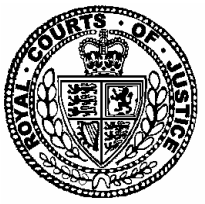

Neutral Citation Number: [2009] EWCA Civ 7

Case No: C4/2008/3083

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
(LORD JUSTICE RICHARDS
AND MR JUSTICE SILBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE LAWS
and
LORD JUSTICE JACOB

- -

Between :

THE QUEEN ON THE APPLICATION OF **(1) FAISAL ATTIYAH NASSAR AL-SAADOON** **(2) KHA LAF HUSSAIN MUFDHI**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Respondent**

- -
- -

Ms K Monaghan QC, Mr G Goodwin Gill and Ms H Law (instructed by Public Interest Lawyers) for the Appellants
Mr Clive Lewis QC, Mr T Eicke and Mr S Wordsworth (instructed by **The Treasury Solicitor**) for the Respondent

Hearing dates : 29 & 30 December 2008

- -

Approved Judgment

Lord Justice Laws:

INTRODUCTION

1. This is an appeal against the judgment of the Divisional Court (Richards LJ and Silber J), given on 19 December 2008, by which the court dismissed the appellants' application for judicial review of the Secretary of State's decision to transfer them into the custody of the Iraqi Higher Tribunal (IHT) to be tried for war crimes – the murder of two British servicemen. Permission to appeal was granted by the court below, which also granted an interim injunction restraining the Secretary of State from transferring the appellants as he proposed until 22 December 2008. On that day this court (Keene and Rimer LJJ) continued the injunction until 4-30 pm on 30 December, and fixed the substantive appeal for hearing on 29 and 30 December. We heard the appeal over those two days and on the afternoon of 30 December dismissed it, giving short reasons and indicating that our full judgment would follow. We also refused leave to appeal to the House of Lords. Ms Monaghan QC for the appellants, anxious if she could to obtain further interim relief pending urgent applications to their Lordships' House and the European Court of Human Rights at Strasbourg, applied for the extant injunction (which at this time was due to expire in less than an hour) to be extended until 4 pm on 31 December, or at least for it to remain in place until it should expire at 4-30 that day, 30 December. We refused any further interim relief and discharged the injunction. I shall explain directly the urgency which drove this compressed timetable.

2. The appellants' essential case was that if they were transferred from their present place of detention by UK troops at Basra into the custody of the IHT they would be at risk, upon conviction of the charges they face, of suffering death by hanging, in violation of rights enjoyed by them under the European Convention on Human Rights (ECHR) alternatively free-standing principles of public international law. The Secretary of State says that no such rights arise, and in any event there will be no substantial risk of the appellants being put to death. There are various subsidiary arguments which I will explain.

3. After our decision dismissing the appeal and refusing further interim relief had been given on 30 December, the appellants obtained an order from a judge of the European Court of Human Rights requiring that the appellants be not removed from the custody of the United Kingdom until further notice. We understand that the transfer has, however, taken place.

4. We now set out our full reasons for dismissing the appeal.

THE FACTS

5. The history of the matter is very amply set out in the judgment of the Divisional Court. What follows is a shorter summary, though it will be necessary to say a little more about some aspects of the facts in dealing with individual points raised in counsel's submissions.

The Context

6. On 28 June 2004 governmental authority was transferred to the Interim Government of Iraq from a body called the Coalition Provisional Authority (the CPA), which had been established to exercise most of the powers of government in Iraq during the occupation by coalition forces. This marked the end of the period of occupation and the start of autonomous government in Iraq as a sovereign State. From 28 June 2004 the Multi-National Force (MNF), of which British troops formed a contingent, remained in Iraq under the authority of successive United Nations Security Council Resolutions and pursuant to requests by the Iraqi government. Measures issued by the United Nations and all other relevant instruments coming into existence after 28 June 2004 consistently recognized and emphasized the sovereignty of the Iraqi State. Thus UN Security Council Resolution 1790, which contained the mandate last in time for the MNF's presence in Iraq, had annexed to it a letter from the Prime Minister of Iraq to the President of the Security Council which *inter alia* referred to the importance for Iraq of being treated as an independent and fully sovereign State, and identified as a relevant objective that "[t]he Government of Iraq will be responsible for arrest, detention and imprisonment tasks"; and that when those tasks are carried out by the MNF "there will be maximum levels of coordination, cooperation and understanding with the Government of Iraq".

7. During the occupation, regulations issued by the CPA provided for the distribution and fulfilment of various public functions. Revisions were later made to the relevant documents to reflect the new constitutional position effective from 28 June 2004. We are concerned in particular with CPA Memorandum No 3 (Revised) and CPA Order No 17 (Revised). The latter made provision for immunity from suit by way of Iraqi legal process for MNF personnel, and inviolability for premises occupied by MNF contingents, including the Divisional Internment Facility at Basra International Airport where the appellants were held at the time of the hearing before us. CPA Memorandum No 3 (Revised) provided for the detention of two classes of prisoner, security detainees and criminal internees. Section 5, headed "Criminal Detentions", provided:

> "1. A national contingent of the MNF shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter 'criminal detainees') who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may retain criminal detainees in facilities that it maintains at the request of appropriate Iraqi authorities based on security or capacity considerations…"

8. The United Nations Mandate for the presence of the MNF in Iraq, including of course the British contingent, expired on 31 December 2008. It was therefore still current, but its expiry was imminent, at the time of the hearing in this court on 29 and 30 December. When the Divisional Court gave judgment on 19 December it was less than a fortnight away. This has been the engine of all the urgency in the case. As is well known British forces have in fact remained in Iraq since 31 December 2008; but as the Secretary of State anticipated, once the Mandate had gone there remained under international law no trace or colour of any power or authority whatever for the MNF, or any part of it, to maintain any presence in Iraq save only and strictly at the will of the Iraqi authorities. I shall have more to say about the consequences of this state of affairs in dealing below with what I will identify as the "jurisdiction question".

9. It is also clear (I shall give some detail later) that the terms on which British forces would be permitted to remain in Iraq by the Iraqi authorities would not permit British (or any other) forces to continue to hold detainees.

The Appellants

10. The appellants are Sunni Arabs. They were arrested on 30 April 2003 and 21 November 2003 respectively by British forces in Basra. Their notices of internment stated that they were suspected of being senior members of the Ba'ath Party under the former regime and of orchestrating anti-MNF violence by former regime elements, and that it was believed that if they were released they would represent an imperative threat to security. Thus they were detained originally as security internees. This was one category of internee, the other being that of criminal detainee, liable to be detained by Coalition Forces, originally under CPA Memorandum of Understanding No 3 in its unrevised form.

11. There followed an investigation by the Special Investigations Branch of the Royal Military Police into the deaths of two British servicemen, SSgt Cullingworth and Spr Allsopp, who after being taken captive in an ambush were murdered while in the custody of the regime then in power in Iraq. At length on 16 December 2005 the case was formally referred by the British liaison officer to the chief investigative judge of the Central Criminal Court of Iraq (the CCCI). On 18 May 2006, pursuant to a request from the Iraqi judges, the appellants were produced before the special investigative panel of the Basra Criminal Court to give evidence in response to the complaint. They denied the allegations. The Basra court issued an arrest warrant against both of them pursuant to Article 406 of the Iraqi Penal Code, and made an order authorising their continued detention by the British contingent of the MNF. Accordingly on 21 May 2006 the British authorities reclassified the appellants as criminal detainees, held on the authority of the Basra Criminal Court. By May 2006, of course, the new constitutional arrangements of 28 June 2004, giving effect to Iraq's political sovereignty, had been in force for all but two years; and so the appellants' detention was authorised pursuant to CPA Memorandum No 3 (Revised) Section 5, which I have set out. On 20 April 2007 they were moved to the Divisional

Internment Facility at Basra International Airport, where they remained at the time of the appeal hearing in this court.

