Neutral Citation Number: [2005] EWCA Civ 1609

Case No: C1/2005/0461, C1/2005/0461B

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
DIVISIONAL COURT
Rix LJ and Forbes J
[2004] EWHC 2911 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2005

Before:

LORD JUSTICE BROOKE,
Vice-President, Court of Appeal (Civil Division)
LORD JUSTICE SEDLEY
and
LORD JUSTICE RICHARDS

- -

Between:

The Queen (on the application of Mazin Mumaa Galteh Al-Skeini and Others)	**Appellants/ Claimants**
- and -	
The Secretary of State for Defence	**Respondents/ Defendants**

- -
- -

Rabinder Singh QC, Michael Fordham, Shaheed Fatima and Christine Chinkin (instructed by **Public Interest Lawyers**) for the **Appellants**
Christopher Greenwood QC, Philip Sales and Cecilia Ivimy (instructed by **the Treasury Solicitor**) for the **Respondents**

The Redress Trust and the Aire Centre intervened with a joint written submission
Hearing dates: 10th-14th October 2005

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Judgment

Summary

(This Summary forms no part of the Judgment)

This is an appeal by the families of five Iraqi civilians and a cross-appeal by the Secretary of State in a sixth case from an order made by the Divisional Court (Lord Justice Rix and Mr Justice Forbes) on 14 December 2004. The claimants are appealing against the declaration of that court that the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998 ("HRA") do not apply to the circumstances of each of their cases. The Secretary of State's cross-appeal relates to the court's declaration that the HRA applies to the circumstances of the sixth claimant's case ("the Mousa case") and that the UK has violated its procedural duties under Articles 2 and 3 of the ECHR. The factual background and relevant case law have been set out in much greater detail in the judgment of the Divisional Court (see [2004] EWHC 2911 (QB); [2004] 2 WLR 1401).

By the present judgment, the Court of Appeal ((Lord Justice Sedley expressing doubts about the result) has dismissed the appeal and (unanimously) has dismissed the cross-appeal, subject to an adjustment of the Divisional Court's order in the Mousa case (at paras 178-179).

Lord Justice Brooke's leading judgment is in fourteen parts.

Parts 1 and 2 (paras 1-11) set out the main issues raised by these appeals and explain why it is arguable that the HRA and the ECHR may apply in the south-east of Iraq. This section of the judgment outlines the relevant principles of international human rights law and considers their implications for these appeals.

Parts 3 and 4 (paras 12-30) outline the circumstances in which the claims arose. References to the paragraphs of the judgment of the Divisional Court are in the form of "DC1", "DC2" etc. All six claims are test cases arising out of the death of civilians in Basrah City, in the south-east of Iraq, between August and November 2003. It is accepted that these deaths occurred whilst the UK was an occupying power. The central issue in this appeal is "whether national and European human rights law also confer on the relatives of the dead Iraqi civilians enforceable rights against the British authorities arising out of the fatal incidents that are at the centre of this case" (para 14). The facts relating to the deaths of the six Iraqi civilians are summarised at paras 22-30.

In Parts 5-6 the judgment considers whether the HRA applies in these circumstances (paras 31-47). In particular, it describes the circumstances in which the ECHR may have extra-territorial effect and refers to the relevant case law (paras 48-53).

Part 7 addresses the arguments that arise from a line of cases concerned with the Turkish invasion of northern Cyprus (paras 54-69).

In Part 8 (paras 70-81) it is noted that it was against this background that the Grand Chamber of the European Court of Human Rights ("ECtHR") determined an admissibility issue in *Bankovic v Belgium & Others* (2001) 11 BHRC 435. The Divisional Court's analysis of *Bankovic* is set out at para 72-73. The judgment sets out the extent to which the Court of Appeal accepts that analysis (paras 74-81).

The judgment goes on in Part 9 (paras 82-96) to consider the decisions of the ECtHR following *Bankovic*, with particular reference to its judgment in *Issa v Turkey* [2004] ECHR 31831/96 (paras 86-96). The case law relied on by the court in *Issa* is discussed in Part 10 (paras 97-112).

Parts 11-14 contain the main conclusions of the court in respect of these appeals.

Part 11 considers whether the UK was in effective control of Basrah City in August-November 2003 (paras 113-128). The court considers Articles 42, 43, 45 and 46 of Section III of the 1907 Hague Convention and the relevant provisions of the 1949 Fourth Geneva Convention. The circumstances in which the UK's troops found themselves in Basrah City are addressed at paras 119-123. The court concludes (at para 124) that although it is accepted that the UK was an occupying power, it is impossible to hold that it was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time.

In Part 12 the judgment is concerned with the question whether there was compliance with Articles 1 and 2 ECHR in the case of the first five claimants (paras 129-142). There is a detailed analysis (at paras 131 – 137) of the case law of the ECtHR in relation to the kind of investigation that is required of a contracting State when its armed forces or its police are involved in the death of a civilian within its own territory. The deficiencies in the investigations are addressed at paras 140-141. The court is satisfied on the facts that the UK was not exercising jurisdiction for Article 1 purposes, and therefore the appeals of the first five claimants are dismissed (para 142).

In Part 13 (paras 143-149), the judgment is concerned with the question whether the HRA applies to the Mousa case. The Secretary of State had conceded that the UK was exercising extra-territorial jurisdiction for ECHR purposes in this case. The court held that the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of State Agent Authority ("SAA") principles (para 147-148).

In Part 14 (para 150-179), the question whether the UK was in breach of its procedural obligations under Articles 2 and 3 of the ECHR in the Mousa case is analysed. Details of the post-death investigations are set out from para 153 onwards. The Divisional Court found that there had been a breach of the procedural obligations under Articles 2 and 3. The Court of Appeal, however, was provided with much more evidence about these matters. In the light of this new evidence, the court concluded that it would be premature to give any substantive answer to the second preliminary issue directed by Collins J and that the matter should be remitted to the Administrative Court, with the recommendation that all further proceedings on that issue be stayed until after the conclusion or other disposal of the pending court-martial proceedings. The first part of the Divisional Court's order in Mousa is upheld.

Sedley LJ agrees with the majority that the Human Rights Act applies in the Mousa case (paras 182-188). He prefers the view, however, that for Article 2 purposes, British troops, as an occupying power, were in effective control of Basrah City for the purposes of Strasbourg jurisprudence, and that the de facto assumption of civil power places on the occupying power an obligation to do all it can to protect essential civil rights, and particularly the right to life, even if in the near-chaos of Iraq it was unable to guarantee the full range of Convention rights (paras 189-197). But he doubts whether this conclusion is compatible with the present Strasbourg case-law.

In a short judgment Richards LJ agrees with Brooke LJ, and explains why despite the views he expressed as a first instance judge in the *Abbasi* case on the proposition that the Human Rights Act has extra-territorial application, he is now willing to follow the dicta in two cases mentioned by Brooke LJ in paras 45 and 46 of his judgment and leave it to the House of Lords to decide whether those dicta are wrong (paras 208-9).

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Lord Justice Brooke :

1. The main issues raised by these appeals

1. This is an appeal by the first five claimants and a cross-appeal by the defendant from an order made by the Divisional Court (Rix LJ and Forbes J) on 14th December 2004. The first five claimants appeal against the declaration by that court to the effect that the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998 ("HRA") do not apply to the circumstances of their cases. The defendant appeals against the court's declaration to the effect that the HRA applies to the circumstances of the case of the sixth claimant and that the United Kingdom's procedural duties under Articles 2 and 3 of the ECHR have been violated. He accepts the court's declaration that the ECHR applies in this case. The Divisional Court itself gave both parties permission to appeal. In its comprehensive judgment ([2004] EWHC 2911 (Admin); [2004] 2 WLR 1401) the court summarised the facts and much of the relevant case-law in great detail. This has simplified my task, because I can cross-refer to the numbered paragraphs of that judgment without being obliged to repeat all this material except when it is necessary to do so for the purpose of explaining my reasoning on the issues raised by these appeals. I will refer to the numbered paragraphs of that judgment as "DC1", "DC2" etc.

2. These appeals raise three main issues:

   i) Did the HRA apply to the activities of British troops in south-east Iraq at the material time?

   ii) Were the six claimants, or any of them (and if so which) entitled to the protection of the ECHR and if so why?

iii) If they were entitled to the protection of the ECHR, were the Convention rights of any of them violated and if so how?

2. The reasons why the HRA and the ECHR may apply in south-east Iraq

3. It may seem surprising that an Act of the UK Parliament and a European Convention on Human Rights can arguably be said to confer rights upon citizens of Iraq which are enforceable against a UK governmental authority in the courts of England and Wales. The reason why this proposition is seriously arguable is that when the ECHR was being drafted, the member states of the Council of Europe decided to alter the phrase "the High Contracting Parties shall secure to *all persons residing within their territories* the rights and freedoms defined in … this Convention," so that instead of the italicised words the words "*everyone within their jurisdiction*" were substituted. Although by the operation of elementary principles of public international law the jurisdiction of a sovereign state is generally restricted to persons and property within its territory (because any attempt to exercise jurisdiction within another sovereign state would constitute a violation of that state's sovereignty) international law has always recognised a narrow range of exceptions to this rule. These relate, for example, to acts done by a state's embassies or consular authorities, or acts done on the high seas in a ship bearing the flag of the state in question, or acts done in an aircraft registered in that state while it is airborne (see *Oppenheim's International Law,* Ninth Edition, Vol 1, for a full discussion, and DC 226 for two important passages in that book). Such exercises of extra-territorial jurisdiction do not impair the sovereignty of any other state. In this context the European Court of Human Rights ("EC^{t}HR") has said that the ECHR should so far as possible be interpreted in harmony with other rules of international law of which it forms part (*Al-Adsani v UK* (2001) 34 EHRR 273 at [55]; (DC 188-9). See also *Bankovic v Belgium* (2001) 11 BHRC 435 at [57]).

4. Today there a number of international human rights instruments whose interpretation sometimes turns round this question of jurisdiction. They use different language and are policed by different international authorities. Thus the Commission and Court at Strasbourg have been charged with the interpretation of the ECHR, the UN Committee on Human Rights (and sometimes the International Court of Justice at the Hague) interprets the International Covenant on Civil and Political Rights ("ICCPR"), the UN Committee on Torture interprets the UN Torture Convention, and the Inter-American Commission on Human Rights interprets the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Sometimes a national court has to determine whether the state in which that court is situated has obligations of an extra-territorial kind, or whether it was lawfully entitled to behave in the way it did when it exercised what is alleged to be extra-territorial jurisdiction. We have been shown decisions of this kind in the Supreme Courts of Canada, Israel and the United States. Although the language of the governing instruments is always different, these cases often disclose a commonality of approach.

5. The present case is not about acts done by embassies or consular authorities or on a ship on the high seas or on an aircraft while it is in the air. It is about acts done by the soldiers of an army which, with others, has overthrown the government of a sovereign state and is temporarily in occupation of the territory of that state pending the establishment of a new national government. This is why it is being contended that the United Kingdom was obliged to secure to the citizens of that part of Iraq which its

forces occupied the rights and freedoms defined in the ECHR because, it is said, those citizens were temporarily within this country's jurisdiction.

6. Mr Christopher Greenwood QC, who appears as leading counsel for the Secretary of State, now accepts on behalf of his client – although he argued unsuccessfully to contrary effect in the court below – that when a citizen of Iraq was in the actual custody of British soldiers in a military detention centre in Iraq during the period of military occupation he was within the jurisdiction of the UK within the meaning of Article 1 of the ECHR. He disputes, however, that Iraqi citizens who were shot dead, whether intentionally or by accident, by British soldiers in their homes or in the street during the period of occupation were properly to be treated as being within this country's jurisdiction. This is one of the issues we have to decide.

7. Even if we were to hold that all these Iraqi citizens were within the jurisdiction of this country for ECHR purposes, the Secretary of State nevertheless argues that the HRA conferred no rights upon them that are enforceable in a UK court, and that they must go to the court at Strasbourg if they wish to have their rights recognised in a court of law. He relies on the canon of statutory construction that requires Parliament to use clear language if it intends one of its Acts to have extra-territorial effect. The contrary argument is that the HRA was all about conferring on people who are within this country's jurisdiction (within the meaning of Article 1 of the ECHR) the right to enforce their Convention rights in UK courts. This is what, it is said, "bringing rights home" was all about. The appellants rely on recent dicta in both this court and in the House of Lords as having great persuasive, even if not binding, effect in their favour. This is the other main issue we have to decide.

8. The reason why these issues are so important is that what is known as international humanitarian law imposes a number of unexceptional moral precepts on occupying forces ("Thou shalt not commit murder"; "Thou shalt not be guilty of torture or other inhuman treatment", etc) but it imposes none of the positive human rights obligations that are inherent in the ECHR. It is a far cry from the complacency of "You must not kill but need not strive Officiously to keep alive" to the obligations imposed on a member state of the Council of Europe by the case law on Articles 1 and 2 of the ECHR ("the High Contracting Parties shall secure to everyone within their jurisdiction [their] right to life"). The difference between these two regimes was vividly illustrated by the powerful written submissions that were prepared by Keir Starmer QC, Richard Hermer and Azeem Suterwalla on behalf of the AIRE Centre and the Redress Trust.

9. As if it were necessary to bring home to us the contemporary resonance of the issues we have to decide, we were shown the terms of a resolution passed by the Parliamentary Assembly of the Council of Europe on 24th June 2004 just before the end of the military occupation of Iraq. This resolution contains the following passages:

> "1. The Parliamentary Assembly welcomes the United Nations Security Council Resolution 1546 (2004) on the situation between Iraq and Kuwait, unanimously adopted on 8 June 2004, and its decision to transfer full responsibility and authority over their country to the Iraqis and to end the occupation by 30 June 2004…

6. In the months preceding the transfer of power, the world's attention has been held by various serious violations of human rights and humanitarian law committed by coalition forces (the Multinational Force, or MNF) in Iraq, in particular by members of the United States and British contingents. The Assembly deplores and condemns all such violations unreservedly…

13. The Parliamentary Assembly condemns and deplores the torture in prisons managed by the coalition forces...

17. The Assembly calls upon those of its member and Observer states that are engaged in the MNF to:

i. ensure that their forces and agents … fully and effectively respect international humanitarian human rights and criminal law, according to the established, generally-accepted definitions, in all circumstances;

ii. ensure, in particular, that detainees are afforded the appropriate status and treated according to the provisions of international humanitarian law relevant to that status, as well as of applicable international human rights law…

iii. ensure that all human rights abuses and offences under international humanitarian and criminal law are promptly and independently investigated and their perpetrators brought to trial in accordance with international standards, so that they may be subjected to appropriate administrative or criminal sanctions fully reflective of the gravity of their misconduct…

iv. ensure that effective remedies are available for violations and that full reparation, including adequate compensation, is made to the victims or to their families; …

18. The Assembly calls upon those of its member states that are engaged in the MNF to accept the full applicability of the European Convention on Human Rights to the activities of their forces in Iraq, in so far as those forces exercised effective control over the areas in which they operated."

10. Similar sentiments were expressed by the UN Committee Against Torture in its *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories, 10/12/04*, in which it considered this country's fourth periodic report pursuant to the Torture Convention:

"4. The Committee expresses its concern at:

(b) the State Party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation 'that those parts of the Convention

> which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq'; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party's authorities."

11. It is the relationship between the positive obligations contained in the ECHR and the status of an occupying force which is accepted to have sufficient authority in the territory it occupies for the purposes of international humanitarian law which is at the heart of this appeal. It will be convenient to set out the facts of these six appeals and to summarise the relevant case law before returning to this difficult question.

3. The circumstances in which the claims arose

12. As I have said, the Secretary of State accepts the finding of the Divisional Court that the sixth claimant, Daoud Mousa, who sues in relation to the death and inhuman treatment of his son Baha Mousa while he was in the custody of British troops in a military detention centre in Basrah City, was entitled to invoke the ECHR. But he maintains that the HRA did not apply in this case, either, and that in any event it is premature to determine whether or not there was a breach of this country's positive obligations under Articles 2 and 3 of the ECHR. (For the positive obligation under Article 3, see *Al-Adsani* v *UK* (2001) 34 EHRR 273 at [38]). I will refer to Daoud Mousa as "the sixth claimant" because his was the sixth case identified as a test case by an order made by Collins J on 11th May 2004 whereby he directed that there should be a hearing to determine the preliminary issues identified in his order (for the details see DC 5-8). The claims of seven other claimants, who are also the relatives of deceased Iraqi civilians, have been stayed pending the resolution of the preliminary issues.

13. All six claims in the test cases arise out of the deaths of members of the civilian population of Basrah City, in south-east Iraq, between August 2003 and November 2003. Major combat operations in Iraq had ceased on 1st May 2003, and these deaths occurred during a period when, it is accepted, the United Kingdom was an occupying power under the relevant provisions of the Regulations annexed to the 1907 Hague Convention ("the Hague Regulations") and the 1949 Fourth Geneva Convention ("Geneva IV") (for which see paras 113-115 below) at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised sufficient authority for this purpose. The period of occupation started on 1st May 2003 and ended on 28th June 2004, when the Iraqi Interim Government assumed full responsibility and authority for governing Iraq. Iraq was a party to Geneva IV but not to its Additional Protocol 1 or to the Hague Convention, but the defendant accepts that the Hague Regulations and the material provisions of Additional Protocol 1 to Geneva IV are recognised as declaratory of customary international law and are therefore applicable as such to the United Kingdom's occupation of Iraq. Throughout the relevant period the Coalition Provisional Authority ("CPA") existed for the purpose of exercising powers of government temporarily, and as necessary (sic). One of its express tasks was to provide security, and its declared goal was to transfer responsibility to representative Iraqi authorities as early as possible (DC 16).

