354 US 1, 6 (1957), per Black J, for a plurality of four justices (military court tried and convicted the wife of a US air force sergeant for the murder of her husband at an air base in England: entitled to a jury trial as required by the Sixth Amendment). Thus in relation to the Iraq conflict, United States citizens have been held entitled to make constitutional claims arising out of detention or alleged torture by US military officials: *Kar v Rumsfeld*, 580 F Supp 2d 80 (DDC 2008); *Vance v Rumsfeld*, 5 March 2010, WL 850173 (ND Ill 2010) ("American citizens do not forfeit their core constitutional rights when they leave the United States, even when their destination is a foreign war zone…[T]he right of American citizens to be free from torture is a well-established part of our constitutional fabric.") But as the court said in the latter case, the "cases establish the importance of citizenship in circumstances in which federal agents outside the United States carry out constitutional violations" (at 13). The position is different where non-citizens are involved. In *United States v Verdugo-Urquidez*, 494 US 259 (1990) it was held that the Fourth Amendment did not apply to the joint search by Mexican and United States authorities of a Mexican suspect's home in Mexico while he was in custody in the United States. This is because "the people" means the American people. Rehnquist CJ said that aliens should not have extra-territorial Fourth Amendment rights, because grave uncertainties would be created for the US employment of armed forces abroad: at 273. See also *Rasul v Myers*, 563 F 3d 527, 532 (DC Cir 2009) (British citizens detained at Guantanamo Bay); *Re Iraq and Afghanistan Detainees Litigation,* 479 F Supp 2d 85, 108 (DDC 2007) (alleged torture of Afghani and Iraqi citizens); *Arar v Ashcroft*, 585 F 3d 559 (2d Cir 2009) (no action against government officials allegedly responsible for alien's extraordinary rendition to Syria). But the application of constitutional protection to activities abroad does not mean that the conduct of military operations is justiciable. In the United States the conduct of military operations is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference": *Harisiades v Shaughnessy*, 342 US 580, 589 (1952). See *Arar v Ashcroft*, 585 F 3d 559, 590 (2d Cir 2009)

237. On this appeal the question arises in the context of the meaning and application of the expression "within their jurisdiction." The expression "jurisdiction" is used in many senses in international law. The doctrine of jurisdiction in international law has given rise to an enormous literature, of which it is useful to mention, in particular, Mann, *The Doctrine of Jurisdiction in International Law*, in *Studies in International Law* (1973), p 1; Oppenheim, *International Law*, 8th ed Sir Hersch Lauterpacht, 1955, pp 235 et seq; Akehurst, *Jurisdiction in International Law* (1972-73) 46 BYIL 145; Meessen, *Extraterritorial Jurisdiction in International Law* (1996); Higgins, *Themes and Theories: Selected Essays, Speeches and Writings in International Law*, 2009, Vol 2, pp 799 et seq.

238. Not every use of the expression "jurisdiction" in international law is co-terminous with that in article 1. For example, a state may exercise jurisdiction over its nationals abroad in the sense that it may prescribe rules of law in relation to its nationals abroad: Restatement (Third), *Foreign Relations Law of the United States*, 1987, section 402; Oppenheim, *International Law*, 9th ed Jennings and Watts, 1992, vol 1, para 138; Higgins, *ante*, vol 2, p 802. But that does not mean that all United Kingdom nationals wherever they may be are within the jurisdiction of the United Kingdom for the purposes of article 1.

239. Armed forces of the United Kingdom serving abroad are subject to military law and discipline, they owe allegiance to the Crown, and where they are stationed abroad with the consent of the local sovereign, the arrangements with that sovereign will normally provide for immunity (at least in certain respects) from the civil and criminal jurisdiction of the host state: for the immunity of United States armed forces in the United Kingdom see *Littrell v United States of America (No 2)* [1995] 1 WLR 82 (CA); *Holland v Lampen-Wolfe* [2000] 1 WLR 1573 (HL). In that sense there can be no doubt that armed forces serving abroad are subject to the jurisdiction of the United Kingdom, or as Lord Bingham put it in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356, [8(3)], "subject to the authority" of the United Kingdom. The international practice is confirmed by CPA Order No 17, under which all coalition personnel were expressed to be subject to the "exclusive jurisdiction of their Sending States"(section 2(3)) and immune from legal process and arrest or detention (section 2(1), (3)).

240. Nor is there any doubt that members of the armed forces have, apart from the Convention, rights to enforce the Crown's duties to them: *Mulcahy v Ministry of Defence* [1996] QB 732 (subject to a possible exception for active operations: *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 and *cf Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75). The Crown Proceedings Act 1947, section 10 excluded armed forces from the benefit of remedies against the Crown, but its operation was suspended by the Crown Proceedings (Armed Forces) Act 1987, section 2 of which gave the Secretary of State for Defence the power (which has not yet been exercised) to revive section 10 of the 1947 Act.

241. What is jurisdiction in international law? According to Oppenheim, *International Law*, 9th ed Jennings and Watts, 1992, vol 1, p 456:

> "State jurisdiction concerns essentially the extent of each state's right to regulate conduct or the consequences of events. In practice jurisdiction is not a single concept. A state's jurisdiction may take various forms. Thus a state may regulate conduct by legislation; or it may, through its courts, regulate those differences which come before them, whether arising out of the civil or criminal law; or it

> may regulate conduct by taking executive or administrative action which impinges more directly on the course of events, as by enforcing its laws or the decisions of its courts. The extent of the state's jurisdiction may differ in each of these contexts."

242. The Restatement (Third), *Foreign Relations Law of the United States* (1987) vol 1, p 230, uses jurisdiction to mean "the authority of states to prescribe their law, to subject persons and things to adjudication in their courts and other tribunals, and to enforce their law, both judicially and non-judicially."

243. These different aspects of jurisdiction are sometimes said to be curial or judicial jurisdiction, legislative jurisdiction, and enforcement jurisdiction. Curial jurisdiction is essentially concerned with the ability of courts to exercise jurisdiction in civil matters over foreigners. Legislative jurisdiction is about the ability of states to use their own laws to regulate or punish acts in foreign countries. The question in international law is whether states have a legitimate interest in, or sufficient connection with, acts committed abroad so as to justify the application of their laws to them. In the famous *Lotus* case (*France v Turkey*), (1927) PCIJ, Series A, No.10, p 4, the Permanent Court of International Justice said (at 19):

> "Far from laying down a general prohibition to the effect that states may not extend the application of their laws ... to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules …"

244. International controversies over the extra-territorial application of criminal or penal laws, such as anti-trust or securities laws, are about the limits of legislative jurisdiction: see *Morrison v National Australia Bank Ltd*, United States Supreme Court, June 24, 2010. That is no doubt why, as will appear below, the Strasbourg court referred in *Banković v Belgium* (2001) 11 BHRC 435, [59], in the context of the words "within their jurisdiction" in article 1 of the Convention to the bases of jurisdiction to prescribe criminal offences for conduct abroad.

245. As for enforcement jurisdiction, in the *Lotus* case (*France v Turkey*), the Permanent Court said (at 18-19):

> "Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory

> of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention."

246. That is a statement about enforcement jurisdiction, namely the limits of the right of a state to act on the territory of another state or to take measures on its own territory which require compliance in another state. Thus a state cannot, without the consent of the territorial sovereign, perform official acts in a foreign state or carry out official investigations in the foreign state. The inability of a foreign state to claim, directly or indirectly, its taxes in England is sometimes put on the basis that it is an illegitimate extension of its territorial jurisdiction: see *Government of India v Taylor* [1955] AC 491.

***The issue on this part of the appeal***

247. On this part of the appeal the issue is whether the undoubted "jurisdiction" which states has over their armed forces abroad means that their soldiers are "within their jurisdiction" for the purposes of article 1 of the Convention. The obvious starting point is that the operation of the Convention is territorial, and that its extra-territorial application is exceptional. The Strasbourg court has recognised few exceptions, and it is not easy to extract a common principled basis for them. The main questions which arise are (1) whether armed forces can be brought within article 1 simply on the basis that in international law they are subject to the jurisdiction of the state which they serve; or (2) whether they are within article 1 because of the authority and control which the state exercises over them; (3) whether they are within article 1 because there is a "jurisdictional link" between them and the state. In order that these questions may be considered it is necessary to consider *Banković v Belgium* (2001) 11 BHRC 435 and its antecedents, and some of the subsequent Strasbourg cases considered in *Al-Skeini*, and finally cases decided in Strasbourg after *Al-Skeini.*

***Early cases***

248. At the risk of repeating some of what has been said in other cases about the antecedents of *Banković v Belgium* (2001) 11 BHRC 435, it is important to consider what was decided by the Strasbourg court in *Banković* in December 2001 against the background of decisions of the Commission and the Court on the scope of jurisdiction under article 1 stretching over 35 years. In *Soering v United Kingdom* (1989) 11 EHRR 439, at [86], the Court, in plenary session, had referred to the limit on the reach of the Convention under article 1 as being "notably territorial."