12. After a ruling by the Basra criminal court that the alleged offences constituted war crimes falling within the jurisdiction of the IHT to which the case should therefore be transferred, the IHT on 27 December 2007 issued a formal request that the British forces transfer the appellants into the custody of the court. The Secretary of State made it clear, both here and in the Divisional Court, that the only reason why the request had not been complied with by December 2008 was the existence of these judicial review proceedings.

THE ISSUES IN THE CASE

13. The appellants' core contention before the Divisional Court was based entirely on the ECHR and the Human Rights Act 1998 (HRA). It was said that their transfer to the IHT would violate rights enjoyed by them under the ECHR, and therefore put the Secretary of State in breach of HRA s.6, because there were substantial grounds for believing that if so transferred they would be at real risk of the death penalty, which is outlawed by Article 1 of Protocol No 13 to the ECHR. Their separate case, that they would be at risk of sentence of death by hanging (the means used under Iraqi law) in breach of free-standing principles of customary international law, was only elaborated in this court; indeed, as I understand it, only communicated to the Secretary of State on 24 December. That circumstance has had important effects upon the scope of the evidence, relevant to this form of execution, which has been assembled for the purpose of this appeal.

14. The Divisional Court accepted that if the appellants were transferred they would be at risk of the death penalty (paragraph 158, which I cite below). However they dismissed the judicial review application because they concluded that the United Kingdom was obliged under international law to transfer the appellants into the custody of the Iraqi court; and that compliance with this obligation could not be said to involve a violation of ECHR rights. The court implicitly held (paragraph 160) that the position would have been different if the death penalty ought properly to be regarded as a "crime against humanity" – a reference to a passage from *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643, on which the court placed much reliance and to which I will return. At the end of their judgment the Divisional Court said:

> "204. Whilst we have been led to that conclusion by our analysis of the legal principles and the factual evidence, we are seriously troubled by the result, since on our assessment the claimants, if transferred, will face a real risk of the death penalty in the event that they are convicted by the Iraqi court. In all normal circumstances the Convention (as well as the Extradition Act 2003 in extradition cases) would operate to prevent such a result. It arises here only because of the highly exceptional circumstances of the case and the application to them of the principles in *R (B) v Secretary of State for Foreign and Commonwealth Affairs*, as we have understood the judgment of the Court

of Appeal in that case. In that and other respects the issues in the present case are of obvious difficulty and importance..."

15. In this court Ms Monaghan QC for the appellants submitted that on analysis there are some four issues falling for determination. I think the issues may be refined into the following questions, which are not quite the same as in Ms Monaghan's formulation:

i) Are there substantial grounds for believing that after being transferred to the custody of the IHT the appellants will, if they are convicted, face a real risk of execution by hanging? ("the real risk question")

ii) While detained by British forces at Basra, were the appellants persons within the jurisdiction of the United Kingdom for the purposes of ECHR Article 1? ("the jurisdiction question")

iii) If the appellants were such persons, was the court obliged to have regard to obligations owed to Iraq by the United Kingdom in deciding whether to grant relief for the purpose of upholding Convention rights? ("the conflict question").

iv) If the appellants are transferred for trial by the IHT, will any such trial constitute so grave a denial of justice as to involve a flagrant breach of the appellants' rights under ECHR Article 6? ("the Article 6 question").

v) Is it shown that execution by hanging must be regarded as a crime against humanity, inhuman or degrading treatment, or a form of torture? ("the international law question")

Unless the real risk question is answered in the affirmative, the appellants have no case at all, either under the ECHR or customary international law. The jurisdiction question raises a major issue in the appellants' ECHR claim, namely whether the ECHR writ runs, so to speak, to the British base in Basra. The conflict question confronts this court's decision in *R (B)* and will be more conveniently explained when I come to it. The Article 6 question raises a subsidiary issue within the ECHR claim. The international law question raises Ms Monaghan's new argument based (as she would have it) on customary law as opposed to the ECHR. This argument is important from the appellants' point of view because if it is right it may provide them with a favourable outcome even if, in the ECHR context, they fail on the jurisdiction question. The international law question is, however, also material to the impact of *R (B)* on the ECHR claim, and again I will explain that in due course.

THE REAL RISK QUESTION

16. The test for the purposes of the ECHR is whether there are substantial grounds for believing that the appellants would face a real risk of execution (if they were transferred to the custody of the IHT): see *Öcalan v Turkey* (2005) 18 BHRC 293, paragraph 166. In his skeleton argument (paragraph 47) Mr Lewis QC for the Secretary of State did not accept that this was the test, referring to an allegedly

different formulation in the *R (B)* case. He suggested that where the complaint was that a State Party to the ECHR proposed to consign a claimant to another State which was not a signatory to the ECHR, at whose hands it was claimed he would suffer treatment in violation of the Convention standards, the test was higher. I do not agree. It is true that in such cases – sometimes called "foreign" cases – the extent of the feared violation must be shown to be gross or "flagrant" (see *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323, to which I refer further below in another context). But the standard of proof is that of real risk. So much is I think confirmed by *Soering v United Kingdom* (1989) 11 EHRR 439, which is also referred to below.

17. It is common ground that the death penalty is a punishment available under Iraqi law for the offences with which the appellants are charged. The Divisional Court held (paragraph 148) that that was enough to give rise *prima facie* to a real risk of its being applied to the appellants. Accordingly, following the approach commended by the Strasbourg court in *Saadi v Italy* (Application no. 37201/06, judgment of 28 February 2008), in particular at paragraph 129, the burden effectively shifted to the Secretary of State to show that such a risk was not in fact made out.

18. Mr Lewis QC for the Secretary of State relied on evidence to the effect that the family of one of the victims had written to President Aref of the IHT to seek clemency for the appellants if they were found guilty. President Aref had earlier invited letters of this kind through the British Embassy, indicating that it would be helpful if the Embassy could waive claims to civil compensation and that he would then pass such letters to the trial chamber for their consideration. Ms Abda Sharif, Legal Adviser and Head of the Justice and Human Rights Section at the British Embassy in Baghdad, has given evidence of legal advice to the effect that the impact of a plea of clemency by the families of the victims in Iraq is likely to be that the Iraqi court "will not impose the death penalty in any particular case". Ms Sharif says that President Aref has confirmed that such a plea for clemency is likely to be an important factor for any court in assessing what sentence would be imposed on the claimants. She also produces a letter from President Aref, given to her at a meeting on 21 October 2008, in which the court's procedures for considering sentence are described in some detail. The Divisional Court observed (paragraph 155):

> "That letter represents President Aref's considered written position. It is striking that the letter gives no indication whatsoever that the death penalty would not be or even probably would not be imposed."

19. Mr Lewis relied on the evidence of Mr Spillers, an American attorney who was the Rule of Law Liaison to the IHT between July 2008 and 22 December 2008. Mr Spillers had also met President Aref, on 27 October 2008. The President explained the factors which would influence the IHT against imposing a death sentence. These were "an admission of the crime by the claimants, a request for forgiveness from the family of the victims, a request for forgiveness of the court for the acts, and a request for leniency from the family of a victim" (Divisional Court, paragraph 156). Mr

Spillers reported the President as indicating that an assurance that the death penalty would not be imposed was "implicit" in his account of these factors.

