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Case No: CO/2242/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 14 December 2004

Before :
THE RIGHT HONOURABLE LORD JUSTICE RIX and
THE HONOURABLE MR JUSTICE FORBES

- -

Between :

THE QUEEN - on the Application of - MAZIN JUMAA GATTEH AL SKEINI and others	**Claimants**
- and -	
THE SECRETARY OF STATE FOR DEFENCE	**Defendant**
-and-	
The Redress Trust	**Intervener**

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Rabinder Singh QC, Michael Fordham, Shaheed Fatima and Professor Christine Chinkin (instructed by **Public Interest Lawyers**) for the Claimant**s**
Professor Christopher Greenwood QC, Philip Sales and Cecilia Ivimy (instructed by The Treasury Solicitor) for the Defendant
Edward Fitzgerald QC, Mark Henderson and Joseph Middleton (instructed by **Bhatt Murphy**) for the **Intervener** by way of written submissions
Hearing dates: 28th, 29th and 30th July and 30 November 2004

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Summary
(this note forms no part of the judgment)

1. In this judgment of the court, the Divisional Court considers the claims of six claimants, relatives respectively of Iraqi citizens who have died in provinces of Iraq where and at a time when the United Kingdom was recognised as an occupying power (viz between 1 May 2003 and 28 June 2004). The first five claimants' relatives were shot in separate armed incidents involving British troops. The sixth claimant's son, Mr Baha Mousa, died in a military prison in British custody. The claims are for judicial review, on the basis that article 2 and (in the case of the sixth claimant) also article 3 of the European Convention of Human Rights applies, by reason of the Human Rights Act 1998, to these claims.

2. This judgment is only concerned with two preliminary issues: (1) whether the deaths took place within the jurisdiction of the United Kingdom so as to fall within the scope of (a) the Convention and (b) the Act; and (2) whether, if so, there has been a breach of the requirements under articles 2 and 3 of the Convention regarding an adequate enquiry into those deaths.

3. The judgment first decides, on the basis of a consideration of Strasbourg jurisprudence, that a state party's jurisdiction within article 1 of the Convention ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention") is essentially territorial; that exceptionally such jurisdiction extends to outposts of the state's authority abroad such as embassies and consulates; that this exception can apply to a prison operated by a state party in the territory of another state with the consent of that state; but that it does not apply to the total territory of another state which is not itself a party to the Convention, even if that territory is in the effective control of the first state; and that therefore only the case of the sixth complainant, in respect of his son's death in a British prison in Iraq, was within the United Kingdom's jurisdiction and thus within the scope of the Convention. It follows that, in the opinion of the court, the claims of the first five claimants must fail.

4. Secondly, the judgment decides, on the basis of a consideration of the Act, that its scope is also essentially territorial but also extends exceptionally, like the Convention, to the case of outposts of the United Kingdom's authority abroad such as embassies and consulates and in this case the prison in Iraq in which the death of Mr Baha Mousa occurred. It follows that, in the opinion of the court, the sixth claim is capable of falling within the Convention and the Act.

5. Thirdly, the judgment decides, on the basis of a consideration of the facts relating to the death of Mr Baha Mousa and the surrounding circumstances, that the enquiries that have taken place into his death are not adequate in terms of the implied procedural requirements of articles 2 and 3 of the Convention.

Index to Al-Skeini Judgment

Lord Justice Rix :

1. This is the judgment of the court to which both members have contributed.

Introduction

2. The claimants in these proceedings are all relatives of deceased Iraqi civilians ("the deceased"), who have been killed by or in the course of action taken by British soldiers in the period following completion of major combat operations in Iraq and prior to the assumption of authority by the Iraqi Interim Government (i.e. the period 1 May 2003 to 28 June 2004). The defendant is the Secretary of State for Defence ("the Secretary of State").

3. This judgment is concerned with the determination of two preliminary issues (as to which, see paragraphs 5 and 6 below) arising out of the claimants' application for judicial review of the Secretary of State's alleged failure and/or refusal: (i) to conduct independent inquiries into the deaths of the deceased, (ii) to accept liability for those deaths and (iii) to pay just satisfaction.

4. Stated in general terms, the claimants' application for judicial review concerns the legal responsibilities of the Secretary of State under section 6 of the Human Rights Act 1998 ("the HRA") in relation to the civilian deaths in question. It is the claimants' case (as originally pleaded) that the Secretary of State acted in breach of section 6 of the HRA, in particular by his violation of the procedural obligations under article 2 (the right to life) of the European Convention on Human Rights ("the Convention"), in failing and/or refusing to conduct independent inquiries into the deaths of the various deceased.

5. On 11 May 2004, at the hearing of the claimants' application for permission to apply for judicial review, Collins J granted the claimants permission to apply in relation to the two preliminary issues to be determined in these proceedings and (*inter alia*) ordered that the remainder of the application for permission be stayed until the determination of those preliminary issues: see paragraph 1 of the order of Collins J, made by consent on 11 May 2004 ("the 11 May Order").

6. Accordingly, these proceedings are concerned with the determination of the following two preliminary issues, as modified later by agreement between the parties (as to which, see paragraph 8 below): see the terms of paragraph 2 of the 11 May Order:

> "2. There shall be a hearing to determine the following preliminary issues:
>
> 2.1 Whether the European Convention of [Human] Rights and the Human Rights Act 1998 apply to the circumstances of this case; and
>
> 2.2 Whether the procedural duty under Article 2 of the European Convention of Human Rights has been violated by the Defendant."

7. By the same Order, Collins J also granted permission to amend the original claim form as follows: (i) to include Daoud Mousa (the father of Baha Mousa: as to whom, see below) as a new claimant and (ii) to amend the original grounds of the application to include (where relevant) a complaint that the Secretary of State has violated the equivalent procedural obligation under article 3 of the Convention (prohibition of torture), for the same reasons as those alleged in respect of article 2 (see paragraph 5 of the 11 May Order).

8. By agreement between the parties, the claims considered by the court for the purpose of determining the two preliminary issues have been limited to six illustrative cases, namely the claims brought by the first five original claimants, plus the claim brought by Daoud Mousa. As is apparent from the relevant factual circumstances (as to which, see below), Daoud Mousa's claim differs from those of the first five claimants in that his son's death occurred as a result of the treatment he received after he had been arrested by and whilst he was in the custody of British soldiers. Accordingly, if the HRA and the Convention do apply to the circumstances of this case, Daoud Mousa's claim is one that raises issues under both articles 2 and 3. The parties therefore have sensibly agreed that, when determining the second preliminary issue (see paragraph 2.2 of the 11 May Order, quoted in paragraph 6 above), this Court should also consider whether the Secretary of State has violated the procedural obligation under article 3.

General background

9. The current military operations by the United Kingdom in Iraq have been and are being conducted under the codename "Operation Telic" and are operations in which British troops form part of a USA-led Coalition ("the Coalition"). Operation Telic was divided into three phases: (i) phase 1, planning and deployment, (ii) phase 2, major combat operations and (iii) phase 3, stabilisation and reconstruction. The deaths with which this case is concerned all occurred during phase 3.

10. Phase 2 of Operation Telic (major combat operations) began on 20 March 2003. By 5 April 2003, the British had captured Basra and by 9 April 2003, US troops had gained control of Baghdad. Major combat operations in Iraq were declared complete on 1 May 2003. In the post-conflict period that followed, British forces have remained in Iraq, together with other Coalition Forces, operating under a joint command, headed by a US General.

11. It is accepted by the Secretary of State that, between 1 May 2003 and 28 June 2004 ("the relevant period"), in those areas of southern Iraq where British troops exercised sufficient authority, the United Kingdom became 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 ("the Fourth Geneva Convention"). As will be explained in greater detail later in this judgment, the Iraqi Interim Government assumed full responsibility and authority for governing Iraq on 28 June 2004. Thereafter, the United Kingdom ceased to be an occupying power and the Hague Regulations and the Fourth Geneva Convention ceased to apply.

12. As already stated, the six deaths with which these proceedings are concerned all occurred in Iraq during the relevant period. It is accepted by the Secretary of State that each of the deaths in question occurred in areas of Iraq (namely the Al Basrah and Maysan provinces) in which British forces were stationed and in respect of which it is also accepted that the United Kingdom was an occupying power at all material times under the relevant provisions of the Hague Regulations and the Fourth Geneva Convention.

13. It is also accepted by the Secretary of State that in the first, second, fourth and fifth cases with which these proceedings are concerned, the deceased were shot and killed by British troops. In the third case, the Secretary of State accepts that the deceased (a bystander) was shot and killed in the course of an exchange of fire between British troops and Iraqi gunmen. However, it is the Secretary of State's position that it is not clear whether the deceased was killed by a shot fired by a British soldier or by an Iraqi gunman. So far as concerns the sixth case (Daoud Mousa), it is accepted by the Secretary of State that the deceased died whilst in the custody of British troops.

The post-conflict government and administration of Iraq

14. On 16 April 2003, US General Tommy Franks issued a "Freedom Message", in which he announced the creation of the Coalition Provisional Authority ("the CPA"), a civilian administration that would exercise powers of government temporarily in Iraq.

15. It is not necessary for the purposes of this judgment to give a detailed account of the post-conflict administration of Iraq. However, in the paragraphs that follow, we have sought to summarise the main relevant events during the period from the creation of the CPA until its dissolution on 28 June 2004 and the transfer of authority from the CPA to the sovereign Iraqi Interim Government on the same date.

16. On 8 May 2003, the US and UK permanent representatives to the United Nations in New York (the "UN") wrote to the then president of the Security Council. Their letter stated (*inter alia*) that, in order to meet the Coalition's objectives and obligations in the post-conflict period in Iraq:

> "…the United States, United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority (CPA), which includes the Office of Reconstruction and Humanitarian Assistance (ORHA), to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction."

The permanent representatives' letter to the Security Council went on to state:

> "The United States, United Kingdom, and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible

> administration of the Iraqi financial sector, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible."

17. On 13 May 2003, the US Secretary for Defence, Donald Rumsfeld, issued a memorandum formally appointing Ambassador Paul Bremer as Administrator of the CPA with responsibility for the temporary governance of Iraq. To that end, the CPA acted as the administrative body for administrative decision-making and for issuing legislation, with all administrative and legislative decisions being taken by Ambassador Bremer.

18. On 22 May 2003, the Security Council unanimously adopted resolution 1483 which noted the permanent representatives' 8 May letter and recognised "…the specific authorities, responsibilities, and obligations under applicable international law of these states under unified command (the "Authority")." Paragraph 4 of resolution 1483 called upon the Authority (in practice the CPA), consistent with the UN Charter and relevant international law "…to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." Paragraph 8 of resolution 1483 provided for the appointment of a UN Special Representative for Iraq, who was to assist the people of Iraq in conjunction with the Authority in the restoration and establishment of national and local institutions for representative governance in Iraq. Paragraph 9 supported the formation by the people of Iraq of an Iraqi interim administration, as a transitional administration run by Iraqis until the people of Iraq established an internationally recognised representative government.

19. From 16 May 2003 onwards, the CPA issued a series of instruments, namely 11 regulations ("R1-11"), 97 orders ("O1-97"), 14 memoranda ("M1-14") and 11 public notices ("PN1-11"). CPA Regulation 1 of 16 May 2003 defined the authority of the CPA in the following terms:

> "The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including resolution 1483 and the laws and usages of war. This authority shall be exercised by the CPA Administrator."

20. Although the CPA was staffed by various nationalities from Coalition countries, in practice it was dominated by US personnel, who made up the majority of its staff. The CPA was not a subordinate organ or authority of the United Kingdom. The UK was represented through the office of the UK special representative. Although the UK special representative and his office sought to influence CPA policy and

decisions, he had no formal decision-making power within the CPA. As already indicated, all the CPA's administrative and legislative decisions were taken by Ambassador Bremer.

21. The CPA administration was divided into regional areas, of which CPA South is the relevant area for the present case. During the relevant period, CPA South remained under British responsibility and control, with a British regional coordinator. It covered the southernmost four of Iraq's eighteen provinces, each having a governorate coordinator. British troops were deployed in the same area (see below).

22. The various instruments issued by the CPA contained and provided a wide range of measures for the temporary governance of Iraq. It is helpful to refer to some of the various instruments, in order to give an indication of the general breadth and detail of the subject matter covered.

23. Provision was made for the dissolution of the Iraqi defence and military agencies in readiness for replacement (O2) and the creation of a new Iraqi army (O22), a code of military discipline (O23) and an Iraqi civil defence corps (O28). The former political dominance of the Ba'ath party was dismantled (M1, M7 and O1), its assets were dealt with (O4) and a special de-Ba'athification council was established (O5).

24. Other matters dealt with by the CPA included establishing Iraqi criminal law procedures (M3) and the creation of a central criminal court (PN6), a ministry of justice (O32), an Iraqi special tribunal (to try Iraqis for war crimes etc: O48) and a ministry of human rights (O60). Provision was also made for enhanced sentences (PN10, PN11), notification of criminal offences (O41), management of prisons (O10), review of the justice system (O15) and an Iraqi judiciary (M12).

25. The CPA set up a wide range of government agencies, including a development fund (R2), a governing council (R6, M6), a strategic review board (R7), a ministry of science and technology (O24), a department of border enforcement (O26), a ministry of municipalities and public works (O33), a ministry of environment (O44), a ministry of displacement and migration (O50) and a communications and media commission (O65).

26. The CPA also dealt with such fundamental matters as (*inter alia*) taxation (O37, O49), banking (O18, O20, O40, O56), foreign investment (O39), regulation of oil distribution (O36), new Iraqi banknotes (O43), company law (O64), trading agencies (PN3), media and communications (PN4, O11, O14), public broadcasting (O66), status of Coalition personnel (PN8), confiscation of the proceeds of crime (O25), public sector employment (O30), disqualification from public office (O62), local government powers (O71), weapons' control (M5, O3), trade liberalisation (O12), management and use of public property (O9) and freedom of assembly (O19).

27. On 13 July 2003, following two national conferences and widespread consultations, the Iraqi Governing Council ("the IGC") announced its formation. On the same day CPA Regulation 6 recognised the IGC formally, in line with resolution 1483, as the principal body of the Iraqi Interim Administration and stated that the IGC was the body with which the CPA was to "consult and co-ordinate on all matters involving the temporary governance of Iraq."

28. On 14 August 2003 the Security Council adopted resolution 1500, which welcomed the establishment of the IGC as "…an important step towards the formation by the people of Iraq towards an internationally recognized representative Government that will exercise the sovereignty of Iraq."

29. On 18 August 2003 the IGC established a constitutional preparatory committee to produce recommendations on how to take forward the process leading to the drafting of a new permanent constitution for Iraq. On 2 September 2003, the IGC announced the appointment of 25 interim ministers. In the period that followed, the various ministries were transferred to the full authority of their Iraqi ministers in stages as their capacities developed – four in April 2004, a further seven in May 2004 and the remaining fifteen in June 2004.

30. On 5 October 2003, the constitutional preparatory committee reported to the IGC, setting out the options for the process of drafting a new permanent constitution for Iraq.

31. On 16 October 2003, the Security Council unanimously adopted resolution 1511 which reaffirmed the sovereignty and territorial integrity of Iraq and underlined the temporary nature of the exercise by the CPA of the specific responsibilities, authorities and obligations under applicable international law that had been recognised in resolution 1483, and that those responsibilities, authorities and obligations would cease when an internationally recognised, representative government established by the people of Iraq assumed those responsibilities. In addition, resolution 1511 determined that the IGC and its ministers were the principal bodies of the Iraqi interim administration which "…embodies the sovereignty of the state of Iraq during the transitional period until an internationally recognised, representative government is established and assumes the responsibilities of the Authority."

32. Resolution 1511 also called upon the Authority (i.e. the CPA) to return government responsibilities and authorities to the people of Iraq as soon as practicable and invited the IGC to provide the Security Council, no later than 15 December 2003, with a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution. The same resolution also determined that the provision of security and stability was essential to the successful completion of the political process in Iraq and authorised a multi-national force ("MNF") to take all necessary measures to contribute to the maintenance of security and stability in Iraq.

33. On 15 November 2003, the IGC promulgated an agreement on the political process, setting out a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution, as requested in resolution 1511. The CPA and the UK special representative signified their acceptance of the process by signing the agreement. Amongst other things, the agreement provided for a swift progressive transfer of authority from the CPA to a provisional Iraqi government by 30 June 2004.

34. On 8 March 2004, the IGC promulgated the transitional administrative law, which provided a temporary legal framework for the governance of Iraq for the transitional period from the establishment of an interim Iraqi government on 30 June 2004 until

the formation of an elected Iraqi government after the adoption of a permanent constitution.

35. On 27 April 2004, after extensive consultations in Iraq, the UN special adviser Mr Lakhdar Brahimi announced the outline of the UN's plan for the Iraqi Interim Government.

36. On 1 June 2004, Mr Brahimi announced the formation of the Iraqi Interim Government, which was to assume full sovereign powers on 30 June 2004. CPA Regulation 10 acknowledged that "…the individuals designated as members of the Iraqi Interim Government will exercise authorities in their respective ministries effective June 1, 2004 until such time as the Iraqi Interim Government assumes full governance authority for Iraq..."

37. Also on 1 June 2004, the IGC adopted an annex to the transitional administrative law encapsulating the structure and powers of the Iraqi Interim Government and then formally dissolved itself, as recognised in CPA regulation 9.

38. In fact, at the request of Iraqi Prime Minister Allawi, the transfer of authority from the CPA to the Iraqi Interim Government took place on 28 June 2004, two days ahead of schedule. At a brief ceremony in Baghdad, Ambassador Bremer handed over to the Iraqi President a letter to the Iraqi Chief Justice, noting that, as recognised in resolution 1546, the CPA ceased to exist on 28 June. Ambassador Bremer and the UK special representative for Iraq left Iraq shortly after the ceremony. The Iraq Interim Government under the presidency of Ghazi al Yawr is now the sole sovereign authority of Iraq. All Iraq ministries are now under full Iraqi control.

39. The UK's occupation of southern Iraq came to an end on 28 June 2004. British troops remain in Iraq at the invitation of the new Iraqi Government and under UN auspices. To the extent that the UK had a jurisdiction of its own to exercise as an occupying power, that jurisdiction came to an end on 28 June 2004. British forces now assist the Iraq government in the exercise to maintain law and order.

The position of The United Kingdom's armed forces in Iraq during the relevant period (i.e. 1 May 2003 to 28 June 2004)

40. Although major combat operations were declared complete on 1 May 2003, hostilities did not all cease on that date. In the words of Lieutenant General Sir John Reith ("General Reith"), the United Kingdom chief of joint operations, "The situation in Iraq has remained volatile and in many areas hostile, resulting in an extremely challenging operational environment for Coalition Forces" (see General Reith's witness statement, paragraph 10). Brigadier William Hewitt Moore ("Brigadier Moore"), who was in command of the UK 19 Mechanised Brigade whilst it was deployed in Iraq during part of the relevant period (i.e. June to November 2003), described the post-conflict situation in Iraq in the following terms (see paragraphs 10 to 14 of Brigadier Moore's witness statement):

> "10. Iraq is the most volatile and violent place in which I have served. The population as a whole possessed a lot of

> weaponry, with at least two weapons in most households. In addition, the tribes, criminal gangs, and terrorist groups were very well armed with heavy machine guns, rocket-propelled grenades, bomb-making kit and a wide variety of other weapons.
>
> 11. The Rule of Law, which normally operates in a civil society, simply did not exist when we arrived in Iraq. The police were ineffective, they were not respected, they were corrupt, and they were easily intimidated by the tribes …
>
> 12. The area was rife with tribal feuds and organised crime. Extortion, kidnapping, carjacking, looting and oil smuggling were the key criminal pursuits. When the criminals were conducting these activities they went heavily armed and they were always ready to shoot at us if we came across them. …I suspect we had 2 or 3 shooting incidents involving armed criminals every night.
>
> 13. Tribal feuds were often extremely violent and dangerous … where heavy machine guns were regularly fired at each other. …
>
> 14. Terrorists, who included the former regime extremists, targeted us quite actively. Their attacks ranged from drive-by shootings to bombings. …"

41. During the relevant period the coalition forces consisted of six divisions that were under the overall command of US generals. Four were US divisions and two were multi-national. Each division was given responsibility for a particular geographical area in Iraq. The United Kingdom was given command of the multi-national division (south east) (MND (SE)), which comprised the provinces of Al Basrah, Maysan, Thi Qar and Al Muthanna and is an area approximately twice the size of Wales with a total population of about 4.6 million. During the relevant period the total number of Coalition troops deployed in MND (SE) was about 14,500, of which about 8,150 were UK forces, giving a troops to population ratio of about 1:317. By way of comparison, the ratio of Turkish troops to population in northern Cyprus (the subject matter of Strasbourg jurisprudence, see below) was in the region of 1:7.

42. The main theatre for operations by UK forces in MND (SE) has been the Al Basrah and Maysan provinces, with a total population of about 2,760,000. Approximately 8,119 British troops were deployed in Al Basra and Maysan provinces, giving a troops to population ratio of about 1:340.

43. From 1 May 2003 onwards, British forces in Iraq carried out two main functions. The first was to maintain security in the MND (SE) area, in particular in Al Basra and Maysan provinces. The principal security task was the effort to re-establish the Iraqi security forces, including the Iraqi police. Other tasks included patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities

and infrastructure and protecting police stations. According to General Reith (see paragraph 46 of his witness statement), UK military records show that, as at 30 June 2004, there had been approximately 178 demonstrations and 1050 violent attacks against Coalition forces in MND (SE) since 1 May 2003. The violent attacks consisted of 5 anti-aircraft attacks, 12 grenade attacks, 101 improvised explosive devices ("IEDs"), 52 attempted IEDs, 145 mortar attacks, 147 rocket propelled grenade attacks, 535 shootings and 53 others. During the same period, 15 British troops have been killed as a result of attacks on UK forces. Of Coalition forces as a whole, as at that time 743 had been killed and 5,221 wounded. Over the same period, some 395 members of the Iraqi security forces had also been killed.

44. The second main function of British troops has been the support of the civil administration in Iraq in a variety of ways, from liaison with the CPA and IGC and local government, to assisting with the rebuilding of the infrastructure (see General Reith's witness statement, paragraphs 11 to 18 and 22 to 24).

45. The use of force by British troops during operations is covered by the appropriate Rules of Engagement ("ROE"). The ROE governing the use of lethal force by British troops in Iraq during the relevant period is the subject of guidance contained in a card issued to every soldier, which is known as Card Alpha (see General Reith's witness statement, paragraph 47). Card Alpha is to all intents the relevant ROE and is in the following terms:

> "CARD A – GUIDANCE FOR OPENING FIRE FOR SERVICE PERSONNEL
>
> AUTHORISED TO CARRY ARMS AND AMMUNITION ON DUTY
>
> GENERAL GUIDANCE
>
> 1. This guidance does not affect your inherent right to self-defence. However, in all situations you are to use no more force than absolutely necessary.
>
> FIREARMS MUST ONLY BE USED AS A LAST RESORT
>
> 2. When guarding property, you must not use lethal force other than for the **protection of human life.**
>
> PROTECTION OF HUMAN LIFE
>
> 3. You 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.**
>
> CHALLENGING
>
> 4. A challenge MUST be given before opening fire unless:

a. To do this would be to increase the risk of death or grave injury to you or any other persons other than the attacker(s),

OR

b. You or others in the immediate vicinity are under armed attack.

5. You are to challenge by shouting:

"**NAVY, ARMY, AIR FORCE,**

STOP OR I FIRE." Or words to that effect.

OPENING FIRE

6. If you have to open fire you are to:

a. Fire only aimed shots,

AND

b. Fire no more rounds than are necessary,

AND

C. Take all reasonable precautions not to injure anyone other than your target."

46. In paragraph 49 of his witness statement, General Reith acknowledged that Coalition forces have used lethal force against Iraqi civilians on a number of occasions since 1 May 2003. UK military records show that between May 2003 and March 2004, 49 Iraqis are known to have been killed in incidents in which British troops have used force.