249. One line of decisions suggested that a state would be responsible for acts of its officials (especially diplomatic and consular officials) performed abroad in performance of their duties to nationals: *X v Germany* (1965) 8 Yb ECHR 158 (Commission). Similar statements in *Cyprus v Turkey* (1975) 2 DR 125, at [8] and *Hess v United Kingdom* (1975) 2 DR 72 fall within this category also, and are not based, as they could have been (and, in the case of Cyprus, later were), on control of territory in Northern Cyprus in the former decision, or on Spandau prison being an extension of the territory of the occupying powers. It is likely that the emphasis on diplomats and consuls in the early decisions reflected the fiction of the extra-territoriality of diplomatic premises. There is, however, no actual decision (as distinct from dicta) either of the Commission or of the Court which assimilates diplomatic or consular premises to the territory of the sending state. So also *Cyprus v Turkey* (1975) 2 DR 125, at [8] assumed an extended notion of territoriality in relation to ships and aircraft registered in a Convention state.

250. Another line of Commission decisions expressed the thought that the expression "within their jurisdiction" was not equivalent to or limited to the national territory of the contracting state concerned, and extended "to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad …": *Cyprus v Turkey* (1975) 2 DR 125, at [8]. See also *X & Y v Switzerland* (1977) 2 DR 57; *M v Denmark* (1992) 73 DR 193.

251. These strands, acts by officials affecting persons, or officials exercising authority over persons, were brought together in *X v United Kingdom,* (Application No 7547/76) (1977) 12 DR 73. This was a child abduction case in which a Jordanian married to a British woman took their daughter to Jordan. The complaint was that the British consulate in Amman had not done enough to obtain the custody of her daughter following a custody order by the English court. The Commission was satisfied that the consular authorities had done all that could be reasonably expected of them. The Commission said, on jurisdiction, that it was clear from the constant jurisprudence of the Commission that authorised agents of a state, including diplomatic or consular agents, brought other persons or property within the jurisdiction of that state to the extent that they exercised authority over such persons or property. Insofar as they affected such persons or property by their acts or omissions, the responsibility of the state was engaged. Therefore even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still "within [the] jurisdiction" within the meaning of article 1. It should be noted that this formulation by the Commission is inconsistent with the text of article 1, which is about persons within the jurisdiction, and not about acts or omissions within the jurisdiction.

252. The decision of the Court in plenary session in *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 must be read against the background of

the previous cases. French and Spanish judges acted as judges in Andorra which was ruled by two co-princes, the President of the French Republic and the Bishop of Urgel (in Spain). The applicants were Spanish and Czech citizens, who had been convicted of armed robbery and complained that they had not had a fair trial. The Court agreed with the respondent states that the judges did not sit in their capacity as French or Spanish judges, and their judgments were not subject to supervision by the authorities of France or Spain. It does not seem to have been disputed by France and Spain that, if the judges had sat in their capacity as French or Spanish judges, the jurisdictional test of article 1 would have been satisfied. The way in which the Court put it was that France and Spain would be responsible "because of acts of their authorities producing effects outside their own territory…." (at [91], citing most of the cases mentioned above). See also *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, at [62].

253. The final strand in the authorities prior to *Banković* is represented by the notion that effective control of territory abroad is equivalent to jurisdiction over that territory. In *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, the Court (reflecting *Cyprus v Turkey* (1975) 2 DR 125, at [8]) held (at [62]) that

> "… the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration".

254. The concept of control is also taken up in other Northern Cyprus cases: e.g. *Loizidou v Turkey (Merits)* (1996) 23 EHRR 513, at [52]; *Cyprus v Turkey* (2001) 35 EHRR 731, at [77].

255. Prior to *Banković*, the Court had also declared admissible complaints against Turkey (a) arising out of operations of its armed forces in Northern Iraq which were alleged to have resulted in violations of the Convention, including the death and torture of some villagers (*Issa v Turkey*, Application No 31821/96, 30 May 2000, unreported); and (b) arising out of the arrest by Turkish security officers of the applicant, the leader of the PKK, at Nairobi airport with the consent of the Kenyan authorities, and his subsequent removal to, and trial in Turkey (*Őcalan v Turkey*, (Application No 46221/99), 14 December 2000, unreported). In neither of these admissibility decisions was there any discussion of jurisdiction under article 1.

***Banković v Belgium***

*The concessions by the respondent states*

256. The prior decisions go some way to explaining why the respondent states made a number of concessions in *Banković*, not all of which found their way into the reasoning of the Court. They accepted that (a) the exercise of jurisdiction involved the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to the state or who had been brought within that state's control, and that the term "jurisdiction" generally entailed some form of structured relationship normally existing over a period of time (judgment of the Court at [36]); (b) the Court had applied that notion of jurisdiction to confirm that individuals affected by acts of a state outside its territory could be considered to fall within its jurisdiction because there was an exercise of some form of legal authority by the state over them (at [37]); (c) the arrest and detention of the applicants in *Issa v Turkey* and *Őcalan v Turkey* constituted a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil (ibid).

*The issue*

257. The issue in *Banković*, stated in para [54] of the decision of the Grand Chamber by reference to the decisions in *Drozd* and the cases involving Northern Cyprus, was whether the fact that the acts of the respondent states were performed or had effects outside the territory of the contracting states meant that the applicants were capable of falling within the jurisdiction of the respondent states.

*The concept of jurisdiction in the Court's decision*

258. For present purposes, the relevant points which emerge from *Banković* are these: (1) the jurisdictional competence of a state is primarily territorial; (2) international law does not exclude a state's exercise of jurisdiction extra-territorially, but the bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are as a general rule defined and limited by the sovereign territorial rights of other states; (3) the competence of a state to exercise jurisdiction over its own nationals abroad is subordinate to the territorial competence of that state and other states; (4) a state may not exercise jurisdiction on the territory of another without the consent of the latter unless it is an occupying state, in which case it may exercise jurisdiction in certain respects; (5) article 1 of the Convention reflects the ordinary and essentially territorial notion of jurisdiction; (6) other

bases of jurisdiction are exceptional and require special justification in the particular circumstances of each case; (7) article 1 is not to be treated as part of the "living instruments" provisions, and the *travaux* confirmed the ordinary meaning of article 1.

259. It should be noted that the Court nowhere explains what it understands by the expression "jurisdiction" in the context of article 1. The reference in para [59] to extraterritorial jurisdiction as "including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality" is a mixture of two entirely different concepts of extra-territoriality.

260. The first ("nationality, flag, diplomatic and consular relations") reflects the fiction of the extra-territoriality of ships and aircraft and diplomatic and consular premises. The second ("effect, protection, passive personality and universality") represents the generally accepted exceptions to the territorial nature of criminal jurisdiction, that is, the exceptions to the principle that a state cannot use its criminal courts to punish persons for acts committed abroad.

261. The first aspect can be illustrated by the way it is put in the last edition of Oppenheim edited by Sir Hersch Lauterpacht, 8th ed (1955), pp 461, 793):

> "In contradistinction to these real parts of State territory there are some things that are either in every respect or for some purposes treated as though they were territorial parts of a State. They are fictional and in a sense only parts of the territory. Thus men-of-war and other public vessels on the high seas as well as in foreign territorial waters are essentially in every point treated as though they were floating parts of their home State. The premises in which foreign diplomatic envoys have their official residence are in many respects treated as though they were parts of the home States of the envoys concerned. Again merchantmen on the high seas are in certain respects treated as though they were floating parts of the territory of the State under whose flag they legitimately sail.
>
> …
>
> "Extraterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving States. The term 'extraterritoriality' is nevertheless valuable because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not

> within the territory of the receiving States. The so-called extraterritoriality of envoys takes practical form in a body of privileges which must be severally discussed."