14. It is common ground that while it was an occupying power the United Kingdom had certain obligations of a humanitarian nature under the Hague Regulations and Geneva IV and other international instruments. As I have said, what is in issue in these appeals is whether national and European human rights law also confer on the relatives of the dead Iraqi civilians enforceable rights against the British authorities arising out of the fatal incidents that are at the centre of the case. The Mousa case has also given rise to complaints of torture and inhuman treatment perpetrated by British soldiers prior to Baha Mousa's death.

15. The Divisional Court has provided a very full, clear précis of the situation in which British troops found themselves in Iraq during the transitional period of occupation with which we are concerned (1st May 2003 to 28th June 2004). It also gave a useful summary of the facts of the six test cases with which we are concerned. I am happy to adopt the contents of DC 39-89 and am therefore able to deal with these matters much more briefly.

16. The United Kingdom had been given command of Multi-National Division (South-East) ("MND(SE)"), which was one of the six divisions that made up the coalition forces in Iraq in this period. The division's area of responsibility comprised four provinces in South-East Iraq. Two of these (Al-Basrah and Maysan) represented the main theatre of operation for UK forces. These provinces had a total population of about 2.75 million people, and just over 8,000 British troops were deployed there, of whom just over 5,000 had operational responsibilities. These troops had two main tasks: to maintain security (a task which included an effort to re-establish the Iraqi security force, including the Iraqi police), and to support the civil administration in Iraq in a number of different ways. In this appeal we are concerned with incidents involving troops from the 1st Battalion, the King's Regiment ("1 Kings") and troops from the 1st Battalion, the Queen's Lancashire Regiment ("1 QLR"), whose duties during their six-month deployments in Iraq were concentrated mainly in Basrah City. Evidence was given to the court in the form of witness statements by Lt. Gen. Sir John Reith, whose operational responsibilities included the activities of the British Army in Iraq, and the two brigadiers whose command included the British forces in the Basrah area, Brigadiers Moore and Rutherford-Jones, whose respective six-month tours of duty in Iraq ended and began in November 2003.

17. All three of these senior officers described the post-conflict situation in Iraq as extremely challenging. During the 14-month period there were just under 180 demonstrations and 1,050 violent attacks against coalition forces in the divisional area. The rule of law had broken down; there were at least two weapons in most Iraqi households; and the tribes, criminal gangs and terrorist groups were very well armed. The area was rife with tribal feuds (which were often extremely violent and dangerous), and with organised crime.

18. The initiating trigger to these proceedings was the refusal of the Secretary of State, by a letter from the Treasury Solicitor dated 26th March 2004, to comply with a request from the claimants' solicitors to the effect that he should conduct independent inquiries into all these civilian deaths. By the same letter the Secretary of State denied liability under Article 2 of the ECHR in respect of any of the fatalities, denied that he was under any obligation to pay damages under the HRA, and averred that the Ministry of Defence's compensation scheme was rational according to ordinary principles of public law. These proceedings were then commenced, and with

commendable speed the parties assembled a substantial quantity of witness statements, together with supporting documents, in time for the hearing before the Divisional Court which took place on 28th-30th July 2004. The judgment of that court was delivered on 14th December 2004, and since that time each party has, without objection, filed a substantial quantity of further evidence. This evidence was to a great extent concerned with bringing the history up to date, and we were content to accept it without any strict inquiry as to the precise jurisprudential basis on which it was being admitted.

19. The first five cases concerned fatalities that occurred while British troops were patrolling the streets of Basrah City. The Secretary of State accepts that in the first, second, fourth and fifth of these cases the deceased was shot and killed by British troops. In the third case he accepts that the deceased (as a bystander) was shot and killed in the course of an exchange of fire between British troops and Iraqi gunmen. In the sixth case he accepts that Baha Mousa's injuries and death occurred while he was being detained by British troops in the circumstances I will summarise in paras 28-29 below. This case, in which court-martial proceedings are now pending, is so very different from the other five that it is convenient to address it separately. I will preface my analysis of the facts of the six cases with a brief description of the operational setting in which the incidents complained of took place.

20. Brigadier Moore described Iraq as the most volatile and violent place in which he had ever served. It was the habit of those who indulged in extortion, kidnapping, car-jacking, looting and oil smuggling to go about heavily armed. They were always ready to shoot at any British troops they encountered. Attacks by terrorists on British troops ranged from drive-by shootings to bombing. Since it was the practice of Iraqi adult males to carry their guns with them – for they were at risk from rival tribes and local criminals just as much as they might be from British troops – the possibilities of fatalities occurring through a misunderstanding of another person's intentions were rife. The British endeavoured to ban the carrying of firearms on the streets, but they did not always succeed in this endeavour.

21. It was against this turbulent backcloth that the deaths in the first five cases occurred.

4. The facts underlying the six appeals

22. Hazim Al-Skeini was 23 years of age. He was unemployed. He was shot dead in the street by British troops just before midnight on 4th August 2003. His father's account of the incident (which differs from his brother's account) suggests that Hazim and a friend (who was also killed) had gone out in the street because they had heard the sound of gunfire a kilometre away, which they associated with a tribal funeral. It is a local custom for tribesmen to fire their guns in the air at a funeral. Lt. Col. Griffin, who commanded 1 Kings, was satisfied from the reports he received from his soldiers, however, that the two armed men had represented an immediate threat to his soldiers' lives. A patrol had seen and heard heavy gunfire from a number of different places, and its intensity seemed to increase as the patrol reached the area. Colonel Griffin reported to his brigadier that the incident fell within the rules of engagement ("ROE") and after he had satisfied the brigadier on one further point, no further investigation was ordered. The relevant ROE are set out at DC 45. In particular, service personnel are told that they may only open fire against a person if he/she is

committing or about to commit an act likely to endanger life and there is no other way to prevent the danger.

23. Muhammed Salim, a 45-year old teacher, was shot dead in his brother-in-law's home at about 11.30 p.m. on the night of 5th November 2003. Members of a British patrol had broken down the front door of the house and shot him in the hall. He died two days later in a military hospital. The Iraqis who were present in the house insist that he posed no threat to the soldiers and that there was no reason for shooting him. Colonel Griffin, however, was satisfied by the report of the incident given to him by the company commander. A patrol had been told that a group of men armed with long-barrelled weapons, grenades and rocket propelled grenades had been seen entering the house in question, and they had been sent out on a search and arrest mission. Because no one had responded to their knocking, they broke in and cleared the first room. They then heard automatic gunfire within the house. At that point they said that two men armed with long-barrelled weapons had rushed down the stairs towards the patrol sergeant, and the sergeant had shot the first man (Muhammed Salim) dead because he believed his own life to be in incredible danger. The brigadier accepted that this was another straightforward case which fell within the ROE. No further investigation was ordered.

24. Hannan Shmailawi was killed by a sudden burst of machine-gun fire from outside her house when she was sitting round the dinner table with her family at about 8 p.m. on 10th November 2003. She died in hospital a few days later. Her husband was a night porter at the Institute of Education, and their home was in the Institute compound. Nobody has suggested that anyone intended to kill his wife, but her husband believes that the British troops reacted precipitately after they heard the Institute's security guards letting off gunfire to scare burglars away. Colonel Griffin was satisfied that this was another straightforward case which fell within the ROE. He received a report from his troops that the incident took place during a fire fight between a patrol and a number of unknown gunmen. Parachute flares had been let off, and these showed at least three men with long-barrelled weapons standing on open ground, two of whom were firing directly at British troops. One of the gunmen was shot dead. After 7-10 minutes the firing stopped, and armed people were then seen running away. The brigadier was satisfied with the colonel's report. There was no further investigation.

25. Waleed Sayay Mezban was 43 years old. He was shot dead at about 8.30 p.m. on the evening of 24th August 2003 when he was driving a 9-seater mini-bus. His brother says he was returning home from work when his mini-bus came under a barrage of bullets, fired for no apparent reason. Colonel Griffin received reports from the troops concerned, and these led him to report to the brigadier that the lance-corporal who had fired the fatal round believed that he was acting lawfully within the ROE. The patrol's account of the matter was that the mini-bus had attracted suspicion when it approached the patrol at slow speed with its headlights dipped and its curtains drawn, and the driver was later shot as the incident unfolded in the way described in DC 70-73. On this occasion Section 61 of the Royal Military Police's Special Investigation Branch ("RMP (SIB)", for which see DC 47 and 51) started an investigation, but this was called off five days later at the brigadier's direction, after some queries about the incident had been answered to his satisfaction. In May 2004, shortly before the Divisional Court hearing, the SIB re-opened its investigation (see para 142 below).

26. Raid Al-Musawi, a 29-year old Iraqi police commissioner, was shot and seriously wounded by a British soldier in the street at about midnight on 26th August 2003. He died in hospital nine weeks later. His mother said he was carrying a box of "suggestions and complaints" to a judge, and had stopped for dinner on the way before resuming his journey to the judge's house. Major Suss-Francksen, the second-in-command of 1 QLR, interviewed the commander and two members of the patrol and then reported to the brigadier that the case fell within the ROE. They told him that all the lights in the area had gone out as a result of a power failure. They then heard a gunshot, and, with the aid of illumination, a corporal in the patrol saw Raid Al-Musawi standing about 20 metres away. He was holding a rifle and gesticulating and shouting at people in a nearby courtyard. The corporal shouted warnings at him, and Mr Al-Musawi was said to have responded by firing a round at him. The corporal fired a single round back, which proved to be fatal. The brigadier accepted that the incident fell within the ROE. No further investigation took place.

27. All five of these incidents resulted in the death of an Iraqi civilian. In none of them was there any ballistics testing following the death, any autopsy report, any post mortem, or any investigation by anyone outside the battalion and its chain of command up to brigade level (other than the aborted police investigation in the fourth case). The families of the deceased were never involved in such inquiries as took place, and in each case the battalion's commanders (and in due course the brigadiers) were willing to accept their soldiers' accounts of the incident at their face value.

28. I turn now to the facts surrounding Baha Mousa's ill-treatment and death in British custody. A much fuller account can be found in DC 81-89. Baha Mousa was 26 years old. He worked as a receptionist at a hotel in Basrah City. In the early morning of 14th September 2003 a unit from 1 QLR raided the hotel. They searched the safe in the hotel (from which it is alleged that they stole 4.5 million dinars), and in due course they broke into the safe in a side-office where they found four weapons: it is said by a witness for the claimants that there was a licence for each gun in the safe. The troops were particularly concerned to ascertain the whereabouts of one of the partners who ran the hotel. Brig Moore himself took part in this operation and was up on the roof of the hotel when the troops were effecting arrests.

29. It was in these circumstances that they rounded up a number of the men they found there, including Baha Mousa. Baha Mousa's father, Daoud Mousa, had been a police officer for 24 years and was by then a colonel in the Basrah police. He had called at the hotel that morning to pick up his son at the end of his shift, and he told the 1 QLR lieutenant in charge of the unit that he had seen three of his soldiers pocketing money from the safe. During this visit he also saw his son lying on the floor of the hotel lobby with six other hotel employees with their hands behind their heads. The lieutenant assured him that this was a routine investigation that would be over in a couple of hours. Colonel Mousa never saw his son alive again. Four days later he was invited by a military police unit to identify his son's dead body. It was covered in blood and bruises. The nose was badly broken, there was blood coming from the nose and mouth, and there were severe patches of bruising all over the body. The claimants' witnesses tell of a sustained campaign of ill-treatment of the men who were taken into custody, one of whom was very badly injured, and they suggest that Baha Mousa was picked out for particularly savage treatment because of the complaints his father had made. The men who were arrested had been taken from the

hotel to a British military base in Basrah City called Darul Dhyafa. Baha Mousa died on 15th September 2001, but it took three days to locate his father and bring him to the hospital.

30. It is sufficient at this stage for the purposes of this brief summary of the facts to say that 1 QLR's commanding officer immediately requested the RMP (SIB) 61 Section to investigate, and in due course court-martial proceedings were instituted against seven military personnel, including the commanding officer (who was charged with negligent performance of duty).

5. Does the HRA apply?

31. The claimants maintain that they are entitled to bring these proceedings pursuant to ss 6 and 7 of the HRA. Section 6(1) provides that is unlawful for a public authority to act in a way which is incompatible with a Convention right, and s 7(1) enables a person who claims that a public authority has acted in a way which is made unlawful by s 6(1) to bring proceedings against that authority under the HRA in an appropriate court if he is a victim of the unlawful act. Section 7(7) contains a definition of the phrase "victim of an unlawful act" on which nothing turns.

32. Section 1(1), as amended, explains that the phrase "the Convention rights" means the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol and Article 1 of the Thirteenth Protocol as read with Articles 16 to 18 of the Convention. Section 21 contains this definition:

> "'The Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom."

Section 5 and Schedule 1 of the Interpretation Act 1978 have the effect of prescribing that in any Act, unless the contrary intention appears, the words "the United Kingdom" mean "Great Britain and Northern Ireland".

33. Section 11 of the HRA, which is entitled "Safeguard for existing human rights", provides:

> "11. A person's reliance on a Convention right does not restrict –
>
> (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
>
> (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9."

34. We heard a good deal of argument about the effect of Article 56 of the ECHR, which is entitled "Territorial application". The text of this article, so far as is material, is set out in DC 93. In essence it entitles a member state to declare that the ECHR is to extend to such of the territories for whose international relations it is responsible as

are named in a notification addressed by that state to the Secretary-General of the Council of Europe. Article 56(3) prescribes that the provisions of the ECHR are to be applied in such territories "with due regard to local requirements".

35. Once the name of such a territory has been appropriately notified, the notifying state may be held accountable before the ECtHR for any violation of a Convention right in that territory. If that state has itself ratified a Protocol to the Convention but has not declared that the Protocol is to have effect in the territory in question, it will not be accountable for alleged breaches of that Protocol in that territory. And in every such case the ECtHR must consider any arguments that are based on the words "with due regard to local requirements".

36. The fact that the reach of ss 6 and 7 of the HRA does not extend to dependent territories for which an appropriate notification has been lodged has now been authoritatively explained by Lord Nicholls in *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57 at [36]:

> "36. The Human Rights Act is a United Kingdom statute. The Act is expressed to apply to Northern Ireland: section 22(6). It is not expressed to apply elsewhere in any relevant respect. What, then, of Convention obligations assumed by the United Kingdom in respect of its overseas territories by making a declaration under article 56? In my view the rights brought home by the Act do not include Convention rights arising from these extended obligations assumed by the United Kingdom in respect of its overseas territories. I can see no warrant for interpreting the Act as having such an extended territorial reach. If the United Kingdom notifies the Secretary General of the European Council that the Convention shall apply to one of its overseas territories, the United Kingdom thenceforth assumes in respect of that territory a treaty obligation in respect of the rights and freedoms set out in the Convention. But such a notification does not extend the reach of sections 6 and 7 of the Act. The position is the same in respect of protocols."

37. Mr Philip Sales, who appeared as junior counsel for the Secretary of State, argued that if the HRA did not have extra-territorial effect in respect of territories for which the ECHR provides a tailor-made scheme for the extension of its reach (having due regard to local requirements), it would be very odd if it had extra-territorial effect elsewhere in the world without any notification process or any saving provision for local requirements. He called in aid a powerful line of authority to the effect that unless a contrary intention appears, Parliament is taken to intend an Act to extend to each territory within the United Kingdom, and linked with this proposition is the presumption that an Act applies only to persons within the United Kingdom, and not to persons or matters outside the United Kingdom. See *Bennion, Statutory Interpretation (4th Edition)*, ss 106 and 128 at pp 282 and 306; *Lawson v Serco Ltd* [2004] EWCA Civ 12 at [8], [11]-[16] and [22]; [2004] ICR 204; and *Tomalin v*

Pearson [1909] 2 KB 61, 64 per Cozens-Hardy MR, approving the following passage from *Maxwell on the Interpretation of Statutes*:

> "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

38. It is a feature of modern Acts of Parliament that they expressly state when they are departing from the presumption of United Kingdom territorial extent (see *Bennion*, *op cit*, p 283). Examples of this practice can be seen in s 1(1) of the Geneva Conventions Act 1957, s 70 of the Army Act 1955 and s 31 of the Criminal Justice Act 1948. Mr Sales accepts that by virtue of the express wording of these sections they would apply to the conduct (or misconduct) of British forces in Iraq.

39. The HRA expressly provides that it extends to Northern Ireland (s 22(6)). It also contains a provision by which any liability to the death penalty under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 was replaced by a liability to life imprisonment "or any less punishment authorised by those Acts" (s 21(5)), and a further provision to the effect that

> "Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends."

40. We were shown how these provisions were not contained in the Human Rights Bill as it was first presented to Parliament. They reflected Parliament's decision during the passage of that Bill to use it as a vehicle for abolishing the death penalty for disciplinary offences committed by British servicemen anywhere in the world. The United Kingdom did not in fact ratify the Sixth Protocol to the ECHR (which is concerned with the mandatory abolition of the death penalty except in time of war or imminent threat of war) until the spring of 1999, and in June 2004 the HRA was amended so as to substitute Article 1 of the Thirteenth Protocol (which addresses the complete abolition of the death penalty) among the Convention rights protected by s 1(1): see para 32 above.