20. Mr Spillers has provided a further statement since the Divisional Court's judgment was delivered. He describes the outcome of the IHT proceedings in what has been called the 1991 Uprising case. The fifteen defendants were all former high-ranking members of Saddam Hussein's regime charged with crimes against humanity. Three were acquitted. Ten received very substantial terms of imprisonment. Only the remaining two were sentenced to death, including one ("Chemical Ali") who was already under sentence of death following an earlier trial.

21. The Divisional Court concluded:

> "158. Taking the evidence as a whole, we are satisfied that substantial grounds have been shown for believing there to be a real risk of the claimants being condemned to the death penalty and executed, contrary to protocol no.13, if they are transferred into the custody of the IHT. In particular: (a) the penalties for the offences with which the claimants are charged include the death penalty; (b) there is clear evidence that persons convicted of such offences are liable in practice to be sentenced to death; (c) the matters relied on as militating against the imposition of the death penalty are not sufficiently cogent or certain to negative the real risk; (d) in spite of the efforts made on behalf of the Secretary of State, no assurance has been given that the death penalty will not be imposed in this case; and (e) in any event, even if President Aref had given such an assurance, we are not satisfied it would necessarily be effective, because he does not have the authority to bind the appeal chamber which would automatically have to consider the appropriate sentence, whatever decision the trial chamber had reached."

22. In my judgment there is no sufficient basis for departing from the balanced assessment of the Divisional Court on this point. Mr Spillers' new evidence concerning the 1991 Uprising case, while helpful to the Secretary of State, is not so substantial as to overturn the lower court's conclusion. The real risk test is satisfied.

THE JURISDICTION QUESTION

23. The scope of the ECHR is essentially territorial. ECHR Article 1 provides that the States Parties shall secure to everyone "within their jurisdiction" the rights and freedoms defined in the Convention. What is meant by "within their jurisdiction"? States have outposts (I use the word neutrally, not as a term of art) of various kinds in the territory of other States. The Divisional Internment Facility at Basra International Airport, where as I have said the appellants were detained at the time of the hearing in this court, might be described as such an outpost, operated by the United Kingdom in

the territory of Iraq. Being detained there, were the appellants within the jurisdiction of the United Kingdom for the purposes of ECHR Article 1?

The Leading Authorities

24. *Bankovic v Belgium* (2001) 11 BHRC 435 is the leading judgment of the European Court of Human Rights on the interpretation of ECHR Article 1. The House of Lords made clear in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, to which I must return, that in determining whether a situation falls within the jurisdiction of a State for the purposes of Article 1, the national court should be guided by this Strasbourg decision. The applicants in *Bankovic* were citizens of the Federal Republic of Yugoslavia who were injured, or whose relatives were killed, when a building was hit by a missile during air strikes by NATO forces on the territory of Yugoslavia. Seventeen NATO States, all States Parties to the ECHR, were named as respondents. The issue was whether the applicants and their deceased relatives should in the circumstances be treated as falling within those States' Article 1 jurisdiction.

25. I should set out the following substantial passages from the judgment the Grand Chamber of the Strasbourg court:

> "57. Moreover, Article 31 § 3 (c) [sc. of the 1969 Vienna Convention on the Interpretation of Treaties] indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties'. More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty... The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part...
>
> ...
>
> 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 ….
>
> 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... 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 …

61. The Court is of the view, therefore, that 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 …

...

65. However, the scope of Article 1, at issue in the present case, 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...

...

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. 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, or of Article 19 of the Convention which does not shed any particular light on the territorial ambit of that 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 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."

At length the court in *Bankovic* held that there was no jurisdictional link between the victims and the respondent States. So the victims could not come within the jurisdiction of those States: paragraph 82.

26. A clear understanding of the limitations imposed by the court in *Bankovic* on the exercise of any extra-territorial ECHR jurisdiction is with respect much assisted by the opinions of their Lordships in *Al-Skeini*, to which I have already referred in passing. In that case Mr Baha Mousa, son of one of the claimants, had been arrested by British forces but had died as a result of beatings at the hands of British soldiers while in detention following his arrest. At the time of his death he was detained at a Temporary Detention Facility in a disused toilet block in a partly destroyed hotel requisitioned by British forces. The Divisional Court found Mr Mousa to have been within the jurisdiction of the United Kingdom for the purposes of the Convention rights, but referred to the detention facility "operating... with the consent of the Iraqi sovereign authorities". That was a mistake; at the material time Iraq was under occupation and had no sovereign authorities of its own. However in the Court of Appeal and the House of Lords the Secretary of State conceded that Mr Mousa had been within the jurisdiction of the United Kingdom for the purposes of ECHR Article 1 on the basis that he had been killed by British troops when held as a prisoner in a British military detention unit. The principal issue in their Lordships' House was whether the HRA had extra-territorial effect so as to cover a case where the United Kingdom's Article 1 jurisdiction was being exercised extra-territorially. Nonetheless there are some important observations in their Lordships' opinions which bear on the interpretation of ECHR Article 1.

27. Lord Rodger of Earlsferry referred to the Strasbourg court's decision in *Issa v Turkey* (2004) 41 EHRR 567, which concerned the deaths of a number of shepherds in a particular area of Northern Iraq. The applicants contended that the shepherds had been killed by Turkish troops operating in that area. Turkey denied that the shepherds had ever been within its jurisdiction. At paragraph 71 of its decision the Strasbourg court said this:

> "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."

The court went on, at paragraph 72, to say that it must ascertain whether the deceased "were under the authority and/or effective control, and therefore within the jurisdiction, of the respondent state" as a result of its extra-territorial acts. The court also cited the following proposition which had been enunciated by the United Nations Human Rights Committee:

> "… it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."

Lord Rodger made this observation (paragraph 75):

> "Without further guidance from the European Court, I am unable to reconcile this approach with the reasoning in *Bankovic.* In these circumstances, although *Issa* concerned Turkish troops in Iraq, I do not consider that this aspect of the decision provides reasoned guidance on which the House can rely when resolving the question of jurisdiction in the present case."

He continued:

> "76. Another major unresolved difficulty with the decision in *Issa* is that it is hard to reconcile with the European Court's description of the vocation of the Convention as being 'essentially regional' and of the Convention operating 'in an essentially regional context and notably in the legal space (espace juridique) of the contracting states': *Bankovic*, para 80. The Convention, the Court continued, was not designed to be applied throughout the world, even in respect of the conduct of contracting states. In *Issa*, as the court records in paras 56 and 57 of its judgment, the Turkish government had advanced an argument based on precisely this aspect of the decision in *Bankovic*.
>
> …
>
> 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 *Bankovic*, 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.

79. The essentially regional nature of the Convention has a bearing on another aspect of the decision in *Bankovic*. 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 1 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, 301, para 197. The European Court quite specifically rejected that line of argument. The court held, 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 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."

At paragraph 97 Lord Carswell said:

"I also respectfully agree with Lord Rodger and Lord Brown on the extent of that jurisdiction. I would only observe that any extra-territorial jurisdiction of one state is *pro tanto* a diminution or invasion of the territorial jurisdiction of another, which must lead one to the conclusion that such extra-territorial jurisdiction should be closely confined. It clearly exists by international customary law in respect of embassies and consulates. It has been conceded by the Secretary of State that it extends to a military prison in Iraq occupied and controlled by agents of the United Kingdom. Once one goes past these categories, it would in my opinion require a high degree of control by the agents of the state of an area in another state before it could be said that that area was within the jurisdiction of the former. The test for establishing that is and should be stringent, and in my judgment the British presence in Iraq falls well short of that degree of control."