Investigations into civilian deaths

47. On 21 June 2003, the general officer commanding 1 UK Armoured Division, who was in command of MND(SE) at the time, issued a formal policy on the investigation of shooting incidents. This policy provided that all shooting incidents were to be reported and the divisional provost marshall was to be informed. Non-commissioned officers from the Royal Military Police (RMP) were then to evaluate the incident and decide whether it fell within the ROE. If it was decided that the incident did come within the ROE, then statements were to be recorded and a completed bulletin submitted through the chain of command. If the incident fell outside the ROE and involved death or serious injury, the investigation was to be handed to the RMP

(Special Investigation Branch) by the divisional provost marshall at the earliest opportunity.

48. However, Brigadier Moore decided that this initial policy should be revised so that any decision whether to initiate an RMP (SIB) investigation was taken at a much higher level. The initial policy was therefore replaced by further policies issued by MND (SE) during the relevant period, as described in the following paragraphs of General Reith's witness statement:

> "53. (The 21 June 2003 policy) was replaced on 28 July 2003 by a further policy issued by MND (SE) … This replacement policy required that all such incidents should be reported to MND (SE) by means of a serious incident report immediately following the incident. If the Commanding Officer (CO) of the soldier was satisfied, on the basis of the information available to him, that the soldier had acted lawfully and within the rules of engagement, then there was no requirement to initiate an investigation by the military police. The CO would record his decision in writing to his Brigade Commander. If the CO was not so satisfied, or if he had insufficient information to arrive at a decision, he was required to initiate a military police investigation.
>
> 54. Between January and April 2004 there was a further reconsideration of this policy. This was prompted by the fact that the environment had become less hostile and also by the considerable media and Parliamentary interest in incidents involving UK forces in which Iraqis had died. On 24 April, a new policy was adopted by MND (SE) which required all shooting incidents involving UK forces which result in a civilian being killed or injured to be investigated by SIB (RMP). Exceptionally the Brigade Commander may decide that an investigation is not necessary and in any such case the decision must be notified to the Commander MND (SE) in writing."

49. In paragraphs 36 and 37 of his witness statement, Brigadier Moore described the form of an investigation during his time in Iraq in the following terms:

> "36. The form of an investigation into an incident would vary according to the security situation on the ground and the circumstances of the individual case. Generally, it would involve the Company Commander or Commanding Officer taking statements from the members of the patrol involved, and reviewing radio logs. It might also include taking photographs of the scene. Sometimes there would be further investigation through a meeting with the family/tribe of the person killed. Investigations at unit level, however, would not include a full

> forensic examination. Within the Brigade, we had no forensic capability.
>
> 37. Once he had investigated the incident, the Commanding Officer would then forward a report to me, stating whether in his opinion the soldiers had acted within the Rules of Engagement, or whether the incident was required to be referred to the Special Investigation Bureau of the Royal Military Police (SIB). The Commanding Officer was required to call in the SIB to investigate if there was any doubt that an individual had not acted within the Rules of Engagement. If his decision was that an SIB investigation was needed, he would require this himself directly."

50. The provost marshall of the British led MND (SE) for the period November 2003 until May 2004 was Lieutenant Colonel Jeremy Troy Green ("Colonel Green"). In paragraphs 22 and 23 of his witness statement, Colonel Green confirmed that the responsibility for requiring an RMP (SIB) investigation into any incidents where third parties had allegedly been killed or seriously injured in Iraq by UK forces rested with the military chain of command in theatre, and not the RMP chain of command. The decision by the military chain of command whether or not to engage the RMP (SIB) to investigate had to be taken within 24 hours of an incident taking place. The chain of command was required to take legal advice from the directorate of army legal services before reaching such a decision and had to submit its decision in writing with that advice and any evidence relied upon to the general officer in command of MND (SE).

51. Captain Gayle Logan ("Captain Logan") deployed to Iraq with the RMP (SIB) in June 2003 and remained there until October 2003 as the officer commanding ("OC") 61 Section RMP (SIB), which was responsible for undertaking SIB operations in Iraq within MND (SE). As its OC, Captain Logan's duties included management of all the investigations that were undertaken by 61 Section. Section 61 was responsible for the investigation of all serious crimes committed by members of the British forces within MND (SE). These were limited to crimes within the British army or any other incidents involving the military, e.g. incidents involving contact between the military and civilians and any special investigations tasked to it (see paragraph 3 of Captain Logan's witness statement).

52. It was therefore Captain Logan's responsibility to investigate incidents involving civilian deaths caused by British soldiers. These investigations would be triggered either (i) if the SIB was asked to investigate by the commanding officer of the units concerned or (ii) if the SIB otherwise became aware of an incident prior to notification. However, the latter type of investigation would be brought to an end if the SIB was instructed to stop by either the provost marshall or the CO of the unit involved (see paragraph 5 of Captain Logan's witness statement).

53. 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 (see paragraphs 9 to 39 of Captain Logan's witness statement).

54. On conclusion of an SIB investigation, the investigating officer would write a report, presenting the evidence to the CO of the unit involved. Such a report would include a covering letter and a brief but factually accurate and complete summary of the evidence, together with the evidence of relevance to the investigation in the form of statements from witnesses and investigators. The report would not contain any decision as to the facts or any conclusions as to what had or might have happened. The SIB report just presented the facts as shown by the evidence (see paragraph 7 of Captain Logan's witness statement).

The facts of each of the six cases

55. We now turn to summarise the main facts of each of the six cases with which these proceedings are concerned.

56. *Case 1: Hazim Jum'aa Gatteh Al-Skeini.* The first claimant, Mazin Jum'aa Gatteh Al-Skeini ("Mazin Al-Skeini"), is the brother of the deceased, Hazim Jum'aa Gatteh Al-Skeini ("Hazim Al-Skeini"), who was unemployed and aged 23 at the time of his death. Hazim Al-Skeini was one of two Iraqis from the Beini Skein tribe who were shot dead in the Al Majidiyah area of Basra just before midnight on 4 August 2003 by Sergeant Ashcroft, the commander of a British patrol from the 1st Battalion The King's Regiment.

57. In his witness statement, Mazin Al-Skeini explained that, during the evening in question, various members of his family had been gathering at a house in Al Majidiyah for a funeral ceremony. In Iraq it is customary for guns to be discharged at a funeral. Mazin Al-Skeini stated that he was engaged in receiving guests at the house, as they arrived for the ceremony, and saw his brother fired upon by British soldiers as he was walking along the street towards the house. According to Mazin Al-Skeini, his brother was unarmed and only about ten metres away when he was shot and killed. He had no idea why the soldiers opened fire.

58. According to the British account of the incident, the patrol saw and heard heavy gunfire from a number of different points in Al Majidiyah. The intensity of firing appeared to increase as the patrol approached the area on foot and in darkness. The patrol thought that a firefight between rival groups was in progress. When the patrol encountered two Iraqi men in the street, Sergeant Ashcroft opened fire because the two men were armed and Sergeant Ashcroft considered them to represent an immediate threat to his life and to the lives of the other members of the patrol. Both Iraqis (one of them the deceased) were killed by the shots fired by Sergeant Ashcroft.

59. The following day, Sergeant Ashcroft produced a written statement describing the incident. This was passed to the CO of the 1st Btn. The King's Regiment, Lieutenant

Colonel Ciaran Griffin (Colonel Griffin), who took the view that the incident fell within the ROE and duly wrote a report to that effect. Colonel Griffin sent the report to Brigade, where it was considered by Brigadier Moore. Brigadier Moore queried whether the other man had been pointing his gun at the patrol. Colonel Griffin wrote a further report that dealt with this query to Brigadier Moore's satisfaction. The original report was not retained in Brigade records. Having considered Colonel Griffin's further report, as did his deputy chief of staff and his legal adviser, Brigadier Moore was satisfied that the actions of Sergeant Ashcroft did fall within the ROE and so he did not order any further investigation (see paragraphs 47 and 48 of Brigadier Moore's witness statement).

60. *Case 2: Muhammad Abdul Ridha Salim.* The second claimant is Fatima Zabun Dahesh, the widow of Muhammad Salim, who was shot and fatally wounded by Sergeant Catterall of 1st Btn The King's Regiment shortly after midnight on 6 November 2003. On 7 November 2003, Muhammed Salim died in hospital of the wound received as a result of the shooting. He was then aged 45 and a teacher by occupation. The incident occurred during a house search being carried out by a British patrol in the Badran area of Basra.

61. Fatima Dahesh was not present when her husband was shot. Her account is based on what she was told by those who were present. In her witness statement, Fatima Dahesh stated that, on the 5 November 2003, during Ramadan, Muhammad Salim went to visit his brother-in-law at Mahmood Sabun's home in Basra. At about 1130 pm British soldiers raided the house. They broke down the front door. One of the British soldiers came face to face with her husband in the hall of the house and fired a shot at him, hitting him in the stomach. Those who were present insist that Muhammad Salim posed no threat to the British soldiers and that he was shot for no reason. The British soldiers took him to the Czech military hospital, where he died on 7 November.

62. According to the British account of the incident, the patrol had received information that a group of men armed with long barrelled weapons, grenades and rocket propelled grenades had been seen entering a house in the Badran area of Basra. The patrol was authorised to carry out a search and arrest operation. After the patrol failed to gain entry by knocking, the door was broken down. Sergeant Catterall entered the house through the front door with two men and cleared the first room. As he entered the second room he heard automatic gunfire from within the house. When Sergeant Catterall moved forward into the next room by the bottom of the stairs, two men armed with long barrelled weapons rushed down the stairs towards him. There was no time to give a verbal warning. Sergeant Catterrall believed that his life was in immediate danger. He fired one shot at the leading man (the deceased) and hit him in the stomach. He then trained his weapon on the second man who dropped his gun. Inquiries of the occupants of the house made by the company commander suggested to him that the patrol might have been deliberately drawn in on one side of a feud about the ownership of some offices.

63. On 6 November 2003, the company commander produced a report of the incident. Having considered the report and spoken to the company commander, Colonel Griffin came to the conclusion that it was a straightforward case in which the incident fell within the ROE and did not require any further RMP investigation. He therefore produced a report to that effect the same day and forwarded it to Brigade, where it

was considered by Brigadier David John Rutherford Jones ("Brigadier Jones"). Brigadier Jones discussed the matter with his deputy chief of staff and his legal adviser. He also discussed the case with his political adviser. As a result, Brigadier Jones also concluded that it was a straightforward case that fell within the ROE and duly issued a report to that effect.

64. *Case 3: Hannan Mahaibas Sadde Shmailawi.* Hameed Kareem is the widower of Hannan Mahaibas Sadde Shmailawi, who was shot and fatally wounded on 10 November 2003, at the Institute of Education in the Al Maaqal area of Basra, where Hameed Kareem worked unpaid as a night porter and lived with his wife and family.

65. According to Hameed Kareem's witness statement, at about 8 pm on the evening in question, he and his family were sitting round the dinner table when there was a sudden burst of machine gun fire from outside the building, fired into the building by British soldiers. Bullets struck his wife in the head and ankles. A child was also injured. Hameed Kareen had no idea why the British soldiers fired shots into the building, but he believed that the soldiers did not intend to kill his wife. Although Hannan Shmailawi and the child were taken to hospital, she subsequently died. However, the child did recover.

66. According to the British account of the incident, Hannan Shmailawi was shot during a firefight that took place in Al Maaqal on the night of 10/11 November 2003 between a patrol from 1st Btn. The King's Regiment and a number of unknown gunmen. When the area was illuminated by parachute flares, at least 3 men with long barrelled weapons were seen in open ground, two of whom were firing directly at the British soldiers. One of the gunmen was shot dead during this exchange of fire with the patrol. After about 7 to 10 minutes the firing ceased and armed people were seen running away. A woman (the deceased) with a head injury and a child with an arm injury were found when the buildings were searched. Both were taken to hospital.

67. The following morning, the company commander Major Routledge produced a report concerning the incident, together with statements from the soldiers involved. After he had considered the report and statements, Colonel Griffin came to the conclusion that it was a straightforward case in which the incident fell within the ROE and did not require any further RMP investigation. He duly produced a report to that effect, which he then forwarded to Brigade. The report was considered by Brigadier Jones, who also discussed the matter with his deputy chief of staff, his legal adviser and Colonel Griffin. As a result, Brigadier Jones came to the conclusion that the incident fell within the ROE and required no further investigation.

68. *Case 4: Waleed Sayay Muzban.* Fadil Muzban is the brother of Waleed Sayay Muzban, aged 43, who was shot and fatally injured on the night of 24 August 2003 in the Al Maqaal area of Basra by Lance Corporal Singleton of the Kings Own Scottish Borderers.

69. Fadil Muzban was not present when his brother Waleed was shot. However, in his witness statement Fadil Muzban has given a short account of what he understands to have happened. According to Fadil Muzban, his brother was returning home from work at about 8.30 pm on the evening in question. He was driving a 1993 model, 9-seater Kia minibus along a street called Souq Hitteen. For no apparent reason, the Kia

"came under a barrage of bullets", as a result of which Waleed was mortally wounded in the chest and stomach.

70. At the time, Lance Corporal Singleton was temporarily attached to the 1st Btn The King's Regiment and was a member of a patrol carrying out a perimeter check during the evening of 24 August 2003. According to the British account of the incident, LCpl. Singleton became suspicious of a minibus, with curtains over its windows, that was being driven towards the patrol at slow speed with its headlights dipped. When the vehicle was signalled to stop, it appeared to be trying to evade the soldiers so LCpl Singleton pointed his weapon at the driver and ordered him to stop.

71. The vehicle then stopped and LCpl Singleton approached the driver's door and greeted the driver (the deceased). The driver reacted in an aggressive manner and appeared to be shouting over his shoulder to people in the curtained-off area in the back of the vehicle. When LCpl Singleton tried to look into the back of the vehicle, the driver pushed him away by punching him in the chest. The driver then shouted into the back of the vehicle and made a grab for LCpl Singleton's weapon. LCpl Singleton had to use force to pull himself free.

72. The driver then accelerated away, swerving in the direction of various other members of the patrol as he did so. LCpl Singleton fired at the vehicle's tyres and it came to a halt about 100 metres from the patrol. The driver turned and again shouted into the rear of the vehicle. He then appeared to be reaching for a weapon. LCpl Singleton believed that his team was about to be fired on by the driver and others in the vehicle. He therefore fired about 5 aimed shots. As the vehicle sped off, LCpl Singleton fired another 2 shots at the rear of the vehicle before it got away.

73. After a short interval, the vehicle reappeared and screeched to a halt. The driver got out and shouted at the British soldiers. He was ordered to lie on the ground. The patrol then approached the vehicle to check for other armed men. The vehicle proved to be empty. The driver was found to have three bullet wounds in his back and hip areas. He was given first aid and then taken to the Czech military hospital where he died either later that day or the following day.

74. On 29 August 2003, Colonel Griffin sent his initial report concerning the incident to Brigade. In it he stated that he was satisfied that LCpl Singleton believed that he was acting lawfully within the ROE. However, Colonel Griffin went on to express the view that it was a complex case that would benefit from an RMP (SIB) investigation.

75. After Brigadier Moore had considered Colonel Griffin's report, discussed the matter with his deputy chief of staff and taken legal advice, it was decided that the matter could be resolved with a unit level investigation, subject to a number of queries being satisfactorily answered. As a result, Colonel Griffin produced a further report dated 12 September 2003, in which he dealt with the various queries and concluded that an RMP investigation was no longer required. After discussing the matter again with his deputy chief of staff and having taken further legal advice, Brigadier Moore concluded that the case did fall within the ROE.

76. By this stage, Brigadier Moore had been informed that RMP (SIB) had commenced an investigation into the incident. A meeting was convened with the officer commanding SIB, Captain Gail Nugent. The outcome of the meeting was that SIB

agreed to stop its inquiries (see paragraphs 49 to 52 of Brigadier Moore's witness statement). However, the SIB has now reopened the investigation, which is currently ongoing (see paragraph 13 of David Pickering's witness statement).

77. *Case 5: Raid Hadi Sabir Al Musawi.* Nuzha Al Rayahi is the mother of Raid Hadi Sabir Al Musawi, an Iraqi police commissioner aged 29, who was shot and fatally wounded by a British soldier from the Queen's Lancashire Regiment (the "QLR") in the Al Hayyaniyah area of Basra at about midnight on 26 August 2003.

78. In her witness statement about the matter, Nuzha Al Rayahi stated that her son was on duty as a police commissioner on the day in question. It was his job to carry a box of "suggestions and complaints" to the judge's house in Basra. On his way to the judge's house, her son had stopped at her house to have dinner. He had then resumed his journey to the judge's house to deliver the box. On his way there he was shot and seriously wounded by a British patrol. He was taken to hospital, where he died nine weeks later on 6 November 2003.

79. According to the British account of the incident, the shooting occurred shortly after all the lights in the area had been extinguished as the result of a power failure. The patrol heard a gunshot in the immediate vicinity. Corporal Smith was nearest to the sound of the gunfire and ran to the corner of an alleyway, where he illuminated a man (the deceased) standing about 20 metres away. The man was holding an AK rifle and gesticulating with both arms raised. He was also shouting at persons in a courtyard who were out of Corporal Smith's sight. Corporal Smith continued to illuminate the man and shouted warnings at him. The man turned towards Corporal Smith, brought down his rifle and fired one round at Corporal Smith. Corporal Smith fired a single shot at the man, hitting him in the lower left side and causing him to fall to the ground. The man was then given first aid and taken to hospital.

80. Major Christopher Michael Suss-Francksen ("Major Suss-Francksen") was the Second-in-Command of the QLR at the relevant time. On 27 August 2003, Major Suss-Francksen interviewed the commander of the patrol and each of the two other members of the patrol. Having interviewed the three soldiers, Major Suss-Francksen produced his report of the incident, in which he expressed the view that the shooting was within the ROE. He then forwarded his report to Brigade. Having considered Major Suss-Francken's report and after discussing the matter with his deputy chief of staff and legal adviser, Brigadier Moore concluded that Corporal Smith had acted within the ROE. He therefore saw no reason to order an SIB investigation.

81. *Case 6: Baha Mousa.* Daoud Mousa has been a policeman for 24 years and is now a colonel in the Basra police force. He is the father of Baha Mousa, who was aged 26 when he died whilst in the custody of the British Army, three days after having been arrested by soldiers from a unit of the QLR on 14 September 2003.

82. According to Daoud Mousa, on the night of 13/14 September 2003, his son Baha Mousa had been working as a receptionist at the Ibn Al Haitham Hotel in Basra. Early in the morning of the 14 September, Daoud Mousa went to the hotel to pick up his son from work. On his arrival he noticed that a British unit from the QLR had surrounded the hotel. He saw soldiers breaking open a safe. They had a plastic bag in which they put various items that they found in the safe. Daoud Mousa also noticed that three of the soldiers were pocketing money taken from the safe. Daoud Mousa

reported what he had seen to the officer in charge, whom he recalls being called "Lieutenant Mike". Lieutenant Mike called the soldiers over, reprimanded them, took their weapons and ordered them inside an army personnel carrier.

83. Whilst this was going on, Daoud Mousa noticed that his son and six other hotel employees were lying on the floor of the hotel lobby with their hands behind their heads. Daoud Mousa expressed his concern to Lieutenant Mike, who reassured him that it was a routine investigation that would be over in a couple of hours.

84. On the third day after his son had been detained, Daoud Mousa was visited by a military police unit. He was told that his son had been killed in custody and was asked to accompany them to identify the corpse. What happened thereafter is best described in Daoud Mousa's own words, as follows (see paragraphs 8 and 9 of his witness statement):

> "8. … When I saw the corpse I burst into tears and I still cannot bear to think about what I saw. … I was horrified to see that my son had been severely beaten and his body was literally covered in blood and bruises. The cover was removed from his body to allow me to see all of it. He had a badly broken nose. There was blood coming from his nose and mouth. The skin on one side of his face had been torn away to reveal the flesh beneath. There were severe patches of bruising over all of his body. The skin on his wrists had been torn off and the skin on his forehead torn away and there was no skin under his eyes either. I literally could not bear to look at him.
>
> 9. I insisted that there was a proper post-mortem and a proper medical report on my son's death. A Professor Hill came over from the UK and he conducted an autopsy on Baha. … I was not allowed to see a copy of his report. However he told me in front of one of the clerks that he thought that my son had died from asphyxiation. …"

85. One of the other hotel employees who were arrested on 14 September 2003 was Kifah Taha Al-Mutari. In his witness statement he described what happened at the hands of the British troops after the prisoners had been taken to a British military base in Basra called Darul Dhyafa. According to Kifah Al-Mutari, once the prisoners had arrived at the base, the British soldiers started beating them. Hoods were placed over their heads. The soldiers kicked and punched them in the abdomen. The prisoners were forced to crouch for hours with their arms out straight in front of them. At the same time they were beaten about the neck, chest and genital areas. During the detention, Baha Mousa was taken into another room where he received more beatings.

86. During the night, Kifah Al-Mutari could hear the sound of Baha Mousa moaning in the separate room where he was detained. Kifah Al-Mutari heard him saying that he was bleeding from his nose and that he was dying. The last words that he heard Baha Mousa say were "I am dying … blood … blood."

87. Brigadier Moore had taken part in the operation in which Baha Mousa was arrested. At the time of his arrest, Brigadier Moore was up on the roof of the hotel. At the end of the operation, he was told that 1 QLR had arrested 9 suspected terrorists. Brigadier Moore did not himself see any evidence of violent arrest.

88. The next thing that Brigadier Moore heard in relation to the matter was the report that he received late on 15 September that Baha Mousa had died whilst being held by 1 QLR and that other prisoners had also been beaten. It was the first case of its kind that Brigadier Moore had come across during his military career. He realised that it was very serious and needed to be investigated by RMP (SIB), which had already been called in by the commanding officer of the QLR. Brigadier Moore did not himself conduct an investigation into the death of Baha Mousa, beyond establishing the basic facts. However, he personally went to considerable lengths to apologise to Baha Mousa's father and brother for what had happened (including preparing an official statement for publication in a local newspaper) and to reassure them that those responsible for any crime that had been committed would be brought to justice (see paragraphs 55 to 60 of Brigadier Moore's witness statement).

89. In paragraphs 43 to 48 of her witness statement, Captain Logan described the SIB investigation into the death of Baha Mousa and the difficulties that were encountered. In particular, there were logistical problems with identification parades, the local hospitals were on strike and doctors were unavailable at the time. In the event, arrangements were made for a home office pathologist to be flown out from the UK to carry out the post-mortem in very makeshift conditions. According to Captain Logan, the SIB investigation was concluded in early April 2004 and the report of the investigation distributed to the unit's chain of command.

Jurisdiction under the Convention

90. We now turn to consider the first question that is raised by the first preliminary issue, namely whether the Convention applies to the circumstances of this case. In order to answer that question it is necessary to carry out a careful analysis of the nature and extent of the Convention's jurisdiction. We are assisted in this and other issues by the parties' careful written and oral submissions. We have also been assisted by a written submission lodged by the Redress Trust, which has been permitted to intervene but did not participate in the hearing.

The provisions of the Convention

91. The most important single provision of the Convention for the purpose of defining its jurisdiction has always been treated as article 1, but there are some other provisions to which reference should also be made. Article 1, which is headed "Obligation to respect human rights", provides as follows:

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

92. Article 1 stands outside the other sections of the Convention. Thus section I, which is heralded in article 1 itself, is headed "Rights and Freedoms" and defines those rights and freedoms, beginning with article 2. Section II is headed "European Court of Human Rights" (the "Court"). It begins with article 19, which establishes the European Court of Human Rights "[t]o ensure the engagements undertaken by the High Contracting Parties". The jurisdiction of the Court, set out in article 32, "shall extend to all matters concerning the interpretation and application of the Convention", and, by article 32(2) – "In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

93. Section III, headed "Miscellaneous Provisions", contains an important provision, article 56, headed "Territorial application". It provides as follows:

> "1. Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible…
>
> 3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
>
> 4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention."