41. Mr Sales argued that if Parliament had wished the HRA to have extra-territorial effect in those situations in which Strasbourg jurisprudence will find member states to have violated the Convention in connection with acts or omissions on their part outside their national territory, it would have made express provision to that effect in accordance with the practice set out in *Bennion* (see para 37 above).

42. His arguments, however, involved interpreting the words "United Kingdom" as referring in some parts of the Act as a geographical place and in other parts as a juristic entity. He would interpret the phrase "*in relation to* the United Kingdom" as meaning "*in* the United Kingdom" as a geographical place in ss 1(4) and 1(6) and in the definition of "the Convention" in s 21(1). It clearly refers to a geographical place in s 11(a) ("in any part of the United Kingdom"). On the other hand, he accepts that

in s 1(5) (a) and (b) the words refer to the United Kingdom as a juristic entity capable of ratifying the Convention.

43. He also observed that the obligation in s 3(1) to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights refers only to the essentially national legislation set out in the definitions contained in s 21, and not to legislation having effect in overseas territories. The statutory provisions relating to declarations of incompatibility in s 4 are similarly confined. He relied, too, on the language of s 11(a) (see para 33 above) which is concerned only with preserving rights or freedoms conferred by or under a law having effect in any part of the United Kingdom. We were shown, by way of example only, local human rights legislation in Jersey, Guernsey and the Isle of Man which in turn makes express provision for the existing rights or freedoms of the citizens of those islands.

44. It was an essential part of his argument that if the violation of the Convention right complained of occurred extra-territorially in one of the circumstances clearly embraced by existing ECHR jurisprudence (for instance, if it arose out of relevant decisions made within a British embassy or consulate overseas) the victim could not make a complaint to a British court under s 7 of the HRA. He or she could only obtain redress in Strasbourg.

45. I will inevitably have to consider the ways in which the ECtHR has held that the ECHR has extra-territorial effect (see paras 47-109 below), but I must first note the existence of two recent judicial dicta that tend to suggest that the HRA does have extra-territorial effect in those circumstances. In *R (B) v Foreign Secretary* [2004] EWCA Civ 1344; [2005] QB 643 (DC 308-317), Lord Phillips MR, giving the judgment of a division of this court which included Chadwick LJ and Lord Slynn of Hadley, said at para 79, after an extensive review of relevant case-law:

> "For these reasons we have reached the conclusion that the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction has been defined by the Strasbourg court. It follows that the Human Rights Act 1998 was capable of applying to the actions of the diplomatic and consular officials in Melbourne."

46. And in *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57 at [33]-[34] Lord Nicholls said of the HRA:

> "33 … The purpose of the Act, as stated in its preamble, was 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. In colloquial terms, the Act was intended to 'bring rights home'. The Act was to provide a means whereby persons whose rights under the Convention were infringed by the United Kingdom could, in future, have an appropriate remedy available to them in the courts of this country. Persons who were victims of a violation of a Convention

right within the meaning of article 34 of the Convention need no longer travel to Strasbourg to obtain redress.

34. To this end the obligations of public authorities under sections 6 and 7 mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention and its protocols. That was the object of these sections. As my noble and learned friend Lord Hope of Craighead has said, the 'purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention': *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 564, para 44. Thus, and this is the important point for present purposes, *the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg.*" (Emphasis added).

47. It will now be convenient to turn to consider, in Lord Nicholls' words, the territorial scope of the obligations of the United Kingdom and the rights of victims under the ECHR. In this respect there was a good deal of agreement between the parties. After identifying the areas in which the ECHR may have extra-territorial effect, I will then return to the question whether the HRA can have extra-territorial effect in any circumstances.

6. When does the ECHR have extra-territorial effect?

48. It was common ground that the jurisdiction of a contracting state is essentially territorial, as one would expect. It was also common ground that:

i) If a contracting state has effective control of part of the territory of another contracting state, it has jurisdiction within that territory within the meaning of Article 1 of the ECHR, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention";

ii) If an agent of a contracting state exercises authority through the activities of its diplomatic or consular agents abroad or on board craft and vessels registered in or flying the flag of the state, that state is similarly obliged to secure those rights and freedoms to persons affected by that exercise of authority.

49. During the course of the hearing the first of these categories was described by a convenient shorthand as "ECA" (effective control of an area) and the second "SAA" (state agent authority). In *Bankovic v Belgium* (2001) 11 BHRC 435 the EC[t]HR said in connection with SAA that customary international law and treaty provisions had recognised the extra-territorial exercise of jurisdiction by the relevant state in the

specific situations listed in (ii) above. It did not regard that list as all-inclusive: indeed in the earlier case of *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 (see DC 158-163) the court had contemplated that if a French judge exercised jurisdiction extra-territorially in the state of Andorra in his capacity as a French judge, then if someone in Andorra complained that in that capacity the judge had violated his or her Convention rights, that person would be regarded as being within the jurisdiction of France (through the operation of the SAA doctrine)

50. So much is common ground. What is in issue is the question how if at all the doctrine of SAA may be applied to the activities of a state's armed forces outside its own territory (so as to fix it with having exercised jurisdiction within the meaning of Article 1 of the ECHR), particularly when such activities took place outside the territory of any of the countries that are members of the Council of Europe. It was also argued that at the relevant time the British armed forces had effective control of the parts of Basrah City in which the incidents occurred, and in that case the question in issue is whether the ECA doctrine applies at all outside the countries embraced by the Council of Europe (other than territories notified under Article 56 of the ECHR).

51. The Divisional Court discussed the relevant line of Strasbourg cases in the long passage in their judgment which begins at DC 127. For the purposes of this judgment it is not necessary at this stage to dwell on the rulings of the European Commission on Human Rights ("E Comm HR") in *X v Germany* (1965: see DC 128-9); *X v UK* (1977: see DC 144-5); *W v UK* (1983: see DC 149); or *WM v Denmark* (1992: see DC 167-9). Three of these cases are illustrations of the rule that extra-territorial activities of a state through its consulates or embassies abroad may bring the persons affected by them within the jurisdiction of that state through SAA principles in the event of a complaint that a Convention right has been breached. The fourth (*W v UK*) is illustrative of the proposition that the UK could not be held responsible in connection with a death in the Republic of Ireland because the deceased man was not within the jurisdiction of the UK at the time of his death within the meaning of Article 1 of the ECHR.

52. *Hess v UK* (1975: see DC 138), another admissibility decision, raised the possibility that if the agreement whereby Rudolf Hess was incarcerated in Spandau prison (which was situated in the British section of Berlin but was controlled by the four main World War II allied powers) had been concluded after the UK ratified the ECHR, this country might have attracted responsibility for alleged breaches of Articles 3 and 8 of the ECHR through the operation of the SAA doctrine. This is the only case to which our attention was drawn which raised the possibility of SAA responsibility in respect of an extra-territorial prison over which a member state exercised authority. This, incidentally, is not mentioned in the list of examples of exceptional situations noted by the EC^{t}HR in para 73 of its judgment in *Bankovic* (for which see DC 123 and para 77 below).

53. The Divisional Court cited one decision of the Commission (*X and Y v Switzerland*: 1977, see DC 141-3) and one decision of the EC^{t}HR (*Drozd and Janousek v France and Spain* (1992, see DC 158-163) which were concerned with incidents arising out of the ancient relationships between Switzerland and Liechtenstein on the one hand and Andorra and two co-princes (in France and Spain respectively) on the other at a time when neither Liechtenstein nor Andorra were member states of the Council of Europe. Neither case raised issues for decision whose resolution casts any useful light

on the question we have to decide. In *X and Y* the relevant decision was taken by the Swiss authorities in Switzerland (although it had effects in Liechtenstein by virtue of a treaty between the two countries), so that jurisdiction existed "*ratione loci*". In *Drozd* the relevant decision was taken by a French or Spanish judge sitting in Andorra in their capacity as a judge of Andorra, so that neither France nor Spain could be said to be exercising extra-territorial jurisdiction.

7. The line of cases concerned with northern Cyprus

54. The cases on which Mr Rabinder Singh QC, who appeared for the claimants, placed particular weight come from a line of Commission decisions relating to the dispute between Cyprus and Turkey about the treatment of Greek Cypriots in the north of Cyprus (or of Greek Cypriots who owned property in that part of Cyprus) following the Turkish invasion in July 1974. Turkey did not accede to the arrangements whereby individual petitioners might complain to the court about its conduct until 1987, so that all the pre-1987 material consists of admissibility decisions on complaints made by Cyprus against Turkey and the subsequent reports by the Commission to the Council of Ministers. At all material times both Cyprus and Turkey were member states of the Council of Europe.

55. The story begins with the Commission's admissibility ruling in *Cyprus v Turkey* in May 1975 (see DC 130-137). Turkey was arguing at that time that she had not extended her jurisdiction to the island of Cyprus because she had neither annexed a part of the island nor established a military or civil government there. She maintained that the administration of the Turkish Cypriot community had absolute jurisdiction over part of the island.

56. The Commission rejected these submissions in a passage which represents the first clear statement of SAA responsibility that is to be found in Strasbourg jurisprudence. The Divisional Court has set out all the material parts of para 8 of the Commission's decision at DC 133 and 135. It is sufficient for present purposes that it described the ambit of the SAA doctrine in these terms (see DC 135):

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

57. In para 10 of its decision the Commission set out the terms of reference of its future inquiry as necessitating an examination whether Turkey's responsibility under the Convention was engaged

> "because persons or property in Cyprus have in the course of her military action come *under her actual authority and responsibility at the time."* (Emphasis added)

It went on to describe how Turkey had accepted that her armed forces had entered the island of Cyprus operating solely under the direction of the Turkish government and under established rules governing their structure and command (including the establishment of military courts). It concluded:

> "It follows that these armed forces are authorised agents of Turkey and that they bring any other persons or property in Cyprus 'within the jurisdiction' of Turkey, in the sense of Art. 1 of the Convention, to the extent that they exercise control over such persons or property. Therefore, insofar as these armed forces, by their acts or omissions affect such persons' rights or freedoms under the Convention, the responsibility of Turkey is engaged."

58. In its subsequent report on these applications by Cyprus (1976) 4 EHRR 482 the Commission applied the test of "control" over persons or property in Cyprus as founding Turkey's jurisdiction within the meaning of Article 1 (see para 83 of the report and DC 137). Thus when it found that persons who had been confined in detention centres, or in the Dome Hotel, Kyrenia (after the full control of that hotel had passed to the Turkish military authorities), or in private residences attached to detention centres, were all under the actual control of the Turkish army, or under the command of Turkish army officers and guarded with the assistance of Turkish soldiers (see paras 279-283), it concluded that their confinement in breach of Article 5(1) of the ECHR was imputable to Turkey (see paras 285-288). The Commission went on to use the test of "actual control" in para 307 in relation to other detainees and prisoners. In relation to complaints of killings and rapes and other alleged violations of the Convention, the Commission held Turkey responsible if the victims were at the material time under Turkey's "actual authority and responsibility", or if the violations complained of were the direct responsibility of Turkish troops (see, for example, paras 350, 373 and 393).

59. In July 1978 the Commission made an admissibility decision on a new application by Cyprus relating to events in the north of the island ((1978) 21 Yearbook of the European Convention on Human Rights 100). Turkey now accepted (see para 18) that Article 1 of the ECHR might have extra-territorial effect in those areas outside a member state's national territory which were under the effective control of the government of that state (the ECA test), but she contended that the north of Cyprus was under the exclusive jurisdiction of an entity known as the Turkish Federated State. In considering the merits of this argument the Commission used the same language in paras 19-20 as it had used in para 8 of its 1975 decision (see para 56 above). Member states were bound to secure the Convention rights and freedoms to "all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad". The "control" test was just one way of conducting the necessary inquiry when complaint was made about military action abroad (see para 21). By this time the *Hess v UK* and *X and Y v Switzerland* rulings were also available. The Commission rejected the "Turkish Federated State" argument on the basis that the recognition of that entity by Turkey did not affect the continuing existence of the republic of Cyprus as a single state, so that it could not be regarded as an entity which exercised jurisdiction over any part of Cyprus.

60. In its subsequent 1983 report on the merits of this application ((1992) 15 EHRR 509) the Commission contented itself (at paras 63-65) with summarising the effect of what it had said about jurisdiction in its admissibility decision and set out to "confine its investigation essentially to acts and incidents for which Turkey, as a High Contracting Party, might be held responsible". For its conclusions on the various complaints, see paras 123, 135-6 and 153-5.

61. In *Chrystostomos and Others v Turkey* (1991, DC 155-7) the Commission made admissibility rulings in relation to three different applicants. They included Titina Loizidou. She complained that she had been denied access to her property in north Cyprus by the activities of Turkish forces and persons acting under their authority. The Commission applied the SAA doctrine set out in its earlier rulings relating to north Cyprus when it declared her complaint admissible in so far as the matters complained of post-dated 29th January 1987, when Turkey first permitted petitions by individuals to the Strasbourg court.

62. In *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99 (DC 170-173) the ECtHR was itself concerned for the first time with the situation in northern Cyprus when it considered Turkey's preliminary objections in this matter. One of Turkey's preliminary objections was that the matters complained of did not fall within Turkish jurisdiction but within that of the Turkish Republic of Northern Cyprus ("TRNC").

63. In para 62 of its judgment the Court set out three different routes by which matters are capable of falling within the "jurisdiction" of a member state even though they occur outside its national territory:

    i) The extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3 and hence engage the responsibility of that state under the ECHR (see *Soering v UK* (1989) 11 EHRR 439, para 91);

    ii) The responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national bodies, which produce effects outside their own territory (*Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, para 91);

    iii) The responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.

64. We are not concerned on this appeal with the first of these propositions, which has featured in a number of recent decisions of the House of Lords in asylum cases: *Soering* itself is summarised at DC 150-152. The second proposition is a restatement of SAA principles. The third proposition was based on arguments that called on relevant principles of international law, and this was the first occasion when the ECA doctrine of responsibility had been clearly articulated in the jurisprudence of the Court. The argument ran that a state was in principle accountable internationally for violations of rights that occurred in territories over which it had physical control, and that international law recognised that a state which was thus accountable with respect to a certain territory remained so even if the territory was administered by a local administration (see the text and footnotes on p 129 of the report). It was also argued that to apply a criterion of responsibility which required (on the application of the

SAA doctrine) the direct intervention of Turkish military personnel in respect of each *prima facie* violation of the ECHR in northern Cyprus would be wholly at variance with the normal mode of applying the principles of State responsibility recognised by international law.

65. The Court clearly accepted these submissions when it said (at para 62):

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

66. Given that this was the approach of the Court it is hardly surprising that the Commission decided to adopt it when it gave its admissibility ruling in relation to a new application by Cyprus against Turkey in relation to events in northern Cyprus ((1996) EHRR 244: DC 177-180). It rejected arguments by Turkey to the effect that international responsibility coincided with territorial jurisdiction where it was exercised on a State's own national territory and that responsibility for any exercise of extra-territorial jurisdiction was exhaustively regulated within what is now Article 56 of the ECHR. Turkey had called in aid the fact that in its earlier decisions the Commission had held her responsible on the basis of personal jurisdiction exercised by her agents outside her national territory (*viz* by the doctrine of SAA responsibility) and submitted, unsuccessfully, that in the case of exercise of such personal jurisdiction it was necessary to prove in each case the causal link between the action of a State official and the alleged facts (see pp 270-1 for Turkey's arguments).

67. In *Loizidou v Turkey (Merits)* (1997) 23 EHRR 513 (DC 175) the EC^{t}HR applied to the facts of the case the tests it had propounded in its earlier judgment on preliminary objections. The court found (at para 56) that it was unnecessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC. It was obvious from the fact that more than 30,000 Turkish military personnel were engaged in active duties in northern Cyprus that her army exercised effective control over that part of the island. Such control entailed her responsibility for the policies and actions of the TRNC. Those affected by such policies or actions (including the applicant) therefore came within the "jurisdiction" of Turkey for the purposes of Article 1 of the ECHR.

68. The judgments of the Court in the *Loizidou* case were available to the Commission when it prepared its Opinion and Report on the merits in the third *Cyprus v Turkey* application: see (2001) 35 EHRR 731 at pp 772-964. It observed (at C96) that in its earlier reports it had examined the question of imputability separately in relation to each of Cyprus's complaints on the basis of actual involvement of Turkish authorities or officers. In this context it had distinguished between acts of Turkish military forces (and other Turkish authorities) on the one hand and acts of Turkish Cypriot authorities on the other, the latter not being imputed to Turkey. The Commission now considered that these distinctions could not be maintained, and that it was bound to

follow the decision of the Court in paragraph 56 of its Merits judgment in *Loizidou* (see para 67 above).

69. In its judgment in this case, delivered on 10th May 2001 (DC 183-186) the EC[t]HR repeated the material parts of its merits judgment in the *Loizidou* case, and continued (at paras 77-78):

> "77. It is of course true that the court in the *Loizidou v Turkey* case was addressing an individual's complaint concerning the continuing refusal of the authorities to allow her access to her property. However, it is to be observed that the court's reasoning is framed in terms of a broad statement of principle as regards Turkey's general responsibility under the convention for the policies and actions of the TRNC authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of art 1 of the convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the convention and those additional protocols which she has ratified, and that violations of those rights are imputable to Turkey.
>
> 78. In the above connection, the court must have regard to the special character of the convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in art 19 of the convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties' (see *Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99 at para 93). Having regard to the applicant government's continuing inability to exercise their convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the convention's fundamental safeguards and their right to call a high contracting party to account for violation of their rights in proceedings before the court."