262. The second aspect of jurisdiction, reflected in the Court's reference to "effect, protection, passive personality and universality" is that which has much exercised international lawyers (but which has nothing to do with the issue under article 1), namely the extent to which states can exercise criminal jurisdiction in respect of acts committed outside their national territory. In the *Lotus* case the Permanent Court said (at 20):

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty".

263. Consequently it is well accepted that there are well established exceptions to the territorial principle, and they are reflected in the reference in *Banković* at [59] to effect (normally referred to as "effects"), protection, passive personality and universality. The exceptions normally articulated are these: first, the nationality principle by which a state has jurisdiction over crimes committed by its nationals abroad; second, the so-called "protective principle" under which states claim jurisdiction over acts committed by aliens abroad which threaten the state; third, the "passive personality" basis of jurisdiction under which a state may exercise jurisdiction over crimes committed abroad by aliens if the victim is a national of the state claiming jurisdiction; fourth, the controversial "effects" doctrine where jurisdiction is taken over an offence which is committed abroad, but which has economic effects in the forum state (such as violations of anti-trust laws or securities laws), and which is sometimes said to be an aspect of the so-called "objective territorial principle", jurisdiction over an offence committed outside the state but concluded or consummated within the territory; fifth, the principle of universal jurisdiction, the oldest example being jurisdiction to try pirates, and now frequently invoked in relation to jurisdiction over war crimes. See Jennings, *Extraterritorial Jurisdiction and United States Anti-Trust Laws* (1957) 32 BYIL 146.

264. It has to be said that neither *Banković* nor a case such as the present has anything to do with extra-territorial jurisdiction in these two senses. The question here is whether armed forces serving abroad are within the jurisdiction of the

contracting states in a quite different sense, namely whether the fact that they are subject to the military law and discipline of the United Kingdom, and generally not subject to the local law, results in their being "within the jurisdiction" of the United Kingdom for article 1 purposes.

*The exceptional cases*

265. The Court went out of its way in *Banković* to emphasise the exceptional nature of the cases in which a state could be responsible for acts or omissions outside its national territory. First, it expressed the view that "article 1 of the Convention must be considered to reflect [the] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case" (at [61]). Second, it said (at [67]): "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the Convention." Third, it emphasised (at [71]): "In sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a contracting state is exceptional …"

266. The Court's treatment of the exceptional cases where acts of contracting states performed, or producing effects, outside their territories could constitute an exercise of jurisdiction within the meaning of article 1 may be summarised in this way. The *Soering v United Kingdom* line of cases is not concerned with the extra-territorial exercise of jurisdiction, because liability is incurred in such cases by the action of a state concerning a person while he or she was on its territory and clearly within its jurisdiction: [68]. The exceptions which the Court recognises are these.

267. First, the responsibility of contracting states could in principle be engaged because of acts of their authorities "which produced effects or were performed outside their own territory", at [69], citing the *Drozd* case.

268. Second, the responsibility of a contracting state is capable of being engaged when as a consequence of military action (lawful or unlawful) it exercises effective control of an area outside its national territory as a consequence of military operation or through the consent, invitation or acquiescence of the Government of that territory, and exercises all or some of the public powers normally to be exercised by that Government: at [70], citing *Loizidou v Turkey (Preliminary Objections)* and *Cyprus v Turkey* (2001) 35 EHRR 731. These cases were explained on this basis that "the respondent state, through the effective control of

the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government" (at [71]).

269. Third (reflecting the fictional extra-territoriality of diplomatic and consular premises and of ships and aircraft) "other recognised instances of the extra-territorial exercise of jurisdiction by a state include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state" and "in these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant state" (at [73]).

270. In applying these principles to the facts the Court rejected the suggestion that anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed or its consequences felt, was thereby brought within the jurisdiction of that state for the purpose of article 1 of the Convention. The applicants had accepted that jurisdiction, and any consequent state Convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. But the Court was "of the view that the wording of article 1 [did] not provide any support for the applicants' suggestion that the positive obligation in article 1 to secure 'the rights and freedoms defined in Section I of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question …" (at [75]).

271. In answer to the argument that failure to recognise the claim of the applicants would leave a vacuum in the Convention system, the Court said (at [80]):

> "The Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in article 19 of the Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties … It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system … In short, the Convention is a multi-lateral treaty operating, subject to article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. … The Convention was not designed to be

> applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[Emphasis in original text].

272. The Court said (at [80]) that *Cyprus v Turkey* (2001) 35 EHRR 731 related to an entirely different situation: the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a contracting state, to fulfil the obligations it had undertaken under the Convention.

273. The Court did not deal expressly with the applicability of the exception it had identified by reference to *Drozd*, namely that the responsibility of contracting states could in principle be engaged because of acts of their authorities which produced effects or were performed outside their own territory. But it did deal with the applicants' reliance on the admissibility decisions in *Issa v Turkey* and *Őcalan v Turkey*. In each of those cases the Court had held admissible complaints relating to Turkey's conduct in non-contracting states, Iraq in the former case and Kenya in the latter case. All that the Court said about those cases was this (at [81]):

> "It is true that the Court has declared both of these cases admissible and that they include certain complaints about alleged actions by Turkish agents outside Turkish territory. However, in neither of those cases was the issue of jurisdiction raised by the respondent Government or addressed in the admissibility decisions and in any event the merits of those cases remain to be decided."

274. The conclusion of the Court (at [82]) was that there was no "jurisdictional link" between the persons who were victims of the act complained of and the respondent states.

***The subsequent decisions***

275. The exceptional nature of any liability for extra-territorial acts or omissions articulated in *Banković* has been repeatedly quoted or re-stated by the Court: *Őcalan v Turkey* (2003) 37 EHRR 238, at [93]; *Assanidze v Georgia* (2004) 39 EHRR 653, at [137]; *Ilaşcu v Moldova and Russia* (2005) 40 EHRR 1030, at [314]; *Issa v Turkey* (2004) 41 EHRR 567, at [68]; *Al-Saadoon and Mufdhi v*

*United Kingdom (admissibility)* (2009) 49 EHRR SE 95, at [85]; *Stephens v Malta (No 1)*(2009) 50 EHRR 144, at [49]; *Medvedyev v France*, Grand Chamber, 29 March 2010, at [64]. In particular the concept of jurisdiction based on effective control has been applied in *Assanidze v Georgia* and *Ilaşcu v Moldova and Russia*, *ante.*

276. The decisions subsequent to *Banković* in Strasbourg up to the time of *Al-Skeini* were fully discussed by the Divisional Court, the Court of Appeal, and the House of Lords, and it is not necessary to go over the same ground. It is useful only to consider the relevance of the decisions in *Őcalan v Turkey* (2003) 37 EHRR 238; (2005) 41 EHRR 985 (Grand Chamber) and *Issa v Turkey* (2004) 41 EHRR 567, and of the decisions subsequent to *Al-Skeini* in *Markovic v Italy* (2006) 44 EHRR 1045 (Grand Chamber); *Al-Saadoon and Mufdhi v United Kingdom (admissibility)* (2009) 49 EHRR SE 95; and *Medvedyev v France*, Grand Chamber, 29 March 2010.

**"Authority and control" and State agents**

277. The decisions in *Őcalan v Turkey* (2003) 37 EHRR 238; (2005) 41 EHRR 985 (Grand Chamber) and *Issa v Turkey* (2004) 41 EHRR 567, both of which were extensively discussed in *Al-Skeini*, are relevant on this appeal because of what is said to be their support for the argument that armed forces abroad are subject to the jurisdiction of the sending state because they are under the authority and control of the sending state.

*Őcalan v Turkey*

278. In *Őcalan v Turkey* (2003) 37 EHRR 238; (2005) 41 EHRR 985 (Grand Chamber) the applicant was arrested by members of the Turkish security forces inside a Turkish aircraft in the international zone of Nairobi airport. His complaint related both to his treatment in Nairobi and subsequently in Turkey. As regards his treatment in Kenya, he complained under articles 3 and 5 about handcuffing and blindfolding, alleged sedation and unlawful arrest. There was also a complaint that the abduction overseas on account of his political opinions constituted inhuman or degrading treatment within the meaning of article 3. It was held that the complaints about the arrest in Kenya fell within article 1. In the first decision the Court said (at [93]):

> "… the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the

> Turkish officials the applicant was under effective Turkish authority and was therefore brought within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of the present case are distinguishable from those in the aforementioned *Banković* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey … "

279. The Grand Chamber said (at [91]):

> "The Court notes that the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport.
>
> It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in the cases of *Illich Ramirez Sánchez v France* and *Freda v Italy*; and, by converse implication, the *Banković v Belgium* ...."