Lord Brown of Eaton-under-Heywood firmly emphasised (paragraph 107) that Article 1 should not be construed as "reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach". He also referred to *Issa v Turkey*, and said this:

> "127. If and insofar as *Issa* is said to support the altogether wider notions of article 1 jurisdiction contended for by the appellants on this appeal, I cannot accept it. In the first place, the statements relied upon must be regarded as obiter dicta. Secondly, as just explained, such wider assertions of jurisdiction are not supported by the authorities cited (at any rate, those authorities accepted as relevant by the Grand Chamber in *Bankovic*). Thirdly, such wider view of jurisdiction would clearly be inconsistent both with the reasoning in *Bankovic* and, indeed, with its result. Either it would extend the effective control principle beyond the Council of Europe area (where alone it had previously been applied, as has been seen, to Northern Cyprus, to the Ajarian Autonomous Republic in Georgia and to Transdniestria) to Iraq, an area (like the FRY considered in *Bankovic*) outside the Council of Europe—and, indeed, would do so contrary to the inescapable logic of the Court's case law on article 56. Alternatively it would stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state's 'authority and control'. It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Bankovic*, not least as to the Convention being 'a constitutional instrument of European public order', operating 'in an essentially regional context', 'not designed to be applied throughout the world, even in respect of the conduct of contracting states' (para 80). It would, indeed, make redundant the principle of effective control of an area: what need for that if jurisdiction arises in any event under a general principle of 'authority and control' irrespective of whether the area is (a) effectively controlled or (b) within the Council of Europe?
>
> 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 163). (Paragraphs 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. 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."

At length Lord Brown said this at paragraph 132:

"Taken as a whole, therefore, and according particular weight to Grand Chamber judgments, so far from weakening the principles established in *Bankovic*, subsequent Strasbourg case law to my mind reinforces them. Certainly, whatever else may be said of the Strasbourg jurisprudence, it cannot be said to establish clearly that any of the first five appellants come within the UK's article 1 jurisdiction. As for the sixth case I for my part would recognise the UK's jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extraterritorial 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 *X v Federal Republic of Germany*)."

The Approach of the Divisional Court

28. The Divisional Court acknowledged (paragraph 62) that there were important differences between these cases and the circumstances in which Mr Mousa had been detained. He was detained under the legal authority of the United Kingdom. However:

> "63. [t]he claimants, by contrast, have been subject to the jurisdiction and legal authority of the Iraqi courts since no later than 18 May 2006, when they appeared before the Basra criminal court and the court issued arrest warrants against them under Iraqi law and made orders authorising their continued detention. What happened was done in accordance with Iraqi law as set out in CPA Memorandum No.3 (Revised)... By section 5(1) of that memorandum the British forces were required to hand over criminal detainees... to the Iraqi authorities as soon as reasonably practicable. In this case the claimants were originally classified as security internees but were handed over to the Iraqi authorities by their production before the Iraqi court. Since that time their further detention in facilities maintained by the British forces has been pursuant to the orders of the Iraqi court and at the request of the court, as also provided for by section 5(1) of the memorandum...
>
> "64. The way the claimants have been dealt with is also in accordance with the MoU regarding criminal suspects, which, although not a legally binding document, plainly gives effect to the participants' understanding of the underlying legal position. The claimants, as individuals who are suspected of having committed criminal acts and who are held at the request of the Iraqi authorities, are 'criminal suspects' as defined in section 1 of the memorandum. Section 2(1) states that the Iraqi government has legal authority over all criminal suspects who have been ordered to stand trial and who are waiting trial in the physical custody of the UK contingent of the MNF in accordance with the terms of the memorandum. The reference to the 'Iraqi government' is plainly to be understood as encompassing the organs of the Iraqi state, the relevant organ in this case being the court; and although the claimants have not yet been ordered to stand trial and are still awaiting a decision on whether there should be a trial, we think that section 2 is plainly intended to apply to persons in their position in just the same way as if their trial had been ordered. Section 3(1), in laying down procedures for the delivery up of

> criminal suspects to attend court or for any other purpose connected with the criminal process, is premised on the existence of an obligation on the part of the British forces to deliver up a criminal suspect on request."

29. The Divisional Court went on to hold, after consideration in particular of *Munaf v Geren*, a decision of the US Supreme Court dated 12 June 2008, that the circumstances of the appellants' detention (as they had found them to be) sufficed to give rise to an obligation owed by the United Kingdom under international law to comply with the request of the IHT to transfer the appellants into the custody of that court (paragraph 74). The Divisional Court then proceeded to consider whether that finding led to the conclusion, contended for by the Secretary of State, that the appellants were not within the jurisdiction of the United Kingdom for the purposes of ECHR Article 1. They referred to *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 and *Gentilhomme v France* (Applications nos. 48205/99, 48207/99 and 48209/99), in which the European Court of Human Rights held there was no Article 1 jurisdiction in situations which, it is said, corresponded to that of the appellants, who on the Secretary of State's argument are "detained in Iraq because of a unilateral decision of the Iraqi courts for which the United Kingdom cannot be held responsible, and... they are therefore not within the jurisdiction of the United Kingdom for the purposes of article 1." The Divisional Court then proceeded as follows:

> "79. Mr Lewis's submissions on attribution and responsibility, in putting their entire focus on the jurisdiction and legal authority of the Iraqi courts over the claimants, suggest that the British forces have no autonomous role in the matter of the claimants' detention or transfer into the custody of the IHT. But plainly they do. They are lawfully present in Iraq as a contingent of the MNF pursuant to a UN mandate, subject to the exclusive jurisdiction of the United Kingdom and independent of the Iraqi state. The Iraqi Prime Minister's letter annexed to UNSCR 1790... refers to an objective that the government of Iraq will be responsible for arrest, detention and imprisonment tasks, but that letter acknowledges the role of the MNF in carrying out such tasks and it can have no effect on the autonomous status of the national contingents of the MNF in so acting. The British forces have physical custody and control of the claimants. They have it in their power to refuse to transfer the claimants to the custody of the IHT or indeed to release them, even though to act in such ways would be in breach of the United Kingdom's obligations under international law. Thus the transfer of the claimants into the custody of the IHT would in our view be an action properly attributable in law to the United Kingdom. The case is distinguishable from *Drozd* and *Gentilhomme*, in each of which the actions complained of lay altogether outside the control of the contracting state or states against which the proceedings were brought. There is a

> closer analogy with *Munaf v Green*, even allowing for the very different legal context. In holding that there was jurisdiction to consider the habeas corpus petitions in that case, the Supreme Court relied on the fact that Munaf and Omar were in the physical custody of US soldiers who answered only to a US chain of command, and observed that 'it is unsurprising that the United States has never argued that it lacks the authority to release Munaf or Omar, or that it requires the consent of other countries to do so' (page 8)."

And at length the court held (paragraph 82) that the appellants indeed fall within the United Kingdom's jurisdiction for the purposes of ECHR Article 1.

The Parties' Arguments

30. Ms Monaghan sought in essence to uphold the approach of the Divisional Court. She laid particular emphasis on the British forces' *de facto* control over her clients as detainees, and submitted that they are in materially the same position as was Mr Mousa in *Al-Skeini*, and therefore within the jurisdiction of the United Kingdom for the purposes of Article 1. Indeed she submitted – and this was important for her argument – that the House of Lords' acceptance of Article 1 jurisdiction in Mr Mousa's case was essentially based on just such *de facto* control. She submitted that the British forces' presence in Iraq had an autonomous status by force of the UN Mandate; and that such an autonomous status, or at least the inviolability of the base at Basra, would survive the expiry of the Mandate on 31 December. She suggested that CPA Memorandum No 3 (Revised) was a non-binding understanding between the British forces and the Iraqi authorities as to the parties' respective roles, and had no legal effect on the status of those held in accordance with it.