8. Bankovic v Belgium

70. It was against this background that a Grand Chamber of the EC[t]HR was, unusually, convened in December 2001 to determine the admissibility of the applicants' claims in *Bankovic v Belgium & Others* (2001) 11 BHRC 435. The claims, under Articles 2, 10 and 13 of the ECHR, arose from the bombing by NATO forces of a building in Belgrade occupied by Radio Television Serbia which caused the deaths or injuries around which the case revolved. The Federal Republic of Yugoslavia ("FRY") was not a member state of the Council of Europe, unlike the 17 other European states who were identified as respondents to the applications.

71. We have been shown the written observations addressed to the court by the United Kingdom which evidence a lively concern about the effect of the SAA doctrine being extended to the effects of military action by any of the 43 contracting parties to the ECHR anywhere in the world. Examples were given of military actions which affected the inhabitants of Iraq during the Gulf conflict, or the inhabitants of Lebanon, Angola, Somalia, Rwanda and East Timor (to list only a few examples of military operations carried out in exercise of the inherent right of self-defence recognised in Article 51 of the UN Charter or in the context of UN enforcement actions or UN or other forms of peacekeeping). On the other hand the ECtHR noted (see *Bankovic*, paras 36-37) that the respondent governments had accepted that jurisdiction could arise from the assertion or exercise of legal authority (actual or purported) over persons who had been brought within a contracting state's control, and that the arrest and detention of persons outside the territory of that state constituted a classic exercise of such legal authority or jurisdiction by military forces on foreign soil.

72. The Divisional Court analysed the effect of the *Bankovic* judgment very carefully and cited a number of passages from it (see DC 117-126, 190-1 and 210). At DC 190 that court said:

> "(1) that it was in *Bankovic* for the first time that the Court examined the question of Article 1 jurisprudence in the context of the background and underpinnings of international law;
>
> (2) that it was in *Bankovic* similarly for the first time that the Court found assistance in the ECHR's own travaux préparatoires on Article 1;
>
> (3) that the essential question posed in *Bankovic* was the one considered by it in *Loizidou*, namely whether the applicants were "capable of falling within" the jurisdiction of the respondent states (see *Bankovic* at para 54);
>
> (4) that it was in *Bankovic* for the first time that Article 1 jurisdiction was pronounced to be "essentially territorial" – albeit the Court was able to cite (even though in reaching its conclusion it had not based its reasoning on) its own reference in *Soering* to the "notably territorial" limit set by Article 1 (see *Bankovic* at para 66);
>
> (5) that, while the citation of previous examples of the extra-territorial reach of Article 1 jurisdiction is expressed for the most part in terms of possibilities, the Court's own recognition of the exercise of extra-territorial jurisdiction by a contracting state is described as "exceptional" and limited to the case of the "effective control of the relevant area" (at para 71);
>
> (6) that otherwise the recognised instances (essentially of the Commission) of extra-territorial exercise of jurisdiction were in cases involving "the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag, of that state", situations where customary

international law recognised a state's extra-territorial exercise of jurisdiction (at para 73);

(7) that in an important and general passage towards the end of its judgment (at paras 79-80) the Court emphasised the essentially regional context of the ECHR and its aims and stated that, subject to the express case of extension pursuant to Article 56, the ECHR was not designed to be applied throughout the world even in respect of the conduct of state parties, and thus in effect warned that the purpose of the ECHR, its "*ordre public* objective", should not be used to universalise its aims or to stretch its reach outside its own "legal space" or "*espace juridique*";

(8) that in the context of that general philosophy the Court stressed that its own 2001 judgment in *Cyprus v. Turkey* in referring to "a regrettable vacuum" was not directed to universalist ambitions for the Convention but to the "entirely different situation" where otherwise the inhabitants of northern Cyprus would have found themselves excluded from the benefits of the Convention which they had previously enjoyed; and

(9) that the Court reasoned that the rights and freedoms under Articles 2 and 3 could not be separated from those under the Convention as a whole (at para 75)."

73. And the Divisional Court went on to express its conclusions on the effect of the *Bankovic* judgment (at DC 259-260) after it had reviewed the effect of Strasbourg jurisprudence up to the date of that judgment:

"259. It is in these circumstances that *Bankovic v. United Kingdom* was decided. We refer to what we have said about it at para 190 above. In our judgment, Mr Greenwood is correct to call it a watershed. It was the first time that the theoretical and international law underpinnings of the doctrine of article 1 jurisdiction had been considered. A succession of cases in the immediately preceding years had perhaps come to demonstrate that a broad and thus potentially world-wide approach to the extra-territorial exercise of personal authority or jurisdiction did not lie happily with the regional scope of the Convention itself. These matters had begun to be considered in the cases on article 56 (*Tyrer, Thanh* and *Yonghong*), but also in *Soering*, as well as in the more recent of the northern Cyprus cases. The significance of that regional scope, of the European public order, of the legal space or *espace juridique*, could now be seen to have both an exclusive and an inclusive dimension. It was exclusive in the sense that it demonstrated that the Convention set a legal order for Europe where a common heritage was enjoyed, not for the world (see *Soering* at para 88, *Bankovic* at para 66). It was inclusive, however, in that within the European

> sphere there was need of particular care to ensure that the Convention standards were preserved (*Cyprus v. Turkey* (2002) at para 78, *Bankovic* at 80).
>
> 260. It also followed from the essentially territorial aspect of article 1 jurisdiction, that the broadest statements in the earlier cases could not survive as a driving force for the extension of article 1 jurisdiction to anywhere in the world where organs of state parties might exercise authority. In the circumstances the earlier cases were rationalised in *Bankovic* more narrowly as exceptional examples supported by international law and treaty provisions, such as "the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of the state" (*Bankovic* at para 73)."

74. While I would not be disposed to describe it as a "watershed", the importance of the *Bankovic* decision is that the Court returned to what I have called elementary principles of public international law (see para 3 above) in order to identify the meaning of the word "jurisdiction" in Article 1. At paras 59-63 the Court said in this context:

> "59. As to the 'ordinary meaning' of the relevant term in art 1 of the convention, the court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states (Mann 'The Doctrine of Jurisdiction in International Law' RdC 1964, vol 1; Mann 'The Doctrine of Jurisdiction in International Law, Twenty Years Later' RdC 1984, vol 1; Bernhardt *Encyclopaedia of Public International Law* edition 1997, vol 3, pp 55–59 'Jurisdiction of States' and edition 1995, vol 2, pp 337–343 'Extra-territorial Effects of Administrative, Judicial and Legislative Acts'; *Oppenheim's International Law* (9th edn, 1992), vol 1, para 137; Dupuy *Droit International Public* (4th edn, 1998), p 61; and Brownlie *Principles of International Law* (5th edn, 1998), pp 287, 301 and 312–314).
>
> 60. Accordingly, for example, a state's competence to exercise jurisdiction over its own nationals abroad is subordinate to that state's and other states' territorial competence (Higgins *Problems and Process* (1994) p 73 and Nguyen Quoc Dinh *Droit International Public* (6th edn, 1999), p 500). In addition, a state may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence, unless the former is an occupying state in which case it can be found to exercise jurisdiction in that territory, at least in certain respects (Bernhardt *Encyclopaedia of Public International Law*

edition 1997, vol 3, pp vol 3, p 59 and edition 1995, vol 2, pp 338–340; *Oppenheim's International Law* (9th edn, 1992), vol 1, para 137; Dupuy *Droit International Public* (4th edn, 1998), pp 64–65; Brownlie *Principles of International Law* (5th edn, 1998), p 313; Cassese *International Law* (2001) p 89; and, most recently, the 'Report on the Preferential Treatment of National Minorities by their Kin-States' adopted by the Venice Commission at its 48th Plenary Meeting, Venice, 19–20 October 2001).

61. The court is of the view, therefore, that art 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 (see, mutatis mutandis and in general, Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, 'Extraterritorial Criminal Jurisdiction', Report published in 1990, pp 8–30).

62. The court finds state practice in the application of the convention since its ratification to be indicative of a lack of any apprehension on the part of the contracting states of their extra-territorial responsibility in contexts similar to the present case. Although there have been a number of military missions involving contracting states acting extra-territorially since their ratification of the convention (inter alia, in the Gulf, in Bosnia and Herzegovina and in the FRY), no state has indicated a belief that its extra-territorial actions involved an exercise of jurisdiction within the meaning of art 1 of the convention by making a derogation pursuant to art 15 of the convention. The existing derogations were lodged by Turkey and the United Kingdom in respect of certain internal conflicts (in south-east Turkey and Northern Ireland, respectively) and the court does not find any basis upon which to accept the applicants' suggestion that art 15 covers all 'war' and 'public emergency' situations generally, whether obtaining inside or outside the territory of the contracting state. (The United Kingdom has withdrawn its derogation as of 26 February 2001, except in relation to Crown Dependencies. Turkey reduced the scope of its derogation by communication to the Secretary General of the Council of Europe dated 5 May 1992.) Indeed, art 15 itself is to be read subject to the 'jurisdiction' limitation enumerated in art 1 of the convention.

63. Finally, the court finds clear confirmation of this essentially territorial notion of jurisdiction in the travaux preparatoires which demonstrate that the expert intergovernmental committee replaced the words 'all persons residing within their territories' with a reference to persons 'within their jurisdiction' with a

> view to expanding the convention's application to others who may not reside, in a legal sense, but who are, nevertheless, on the territory of the contracting states (para 19, above)."

The relevance of state practice in this context is that Article 31(3)(b) of the Vienna Convention on the Law of Treaties permits the subsequent practice of the parties to a treaty to be used as an aid to the interpretation of its meaning.

75. I accept as correct items (1) to (4) of the Divisional Court's analysis of *Bankovic*. In para 71 of the *Bankovic* judgment the EC^{t}HR said, by way of a summary of what had gone before:

> "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."

76. This passage, which is an echo of para 60 of the same judgment, clearly identifies the principle that the exercise of extra-territorial jurisdiction customarily represents a violation of the sovereignty of the state in which it is exercised. This problem will not occur when the government of that state has consented to another state having effective control of any part of its territory (and of its inhabitants) or has invited the other state to exercise this control. The Court also envisaged such control being exercised as a consequence of military occupation or through the acquiescence of the host state in what is likely to have been a fait accompli. Subject to this gloss, I accept item (5) of the Divisional Court's analysis.

77. In para 73 of the *Bankovic* judgment the EC^{t}HR summarised the other exceptions to the essentially territorial nature of a state's jurisdiction in these terms:

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

78. This passage is a restatement of the principles of public international law I have recited in para 3 above, and subject to the gloss that the Court never intended these examples to be all-inclusive, I accept item (6) of the Divisional Court's analysis.

79. I find items (7)-(9) of that analysis more problematic. Paras 79-80 of the *Bankovic* judgment occur in a passage in which the Court is applying the principles it set out in paras 71 and 73 to the arguments being advanced by the applicants in that case. Their fifth and final argument was to the effect that any failure by the Court to accept that

they fell within the jurisdiction of the respondent states would defeat the *ordre public* mission of the ECHR and leave a regrettable vacuum in the ECHR system of human rights' protection. It was in that context, and that context only, that the Court was anxious to emphasise the essentially regional context of the Convention. If a member state was not fixed with having exercised extra-territorial jurisdiction by a route recognised by the principles set out in paras 71 and 73, this argument could not avail the present applicants, because the FRY, unlike Turkey, was not a member state of the Council of Europe.

80. I would therefore be more cautious than the Divisional Court in my approach to the *Bankovic* judgment. It seems to me that it left open both the ECA and SAA approaches to extra-territorial jurisdiction, while at the same time emphasizing (in para 60) that because a SAA approach might constitute a violation of another state's sovereignty (for example, when someone is kidnapped by the agents of a state on the territory of another state without that state's invitation or consent), this route to any recognition that extra-territorial jurisdiction has been exercised within the meaning of an international treaty should be approached with caution.

81. Viewed in this light, the Court's conclusion in *Bankovic* was fairly inevitable. It was not a case in which it could possibly be said that the NATO forces were in effective control of the relevant area when they bombed the television station in Belgrade. What was in issue on the applicants' arguments was whether, because the bombing was NATO's direct act, any of the states involved in the bombing could be said to have exercised Article 1 jurisdiction over any of the citizens of the FRY who were affected by it, and the court ruled out this possibility in para 71 of its judgment. I do not read the judgment as excluding the possibility that if a person is in the custody or control of the agents of a member state (whether they be military personnel or police officers) that state may not be fixed with having exercised jurisdiction over that person *ratione personae*, particularly if, like the British army in Iraq, those agents form part of an occupying force in the eyes of international law. This question did not arise for decision in *Bankovic.* On the other hand, I consider that the attempt by the claimants to rely on some of the conclusions reached by the Commission on SAA grounds in its 1976 *Cyprus v Turkey* report (see para 58 above) as authority for the proposition that the citizens of Basrah City came within the jurisdiction of the UK simply because they were affected by the activities of the street patrols, without more, as being authoritatively refuted by *Bankovic.*

9. Decisions of the Court following Bankovic

82. *Gentilhomme v France* [2002] ECHR 48205/99 (at para 20) is an early example of the EC[t]HR applying the principles it had set out in *Bankovic* at paras 59-62 to a case in which extra-territorial jurisdiction was alleged. In *Assanidze v Georgia* [2004] ECHR 71503/01, the court set out the *Bankovic* ground rules again at para 137 and then added (at para 138):

> "In addition to the State territory proper, territorial jurisdiction extends to any area which at the time of the alleged violation, is under the 'overall control' of the State concerned (*Loizidou v Turkey (preliminary objections)* judgment of 23 March 1995, Series A No 210), notably occupied territories (*Cyprus v*

> *Turkey* [2001] ECHR 25781/94), to the exclusion of areas outside such control."

83. This formulation appears to allow no room for the doctrine of SAA to fix a state with extra-territorial jurisdiction in relation to its military activities in areas in which it does not have overall control. This is reflected, too, in the way the court explained (at paras 146-7) the obligations of a state in a territory in which it does have jurisdiction:

> "146. Further, the Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; it also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels (*Ireland v UK*, judgment of 18 January 1978, Series A no 25, pp 90-91, para 239). The higher authorities of the State are under a duty to require their subordinates to comply with the Convention and cannot shelter behind their inability to ensure that it is respected (ibid, p 64, para 159).
>
> 147. ...The general duty imposed on the State by art 1 of the Convention entails and requires the implementation of a national system capable of securing compliance with the Convention throughout the territory of the State for everyone. That is confirmed by the fact that, firstly, art 1 does not exclude any part of the member States' 'jurisdiction' from the scope of the Convention and, secondly, it is with respect to their 'jurisdiction' as a whole – which is often exercised in the first place through the Constitution – that member States are called on to show compliance with the Convention (*United Communist Party of Turkey and Others v Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp 17-18, para 29)."

84. *Ilascu v Moldova* [2004] ECHR 48787/99 (DC 196-200) was a case which raised issues similar to those raised by the Turkish occupation of northern Cyprus. It was another dispute involving two contracting states, and was concerned with issues arising out of the status of secessionist territory in Moldova called the Moldovian Republic of Transdniestria, which had been set up in 1991-2 with the support of the Russian Federation. The question at issue was whether Russia or Moldova or both were responsible for alleged breaches of the ECHR in that territory. After repeating (at para 312) the ground rules established in *Bankovic* and applied in *Gentilhomme* and *Assanidze*, the Court restated the principles whereby a state may be fixed with responsibility under the Convention in respect of extra-territorial military activities:

> "314. … The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory or which produce effects there may amount to exercise by them of their jurisdiction within the meaning of art 1 of the Convention.

> According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action – whether lawful or unlawful – it in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration [*Loizidou v Turkey (Merits) para 52*].
>
> 315. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned (*ibid*, ..., para 56).
>
> 316. Where a Contracting State exercises overall control over an area outside its national territory its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support (see *Cyprus v Turkey*, [2001] ECHR 25781/94, para 77)."

85. It is noteworthy that both in the judgment of the court and in Sir Nicolas Bratza's partly dissenting opinion, in which he repeats these principles in his own words at para 5, there is no trace of the doctrine of SAA responsibility attaching to extra-territorial military activities in the absence of effective control of the relevant area. This is the pure ECA doctrine of extra-territorial jurisdiction.

86. In *Issa v Turkey* [2004] ECHR 31831/96: DC 202-8; 217-8) the Court had accepted that the applicants' complaints were admissible in a ruling given before the *Bankovic* judgment. The issue in this case was whether extra-territorial jurisdiction existed in relation to allegations that Turkey had committed breaches of ECHR rights in connection with the deaths of Iraqi shepherds who had allegedly been killed by Turkish soldiers in northern Iraq.

87. In ruling that the question of jurisdiction raised a live issue in the case the Court reminded itself (at para 55) that Turkey had at all times denied the factual basis of the applicants' allegations and, by implication, their specific and crucial contention that the deceased shepherds were under the control and authority of Turkish armed forces operating in northern Iraq at the relevant time and were, accordingly, within the jurisdiction of Turkey.

88. The argument of the Turkish Government on the jurisdiction issue (see paras 56-61) picked up the Court's conclusion in *Bankovic* that the ECHR was a treaty operating in an essentially regional context. Turkey asserted that the mere presence of Turkish armed forces in northern Iraq for a limited time and for a limited purpose was not synonymous with Article 1 "jurisdiction". Turkey did not exercise effective control of any part of Iraq. In any event no Turkish soldiers had been present in the relevant area.