94. Article 57, headed "Reservations", contains a reference in that context to "law then in force in [a State's] territory", viz –

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision…"

95. Finally, reference should be made to two aspects of the Convention's preamble. One is that the parties to the Convention express their motivation in ("Considering") the UN General Assembly's Universal Declaration of Human Rights proclaimed 10 December 1948 and its aspiration for securing "the universal and effective recognition and observance" of those rights. The other is that the Convention itself was the product of its parties' common European heritage. Thus the first paragraph of the preamble refers to the Universal Declaration, and its final paragraph reads:

> "*Being resolved*, as the governments of European countries which are like-minded and have a common heritage of political

> traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."

The travaux préparatoires of the Convention

96. The drafting history of article 1 of the Convention was considered by the European Court of Human Rights (the "Court") for the first time in *Bankovic v. Belgium* [2001] 11 BHRC 435 (at paras 19/21). That history showed that article 1's phrase "everyone within their jurisdiction" had originally been drafted as "all persons residing within their territories". That original language had been changed, however, because of a concern that "residing" might be too restrictive if interpreted as requiring the legal indicia of the formal concept of residence. Thus the court quoted the following extracts from the *Collected Edition of the Travaux Preparatoires of the European Convention on Human Rights*:

> "The Assembly draft had extended the benefits of the Convention to "all persons residing within the territories of the signatory States". It seemed to the Committee that the term "residing" might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term "residing" by the words "within their jurisdiction" which are also contained in Article 2 of the Draft Covenant of the United Nations Commission" (at vol III, p 260).

97. The next relevant comment prior to the adoption of article 1, made by the Belgian representative on 25 August 1950 during the plenary session of the Consultative Assembly, was to the effect that –

> "…henceforth the right of protection by our States, by virtue of a formal clause of the Convention, may be exercised with full force, and without any differentiation or distinction, in favour of nationals of whatever nationality, who on the territory of any one of our States, may have had reason to complain that [their] rights have been violated."

98. The wording did not give rise to any further discussion and the text as it was, and remains, was adopted on the same day (at vol VI, p 132).

99. The Court in *Bankovic* found this history confirmatory of its conclusion that jurisdiction under the Convention was essentially territorial. Thus it said:

> "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)…
>
> 65…In any event, the extracts from the travaux preparatoires detailed above constitute a clear indication of the intended meaning of art 1 of the convention which cannot be ignored. The court would emphasise that it is not interpreting art 1 'solely' in accordance with the travaux preparatoires or finding those travaux 'decisive'; rather this preparatory material constitutes clear confirmatory evidence of the ordinary meaning of art 1 of the convention as already identified by the court (art 32 of the Vienna Convention)."

Other relevant international texts

100. It is convenient to collect under this heading and in one place a number of other international treaty texts which bear on the issue under consideration and the arguments which have been deployed.

101. Thus, a comparison between article 1 of the Convention can be made with the contemporaneous texts of the four Geneva Conventions on the Protection of War Victims of 1949, whose article 1 in each case set out to define their respective scope in the following terms:

> "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

102. Attention is drawn on behalf of the Secretary of State to the width of the language "in all circumstances" and the contrast to be drawn between that and the (1950) Convention's "within their jurisdiction".

103. In the later Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1985 (the "Torture Convention"), on the other hand, article 2(1) states:

> "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

The parties were at issue as to whether this could apply to the United Kingdom in Iraq. Mr Greenwood submitted that it did not: the United Kingdom could not have taken legislative or judicial measures of the kind envisaged since legislative authority was in the hands of the CPA and judicial authority was largely in the hands of the Iraqi courts. Mr Singh, however, submitted that the phrase "any territory under its jurisdiction" was in any event plainly wider than article 1 of the Convention's "within [its] jurisdiction".

104. Regulation 42 of the Hague Regulations (annexed to the 1907 Hague Convention) provides as follows:

> "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."

Mr Singh stressed the importance for the argument on article 1 jurisdiction of the acceptance by the Secretary of State of the application of this test to the United Kingdom in the relevant provinces of Iraq. Similarly, the Fourth Geneva Convention refers to the obligations of an "Occupying Power" in "occupied territory".

105. The obligations under the 1907 Hague Convention only apply between belligerent contracting powers (article 1). Violation of the provisions renders a belligerent power liable to pay compensation (article 2). The Hague Regulations set out the relevant obligations, which are concerned with the laws and customs of war on land. They cover for instance the treatment of prisoners of war ("They must be humanely treated", article 4), limitations on the means of injuring the enemy, and, of special relevance to the present case, "military authority over the territory of the hostile state" (section III). Article 43 provides:

> "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."

106. The Fourth Geneva Convention is concerned with the protection of civilian persons in time of war and contains detailed provisions generally considered to be declaratory of customary international law. Section III is headed "Occupied Territories". The occupying power is entitled to subject the population of an occupied territory to provisions which are essential to enable the power to fulfil its obligations, maintain orderly government and ensure its own security and that of its occupying forces (article 64). "Grave breaches" of the Fourth Geneva Convention are defined to include those, committed against persons protected by it, amounting to "wilful killing, torture or inhuman treatment" (article 147). The parties to it agree to a regime of universal jurisdiction whereby each is "under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" (article 146). At the request of a party to the conflict, an enquiry must be instituted

concerning any alleged violation (article 149). The Geneva Conventions Act 1957 as amended gives effect in the United Kingdom to the "grave breaches" provisions: so that such breaches are triable in the United Kingdom wherever and by whomsoever they were committed.

107. The Torture Convention contains a general obligation, not confined to torture committed in territory under the jurisdiction of the state concerned, to make torture a criminal offence (articles 4 and 7). The Criminal Justice Act 1988 by its section 134 makes torture a criminal offence under the law of the United Kingdom irrespective of where and by whom it was committed. See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] AC 147.

The essential structure of the issue between the parties concerning the jurisdiction of the Convention

108. There is a rich jurisprudence emanating from Strasbourg concerning the jurisdiction of the Convention, on which we have been addressed in detailed written and oral submissions on behalf of the claimants and the Secretary of State respectively. It is not possible to do justice to the parties' submissions without setting out the basic material of that jurisprudence, particularly as the parties are fundamentally at odds as to its correct interpretation.

109. Thus, although there is common ground both that the Convention's reach is essentially territorial and that there are exceptions to the basic principle of territoriality (*Bankovic v Belgium (2001) 11 BHRC 435*), there is complete disagreement as to the width, nature, rationale and applicability of the exceptions.

110. On behalf of the claimants, Mr Rabinder Singh QC submits that one or other or both of two principal exceptions are relevant. The first is that there is jurisdiction where a state exercises control over persons or property outside its own territory. He calls that "personal jurisdiction". He finds support for that exception in a line of early Strasbourg cases whose conclusions and rationale, he submits, are approved by *Bankovic* itself and still hold good in cases post-*Bankovic*. The second exception is that there is jurisdiction where a state has "effective control of an area" outside its own territory. The principal line of authority for that exception, he submits, is to be found in the development of Strasbourg jurisprudence concerning Turkey's responsibility for breach of human rights in northern Cyprus following Turkey's 1974 invasion of the island. He submits that this rationale is again approved in *Bankovic*. He submits that the overlapping principle is that of control, whether of persons or of land, and that these two exceptions are dual strands within what is ultimately a single principle. The principle is applicable to the present complaints because of the Secretary of State's acceptance that the United Kingdom, through its armed forces, was an occupying state for the purposes of the 1907 Hague Convention and the Fourth Geneva Conventions under international humanitarian law (see paras 11 and 104/106 above).

111. On behalf of the Secretary of State, Mr Christopher Greenwood QC acknowledged that, for the purposes of the Hague and Geneva Conventions and in the relevant areas of southern Iraq (Basra and Maysan provinces) where the deaths complained of in

these proceedings occurred and at the time of their occurrence, the United Kingdom was an occupying state and was so during the period, which he emphasises was relatively short, between 1 May 2003, when major combat operations were declared complete, and 28 June 2004, when the Iraqi Interim Government assumed full responsibility and authority for governing Iraq.

112. However, he disputed that such occupancy amounted either ipso facto or on the particular facts of this case to such "effective control of an area" as came within the exceptional jurisdiction known by that phrase and recognised in Strasbourg for the purposes of the Convention. Still more fundamentally, he submitted that the exceptional jurisdiction derived from "effective control of an area" was, in Strasbourg jurisprudence, confined to situations such as northern Cyprus where the area in question in any event fell within Convention territory, even if not within the home territory of the defendant state.

113. He contrasted that situation with the facts of this case, where Iraq has never been within the territorial jurisdiction of any Convention state. As for the claimants' reliance on an alternative exceptional doctrine of personal jurisdiction, he denied that such a doctrine existed at all in any principled form, other than as a handful of disparate and truly exceptional cases, reflecting international law concepts of exceptional state sovereignty in relation to such matters as embassies and consulates, ships and aircraft, none of which applied to the situation in Iraq.

114. The parties also divided over their reading of *Bankovic* itself. On the claimants' side, it was just one among a long line of Strasbourg authorities. On its own facts it was understandable that it emphasised the essentially territorial nature of jurisdiction under the Convention, for it arose from the aerial bombing of Serbia by NATO forces who lacked any control of the land or any authority over its citizens. As such, it had nothing to do with the situation in Iraq. It was not the first, even if it was up to now perhaps the most important, of the authorities which emphasised the territorial nature of Convention jurisdiction. In any event it continued to recognise prior authorities in which the two exceptions relied on by the claimants had been developed as a matter of principle. Moreover, further cases since *Bankovic* continued to demonstrate that those principled exceptions remained as valid as ever at today's date.

115. On the part of the Secretary of State, however, *Bankovic* was a watershed. It was the first occasion on which the Strasbourg Court, guided by principles of international law, had undertaken a fundamental and principled review of jurisdiction under the Convention. Even if earlier cases were not doubted in their outcomes, they were subject to a fresh rationalisation, so that what at an earlier stage may have seemed a matter of broad principle, had to be re-evaluated as narrow exceptions. Nothing since *Bankovic* altered that perception of it as a definitive watershed. Cases, as in northern Cyprus, of "effective control" were to be understood as confined to control of the territories of the Convention states themselves. A concept of "personal jurisdiction" could not live with the essentially territorial jurisdiction of the Convention without undermining the latter.

116. In the light of these conflicting submissions, there is no alternative to reviewing in detail the Strasbourg authorities presented to us. To give focus and point to that review, while at the same time mindful of the different readings given by the parties to *Bankovic* itself, we think it is appropriate and necessary to start with some

reference to the Court's reasoning in *Bankovic*, before we put it in its place as part of a chronological account of the Strasbourg jurisprudence.

Bankovic v. Belgium (2001)

117. The applicants in *Bankovic* were citizens of the Federal Republic of Yugoslavia (FRY). They were either injured by, or relatives of those killed by, the NATO bombing in April 1999 of the Serbian radio and television headquarters (Radio Televizje Srbije or RTS). Articles 2, 10 and 13 of the Convention were invoked. FRY was not, however, a state party of the Convention. The respondent governments included not only Belgium but other members of NATO who were also state parties of the Convention, among them the United Kingdom. The acts complained of occurred in FRY, outside the territorial jurisdiction of the respondent states and outside any Convention territory. The dominant issue to be tried was "Whether the applicants and their deceased relatives came within the 'jurisdiction' of the respondent states within the meaning of art 1 of the convention" (at 443f). The case was heard by the Grand Chamber of the Court (see articles 30 and 43).

118. The Court noted (at para 54) that –

> "… the real connection between the applicants and the respondent states is the impugned act which, wherever decided, was performed, or had its effects, outside of the territory of those states (the extra-territorial act). It considers that the essential question to be examined therefore is whether the applicants and their deceased relatives were, as a result of that extra-territorial act, capable of falling within the jurisdiction of the respondent states…"

119. It then found the applicable rules of interpretation in the Vienna Convention and thus in relevant rules of international law. On the question of the meaning of the words in article 1 "within their jurisdiction", the Court concluded as follows:

> "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, pp55-59 'Jurisdiction of States' and edition 1995,

vol 2, pp337-343 'Extra-territorial Effects of Administrative, Judicial and Legislative Acts'; *Oppenheim's International Law* (9th Edn, 1992), col 1, para 137; Dupuy *Droit International Public* (4th edn, 1998), p61; and Brownlie *Principles of International Law* (5th edn, 1998)pp287, 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) p73 and Nguyen Quoc Dinh *Droit International Public* (6th edn, 1999), p500). 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, p59 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), pp64-65; Brownlie *Principles of International Law* (5th edn, 1998), p313; Cassese *International Law* (2001) p89; 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, pp8-30).

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."

120. The Court then considered (at paras 64/65) whether the doctrine that the Convention is a "living instrument" ought to affect its conclusion, and held that it did not. The issue was as to the scope and reach of the entire Convention, rather than as to the substance of the rights and freedoms protected by it.

121. Under the heading "Extra-territorial acts recognised as constituting an exercise in jurisdiction", the Court next considered its previous jurisprudence, which it introduced as follows:

> "67. In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of art 1 of the convention."

122. The Court then turned to a number of cases where the extradition or expulsion by a member state of a person within its territory might engage rights under the Convention (and in particular articles 2 and 3) because of what might befall that person in another country to which he or she would be returned, cases such as *Soering v. UK* [1989] ECHR 14038/88 (as to which see below at paras 150/153). However, the Court explained that in such cases liability is incurred–

> "… by an action of the respondent state concerning a person while he or she is on its territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad…" (at para 68).

In other words, although such cases might involve extra-territorial effects, they were not proper examples of extra-territorial jurisdiction.

123. The Court next considered a relatively small number of other cases, by name only *Drozd v. France* (1992) 14 EHRR 745, *Loizidou v. Turkey* (preliminary objections) (1995) 20 EHRR 99, and *Cyprus v. Turkey* (2001) 11 BHRC 45, from which it derived the following two conclusions:

> "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…
>
> "73. 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."

124. In a section of its judgment concerned with the application of these principles to the case before it ("(d) Were the present applicants therefore capable of coming within the 'jurisdiction' of the respondent states?"), the Court first considered but rejected the applicants' submission that the "effective control" criteria developed in the northern Cyprus cases applied to FRY, or at any rate did so to an extent proportionate to the degree of control exercised (at para 75). In other words, as we understand the matter, the argument had been that a control sufficient to put the rights and freedoms under articles 2 and 3 at risk would suffice to implicate Convention responsibility, even if the control in question did not extend widely enough to encompass other articles of the Convention. The Court reasoned, first, that the positive obligation in article 1 to secure the Convention rights and freedoms could not be "divided and tailored" in accordance with the particular circumstances of the extra-territorial act in question; and secondly, that had such extensive jurisdiction been intended, then the drafters of the Convention would have adopted a text similar or identical to the contemporaneous articles 1 of the four Geneva Conventions of 1949 (see under para 101 above).

125. Our final reference at this stage to the Court's judgment in *Bankovic* is to the following passage in which the Court considered an important submission regarding the Convention's scope:

> "79. Fifthly and more generally, the applicants maintain that any failure to accept that they fell within the jurisdiction of the respondent states would defeat the ordre public mission of the convention and leave a regrettable vacuum in the convention system of human rights' protection.
>
> 80. The court's obligation, in this respect, is to have regard to the special character of the convention as a constitutional instrument of European public order for the protection of human beings and its role, as set out in art 19 of the convention, is to ensure the observance of the engagements undertaken by the contracting parties (*Loizidou v Turkey* (preliminary objections) (1995) 20 EHRR 99 at para 93). It is therefore difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent states would fall foul of the convention's ordre public objective, which itself underlines the essentially regional vocation of the convention system, or of art 19 of the convention which does not shed any particular light on the territorial ambit of that system.
>
> It is true that in its *Cyprus v Turkey* judgment ((2001) 11 BHRC at para 78), the court was conscious of the need to avoid 'a regrettable vacuum in the system of human-rights protection'

> in northern Cyprus. However, and as was noted by the governments, that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus would have found themselves excluded from the benefit of the convention safeguards and system which they had previously enjoyed, by Turkey's 'effective control' of the territory and by the accompanying inability of the Cypriot government, as a contracting state, to fulfil the obligations it had undertaken under the convention.
>
> In short, the convention is a multi-lateral treaty operating, subject to art 56 of the convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the contracting states. (Article 56(1) enables a contracting state to declare that the convention shall extend to all or any of the territories for whose international relations that state is responsible.) The FRY clearly does not fall within this legal space. The convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied upon by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention."

126. Mr Greenwood submitted that this passage was fundamental to the understanding of the northern Cyprus cases and expressly or by implication limited their reasoning to territories, such as northern Cyprus itself, which, since Cyprus was a state party, were in any event within the sphere of Convention territories. Mr Singh, on the other hand, submitted that this, like the similar passage in *Cyprus v. Turkey* (2001) 11 BHRC at para 78 referred to in the passage cited above, was merely an additional rationalisation in support of a conclusion already reached in *Bankovic* and in the northern Cyprus cases on broader and in their own way as fundamental principles.

The Strasbourg jurisprudence

127. We shall now review the Strasbourg jurisprudence as a whole, bearing in mind the parties' conflicting submissions about them. There is something to be said for sub-dividing the cases into categories, for instance dealing with the northern Cyprus cases by themselves (as Mr Greenwood did). On balance, however, we think it is preferable to take the jurisprudence chronologically and as a whole, since cases within the potentially separate categories cite and influence one another. There will be time, when drawing conclusions, to see whether and to what extent categorisation can cast any illumination.

128. *X v. Federal Republic of Germany* (App No 1611/62, 25 September 1965, Yearbook of the European Convention on Human Rights, Vol 8, pp158/169), an admissibility decision of the Commission, is the earliest authority cited to us. The applicant, who had been born in Bohemia, started life as an Austrian citizen, had acquired Czech nationality and, in 1938, German nationality. In 1945 he had been expelled from Czechoslovakia. He was now living in Morocco, in possession of a Spanish refugee passport. He claimed to be a German citizen, recognised as such by post-war legislation of the Federal Republic of Germany. His complaint was that German consular officials in Morocco had asked the Moroccan authorities to expel him. He alleged various breaches of the Convention.

129. The Commission considered X's claim to be manifestly ill-founded on the facts, citing various reasons, among them that no sufficient proof in support of his allegations had been furnished. However, it appears that the Commission was prepared to assume as arguable that his claim would otherwise have fallen within article 1, which it cited, for it said:

> "Whereas, in certain respects, the nationals of a Contracting State are within its "jurisdiction" even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that country liable in respect of the Convention;"

It appears that the Commission was prepared to treat X as a German citizen.

130. *Cyprus v. Turkey* (unreported, App No 6780/74 and No 6950/75, 26 May 1975) is the earliest of the northern Cyprus cases. The Commission ruled the two applications in question to be admissible. Its decision on the law is included within a report of the Commission (1976) 4 EHRR 482 (at 583/589). The applications arose out of the invasion of northern Cyprus on 20 July 1974. Cyprus complained of various crimes, including those of murder and rape, committed by Turkish forces in the area under their control. Both Cyprus and Turkey were state parties to the Convention. Among the arguments deployed by Turkey for disputing the admissibility of Cyprus's applications were, by reference to articles 1 and 63 (now 56), submissions (para cc) to the effect that –

> "the Commission had no jurisdiction ratione loci to examine the application as Cyprus did not fall under Turkish jurisdiction. Turkey had not extended her jurisdiction to the island of Cyprus since she had not annexed a part of the island nor established a military or civil government there. The administration of the Turkish Cypriot community had absolute jurisdiction over part of the island. Moreover, Turkey could not be held liable under Art. 63 of the Convention since she was not responsible for the international relations of either the whole or a part of Cyprus."

131. Cyprus on the other hand submitted (para cc) that –

> "It was clear from the language and object of Art. 1 and from the purpose of the Convention as a whole that the High

> Contracting Parties were bound to secure the rights and freedoms defined in the Convention to all persons under their actual and exclusive authority, whether that authority was exercised within their territory or abroad…
>
> In the occupied part of Cyprus the actual and exclusive authority was exercised by the Turkish army under the direction of the Turkish Government; indeed, through various official statements and activities Turkey was treating this area as being under her control and supervision. The Turkish Cypriot community had neither legal nor actual authority over the area.
>
> The operation of the Convention in the occupied part of Cyprus would become ineffective if one accepted the respondent Government's submission that alleged violations of the Convention in that area could not be examined by the Commission. It followed from Art. 17 that the Convention did not allow such a vacuum in the protection of its rights and freedoms."

132. That is, so far as we are aware, the first reference to the "vacuum" argument in this context.

133. Under the heading "As to the Commission's competence ratione loci" (at paras 7/10 of the decision), these arguments were considered. As to the term in article 1 "within their jurisdiction", the Commission found (at para 8):

> "that this term is not, as submitted by the respondent Government, equivalent to or limited to the national territory of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their territory or abroad. The Commission refers in this respect to its decision on the admissibility of…*X v. Federal Republic of Germany…*"

134. Thus the broadest of Cyprus's submissions was adopted. It is hard to see how this principle is consistent with a view that jurisdiction under the Convention is essentially territorial, since on every level of interpretation, both linguistic and purposive, the test here formulated is not territorial but that of "authority and responsibility".

135. The Commission continued (again at para 8):

> "The Commission further observes that nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic and 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."

136. These are again extremely broad statements. "All nationals", let alone registered ships and aircraft and state agents, are "within their jurisdiction": and all other persons and property, presumably whether national or not, may be brought "within their jurisdiction" to the extent that they are affected by the acts or omissions of such state agents. Thus the Commission's conclusion on the facts of the case was expressed as follows (at para 10):

> "It follows that these armed forces are authorised agents of Turkey and that they bring any other persons or property within 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."

137. The only concept added in that conclusion to those already discussed was the concept of "control", which appears to be potentially narrower than the still broader concept of "affect". It was, however, in these terms just cited, emphasising "control", that the Commission in their report (C*yprus v. Turkey* (1976) 4 EHRR 482) summarised (at para 83) its earlier decision on admissibility.

138. *Hess v. United Kingdom* (1975) 2 D&R 72 was another admissibility decision of the Commission, published two days after its decision in *Cyprus v. Turkey* but without any reference to it. This concerned an application by the wife of Rudolf Hess, the Nazi war criminal then held under a sentence of life imprisonment, handed down at Nuremberg, in the allied military prison in Spandau. That prison was under the control of the four allied powers, the USA, France, the United Kingdom and the USSR, but was located in the British sector of (West) Berlin. Mrs Hess alleged violations of articles 3 and 8 of the Convention. It would seem that it was only the veto of the USSR which prevented the release of Hess, who since October 1966 had been the sole remaining Nazi prisoner in Spandau. The Commission ruled the application inadmissible "ratione personae" on the ground (inter alia) that, since the prison was under the joint responsibility of the four powers, and not of the United Kingdom alone, its administration did not come "within the jurisdiction" of the United Kingdom for the purposes of article 1. It would seem, however, that if the prison had been in the United Kingdom's sole administration, then jurisdiction might have been established, since, in an earlier part of its decision, the Commission reasoned as follows:

> "The Commission first observes that in the present case the exercise of authority by the respondent Government takes place not in the territory of the United Kingdom but outside its territory. As the Commission has already decided, a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory…*X v. Federal Republic of Germany*. The Commission is of the opinion that there is in principle, from a legal point of view, no reason why the acts of British authorities in Berlin should not entail the liability of the United Kingdom under the Convention…"

139. This is, as it seems to us with respect, rather unsatisfactory reasoning, because if territoriality was no impediment, then it is not at all obvious why the alleged violations were not "within the jurisdiction" of all four powers. It may well be, of course, that on the facts they could only be imputed to the USSR's veto, but that would have been a different question. It may also be remarked that it seems somewhat strange that an analogy was not drawn with Turkey's "control" of northern Cyprus, unless it be that shared control is not sufficient. Moreover, the reliance on *X v. Federal Republic of Germany* seems somewhat overdone, for nothing had been "decided" in that case.