31. Mr Lewis submitted that the appellants had been transferred to the legal jurisdiction of the Iraqi courts and were being held as criminal suspects to the order of the Iraqi court, a judicial organ of the sovereign State of Iraq. The legal authority being exercised over them was that of Iraq, exercising sovereignty on its own territory in relation to its own nationals. The United Nations Security Council has itself recognised (Resolution 1790 (2007) of 18 December 2007) that "the presence of [the MNF] in Iraq is at the request of the Government of Iraq". In the circumstances it is for the Iraqi court to decide whether the claimants are to be detained or released. The United Kingdom was obliged as a matter of international law to transfer the appellants to the custody of the Iraqi court as requested by that court. The whole factual position was incompatible with the existence or exercise of any jurisdiction within ECHR Article 1.

The Legal Position Relating to the Appellants' Detention – Before 31 December 2008

32. Until 31 December 2008 the United Kingdom forces at Basra enjoyed the guarantees of immunity and inviolability provided by CPA Order No 17 (Revised). But those measures prohibited invasive sanctions; they did not confer executive power. In my judgment, from at least May 2006 until 31 December 2008, the British forces at Basra

were not entitled to carry out any activities on Iraq's territory in relation to criminal detainees save as consented to by Iraq, or otherwise authorized by a binding resolution or resolutions of the Security Council. So much flows from the fact of Iraq's sovereignty, and is not contradicted – quite the reverse – by any of the United Nations measures in the case. Thus the MNF Mandate was extended by the Security Council at Iraq's express request. The letter requesting its extension (which was attached to Resolution 1790 (2007)) expressly stated at paragraph 4, "[t]he Government of Iraq will be responsible for arrest, detention and imprisonment tasks". The various material Security Council Resolutions (1483 (2003), 1546 (2004) and 1790 (2007)) all emphasise the primacy of Iraqi sovereignty. As regards criminal detentions, CPA Memorandum No. 3 (Revised) makes it plain that so far as criminal detainees may be held by any national contingent of the MNF, they are held, in effect, to the order of the Iraqi authorities.

33. In these circumstances the United Kingdom was not before 31 December 2008 exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign State.

The Legal Position Relating to the Appellants' Detention – After 31 December 2008

34. As I stated earlier, once the Mandate expired there remained under international law no trace or colour of any power or authority whatever for the MNF, or any part of it, to maintain any presence in Iraq save only and strictly at the will of the Iraqi authorities. Ms Monaghan sought to submit that the British base at Basra would by force of customary international law remain inviolable after 31 December. But she was unable to identify any principle which might, on the facts, support that position; and it is to my mind wholly inescapable that after that date British forces remaining in Iraq have done so only by consent of the Iraqi authorities and on such terms as those authorities have agreed. And it must have been plain, as soon as it was known when the Mandate would come to an end, that this would be the true state of affairs.

35. And there is no sensible room for doubt but that the terms on which British forces would be permitted to remain in Iraq by the Iraqi authorities would not encompass any role or function which would permit, far less require, British (or any other) forces to continue to hold detainees. By his third witness statement made on 26 December 2008 Mr Watkins, Director of Operational Policy in the Operations Directorate in the Ministry of Defence, produced a resolution passed by the Iraqi Council of Representatives on 23 December authorising the Council of Ministers to regulate the presence and activities of British and other forces in Iraq after 31 December. It is plain that the arrangements envisaged do not contemplate the detention of any prisoners by any such forces. Mr Watkins also stated that Iraqi officials had made it clear on 21 December that even in relation to proposed authorized tasks they did not consider it acceptable for British forces to exercise any powers of detention after 31 December. The Council of Representatives resolution (which was to, and I assume did, come into force on 1 January 2009) also suspended the operation of CPA Order No 17 (Revised). Mr Watkins had given evidence in an earlier statement that the Iraqi government would

not after 31 December accept CPA Memorandum No 3 (Revised) as remaining in operation.

36. After 31 December 2008 British forces enjoyed no legal power to detain any Iraqi. Had they done so, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such person so detained.

Conclusion on the Jurisdiction Question

37. It is not easy to identify precisely the scope of the Article 1 jurisdiction where it is said to be exercised outside the territory of the impugned State Party, because the learning makes it clear that its scope has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather than lexical. Drawing on the *Bankovic* judgment and their Lordships' opinions in *Al-Skeini*, I suggest that there are four core propositions, though each needs some explanation. (1) It is an *exceptional* jurisdiction. (2) It is to be ascertained *in harmony* with other applicable norms of international law. (3) It reflects the *regional* nature of the Convention rights. (4) It reflects the *indivisible* nature of the Convention rights. The first and second of these propositions imply (as perhaps does the term *jurisdiction* itself) an exercise of sovereign *legal* authority, not merely *de facto* power, by one State on the territory of another. That is of itself an exceptional state of affairs, though well recognized in some instances such as that of an embassy. The power must be given by law, since if it were given only by chance or strength its exercise would by no means be harmonious with material norms of international law, but offensive to them; and there would be no principled basis on which the power could be said to be limited, and thus exceptional. As I have said, Ms Monaghan submitted that in *Al-Skeini* the House of Lords' acceptance of Article 1 jurisdiction in Mr Mousa's case was essentially based on *de facto* control over the territory in question. With respect this was a misconceived reading of their Lordships' decision. It is impossible to reconcile a test of mere factual control with the limiting effect of the first two propositions I have set out, and, indeed, that of the last two, as I shall explain.

38. These first two propositions, understood as I have suggested, condition the others. If a State Party is to exercise Article 1 jurisdiction outside its own territory, the regional and indivisible nature of the Convention rights requires the existence of a regime in which that State enjoys legal powers wide enough to allow its vindication, consistently with its obligations under international law, of the panoply of Convention rights – rights which may however, in the territory in question, represent an alien political philosophy.

39. The ECHR's natural setting is the *espace juridique* of the States Parties; if, exceptionally, its writ is to run elsewhere, this *espace juridique* must in considerable measure be replicated. In short the State Party must have the legal power to fulfil substantial governmental functions as a sovereign State. It may do so within a narrow scope, as in an embassy, consulate, military base or prison; it may, in order to do so, depend on the host State's consent or the mandate of the United Nations; but however precisely exemplified, this is the kind of legal power the State must possess: it must

enjoy the discretion to decide questions of a kind which ordinarily fall to a State's executive government. If the Article 1 jurisdiction is held to run in other circumstances, the limiting conditions imposed by the four propositions I have set out will be undermined.

40. I have held (paragraph 33) that before 31 December 2008 the United Kingdom was not exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign State. After that date (paragraph 36) the British forces enjoyed no legal power to detain any Iraqi. Had they taken such action, the Iraqi authorities would have been entitled to enter the premises occupied by the British and recover any such person so detained. In those circumstances, given my approach to ECHR Article 1 as I have just explained it, it is inevitably my conclusion that the detention of the appellants by the British forces at Basra did not constitute an exercise of Article 1 jurisdiction by the United Kingdom, either before or after 31 December 2008. I would accordingly answer the jurisdiction question in favour of the Secretary of State.

THE CONFLICT QUESTION

41. This question only arises if I am wrong on the jurisdiction question. Its premise is that the appellants are indeed persons within the jurisdiction of the United Kingdom for the purposes of ECHR Article 1. Accordingly the United Kingdom is obliged to secure their Convention rights. The question is whether that duty is modified by an obligation owed to Iraq by the United Kingdom under international law to return the appellants for trial by the IHT.