280. There are four features about this decision which should be noted. First, the Turkish Government conceded that the case fell within article 1. Second, it involved, at least in part, acts committed on a Turkish aircraft. Third, the Turkish activities were authorised by Kenya. Fourth (as Lord Brown pointed out in *Al-Skeini* at [118]-[119]), it involved the forcible removal by state A from state B with state B's consent of a person wanted for trial in state A. *Cf Illich Ramirez Sánchez v France* (Application No 28780/95) (1996) 86-A DR 155 (Commission)*;* see also *López Burgos v Uruguay* (1981) 68 ILR 29 and *Celiberti de Casariego v Uruguay* (1981) 68 ILR 41(UN Human Rights Committee). In *Stephens v Malta (No 1)* (2009) 50 EHRR 144, at [52], [54], in a section dealing with jurisdiction under article 1, it was held that the arrest of a British citizen in Spain pursuant to an unlawful request for extradition by Malta was attributable to, and engaged the responsibility of, Malta, but the Court did not explain why the applicant was within the jurisdiction of Malta.

281. It is entirely consistent with common sense for the Convention to apply (even to that part of the operation which occurs abroad) when agents of a state go abroad and forcibly remove one of its citizens for trial at home. The decision is not authority for a generalised basis of jurisdiction based on "authority and control" by state agents.

*Issa v Turkey*

282. *Issa v Turkey* (2004) 41 EHRR 567 has been subject to close analysis and criticism at all levels in *Al-Skeini.* It arose out of an incursion by Turkish troops into Northern Iraq in 1995 to pursue and eliminate Turkish terrorists who were seeking shelter in Iraq. The applicants were Iraqi villagers who alleged that in contravention of their Convention rights and those of their relatives, Turkish troops had (among other things) detained, tortured, and killed villagers and caused distress to others. The Court decided that the applicants' relatives did not come within the jurisdiction of Turkey within the meaning of article 1. Citing *Loizidou v Turkey (Merits)* (1996) 23 EHRR 513, at [52], the Court re-stated (but for the first time in relation to territory outside the Convention states) that the responsibility of a state could be engaged where as a consequence of military action, whether lawful or unlawful, the state in practice exercised effective control of an area situated outside its national territory: [68]-[69]. That deals with jurisdiction based on control of territory, and not jurisdiction based on authority and control of the victim by state agents outside the territory of the state.

283. In a much-discussed passage, the Court said (at [71])

> "Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State … Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*ibid*)."

284. Consequently, jurisdiction could have been based on either effective control of the area or (although the formulation is by no means clear) on the activities of state agents against local inhabitants. But the applicants were not within the jurisdiction of Turkey because Turkey did not exercise effective control over the relevant area, and also because it had not been proved that Turkish forces had conducted operations in the area in question: [75], [81].

285. It is implicit in the reasoning in this decision that there would have been jurisdiction if the Turkish troops had been guilty of atrocities even without overall control of the area. If that is so, it is inconsistent with *Banković*. It is impossible to see how an attack on villagers in a cross-border incursion into a non-contracting state could make the villagers within the jurisdiction of Turkey, when a bombing raid on Belgrade did not make the victims within the jurisdiction of the NATO States involved.

286. The notion of "authority and control" through State agents operating abroad derives from the report of the Inter-American Commission of Human Rights in *Coard v United States* (Report No 109/99, 29 September 1999) (1999) 9 BHRC 150, which was cited by the Strasbourg court in *Issa v Turkey* at [71] in support of that notion. The Commission was examining complaints about the applicants' detention and treatment by United States' forces in the military operation in Grenada. The American Declaration on the Rights and Duties of Man 1948 contains no express provision on its territorial limits. The Commission said:

> "While the extraterritorial application of the Declaration has not been placed at issue by the parties … Given that individual rights inhere simply by virtue of a person's humanity, each American state is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the state observed the rights of a person subject to its authority and control."

287. The *Coard* report was referred to in *Banković* at [23] and [78], but the Grand Chamber (at [78]) specifically indicated that it derived no assistance from it because the American Declaration on the Rights and Duties of Man 1948 contained no explicit limitation of jurisdiction.

288. Jurisdiction on the basis of "authority and control" (especially outside the Convention states) as a separate head was firmly rejected by the House of Lords in *Al-Skeini*: see especially Lord Brown at [116]-[127], and Lord Rodger at [73]-[77]; and see also Rix LJ speaking for the Administrative Court at [216], and Brooke LJ in the Court of Appeal at [103].

289. Not only is there no firm basis in authority for the notion of authority and control as a basis of jurisdiction under article 1, *Issa* is also inconsistent with the notion of the regional nature of the Convention. As Lord Rodger said in *Al-Skeini* (at [78]):

> "The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd. Hence, as noted in *Banković*, 11 BHRC 435, 453-454, para 80, the court had 'so far' recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism."

See also Mactavish J in the Federal Court of Canada: *Amnesty International Canada v Canada (Chief of Defence Staff),* 2008 FC 336, [2008] FCR 546, [235].

*Medvedyev v France*

290. In *Medvedyev v France*, Grand Chamber, 29 March 2010, the applicants alleged that they had been arbitrarily deprived of their liberty contrary to article 5(1) following the boarding of the ship on which they were crewmen by French authorities and complained that they had not been brought promptly before a judge or other officer authorised by law to exercise judicial power. The ship was registered in Cambodia. Cambodia had given France authorisation to intercept the ship. The Court held unanimously (although it was divided on the merits of the claim) that because France exercised full and exclusive control over the ship and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of article 1: at [67].

291. This case bears some resemblance to *Őcalan v Turkey* (2003) 37 EHRR 238, except that the aircraft in *Őcalan* was registered in Turkey, the respondent state, whereas the ship in *Medvedyev v France* was registered in Cambodia, and the applicant in *Őcalan* had the nationality of the respondent state, whereas the applicants in *Medvedyev* had a variety of non-French nationalities, Ukrainian, Romanian, Greek and Chilean. The differences are not crucial, since although an aircraft is for some purposes regarded as part of the territory of the country of registration, while it is in an airport it is no sense exempt from the criminal and public law of the territorial state, and non-nationals within the jurisdiction are equally entitled to the protection of Convention rights.

*Al-Saadoon and Mufdhi v United Kingdom (admissibility)*

292. Nor is *Al-Saadoon and Mufdhi v United Kingdom (admissibility)* (2009) 49 EHRR SE 95 authority for any concept of extra-territoriality going beyond *Banković* as recognised in *Al-Skeini.* The applicants complained that their transfer by British forces to the custody of the Iraqi High Tribunal exposed them to a real risk of the death penalty in breach of articles 2 and 3. The United Kingdom's argument on jurisdiction was that the transfer of the applicants into the custody of the Iraqi authorities took place in circumstances where the United Kingdom forces had the power to detain Iraqi nationals only at the request of the Iraqi courts; the United Kingdom forces were not to retain any power to detain Iraqi nationals after 31 December 2008 and, within hours of the actual transfer, the base would have ceased to be inviolable and the Iraqi authorities would have had the right to come physically to the base where the applicants were detained and remove them. Consequently, it was argued, the United Kingdom was not exercising any public powers through the effective control of any part of the territory or the inhabitants of Iraq,

293. The Court recognised that, during the first months of the detention of the applicants, the United Kingdom was an occupying power in Iraq. The United Kingdom exercised control and authority over the individuals detained in the British-run detention facilities initially solely as a result of the use of military force. Subsequently its de facto control over the premises was reflected by the CPA order which provided that all premises used by the multi-national force should be inviolable and subject to the exclusive control and authority of the multi-national force: [87]. Given the total and exclusive de facto and subsequently also de jure control exercised by United Kingdom authorities over the premises, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction: *Hess v United Kingdom*. That conclusion, the Court said (at [88]), was consistent with the decision of the House of Lords in *Al-Skeini* and the position adopted by the United Kingdom in that case before the Court of Appeal and the House of Lords (where it had been conceded that the jurisdiction under article 1 extended to a military prison occupied and controlled by the United

Kingdom). The Court referred to *Rasul v Bush*, 542 US 466 (2004) where the United States Supreme Court decided (6-3) that United States courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals incarcerated in Guantanamo Bay, since by the express terms of the agreements with Cuba, the United States exercised complete jurisdiction and control over the Guantanamo Bay. See also *Al-Saadoon and Mufdhi v United Kingdom (Merits)*, 2 March 2010, with many references to the United Kingdom's "jurisdiction" over the applicants: [137], [140], [164], [165].