140. Nevertheless, this is perhaps an important decision, for in a sense it is, of all the cases cited to us, the one that comes closest to the facts concerning Mr Baha Mousa, who died in the custody of the UK armed forces. It might also be said that those forces were also acting in Iraq as part of a joint authority: but that point, although made by the Secretary of State on the facts, was not, as we understood it, specifically relied on by him as preventing the establishment of jurisdiction, if it otherwise existed.

141. *X and Y v. Switzerland* (unreported, App No 7289/75, 14 July 1977) was another decision of the Commission on admissibility. X and Y were lovers, and parents of two children: X was a German citizen living in Munich (with his wife and legitimate family), Y was an Austrian citizen living in Liechtenstein with the two children. X used to visit Y in Liechtenstein, and at one time, while he was ill, spent a whole 18 months with her. Under a Swiss-Liechtenstein treaty, the Swiss authorities had competence in matters of entry, residence and establishment of foreigners in Liechtenstein. There came a time when the Federal Aliens' Police of Switzerland, in Bern, issued an order prohibiting X's entry into Liechtenstein (or Switzerland) for two years, citing gross violation of regulations applicable to foreigners.

142. X and Y now alleged breaches of articles 2, 3, 5, 6 and 8 of the Convention: article 3 was cited on the ground that prohibition of entry into Liechtenstein amounted to inhuman or degrading treatment. Switzerland was, but Liechtenstein then was not, a state party to the Convention. Switzerland submitted that the complaint of breach of article 3 was inadmissible, inter alia because, in reliance on article 1, the prohibited entry into Liechtenstein was a matter which occurred within Liechtenstein, but not within Swiss territory. The Commission disagreed, however, holding that the complained of acts had occurred within Swiss territory, even if they also had effects within Liechtenstein, which effects had been extended into Liechtenstein by reason of

the bilateral treaty. Therefore "Swiss jurisdiction… was used and extended to Liechtenstein". There was jurisdiction ratione loci.

143. Although the Commission recalled "its earlier case law" (citing *X v. Federal Republic of Germany*, *Hess v. United Kingdom* and *Cyprus v. Turkey*) to the effect that "the Contracting Parties' responsibility under the Convention is also engaged insofar as they exercise jurisdiction outside their territory and thereby bring persons or property within their actual authority or control", it seems to us that this decision was, so far as relevant to our concerns, founded on the basis that Switzerland had acted within its own territory albeit with extra-territorial effect, based on the Swiss-Liechtenstein treaty. It may be, however, that it could also have been decided on the alternative ratio for which the earlier cases had been cited. Despite finding jurisdiction, the Commission considered the applications ultimately inadmissible.

144. *X v. United Kingdom* (unreported, App No 7547/76, 15 December 1977). In this case the Commission decided that the application was manifestly ill-founded, but again expressed the view that it would otherwise have fallen within the scope of article 1. The case concerned the complaint of a British national resident in the United Kingdom in respect of the failure by the British consulate in Jordan to assist her in recovering her child whom her husband had taken to Jordan and would not return. The Commission found on the facts that the consulate had done all that could be reasonably expected of it. However, the Commission also said that –

> "It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged."

145. It may be noted that the applicant in this case was a British national, but the reasoning went much broader than that.

146. *Tyrer v. United Kingdom* (1978) 2 EHRR 1 is an authority which lies outside the run of cases previously considered, for article 1 jurisdiction was not itself in question. Mr Greenwood nevertheless relied on it as demonstrating the Europe-centric nature of the Convention. It concerned a 15 year old boy in the Isle of Man who on his conviction for actual bodily harm had been sentenced to three strokes of the birch. He complained of a violation of article 3. The Court found the violation proved to the extent that it constituted degrading punishment.

147. Of present relevance was the Court's rejection of an argument raised by the United Kingdom which depended on the fact that the Convention applied in the Isle of Man because the United Kingdom had notified its intention that the Convention should extend to it pursuant to article 63 (now 56). The Isle of Man is not a part of the United Kingdom but a dependency of the Crown with its own government, legislature and courts and its own administrative, fiscal and legal systems. Nevertheless the Crown is ultimately responsible for its good government. The United Kingdom

submitted therefore that, pursuant to article 63(3) (now 56(3)), the Convention's provisions should be applied in the Isle of Man "with due regard…to local requirements". The Court, however, rejected that argument not only on the absence of proof of the necessary "local requirements" but also in these terms (at 13):

> "Historically, geographically, and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble to the Convention refers. The Court notes, in this connection, that the system established by Article 63 was primarily designed to meet the fact that, when the Convention was drafted, there were still certain colonial territories whose state of civilisation did not, it was thought, permit the full application of the Convention."

148. It may be noted that this is the first judgment of the Court, as distinct from decisions of the Commission, which we have had to consider. Mr Greenwood submits, in effect, first, that article 56 (ex 63) is the (only) proper means by which the Convention is extended beyond the boundaries of its parties to other territories over which a state party has authority or control; and secondly that, in addition to the preamble, article 56(3) both emphasises the common heritage of its European parties and makes special allowance for extra-European colonies and dependent territories by means of its provision concerning regard for local requirements. All of this, he submits, excludes the possibility that Iraq should be considered to be "within their jurisdiction" for the purposes of article 1.

149. *W v. United Kingdom* (1983) 32 DR 190 is another decision of the Commission on the admissibility of an application. W was a British citizen whose husband had been murdered in the Republic of Ireland and whose brother had been murdered in Ulster. She complained that the United Kingdom had failed to secure (article 1) her husband's and brother's right to life (article 2) with consequential violations of other articles of the Convention. Her application was held to be inadmissible: in the case of the murder in Ireland because it was not "within the jurisdiction" of the United Kingdom in the sense of article 1, and in the case of the murder in Ulster for other reasons. The court stressed that in considering the article 1 question of competence ratione loci, regard must be had to the location, at the relevant time, of the direct victim as distinct from the indirect victim (the applicant). It also observed that the applicant had not alleged that the United Kingdom authorities had contributed to the husband's murder in Ireland by any active measures. In the circumstances, this was a straightforward application of a territorial principle, even if that received little emphasis.

150. *Soering v. United Kingdom* (1989) 11 EHRR 439 concerns the problem of an expulsion or extradition from the home territory of a state party to another country where there is danger of inhuman or degrading treatment. The victim and the act of removal are both located in the state party's territory, but the danger lies abroad.

151. Soering was a West German national whom the United Kingdom had decided to extradite to the USA to face trial on a charge of capital murder: if sentenced to death he would face the "death row phenomenon" of long-drawn out proceedings under the shadow of death. The court held that article 3 could not be interpreted as generally prohibiting the death penalty, but that the circumstances relating to its imposition could and, in the particular case where Soering might instead be tried in West Germany, did. For present purposes we are interested in what the court said about article 1 (at para 86):

> 86. Article 1 of the Convention, which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I,' sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention."

152. Nevertheless, the court went on to consider the special, absolute and fundamental nature of article 3's prohibition on torture and inhuman or degrading treatment or punishment and thus to conclude (at para 91) that a decision to extradite might engage article 3 where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of such conduct in the requesting country. Ultimately, therefore, the decision was that an act by a state within its territory bringing with it sufficiently clear and fundamental extra-territorial consequences could engage the state's responsibility under the Convention.

153. The Court in *Bankovic* (at para 66) was subsequently to pick up and cite the opening sentences of *Soering's* para 86 for support for its conclusion as to the essentially territorial nature of the Convention's scope. The passage in *Soering* is perhaps the first clear and authoritative statement by the court of article 1's essentially territorial nature. The year was 1989.

154. *Thanh v. United Kingdom* (unreported, App No 16137/90, 12 March 1990) concerned an applicant, formerly from Vietnam, who was being held in a detention centre in Hong Kong. The applicant complained that his return to Vietnam would lead to the real risk of conduct in violation of article 3: in other words this was a *Soering* type case. The question, however, was whether acts within Hong Kong were within the scope of article 1. The United Kingdom had not made a declaration extending the

Convention to Hong Kong under article 63 (now 56). The Commission found that fact to be crucial in ruling the application inadmissible ratione loci. It said:

> "It is clear from the case-law of the Commission that the concept of jurisdiction in Article 1 (Art. 1) is not limited to the territory of a High Contracting Party and may extend in certain circumstances to matters which occur outside their territory (see e.g…*Cyprus v. Turkey,* loc. cit.).
>
> However, the Convention system also provides the State with the option of extending the Convention to territories for whose international relations it is responsible by lodging a declaration under Article 63…It is an essential part of the scheme of Article 63 (Art. 63) that a declaration extending the Convention to such a territory be made before the Convention applies either to acts of the dependent Government or to policies formulated by the Government of a Contracting Party in the exercise of its responsibilities in relation to such territory. Accordingly, in the present case even if the Commission were to accept that the acts of the Hong Kong authorities were based on United Kingdom policy, it must find that it has no competence to examine the application since no declaration…has been made in respect of Hong Kong."

155. *Chrysostomos, Papachrysostomou and Loizidou v. Turkey* (unreported, App Nos 15299/89, 15300/89 and 15318/89, 4 March 1991) was a decision by the Commission on the admissibility of a new round of applications arising out of the situation in northern Cyprus. These, unlike Cyprus's application in 1975, were brought by individual applicants, complaining of personal violations on them by Turkish troops. They were brought pursuant to a declaration lodged for the first time in 1987 by Turkey under what was then article 25 of the Convention, recognising the competence of the Commission to receive such individual applications. Among other limitations in Turkey's declaration was a territorial limitation to "acts or omissions of public authorities in Turkey…or territory to which the Constitution of Turkey is applicable". The Commission had to consider whether this limitation was a permissible one, and concluded that it was not. The Commission stated (at para 32) that –

> "the application of the Convention extends beyond the national frontiers of the High Contracting Parties and includes acts of State organs abroad."

For this proposition it cited extracts from its 1975 decision in *Cyprus v. Turkey* (see paras 130/137 above).

156. It also emphasised its 1978 decision in another application, *Cyprus v. Turkey* (App No 8007/77, 10 July 1978) which recognised that, despite the invasion of northern Cyprus and the creation there of what Turkey called the "Turkish Federated State of Cyprus", Cyprus continued to exist as a single state and remained the state party to the Convention, and that, even though Cyprus was prevented from exercising its

jurisdiction in northern Cyprus, the "Turkish Federated State of Cyprus" could not be regarded as an entity which exercised article 1 jurisdiction over any part of Cyprus.

157. The Commission then went on to consider Turkey's submission that it could choose, under or by analogy with article 63 (now 56), whether to extend the Convention to a territory, to wit northern Cyprus, beyond Turkey's own boundaries. The Commission held that article 63 could not apply directly, since Turkey was not recognised as having responsibility for northern Cyprus's international relations. It also held that article 63 could not apply by analogy, on the principal ground, already stated (at para 32) that the Convention applied beyond national boundaries so as to include the acts of state agents abroad. In essence, therefore, the Commission's views in this context on article 1 jurisdiction remained where they had been in 1975.

158. *Drozd and Janousek v. France and Spain* (1992) 14 EHRR 745 is a significant authority in that it is one of a small number of the Court's judgments which were specifically cited in *Bankovic*. The applicants were Spanish and Czeck citizens who had been convicted in Andorra (and subsequently imprisoned in France). They complained of violations under article 6 in their trial process. Andorra, however, was not a state party to the Convention. France and Spain had, nevertheless, been made respondents on the ground that the Andorran courts were administered by French and Spanish judges. This occurred by reason of the anomalous international law status of Andorra, whereby sovereignty is exercised by two co-princes, the President of the French Republic and the Bishop of Urgel in Spain. It is the co-princes, as sovereigns of Andorra, who appoint French and Spanish judges to sit in the Andorran courts, but not as judges of France or Spain, rather as judges of Andorra.

159. France and Spain submitted that the court lacked jurisdiction both ratione loci and ratione personae. The first of those two objections, which was in essence that "the Convention did not apply on the territory of Andorra" (at para 84), was dealt with at part A of the court's judgment (paras 84/90), and succeeded. Andorra did not form part of France or Spain, nor was it a Franco-Spanish condominium. It was not even a member of the Council of Europe. "In short, the objection of lack of jurisdiction ratione loci is well-founded" (at para 89).

160. It might be thought that, if that was the case, then, although there might be additional reasons why the application failed, such as lack of jurisdiction ratione personae, the lack of jurisdiction ratione loci, i.e. lack of jurisdiction (as we understand it) on the basis that the matters complained of fell outside the territorial scope of the Convention, would be sufficient by itself to defeat the complaint. However, the court appears to suggest otherwise by immediately continuing (at para 90) as follows:

> "90. This finding does not absolve the Court from considering whether the applicants come under the 'jurisdiction' of France or Spain within the meaning of Article 1 of the Convention because of their conviction by an Andorran court."

161. The Court then proceeded, in section B of its judgment (paras 91/98), to its consideration of the governments' objection ratione personae by remarking:

> "91. The term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory."

162. For that proposition the Court then cited, in footnote 83, the Commission's decisions in *X v. Germany* (see paras 128/129 above), *Hess v. United Kingdom* (see paras 138/140 above), *Cyprus v. Turkey* (see paras 130/137 above), *X and Y v. Switzerland* (see paras 141/143 above) and *W v. United Kingdom* (see para 149 above). The Court continued:

> "The question to be decided is whether the acts complained of by Mr Drozd and Mr Janousek can be attributed to France or Spain or both, even though they were not performed on the territory of those States."

163. To that question the court rendered a negative answer, on the ground that the French and Spanish judges, when they sat as judges in Andorra, did not do so in their capacity as French or Spanish judges. Just as, the Court added, Austrian and Swiss jurists sat as judges in Liechtenstein. The Court therefore concluded (at para 97) that –

> "97. In short, the objection of lack of jurisdiction ratione personae must also be upheld."

164. We confess to being rather puzzled by this analysis. The treatment of jurisdiction ratione personae is made to sound like an issue on the merits, dependent on attribution. It is not clear how territorial and personal jurisdiction operate in relation to one another. Sometimes the jurisdiction being spoken of by the Court is the jurisdiction or competence of the Court itself, as distinct from the jurisdiction of the state parties referred to in the article 1 phrase "within their jurisdiction". Perhaps the explanation is that which Mr Singh advocated, namely that "jurisdiction" within article 1 (albeit that article was not explicitly mentioned) may be established either territorially or personally.

165. On that basis, and by reference to some of the broad statements contained in the Commission decisions footnoted in footnote 83, the concept of article 1 jurisdiction could hardly be referred to as essentially territorial, for territoriality may be entirely irrelevant if personal jurisdiction is established. Moreover, if the proposition in the first sentence of para 91 is taken at face value, it could be sufficient to establish personal jurisdiction merely on the ground that acts of state authorities "produce effects outside their own territory". That is perhaps the broadest proposition yet encountered. It is understandable where the acts take place within the territorial jurisdiction (as in *Soering*), but less so where both act and its effect take place outside

the territorial jurisdiction. Perhaps a lot of stress has to be placed on the word "can" in the Court's proposition "responsibility can be involved".

166. An alternative explanation may be that, in a case where it was impossible either to point to any act performed within the territorial jurisdiction of France or Spain or to identify any act performed in Andorra which was attributable to France or Spain or to any French or Spanish authority, the Court expressed itself more loosely and broadly than might otherwise have been the case. We might ask: what would have been the position if the judges in Andorra had been French and Spanish judges sitting in their capacity as such, rather than Andorran judges merely supplied by France and Spain? In such a case, France and Spain, through its judges, would have been exercising jurisdiction in a very real sense in Andorra. Even though territorial jurisdiction might have ended at the border, by arrangement between France, Spain and Andorra the legal jurisdiction of the French and Spanish judges would have been extended to Andorra. If that had been the factual position, it is possible to see a case for saying that defendants before those judges were, exceptionally, within the jurisdiction of France and Spain. But that would have been because the territory over which the French and Spanish judges exercised their jurisdiction would have included Andorra.

167. *WM v. Denmark* (unreported, App No 17392/90, 14 October 1993) is a case in which we return again to a Commission decision on admissibility concerning a complaint about diplomatic and consular activities. The applicant was a German citizen (by now West and East Germany had been reunited) who prior to 1989 had lived in the DDR. In 1988, in an attempt to get into West Germany, he had entered the Danish Embassy in East Berlin in order to force negotiations with the DDR authorities to permit him to leave for the West. At the request of the Danish ambassador, the DDR police were allowed to enter the embassy: they asked the applicant and his associates to leave with them, which they did. The applicant was subsequently arrested and convicted of an offence under DDR law. He alleged various violations of the Convention against Denmark, having learned of a Danish report into the incident which said that the ambassador had acted contrary to a practice which had grown up in similar cases. The application was declared inadmissible.

168. Despite the application's overall failure, it would appear that the Commission ruled both that the acts of the Danish ambassador were within Denmark's article 1 jurisdiction, and that, as to some of the violations alleged, the application was incompatible "ratione materiae" on the ground that the embassy was not part of Danish territory. We are not sure that we perfectly understand the Commission's analysis, but record the relevant parts of the decision:

> "The Commission notes that these complaints are directed mainly against Danish diplomatic authorities in the former DDR. It is clear, in this respect, from the constant jurisprudence of the Commission that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged [citing *X v. United Kingdom*]. Therefore, in the present case the Commission is satisfied that the acts of the Danish ambassador complained of

> affected persons within the jurisdiction of the Danish authorities within the meaning of Article 1…
>
> "He maintains that he was deprived of his right to move freely on Danish territory, that he was, together with his 17 friends, collectively expelled and that the decision to expel him was not taken in accordance with law.
>
> "The Commission finds that although, as stated above, a State party to the Convention may be held responsible either directly or indirectly for acts committed by its diplomatic agents, the provisions invoked by the applicant must be interpreted in the light of the special circumstances which prevail in situations as the one which is at issue in the present case. It is clear that Embassy premises are not part of the territory of the sending State. Consequently as the applicant, while the incident took place, was not on Danish territory, the provisions invoked by him are not applicable to his case.
>
> This part of the application is accordingly incompatible ratione materiae…"

169. Other than to recognise that the Commission appears at one point to be acting here in conformity with its previous views regarding the width of article 1, it is hard to tell whether this decision supports one side of the argument rather than the other. Mr Greenwood accepted, nevertheless, that the Commission was right to say that, under modern views of international law, embassy premises, although accorded special rights under international law, were no longer regarded as even fictionally part of the territory of the sending state.

170. *Loizidou v. Turkey(Preliminary Objections)* (1995) 20 EHRR 99 is the judgment of the Court on the preliminary jurisdiction issues raised by the application of Mrs Loizidiou, which became separated from the other two applications considered by the Commission (see at paras 155/157 above). The Court held that her application was "capable of falling within" article 1 (at paras 56/64) and that Turkey's territorial reservations were invalid (at paras 65/89). We emphasise the language "capable of falling within", for that reflects a change from the language used by the Commission, which had been more conclusive. The Court, on the other hand, stressed that the question of state responsibility was a matter for the later, merits, stage of the proceedings. On the question of article 1 jurisdiction it reasoned as follows:

> "62. In this respect the Court recalls that, although article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under the provision is not restricted to the national territory of the High Contracting Parties. According to its established case law, for example, the Court has held that 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 Convention [citing

> *Soering*]. In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory [citing *Drozd* at para 91, see at paras 158/160 above].
>
> 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. [emphasis added]
>
> 63. In this connection the respondent Government have acknowledged that the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of the "TRNC" [the "Turkish Republic of Northern Cyprus", a successor to Turkey's recognised so-called "Turkish Federated State of Cyprus"]. Furthermore, it has not been disputed that the applicant was prevented by Turkish troops from gaining access to her property.
>
> 64. It follows that such acts are capable of falling within Turkish "jurisdiction" within the meaning of Article 1 of the Convention. Whether the matters complained of are imputable to Turkey and give rise to State responsibility are thus questions which fall to be determined by the Court at the merits phase."

171. In considering the question of the territorial restriction placed by Turkey on its declaration, the Court went on to say this:

> "86. Finally, although the argument has not been elaborated on by the respondent Government, the Court does not consider that the application of Article 63(4) [now 56(4)], by analogy, provides support for the claim that a territorial restriction is permissible under Articles 25 and 46.
>
> According to this argument, Article 25 could not apply beyond national boundaries to territories, other than those envisaged by Article 63, unless the State specifically extended it to such territories. As a corollary, the State can limit acceptance of the right of individual petition to is national territory – as has been done in the instant case.

> 87. The Court first recalls that in accordance with the concept of "jurisdiction" in Article 1 of the Convention, State responsibility may arise in respect of acts and events outside State frontiers [citing its own para 62 above]. It follows that there can be no requirement, as under Article 63(4) in respect of the overseas territories referred to in that provision, that the Article 25 acceptance be expressly extended before responsibility can be incurred."

172. A number of matters may be noted about this judgment. First, although the Commission had referred expressly to its 1975 decision in *Cyprus v. Turkey* and had incorporated the relevant paragraphs from it into its decision in *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, the Court did not do so: at its highest there is a very indirect reference to the 1975 *Cyprus v. Turkey* decision via the footnoted reference (in para 62) to para 91 of *Drozd*, which in turn contained a footnoted reference to the 1975 *Cyprus v. Turkey* decision among others.

173. Secondly, the Court's critical para 62 contains three reasons of its own making for the proposition that the article 1 concept of "jurisdiction" is "not restricted to the national territory" of state parties. (1) Reflecting and citing its judgment in *Soering*, it observed that extradition or expulsion may give rise to an issue under article 3. However we would observe that, as *Soering* makes clear, the relevant acts of the state party as well as the situation of the applicant victim are within the state's territory, even if the engagement of article 3 also depends on a fear of what will happen to the applicant abroad. (2) It cited *Drozd* for the proposition that acts of state authorities, wherever performed, "which produce effects outside their own territory" can engage the responsibility of the state. As we have observed above in relation to *Drozd*, that might be regarded as perhaps the broadest proposition yet encountered, but of course much depends on the width of the "can" (see para 165 above). (3) It formulated a separate doctrine ("responsibility…may also arise") where a state exercises "effective control of an area" outside its national territory. This is, we think, the first time that that phrase was formulated or adopted by the Court (or the Commission). In its 1975 decision in *Cyprus v. Turkey* (repeated in *Chrysostomos, Papachrysostomou and Loizidou*) the Commission had merely spoken of the exercise of "control" by armed forces over persons or property abroad. In effect, the Court here seems to have reached right back to Cyprus's original 1975 submission in *Cyprus v. Turkey* (see at para 131 above) that "Turkey was treating this area as being under her control and supervision".

174. Thirdly, we would observe that the Court does not clearly identify under which, if not all, of these three reasons it would place its acceptance in Ms Loizidou's case that Turkey's acts were capable of falling within its article 1 jurisdiction: however, there is a substantial argument that it is the third, for the Court immediately continues (at para 63, "In this connection") with the comment that Turkey had acknowledged that her claim stemmed from "the occupation of the northern part of Cyprus by Turkish troops". Finally, we think that Mr Singh is entitled to say that the rationalisation contained in this judgment as a whole still shows the Court to be adopting a broad view or at any rate a potentially broad view of article 1 "jurisdiction".