89. The applicants, on the other hand, maintained (at paras 62-64) that Turkey's ground operations in northern Iraq at the time (when they were deploying more than 35,000 ground troops backed by tanks, helicopters and F-16 fighter aircraft) were sufficient to constitute "effective overall control" (within the meaning of the *Loizidou* judgment). Given the degree of control enjoyed by the Turkish armed forces of the area, they argued that the Turkish government had *de facto* authority over northern Iraq and its inhabitants, as opposed to *de jure* sovereignty.

90. The importance of the judgment of the EC[t]HR in *Issa* is that when it set out the governing principles (at paras 65-71) it went one step further than it had done in *Bankovic*, *Gentilhomme*, *Assanidze* or *Ilascu*. It started by reminding itself (at para 67) that the concept of "jurisdiction" for the purposes of Article 1 of the ECHR had to be considered to reflect the term's meaning in public international law. Then after setting out (at paras 68-70) what was by now a familiar restatement of ECA principles, the court continued (at para 71):

> "71. Moreover, a state may also be held accountable for violation of the convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state (see, mutatis mutandis, *M v Denmark* (1992) 15 EHRR CD 28; *Illich Sanchez Ramirez v France* (1996) 86 DR 155; *Coard v US* (1999) 9 BHRC 150 at paras 37, 39, 41 and 43; and the views adopted by the Human Rights Committee on 29 July 1981 in the cases of *Lopez Burgos v Uruguay* (no 52/1979) (29 July 1981) at para 12.3 and *Celiberti de Casariego v Uruguay* (no 56/1979) (29 July 1981) at para 10.3 respectively). Accountability in such situations stems from the fact that art 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 ([1996] ECHR 15318/89)."

91. Although this was not a decision of a Grand Chamber, the seven-judge court contained three members of the court which had decided the *Bankovic* case (Judges Costa, Baka and Thomassen) and this appears to be an unequivocal statement of SAA responsibility in a military context, if the requisite facts are proved, even where the contracting states' agents are operating outside the *espace juridique* of the Council of Europe. (Compare the wide statement of principle by Lord Steyn in *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [29]; [2004] 2 AC 323). I do not consider that it is open to us to consider that *Issa* was wrongly decided, as Mr Greenwood suggests, since it reflects a long line of Strasbourg jurisprudence to similar effect. The fact that the "impact" theory of jurisdiction was rejected by the Court in *Bankovic* does not mean that the Court could not legitimately consider caselaw drawn from other human rights systems when testing whether its approach was consonant with international law more generally (for which see para 3 above). And the fact that the ECHR makes specific provision (by Article 56) for the responsibility of a contracting state to be extended to its dependent territories (subject to local requirements) does not appear to me to afford any good reason for holding that a contracting state should

not also be fixed with having exercised extra-territorial jurisdiction in the very limited range of situations covered by the SAA exceptions to the general rule.

92. In its application of the governing principles to the facts of the case, the Court said (at para 72):

> "In the light of the above principles the Court must ascertain whether the applicants' relatives were under the authority and/or effective control, and therefore within the jurisdiction, of the respondent State as a result of the latter's extra-territorial acts."

This is SAA, not ECA, language.

93. At paras 73-75 the Court declined to make a finding that at the relevant time Turkey exercised effective overall control of the entire area of northern Iraq. In contrast to the position in northern Cyprus, the 30,000 Turkish troops were only in northern Iraq for a six-week period. They were not stationed throughout the whole of that territory, did not conduct constant patrolling of the area, and did not have check-points on all the main lines of communication between northern and southern Iraq. The cross-border operation, although extensive, was aimed at pursuing and eliminating terrorists who were seeking shelter in northern Iraq.

94. After thus declining to make an ECA finding against Turkey on the facts of the case, the Court then continued (at para 76):

> "The essential question to be examined in the instant case is whether at the relevant time Turkish troops conducted operations in the area where the killings took place."

95. On the facts the Court was not satisfied beyond reasonable doubt that Turkish armed forces did conduct operations in the area in question (see paras 76-81) but the Court's language can only be interpreted as meaning that if it had concluded that the presence of Turkish troops was such as to mean that the applicants' relatives were under the authority and control of those troops, notwithstanding that they did not have effective control of the entire area, then it would have been willing to find that they were within the jurisdiction of Turkey on SAA grounds notwithstanding that Iraq is not within the *espace juridique* of the contracting states.

96. The importance of this judgment is that:

i) For ECA purposes, the Court showed itself willing to find that complainants were within the jurisdiction of a contracting state, notwithstanding that they were physically in a country outside the *espace juridique* of the contracting states (see para 74);

ii) For SAA purposes, the court was willing to apply a principle it derived not only from Strasbourg decisions but from decisions in different areas of public international law, to the effect that a State might be held accountable extra-territorially for violation of the ECHR rights and freedoms of persons who were found to be under its authority and control through its agents operating in

a different State, on the grounds that Article 1 could not be interpreted so as to allow a State party to perpetrate violations of the ECHR on the territory of another State which it could not perpetrate on its own territory (see paras 67 and 71).

10. The caselaw relied on by the Court in Issa v Turkey: Ocalan v Turkey

97. The Court cited five cases in support of the proposition contained in para 71 of its judgment, two from Strasbourg jurisprudence, one from the jurisprudence of the Inter-American Commission on Human Rights, and two (which set out identical propositions) from the jurisprudence of the UN Human Rights Committee. In *Bankovic* the Court had earlier made it clear (at para 78: see DC 210) that it had derived no assistance from the cases of *Lopez* and *Coard* (which are referred to below), but this was in a context in which it was responding to the very broad submissions by the applicants which are recited in paras 46-48 of that judgment.

98. In *WM v Denmark* [1992] ECHR 17392/90) the applicants had entered the Danish Embassy in East Germany as uninvited visitors. The ECommHR was willing to accept that Embassy officials were capable of exercising authority over them on SAA principles for the purposes of a finding of Article 1 jurisdiction, notwithstanding the fact that East Germany was not at that time within the *espace juridique* of the Council of Europe.

99. In *Illich Sanchez Ramirez v France* (24th June 1996, 86 DR 155: see DC 212) the applicant was arrested in Khartoum by Sudanese security forces and handed over to French police officers who escorted him to France in a French military aircraft. The ECommHR was willing to accept that he was effectively under the authority, and therefore the jurisdiction, of France on SAA principles, notwithstanding that this authority was being exercised abroad. Since this case was not concerned with diplomatic niceties concerned with the status of an embassy or consular premises, the fact that the French authorities took the applicant into their custody on Sudanese soil with the consent of the Sudanese authorities is a reason why this case can be distinguished from a case where what was done was done without the knowledge or consent of the state from whom the kidnapped person was taken.

100. In *Lopez v Uruguay* (1981) 68 ILR 29 (see DC 213) the UN Human Rights Committee was concerned with a case in which a citizen of Uruguay had been kidnapped in Argentina by Uruguayan security forces working with their Argentine counterparts. Article 2(1) of the ICCPR creates positive obligations on the part of a State Party towards “individuals within its territory and subject to its jurisdiction”, and at the material time Argentina was not a signatory to the ICCPR. The Committee was of the opinion that the phrase "individuals subject to its jurisdiction" was a reference "not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred" (para 12.2). It continued (at para 12.3):

> "In line with this, 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."

This case, and *Celiberti di Casariego v Uruguay* (1981) 68 ILR 41 (DC 214), a virtually identical case decided at the same time, show the Committee adopting an approach that was followed by the ECommHR in the *Ramirez* case.

101. It may be convenient at this stage to refer also to the way in which the UN Human Rights Committee has interpreted this aspect of the ICCPR in a very recent comment. In its General Comment No 31, which it adopted on 29th March 2004, it restated (at para 10) the relevant part of Article 2(1) and continued:

> "This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State party, even if not situated within the territory of that State party… This principle [of applicability to all individuals who may find themselves subject to the jurisdiction of the State Party] also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peace-keeping or peace-enforcement operation."

See also the Advisory Opinion of the International Court of Justice in the recent matter of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 9th July 2004) at paras 108 and 109.

102. Finally, in *Coard v United States* (Inter-Am CHR No 109/9, 29th September 1999: see DC 215-6) the Inter-American Commission on Human Rights was concerned with a case in which citizens of Grenada complained that they had been illegally detained and mistreated by the invading US forces who invaded their island. The Commission held that the United States was exercising extra-territorial jurisdiction for the purposes of the American Declaration of the Rights and Duties of Man (when read alongside Article 1 of the American Convention on Human Rights which contains positive obligations on the part of States Parties to all persons "subject to their jurisdiction"). It said:

> "37. While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination -- "without distinction as to race, nationality, creed or sex." Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While

> this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."

103. It appears, however, that the Inter-American Commission has never held that a state party to that declaration (or to the American Convention on Human Rights, to which the United States is not a party) is accountable for extra-territorial breaches outside the regional area covered by the parties to these instruments (see Christina M. Cerna's paper, *Extra-Territorial Application of the Human Rights Instruments of the Inter-American system* in the collection of papers on *Extra-Territorial Application of Human Rights Treaties* by *Coomens and Kamminga* (2004) at p 170).

104. In *Ocalan v Turkey* [2005] ECHR 46221/99) in a judgment post-dating the judgment of the Divisional Court (which had analysed the Court's original decision at DC 192-5), a Grand Chamber of the EC[t]HR was concerned with issues arising out of the arrest of the applicant on Kenyan soil. He had allowed himself to be taken by Kenyan officials to Nairobi airport in the belief that he was free to leave for a destination of his choice, but they took him to an aircraft in which Turkish officials were waiting for him and he was arrested after he had boarded the aircraft. The Court recorded without comment (at para 91):

> "It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of art 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in the cases of *Illich Ramirez Sanchez v France* and *Freda v Italy*; and, by converse implication, *Bankovic v Belgium* (2001) 11 BHRC 435)."

105. In paras 83-90 the Court appears to regard the question whether the arrest of the applicant by Turkish officials on Kenyan soil did or did not have the consent of the host state (and therefore whether it did or did not violate Kenyan sovereignty) as a matter which went to the legality of the arrest pursuant to Article 5(1) of the ECHR, and not to the question whether Turkey was exercising extra-territorial jurisdiction when its officials arrested him.

106. The case of *Freda v Italy* (8916/80, 7th October 1980), to which the Court referred, was a very similar case in which an Italian citizen had been handed over by the authorities in Costa Rica to Italian police who obliged him to go on board an Italian

Air Force plane. The ECommHR was satisfied (at para 3) that he was under the authority of the Italian state and therefore within the jurisdiction of that country from the time he was handed over, notwithstanding that this authority was being exercised abroad.

107. These cases have nothing to do with the principle of public international law relating to activities within aircraft registered with a state when the aircraft is airborne. They reflect examples of the SAA doctrine applying when someone is within the control and authority of agents of a contracting state, notwithstanding that he comes within that control and authority outside the *espace juridique* of the Council of Europe, and apparently whether or not the host state has consented to this exercise of control and authority on its soil.

108. Throughout the case law to which I have referred in paras 98-106 above there has been the constant refrain that a state may be fixed with having exercised extra-territorial jurisdiction if it has exercised control and authority over a complainant. The court's analysis will then be centred on the particular complaint that is made. If the complaint concerns a breach of Article 2 or Article 3 rights, the court will not only consider whether those rights have been violated but also whether the state was in breach of the positive obligations imposed on it in connection with the duty to secure those rights. The Secretary of State now concedes that the UK had jurisdiction in relation to Baha Mousa throughout the period that led up to his death, because he was being held in a British military prison that was operating in Iraq with the consent of the Iraqi sovereign authorities and contained arrested suspects (see DC 287). In my judgment, Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops.

109. I have summarised the circumstances surrounding the deaths of the first five claimants in paras 22-26 above. Hazam Al-Skeini was at liberty in a city street when a patrol of British soldiers shot him dead. Muhammed Salim was at liberty in his brother-in-law's home when British soldiers entered the house and shot him dead. Hannan Shmailawi was at liberty in her own home when a chance bullet entered the house and killed her. Waleed Sayay Mezban was driving his mini-bus, and even on the soldiers' story he had accelerated away and then seemed to be reaching for a weapon when he was shot dead. Raid Al-Musawi was also at liberty in a city street when he was shot dead.

110. None of them were under the control and authority of British troops at the time when they were killed. This is one of the main points that was decided in *Bankovic* (see para 81 above). The only case which might give rise to an argument to the contrary is that of Muhammed Salim (on the basis that British troops assumed control of the house when they burst in), but it would in my judgment be thoroughly undesirable for questions about the applicability of the ECHR to turn for their resolution on sophisticated arguments of this kind. The soldiers, for instance, might have found they were by no means in control of the house if they had all been shot dead by hostile gunfire after they had broken in. It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone's liberty he is under their control. This did not happen in any of these five cases.

111. So far, I have been applying SAA principles. In any other case involving extra-territorial considerations, a complainant will have no standing under the ECHR unless

the state of whose conduct he/she makes complaint is in effective control of the area in which he/she is situated with the consent, invitation or acquiescence of the host state or in circumstances that amount to a military occupation.

112. It is therefore necessary to turn to the facts to see if British troops could be said to have been in effective control of Basrah City for the purposes of Strasbourg jurisprudence at the relevant time. This requires first an examination of what is meant by occupation for the purposes of international humanitarian law, and then a consideration of the question whether something more is needed to establish ECA for ECHR purposes.

11. Was the United Kingdom in effective control of Basrah City in August-November 2003?

113. Section III of the Hague Regulations is concerned with military authority over the territory of a hostile state. Articles 42, 43, 45 and 46 are relevant in the present context:

> "42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.
>
> 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter 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…..
>
> 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.
>
> 46. Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
>
> Private property cannot be confiscated."

114. The provisions of Geneva IV were expressly (by Article 2) to apply to all cases of partial or total occupation of the territory of a High Contracting Party. Relevant provisions include Article 27 and 64, the material parts of which prescribe:

> "27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> 64. The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they

> constitute a threat to its security or an obstacle to the application of the present Convention.
>
> Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
>
> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

115. Articles 146 and 147 contain an undertaking by the High Contracting Parties to provide effective penal sanctions for persons committing, or ordering to be committed, any grave breaches of the Convention. Examples of grave breaches include wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. These provisions have now been supplemented by the provisions of Additional Protocol 1 (1977) to Geneva IV, which provides fundamental guarantees to civilian populations, including protection from murder, torture, corporal punishment, mutilation and collective punishment (Article 75). It also imposes obligations on military commanders to prevent and report breaches of the Convention, and, where appropriate, to initiate disciplinary or penal action against violations of the Convention (Article 87).

116. DC 14-39 give details of the governmental structures that were in place in Iraq during the period of military occupation which followed the cessation of hostilities. In short, the CPA had temporarily assumed powers of government, but the Coalition's goal from the outset was to transfer responsibility for administration to representative Iraqi authorities as early as possible (DC 16 and see para 13 above). The CPA expressed itself to be vested with all executive, legislative and judicial authority necessary to achieve its objectives, "to be exercised under relevant UN Security Council resolutions... and the laws and usages of war." (DC 19). This authority was exercised by Ambassador Bremer, the administrator of the CPA, who was charged by the US Secretary of Defence with responsibility for the temporary governance of Iraq. Ambassador Bremer formally took all administrative and legislative decisions on behalf of the CPA (DC 17).

117. The Divisional Court referred to the wide range of activities undertaken by the CPA during its period of responsibility (DC 22-36). As early as 13th July 2003 a body called the Iraqi Governing Council ("IGC") was formed. The CPA stated that the CPA would consult and co-ordinate with the IGC on all matters involving the temporary governance of Iraq (DC 27). In DC 28-38 the Divisional Court described the transitional process which led ultimately to the transfer of power from the CPA to the new Iraqi Interim Government on 28th June 2004.

118. In practice the CPA was dominated by US personnel. They made up most of its staff. It was in no sense a subordinate organ or instrument of the UK government. Although the UK special representative (and his office) sought to influence CPA policy and decisions, he had no formal decision-making powers whatsoever.

119. Basrah City was in the CPA regional area called "CPA South". During the period of military occupation there was a significant degree of British responsibility and authority in CPA South, although its staff were drawn from five different countries and until the end of July 2003 the regional co-ordinator was a Dane. Indeed, only one of the four governorate teams in CPA South was headed by a British co-ordinator. However, although the chain of command for the British military presence in Iraq led ultimately to a US general, the Al Basrah and Maysan provinces were an area of direct British military responsibility. As I have already said (see para 13 above), the Secretary of State accepts that the UK was an occupying power within the meaning of Article 42 of the Hague Regulations (for which see para 113 above), at least in those areas of southern Iraq, and particularly Basrah City, where British troops exercised sufficient authority for this purpose.

120. But whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basrah City for ECA purposes. The situation in August - November 2003 contrasts starkly with the situations in northern Cyprus and in the Russian-occupied part of Moldova which feature in Strasbourg case-law. In each of those cases part of the territory of a contracting state was occupied by another contracting state which had every intention of exercising its control on a long term basis. The civilian administration of those territories was under the control of the occupying state, and it deployed sufficient troops to ensure that its control of the area was effective.

121. Brig Moore's long statement tells a very different story. He was not provided with nearly enough troops and other resources to enable his brigade to exercise effective control of Basrah City. In DC 40 the Divisional Court quoted part of his evidence (see also para 20 above). Elsewhere he described how the local police would not uphold the law. If British troops arrested somebody and gave them to the Iraqi police, the police would hand them over to the judiciary, who were themselves intimidated by the local tribes, and the suspected criminals were back on the streets within a day or two. This state of affairs gave the British no confidence in the local criminal justice system. It also diluted their credibility with local people. Although British troops arranged local protection for the judges, this made little difference. The prisons, for their part, were barely functioning.