294. The decisions in *Al-Saadoon* are consistent with, and do not take the matter any further than, *Al-Skeini.*

***The concept of a "jurisdictional link" and Markovic v Italy***

295. The conclusion of the Court in *Banković* (at [82]) was that there was no "jurisdictional link" between the persons who were victims of the act complained of and the respondent states. There was no elucidation of that expression, and the only other decision of the Strasbourg court in the article 1 context which makes use of the notion of jurisdictional link is *Markovic v Italy* (2006) 44 EHRR 1045 (Grand Chamber), in which the Court said that "once a person brings a civil action in the courts or tribunals of a state, there indisputably exists, without prejudice to the outcome of the proceedings, 'a jurisdictional link' for the purposes of article 1" ([54]).

296. *Markovic v Italy* is a decision which shows that the victim of a breach of the Convention need not necessarily be present in the contracting state. The applicants were nationals of Serbia and Montenegro, who had brought claims in the Italian courts for compensation for damage caused by an airstrike by NATO forces. The Italian Court of Cassation ruled that the Italian courts had no jurisdiction because the claim was a political one. The applicants claimed that this was a refusal to grant them access to a court in breach of article 6. The Court held that there was no breach of article 6 because the inability to sue the state was not the result of an immunity but of the principles governing the substantive right of action in domestic law.

297. The Court held that the applicants were within the jurisdiction of Italy for the purposes of article 1. The Italian and British Governments argued that there was no jurisdiction for the purposes of article 1 because (for reasons which are hard to follow) the underlying claim related to NATO airstrikes outside the Convention countries. But, apart from that, they both accepted that a claimant from outside the contracting states who brings a claim in the courts of the contracting state is within its jurisdiction for article 1 purposes. The Italian Government

accepted that the applicants had brought themselves within the ambit of the state's jurisdiction by lodging a claim with the authorities: see [38]. The British Government seemed (somewhat artificially) to treat the bringing of the claim as a notional entry into the territory in order to bring proceedings: see [48].

298. As regards jurisdiction for the purposes of article 1, the Court three times used the expression "jurisdictional link" in these passages:

> "54. Even though the extraterritorial nature of the events alleged to have been at the origin of an action may have an effect on the applicability of Article 6 and the final outcome of the proceedings, it cannot under any circumstances affect the jurisdiction *ratione loci* and *ratione personae* of the State concerned. If civil proceedings are brought in the domestic courts, the State is required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6.
>
> The Court considers that once a person brings a civil action in the courts or tribunals of a State, there indisputably exists, without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purposes of Article 1.
>
> 55. The Court notes that the applicants in the instant case brought an action in the Italian civil courts. Consequently, it finds that a 'jurisdictional link' existed between them and the Italian State."

299. The expression "jurisdictional link" in the conclusion in *Banković* (at [82]) is plainly not intended to state or represent a separate and independent test of jurisdiction, and the same must be so of the passages in *Markovic v Italy.* Consequently, neither of those decisions suggests that there is a separate free-standing head of jurisdiction based on a jurisdictional link, and (contrary to the respondents' position on this appeal) there is nothing in the opinion of Lord Rodger in *Al-Skeini* which supports such a suggestion. He said (at [64])

> "It is important therefore to recognise that, when considering the question of jurisdiction under the Convention, the focus has shifted to the victim or, more precisely, to the link between the victim and the contracting state … [F]or the purposes of deciding whether the Convention applies outside the territory of the United Kingdom, the key question is whether the deceased were linked to the United Kingdom when they were killed. However reprehensible, however

> contrary to any common understanding of respect for 'human rights', the alleged conduct of the British forces might have been, it had no legal consequences under the Convention, unless there was that link and the deceased were within the jurisdiction of the United Kingdom at the time. For, only then would the United Kingdom have owed them any obligation in international law to secure their rights under article 2 of the Convention and only then would their relatives have had any rights under the 1998 Act".

300. All that Lord Rodger was saying was that there must be a relevant link, not that a link, or any link, is a sufficient basis for the existence of jurisdiction under article 1.

301. It should be added in relation to *Markovic v Italy* that it makes complete sense for the Convention to apply to parties to litigation in contracting states irrespective of where they are. It could not be seriously suggested, for example, that a Japanese defendant in English proceedings who is served out of the jurisdiction is not entitled to article 6 rights. In *Lubbe v Cape plc* [2000] 1 WLR 1545 the South African asbestosis victims suing in England submitted that to stay the proceedings in favour of the South African forum would violate their article 6 rights. A stay was refused on the non-Convention ground that, because of the lack of funding and legal representation in South Africa, they would be denied a fair trial on terms of equality with the defendant. Lord Bingham said (at p 1561) that article 6 did not support any conclusion which was not already reached on application of the stay principles *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460. There was no suggestion, nor could there have been, that the claimants could not rely on article 6 because they were South Africans without any connection with the United Kingdom.

302. In *Banković* the Court said [75] that the obligation in article 1 could not be "divided and tailored in accordance with the particular circumstances of the extra-territorial act in question," and the Court has said that in territory which is subject to the effective control of a contracting state the obligation of the State is to secure "the entire range of substantive Convention rights" *Banković* at [70], citing *Cyprus v Turkey* (2001) 35 EHRR 731 at [77]. But cases such as *Markovic v Italy* suggest that some qualification is necessary to the principle of indivisibility of Convention rights, and that there may be cases in which a person may be within the jurisdiction of a contracting state for limited purposes only. Another possible example is suggested by *Carson v United Kingdom*, Grand Chamber, 16 March 2010 (in which there was no issue under article 1). The applicants were persons who had worked in the United Kingdom and paid national insurance contributions and then emigrated to South Africa, Canada or Australia. State pensions to persons abroad were not up-rated to take account of inflation with the result that they received less (far less in some cases). They failed in their claim under article 14 of the

Convention and article 1 of the First Protocol, but rightly it was never suggested that because they were permanently abroad they were not within the jurisdiction of the United Kingdom for article 1 purposes in relation to interference with property situate in the United Kingdom (as the pension rights were). Consequently there may be cases in which persons abroad may not be entitled to the "whole package" of Convention rights.

***Conclusions***

303. *Banković* made it clear that article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions: [64]-[65]. It is hardly conceivable that in 1950 the framers of the Convention would have intended the Convention to apply to the armed forces of Council of Europe states engaged in operations in the Middle East or elsewhere outside the contracting states. Even the limited exceptions to territoriality recognised by the Strasbourg court were plainly not contemplated in the drafting process. The original draft prepared by the Committee of the Consultative Assembly of the Council of Europe on legal and administrative questions referred to "all persons residing within their territories". Following a suggestion that "residing within" be replaced by "living in", the Expert Intergovernmental Committee decided instead on persons "within their jurisdiction". The reason was that the term "residing" might be considered too restrictive, and there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory states, even those who could not be considered as residing there in the legal sense of the word: *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol III, p 260. Apart from a comment by M Rolin, the eminent Belgian representative to the Consultative Assembly, that the protections would extend to all individuals of whatever nationality, who on the territory of any one of the states, might have had reason to complain that their rights were violated, article 1 did not give rise to any further discussion on this aspect and that text was adopted by the Consultative Assembly on 25 August 1950 without further amendment: *Collected Edition*, vol VI, pp 132, 148. See *Banković* at [19]-[21] and also Lawson, *Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, in *Extraterritorial Application of Human Rights Treaties*, ed Coomans and Kamminga, 2004, 83, at 89-90. There is nothing in the drafting history to give the slightest credence to the proposition that the Convention was to apply to the relations of the state with its armed forces abroad.

304. It is noteworthy that, writing in the same year, Professor Hersch Lauterpacht (as he then was) produced a draft of the International Bill of the Rights of Man which provided (article 18): "The obligations of this Bill of Rights shall be binding upon States in relation both to their metropolitan territory and to any other territory under their control and jurisdiction". See Lauterpacht, *International Law and Human Rights*, 1950, p 317.