175. *Loizidou v. Turkey* (Merits) (1997) 23 EHRR 513 was decided by the Court in 1996. In this case, Mrs Loizidou's claim was considered by the Court on the merits. In effect, Turkey tried to reargue the question of jurisdiction under the issue of imputability or responsibility. This is not altogether surprising, seeing that the preliminary issue on jurisdiction had been phrased so much in terms of state responsibility for the acts of its agents and also in terms of what was merely "capable of falling within" article 1. At any rate, Turkey's submissions led to the following comments:

> "52. As regards the issue of imputability, the Court recalls in the first place that in its above-mentioned *Loizidou v. Turkey* (Preliminary Objections) judgment it stressed that under its established case law the concept of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could 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…
>
> 56…It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies and actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus."

176. Those passages seem to us to confirm that we were right to be inclined to read the earlier judgment on jurisdiction as being founded primarily on the concept of effective control of an area.

177. *Cyprus v. Turkey* (1997) 23 EHRR 244 (decided in late 1996) reflects a third round (App No 25781/94) of litigation arising out of the problem of northern Cyprus. This,

like the first round in 1975, was initiated by Cyprus itself. Cyprus complained of systematic violations of human rights in northern Cyprus by Turkish state organs and other persons acting with the support and knowledge of Turkey. In this decision, the Commission decided that Cyprus's complaints were admissible. The merits were left for later. The first issue for the Commission's determination was Turkey's "alleged lack of jurisdiction and responsibility" for the acts complained of: this the Commission considered at paras 2/17 of its decision on "The Law".

178. The first matter resolved by the Commission in this context was that it agreed with Turkey's submission that ultimately the question whether Turkey's jurisdiction under article 1 did extend to northern Cyprus was bound up with the question of its responsibility and thus could only finally be resolved at a hearing on the merits. However, what the Commission said it could and ought to decide at this stage was whether an objection to competence must succeed. Thus –

> "13. In this respect, the Commission follows the approach adopted by the Court in the *Loizidou v. Cyprus* (Preliminary Objections) judgment of 23 March 1995 [see above at paras 170/174]: It will limit the examination of the question whether its competence to examine the applicant Government's complaints is excluded on the grounds that they concern matters which cannot fall within the jurisdiction of the respondent Government, leaving open, at this stage, the question of whether the respondent Government is actually responsible under the Convention for the acts which form the basis of the applicant Government's complaints and the further question as to which are the principles that govern State responsibility under the Convention in a situation like that obtaining in the northern part of Cyprus. The Commission's examination will thus be limited to determining whether the matters complained of by the applicant Government are capable of falling within the jurisdiction of Turkey even though they occur outside her national territory."

179. This is a potentially important passage, because it may throw light on the reason why previous citations in this jurisprudence are expressed as broadly as they appear. In other words, the Commission or Court may not, at the admissibility stage, be concerned to define the applicable principle upon which jurisdiction is founded, so much as to indicate that, because article 1 jurisdiction is not exclusively confined to territorial jurisdiction, it is possible, but always depending on the facts, to establish the necessary jurisdiction even where an act takes place outside the national territory of the respondent state.

180. Thus the Commission continued (at paras 14/17):

> "The Commission recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties…This situation is similar to that in

> the *Loizidou* application where the Court held that the acts complained of were capable of falling within Turkish jurisdiction within the meaning of Article 1. The Commission reaches the same conclusion concerning the above complaints…This finding does not in any way prejudge the questions to be determined at the merits stage of the proceedings, namely whether the matters complained of are actually imputable to Turkey and give rise to her responsibility under the Convention."

181. *Yonghong v. Portugal* (unreported, App No 50887/99, 25 November 1999) is a Court decision on admissibility (held: inadmissible) raising the same issue as in *Thanh v. United Kingdom*. The applicant was Taiwanese: he was arrested under an international arrest warrant in Macao, and the authorities there intended to extradite him to the People's Republic of China at the latter's request. He complained of a violation of (inter alia) article 3 (cf *Soering*). However, Portugal had not extended the Convention under article 56 to its colony Macao. The applicant nevertheless relied on *Drozd* and the argument that Portugal's responsibility was engaged because the Governor of Macao had authorised the extradition proceedings to continue and (perhaps) that the Macao court's decision was subject to review by a Portuguese court. The Commission said –

> "The Court acknowledges from the outset that, as the applicant submitted, the term "jurisdiction" is not limited to the national territory of the High Contracting parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory (see…*Drozd*…).
>
> It observes, however, that Article 1 of the Convention must be read in the light of Article 56. The latter provision enables the States to lodge a declaration extending the Convention to territories for whose international relations they are responsible and thus to bring issues relating to such territories within the ambit of the Convention. An essential feature of the system established by Article 56 is that the Convention cannot apply to acts of the authorities of such territiories, nor to the policies implemented by the Government of the Contracting Party concerned in the exercise of their responsibilities for those territories, unless a declaration extending the ambit of the Convention has been made…
>
> Therefore, in the absence of a declaration by Portugal under Article 56 of the Convention regarding the territory of Macao, the Court is bound to conclude that it has no jurisdiction ratione loci to examine the present application.
>
> As regards the applicant's argument that the Governor of Macao engaged the responsibility of Portugal by authorising the extradition proceedings against the applicant to continue,

> the Court notes that that was merely a preparatory step since, under the extradition procedure applicable in the instant case, it was for the judicial authorities to take the final decision on the request for extradition.
>
> The Court notes, lastly, that since 1 June 1999 the courts of Macao have had exclusive jurisdiction for the whole of the territory such that no Portuguese court will be called upon to review the decisions of those courts."

182. There is again, as it seems to us, some ambiguity as to whether the absence of an extension to Macao is decisive, or whether ultimately the only decisive factor is the absence of any Portuguese state organ's involvement in the extradition process. The judgment reads as though the former is the case, but the latter possibility cannot be excluded.

183. *Cyprus v. Turkey* (2002) 35 EHRR 30 is the Court's judgment (decided in 2001) on both the preliminary issues and the merits of the third round of litigation concerned with northern Cyprus: it proceeds from the Commission's decision, reviewed above, in *Cyprus v. Turkey* (1997) 23 EHRR 244 and incorporates (at pp772/964) the Commission's subsequent opinion and report on the merits of Cyprus's allegations.

184. As a result of the Commission's opinion and report, the facts of the case had now been found by the Commission. The Court explained (at paras 56/58) how it had come about that Turkey had refused to participate in the proceedings before it and thus had not re-submitted to the Court those preliminary objections which had been the subject-matter of the Commission's earlier decision on admissibility. Nevertheless, the Court said that it would examine them anew, by reference to Turkey's pleadings before the Commission. It would seem that since Turkey's original submissions had become overlaid by its pleadings before the Commission for the purposes of its opinion and report on the merits, the question of jurisdiction was now expressed in terms of its "responsibility" (see heading 3 immediately before para 69 of the Court's judgment).

185. In effect the argument had changed, as appears from the Court's resumé of Turkey's argument at para 69: it was now centred on the submission that the TRNC was an "independent state established by the Turkish-Cypriot community in the exercise of its right to self-determination and possessing exclusive control and authority over the territory north of the United Nations buffer-zone". In other words, Turkey now started from the point of view that the critical issue was who exercised control and authority over northern Cyprus, but submitted that such control and authority lay exclusively in the hands of the TRNC and not of itself. Cyprus, however, submitted (at paras 70/73) that the TRNC was an illegal entity under international law which owed its existence to Turkey's illegal invasion; that Turkey exercised overall military and economic control over the area, and indeed exclusive control, and was proved by "irrefutable evidence of Turkey's power to dictate the course of events in the occupied area"; that in such circumstances Turkey, as a state party to the Convention, could not avoid its responsibilities under the Convention by delegating its powers to

"a subordinate and unlawful administration", for to hold otherwise would in the context of northern Cyprus give rise to "a grave lacuna" in the Convention.

186. The Court's resolution (at paras 75/80) of these conflicting submissions commenced with a reference to its own earlier judgment on the merits in *Loizidou* (see at para 175 above) for the "imputability principles" developed there in relation to Turkey's role in northern Cyprus. It then continued as follows:

> "77…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 Article 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 for the protection of individual human beings and its mission, as set out in Article 19 of the Convention "to ensure the observance of the engagements undertaken by the High Contracting Parties". 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 violations of their rights in proceedings before the Court…
>
> 80. The Court, concludes, accordingly…that the matters complained of in the instant application fall within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and therefore entail the respondent State's responsibility under the Convention."

187. It is not readily apparent what to make of this reasoning. Although it purports in one sense to be dealing with the preliminary question of article 1 jurisdiction, it is conducted largely in terms of state responsibility at a stage of the argument when the facts are found. The *Loizidou* judgment referred to is similarly a judgment on Turkey's responsibility on the merits. There is also an issue between Mr Singh and

Mr Greenwood as to the significance of the Court's para 78 just cited. Mr Greenwood relies on this (as on para 80 of the *Bankovic* judgment, see at para 125 above) to submit that the true rationale of the Cyprus litigation is ultimately to be found here, in the Court's refusal to permit the people of northern Cyprus, who had always been within Cyprus's Convention jurisdiction, to fall outside the Convention into a vacuum. In any event, the reasoning was reliant on the doctrine of the effective control of an area, as it had done since *Loizidou v. Cyprus* in 1995. Mr Singh on the other hand submits that para 78 is an extra piece of reasoning, unnecessary to the conclusions on article 1 jurisdiction rejecting Turkey's preliminary objections, conclusions which had originally gone back to the Commission's first decision in 1975 (in *Cyprus v. Turkey*), and had been reinforced repeatedly since then: by the Commission in 1991 (in *Chrysostomou*), in 1995 (in *Loizidou*), and again in 1996 (in *Cyprus v. Turkey*).

188. *Al-Adsani v. United Kingdom* (2002) 34 EHRR 34 concerned an applicant with joint British and Kuwaiti citizenship who alleged that he had been abducted and tortured in Kuwait. This led him to commence proceedings in England against the Government of Kuwait, but he failed on the ground of sovereign immunity as mandated under the State Immunity Act 1978. He sought a remedy in Strasbourg on the ground that the immunity was in violation of articles 3 and 6. The linchpin of his claim was the Court's decision in *Soering*, but the Court held that the analogy was misconceived:

> "39. In the above-mentioned *Soering* case the Court recognised that Article 3 has some, limited, extraterritorial application, to the extent that the decision by a Contracting State to expel an individual might engage the responsibility of that State under the Convention, where substantial grounds had been shown for believing that the person concelled, if expelled, faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. In the judgment it was emphasised, however, that in so far as any liability under the Convention might be incurred in such circumstances, it would be incurred by the expelling Contracting State by reason of its having taken action which had as a direct consequence the exposure of an individual to proscribed ill-treatment.
>
> 40. The applicant does not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In these circumstances, it cannot be said that the High Contracting Party was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities."

189. This authority demonstrates, to our mind, that for the *Soering* principle to operate where conduct described in article 3 threatens a person outside the jurisdiction of the respondent state at another's hands, there must be some act of the respondent state committed within its jurisdiction which has a sufficiently causal connection with the

ensuing conduct abroad. It also demonstrates that the *Soering* principle, in so far as it operates extra-territorially, is a "limited" exception. The decision has therefore been regarded in domestic jurisprudence as being anchored, albeit implicitly, in the territorial principle (see *R (Abbasi) v. Secretary of State for Foreign Affairs* [2003] UKHRR 76, discussed at paras 203/204 below).

190. *Bankovic v Belgium* (2001) 11 BHRC 435. The Court's decision in *Bankovic* followed *Al-Adsani* in December 2001, seven months after the Court's 2001 decision in *Cyprus v. Turkey*. We refer to our review of *Bankovic* in paras 96/99 and 117/126 above. Now that the line of jurisprudence at any rate down to *Bankovic* has been examined as a whole, we would observe: (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 Convention'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 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 Convention and its aims, stated that, subject to the express case of extension pursuant to article 56, the Convention 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 Convention, 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) in the context of that general philosophy 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) 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).

191. Mr Singh obtained a copy of the United Kingdom's submissions to the Court in *Bankovic* and relied on them as being inconsistent with Mr Greenwood's current analysis on behalf of the Secretary of State. In particular, Mr Singh pointed to those passages in which the United Kingdom interpreted previous Strasbourg jurisprudence and sought to distinguish factually the situation in FRY, where NATO had deployed

no ground troops, with the control which had been attributed to Turkey by reason of its ground forces in northern Cyprus. We are not assisted by this argument on the part of Mr Singh. In the first place, we are concerned with the Court's judgment in *Bankovic*, rather than with the parties' detailed submissions in that case. Secondly, in the earlier part of the United Kingdom's submissions in *Bankovic* reference is made to the role of general international law and to the Convention's travaux préparatoires in terms which are reflected in the Court's judgment. Thirdly, the United Kingdom's submissions would naturally have been drafted with at least two matters in mind: the applicants' wide argument about the scope of article 1 jurisdiction and the pre-*Bankovic* Strasbourg jurisprudence. In the light of *Bankovic* itself, however, Mr Singh's submissions are in general narrower than they might otherwise have been, for he accepts the essentially territorial nature of article 1 jurisprudence, while Mr Greenwood's submissions are entitled to reflect an analysis of the Strasbourg jurisprudence filtered through the Court's judgment in *Bankovic*. Fourthly, to the extent that the United Kingdom's submissions to the Court in *Bankovic* might have been prepared to accept a broader view of article 1 jurisdiction (in that factual context) than it now espouses (in a different factual context), it is the more a matter for remark that the Court in *Bankovic* should have phrased its analysis as it has done.

192. *Öcalan v. Turkey* (2003) 37 EHRR 238 is the first of two post-*Bankovic* Strasbourg authorities to which it is necessary to refer. Öcalan was a Turkish national, the leader of the Workers Party of Kurdistan (PKK), accused by Turkey of inciting terrorist acts in support of a separatist Kurdish state. In 1999 he found himself on the run in Kenya, where he was handed over by Kenyan officials to Turkish officials, who arrested him, on board an aircraft in the international zone of Nairobi aircraft. The judgment of the Court does not state where the aircraft was registered. He was flown to Turkey, detained over a lengthy period and ultimately tried, convicted and sentenced to death. He now complained in Strasbourg that (inter alia) he had received an unfair trial in breach of article 6, that the imposition or execution of his sentence was or would be a violation of articles 2 and 3, and that the conditions in which he was transferred from Kenya to Turkey and detained pending trial amounted to inhuman treatment in breach of article 3. The Court held that there had been violations of article 6 and of article 3 (but only with regard to the imposition of the death penalty following an unfair trial), but otherwise no violation of articles 2 or 3.

193. There were a number of preliminary objections (all in relation to article 5 and his complaint that he did not have access to proceedings to challenge the lawfulness of his detention) which were dealt with separately and which were not concerned with the fact that the original arrest on board the aircraft at Nairobi had occurred outside Turkish territorial jurisdiction. In that connection Turkey's submission was principally directed at the merits, and was to the effect that his original arrest had been lawful and complied with a procedure prescribed by law in that it was carried out with the co-operation of Kenyan and Turkish authorities, albeit informally in the absence of any formal extradition treaty, and did not amount to a violation of Kenyan sovereignty or, consequently, international law. The Court accepted that submission in full (at paras 99/103) and therefore held that there had been no violation of article 5(1). Nevertheless, the Court also briefly referred (at para 84) to the fact that Turkey had "affirmed, without further explanation, that, in the light of the Court's case law in…*Bankovic*…, their responsibility was not engaged by the applicant's arrest

abroad". As to this submission, the Court referred to paras 59/60 and 67 of its judgment in *Bankovic*, and continued (at para 93):

> "In the instant case, the applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Art. 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. The Court considers that the circumstances of this case are distinguishable from those in the aforementioned *Bankovic* case, notably in that the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey."

194. The parties have differed about the interpretation of this authority. For Mr Singh it demonstrates that he is correct to submit that *Bankovic* has changed nothing and is not the watershed that Mr Greenwood says it is. For Mr Greenwood it is the special exception of a Turkish aircraft (even if that detail is not mentioned in the judgment), or at any rate an exceptional case dependent on the fact that the instant of arrest on the aircraft was but the prelude to Öcalan's return to Turkey.

195. We would observe that in *Bankovic* the Court had pointed out (at para 81) that the decision on admissibility in *Öcalan v. Turkey* (App No 46221/99, 14 December 2000) had already been decided without the issue of jurisdiction having been raised by Turkey or addressed in the decision. In the circumstances *Öcalan's* case came before the Court without any issue on jurisdiction: at most there was the unsupported comment by Turkey referred to in the Court's judgment that its responsibility was not engaged by the applicant's arrest abroad. In the circumstances we do not consider that for present purposes *Öcalan* should be treated as an illuminating judgment. In any event, for the purposes of distinguishing the case from *Bankovic* the Court concentrated on the fact that ("notably in that") the essential violation complained of was his forced return to Turkey and his detention there.

196. *Ilaşcu v. Moldova and Russia* (Unreported, App No 48787/99, 8 July 2004) was at the time of the main hearing before us the last case in this line of Strasbourg authority, having been decided by the Court only a few weeks earlier. At the admissibility stage the Commission had decided (unreported, 4 July 2001) that the issue of jurisdiction was so bound up with the merits of the case that it was inappropriate to determine it at that preliminary stage of proceedings. The judgment of the Court therefore followed argument about both jurisdiction and merits.

197. The facts were in principle identical to a situation where a victim such as Mrs Loizidou might have claimed not only against Turkey but also against Cyprus. Cyprus would have been the state in whose jurisdiction the violations occurred but would have been entitled to argue, at the merits stage of imputability and responsibility, that it had no control over events in northern Cyprus, and had no responsibility for them;

whereas the events had happened within the jurisdiction of Turkey, and could be attributed to it. So in *Ilaşcu*: the events happened in Moldova, which had become a state party to the Convention, but in the secessionist territory on the left bank of the Dniester known since 1991 as the "Moldovian Republic of Transdniestria" (or MRT), as to which Moldova, when it ratified the Convention, had made a declaration seeking to exclude its responsibility on the basis of lack of control. The Court found that Moldova was the only legitimate government of the secessionist territory under international law, but that, as was undisputed, it did not exercise authority over it (at para 330). As to Moldova the Court therefore analysed the issues of jurisdiction and responsibility as follows:

> "333. The Court considers that where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation, such as obtains when a separatist regime is set up, whether or not this is accompanied by military occupation by another State, it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory temporarily subject to a local authority sustained by rebel forces or by another State.
>
> Nevertheless such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms guaranteed by the Convention.
>
> 334. Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.
>
> 335. Consequently, the Court concludes that the applicants are within the jurisdiction of the Republic of Moldova for the purposes of Article 1 of the Convention but that its responsibility for the acts complained of, committed in the territory of the "MRT", over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."

198. The Court had previously derived the following principles from *Bankovic* and the northern Cyprus cases as follows (at paras 312/316):

> "312…From the standpoint of public international law, the words "within their jurisdiction" in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily territorial (see the *Bankovic* decision, cited above, § 59), but also that jurisdiction is presumed to be exercised normally throughout its territory.
>
> This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation which effectively controls the territory concerned (see *Loizidou v. Turkey (Preliminary Objections)* judgment of 25 March 1995…and *Cyprus v. Turkey*…as cited in the *Bankovic* decision, §§ 70-71), to acts of war or rebellion, or to the acts of a separatist State within the territory of the State concerned.
>
> 314. Moreover, the Court observes that, although in the *Bankovic* case it emphasised the preponderance of the territorial principle in the application of the Convention…it also acknowledged that the concept of "jurisdiction" within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties (see *Loizidou v. Turkey (Merits),* judgment of 18 December 1996…
>
> 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 Article 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…"

199. After a reference to the *Soering* principle, the Court continued –

> "319. A State may also be held responsible even where its agents are acting ultra vires or contrary to instructions. Under the Convention a State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected…"

200. In applying these principles to the case of Russia, the Court concluded on the facts –

> "392. All of the above proves that the "MRT", set up in 1991-1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that its survives by virtue of the military, economic, financial and political support given to it by the Russian Federation…
>
> 394. In conclusion, the applicants therefore come within the "jurisdiction" of the Russian Federation for the purposes of Article 1 of the Convention and its responsibility is engaged with regard to the acts complained of."

201. In our judgment, other than in demonstrating that effective control of an area may be achieved by supporting a separatist regime as well as by direct invasion, this decision goes no further in principle, at any rate so far as concerns the state party with control of the territory in question, than *Loizidou v. Cyprus* (1995) and *Cyprus v. Turkey* (2002). As in the northern Cyprus situation, both Moldova and Russia were, for the relevant period, state parties to the Convention.

202. *Issa v. Turkey* (Application no 31831/96, 16 November 2004) is so recent a decision (of the second section of) the Court that it was published only after the main hearing in this case, and indeed after our judgment had been written. It was brought to our attention by Mr Greenwood more or less on the eve of the handing down of our judgment. We are grateful to him for that courtesy, especially as the decision does not assist the Secretary of State. It has led to the exchange of further written submissions and to a further oral hearing. It has led to the rethinking and revision of our judgment. We think that it is only right that the formulation of our judgment should have full transparency. We will therefore indicate the principal changes which consideration of *Issa* and the submissions we have received about it have wrought. One of them is of course this passage (paras 202/222) in which we set out the decision itself and the submissions to which it has given rise. The others are in paragraphs 262/265 and 277 below.

203. The dominant significance of *Issa* is that it is a case about Iraq itself, albeit not the recent events of the 2003 invasion by the United States and its allies, but rather a large-scale cross-border raid by the military forces of Turkey into northern Iraq between 19 March and 16 April 1995. The purpose of this raid was the pursuit and elimination of terrorists who were seeking shelter in northern Iraq. The six applicants were the relatives of seven shepherds who, as the applicants alleged, had on 2 April 1995 been detained by members of the Turkish forces in brutal circumstances, separated from their female companions, and taken away. On the next day the bodies of five of the shepherds were found. They had been shot and the bodies were badly mutilated – ears, tongues and genitals were missing. Two days later the bodies of the other two shepherds were found in a similar condition. The applicants filed petitions almost immediately with the authorities of the region for an investigation, but had heard nothing further. Complaints were made under articles 2, 3, 5, 8, 13, 14 and 18

of the Convention. Turkey, on the other hand, said that no Turkish soldiers had advanced within 10 kilometres of the village area in question. Ultimately, the case was decided and the applications rejected on the purely factual basis that the applicants had failed to establish "to the required standard of proof" that the Turkish forces had conducted operations in the area in question (para 81). The applicants' substantive complaints therefore did not have to be examined because the Court was not satisfied that the men who had died were within the article 1 jurisdiction of Turkey (para 82).

204. The actual decision does not therefore assist the claimants in this case. However, Mr Singh submits that the Court's reasoning does. The jurisdiction point arose in somewhat unusual circumstances. The claims had already been ruled admissible (30 May 2000) without any point being taken by Turkey to the effect that the alleged events occurred outside Turkey's jurisdiction. The Court in *Bankovic* had referred to this fact to meet the point that the admissibility decisions in *Issa* (and *Öcalan*) were of assistance to the *Bankovic* applicants. It said (at para 81):

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

However, albeit only at the merits stage, Turkey raised the point, in reliance on *Bankovic* itself, that there –

> "the Court had departed from its previous case-law on the scope of the interpretation of Article 1 of the Convention" (*Issa*, para 52).

205. The *Issa* applicants objected that it was too late for Turkey to take a jurisdiction point, but the Court ruled against them. It said (at para 55):

> "the Government cannot be considered precluded from raising the jurisdiction issue at this juncture. That issue is inextricably linked to the facts underlying the allegations. As such, it must be taken to have been implicitly reserved for the merits stage."