122. After describing other aspects of the highly volatile situation in which a relatively small number of British military personnel were trying to police a large city as best they could, Brig Moore said (at para 25 of his statement):

> "The combination of terrorist activity, the volatile situation and the ineffectiveness of Iraqi security forces meant that the security situation remained on a knife-edge for much of our tour. Despite our high work rate and best efforts, I felt that at the end of August 2003 we were standing on the edge of an abyss. It was only when subsequent reinforcements arrived...

> and we started to receive intelligence from some of the Islamic parties that I started to regain the initiative."

123. Unlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq. I have already shown how the CPA, which was not an instrument of the UK government, had the overall executive, legislative and judicial authority in Iraq whenever it deemed it necessary to exercise such authority to achieve its objectives. At a local level Section 1 of CPA Order 71 encouraged the exercise of local authority by local officials. Brig Moore described the situation in these terms (at para 26 of his statement):

> "I was not responsible for civil administration *per* se but the brigade had to become loosely involved in supporting it, owing to a lack of help from elsewhere. My colleagues and I dealt on a daily basis with the Iraqi local governor in Basra, and his governing council. The Commanding Officer of 1 KOSB did the likewise [*sic*] in Maysan. We also put perhaps 40 or 50 military personnel to work in the [CPA] offices. We assisted civil administration by paying public workers, rebuilding facilities and getting infrastructure working. For most of the tour the military provided vital support in running the two provinces. "

124. In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces, and as an occupying power it was bound to respect the laws in force in Iraq unless absolutely prevented (see Article 43 of the Hague Regulations cited in para 113 above). It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways (see para 16 above).

125. It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves. To build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR at the very time when the IGC had been formed, with CPA encouragement, as a step towards the formation by the people of Iraq of an internationally recognized representative Government (see DC 27-28), would have run right against the grain of the Coalition's policies.

126. And it is in any event very much open to question whether an effort by an occupying power in a predominantly Muslim country to inculcate what the ECtHR has described (in *Golder* v *UK* (1975) 1 EHRR 524 at para 34) as "the common spiritual heritage of the member states of the country of Europe" during its temporary sojourn in that country would have been consistent with the Coalition's goal, which was to transfer responsibility to representative Iraqi authorities as early as possible. See also recitals

3 and 5 to the ECHR and *Tyrer v UK* (1978) 2 EHRR 1 at [38] (DC 146-7) for further references to the common heritage of the states that became parties to the ECHR. Recital 5 is set out at DC 95.

127. In the interests of completeness, I should make it clear that I reject the arguments by the claimants to the effect that occupation for the purposes of the Hague Regulations must necessarily be equated with effective control of the occupied area for ECHR purposes. Mr Rabinder Singh referred to passages in *Oppenheim, International Law,* Vol 2 (1952) at paras 166, 169 and 170 which set out the obligations of an occupying power in wide and general terms. It is a feature of Strasbourg jurisprudence that the Court will examine the facts of each particular case to see if the requisite control is in fact exercised (see *Loizidou v Turkey (Preliminary Objection*s) at [62], cited in para 65 above), and the status of the British military forces in Basrah City was markedly different from that featured in the text on which Mr Singh relies.

128. Mr Singh suggests that the consequences of the Secretary of State's argument would be that a state could send a sufficiency of troops to an occupied area, whether within the European region or beyond it, to assert the rights of belligerent occupation but avoid otherwise applicable human rights standards by reducing to a minimum the number of troops. If the territory in question is within the European region, its citizens will enjoy the rights and protections afforded by the ECHR, and it will be a question of fact in each case as to which state is responsible for their violation. If the territory in question is outside the European region, this conclusion is an inevitable consequence of the fact that there is not yet in place an enforceable human rights convention covering the whole world. And although the protections afforded to civilian populations under humanitarian treaties are not nearly so valuable as those afforded by the ECHR, it would be facile to suggest that they do not exist at all.

12. Was there compliance with Articles 1 and 2 of the ECHR in the cases of Claimants 1-5?

129. If, contrary to my view, the UK had been under the positive obligations imposed by Articles 1 and 2 of the ECHR in relation to the deaths that triggered off the first five applications, it would be necessary to consider whether the conduct of the military authorities complied with the requirements of Strasbourg jurisprudence. The Divisional Court gave a clear description at DC 47-54 of the procedures that were followed in Iraq at the material time for conducting a police investigation into allegations of serious crime. In short, it was a matter for the military chain of command to decide whether to involve the RMP (SIB) at all. It was also open to the military chain of command to call off a police investigation, as happened with the fourth case with which we are concerned. In turn, the RMP (SIB) delivered its report, when completed, to the military chain of command, and it was then a matter for that command to decide whether to forward the report to the Army Prosecuting Authority ("APA").

130. Each case, of course, turns on its own facts, but Mr Singh maintains that all the post-death investigations were flawed because the British troops' accounts of what had happened were on every occasion accepted at their face value, and control over the investigative process within their own chain of command (from the commanding officer of the battalion upwards to the brigade commander) did not satisfy the requirement of independence. The requisite independence was also lacked by the SIB 61 Section on the single occasion when its services were requested, because the

decision whether to invoke or to call off a SIB investigation rested with the military chain of command, and because SIB involvement, if invoked and not prematurely terminated, would end when it delivered its report back to the soldiers' chain of command and not to the APA (which did possess the requisite independence). He adds that the absence of any involvement of the families of the deceased and other potential Iraqi witnesses in the investigations into the Iraqi civilians' deaths breached Article 2 requirements. In some of these cases a very thorough autopsy and forensic examination could well have introduced greater clarity into a situation in which both the cause of death and the circumstances surrounding the death were sometimes in dispute.

131. A number of EC[t]HR judgments drawn from complaints against Turkey illustrate the kind of investigation that is required of a contracting state when its armed forces or its police are involved in causing a civilian death within its own territory. In *Gulec* v *Turkey* (1995) 28 EHRR 121 a 15-year old boy was killed during the course of incidents in a Turkish city which involved demonstrations, shop closures and attacks on public buildings. The government maintained that he had been hit by a bullet fired by armed demonstrators at the local gendarmerie. An official investigation was quite soon discontinued. The EC[t]HR held that the force used to disperse the demonstrators was not "absolutely necessary" (so that there was a violation of a substantive Article 2 right), and also that the ensuing investigation fell short of Turkey's procedural obligations, because it was not thorough; it was not conducted by independent authorities; it was not conducted with the participation of the complainants; the evidence of the gendarmes was accepted at its face value; and the ballistics tests which the situation required were not carried out.

132. In *Ogur* v *Turkey* [1999] ECHR (21594/99) a nightwatchman at a mining site was killed one morning by Turkish security forces when he was coming off duty. The EC[t]HR again found that there had been a substantive violation of Article 2. So far as the ensuing investigation was concerned, the applicant said that his son had been shot without warning, whereas the government maintained that he was one of a number of PKK terrorists who had been sheltering at the site, and that warnings were given before any shots were fired. Again, the official investigation ended inconclusively. The EC[t]HR held that the public prosecutor had conducted an inadequate examination; the subsequent investigation by the administrative authorities was not truly independent and scarcely remedied the earlier deficiencies; there had been no post mortem or other forensic examination (notably in the form of ballistics tests); and no serious attempt had been made to identify the person who had fired the fatal shot. The victim's relations were not involved in the investigation at all.

133. In *Salman* v *Turkey* (2000) 34 EHRR 125 the deceased had been taken into police custody at 1 am one morning, and 24 hours later he was pronounced dead on arrival at a hospital to which he had been transferred when his condition aroused concern. The EC[t]HR found that the autopsy examination conducted on the day of death was seriously deficient. This unfortunately undermined any attempt to determine police responsibility for the death.

134. In *Ergi* v *Turkey* [1998] (66/1997/850/1057, 28th July 1998) a village girl was shot dead when she went out onto the veranda of her home after security forces had been engaged in an ambush of PKK members close to the village where she lived. Nobody asked her family about the circumstances of the shooting, and the local gendarmes

conducted no interviews with villagers or with the members of a commando unit which had also been involved in the incident. There had been no communication with the family since the date of the autopsy. There was a dispute as to whether the shot could have been fired by the security forces. The EC[t]HR said (at para 74) that it had to consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise to the greatest extent possible any risk to the lives of the villagers from the firepower of PKK members caught in the ambush. The Court found (at para 81) that it could reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population. It added (at para 85) that neither the prevalence of violent armed clashes nor the high incidence of fatalities could displace the obligation under Article 2 to ensure that an effective, independent investigation was conducted into deaths arising out of clashes involving the security forces, the more so in cases like the present where the circumstances were in many respects unclear.

135. In *Ozkan* v *Turkey* [2004] ECHR (21689/93, 6th April 2004) Turkish military forces attacked a village with rifles and heavy weapons. During this operation they burned a number of houses, and a bomb was thrown into one house, with the result that a girl of six suffered severe intestinal injuries. When the forces returned the next day, they burned more of the village houses, and the family were taken to a mosque where the girl died without having received any medical attention at all for her injuries. The EC[t]HR found that the soldiers had opened fire in response to fire from the village, and there was no substantive violation of Article 2. On the other hand, the security forces made no attempt to verify whether there had been any civilian casualties (see para 307), and there had been a callous disregard of this possibility (see para 308). Criticisms of the subsequent investigation centred on the inadequacy of the evidence-taking process and the absence of any serious attempt to find out who had in fact fired the explosive device that had killed the girl.

136. This judgment is valuable because at paras 309-313 the EC[t]HR set out in clear terms what is required of an Article 2 investigation even where security forces are encountering considerable personal risk in carrying out their duties. The effect of this passage can be summarised under eight main heads:

> (i) The obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (para 309);
>
> (ii) The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (para 310);
>
> (iii) What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once

the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (para 310);

(iv) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (para 310);

(v) The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means (para 311);

(vi) The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (para 311);

(vii) A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (para 312);

(viii) For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (para 313).

137. In *R (Amin) v Home Secretary* [2003] UKHL 51 at [31]; [2004] 1 AC 653 Lord Bingham of Cornhill summarised the purposes of the Article 2 procedural obligation in these terms:

> "The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

138. I have set out these matters at some length even though I am satisfied that the UK was not exercising jurisdiction for Article 1 purposes in relation to those who were killed in the first five cases before the court. I have done so because we were expressly invited by counsel for the Secretary of State to give fuller reasons than those given by the Divisional Court at DC 337-340 for the inadequacy of the investigations in these cases when judged by ECHR standards.

139. After all, the first two Articles of the ECHR merely articulate the contemporary concern of the entire European community about the importance that must always be attached to every human life. It could be difficult for a European government to decide to pursue policies that treated human life as more readily expendable just because those whom their forces kill are not themselves European. That this also appears to be the conviction of responsible bodies at both European and UN level is borne out by the statements I have reproduced at paras 9 and 10 of this judgment. Needless to say, the obligation to comply with these well-established international human rights standards would require, among other things, a far greater investment in the resources available to the Royal Military Police than was available to them in Iraq, and a complete severance of their investigations from the military chain of command.

140. In other words, if international standards are to be observed, the task of investigating incidents in which a human life is taken by British forces must be completely taken away from the military chain of command and vested in the RMP. It contains the requisite independence so long as it is free to decide for itself when to start and when to cease an investigation, and so long as it reports in the first instance to the APA and not to the military chain of command. It must then conduct an effective investigation, and it will be helped in this regard by the passages from ECHR case-law I have quoted. Many of the deficiencies highlighted by the evidence in this case will be remedied if the RMP perform this role, and if they are also properly trained and properly resourced to conduct their investigations with the requisite degree of thoroughness.

141. I see no value in referring in detail to the numerous points raised by the claimants' lawyers on different aspects of the evidence in these cases. They have been made with great care, and they will no doubt be studied with equal care by the military prosecuting and police authorities. After all, they should be anxious to ensure that in future their investigations match up to what is now required by international standards in these matters. All that it is then necessary to say before leaving this appeal is that in my view the claimants' lawyers, and particularly their solicitor Mr Phil Shiner, have rendered a valuable public service in bringing forward their clients' claims and prosecuting them with such conspicuous skill and vigour.

142. It follows that I agree with the Divisional Court, although by a rather different route, that the UK did not possess Article l jurisdiction in relation to those killed in the first five incidents with which we are concerned, and that the appeals of the first five claimants must be dismissed. It is unnecessary in these circumstances to say very much about what happened after their cases were re-examined by the RMP after these proceedings were commenced. In short, no action was taken in two cases, and in two more a recommendation that further inquiries should be conducted was not accepted by senior officers. Only one of the five cases was referred to the APA, and it was eventually decided on counsel's advice not to prefer any charges. The inadequacy of the immediate post-death investigation made the task of pursuing any useful inquiries six to nine months later more difficult in some of these cases than it might otherwise have been. It is to be hoped that deficiencies of this kind will be remedied in future.

13. Did the HRA apply to the Mousa case?

143. Because it is conceded that the UK was exercising extra-territorial jurisdiction for ECHR purposes in the case of Baha Mousa it remains to be decided whether the HRA applies to this case. The Divisional Court analysed the arguments at DC 289-306. I have already recited the main arguments advanced by Mr Sales to this court at paras 37-44 above. The Divisional Court set out its main conclusions at DC 301:

> "301. From the point of view [of] the Mousa claim, we have not been persuaded by Mr Sales' submissions. There is no express provision of solely territorial scope. The presumption of territoriality is subject to contrary intention. In the present case there is also the presumption that a domestic statute enacting international treaty obligations will be compatible with those obligations. Section 3(1) is express language consistent with, and going further than, that latter presumption. Whatever may have been the position if our conclusion, or Strasbourg jurisprudence, had been that article 1 of the Convention was founded on some form of broad personal jurisdiction, nevertheless where on the contrary, for the reasons which we have described above, article 1 should be and has been given an essentially territorial effect, it is counter-intuitive to expect to find a Parliamentary intention that there should be gaps between the scope of the Convention and an Act which was designed to bring rights home, that is to say as we understand that metaphor to enable at any rate domestic or British claimants to sue in the domestic courts rather than in Strasbourg... Sections 1(4), 1(6) and 21(1) are written in terms of "in relation to" rather than "in" the United Kingdom and are in any event addressing a different issue to that of territorial or extra-territorial scope. Sections 3(1), 4(5) and 6(1) are all dealing of course with UK institutions, but it does not follow, even if it is in most cases likely, that those institutions must be based in the United Kingdom. An English embassy or consulate will be overseas; an English court might perhaps, at any rate with the consent of the foreign country concerned, go on a view abroad. The possibility of exceptional extra-territorial scope for

> an essentially territorially focussed constitutional enactment has been recognised not only in the Strasbourg jurisdiction itself, but also in Canada and the United States (see *Cook* v. *The Queen* and *Rasul* v. *Bush* discussed above)."

The cases of *Cook* v *The Queen* and *Rasul* v *Bush* were described at DC 241-2 and need no further exposition here.

144. I am not disposed to accept the whole of the reasoning of the Divisional Court. For instance, this country was not obliged to incorporate the ECHR into its national law, either in whole or in part. The HRA would still be compatible with (or consonant with) the UK's international obligations under the ECHR even if it were not co-extensive with the ECHR in its territorial scope. Furthermore, the House of Lords has recently made it clear that a person may have rights enforceable in Strasbourg and not in the UK if those rights accrued before the HRA came into force (see *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807 at [25] and [68]): the extent of the rights under national law depends on the language of the national statute (see *McKerr* at [63]).

145. I am also willing to accept that the decision of this court in *R (B) v Foreign Secretary* (see para 45 above) is not strictly binding on us. In *B* this court held that even if it was assumed in favour of the claimants that they were within the jurisdiction of the UK for the purposes of the ECHR (see para 66 of the judgment), there had in fact been no breach of their Convention rights (see para 97). It was therefore not necessary for the court to hold that the territorial ambit of the HRA was co-extensive with that of Article 1 of the ECHR: it could have reached its decision without including this stage of its reasoning in its judgment at all. The *ratio decidendi* of a case has been defined as any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the reasoning adopted by him (Cross & Harris, *Precedent in English Law*, 4th Edition (1991), p 72; and see *Dunnachie v Kingston upon Hull Council* [2004] EWCA Civ 84 at [82]; [2004] ICR 482). For these reasons I accept that we are not strictly bound by the judgment in *B.*

146. On the other hand it constitutes strong persuasive authority, as does the dictum of Lord Nicholls in *Quark* (see para 46 above). Mr Sales's submissions include the unnatural substitution of the word "in" for the words "in relation to" in ss 1(4), 1(6) and 21(1) of the HRA (see para 42 above), and carry the unhappy consequence that a victim offended by a decision of an instrument of the UK government would have to take a complaint all the way to Strasbourg, as opposed to the British courts, if the relevant decision was taken within a consulate or embassy abroad and not in a Whitehall department. Given the purpose of the HRA, as explained by Lord Nicholls, it can be naturally interpreted as impliedly having extra-territorial effect in the very limited number of cases in which the state has exercised extra-territorial jurisdiction on SAA principles. I am not persuaded that the very general statements in a Government White Paper or in Hansard (for which see DC 297), on which the Secretary of State relied, should dissuade us from being willing to follow the dicta in *B* and *Quark*. There is no doubt that jurisdiction is essentially territorial: the question is whether any very limited exceptions exist, and broad statements of policy do not usually concern themselves with detail of this kind.