42. I am essentially in agreement with the judgment of the Divisional Court on this question, and so will deal with it relatively shortly. I should first refer to two authorities. First, *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332, which was in some respects a comparable case to *Al-Skeini*. It concerned a person having dual Iraqi and British nationality who was detained by British forces at Basra as a security internee, not having been charged with any offence. It was conceded by the Secretary of State, on the same basis as in *Al-Skeini*, that the claimant, as a person detained in a British military detention centre, fell within the Article 1 jurisdiction of the United Kingdom. He alleged violations of ECHR Article 5. In the House of Lords the Secretary of State submitted that UN Security Council resolutions obliged the United Kingdom to exercise its power of detention where necessary for imperative reasons of security in Iraq, and that that obligation prevailed over the United Kingdom's obligations under Article 5. The House of Lords accepted that argument. Lord Bingham expressed his conclusion on the issue in this way:

> "Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by

> ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention."

43. Here then is a recognition that there may be cases where in the same situation a State is obliged both to respect the Convention rights and to make good a separate and potentially inconsistent duty owed under international law. This dilemma calls up the second case to which I should refer: that of *R (B)* in this court, on which as I have said the Divisional Court placed much reliance. There the infant applicants sought asylum in Australia but were held in a detention centre whose conditions gave rise to serious concern. They escaped, found their way to the British consulate in Melbourne, and requested asylum there. The consular officials made it clear that the applicants would not be permitted to remain in the consulate, and unless they left voluntarily some other way would be found to return them to the Australian authorities. They then left of their own accord, but brought an application for judicial review of the decision not to permit them to remain in the consulate on the ground that the decision exposed them to the risk of treatment contrary to Articles 3 and 5 of the Convention by reason of their return to the detention centre. In the context of what in this case I have called the jurisdiction question, this court identified "the activities of [a State's] diplomatic or consular agents abroad" as the relevant category of extra-territorial jurisdiction, and stated (paragraph 66):

> "We are content to assume (without reaching a positive conclusion on the point) that while in the consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of article 1 …"

The court then proceeded to consider what has been referred to as the *Soering* principle, citing Lord Steyn in *R v Special Adjudicator ex parte Ullah* [2004] 2 AC 323 (paragraph 29):

> "The notion of jurisdiction is essentially territorial. However, the ECtHR has accepted that in exceptional cases acts of 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 ECHR: *Öcalan v Turkey* (2003) 37 EHRR 238, 274-275, para 93; *Bankovic v Belgium*... The effect of the decision of the ECtHR in *Soering v United Kingdom* (1989) 11 EHRR 439 was that the extraditing or deporting state is itself liable for taking action the direct consequence of which is the exposure of an individual abroad to the real risk of proscribed treatment. The Court of Appeal rightly stated that *Soering* is an exception to the essentially territorial foundation of jurisdiction. It is important, however, to bear in mind that apart from specific bases of jurisdiction such as the flag of a ship on the high seas or consular premises

> abroad, there are exceptions of wider reach which can come into play. Thus contracting states are bound to secure the rights and freedoms under the ECHR to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad: *Cyprus v Turkey* (1976) 4 EHRR 482, at p 586, para 8. Moreover, the doctrine of positive obligations under certain guarantees of the ECHR may in exceptional cases require states to protect individuals from exposure to foreseeable flagrant risks of violations of core guarantees caused by expulsions: *D v United Kingdom* (1997) 24 EHRR 423."

44. I have not referred to the *Soering* principle in dealing with the jurisdiction question. That is because it only arises for consideration where a State Party undoubtedly *has* Article 1 jurisdiction, but there is a question whether its Convention obligations require it to protect the subject from ill-treatment which is repugnant to the Convention standards, for example of ECHR Article 3, in another territory outside that jurisdiction. Thus in *Soering* itself the claimant was in the United Kingdom, and the question was whether the United Kingdom authorities would violate ECHR Article 3 by removing him to Virginia where, if convicted of the murder charge he faced, he would be likely to find himself on death row. *Soering* is not therefore relevant in the present case to what I have called the jurisdiction question. In *R (B)* the court was concerned with it because there was on the face of it an international law obligation to return the applicants to the Australian authorities. The court at length concluded:

> "84. In a case such as *Soering* the Contracting State commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another State. The same is not necessarily true where a State permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the Convention can require States to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Bankovic* to principles of international law. Furthermore, there must be an implication that obligations under a Convention are to be interpreted, insofar as possible, in a manner that accords with international law. What has public international law to say about the right to afford 'diplomatic asylum'?
>
> …
>
> 88. We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving State requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the

> receiving State can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction; see Article 55 of the 1963 Vienna Convention. Where such a request is made the Convention cannot normally require the diplomatic authorities of the sending State to permit the fugitive to remain within the diplomatic premises in defiance of the receiving State. Should it be clear, however, that the receiving State intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a Contracting State to afford diplomatic asylum."

45. Ms Monaghan has two submissions. She says first that *R (B)* is wrongly decided. There is no special rule which modifies "the *Soering* approach" where the host or receiving State requests that a fugitive be handed over. There is no supervening duty to comply with the request. *Soering* applies, and since there are substantial grounds for believing that the appellants on being transferred to the custody of the IHT would face a real risk of execution in violation of their right under ECHR Protocol 13, the court should – or should have – declined to allow the transfer. Secondly, Ms Monaghan submits that execution by hanging in any event constitutes a crime against humanity, so that even applying *R (B)* the appellants ought to have been protected.

46. It will be more convenient to address this second argument when I come to the international law question. As regards Ms Monaghan's first submission, there is at once an obvious difficulty: on the face of it we are bound by *R (B).* Ms Monaghan submits, however, that because the appellants' lives may be at stake, and in reality this court may well represent their last effective appeal recourse, we should not accept the fetters of *stare decisis* which (as *Young v Bristol Aeroplane* [1944] 1 KB 718 shows) generally bind the Civil Division of the Court of Appeal. Rather we should "approach the case in the same manner as it would if it were in the Criminal Division of this Court, as indicated by Lord Goddard CJ in *R v Taylor* [1950] 2 KB 368" (paragraph 9 of Ms Monaghan's note, 29 December 2008). In that case, in which seven judges sat, Lord Goddard said (at 371):

> "I desire to say a word about the reconsideration of a case by this court. The Court of Appeal in civil matters usually considers itself bound by its own decisions or by decisions of a court of co-ordinate jurisdiction... In civil matters this is essential in order to preserve the rule of stare decisis.
>
> This court [sc. now the Criminal Division of the Court of Appeal], however, has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned it is the bounden duty of

> the court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present..."

47. I cannot follow Ms Monaghan along this path. We are in fact sitting in the Civil Division; and if the law is to develop principled exceptions to the well-established rules in *Young v Bristol Aeroplane* relating to the scope of precedent in civil appeals, short of the House of Lords I think it would at least require a special court of five Lords Justices or perhaps more. I should add, I do not say that no such exceptions are desirable.

48. But in any event I consider that Ms Monaghan's substantive argument is misconceived. A State Party to the ECHR, exercising Article 1 jurisdiction in a foreign territory, may certainly owe duties arising under international law to the host State. Article 55 of the Vienna Convention, referred to in *R (B)* at paragraph 88, offers an obvious platform for such a potential duty. In this case the United Kingdom was plainly obliged under international law to transfer the appellants pursuant to the IHT's request. In such instances, there may be a conflict between the State Party's ECHR obligations and its international obligations.