Since on the merits the deaths of the shepherds could not, as the Court was to go on to find, be imputed to the Turkish forces at all, it is not plain why the Court went out of its way to resolve the jurisdiction issue. That it did so suggests that it was keen to do so, possibly, but we are speculating here, because it was conscious that claims arising out of the 2003 invasion of Iraq might in due course need consideration. That it did so when it could have avoided the issue lends force, in our judgment, to Mr Singh's submission that, whether the reasoning on jurisdiction is strictly (in English law terms) *obiter* or not, it is deserving of the closest attention and respect.

206. The Court considered the question of jurisdiction at part II of its judgment (paras 56/82). Turkey submitted, in reliance on *Bankovic*, that Iraq fell outside the *espace juridique* of the Convention. It argued, as Mr Greenwood has in this case, that this concept was fundamental to the understanding of the decision in *Bankovic* and in the northern Cyprus cases, thus (at paras 56/57):

> "[*Bankovic*] also confirmed that the Convention was a treaty operating in an essentially regional context and in the legal space (*espace juridique*) of Contracting States and that jurisdiction would only be established when the territory in question was one that would normally be covered by the Convention.
>
> 57. Iraq was an independent and sovereign State which exercised effective jurisdiction over its national territory. It was neither a member of the Council of Europe nor a signatory to the Convention. Accordingly the acts imputed to Turkey could not fall under the Convention system and/or within the jurisdiction of a Contracting State."

In any event, Turkey submitted on the facts that (at para 58):

> "the mere presence of Turkish armed forces for a limited time and for a limited purpose in northern Iraq was not synonymous with "jurisdiction". Turkey did not exercise effective control of any part of Iraq…"

207. The applicants on the other hand submitted that the issue of jurisdiction had remained unaffected by *Bankovic* and was to be found grounded in the northern Cyprus cases, *Drozd*, and principles of international law. As to the facts of the incursion, Turkey's operations were sufficient to constitute "effective overall control" within the meaning of *Loizidou v. Turkey.* Turkey had deployed over 35,000 ground troops, backed up by helicopters and fighter aircraft and had obtained *de facto* authority over the region in question. Unlike the situation in *Bankovic*, the shepherds had been deliberately targeted, murdered and mutilated. Moreover, they fell within the category of "protected persons" defined in article 4 of the Fourth Geneva Convention. The fact that under international law the victims were clearly within the jurisdiction of Turkey reinforced their submission that the requirements of the applicability of article 1 of the Convention were satisfied (at paras 62/64).

208. The Court considered "general principles" at paras 66/71 of its judgment. It cited *Bankovic* for the principles that the concept of article 1 jurisdiction must reflect its meaning in international law and thus was primarily territorial, and *Loizidou v. Turkey* (Merits) at para 52 for the exceptional doctrine of "effective control of an area". It then continued as follows:

> "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*, application no. 17392/90, Commission decision of 14 October 1992, DR73, p. 193; *Illich Sanchez Ramirez v. France*, application no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 155; *Coard et al. v. the United States*, the Inter-American Commission of Human Rights decision of 29 September 1999, Report No. 109/99, case No. 10.951, §§ 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* and *Celiberti de Casariego v. Uruguay*, nos. 52/1979 and 56/1979, at §§ 12.3 and 10.3 respectively). Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory (*ibid*)."

209. We interpret this section of the Court's judgment as follows. Two exceptions to the territorial principle are mentioned. The first is the "effective control of an area" exception found in the northern Cyprus cases. Nothing, however, has been said so far in response to Turkey's submission that such a principle applies only within the Convention's own *espace juridique*. The second exception relates to the exercise of a contracting state's "authority and control through its agents operating" in another state. That is a broad statement of a principle of state responsibility for its agents acting extra-territorially. In one sense it could be said to go back to the Commission's early views about the northern Cyprus situation in *Cyprus v. Turkey* (1975). However, that situation had already been dealt with under the first exception. Instead the Court refers to *WM v. Denmark*, which is a case about embassies (even if it also contains wider language). *WM v. Denmark* was not specifically cited in *Bankovic*, but may be said to have been covered in the general reference in *Bankovic* at para 73 to "cases involving the activities of its diplomatic or consular agents abroad". The Court in *Issa* goes on to cite four other cases: *Ramirez*, a pre-*Bankovic* decision of the Commission in 1996; and three non-Strasbourg cases, namely *Burgos* (1981), *Casariego* (1981) and *Coard* (1999).

210. Remarkably, none of these four cases had been previously relied on by the Court as influential in this context. Mr Singh and Mr Greenwood thought that *Ramirez* had not been mentioned at all, at any rate in the jurisprudence above. We have noted, however, that it comes in as a footnote reference (footnote 35) at the end of para 93 of *Öcalan* (cited at para 193 above). The other three decisions were relied on by the applicants in *Bankovic*, but were discounted by the Court in the following passage, which it has not hitherto been necessary to cite:

> "78. Fourthly, the court does not find it necessary to pronounce on the specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions in the international instruments to which the applicants refer because it is not convinced by the applicants' specific submissions in these

> respects (see para 48, above). It notes that the American Declaration on the Rights and Duties of Man 1948 referred to in *Coard v US* (1999) 9 BHRC 150, contains no explicit limitation on jurisdiction. In addition, and as to art 2(1) of the ICCPR [the International Covenant on Civil and Political Rights 1966] (para 26, above), as early as 1950 the drafters had definitively and specifically confined its territorial scope and it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that article of the ICCPR or explains the precise meaning of 'jurisdiction' in art 1 of its optional protocol (para 27, above). While the text of art 1 of the American Convention on Human Rights 1978 (para 24, above) contains a jurisdiction condition similar to art 1 of the European Convention, no relevant case law on the former provision was cited before this court by the applicants."

Although *Burgos* and *Casariego* were not mentioned in that paragraph by name, they are referred to in the passage dealing with the ICCPR where the Court said that the applicants there "give one example only". That example, Mr Greenwood is in a position to inform us, was *Burgos*. As will appear below, *Casariego* is on all fours with *Burgos* and was decided at the same time.

211. For completeness we ought to set out the essence of these four additional authorities, for they are relied on by Mr Singh, and the latter three by the Redress Trust, whose written submissions in this respect anticipated *Issa*.

212. *Illich Sanchez Ramirez v. France* (Application No 28780/95, 24 June 1996) concerned the revolutionary known as "Carlos". He complained that while in Khartoum in Sudan in 1994 he was abducted by Sudanese security forces and delivered onto a French military aeroplane which flew him to France. He complained about a breach of article 5. The Commission said (at 161/162):

> "According to the applicant, he was taken into the custody of French police officers and deprived of his liberty in a French military aeroplane. If this was indeed the case, from the time of being handed over to those officers, the applicant was effectively under the authority, and therefore the jurisdiction, of France, even if this authority was, in the circumstances, being exercised abroad…"

citing (inter alia) *Cyprus v. Turkey* (1975). Post-*Bankovic* one would tend to regard this as a decision within the exception regarding vessels and aircraft, if indeed there was any need to treat the flight and his detention on board separately from his detention in France. The Commission went on to find that his arrest had been made pursuant to a lawful arrest warrant issued before his abduction. It found that his application was manifestly ill-founded.

213. *Lopez Burgos v. Uruguay* (1981) 68 ILR 29 concerned a Uruguayan trade unionist who moved to Argentina. He was there kidnapped by Uruguayan security forces working with their Argentine counterparts. After being held for two weeks incommunicado in Argentina he was taken back to Uruguay and detained there in secret for a further three to four months. Only after that was he formally arrested. His wife complained of his torture and illegal detention under various articles of the ICCPR. The matter came before the UN Human Rights Committee for their "Views under article 5(4) of the Optional Protocol". That protocol permitted individual complaints. At the relevant time Argentina was not a signatory to the ICCPR. Uruguay therefore disputed jurisdiction for the period of the alleged detention in Argentina. Article 2(1) of the ICCPR speaks of "individuals within its territory and subject to its jurisdiction". Article 1 of the Optional Protocol speaks of "individuals subject to its jurisdiction". The Committee rejected any territorial limitation since it opined that "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."

That last sentence was effectively reproduced in *Issa* at the end of its para 71 (see above under para 208). However, it is not easy to see how an Human Rights Committee opinion which rejects, root and branch, a territorial approach is compatible with the *Bankovic* decision.

214. *Celiberti de Casariego v. Uruguay* (1981) 68 ILR 41 was essentially on all fours with *Burgos*, but concerned a Uruguayan abducted in Brazil at a time before that country too had become a signatory to the ICCPR. The Human Rights Committee's views in *Casariego* were published on the same day as its views in *Burgos*. The relevant paragraph in *Casariego*, para 10, is in the same terms as para 12 of *Burgos*.

215. *Coard v. United States* (Inter-Am CHR, Report No 109/9, 29 September 1999) concerns the recommendations of the Inter-American Commission on Human Rights, interpreting the American Declaration of the Rights and Duties of Man. The petitioners were Grenadians who complained of illegal detention and mistreatment by the US military forces who had invaded Grenada. The Declaration, as the Court observed in *Bankovic,* contains no explicit limitation on jurisdiction. There was no issue before the Commission as to extra-territorial application (para 37). Rather, the United States argued that the Commission lacked specialised expertise to apply the international (humanitarian) law which was in issue (para 38). However, the Commission rejected that argument, stating that there was an integral linkage between such law and international human rights law (para 39). It also pointed out that the Declaration was intended to apply throughout the Americas. It was in this context that it used the language (at para 36) which appears to have resonated with the Court in *Issa* –

> "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."

216. This asserts a principle of state authority and control which usurps, rather than provides an exception to, a primary principle of territoriality. We find it difficult to think that the cases deployed in *Issa* para 71, particularly post-*Bankovic* and in the light of *Bankovic* para 78, present a cogent basis in authority for a general principle of article 1 jurisdiction wherever a contracting state acts, by its agents, outside its territory. Even the Redress Trust, which in its written submissions had drawn attention to *Burgos, Casariego and Coard,* did not rely on them for a general theory of Convention jurisdiction so much as for a purposive construction which would single out article 3 (and perhaps article 2) for special treatment. This was on the basis that the prohibition of torture had become part of international law's *ius cogens*, as for instance recognised by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet (No 3)* [2000] 1 AC 147.

217. It remains to be seen how these general principles were applied by the Court in *Issa*. The Court approached the question of the application of these principles in a separate section of its judgment at paras 72ff. It began by positing the issue by reference to its second exception (state agents' extra-territorial exercise of authority and control), thus:

> "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."

218. However, in paras 74/75 the Court then proceeded by considering the first exception, that of "effective control of an area", and, as Mr Singh himself submits, rejecting that exception on the facts:

> "74. The Court does not exclude the possibility that, as a consequence of the military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States (see the above-cited *Bankovic* decision, § 80).

> 75. However, notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases (both cited above). In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case – see § 63 above – but with the difference that the troops in northern Cyprus were present over a much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all the main lines of communication between the northern and southern parts of the island."

219. Two important observations need to be made about that passage. The first is that at para 74 the Court appears to be saying that if the effective control of an area exception is found to exist on the facts and such control is found to be vested in a state party to the Convention, then *ipso facto* ("logically") the territory in question, although previously not part of the *espace juridique* of the Convention, falls subject to the Convention jurisdiction of the state party. Presumably, therefore, although this is not said in express terms, the territory is automatically drawn within the Convention's legal space. Mr Singh is right to say that this passage supports his submission that the vacuum and *espace juridique* doctrines of *Cyprus v. Turkey* (2002) and of *Bankovic* are merely inessential and make-weight arguments. On the other hand, the reasoning of the passage proceeds formally by acknowledging and accepting those doctrines, but then turning their flank by asserting that the effective control of an area doctrine simply changes the territory of a non-party state into the territory of a party state. If so, that would emphasise that the effective control of an area doctrine is essentially a territorial doctrine: but it leaves entirely side-lined the doctrine that there is any difference between the *espace juridique* of the Convention and any other space anywhere in the world. Mr Greenwood submitted that this was inconsistent with *Bankovic* and totally ignored the significance of article 56.

220. The second observation goes to the relevance of Mr Singh's insistence that in para 75 the Court was rejecting on the facts the applicability of the effective control of an area exception. It follows that what the Court had said in para 74 was on any view *obiter*. It also follows that the only remaining principle discussed by the Court which was capable of applying to the facts of *Issa* was the second exception relating to authority and control exercised by state agents extra-territorially (see para 71). And indeed Mr Singh can point to the circumstance that this section of the Court's judgment both begins (at para 72) and continues (at para 76) with that exception, for the Court goes on immediately to say –

> "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."

221. Mr Singh himself underlined those words "The essential question". He submitted that there the Court was applying its second exception, founded on the reasoning of para 71. It was therefore of the highest relevance, he said, that, even after *Bankovic*, the Court was prepared to apply, subject of course to proving a factual basis for Turkey's involvement, a broad extra-territorial doctrine, whether based on either exception discussed in *Issa*, not confined by any doctrine regarding a vacuum in the Convention's *espace juridique*, and, as he emphasised, extending to Iraq itself. Therefore *Issa* threw light on the whole of the Strasbourg jurisprudence and in particular answered a question relating to Iraq. Mr Greenwood accepted Mr Singh's analysis to this extent, that the Court was ultimately concerned with the applicability of its second exception – that much was therefore common ground – but he submitted that the second exception was too broadly stated, not properly grounded in the authorities referred to in para 71, and inconsistent with the Grand Chamber's judgment in *Bankovic*.

222. For the present we will content ourselves with saying that, on the basis on which Mr Singh regards *Issa*, it is difficult to understand what the jurisdictional difference is between deaths caused by ground troops in Iraq and deaths caused by aerial bombardment in Serbia. It is common ground that in *Issa* the Turkish troops did not have effective control of the area. The question was nevertheless whether Turkish troops exercised authority or control over the shepherds. Subject to the fact, which may possibly be important but was not stressed in *Issa*, that there the shepherds had been detained before they were shot and mutilated, it is difficult to see any principled difference between deaths caused by the extra-territorial military exercise by a state party *in the skies* of authority and control over civilians in another non-party state and deaths caused by the extra-territorial military exercise by a state party *on the ground* of authority and control over civilians in another non-party state.

Domestic jurisprudence

223. There are a small number of cases arising within the domestic courts of the United Kingdom which have had to consider the nature of article 1 jurisdiction or related matters. One of them, *The Queen on the Application of "B" & Ors v. Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344 (unreported, 18 October 2004) was handed down only after this judgment was written. It is relevant both to the present issue, as to the scope of the Convention, and to the subsequent issue, as to the scope of the Human Rights Act 1998. For these reasons, it is addressed in a separate section of this judgment, at paras 282/291 below.

224. *R (Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598, [2003] UKHRR 76. Mr Abbasi was a British national who had been captured by US forces in Afghanistan and taken to Guantanamo Bay. He sought, by judicial review, to compel the UK authorities to make representations on his behalf to the US Government (inter alia) so as to secure to him his rights under the Convention. It was argued that if there was a causal link between the failure to accord Mr Abbasi diplomatic protection and his continued arbitrary detention, then the Foreign and Commonwealth Office was in breach of article 5 of the Convention. There were many difficulties in the way of this claim, among them the fact that the UK

Government had no direct responsibility for Mr Abbasi's detention and the court of appeal's conclusion that international law had not yet recognised that a state was under a duty to intervene by diplomatic or other means to protect a citizen who was suffering or threatened with injury in a foreign state. Lord Phillips of Worth Matravers MR, in giving the judgment of the court, considered three Strasbourg cases on the scope of article 1 of the Convention, namely *Al-Adsani, Bankovi*c and *Soering* and concluded:

> "76. We derive the following principles from the decisions referred to above:
>
> (i) The jurisdiction referred to in Art 1 of the Convention will normally be territorial jurisdiction.
>
> (ii) Where a state enjoys effective control of foreign territory, that territory will fall within its jurisdiction for the purposes of Art 1.
>
> (iii) Where, under principles of international law, a State enjoys extra-territorial jurisdiction over an individual and acts in the exercise of that jurisdiction, that individual will be deemed to be within the jurisdiction of the State for the purposes of Art 1, insofar as the action in question is concerned."

225. Principles (i) and (ii) are uncontroversial, save that Mr Greenwood would add that the latter principle only applied within the sphere of territories of Convention states. Although Lord Phillips expressed this principle without that qualification, such a question never arose in that case, because no one was suggesting that the United Kingdom had effective control over any foreign territory. Principle (iii) was equally not in issue, since, as Lord Phillips went on to remark (at para 77), no one had been able to identify any relevant control or authority exercised over Mr Abbasi by the United Kingdom. In the circumstances, and seeing that the court of appeal in that case did not have presented to it the wealth of relevant Strasbourg authority which has been relied on in this case, we doubt that it would be useful to approach Lord Phillips' formulation as though it were a statute. Mr Singh's might seek to bring the Secretary of State's acceptance of the United Kingdom's control over the provinces of Basra and Maysan for the purposes of the Hague and Geneva Conventions within its terms; but that would be to beg the issue in this case.

226. *In re Fayed* is an opinion of Lord Drummond Young in the Outer House, Court of Session (unreported, 12 March 2004) and concerns Mr Mohamed Al Fayed's unsuccessful request for a public inquiry in Scotland into the death of his son Dodi (together with Princess Diana) in a car crash in Paris. Mr Al Fayed had a residence in Scotland, but there was no other connection between Scotland and the events in Paris. Mr Al Fayed's principal argument was that article 2 of the Convention required that loss of life in circumstances which were unclear demanded an official inquiry. Although the death of his son had occurred in Paris, nevertheless it was sufficient for him, as the indirect victim, to reside within the jurisdiction. In other words Mr Al Fayed's submission was that jurisdiction under article 1 of the Convention was

primarily personal, not territorial. Lord Drummond Young disagreed. Before citing extensively from *Bankovic*, he considered the position under international law, citing two extracts from *Oppenheim's International Law* which it is convenient to set out in the following passage from the judge's judgment:

> "8. The European Convention of Human Rights was concluded against a background of customary international law, and the obligations that it imposes on High Contracting Parties must be construed in the light of that background. Under international law, the jurisdiction exercised by a state is primarily territorial. While exceptions exist, notably in relation to ships and aircraft and diplomatic and consular premises, the primary rule is that a state is entitled to exercise jurisdiction over all persons and things within its own territory. The corollory of this rule is that each state must respect the competence of every other state to exercise jurisdiction over all persons and things within its territory. The general approach of international law is clearly set out in two passages from the leading British textbook on the subject, Oppenheim's International Law, 9th edition, 1992, edited by Jennings and Watts. The first is found at paragraph 137 of volume 1:
>
> > "Territorial jurisdiction. As all persons and things within the territory of a state fall under its territorial authority, each state normally has jurisdiction – legislative, curial and executive – over them. Territoriality is the primary basis for jurisdiction; even if another state has a concurrent basis for jurisdiction, its right to exercise it is limited if to do so would conflict with the rights of the state having territorial jurisdiction. Thus even though a state has personal jurisdiction over its nationals abroad, its ability to enforce that jurisdiction is limited so long as they remain within the territory of another state: as the Permanent Court of International Justice said in the *Lotus* case in 1927, 'a State may not exercise its power in any form in the territory of another State'; jurisdiction 'cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention' (PCIJ, Series A, No 10, pp 18-19)."
>
> The second passage is found at paragraph 169 of volume 1, where the same matter is considered in the context of state territory:
>
> > "Importance of state territory. The importance of state territory is that is the space within which the state exercises its supreme, and normally exclusive, authority. State territory is an object of international law, because that law recognises the supreme authority of every state within its territory; which authority must of course be exercised in accordance with international law. Whatever person or thing,

> is on, or enters into, that territory, is ipso facto subjected to the supreme authority of the state: Quidquid est in territorio, est etiam de territorio and Qui in territorio meo est, etiam meus subditus est. No other state may exercise its power within the boundaries of the home territory; however, international law does, and international treaties may, restrict the territorial sovereign in the exercise of its sovereignty, and, for example, foreign sovereigns and diplomatic envoys enjoy certain privileges and immunities. The exclusive dominion of a state within its territory is basic to the international system…"
>
> 9. In the present case the petitioner claims under article 2 of the Convention that he is entitled to a public inquiry into the death of his son. Any such right obviously arises out of the death, but the death occurred on French territory. As a matter of general international law, therefore, jurisdiction over any inquiry into the circumstances of the death belongs to France…It is clear in my opinion that the word "jurisdiction" in that article must be construed in the manner in which it has been construed in international law. On that basis, the concept of jurisdiction contained in article 1 of the Convention is primarily territorial."

227. After considering the Court's judgment in *Bankovic* itself, Lord Drummond Young commented that its approach had been anticipated at Strasbourg in *Al-Adsani* and followed in *Öcalan*, as to the latter of which he commented (at para 14):

> "On its facts, therefore, the case represents an exception to the general rule that the concept of jurisdiction in article 1 is territorial. The justification for the exception is clearly that Turkey was, with the consent of Kenya, exercising effective control within the latter's territory."

228. That explanation of *Öcalan* may be more favourable to the claimants here than Mr Greenwood's.

229. *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA 527, [2004] 3 WLR 1. In this case, Quark Fishing sought a fishing licence in the waters of South Georgia and the South Sandwich Islands (SGSSI), an overseas territory of the United Kingdom. The Commissioner of SGSSI stated that he had received a formal instruction from the Secretary of the State directing him not to grant Quark Fishing the licence. Quark Fishing complained that this direction was a violation of article 1 of the First Protocol. The Convention had been extended to SGSSI under article 56, but, critically, not in respect of the First Protocol. However, Quark Fishing submitted that the direction had been made by the Secretary of State within the home jurisdiction and therefore

within the scope of the Convention, including the First Protocol, as it operated in respect of the United Kingdom.

230. At first instance, however, Collins J had found that the Secretary of State had acted on behalf of the Crown in right of government of SGSSI so that his direction was not an act of the government of the United Kingdom. The claim therefore failed. In the court of appeal, however, Pill LJ, with whom the other members of the court agreed, on the contrary held that the Secretary of State was acting on behalf of the Crown in right of the government of the United Kingdom.

231. Nevertheless, the appeal was dismissed because Pill LJ also held that the failure to extend the First Protocol to SGSSI was fatal to Quark Fishing's claim. He rejected Quark Fishing's submission that extension of the Convention by itself had brought SGSSI within the "legal space (*espace juridique*) of the Contracting States" spoken of in *Bankovic* at para 80. He said (at paras 56/58):

> "However complete the control exercised by the Convention State over the dependent territory, the Convention applies to the territory only if there has been a notification under Article 56 and, in the case of the Protocol, only if there has been notification under its Article 4. This principle is well established in the jurisprudence of the ECHR in *Bui van Than v UK*…and *Yongkong v Portugal*…Thus control over the territory is insufficient; the declaration extending the ambit of the Convention (or the Protocol) must have been made…Resort to the expression *espace juridique* throws no light on the issue in my view and *Bankovic* is a reaffirmation of the territorial principle, subject to exceptions (*Bankovic* paragraph 70) which do not apply in the present case."

232. *Regina (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 3 WLR 23 is a case in which the claimants were asylum seekers who feared religious persecution if they returned to their home countries. The claim was made under article 9, not articles 2 or 3. The adjudicators found that in one case there would be no serious interference and that in the other case article 9 was engaged but that the applicant's removal was justified. The court of appeal [2002] EWCA Civ 1856, [2003] 1 WLR 770 dismissed the appeals, on the different ground that the *Soering* principle only applied if there was a real risk of persecution within the meaning of article 3, but not on the basis of article 9.

233. The House of Lords affirmed, but again on different grounds, namely that it was possible for the Convention to be engaged in the *Soering* situation in respect of any of its rights and freedoms, but that outside article 3 reliance required an exceptionally strong case amounting to a flagrant denial or a gross violation of the relevant right, and that on the facts both applicants fell far short of supporting such a claim (see paras 21/25). Albeit in the *Soering* context, this reflects the unitary approach to all the Convention rights and freedoms adopted in *Bankovic* at para 75.