305. *Banković* (as applied in *Al-Skeini*) confirms that article 1 reflects the territorial notion of jurisdiction, and that other bases of jurisdiction are exceptional and require special justification. In practice the exceptions recognised by the Court have either consisted of (1) territorial jurisdiction by a state over the territory of another contracting state; (2) extensions of territorial jurisdiction by analogy; and (3) commonsense extensions of the notion of jurisdiction to fit cases which plainly should be within the scope of the Convention.

306. The Northern Cyprus cases such as *Loizidou v Turkey (Merits)* and *Cyprus v Turkey*, and also *Ilaşcu v Moldova and Russia* and *Assanidze v Georgia* are all illustrations of the extension or application of territoriality to cases of effective control (or lack of control) by contracting states of Council of Europe territory. The extension of the Convention to military bases and hospitals (ultimately based on concession by the Secretary of State) in *Al-Skeini* and *Al-Saadoon and Mufdhi v United Kingdom (admissibility)* is consistent with the treatment in dicta of the Commission and the Court of fixed premises abroad as territorial extensions of the state. If the judges in *Drozd v France and Spain* had been acting as French or Spanish judges commonsense would have recognised them as extensions of the state judiciary acting abroad. So also in cases such as *Őcalan v Turkey* and *Medvedyev v France*, where a state's officials detain a person abroad for trial in its territory, it would be odd if there could be no complaint under the Convention in respect of the acts which took place outside the territory. Similarly, the application of article 6 rights to foreign claimants in *Markovic v Italy* makes complete sense: it would be a travesty of the Convention to deny them the right to access to a court because they were outside the Convention states.

307. This case comes within none of the exceptions recognised by the Strasbourg court, and there is no basis in its case-law, or in principle, for the proposition that the jurisdiction which states undoubtedly have over their armed forces abroad both in national law and international law means that they are within their jurisdiction for the purposes of article 1. For the reasons given in the preceding sections of this judgment, jurisdiction cannot be established simply on the basis that the United Kingdom's armed forces abroad are under the "authority and control" of the United Kingdom, or that there is a "jurisdictional link" between the United Kingdom and those armed forces. To the extent that *Issa v Turkey* states a principle of jurisdiction based solely on "authority and control" by state agents over individuals abroad, it is inconsistent with *Banković*, and with *Al-Skeini*, where it was comprehensively criticised by the House of Lords. Nor is there anything in *Markovic v Italy* or in Lord Rodger's opinion in *Al-Skeini* to support a "jurisdictional link" as a free-standing basis for jurisdiction under article 1.

308. Nor are there policy grounds for extending the scope of the Convention to armed forces abroad. On the contrary, to extend the Convention in this way would

ultimately involve the courts in issues relating to the conduct of armed hostilities which are essentially non-justiciable.

309. I would therefore allow the appeal on the first issue. On the second issue, I agree with the judgment of Lord Phillips and would dismiss the appeal.

**LORD KERR**

310. Article 1 of the European Convention on Human Rights and Fundamental Freedoms provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." The first issue in this appeal is concerned with the question of what is meant by the phrase, "within their jurisdiction".

311. I have read the judgment of Lord Mance and am in complete agreement with what he has said on the first issue. For the reasons that he has given, I too would dismiss the appeal on the first ground.

*The first issue*

312. It has been accepted in a series of decisions, both domestic and European, that the primary and essential basis for jurisdiction under article 1 is territorial. It has also been accepted that this important principle is subject to exceptions. A central issue on the first ground of appeal is whether the admissible exceptions are confined to those specific examples that have been expressly recognised by the decisions in this field, particularly those reached in Strasbourg, or whether further exceptions may be recognised by the application of principles already established by the European Court of Human Rights.

313. In *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] AC 1356, Lord Bingham clearly contemplated that any exceptions to or extensions of the principle of territoriality should be specific and limited – see para 8(3) of his opinion. That case of course involved a claim that the lawfulness of the war in Iraq should be investigated in order to test whether the United Kingdom had fulfilled what were said to be its article 2 obligations to soldiers who were exposed to the risk of death in that war. It was not concerned with the question that arises here – whether a soldier who is within the control of the state, in the form of the army authorities, remains within the jurisdiction of the state for the purposes of article 1 of the Convention when he is outside the state's national territory.

314. As Lord Mance has pointed out, Lord Bingham outlined three reasons that article 2 had never been held to apply to the process of deciding on the lawfulness of a resort to arms. The first was that the lawfulness of military action has no immediate bearing on the risk of fatalities. The second was that the draftsmen of the European Convention had not envisaged that it could provide a suitable framework or machinery for resolving questions about the resort to war. The final reason related to the territoriality issue. On this point, Lord Bingham said:

> "Subject to limited exceptions and specific extensions, the application of the Convention is territorial: the rights and freedoms are ordinarily to be secured to those within the borders of the state and not outside. Here, the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the defendants they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted: *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, paras 79, 129."

315. The *Al-Skeini* case involved the deaths of six Iraqi civilians at the hands of British troops. Five of the deceased were shot in the course of security operations; the sixth, Mr Mousa, died following gross ill-treatment while in custody in a UK military detention facility. The appellants, who were relatives of the deceased, asked the Secretary of State to hold a public inquiry into their relatives' deaths. The Secretary of State indicated that he would not hold such an inquiry. The appellants sought judicial review of that decision. In order to promote that application the appellants had to establish (among other things) that their complaint fell within the scope of ECHR and that a Convention right had been violated. The violation alleged by the appellants consisted primarily of a failure to investigate, as required by article 2, a violent death alleged to have been caused by agents of the state. The House of Lords held that the Convention operated in an essentially regional context, most notably in the legal space of the contracting states (*ie* within the area of the Council of Europe countries). The jurisdiction under article 1 was primarily territorial. The House of Lords recognised, however, that exceptions to that principle existed. These included circumstances where the state had effective control of a foreign territory and its inhabitants through military occupation or by the consent, invitation or acquiescence of the government of that territory and it exercised all or some of the public powers that would normally have been exercised by the local government. This was the context in which the observations in paras 79 and 129 of *Al-Skeini* (on which Lord Bingham relied in *Gentle*) were made.

316. The statements of Lord Rodger in para 79 of *Al-Skeini* were based largely on his consideration of the decision of the European Court of Human Rights in *Bankovic v Belgium* (2001) 11 BHRC 435. That case has been extensively

discussed in the judgment of Lord Phillips and it is therefore unnecessary for me to rehearse its details. It should be noted, however, that in para 80 the court observed that Strasbourg had "so far" recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. From this one can safely assume that it was not contemplated that the exceptions would be confined solely to this situation and, indeed, further extensions to the exceptional category have been recognised in later decisions of ECtHR. The observation in para 80 of *Bankovic* provided the backdrop for what Lord Rodger said at para 79 of *Al-Skeini*:

> "The essentially regional nature of the Convention has a bearing on another aspect of the decision in *Bankovic v Belgium* (2001) 11 BHRC 435. In the circumstances of that case the respondent states were plainly in no position to secure to everyone in the RTS station or even in Belgrade all the rights and freedoms defined in Section I of the Convention. So the applicants had to argue that it was enough that the respondents were in a position to secure the victims' rights under articles 2, 10 and 13 of the Convention. In effect, the applicants were arguing that it was not an answer to say that, because a state was unable to guarantee everything, it was required to guarantee nothing—to adopt the words of Sedley LJ, [2007] QB 140, 300, para 197. The European Court quite specifically rejected that line of argument. The court held, (2001) 11 BHRC 435, 452, para 75, that the obligation in article 1 could not be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'. In other words, the whole package of rights applies and must be secured where a contracting state has jurisdiction. This merely reflects the normal understanding that a contracting state cannot pick and choose among the rights in the Convention: it must secure them all to everyone within its jurisdiction. If that is so, then it suggests that the obligation under art 1 can arise only where the contracting state has such effective control of the territory of another state that it could secure to everyone in the territory all the rights and freedoms in Section I of the Convention."

317. It is important, I believe, to note that these comments were made in the context of jurisdiction *based on territorial control*. This is clear from para 75 of *Bankovic*, on which they are founded. But the present case is not one of territorial control. It is, rather, a case of control of personnel. Soldiers serving in Iraq were under the complete control of the United Kingdom authorities. They were subject to UK law. They were not amenable to the law of Iraq. The only legal system to which they were answerable or to which they might have recourse was that of the United Kingdom. In these circumstances, one may ask, if they were not within the

jurisdiction of the UK, in whose jurisdiction were they? The answer that the appellant impliedly gives to this question is that the soldiers were within the jurisdiction of the UK for all purposes except for those of article 1 of the Convention but that response merely prompts the further question, "why" and, for reasons that I shall touch on below, to that second query I can find no satisfactory reply.