49. One solution might have been to hold that the existence of such an international obligation is incompatible with the exercise of Article 1 jurisdiction, because it would show that the State Party's legal power in the relevant foreign territory lacked the amplitude required to guarantee the Convention rights. In that case there would be no conflict. Such an outcome would of course be no comfort to the appellants – the duty to transfer them would without more negative the ECHR jurisdiction, so that they would enjoy no Convention rights. However such an outcome would, I think, have been consistent with *Bankovic*; but this is not the direction our courts have taken. Both *Al-Jedda* and *R (B)* recognize that a State Party may be fixed with potentially inconsistent obligations arising under the ECHR and international law respectively.

50. With great respect I see no reason to doubt this position. While I have certainly asserted that the scope of the Article 1 jurisdiction has to accommodate the pressure on States Parties of international obligations apart from the ECHR, it by no means follows that the ECHR duty must always yield to the other obligation, so that no conflict can arise. No doubt it will be a matter for assessment in any case (where the issue sensibly arises) whether the international law obligations are so pressing, or operate on so wide a front, as in effect to deprive the relevant State Party of the *espace juridique* which the Article 1 jurisdiction demands. They may not do so; and where they do not, this court's decision in *R (B)* shows the correct juridical approach.

51. I would accordingly answer the conflict question in the affirmative. The court was obliged to have regard to the United Kingdom's obligation, arising under international law, to transfer the appellants to the custody of the IHT in deciding whether to grant relief for the purpose of upholding Convention rights.

THE ARTICLE 6 QUESTION

52. This question also only arises if I am wrong on the jurisdiction question. Ms Monaghan acknowledges that a claimant relying on ECHR Article 6 (which guarantees fair trial before an independent and impartial tribunal) on grounds that his *refoulement* to the jurisdiction of a third State will expose him to unfair trial procedures in breach of the Article must ordinarily show a real risk of a *flagrant* breach, such as in effect will altogether nullify the right which Article 6 guarantees: see for example *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, *per* Lord Bingham at paragraph 24. She submits, however, where the proposed *refoulement* is to a State where after trial the claimant might suffer the death penalty, no flagrant breach need be shown and the requirement is only to demonstrate a real risk of an unfair trial. The source of this submission is the Grand Chamber decision in *Öcalan v Turkey* (2005) 18 BHRC 293 at paragraph 166 (to which I have referred in passing in addressing the real risk question). The Strasbourg court said:

> "166. As regards the reference in Article 2 of the Convention to 'the execution of a sentence of a court'", the Grand Chamber agrees with the Chamber's reasoning…:
>
> ...
>
> > '... Even if the death penalty were still permissible under Article 2, the Court considers that an arbitrary deprivation of life pursuant to capital punishment is prohibited. This flows from the requirement that 'Everyone's right to life shall be protected by law'. An arbitrary act cannot be lawful under the Convention…
> >
> > It also follows from the requirement in Article 2 § 1 that the deprivation of life be pursuant to the 'execution of a sentence of a court', that the 'court' which imposes the penalty be an independent and impartial tribunal within the meaning of the Court's case-law… and that the most rigorous standards of fairness are observed in the criminal proceedings both at first instance and on appeal…
> >
> > It follows from the above construction of Article 2 that the implementation of the death penalty in respect of a person who has not had a fair trial would not be permissible.'
>
> …
>
> 169. In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish.

> Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention."

Ms Monaghan submits that this reasoning bears no trace of an additional requirement that a flagrant breach be demonstrated.

53. Öcalan was not, however, a "foreign" case, that is to say a case where the claimant alleges a fear of violations in another State. The burden of Strasbourg authority is to the effect that in such a case, where Article 6 is in issue, the claimant must demonstrate a real risk of a flagrant breach even where he may face the death penalty in the foreign State: *Bader v Sweden* (App No 13284/04, paragraph 42).

54. On this issue the Divisional Court reviewed the evidence before them and concluded as follows:

> "140. The overall picture which emerges is that, although initially there were deeply unsatisfactory aspects of the IHT and trial environment, which cast doubt on the ability to provide defendants with a fair trial at that time, there have been many significant improvements since then. We see no reason to reject the evidence of Mr Spillers who, unlike Mr Wiley [sc. the appellants' expert], is able to give up-to-date information on the IHT and its proceedings and whose witness statements we have found convincing. It is noteworthy, for example, that the IHT has in recent months ordered the release of people whom Mr Spillers describes as 'high value internees'. Another example, albeit small in itself, is that in the *1991 Uprising* trial, at the end of the prosecution closing arguments, the defence asked for 30 days in which to prepare closing submissions but the IHT allowed 45 days for the purpose.
>
> 141. To date the claimants have appeared before the Iraqi courts and have denied the allegations made against them; and there can be no complaint about the way in which the courts have dealt with them. As to the future, looking at the various points individually and cumulatively, the evidence before us falls a long way short of establishing substantial grounds for believing there to be a real risk that a trial of the claimants would involve a flagrant breach of the principles guaranteed by article 6. Thus, even if the Convention were to apply in the normal way, we would reject the claim that transfer of the claimants into the custody of the IHT would be contrary to article 6."

55. I see no basis for overturning this conclusion reached, as I have said, on the evidence before the Divisional Court. I do not propose to review that evidence; I agree with

the Divisional Court's treatment of it. There is, however, further material before us. I have already referred to Mr Spillers' latest statement describing the outcome of the IHT proceedings in the 1991 Uprising case. It will be recalled that the fifteen defendants were all former high-ranking members of Saddam Hussein's regime charged with crimes against humanity. Three were acquitted. Ten received very substantial terms of imprisonment. Only the remaining two were sentenced to death, including one ("Chemical Ali") who was already under sentence of death following an earlier trial. Mr Spillers concluded:

> "8. … As I concluded in my assessment for my own government, the trial and trial results demonstrate a competent court that respects the rights of defendants, gives careful consideration of the evidence and exercises sound judgment in distinguishing levels of culpability."

56. Mr Spillers' judgment may be a little exuberant, but the Secretary of State is entitled to say that his evidence tends to confirm the Divisional Court's conclusion. I would accordingly answer the Article 6 question in the negative.

THE INTERNATIONAL LAW QUESTION

57. All the foregoing questions address the appellants' ECHR case, which must however fail if as I would hold the jurisdiction question is to be answered against them. The international law question raises an alternative case, entirely free-standing from the ECHR (although as I stated at paragraph 15, its answer is also material to the impact of *R (B)* on the ECHR claim). So far as it relates specifically to death by hanging it is also a new case, not raised as such before the Divisional Court. In fact Ms Monaghan puts it two ways, only one of which is properly reflected by the terms in which at the outset I expressed this question – whether execution by hanging falls to be regarded as a crime against humanity, inhuman or degrading treatment, or a form of torture. In answer to the question thus put Ms Monaghan's case is that the law of nations generally now condemns or must (because it is equivalent to torture) be taken to condemn this means of execution, and her clients are entitled to sue the Secretary of State to obtain relief which makes good this condemnation. Her alternative submission is that there exists a principle of *regional* customary law, effective amongst the Member States of the Council of Europe, by which the death penalty by any means is likewise condemned and her clients are likewise entitled to sue.

58. Both of these submissions require not only that the rule of customary international law contended for indeed exists, but also (as I have indicated) that a claimant may deploy the rule as a cause of action in the English courts. For the proposition that rules of customary international law are automatically incorporated into English law, Ms Monaghan relies on such authorities as *Trendtex Trading Corp v Central Bank for Nigeria* [1977] QB 529, 553, and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, 207 in this court, *R (European Roma Rights*

Centre) v Immigration Officer at Prague Airport [2005] 2 AC 1 in the House of Lords, and the following passage from *Oppenheim's International Law* (p. 57) cited by Lord Lloyd in *R v Bow Street Magistrates, ex parte Pinochet (No 2)* [2000] 1 AC 61, 90:

> "The application of international law as part of the law of the land means that, subject to the overriding effect of statute law, rights and duties flowing from the rules of customary international law will be recognised and given effect by English courts without the need for any specific Act adopting those rules into English law."