234. Of particular interest for present purposes is Lord Bingham's analysis of such asylum and extradition cases, whether "domestic" or "foreign", as falling within the territorial jurisdiction of the excluding state. He said –

> "7…Thus the primary focus of the European Convention is territorial: member states are bound to respect the Convention rights of those within their borders. In the ordinary way, a claim based on the Convention arises where a state is said to have acted within its own territory in a way which infringes the enjoyment of a Convention right by a person within that territory. Such claims may for convenience be called "domestic cases"."

235. After referring to *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471, Lord Bingham continued –

> "8… The Commission had held (para 59) that "immigration controls had to be exercised consistently with Convention obligations, and the exclusion of a person from a state where members of his family were living might raise an issue under article 8". As this quotation makes plain, however, this was a domestic case: the applicants were wives settled here; they complained that their husbands had been refused leave to enter or remain; they alleged an interference with their family life here.
>
> 9. Domestic cases as I have defined them are to be distinguished from cases in which it is not claimed that the state complained of has violated or will violate the applicant's Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (whether by expulsion or extradition) to another territory will lead to a violation of the person's Convention rights in that other territory. I call these "foreign cases", acknowledging that the description is imperfect, since even a foreign case assumes an exercise of power by the state affecting a person physically present within its territory. It is a question of obvious relevance to these appeals, since the appellants do not complain of any actual or apprehended interference with their article 9 rights in the United Kingdom.
>
> 10. A clear, although partial, answer to this question was given in *Soering v United Kingdom*…"

236. Then, after referring to the jurisprudence built on the *Soering* principle, Lord Bingham continued (at para 14) with an express citation from the Court's judgment in *Bankovic* at paras 67/68, where it will be recalled that the Court said of the *Soering*

line of authority that "liability is incurred in such cases by an action of the respondent state concerning a person while he or she is on the territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a state's competence or jurisdiction abroad…"

237. Lord Bingham also referred to *Drozd* in these terms (at para 17):

> "*Drozd*…was not, within my definition, a foreign case. It involved no removal. The applicants complained of the fairness of their trial in Andorra (which the court held it had no jurisdiction to investigate) and of their detention in France, which was not found to violate article 5. The case is important, first, for the ruling (in para 110 of the court's judgment) that member states are obliged to refuse their co-operation with another state if it emerges that a conviction "is the result of a flagrant denial of justice". Secondly, the case is notable for the concurring opinion of Judge Matscher, who said, at p 795:
>
> > "According to the court's case law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a state may violate articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to the provisions of the Convention…"

238. Lord Steyn, however, put the matter more broadly, in a way which is reflected by Mr Singh's submissions in the present case (at para 29):

> "There is much in the legal analysis of the Court of Appeal which is uncontroversial. The Court of Appeal emphasised the principle of territoriality expressed in article 1 of the ECHR: p 785, para 47. The notion of jurisdiction is essentially territorial. However, the European Court has accepted that in exceptional cases acts of contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of article 1 of the ECHR: *Öcalan v Turkey* (2003) 37 EHRR 238, 274-275, para 93; *Bankovic v Belgium* 11 BHRC 435. The effect of the decision of the European Court in *Soering v United Kingdom* 11 EHRR 439 was that the extraditing or deporting state is itself liable for taking actions the direct consequence of which is the exposure of an individual abroad to the real risk of proscribed treatment. The Court of Appeal rightly stated that *Soering* is an exception to the essentially territorial foundation of jurisdiction. It is important, however, to bear in mind that apart from specific bases of jurisdiction such as the flag of a ship on the high seas or consular premises abroad, there are exceptions of wider

> reach which can come into play. Thus contracting states are bound to secure the rights and freedoms under the ECHR to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad: *Cyprus v Turkey* (1976) 4 EHRR 482, 586, para 8."

239. Lord Walker of Gestingthorpe agreed with the reasons of Lord Bingham and Baroness Hale of Richmond agreed with the reasons of Lord Bingham, Lord Steyn and Lord Carswell. Lord Carswell did not discuss the Strasbourg jurisdiction for himself, other than to say (at para 67) that –

> "I am myself satisfied that a fair reading of the Strasbourg cases requires a national court to accept that these articles [2, 4, 5, 7 and 8] could possibly be engaged and that the exception to the territoriality principle is not confined to article 3."

Jurisprudence of other nations

240. Two cases have been cited to us in which the jurisdiction issue has been raised in connection with different constitutional texts, one Canadian, the other American.

241. *Cook v. The Queen* [1998] 2 SCR 597. In this case, Cook was arrested in the United States pursuant to a Canadian warrant issued in connection with a Canadian extradition request following a murder in Canada. He was then interviewed in the United States by Canadian detectives, who failed to ask the US authorities if he had requested a lawyer and informed him of his right to a lawyer in a confusing and deficient manner, allegedly in breach of his rights under the Canadian Charter of Rights and Freedoms. One issue was whether the Charter applied in these circumstances to an interview in the United States. The relevant section of the Charter (section 32(1)) provided that it applied "to the Parliament and government of Canada in respect of all matters within the authority of Parliament". The appellant submitted that the Charter applied to the acts of Canadian authorities wherever they took place, the Crown that it did not apply outside of Canada. The Canadian Supreme Court held that exceptionally, but in accordance with its purpose, the Charter did apply to the impugned interview. It emphasised that the basic rule in international law was against extra-territorial application; that the Charter could however apply outside Canada in certain limited and rare circumstances; that it was relevant in international law terms both that the appellant was a Canadian national and that the interview had taken place in the United States without interference or conflict with that foreign state's sovereign authority; and that it was reasonable in the circumstances to expect the Canadian detectives to comply with, and the appellant to be granted the benefit of, constitutional protection for Canadian standards of criminal law and procedure.

242. *Rasul v. Bush* (03-334) 321 F.3d 1134 (28 June 2004) is the recent US Supreme Court decision on the applicability to twelve Guantanamo Bay detainees of the right to invoke habeas corpus. The lower courts had dismissed their petitions on the ground of want of jurisdiction, holding on the basis of earlier authority that aliens detained

outside US sovereign territory may not invoke habeas corpus relief. The Supreme Court, however, held by a majority that there was jurisdiction under the relevant US statute which authorised district courts "within their respective jurisdictions" to entertain habeas corpus applications by persons claiming to be held in custody in violation of the laws of the United States, and that such jurisdiction extended to aliens held in a territory over which the United States exercised plenary and exclusive jurisdiction even if not ultimate sovereignty. Under the 1903 lease for Guantanamo Bay, confirmed by treaty in 1934, the USA recognised the ultimate sovereignty of Cuba, but Cuba recognised that during its period of occupation the USA "shall exercise complete jurisdiction and control over and within said areas".

243. Mr Singh relied on these authorities, by analogy, as illustrating the extra-territorial width of similar constitutional texts.

Conclusions derived from this jurisprudence

244. We would draw the following conclusions and principles from these authorities.

245. *First*, the essential and primary nature of article 1 jurisdiction and therefore of the scope of the Convention is territorial. This follows from the essential nature of sovereignty in international law, from the fact that the Convention is anchored in principles of international law, from the travaux préparatoires of article 1 itself, from the express extension to a limited class of territories beyond the home territories of the state parties pursuant to article 56 (ex 63) but only under the conditions laid down in that article, and from the essentially regional nature of the Convention itself. *Bankovic* is the leading authority in support of both the basic proposition and the reasons for it. As such it must throw its light and its learning over all the authorities which precede and follow it.

246. *Second*, there are nevertheless exceptions to the territorial limitation of article 1 jurisdiction. This is also common ground. The area of dispute is as to the appropriate formulation of the exception or exceptions. The *Soering* principle is, in our judgment, not a true exception to the territorial principle. It is correct that the *Soering* principle engages the responsibility of the excluding state in part because of what may happen to the applicant overseas, in circumstances where the Court spoke of "a direct consequence" (at para 91), Judge Matscher in *Drozd* spoke of an "indirect effect", and Lord Bingham in *Ullah* spoke of "foreign cases": but the principle is effective irrespective of what actually happens to the applicant overseas, since, if the Convention is properly applied, the applicant will never go overseas and ought not to suffer the danger which is feared. The Convention is engaged because both the victim and the act of the respondent state are located in the home territory and the respondent state is under an obligation to secure to persons there the enjoyment of their Convention rights. In such circumstances, the act of the respondent state engages the Convention not because of what is actually done to the applicant overseas, but because the act of expulsion itself is sufficiently likely to have consequences which would violate the Convention. *Bankovic*, in the passage cited by Lord Bingham in *Ullah* (at para 14), expressly states (at para 68) that "such cases do not concern the actual exercise of a state's competence or jurisdiction abroad". At most, the *Soering*

principle permits reference to a "limited" extra-territorial application (*Al-Adsani*, para 39).

247. It is in our judgment consistent with the Convention being engaged territorially that the *Soering* principle is capable of applying, in a sufficiently cogent case, to every right and freedom under the Convention, and not merely articles 2 and 3: see *Ullah* and *Bankovic* (at para 75). It has to be recognised, nevertheless, that in *Ullah* Lord Carswell regarded the *Soering* principle as an exception to the territoriality principle (at para 67), and that Lord Steyn even more broadly observed (at para 29) that not only was the *Soering* case an exception to the essentially territorial foundation of jurisdiction but also cited the Commission's principle of personal jurisdiction from its 1975 decision in *Cyprus v. Turkey* for its full width. In sum, however, it may not matter whether the *Soering* principle is regarded as a true exception to territoriality or not, as long as it is appreciated, with *Bankovic*, that, for all its importance in the field of expulsion and extradition, it is essentially founded on the respondent state's responsibility for persons within its own home jurisdiction. To speak of it therefore as though it exemplifies a broad principle of extra-territoriality based on effects outside the jurisdiction, as it has on occasions been referred to, is we think a potentially misleading simplification. As for Lord Steyn's citation of the 1975 decision in *Cyprus v. Turkey*, we will address that below.

248. *Third*, however, it is clear that there is an exception to the principle of territoriality where a state party has effective control of an area, lawful or unlawful: *Loizidou v. Turkey* (Preliminary Objections, 1995), *Loizidou v. Turkey* (Merits, 1997), *Cyprus v. Turkey* (Preliminary Objections, 1997), *Cyprus v. Turkey* (Merits, 2002), *Ilaşcu v. Moldova and Russia* (2004). This principle first emerged out of the northern Cyprus litigation in 1995, but once it had done so, as it seems plain to us, it became the dominant reasoning and was applied again in the case of Russia's role in MRT.

249. In this connection, a critical question for present purposes is whether the doctrine of effective control of an area applies in territories outside the regional sphere of the party states of the Convention itself. We would first observe that (subject to some *obiter* remarks in *Issa*) it has as a matter of fact only been applied so far within that sphere, in northern Cyprus, where Cyprus at all relevant times was and remains a party state of the Convention, and in trans-Dniester Moldova, after Moldova had become a party state of the Convention. We would also refer to the Court's reasoning concerning the regional legal space of the Convention and the "vacuum" argument as it applies to the people of the occupied territory in Cyprus or the separatist part of Moldova, reasoning which has in more recent years achieved prominence, although it goes back ultimately to Cyprus's first submissions in *Cyprus v. Turkey* in 1975. We shall have to state our conclusion as to the importance of that reasoning to the doctrine of the effective control of an area: but before we do so we think it is necessary to consider another, because broader question, and that is how wide and how important is the other exception to the territoriality principle acknowledged in the jurisprudence, expressed in terms of the authority or control of state agents of party states, wherever those agents operate.

250. This doctrine, although now acknowledged as an exception to the principle of territoriality (*Bankovic*), took its roots from a very early stage of the jurisprudence, as far back as *X v. Republic of Germany* in 1965. That was the case of the applicant who alleged that he was a German national and claimed that the German consulate in

Morocco had asked the local authorities to expel him. His claim was inadmissible, but the Commission canvassed the possibility that all nationals of a state party or in particular persons of any kind dealing with a state party's consular authorities are within that state's jurisdiction.

251. In 1975 in *Cyprus v. Turkey* the Commission referred to its decision in *X v. Federal Republic of Germany* and stated that article 1 required party states to secure Convention rights to all persons within their actual authority and responsibility whether within their own territory or abroad; and that authorised agents of the state brought persons and property within that state's jurisdiction to the extent that they exercised authority over them. On the facts of the case, however, the persons concerned were in fact nationals of the territory in question and the admissibility of the application against Turkey was acknowledged on the basis of Turkey's "control".

252. In *Hess v United Kingdom* (1975), although there the claim was inadmissible, the Commission relied on its 1965 decision to say that there "was no reason" why acts of British authorities in Berlin should not entail the liability of the United Kingdom. There were similar broad statements in *X and Y v. Switzerland* (the Commission decision in 1977 concerning Switzerland's prohibition of the German and Austrian applicants from entering into Liechtenstein, albeit the applications were ruled inadmissible), *X v. UK* (the Commission decision in 1977 regarding a British national's application regarding the omissions of the British consulate in Jordan, again ruled inadmissible), *Chrysostomos v. Turkey* (the Commission decision in 1991, which repeated its 1975 jurisprudence from *Cyprus v. Turkey*), and *WM v. Denmark* (the rather ambivalent Commission decision in 1992 concerning East German nationals handed over to East German police within the Danish embassy in East Berlin). To these decisions may now be added the Commission decision in 1996 of *Ramirez v. France*, a case concerning abduction from Sudan to France in a French military aeroplane: this too concluded that the application was manifestly inadmissible.

253. A number of factors may be observed about these decisions, which conclude in 1996 or with the exception of *Ramirez v. France* in 1992. They are all decisions of the Commission. Despite the broad statements to be found in them, for one reason or another the applications were all ruled inadmissible save only in the northern Cyprus cases. For that reason, it is not always easy to say how widely or narrowly the doctrine that extra-territorial jurisdiction is possible is to be assessed. As to the northern Cyprus cases, we have already said that these have now to be understood as depending on the special exception concerning the doctrine of "effective control of an area" rather than on a broad form of extra-territorial personal jurisdiction effected by the exercise of state authority anywhere in the world.

254. Finally, the factual circumstances of these decisions, outside the northern Cyprus cases, are narrowly circumscribed. *X v. Federal Republic of Germany*, *X v. United Kingdom*, and *WM v. Denmark* are all cases about consulates or embassies. *Hess v. United Kingdom* is about a prison actually within the British zone in West Berlin. *X v. Switzerland* is about the special case of an anomalous principality within Europe, where in any event the Commission appears to have regarded the act as taking place within the territorial jurisdiction of Switzerland, albeit having extra-territorial effects due to Liechtenstein's delegation to Switzerland, under treaty, of certain functions of sovereignty. *Ramirez v. France* is a case about a French military aircraft.

255. During this period, from 1965 to 1992 (or 1996), there had also been a number of decisions of the Court. Two of them, *Tyrer v. United Kingdom* (1978) and *Thanh v. United Kingdom* (1990) were concerned with article 56 (ex 63). In the first of them, *Tyrer*, a declaration of extension to the Isle of Man had been made. In the second, *Thanh*, which concerned Hong Kong, no declaration had been made. In both cases, the presence or absence of a declaration was critical. Moreover, in *Tyrer* the Court emphasised the European centricity of the Convention, and in *Thanh* it ruled that the absence of a declaration was critical even in respect of policy which was made in the home territory, there the United Kingdom.

256. The other decisions of the Court during this period are *Soering* (1989) and *Drozd* (1992). We have already referred above to the significance of the former and its explanation that the relevant jurisdiction was territorial. It was also the first time in the jurisprudence that article 1 was expressly stated to set a "*notably territorial*" limit on the reach of the Convention, although the matter was not elaborated there. As for *Drozd*, we have reviewed at paras 158/166 above the potentially complex interpretations of this case. It appears to be balanced between a territorial and a personal approach to state jurisdiction. We note, however, that in *Ullah* Lord Bingham did not appear to regard it as endorsing a generally extra-territorial approach to article 1.

257. We are inclined to think that the complexities of this case are to be put down to perhaps three special factors: the first was that on any approach there was no real problem in light of the fact that the French and Spanish judges were acting only in their capacity as Andorran judges; the second was that such problem as there may have been was caused by the unusual situation of the judges of one country providing the judicial manpower of another, which, as in the example given by the Court in respect of Liechtenstein, arose from the constitutional anomalies of these ancient principalities of Europe; the third was the consideration that, if the judges had been acting in their capacity as French and Spanish judges, then in this most important legal sphere, in one sense the heart of what is meant by "jurisdiction", there would have been a form of extension of French and Spanish jurisdiction into the territory of Andorra. In our judgment, while *Drozd* recognises the possibilities of extra-territorial jurisdiction and in this connection refers to the earlier Commission decisions, it is too much of a special case to provide any firm foundation for a submission that personal jurisdiction exercised extra-territorially by state agents or authorities is a broad principle of jurisdiction under article 1.

258. We have now arrived at a series of decisions which run from 1995 to 2001 and provide the immediate prelude to *Bankovic* itself. Apart from *Yonghong v. Portugal* (1999), which is a further decision of the Court on the importance of the territorial principle in the context of article 56, and *Al-Adsani v. United Kingdom* (2001), which has been understood in *Abbasi* and *Quark Fishing* to state an implicitly territorial doctrine, the other cases all concern northern Cyprus. In those cases, namely *Loizidou v. Turkey* at the preliminary and merits stages (both decisions of the Court, in 1995 and 1996 respectively) and *Cyprus v. Turkey* (at the Commission stage on preliminary objections in 1996 and before the Court on both preliminary objections and the merits in 2001), we would conclude that the Commission's earlier broad personal jurisdiction approach in *Cyprus v. Turkey* in 1975 and *Chrysostomos v. Turkey* in 1991 has been overtaken and replaced by the special exception of the doctrine of

"*effective control of an area*", which now becomes, as we have said above, the dominant reasoning. Although there are passages in these cases which still reproduce in one form or another reference to a broader doctrine, it becomes increasingly clear that what is driving the rationale of Turkey's jurisdictional engagement is not the mere personal exercise of authority over "*persons or property*", but its responsibility as the new military and, through its puppet regime, civil government in northern Cyprus. This may in a strict sense be outside the home territory of Turkey, but in a very real and practical sense it is a territorial or quasi-territorial doctrine dependent on control of territory (the "area").

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).

261. We also consider that, for the reasons given above where we have reviewed the cases in question, there is nothing in the first two judgments of the Court which follow *Bankovic*, namely *Öcalan v. Turkey* (2003) and *Ilaşcu v. Moldova and Russia* (2004), which undermines or detracts from *Bankovic* as a watershed and, for the present, definitive authority.

262. Issue has nevertheless been joined over the question whether the most recent of all the Court's decisions, that in November 2004 in *Issa*, shows that *Bankovic* is not a watershed authority, as Mr Greenwood submits it is, but rather, as Mr Singh submits, a limited authority dealing with an entirely new and false "impact theory" which was rejected as a "step too far", but otherwise leaving untouched a broad doctrine of extra-territorial jurisdiction wherever and whenever a state party acts through its agents in a way so as to exercise authority or control over any persons anywhere in the world. In our judgment, however, that is an improbable interpretation of *Bankovic*. The Court's

judgment in *Bankovic* gives no support to such a broad doctrine, which would entirely undermine and usurp the essentially territorial aspect of article 1 jurisdiction under international law which is its essential learning. Moreover, the Court there went out of its way to analyse the exceptions in relatively limited ways, pointing in the context of the "effective control of an area" exception to the importance of the vacuum and *espace juridique* doctrines, and otherwise making specific reference to embassies, consulates, vessels and aircraft.

263. For the same reasons and in the light of our analysis of *Issa* above (at paras 202/222) we do not consider that its broad dicta are consistent with *Bankovic*. Moreover, the authorities relied on by the Court for those broad dicta do not adequately support them and (as to the non-Strasbourg authorities) had already been discounted in *Bankovic*.

264. Mr Singh nevertheless submits that it is this court's duty under section 2(1) of the Human Rights Act 1998 to take *Issa* into account. He submits that it is the most directly relevant of all Strasbourg authorities because it is dealing with Iraq itself. He points out that two of the Court's judges in *Issa* had also been members of the Grand Chamber in *Bankovic*, namely Judge Costa (the president of the Chamber) and Judge Thomassen. He relies on what Lord Bingham said on this subject in *Ullah* at para 20:

> "20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this is follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

265. However, in our judgment the dicta in *Issa* do not, for the reasons which we have sought to express, follow any "clear and constant jurisprudence of the Strasbourg court". On the contrary, we think that they are inconsistent with *Bankovic* and the development of the Strasbourg jurisprudence in the years immediately before

Bankovic. In a sense *Issa* seems to us to look back to an earlier period of the jurisprudence, which has subsequently made way for a more limited interpretation of article 1 jurisdiction. It may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgment in *Bankovic* and it is to that school that we think we owe a duty under section 2(1).

266. We therefore respectfully take the view that in *Ullah* at 44B Lord Steyn's citation of para 8 of the Commission's 1975 decision in *Cyprus v. Turkey* was for a broader proposition than can on the whole of this jurisprudence be justified. That, however, was not the point of *Ullah*, nor was this jurisprudence shown to their Lordships there in the detail of which we have had the benefit.

267. We would, however, also observe that the facts as alleged in *Issa* itself, as well as in the four authorities relied on in its para 71, namely *Ramirez v. France*, *Burgos v. Uruguay*, *Casariego v. Uruguay*, and *Coard v. United States*, all concern victims who were actually detained by the respondent state in question. Moreover, it may be that, despite the reasoning of *Bankovic* (and *Ullah*) to the effect that, where the Convention applies, it does so across all and not merely some of the rights and freedoms guaranteed by it, there is room for the development of a new exception to the primary principle of territoriality where torture is concerned, reflecting international law's abhorrence of it. However, that was not Mr Singh's submission.

268. *Fourth*, for all these reasons we conclude that *Bankovic* is a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated; and

269. *Fifth*, that as a result the article 1 jurisdiction does not extend to a broad, world-wide extra-territorial personal jurisdiction arising from the exercise of authority by party states' agents anywhere in the world, but only to an extra-territorial jurisdiction which is exceptional and limited and to be found in specific cases recognised in international law. Such instances can be identified piece-meal in the jurisprudence.

270. If there is some further rationale which can accommodate such instances and throw light on any further ones, it is not apparent from the authorities. We would, however, hazard the thought that the recognised instances are ones where, albeit the alleged violation of Convention standards takes place outside the home territory of the respondent state, it occurs by reason of the exercise of state authority in or from a location which has a form of discrete quasi-territorial quality, or where the state agent's presence in a foreign state is consented to by that state and protected by international law: such as diplomatic or consular premises, or vessels or aircraft registered in the respondent state. Such a rationalisation could also encompass courts located in a foreign state but, by international treaty, manned by the respondent state's judges acting as such.

271. Mr Greenwood submitted that this exception is limited to cases where the complainant or original victim was a national of the defendant state party, a limitation exemplified, for instance, by the earliest of the authorities, *X v. Federal Republic of Germany* (1965), also by *X v. United Kingdom* (1978). However, this limitation is not borne out by the authorities as a whole. In *Hess v. United Kingdom*, the complainant was (West) German; in *X and Y v. Switzerland* the complainants were respectively

German and Austrian; in *Drozd and Janousek v. France and Spain* the second complainant was Czeck; in *WM v. Denmark* the complainant was German. There is no theme which makes the nationality of the complainant critical. There is perhaps a separate question, which does not need to be answered in the present case and which was not pursued in argument, as to whether there is or could be an additional exception to the principle of territoriality to the extent that a state agent exercises control over a national of that state, wherever that occurs.