147. In any event I consider on general grounds that it should be for the House of Lords, and not for this court, to say whether these dicta are wrong. Mr Sales told us that he

had deployed much fuller argument than had been advanced on behalf of the Foreign Secretary in *B*, but it would be very much more satisfactory if these arguments were authoritatively considered at a higher level than the Court of Appeal rather than that different divisions of this court should express perhaps conflicting opinions upon them. Accordingly I would hold that the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of SAA principles.

148. It follows that when s 6(1) of the HRA prescribes that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, this may include a right arising from some extra-territorial jurisdiction that the public authority in question (the Secretary of State in the present case) has elected to exercise, since the phrase "Convention right" is defined as one of the rights and fundamental freedoms set out in the ECHR as it has effect for the time being in relation to this country.

149. I do not, incidentally, regard it as necessary to consider what would be the position if this country were to take over part of another country in such a way as to be truly in effective control of it. If this were, improbably, to be the case, there is no reason why Parliament should not enact primary legislation to make it possible for this country to ensure protection of ECHR rights and adherence to ECHR obligations in the territory it has decided to occupy: the absence of any saving for local requirements, apposite as this may have been in the context of a colonial territory when the ECHR was being formulated, should not deflect one from that conclusion. In any event I see no reason why these hypothetical considerations should deter this court from being willing to adopt the same approach as that adopted by a different division of the court in *B* and by Lord Nicholls in *Quark*.

14. Was this country in breach of its procedural obligations under Articles 2 and 3 of the ECHR in the Mousa case?

150. I turn finally to the question whether there has been an infringement of this country's procedural obligations under Articles 2 and 3 of the ECHR in relation to the Mousa case.

151. This court has received a much fuller picture of the course of events in the investigations that followed Baha Mousa's death on 15th September 2003 than was available to the Divisional Court.

152. That court gave a clear description at DC 47-54 of the procedures that were followed in Iraq for conducting a police investigation into allegations of serious crime. In short, it was a matter for the military chain of command to decide whether to involve the RMP (SIB) at all. It was also open to the military chain of command to call off a police investigation, as happened with the fourth case with which we are concerned. In turn, the RMP (SIB) delivered its report, when completed, to the military chain of command, and it was then a matter for that command to decide whether to forward the report to the Army Prosecuting Authority ("APA").

153. In Baha Mousa's case the initial RMP (SIB) investigation culminated in the delivery of a report by the SIB in April 2004. The military chain of command then asked for further inquiries to be conducted. These were completed in mid-July of that year. It

was not until 21st June 2004 that the first case (involving two soldiers) was referred to the APA, and on 9th July a further case, involving two more soldiers, was referred. It was then decided that an APA colonel based in Germany should prosecute, and on 23rd July 2004 a high level meeting, which included Maj. Gen. Howell (the APA) and a representative of the Attorney-General's office, took place in order to decide what should be done to take the cases forward.

154. The history therefore falls conveniently into two parts: the first between 15th September 2003 and 21st June 2004, when the APA was first involved, and the second from 21st June 2004 onwards. As I have said, the Divisional Court hearing took place at the end of July 2004 and it received no evidence about the second period.

155. At DC 53 the Divisional Court said:

> "SIB investigations in Iraq were hampered by a number of difficulties such as security problems, lack of interpreters, cultural difficulties (e.g. the Iraqi practice of burying a body within 24 hours and leaving it undisturbed for 40 days), the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics and the climate and general working conditions…"

156. This is a necessarily abbreviated summary of the formidable difficulties faced by 61 Section, which are described in detail by Capt Logan, who commanded the section between 10th June and 12th October 2003. The scale of the practical difficulties confronting the unit was amply corroborated by a review team under the direction of the Deputy Chief of the Defence Staff which visited Basrah City in June 2004. At the material time the unit consisted of an officer, a warrant officer, two staff sergeants and eight sergeants, split up into two teams. It was stationed 15 kilometres outside Basrah City. Sgt Maj Spence, who was with the unit in Iraq as crime manager between 10th June and 26th October 2003, described some of their problems in these terms:

> "At any one time during my tour of Iraq, 61 Sect SIB would be involved in approximately 15 investigations of serious incidents involving different UK units, other Coalition forces, and Iraqi civilians. The incidents and the forces concerned were in some cases a four hour drive from our base location. In order to deal with their workload, each morning having identified the area that we were to visit, each case file having a bearing on that particular location was taken in order that the investigation into that case could be furthered. For security reasons, movement restrictions were placed on us by HQ MND (SE). In order to perform any task, which required travelling outside our HQ, we were required to travel in two vehicles, each vehicle having four occupants. Although any individual member of 61 Sect could be dropped off at a Coalition Force base to carry out a task, he or she had to then be picked up by the full team of two vehicles and eight other personnel on conclusion of their tasking. If a task had to be performed outside a secure facility, such as Basrah General Hospital, then force protection would have to be provided by the remainder of

> the two vehicle convoy. Very infrequently force protection was provided by other units however this was rare because of the security taskings they were required to carry out themselves. Because of the lack of personnel and the methods by which we were required to work we were limited in what we could achieve".

157. The commanding officer of 1 QLR called in 61 Section as soon as he heard of Baha Mousa's death. The body was conveyed to the British Military Hospital ("BMH"), which was situated on a disused airfield. Attempts were made the following day to organise a post-mortem examination by a local Iraqi doctor, but these failed because the local hospitals were on strike. Arrangements were therefore made for a Home Office pathologist to fly out from the UK. On 17th September a SIB staff sergeant visited the rooms where the detainees from the hotel had been held. She made a sketch plan, but did not carry out a full scene of crime investigation because the unit was still trying to establish what had happened, and what had caused the death in custody. At that time there was no evidence to the effect that anyone had been involved in mistreating detainees apart from the soldier who had restrained the deceased at the time of his death.

158. Statements were taken from the medical staff involved in Baha Mousa's treatment. The staff sergeant learned that a US-employed doctor had examined the nine other detainees and referred two of them immediately to the BMH because of their serious medical condition. She took a statement from this doctor. On the same day another staff sergeant and two other members of the SIB team interviewed the detainees who had not been transferred to hospital, to learn what they knew about Baha Mousa' s treatment and whether they were potential complainants. They also discovered roughly where the Mousa family lived.

159. On 18th September a visit was paid to one of the detainees in hospital, although it proved impossible to take a statement from him. Colonel Mousa was located and taken to the BMH to identify his son's body. That day the unit started interviewing the members of the platoon who had been involved at the operation in the hotel, and two of them (a lance-corporal and a private soldier) were arrested.

160. On 19th September witness statements were taken from three members of the Media Operations Group who had witnessed events in the detainee holding centre, and one of the soldiers arrested the previous day was interviewed under caution. On 20th September the process of conducting full interviews of the detainees commenced, but due to personnel constraints, and in particular the lack of interpreters, only two interviews were completed that day.

161. On 21st September the Home Office pathologist arrived. He was taken straight to the mortuary. The post mortem examination took place inside a Scenes of Crime tent placed in the sand next to the BMH. The doctor used his own instruments and a wooden table covered by a sheet. There was no running water available, and no air-conditioning. An Iraqi doctor was present at the family's request, and the doctor told Col Mousa the result of the post mortem when it was complete. The following day the family was allowed to collect the body for burial.

162. That day a full crime scene examination of the detainee holding area was conducted, and statements were taken from the 1 QLR medical staff concerning the injuries suffered by other detainees. On 23rd and 24th September statements were taken from all the remaining detainees, apart from the one who was not fit to be interviewed. On 16th September Sgt Maj Spence, who had been leading another major inquiry, took over responsibility for this inquiry.

163. On 26th September the commanding officer of 1 QLR met Col Mousa and his family, and the following day Brig Moore met Col Mousa and Baha Mousa's brother. Brig Moore said he had never previously come across a case like this in his entire military career. He spent most of a long interview apologising to the family, and at their request he issued a press statement expressing deep regret at Baha Mousa's death and offering sincere condolences. He assured Col Mousa that if a crime had been committed the person or persons responsible would be brought to justice, and that if there was a trial in the UK, he would be allowed to come and see the proceedings. The commanding officer of 1 QLR met the Mousa family again on 5th October, and Brig Moore saw Col Mousa again by chance when he called on the governor of the province just before he left Iraq on 6th November. He explained that the police investigation was ongoing, and that it was unlikely to report for six to seven months. Thereafter the commanding officer of the Royal Regiment of Wales, which took over from 1 QLR in Basrah City, kept Col Mousa in touch with any developments in the case until he, too, left Iraq in April 2004.

164. On 27th September interviews were conducted with the senior NCOs who had interrogated the detainees, against whom no allegations of abuse had been made. On 1st October a soldier was arrested and immediately put on a flight to England, together with the arresting sergeant. He was interviewed in England under caution two days later.

165. On 7th October Sgt Maj Spence conducted a street identification parade, after which two more soldiers were arrested and sent to England for interviews under caution. Formal identification parades then took place in England on 16th October. All three members of the Media Operations Group attended at least one of these parades. On 10th October three members of 1 QLR were interviewed, as was the final detainee, who was now fit to be interviewed. On 12th-13th October statements were taken from 12 members of A Company, 1 QLR, who had responsibility for the arrest or detention of the detainees or the search of the hotel, and notebook entries were made of interviews with three more.

166. Capt Logan returned to the UK on 12th October, taking case files with her. She concluded her statement to the court in these terms:

> "Interpreters once again proved a great restraint on the speed of the investigation, as did force protection. Although several courses of action were identified as urgent, only one or two could occur at the same time due to lack of interpreters, force protection and vehicles. One suspect was escorted from theatre in order to avoid interference with witnesses and to give him the opportunity to consult with a legal adviser of his choice prior to interview under caution; the loss of the investigator accompanying and interviewing him meant that the small

> investigative team in Iraq was further diminished. The subsequent identity parades were also very difficult. The detainees were still being held at Camp Bucca, some of the military witnesses had returned to the UK, as had some suspects. This prolonged the process although it did take place satisfactorily."

167. Sgt Maj Spence went back to the UK on 26th October. Before he left Iraq he had taken statements from the 1 QLR company commander and the company sergeant major, and also from the commanding officer. He also ensured that all case files for all investigations with taskings in Iraq had been completed. The intention was for the investigation to be continued if necessary from the UK, to which the soldiers concerned in the inquiries were also returning.

168. Exhibits, with supporting paperwork, were submitted to the Forensic Science Service, who submitted a report on 24th February 2004. In the meantime another soldier was arrested, and identification parades were conducted in England and (by video) in Iraq. Further interviews were conducted under caution with the soldiers who were arrested in early March. In early April Sgt Maj Spence submitted a report, with supporting evidence, to the responsible commanding officers of the accused soldiers and the Divisional Army Legal Services, and a copy of the report only was sent to the relevant Divisional and Brigade authorities. He produced an Addendum report identifying three further suspects in February 2005 after further interviews had been conducted.

169. The second part of the history started on 21st June 2004 when the military chain of command referred the case against two soldiers to the APA, followed by two more on 9th July. Brig Paphiti, the Brigadier Prosecutions, attended the conference held on 23rd July. After that meeting further inquiries were directed. In particular SIB was tasked to instruct a pathologist and a toxicologist. The pathologist's report became available on 11th January 2005. Brig Paphiti has described that report as critical to their determination of the entire case, because the APA was in no position to decide whether any charges should be brought against anyone (even in relation to lesser allegations of assault) until it came to hand. Directions were also given for further work to be undertaken in relation to the identification of suspects by the witnesses, and linking the suspects with the individual victims.

170. At the meeting on 23rd July 2004 it was agreed to expand the investigation so as to examine the potential responsibility of anyone higher up the chain of command. Nothing, however, was then done, apparently because SIB understood that no action was to be taken about this until after the investigation into all those directly involved had been completed. A further high level meeting was held on 19th January 2005 when the APA gave directions about the nature of these further investigations, and specific instructions were given to SIB personnel on 3rd March 2005. Eventually in July 2005 charges were preferred against two senior officers, a warrant officer, a sergeant, a corporal, a lance-corporal and a private soldier. The charges ranged from manslaughter and inhuman treatment to assault and negligent performance of duty. Court-martial proceedings are now pending.

171. To complete the story, we have been shown correspondence passing between the Attorney-General and the Secretary of State for Defence between November 2004 and

March 2005. In early March 2005 the Attorney-General expressed concern that many of the investigations arising out of incidents in Iraq appeared to have suffered not only from the operational conditions in which the RMP had to operate but also from a lack of resources and access to suitably qualified and experienced investigators. He mentioned the Mousa investigation in this context. Three weeks later he said he had become most concerned about the quality of the investigation into the Mousa incident. He referred to the fact that the case was referred for the first time to the APA more than nine months after the incident had occurred, and then at a level involving junior ranks only, and that when the APA had asked the RMP to carry out further inquiries they were not carried out effectively. Maj-Gen Howell, the APA, had had to make clear his concerns about the RMP investigation at the meeting on 19th January 2005, and to identify the further investigations that were required, investigations the Attorney-General described as vital.

172. The concerns expressed by the Attorney-General do not surprise me. But can a court make a substantive finding in favour of Col Mousa at this stage of the history? In para 18 of this judgment I referred to the Secretary of State's refusal to conduct an independent inquiry into these civilian deaths in Iraq and his rejection of three other claims made by the claimants' solicitors, who were not at that time representing Col Mousa. These claims were made in a letter before action dated 23rd February 2004. In that letter the claimants' solicitors explained why they were contending that both the ECHR and the HRA had extra-territorial application in the particular circumstances. They also referred to what they described as an obvious and urgent need to protect evidence in the context of the inquiries they were seeking. In reply the Secretary of State contended that the ECHR did not have extra-territorial application, and that in any event it was not feasible to suppose that the sort of independent inquiry to which the claimant's solicitors referred could be carried out by the UK in Iraq. Even if Article 2 had any application, its procedural requirements would have been satisfied by the inquiries that were made within the military chain of command in each case, supplemented (if thought necessary) by a RMP (SIB) investigation.

173. The relief sought by the claimants in their Judicial Review Claim Form was a declaration that Article 2 (and Article 3) had been violated both substantively and in relation to the failure to conduct independent inquiry into each death, together with just satisfaction under s 8(2) of the HRA.

174. It appears to be well-established in Strasbourg jurisprudence that the ECtHR will not make a finding that the procedural obligation in Article 2 has been violated until after all the proceedings that arose out of the death in question have been concluded, and the Court is able to take a broad view of the matter. Its judgment in *McKerr v UK* [2001] 34 EHRR 20 is a good example of how it then considers the whole of the history in the round. Inadequacies at some stage of an investigation might be remedied later, and different forms of proceedings and investigations might be required in different cases (see, generally, at paras 108-161).

175. A deficiency in an investigation which undermined its ability to establish the cause of death (such as an inadequate autopsy or a failure to take reasonable steps to secure witness testimony and forensic evidence) would risk falling foul of the required standard of effectiveness (para 113), but would not necessarily do so. Similarly, a properly conducted criminal trial would in the normal course of events be regarded as furnishing the strongest safeguards of an effective procedure for finding the facts and

attributing criminal responsibility (para 134), but it will not necessarily have this effect, particularly if the trial goes short because of a guilty plea or a successful plea of "no case to answer", or because there are important issues arising out of the death that require a wider examination than could have been available through the trial process.

176. Other indications that the EC[t]HR's policy is to examine the whole of the history in the round before determining whether there has been a breach of an Article 2 procedural obligation can be gleaned from *Edwards v UK* (2002) 35 EHRR 19 at paras 77, 79 and 86, and from the admissibility rulings in *Menson v UK* [2003] ECHR 47916/99, (para 1), and *Hackett v UK* [2005] ECHR 34698/04 (para 1). See also *re Teresa Kelly* [2004] NIQB 72 at [27] – [34].

177. The Divisional Court made the order in the Mousa case to which I have referred in para 1 of this judgment. It found that there had been a breach of the procedural obligation under Articles 2 and 3, partly because there was no evidence as to what had been going on since the SIB submitted its report. It complained, understandably (at para 332):

> "… If, following the SIB report of early April, the investigation was still ongoing, we need to be put in a position where we can understand what is going on. For the same reason, we are unable to accept that the investigation has been open or effective. Other than in the early stages and at the autopsy, the family has not been involved. The outcome of the SIB report is not known. There are no conclusions. There has been no public accountability. All this in a case where the burden of explanation lies heavily on the United Kingdom authorities. "

178. I have considerable sympathy with this approach. However, this court has been furnished with much more evidence about these matters, which was then brought up to date just before the hearing. Court-martial proceedings are now pending, and for all we know, further investigations may then follow, depending on what emerges in those proceedings. In these circumstances it seems to me that it would be premature to give any substantive answer to the second preliminary issue directed by Collins J, and that we should remit that issue to the Administrative Court, with the recommendation that all further proceedings on that issue be stayed until after the conclusion or other disposal of the pending court-martial proceedings. I would uphold the first part of the Divisional Court's order in the Mousa case.

179. Subject to this alteration to the order in the Mousa case, I would dismiss both the appeal and the cross-appeal.

Lord Justice Sedley :

1. The responsibility of the United Kingdom

180. The Crown's evidence is that its forces were present in Iraq in the material period, between May 2003 and March 2004, as part of a multilateral force which in March 2003 had invaded the country and deposed its regime. British troops were now engaged, pending the establishment of a democratic indigenous government, in

maintaining what order they could in the absence of any effective civil authority, legal system or public administration.