318. Para 129 of *Al-Skeini* (the other passage on which Lord Bingham relied in *Gentle*) is equally concerned with the question of territorial control. There Lord Brown said:

> "… except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory and, unless it is within the area of the Council of Europe, it is unlikely in any event to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population. Indeed it goes further than that. During the period in question here it is common ground that the UK was an occupying power in southern Iraq and bound as such by Geneva IV and by the Hague Regulations. Article 43 of the Hague Regulations provides that the occupant 'shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'. The appellants argue that occupation within the meaning of the Hague Regulations necessarily involves the occupant having effective control of the area and so being responsible for securing there all Convention rights and freedoms. So far as this being the case, however, the occupants' obligation is to respect 'the laws in force', not to introduce laws and the means to enforce them (for example, courts and a justice system) such as to satisfy the requirements of the Convention. Often (for example where Sharia law is in force) Convention rights would clearly be incompatible with the laws of the territory occupied."

319. It is immediately evident that Lord Brown was discussing the nature and degree of control that was required before the territorial control exception could arise. The principal message – as it seems to me – to emerge from this passage is that the extent of the occupants' actual control over the territory in question was very far from complete and therefore entirely incompatible with a capacity to enforce compliance with the Convention. On that account, the extra-territorial exception could not be held to apply. When one approaches the matter from the perspective of power over military personnel, however, the level of control of the UK occupying forces is of an altogether different order from that which they could exert over the territory. The control that the UK had over Private Smith was as

complete as it is possible in today's world to be. Moreover, for the reasons given by Lord Mance in paras 185-188 of his judgment, no other agency or state was entitled to or could exercise any authority over him. In plain terms, he did not come within any legal order or jurisdiction other than that of the United Kingdom.

320. I therefore respectfully agree with Lord Mance that Lord Bingham's statement in *Gentle* that the soldiers, although subject to the authority of the United Kingdom government, were "clearly not within the jurisdiction of the UK" must be treated with some reservation. Neither Lord Rodger nor Lord Brown (in the paragraphs of their opinions in *Al-Skeini* that Lord Bingham relied on) had addressed the question whether serving soldiers came within the state's jurisdiction for the purposes of article 1 of the Convention. Although a number of other members of the House of Lords in *Gentle* agreed in general terms with Lord Bingham, like Lord Mance, I doubt that his statement that the soldiers were not within the jurisdiction of the UK forms part of the *ratio decidendi* of that case. Even if it does, in light of the much fuller argument that this court has received on the topic than was presented to the House of Lords in *Gentle*, it is right that the matter should be considered again.

321. Lord Brown discussed in *Al-Skeini* the exceptions that had been already identified to the strict territorial basis for jurisdiction and Lord Mance has analysed these in paras 172 to 179 of his judgment. I agree with his analysis and with his conclusion that underpinning each of the exceptions is the exercise by a state in a country other than its national territory of power over individuals by the consent, invitation or acquiescence of the foreign state. The exclusion of extra-territorial jurisdiction of one state in the territory of another rests primarily on the sovereign territorial rights of the latter state. As the court in *Bankovic* said, "a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to that State's and other States' territorial competence" – para 60.

322. Where, however, a state yields authority to a foreign state to exercise power in its sovereign territory, this principle does not apply. Likewise, if the sovereignty of the original state is ousted by an occupying force, the occupiers' jurisdiction replaces that of the original state. In the present case both these situations – so far as they involved UK military personnel - tend to blend into each other. The UK was certainly permitted to exercise power over its soldiers, although this could not be said to be a permission granted by the state having original sovereignty over Iraq since that state's sovereignty had been ousted by the invading forces. In so far as the UK's authority to exercise power over its own forces depended on the grant of permission, however, that was certainly constituted by CPA Order No 17 and Security Council Resolution No 1483. For the reasons given by Lord Mance in paras 184 to 186 of his judgment, I also consider that the UK exercised exclusive jurisdiction over its forces by reason of its being an occupying power. The situation can be described simply in the following way: the United Kingdom

brought its soldiers into Iraq; it not only asserted complete authority over them while they remained there, it explicitly excluded the exercise of authority over those soldiers by any other agency or state; and it has always been clear that soldiers remain subject to the laws of the UK during their service abroad. In those circumstances it would be, to my mind, wholly anomalous to say that soldiers did not remain within the jurisdiction of the UK while serving in Iraq especially since it has been accepted in *Al-Skeini* and not disputed by the appellant in the present case that all persons while on premises under the control of the army are within the UK's jurisdiction for the purposes of article 1 of the Convention.

323. In *Bankovic* there were no fewer than 17 respondent states: Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. It is interesting and significant that all seventeen subscribed to an argument described in this way in para 36 of the court's judgment:

> "As to the precise meaning of 'jurisdiction', [the respondent governments] suggest that it should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law. The exercise of 'jurisdiction' therefore involves the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that state or who have been brought within that state's control. They also suggest that the term 'jurisdiction' generally entails some form of structured relationship normally existing over a period of time."

324. Of course, most soldiers serving on behalf of a member state in a foreign country would come clearly within the first of these formulations since they are subject to the legal authority of the government of their native country and they owe allegiance to that state. The court in *Bankovic* did not comment adversely on the argument that a state's exercise abroad of legal authority over persons owing allegiance to that state would satisfy the requirements of article 1. Indeed, the court's treatment of the arguments of the parties is not at all inconsistent with that submission.

325. It is to be noted that the final conclusions expressed by the court in paras 67 to 71 are preceded by the cross heading "Extra-territorial *acts* recognised as constituting an exercise of jurisdiction" (emphasis added). By making its soldiers subject to its sole authority while abroad a state is not engaging in an extra-territorial act so much as creating a state of affairs. There may not be much in this point but it is, I think, worth remarking that the focus of the court in *Bankovic* was whether the *actions* of the respondent governments might be a sufficient foundation for concluding that the applicants came within their jurisdiction

whereas here the essential issue is whether soldiers who are subject to the exclusive legal control of the UK authorities remain within its jurisdiction. There is nothing in *Bankovic* which speaks directly to the question whether a member state that takes its soldiers abroad, asserts that it has sole authority over them and expressly excludes all other possible forms of control over them can nevertheless claim that those soldiers are not within its jurisdiction for the purposes of article 1 of the Convention. To suggest, as the Secretary of State must, that soldiers are within the jurisdiction of the United Kingdom for every conceivable legal purpose other than article 1 seems to me to involve the acceptance of one anomaly too many.

326. In this appeal the Secretary of State has argued that, because it is impossible to secure the whole package of Convention rights for soldiers serving abroad, it should be concluded that they cannot be within the UK's jurisdiction for article 1 purposes. Expressed in this unvarnished way, the argument appears circular or, at least, intensely pragmatic. But a similar argument found favour with ECtHR in *Bankovic* and with the House of Lords in *Al-Skeini*. One must consider, therefore, whether this is a universally required prerequisite in order to bring an applicant within the jurisdiction.

327. As Lord Phillips has pointed out (in para 43 of his judgment), the European Court in *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 accepted that if the applicants had appeared before a French judge sitting in that capacity in Andorra they would have been within the jurisdiction of France for the purposes of article 1 in relation to their article 6 rights. They would not have been entitled to claim against France the benefit of protection of the other Convention rights, however. It is implicit in that judgment that there are certain settings in which the 'whole package' principle does not apply. In other words, there is not an invariable pre-condition that one must be able to have access to the entire panoply of Convention rights in order to be able to claim that one is within the jurisdiction of the member state for the purposes of article 1.

328. Likewise in *Carson v United Kingdom (*Application No 42184/05) (unreported) 16 March 2010, the decision of the Grand Chamber on the admissibility of claims against the United Kingdom by persons who were resident abroad must have proceeded on the basis that they were within the jurisdiction for the purposes of pursuing a claim of violation of article 14 of the Convention in combination with article 1 of the First Protocol. There was no question of the applicants being entitled to the benefit of other Convention rights. It follows that the whole package of rights principle is not an indispensable requirement in every case. It is not necessary in every instance that it be shown that an applicant, in order to be entitled to claim that he is within the jurisdiction for article 1 purposes, must also show that he is entitled to the benefit of all the Convention rights. It appears to me that this principle is primarily relevant in the territorial control

context. One can understand that an applicant who claims that he is entitled to be regarded as within the jurisdiction of a member state on the basis that he was, at the material time, within the territory controlled by that state should be able to demonstrate that the state was in a position to deliver all the protections secured by the Convention. In that instance the capacity of the state (or its lack of capacity) to deliver that breadth of protection can be seen as a measure of the extent of its control of the territory.