59. So far so good. But the further proposition that the customary rule may be sued on as a cause of action in the English courts is perhaps not so clear cut. It would of course have to be shown that the rule did not conflict with any provision of English domestic law; that creates no difficulty in this case. I apprehend the rule would also have to possess the status of *jus cogens erga omnes* (a peremptory norm binding on all States). It may be that once the customary rule were shown to exist, this further requirement would not be a step too far. Strictly for the purpose of determining this part of the case I will assume in Ms Monaghan's favour that the further proposition is correct and applies in relation to both of her submissions on the international law question.

60. I turn to these alternative submissions. It is convenient first to address Ms Monaghan's contention on regional customary law. She referred to authority said to demonstrate that *regional* customary law is a concept known to jurists and courts: *Asylum Case* (1950) ICJ Reports 266, 276 – 278; see also Jennings & Watts, *Oppenheim's International Law*, Vol 1, p. 30. Mr Lewis did not in terms seek to contradict this proposition, and in the course of argument the court did not examine it in any depth. I will accept it is correct for the purposes of the case.

61. Ms Monaghan's argument then proceeds as follows:

> "There has been an evolving practice across Europe in relation to *non-refoulement* to countries where the death penalty is available, which has developed into a rule of regional customary international law. The rule derives from and is illustrated by both the consistent state practice and clear statements demonstrating *opinio juris* by all European states. As a matter of policy and practice no European state returns an individual to a country in which they are at risk of the death penalty. That state practice is consistent with the following statements and texts (both pre and post-dating the adoption of Protocol Number 13 in July 2003)…" (Ms Monaghan's note, 29 December 2008)

There follows a list of materials which include Article 19 of the EU Charter of Fundamental Rights, *Guidelines on human rights and the fight against terrorism* adopted by the Council of Europe Committee of Ministers, an interpretation by the

Committee of Ministers of the principle of *non-refoulement* in the context of Articles 2 and 3 of the ECHR, a Joint European Union/Council of Europe Declaration establishing a *European Day against the Death Penalty* and referring to the ECHR and the European Union Charter of Fundamental Rights, and the approval of many European States of a resolution on the moratorium on executions adopted by the General Assembly of the United Nations.

62. Some of these materials are not sources of law. In my judgment, so far as any of them reveal the law, it is the law established by treaty in the shape of the ECHR. The States Parties to the ECHR, which of course include all the Member States of the European Union, are necessarily committed to oppose the death penalty: at least those which have ratified Protocol No 13 must be so committed. It is little surprise that this commitment has been expressed in statements and texts other than the ECHR and Protocol themselves. These statements cannot in my view suffice to establish a free-standing principle of customary law, effective and enforceable irrespective of the Council of Europe States' adherence to the ECHR. It is true (as Ms Monaghan asserts) that some of the documents predate the adoption of Protocol No 13 in July 2003. But the aspiration of States in Europe to achieve a general abolition of the death penalty was fulfilled, not by the emergence of a legal norm from custom and practice, but by the Convention and Protocol. So much is expressly recognized in the very documents on which Ms Monaghan relies: see paragraphs 2 and 3 of the Committee of Ministers' written reply to the Parliamentary Assembly of 23 February 2007 and the Joint European Union/Council of Europe Declaration of 10 October 2008, both cited at paragraph 2 of Ms Monaghan's note of 29 December 2008.

63. I should add that Mr Lewis advanced a different response to Ms Monaghan's case on regional customary law. He submitted that there is no rule of regional customary law binding on *Iraq* by which the imposition of the death penalty would violate Iraq's obligations under international law. This is plainly correct; but Ms Monaghan's specific case was to assert a rule, not merely against the domestic practice of the death penalty, but of *non-refoulement* by European States to third countries where the death penalty might be carried out. For reasons I have given, however, I do not accept that any such free-standing rule of regional customary international law exists.

64. I turn to Ms Monaghan's other (and in fact primary) contention on the international law question: that execution by hanging falls to be regarded as a crime against humanity, inhuman or degrading treatment, or a form of torture, and as such is excoriated by international law.

65. Mr Lewis submits that there is no decision of any international court, nor any text from any responsible international organization, establishing that the imposition of the death penalty generally or by hanging in particular is contrary to customary international law; and the academic literature does not support the suggestion that that position is yet established in customary international law. That is so; but if it were plainly shown that a particular means of execution inflicted so great a degree of pain and suffering that by common consensus it would be regarded as a crime against

humanity, inhuman or degrading treatment, or a form of torture, I apprehend Ms Monaghan might readily establish that it was contrary to a peremptory norm of customary international law notwithstanding that the books had not covered the particular case.

66. Mr Lewis does not accept that the death penalty (I think he means, however it may be carried out) is within the definition of torture given by Article 1 of the UN Convention against Torture: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". But this issue cannot, I think, be made to depend on the niceties of interpretation to which this provision might give rise. As I have indicated, a means of execution might inflict so great a degree of pain and suffering that by common consensus it would be regarded as a crime against humanity, inhuman or degrading treatment, or a form of torture.

67. Ms Monaghan has assembled a good deal of material to support this proposition, at any rate in relation to execution as inhuman or degrading treatment. I did not understand Mr Lewis to dissent from that position. I will cite only one of Ms Monaghan's references: *Fisher v Minister of Public Safety and Immigration* [1998] 1 AC 673, *per* Lord Steyn at 688:

> "…[I]n principle any substantial and serious suffering of an avoidable nature added to the anguish inevitably resulting from the death sentence may constitute inhuman or degrading treatment or punishment. The State may not superimpose upon the inevitable consequences of a death sentence further unnecessary agony and suffering."

68. Much, however, depends on the facts; and it is on the facts that in my judgment Ms Monaghan's case falls down. In her final skeleton argument (paragraphs 72 ff) she cites a number of sources which describe horrific and agonizing instances in which the hanged man's neck is not broken, so that he suffocates, or the drop is too long, so that he is decapitated. These terrible errors have undoubtedly happened from time to time. There was a notorious instance in January 2007 of an execution in Iraq when the condemned man was decapitated. Ms Monaghan's most graphic material is a quotation from a prison warden in a high security gaol in the United States, which was cited by Justice Bhagwati in a dissenting judgment in the Indian Supreme Court in *Bachan Singh v State of Punjab* (1982) AIR 1325.

69. But this evidence is anecdotal, and partial. The majority in *Bachan Singh* upheld the constitutionality of hanging, and in *Deena v Union of India* (1983) SC 1155 the

Supreme Court also found that hanging was not unconstitutional. The factual instances on which Ms Monaghan relies appear to be cases where mistakes have been made and the execution has not been carried out as it should have been. There is other evidence, not least the general balance of evidence which was accepted, after exhaustive investigation, in the Report of the Royal Commission on Capital Punishment 1949 – 1953 (to which Ms Monaghan refers in passing). Amongst many other things the Royal Commission found that hanging was "speedy and certain" (p. 247).

70. The material we have seen concerning this method of execution has been very limited. I would accept Mr Lewis' submission that we are in no position whatever to arrive at any overall conclusion as to the effects of hanging for the purpose of making an assessment of its compatibility or otherwise with norms of customary international law.

71. Ms Monaghan has not, in my judgment, begun to make out her free-standing case independent of the ECHR. I would answer the international law question in the negative.

CONCLUSION

72. For all the reasons I have given I would dismiss the appeal.

Lord Justice Jacob:

73. I agree.

Lord Justice Waller:

74. I also agree.