181. One aspect of the Crown's argument in this court has been that as a secondary partner in the US-led coalition, the UK should bear no separate responsibility for any human rights violations committed by its troops. I consider this argument to be both factually and legally untenable. The witness statement of Lieutenant General Sir John Reith makes it clear that command responsibility for British forces engaged on United Kingdom military operations in Iraq is his. He explains that full command is, as one would expect, a non-delegable national responsibility, and that operational command also remains with him. It is only operational control – the authority to direct assigned forces to accomplish specific tasks – which is vested in the US general who commands the Coalition forces. It is accepted, moreover, that our troops are both answerable to the criminal law of the United Kingdom and amenable to its civil law of tort in relation to anything they do in Iraq. In this situation I do not understand by what military or legal logic Mr Christopher Greenwood QC seeks to relieve them of the even more fundamental responsibility, if it otherwise exists, of respecting the human rights of Iraqis with whom they come into contact. The real question is whether such a responsibility does exist.

2. The reach of the ECHR

182. As to this, I share the view of both the Divisional Court and the other members of this court that there would be something amiss if a prisoner in a British military prison, to which it is now accepted that the European Convention on Human Rights applied because it lay within the UK's jurisdiction, had nevertheless no protection under legislation which was designed specifically to afford redress in our domestic courts for violations by the British state of people's Convention rights. But that is the Crown's case in relation to the violent death in the Basra military prison of Mr Mousa.

183. It is also the Crown's case that if the Human Rights Act or the Convention is allowed to operate in a foreign country beyond the strict confines of a British-controlled establishment, there is no perceptible limit to its ambit: every single death in British-controlled territory will have to be investigated. To an extent the claimants agree with this: how, Mr Rabinder Singh QC asks, can one draw a rational line at the prison wall, so that if Mr Mousa had been beaten to death by troops in the hotel where he was arrested rather than in the prison to which he was taken, there would have been no violation of his Convention rights? The logic of Mr Greenwood's submission is that, bar the special status of the military prison in international law, there can be no extra-territorial reach to the ECHR. The logic of Mr Singh's submission is that, given that the Convention reaches the prison, by parity of reasoning it reaches everywhere in Iraq where British forces are the only functioning form of government. That at least is his narrower submission, based on what he calls effective control authority (ECA). His broader and preferred submission is that the Convention reaches everywhere that agents of a state signatory operate (SAA).

3. The reach of the Human Rights Act

184. It may be useful to start the search for an answer on the common ground that the Convention governs the UK's acts in relation to the military prison in Basra. This is

now conceded because the Crown accepts that such an establishment is analogous to a diplomatic legation: not an extension of British territory but a United Kingdom enclave within another state, and so within the *espace juridique* of the Convention. Why then does the Human Rights Act not also apply there?

185. The reason, as developed by Mr Sales, is the domesticity of the Human Rights Act: nothing in the Act or its genesis indicates any intention that it is to apply to events occurring beyond the shores of the United Kingdom. Absent any such indication, he submits, it is a primary rule of construction that the Act is to be taken not to have any extra-territorial reach. Although I am unpersuaded that there are any positive indicators of this in the Act, I accept that there is nothing in it to contra-indicate the presumption on which Mr Sales relies.

186. But Mr Singh relies on an equal and opposite principle of construction: that, absent some clear indication to the contrary, domestic legislation is to be taken to have been intended to cohere with the state's international obligations. If so, there is a presumption at the very least that, if the Convention reaches the military prison in Basra, so does the Act.

187. The second presumption is not always easy to apply, but it fits the Human Rights Act well. Its avowed purpose was to make accessible in the courts of this country all the scheduled rights – including those contained in Article 2 – which the United Kingdom had since 1950 undertaken by treaty to vouchsafe to individuals within its jurisdiction. The reason why the Act did not reproduce Article 1, with its reference to the state's jurisdiction, is that the enactment itself was intended to implement Article 1. The same was true of Article 13.

188. I would therefore hold, in agreement with the Divisional Court and with Brooke and Richards LJJ, that Mr Mousa's case is justiciable in the courts of this country. Since my reason is that I consider the Act to be not only presumptively but designedly coextensive with the Convention, the next question is whether the Convention, and with it the Act, extends either to areas controlled, however imperfectly, by British troops (the ECA option), or to any operations undertaken by them (the SAA option).

4. The applicability of the ECHR and the HRA

189. It is here that the claimants' case encounters an increasingly steep terrain of practical reality. It starts with Mr Singh's straightforward proposition, which I have mentioned, that there is no distinction of principle between prisoners held within and prisoners held outside a British military prison. It then has to cover cases such as those of Mr Al-Skeini, Mr Salim, Mr Muzban and Mr Musawi, each of whom was deliberately shot by a British soldier in the course of a patrol but not while in British military custody. Finally, among the present test cases, it has to cover Mrs Shmailawi, who was killed by a bullet which may have been fired by a British soldier but was almost certainly not intended for her.

190. Mr Greenwood's argument against any such reach has two limbs: first, that the legal test is effective control, not state agency, and that there was no effective control in these cases; second, that the Convention is applicable either in full, as it manifestly was not in the prevailing situation of civil disorder, or not at all. Here I would accept that while ECA and SAA have proved useful exegetic tools in analysing the decisions

of the ECtHR, they do not represent discrete jurisprudential classes each of which attracts state liability. The single criterion is effective control.

5. What is effective control?

191. I have given in paragraph 181 above my reasons for considering that such control as was being exercised in the Basra area at the material time was being exercised by the Crown, and not by either the United States or a coalition force lacking international legal personality or responsibility. The evidence before the court, however, which is described in part 11 of the judgment of Brooke LJ, shows that such control was intermittent and incomplete. In no practical way did it replicate that of a functioning civil authority.

192. The decisions of the European Court of Human Rights do not speak with a single voice on the question whether such a level of presence and activity engages the responsibility of a member state on foreign soil. *Issa v Turkey* contains a clear indication that even a brief incursion into a non-member state by a member state's troops will bring with it liability for any violation of local people's human rights which they can be proved to have committed. Effective control here is equated with immediate presence and power. *Bankovic v Belgium*, by contrast, rejects state liability where Convention rights are violated by aerial bombardment of a non-member state. Effective control here is distinguished from immediate presence and power.

193. I do not accept Mr Greenwood's submission that *Bankovic* is a watershed in the Court's jurisprudence. *Bankovic* is more accurately characterised, in my view, as a break in a substantial line of decisions, nearly all of them relating to the Turkish occupation of northern Cyprus, which hold a member state answerable for what it does in alien territory following a de facto assumption of authority. They are not explained, in my opinion, by the fact that but for the occupation the citizens of northern Cyprus (unlike those of Iraq) would have enjoyed the protection of the Convention. This is no doubt the case – the Court more than once draws attention to it – but it is not the legal ground of Turkey's liability. If it were, one would expect to find it in the Court's reasoning in *Bankovic*, where it would have been straightforward to hold that the citizens of the FRY, unlike those of northern Cyprus, could not complain of the violation of rights which they had never had. But the *Bankovic* decision turned on the concept of a member state's *espace juridique*. This, the Court held, was limited to its physical territory, with only such extensions as could be exceptionally justified. By way of example, in paragraph 71 of its judgment, it cited those cases "where the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation …. exercises all *or some* of the public powers normally to be exercised by that government". The two words I have italicised are presumably there for some reason.

194. In any event, the Court's explanation in *Bankovic* of the legal distinction between the bombing of Belgrade and the occupation of northern Cyprus places the British occupation of the Basra region of Iraq unequivocally in the latter class - subject to the single question of how much control is, for this purpose, effective control. International human rights law in its present phase does not answer this question. On the one hand, it sits ill in the mouth of a state which has helped to displace and dismantle by force another nation's civil authority to plead that, as an occupying power, it has so little control that it cannot be responsible for securing the

population's basic rights. On the other, the fact is that it cannot: the invasion brought in its wake a vacuum of civil authority which British forces were and still are unable to fill. On the evidence before the Court they were, at least between mid-2003 and mid-2004, holding a fragile line against anarchy.

195. In respectful disagreement with what Brooke LJ says in paragraph 124, I do not see why the presence or absence of adequate civil power for effective control in international law should be tested by asking whether there is sufficient control to enforce the full range of Convention rights. Nor does the ECtHR seem to have thought so in *Bankovic*. What seems to me more material is the fact that, as Brooke LJ explains in his preceding paragraphs, the United Kingdom was an occupying power within the meaning of Article 42 of the Hague Regulations because the Basra region was under the authority of its armed forces. Article 43 then made it incumbent upon the UK "to take all the measures in [its] 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". (I will return to the words I have italicised.) These obligations are predicated not on effective control but on "the authority of the legitimate power having in fact passed into the hands of the occupant". Geneva IV, Article 27, adds to them an obligation to respect "in all circumstances" the persons of civilians and to protect them from acts of violence.

196. No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this. If effective control in the jurisprudence of the ECtHR marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying state and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights; nor therefore does it demand sufficient control for all such purposes. What it does is place an obligation on the occupier to do all it can.

197. If this is right, it is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing. The question is whether our armed forces' effectiveness on the streets in 2003-4 was so exiguous that despite their assumption of power as an occupying force they lacked any real control of what happened from hour to hour in the Basra region. My own answer would be that the one thing British troops did have control over, even in the labile situation described in the evidence, was their own use of lethal force. Whether they were justified in using it in the situations they encountered, of which at least four of the cases before us are examples, is precisely the subject of the inquiry which the appellants seek. It is in such an inquiry that the low ratio of troops to civilians, the widespread availability of weapons and the prevalence of insurgency would fall to be evaluated. But, for reasons I now come to, I am not confident that this route is open in the present state of ECHR jurisprudence.

6. Two solutions

198. Since in any event the other members of the court do not share this analysis of the UK's responsibility as an occupying power, let me consider two related solutions which were canvassed in answer to the problem of unenforceability. One was that the

applicability of Convention rights depended not on their enforceability as a whole but on whether it lay within the power of the occupying force to avoid or remedy the particular breach in issue. The other was that both the violation and the remedy lay not in Iraq but in the United Kingdom. Both possibilities had regard to the fact that what is sought by all six claimants is a single derivative right arising out of article 2: the right to an open and independent inquiry into a death at the hands of a state signatory. This right, necessarily residing in the family or friends of the victim, is a well-settled aspect of the victim's right to life.

199. If this is the correct focus, two things arguably follow: first, that a practical capacity to investigate impartially – albeit not comprehensively – the circumstances in which civilian deaths have occurred at the hands of British troops in Iraq is all that the appellants need to show in order to establish the necessary degree of effective control; secondly, that any failure to investigate properly has been a systemic failure of British military governance and administration and so not extra-territorial at all.

7. The specific breach solution

200. The difficulty with the first avenue is that it appears to be blocked by *Bankovic*. In paragraph 75 the Court said:

> "In the first place, the applicants suggest a specific application of the 'effective control' criteria developed in the northern Cyprus cases. They claim that the positive obligation under art 1 extends to the securing the convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The governments contend that this amounts to a 'cause-and-effect' notion of jurisdiction not contemplated by or appropriate to art 1 of the convention. The court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that state for the purpose of art 1 of the convention.
>
> The court is inclined to agree with the governments' submission that the text of art 1 does not accommodate such an approach to 'jurisdiction'. Admittedly, the applicants accept that jurisdiction, and any consequent state convention responsibility, would be limited in the circumstances to the commission and consequences of that particular act. However, the court is of the view that he wording of art 1 does not provide any support for the applicants' suggestion that the positive obligation in art 1 to secure 'the rights and freedoms defined in Section 1 of this convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of art 19 of the convention. Indeed the applicants' approach does not explain the application of the words 'within their jurisdiction' in art 1 and it even goes so far as to render those words superfluous and devoid for any purpose. Had the drafters of the convention wished to ensure jurisdiction as extensive as that advocated by the applicants, they could have adopted a text the same as or similar to the contemporaneous arts 1 of the four Geneva Conventions of 1949 (see para 25, above).

> Furthermore, the applicants' notion of jurisdiction equates the determination of whether an individual falls within the jurisdiction of a contracting state with the question of whether that person can be considered to be a victim of violation of rights guaranteed by the convention. These are separate and distinct admissibility conditions, each of which has to be satisfied in the aforementioned order, before an individual can invoke the convention provisions against a contracting state."

201. It may be that the Court will sooner or later revisit this passage. The applicants' argument is not one, I would respectfully suggest, which reduces itself to an absurdity in quite the way suggested by the Grand Chamber. Its predicate is not a worldwide *espace juridique* but precisely the kind of state agency illustrated in *Issa v Turkey* and indeed in the present case, now ex concessis so far as it concerns the British military prison in Basra. The holding that the underlying obligation contained in art.1 of the Convention cannot be "divided and tailored [in the French text, *fractionnée et adaptée*] in accordance with the particular circumstances of the extra-territorial act in question" may not flow inexorably from either of the propositions which follow it by way of explanation. "Jurisdiction" need equate only with state agency: it does not have to operate "in all circumstances" as the 1949 Geneva Conventions do. And there may be room for debate whether jurisdiction and breach, even if they are separate admissibility questions, are nevertheless synergistic to the extent that the nature of the breach may condition or determine whether the responsibility of the state is extra-territorially engaged. I have explained in paragraphs 196 to 198 above why this may be a tenable approach to what is both literally and figuratively an outlandish situation – the situation where a member state, acting outside its own territory but still in the exercise of its sovereign powers, has acquired only partial or temporary control of another state.

202. All this said, the consequential jurisprudence of *Bankovic* seems clear in this regard. The approach from specific breach rather than from general applicability of the ECHR was a potentially relevant one, since the applicants' case was in large part based on article 10, the bombing having had the express purpose of silencing a radio and television station because of what it was broadcasting. But it is not an approach that seems to have commended itself to the Court. Taking it into account, as s.2 of the Human Rights Act requires us to do, *Bankovic* appears for the present to constitute a road-block on the first way out of the dilemma. It is also, I accept, an obstacle to the solution I have proposed in paragraph 198 above. It stands in striking contrast, in this regard, to the decision of the Inter-American Commission on Human Rights in *Coard v United States* (see paragraph 102 above) that extra-territorial liability for a state's breach of human rights depended simply on "whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control" – in other words, that liability is case- and fact-specific.

8. The locus of decision solution

203. The second way out encounters the decision of the House of Lords in *Quark Fishing* [2005] UKHL 57, where a majority concluded that, accepting that the Convention had occasional and exceptional extra-territorial application, domestic jurisdiction in relation to breaches was coextensive with that of the Strasbourg court: see paragraphs 24-5 (Lord Bingham), 57 (Lord Hoffmann) and 88-9 (Lord Hope). Despite the constitutional divisibility of the British Crown, there is too close an analogy between the Foreign Secretary's direction to the South Georgia director of fisheries and the

failure of the Ministry of Defence to conduct proper investigations into the deaths of Iraqis to admit a distinction of outcome. It may be that if this case goes further, the principle will be refined or the distinction be drawn; but for the present it does not seem to me to be possible, or perhaps wise, for us to take this route out of the dilemma.

204. But for the decisions in *Bankovic* and *Quark Fishing* I would have said there was force in Mr Singh's fallback submission that what was in issue here was simply the failure of the Ministry of Defence to set up an impartial inquiry into civilian deaths at the hands of the United Kingdom's armed forces – in other words a domestic breach of a discrete Convention right.

9. Conclusions

205. I therefore agree with the other members of the court that the Act reaches the same parts of the body politic as the Convention. For my part I also see good grounds of principle and of substantive law for holding that, at least where the right to life is involved, these parts extend beyond the walls of the British military prison and include the streets patrolled by British troops.

206. The reason why, nevertheless, I express doubt rather than dissent is that such a conclusion would probably not be compatible with the central reasoning of *Bankovic*. Given, however, that there are passages in the Grand Chamber's judgment itself which point the other way and reasoning in critical parts of it which may be thought less than compelling, I would be content if on consideration at a higher level my doubts were to prove misplaced.

207. In Mr Mousa's case I agree that, given the new material and developments, the right course is to adjourn the question of relief.

10. Postscript

208. I would endorse what Brooke LJ has said in paragraph 141 about the public service performed by the claimants' lawyers. I would also add my appreciation of the disclosure to the court of correspondence manifesting a significant difference of opinion between two departments of state on a matter of importance to these claims. Ordinarily governmental policy positions are simply reflected in the line of argument put forward by Treasury counsel, subject always to his own professional judgment. But this is not possible where government itself is divided. It seems to me an honourable thing, as well as a step in the direction of open government, that in such circumstances the court – which means in turn the parties and the public - should be told of the division of view.

Lord Justice Richards:

209. I agree that, for the reasons given by Brooke LJ and subject to the alteration proposed by him to the order of the Divisional Court in the Mousa case, the appeal and the cross-appeal should be dismissed. I would also endorse the observations in Sedley LJ's postscript at paragraph 208 above.

210. The issue that has caused me a degree of hesitation is the territorial scope of the HRA. When first faced with that issue, at first instance in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWHC 651 (Admin), I accepted the case for the Secretary of State that, in accordance with the normal legislative presumption, the HRA extended, with limited exceptions, only to the territory of the United Kingdom. Since then the competing arguments have become much more sophisticated, the Court of Appeal in *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643 has reached a different conclusion, albeit strictly *obiter*, and the observations of Lord Nicholls in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 have provided support for the conclusion in *B.* In my view there is still considerable force in the Secretary of State's case, but the matter is more finely balanced than it first appeared; and in the circumstances I agree with Brooke LJ that the right course is to follow the dicta in *B* and *Quark* and leave it to the House of Lords to decide whether those dicta are wrong.