329. Having examined the cases of *Drozd; X and Y v Switzerland* (1977) 9 DR 57; *Gentilhomme, Schaff-Benhadji and Zerouki v France* (Application Nos 48205/99, 48207/99, 48209/99) (unreported) 14 May 2002, Lord Phillips suggests that they might be thought to support a general principle that there will be jurisdiction under article 1 whenever a state exercises legislative, judicial or executive authority which affects a Convention right of a person, whether or not he is within the territory of that state. He points out, however, that the Strasbourg court had not yet propounded such a principle. I agree that no principle in these precise terms has been articulated by the ECtHR but where the exercise of such authority is combined with control over the individual affected, it appears to me that the extra-territorial extension of jurisdiction is undeniable. The essence of the decisions in *Bankovic* and *Al-Skeini* is that an exception to the territorial basis for jurisdiction will be recognised where there is effective control of the relevant territory and its inhabitants by an occupying force. The rationale for the decision is surely the element of control. Where the occupying force supplants and replaces the power which had been wielded by the national authority, it provides, indeed imposes, its own jurisdiction. No particular magic attaches to the geographical dimension of this exercise of power – it is the comprehensive nature of the power rather than the area where it is exerted that matters. Obviously, in those areas where the occupying force is unable to exert a measure of power that might be regarded as effective, its jurisdiction will not be established but that is a reflection of the restriction on the power rather than of geography.

330. And so, where the control of an individual is of a sufficiently comprehensive nature as to qualify for the description, "effective power", there is no reason in logic or principle that he should not be regarded as being within the jurisdiction of the state which wields that power over him. If a state can "export" its jurisdiction by taking control of an area abroad, why should it not equally be able to export the jurisdiction when it takes control of an individual?

331. I agree with Lord Phillips that, despite some indications to the contrary, the case law of Strasbourg has not yet developed to the point of recognising a general principle that there will be jurisdiction under article 1 whenever a State exercises legislative, judicial or executive authority in a way that affects an individual's Convention right, whether that person is within the territory of that State or not. But where an individual is under the complete control of his native state while in

foreign territory, I cannot see any reason that he should be regarded as being any less within its jurisdiction than individuals who happen to find themselves in a location in that territory which is under the effective control of the same state. And it appears to me that this position has already been recognised, albeit somewhat obliquely, by the ECtHR. In *Issa v Turkey* (2004) 41 EHRR 567 the court said at para 71:

> "… a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State."

332. Lord Phillips suggests that this passage "clearly advances state agent authority as an alternative to effective territorial control as a basis of article 1 jurisdiction". I agree. But, more significantly, it emphasises the importance of *control* (whether of territory or individuals) as the essential ingredient in extra-territorial jurisdiction. That theme featured again in the recent decision of the Grand Chamber in *Medvedyev v France* (Application No 3394/03) judgment delivered on 29 March 2010. In that case a special forces team from a French warship boarded a merchant vessel which, it was suspected, was carrying drugs. After boarding the vessel, the French commando team kept the crew members of the merchant ship under their exclusive guard and confined them to their cabins during the rerouting of the ship to France. At para 67 the court said:

> "… the court considers that, as this was a case of France *having exercised full and exclusive control* (my emphasis) over the [merchant vessel] and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of article 1 of the Convention".

333. The exercise of control was obviously pivotal to the finding that the merchant ship's crew were within the jurisdiction of France. That control had no geographical dimension, at least not before the vessel was returned to France. But the very fact that the crew members were under the control of the French authorities, even before they arrived in France, was sufficient to bring them within French jurisdiction for the purposes of article 1 of the Convention. If taking control of the crew members on the high seas is sufficient to bring them within the jurisdiction of France, it appears to me that where a state asserts and exercises exclusive control over the members of its own armed forces while they are in foreign territory, this must be an *a fortiori* instance of the extra-territorial reach of the Convention.

334. The prospect of the state owing article 2 obligations to its soldiers serving overseas is not the daunting one that the appellant in this case has portrayed. For the reasons explained by Lord Rodger in his judgment, the article 2 investigation conducted by means of a coroner's inquest is not concerned with matters of policy or "broad political decisions". The primary function of a coroner's inquest is, as Lord Phillips has put it, to find facts rather than review policy.

335. Lord Brown expresses concern that, if it is held that soldiers operating outside the *espace juridique* are within the jurisdiction for the purposes of article 1, Strasbourg will "scrutinise a contracting state's planning, control and execution of military operations to decide whether the state's own forces have been subjected to excessive risk". I am afraid that, with great respect, I must disagree.

336. The cases which prompted Lord Brown's apprehension were *Ergi v Turkey* (1998) 32 EHRR 388, *Isayeva, Yusupova and Bazayeva v Russia* (Application Nos 57947-49/00) [2005] ECHR 129 and *Isayeva v Russia* (Application No 57950/00) [2005] ECHR 128. In the first of these cases, the Turkish security forces had set up an ambush in the vicinity of the village where the applicant's sister lived, purportedly to capture members of the PKK. The applicant alleged that his sister had been killed by a bullet fired by members of the security forces in the course of an indiscriminate, retaliatory attack on the village, apparently carried out because the inhabitants had in the past harboured members of the PKK. Although the court felt unable to conclude that the applicant's sister had been killed by a bullet fired by a member of the security forces or that the firing on the village was carried out in retaliation, as alleged, it decided that, even on the government's account of having laid an ambush for the PKK and having been involved in a fire fight with them, a violation of article 2 had been established. This was because insufficient precautions had been taken to protect the lives of the civilian population. It was also held that the investigation into the death was insufficient to satisfy the procedural requirements of article 2.

337. Judgment in the second and third cases referred to by Lord Brown was delivered on the same day, 24 February 2005. In the earlier of these two cases the applicants alleged that they had been the victims of indiscriminate bombing by Russian military planes of a civilian convoy near Grozny. The attack took place while the applicants were on what had been designated a "humanitarian corridor". It was found that a large number of civilian vehicles were in the convoy when the attack took place. It was found that, even assuming that the military were pursuing a legitimate aim, the operation had not been planned and executed with sufficient care for the civilian population.

338. In the final case the applicant claimed that she and her family were the victims of an air bombardment by Russian forces while trying to flee their village

in Chechnya. It was established that heavy free-falling, high explosive bombs and other non-guided heavy combat weapons were used in the centre and on the edges of the applicants' village. The avowed justification for this was that the civilian population was being held hostage by a large group of Chechen fighters. No attempt had been made to evacuate the village in advance and no steps had been taken to minimise the risk of injury to the civilian population. A breach of article 2 was found.

339. The facts of these three cases are very far removed from the hypothetical example given by Lord Brown of courts embarking on scrutiny of planning, control and execution of military operations to decide whether a state's own forces have been exposed to excessive risk. Lord Brown acknowledges that Strasbourg's concern in these cases was essentially for the safety of civilians caught up in conflict. That is a very different matter from the safety of combatants in the course of a war. As Lord Rodger has said, deaths and injuries of soldiers in a combat situation are inevitable. There is no reason, in my view, to anticipate that a similar level of scrutiny to that suitable to the death of a civilian will be required or appropriate where a soldier has been killed in the course of military operations. In this context, I should say that I agree entirely with Lord Rodger's observations in para 126 of his judgment. It will often be possible to suggest, after an event, measures that could have been taken that might have reduced the risk to a particular soldier but that type of retrospective analysis is surely inapposite (and will be recognised by courts as such) to address the question whether a state's obligations to its soldiers under article 2 have been discharged. The duty to protect soldiers in a war setting is of an entirely different nature from the obligation to take proper steps to ensure that civilians are not exposed to unnecessary risks from military operations. I do not believe that the fear of tactical decisions taken in the field by military commanders being subject to painstaking dissection by the courts is justified or that it should deter this court from declaring that when our government commits our armed forces to wars in foreign territories, it cannot deny them the protection that the Convention affords.

*The second issue*

340. I have read and agree with the judgment of Lord Phillips in relation to the second issue. For the reasons that he has given, I would dismiss the appeal on this ground also.