272. In any event, the "consular" exception presently under consideration can be contrasted with the exceptional doctrine of the effective control of an area, for in such a case it does not matter whether the occupying forces or secessionist regime are lawful or unlawful by international law. However, as we have already suggested above, the effective control of an area exception can also be rationalised on a quasi-territorial basis. In either case, whether with or without international law approval or the consent of the home state, the respondent state has in a real sense extended its jurisdiction territorially into another territory, either wholly, where it has effective control of an area as a whole, or, by reference to a particular location such as a consulate or ship (or perhaps court house or prison), partially.

273. We are now in a position to return to the question which we deferred answering a little while ago, namely whether the doctrine of effective control of an area should currently be understood as being limited to the territorial sphere of the Convention states itself, as in Cyprus and Moldova, or extends anywhere in the world, for which there is a measure of support in *Issa*.

274. *Sixth*, now that we have concluded that the separate exception relating to the exercise of authority by state agents outside their home jurisdiction is not a broad doctrine of personal jurisdiction but a limited exception to a primary doctrine of territorial jurisdiction, we feel entitled also to conclude that Mr Greenwood is correct to submit that the northern Cyprus and Moldova cases are correctly to be understood as ultimately turning on the exclusive and inclusive aspects of the rationalisation of the Convention as operating essentially only within its own regional sphere but also as permitting no vacuum to appear within that space.

275. Mr Singh has submitted that this rationalisation is only an additional and unnecessary piece of reasoning. We disagree. It is fundamental reasoning. When in *Loizidou v. Turkey* (Preliminary Objections) in 1995 the Court had to consider the question of jurisdiction in terms of a preliminary objection, it merely said that the application was capable of falling within the jurisdiction of Turkey within article 1. In *Loizidou v. Turkey* (Merits) in 1996 the Court in fact found article 1 jurisdiction in Turkey's exercise of effective control of the area. In *Cyprus v. Turkey* in 1996 the Commission adopted the same approach as the Court had done in 1995: the application was capable of falling within the article 1 jurisdiction of Turkey but whether it did could only finally be resolved at the merits stage.

276. In *Cyprus v. Turkey* (2002) the Court had to consider whether article 1 jurisdiction did in fact extend to the complaints in question. Turkey adopted the same argument as it had done in 1996 in *Loizidou*, namely to say that it was not responsible for the activities of the TRNC. However, on this occasion the Court explained, critically, that Turkey's obligations under article 1 were founded in "the special character of the Convention as an instrument of public order" and that on any other view there would

be a "regrettable vacuum" (at para 78). It then concluded "accordingly" (at para 80) that the matters complained of did in fact fall within Turkey's article 1 jurisdiction. At that point, perhaps, it might have been possible to say that, because Turkey's same argument had been dealt with in 1996 (in *Loizidou*) without the benefit of the additional reasoning found in 2001 (in *Cyprus v. Turkey*), therefore one could pick and choose between the two analyses. However, seven months later in *Bankovic*, in a case which considered this jurisprudence as a whole, the Court focussed (in para 80) on the additional *Cyprus v. Turkey* reasoning in 2001 as critical. It may be true that the argument, as it is there found discussed, was raised by the applicants in *Bankovic* in a form designed to assist themselves, but it is turned against them by the Court for its true import, in language and application which it bears repeating:

> "In short, the convention is a multi-lateral treaty operating…in the legal space (*espace juridique*) of the contracting states…The FRY clearly does not fall within this legal space. The convention was not designed to be applied throughout the world, even in respect of the conduct of contracting states. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention."

277. In *Issa* at para 74 the Court recognises the *espace juridique* doctrine but, in our respectful opinion, does not succeed in avoiding it implying that non-Convention territory automatically becomes Convention territory if there is effective control of an area by a state party. Of course, if one is of the view that the exercise by a state party to the Convention of authority or control anywhere in the world is within article 1 jurisdiction, then the *espace juridique* doctrine becomes irrelevant and unnecessary, another inconsistency with *Bankovic*. We also refer generally to our other reasons above for thinking that *Issa* cannot, consistently with *Cyprus v Turkey* (2002) and *Bankovic*, be viewed as turning the flank of this doctrine (see at paras 202/222 and 262/265). For these reasons, we consider that the effective control of an area doctrine does not apply in Iraq.

278. *Seventh*, our sixth conclusion is supported by a consideration of the role within the Convention of article 56, headed "Territorial application" and article 57, headed "Reservations". As for article 56, we appreciate that this does not affect an exceptional extra-territorial application such as to a consulate, embassy or ship: for plainly such a case is too specific and lies outside the concept of general territorial application. Nor can it apply in any event to a territory outside the home jurisdiction which does not fall within the language of article 56(1) – "for whose international relations it is responsible" (see *Chrysostomos v. Turkey* at para 37). However, we accept Mr Greenwood's submission that the regime of article 56 ill accords with a doctrine that would make a state party responsible for the whole of a territory effectively controlled by it, wherever in the world such a territory was, whatever its "local requirements" (see article 56(3) and cf *Tyrer v. United Kingdom*), and even if the party state did not choose to apply the Convention to it (cf *Hong Kong v. United Kingdom*). Such a result would be counter-intuitive. If the Convention acknowledges

that a special declaration is necessary to extend its scope to dependent territories abroad, and then makes allowances for "local requirements", it makes no sense to impose upon the state party the full rigour of the Convention's obligations, if that state acquires effective control of a new territory, without any choice on its part and without due regard for local requirements. This illogicality is all the greater in that the Convention, once it applies, does so across the full range of rights and obligations, and is not to be confined to particular articles of fundamental and absolute importance, such as articles 2 or 3, nor to be adjusted in relation to the degree of control (see *Bankovic* and *Ullah*). This difficulty, however, is removed if the exceptional doctrine of "effective control of an area" is confined to the sphere of territories, such as northern Cyprus and trans-Dniester Moldova, which lie in any event within the jurisdiction of the Convention's state parties. As for article 57, a similar point can be made, mutatis mutandis.

279. We prefer to put the matter in this way, rather than on the basis which seemed at one point to be urged on us by Mr Greenwood, that there were territories in the world, such as Iraq, for which the Convention was not designed and for which they might not be ready. That seemed to us an unhappy submission to have to make about a country which was one of the cradles of civilisation. No one knows to whom the baton or batons of the human race will be handed. The Convention was not created because of the humanity of Europe, but because of its failures.

280. It remains to be seen how these principles apply to the facts of this case.

The principles as applied to the facts.

281. It follows in our judgment that, since Iraq is not within the regional sphere of the Convention, the complaints before us do not fall within the article 1 jurisdiction of the United Kingdom under the heading of the extra-territorial doctrine of the "effective control of an area" exception as found in the cases of northern Cyprus and Moldova.

282. That conclusion makes it unnecessary for us to consider Mr Greenwood's subsidiary submission that, even if that doctrine could apply in theory to Iraq, and despite the United Kingdom being recognised as an occupying power for the purposes of the Hague Regulations and Fourth Geneva Convention, nevertheless it did not have such control of the relevant provinces where the deaths complained about took place as to amount to "effective control" of that area within the meaning of that doctrine. Mr Greenwood contrasts the total military and civil control in northern Cyprus and secessionist MRT with the dangerous and volatile situation in Basra and Maysan provinces, where the British (among other national forces of the coalition) were relatively few in number, and where civil government remained in the hands of the Iraqi authorities under the aegis of the US dominated CPA (Coalition Provisional Authority). In this connection we remind ourselves that UN Security Council resolution 1483 of 22 May 2003 inter alia reaffirmed the sovereignty and territorial integrity of Iraq, recognised the role of the CPA and of the USA and the UK as "occupying powers under unified command" and looked forward to the formation of an Iraqi Interim Administration; that on 13 July 2003 the Iraqi Governing Council was formed, which was recognised by UN Security Council resolution 1500 of 14 August 2003; and that UN Security Council resolution 1511 of 16 October 2003,

acting under chapter VII of the UN Charter, determined that the Iraqi Governing Council embodied the sovereignty of the state of Iraq during the transitional period.

283. We also remind ourselves that the status of northern Cyprus and MRT as being within the effective control of Turkey and Russia respectively was ultimately decided by the Court only after a full consideration of the facts on the merits of those respective cases and in circumstances where, upon a consideration of those facts, such effective control was plainly established (see, for instance, *Loizidou v. Turkey* (1997) at para 56, cited in *Bankovic* at para 70, and *Ilaşcu v. Moldova and Russia* at paras 379/394). It is therefore perhaps fortunate that, on the view we have taken as to the principle involved in the matter of this exceptional doctrine, it has not been necessary at this preliminary stage to attempt to resolve this factual issue. If it was only a question of whether, on the materials presented to us, and on the assumption that the case of Iraq was like the cases of northern Cyprus and of MRT, these complaints were capable of falling within the jurisdiction of the United Kingdom, we could perhaps conclude that they were. But a definitive decision is something different.

284. There remains the question whether the deaths with which we are concerned can come within the other recognised exception as resulting from the extra-territorial activity of state agents. On the view which we have taken of this exception as narrowly based, not extending to a broad personal extra-territorial jurisdiction, we conclude that it is necessary to consider the first five claimants and the sixth claimant separately. This was not the way in which Mr Singh argued the matter: indeed, in answer to a specific question from the court as to whether he made any distinction, even on an alternative basis, between the first five and the sixth claimants, he assured the court that he did not. Even so, it seems to us that we are nevertheless obliged to give separate consideration to these respective cases. This is because, on our analysis of the jurisprudence, the case of deaths as a result of military operations in the field, such as those complained of by the first five claimants, selected as reflecting various broadly representative examples of such misfortunes, do not seem to us to come within any possible variation of the examples of acts by state authorities in or from embassies, consulates, vessels, aircraft, (or, we would suggest, courts or prisons) to which the authorities repeatedly refer.

285. In such circumstances it seems to us that to broaden the exception currently under discussion into one which extends extra-territorial jurisdiction to the situations concerned in the case of the first five claimants would be illegitimate in two respects: it would drive a coach and horses through the narrow exceptions illustrated by such limited examples, and it would side-step the limitations we have found to exist under the broader (albeit still exceptional) doctrine of "effective control of an area". Although article 2 claims are of course a matter of particular and heightened concern, if jurisdiction existed in these five cases, there would be nothing to stop jurisdiction arising, or potentially arising, across the whole range of rights and freedoms protected by the Convention.

286. The sixth case of Mr Baha Mousa, however, as it seems to us, is different. He was not just a victim, under however unfortunate circumstances, of military operations. He was not, as we understand the matter, a prisoner of war. He was, prima facie at any rate, a civilian employee. He was arrested by British forces on suspicion of involvement with weapons hidden in the hotel where he worked as a receptionist, on suspicion therefore of involvement in terrorism. He was taken into custody in a

British military base. There he met his death, it is alleged by beatings at the hands of his prison guards. The death certificate referred to "cardio respiratory arrest: asphyxia".

287. In the circumstances the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison. It seems to us that our interpretation of *Drozd* also lends support to our conclusion, as do the two cases discussed (at paras 220/221 above) from Canada and the United States, viz *Cook v. The Queen* and *Rasul v. Bush*. We can see no reason in international law considerations, nor in principle, why in such circumstances the United Kingdom should not be answerable to a complaint, otherwise admissible, brought under articles 2 and/or 3 of the Convention.

288. We would therefore hold that the first five cases do not fall within the jurisdiction of the United Kingdom or the scope of the Convention for the purposes of its article 1, but that that of Mr Mousa does.

Jurisdiction under the Human Rights Act 1998

289. The Secretary of State's primary argument on jurisdiction was concerned with jurisdiction under the Human Rights Act 1998 (the "Act") rather than with jurisdiction for the purposes of article 1 of the Convention. In this connection oral submissions at the hearing were made on behalf of the Secretary of State by Mr Philip Sales In sum, his point was that, whatever the interpretation of article 1 of the Convention, and whatever the jurisprudence of Strasbourg on this question, in this court we were rather concerned with the Act, which contained its own provisions but did not incorporate either article 1 or anything of its language: and that on the true interpretation of the Act the normal implication that it applied only territorially prevailed.

290. Mr Singh's rejoinder was that any mere implication had to make way for an interpretation which sought consistency with the Convention itself, essentially for three reasons: because that was the normal way to construe a domestic statute which was enacted to comply with the United Kingdom's international obligations; because the Act was passed with the declared intent of bringing rights home (*White Paper, Rights Brought Home: The Human Rights Bill*); and because section 3 of the Act contained its own provision requiring its interpretation to be consistent with that of the Convention if at all possible. It will be recalled that section 3(1) of the Act provides –

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

291. Although it was in a sense logical for Mr Sales to begin with the Act, in our judgment the order which we have here adopted is to be preferred: ultimately, the Act has to be construed against the existing background of the Convention and the jurisprudence in Strasbourg. We also agree with Mr Singh that, if possible, the Act should be construed in conformity with the Convention: if, because jurisdiction under the Act is narrower than under the Convention, there will be gaps between the scope of the Convention and of the Act respectively, something which Mr Sales urged us to tolerate with equanimity, then to that extent, the Act will have failed to enact the United Kingdom's obligations into domestic law, will have correspondingly failed to bring rights home, and section 3 will have failed of its obvious purpose. We see no reason why section 3(1) should not apply to the Act itself and to the question of its scope. We recognise that article 1 is not itself reproduced in Schedule 1 to the Act, but we do not favour Mr Sales' submission, as we understand it, that section 3 is only concerned with the substance of the rights protected by the Convention and not with the jurisdictional scope of those rights. We note that "primary legislation" is defined in section 21(1) of the Act to include "any…public general Act". We think it is therefore necessary to interpret the Act itself along the lines indicated in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 WLR 113. We are not impressed by the fact relied on by Mr Sales, that the Act expressly creates a temporal gap between domestic and Convention rights to the extent that the Act is not retroactive: for that is the product of the Act's express language, and in any event temporal provisions of one kind or another had to be dealt with in the Act to explain how its introduction was to fit in with the previous domestic law and the existing Convention. Quite apart from section 3(1), moreover, it is a general principle to construe domestic legislation which enacts treaty obligations in conformity with those obligations, if there is doubt about its true construction: see *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 116 at 143, *James Buchanan & Co Ltd* [1978] AC 141 at 152, a principle not thrown into doubt by a passage relied on by Mr Sales from Lord Hoffmann's speech in *R v. Lyons* [2003] 1 AC 976 at para 27.

292. In the present case, Mr Sales acknowledges that the principle of strict territoriality for which he contends in relation to the scope of the Act is not expressly enacted, but he submits that it is nevertheless to be implied as a matter of well recognised presumptions, and that the implication is supported and confirmed by other provisions of the Act on which he relies.

293. The presumptions he relies on are those set out in *Bennion*, *Statutory Interpretation*, 4th ed, 2002, as follows:

> "Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom" (at section 106, p 282); and
>
> "Unless the contrary intention appears…an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters" (at section 128, p 306).

294. Mr Sales also referred to *Attorney-General for Alberta v. Huggard Assets Ltd* [1953] AC 420 (PC) at 441 where Lord Asquith said:

> "An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession";

and to *Tomalin v. S Pearson & Son Ltd* [1909] 2 KB 61 at 64 where Cozens-Hardy MR said:

> "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 on its subjects beyond the territorial limits of the United Kingdom."

295. The textual indications in the Act itself on which Mr Sales relies as supporting these presumptions are then as follows. He points to the absence of article 1 from Schedule I; to the language in both section 1(4) and section 1(6) about the effects of protocols to the Convention "in relation to the United Kingdom"; to section 3(1) itself in as much as it there refers to primary and subordinate legislation defined (in section 21(1)) in terms of the legislative acts of only UK institutions (and not of its dependencies); to section 4(5) which defines "court" in terms of courts again only of the United Kingdom; to section 6(1) where "public authority", itself defined at any rate inclusively in section 6(3), could not, he submits, be intended to refer to any public authority outside the United Kingdom; to section 11(a) which safeguards existing human rights in terms of "any law having effect in any part of the United Kingdom";; to section 21(1) which defines "the Convention" itself as a reference to the ECHR "as it has effect for the time being in relation to the United Kingdom"; and above all to section 22(6) which states that "This Act extends to Northern Ireland" and section 22(7) which extends section 22(5) ("This Act binds the Crown") to "any place to which that provision extends" where "that provision" is a reference to any provision in the armed forces discipline acts (the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957) so far as section 21(5) relates to it.

296. In connection with these textual indications, Mr Sales submits that they emphasise the geographical limitation of the application by the Act of the Convention rights to the territory of the United Kingdom. None of these provisions would have been necessary if the Act had been intended to extend extra-territorially. The "United Kingdom" was itself defined in section 1 of the Interpretation Act 1978 as meaning "Great Britain and Northern Ireland", ie as a geographical concept rather than a juridical one. In any event, Parliament could not have intended the Act to apply anywhere in the world where the United Kingdom's state agents might operate or where the effects of their actions might be felt. Moreover the Act made no provision for its application to its dependencies or overseas territories, whereas the Convention did, pursuant to article 56. So it was that the Convention had been given separate effect by local statutes, as in Jersey by the Human Rights (Jersey) Law 2000, in Guernsey by the Human Rights (Bailiwick of Guernsey) Law 2000, and in the Isle of

Man by the Human Rights Act (Isle of Man) 2001. Therefore, Parliament must have intended there to be geographical as well as temporal gaps between the Convention's scope and that of the Act, and all the more so if the Convention's scope was to be interpreted as widely as the claimants submitted that it should be.

297. Finally, Mr Sales relied on what Lord Irvine of Lairg LC said in Parliament, during a debate as to whether article 1 of the Convention should be included in the Act, in rejecting an amendment that the Act should state that "The main purpose of this Act is to provide remedies for the violation of the Convention rights within the jurisdiction of the United Kingdom". Lord Irvine said (*Hansard, House of Lords*, 18.11.97, col 476) –

> "The Bill gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention".

And on a later occasion Lord Irvine also said (*ibid*, 29.11.98, col 421):

> "The words in the Bill are "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights." But I have not conceded that this Bill claims any extra territorial effect. I do not believe that it is a great flight of the imagination to read it as meaning in the United Kingdom. I have to make this point absolutely plain. The European Convention on Human Rights under this Bill is not made part of our law. The Bill gives the European Convention on Human Rights a special relationship which will mean that the Courts will give effect to the interpretative provisions to which I have already referred, but it does not make the convention directly justiciable as it would be if it were expressly made part of our law. I want there to be no ambiguity about that."

298. Mr Sales submitted that we were entitled to take these statements into account as part of the travaux préparatoires of the Act, on the basis that they identified the objective and mischief of the statute: see *R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 at para 5.

299. Mr Sales also referred to the fact that there was no obligation to incorporate the Convention into domestic law: *The Observer and the Guardian v. United Kingdom* (1991) 14 EHRR 153 at para 76 of the judgment of the Court. He also referred to what Richards J said at first instance in *R (Abassi) v. Secretary of State for the Foreign and Commonwealth Office* [2002] EWHC 651 Admin at para 31, viz –

> "the 1998 Act extends, with limited exception, only to the territory of the United Kingdom. The usual presumption as to the territorial scope of an Act of Parliament applies."

300. These were sustained and powerful arguments, which, when they were made, were directed to the full range of Mr Singh's submissions on behalf of the claimants. We have, however, now reached a position in our analysis where we have held that the article 1 jurisdiction under the Convention is both essentially territorial and that, to the extent that there are exceptions to that principle of territoriality, they are limited rather than broad ones. The broadest of those limited exceptions is the "effective control of an area" exception, but even that only applies within the sphere of territories of the state parties. We have therefore held that only the case of Mr Baha Mousa comes within the jurisdiction of the United Kingdom under article 1. The critical question for us at this point is whether jurisdiction under the Act extends to his father's claim. While we have to concentrate on that claim, nevertheless it is desirable to find a solution to that question within a logical framework for the Act and the Convention as a whole.

301. From the point of view 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. The temporal gap, as we have already pointed out, is another matter. So is the question of which domestic courts should be entitled to hear the domestic claim: thus the Act extends to Northern Ireland, but not to Scotland, which after all is part of the United Kingdom, but which, like the Channel Islands and the Isle of Man, has its own statute. Therefore section 22(6) throws no light on the issue. Section 22(7) is perhaps closer to the point: but it is a specific extension, valuable, even if perhaps not strictly necessary (on our view of the principle behind *Drozd*), in the context of service disciplinary proceedings wherever they take place. 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). We do not consider that anything in Lord Irvine's statements in Parliament, even if properly admissible as to which there was dispute between the parties, takes the matter decisively further. We are in any event clear in our minds that the Convention is only reached through the Act and that it is

the Act which we must apply in these courts: see *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807.

302. We would accept, nevertheless, that not every part of that reasoning applies naturally to the case of Messrs Mousa, son and father. Neither of them has any connection with the United Kingdom other than as residents of a province in a foreign country where the United Kingdom is an occupying power under the Hague and Fourth Geneva Conventions and other than, in the case of the son, as a prisoner in a British military prison. It is hard to say that the Act was designed to bring rights home in their case, for the United Kingdom is in no way their home: in their case, it is not their rights which are brought home, but the United Kingdom's responsibilities. Even so, we would be reluctant to distinguish their case from that of a British resident or national where Convention rights are interfered with in a narrow extra-territorial context interpreted by Strasbourg jurisprudence (itself founded in concepts of international law) to be within a state party's essentially territorial jurisdiction under article 1.

303. When, however, we consider the possibly wider ramifications of extra-territorial jurisdiction, as they might extend beyond the case of the Mousas, we think the problems raised by Mr Sales' submissions become potentially more difficult. For example, what of claims arising out of events within colonies and other dependencies? The Convention has its own system in article 56 for dealing with that question, but the Act does not. The decision in *Quark* treats the article 56 procedure as determinative (see paras 208/210 above), at any rate in a negative sense, for if a claim does not fall within a state party's article 1 jurisdiction under the Convention, it cannot fall within the Act. The same approach appears in the court of appeal's judgment in *Abassi* (see paras 203/204 above). It does not follow, however, that the reverse is true, namely that an extension under article 56 brings with it an extension of jurisdiction under the Act, for the Act has no similar procedure. On the contrary, we think that without an equivalent mechanism under the Act for extending its scope to colonies and dependencies, the Act's jurisdictional scope does not extend extra-territorially to them. However, we see no logical difficulty about this. Article 56 is an *extension* to the basic scope of article 1 jurisdiction, and a voluntary extension at that. Without similar machinery within the Act, we do not see why the Act should extend beyond the basic jurisdictional reach of article 1 of the Convention. This, therefore, would, in a case where the article 56 machinery is used, lead to a gap between Act and Convention: but such a gap is logically consistent with the structure of both Convention and Act.

304. What, however, of the "effective control of an area" exception under the Convention? Would this come within the Act? We do not have to decide this question, but recognise that in this context Mr Sales' submissions are potentially stronger. On our interpretation of this exception, it only applies within the sphere of the territories of the state parties, and does so in order to prevent a vacuum within that sphere. That is a rationale that applies strongly in the context of Strasbourg, but not to the United Kingdom for the very reason that there would always be a remedy, and thus no vacuum, via the Convention in Strasbourg. It is intuitively difficult to think that Parliament intended to legislate for foreign lands. On the other hand, if we were to give the concept of "effective" control its full force, as exemplified by the case of northern Turkey, the territory concerned becomes effectively a province of the

responsible state party – even though in practice and in theory constitutional arrangements for such a situation may vary.

305. Finally, we ask ourselves whether the inconclusive debate undertaken in the last paragraph undermines what we have already said about the much narrower exception which applies in the case of Mr Mousa. If the "effective control of an area" exception might expose a gap between Convention and Act, why not the narrower exception? However, we are not persuaded. The narrower exception is in truth an interpretation in the context of Convention rights of the extent of territorial jurisdiction: at the margins there will always be cases of difficulty. The "effective control of an area" exception is ultimately founded, however, as we have understood it, not on such marginal problems but on the need to avoid a vacuum within the sphere of the state parties' own territories. We do not think that the answer to the former case is dictated by an answer to the latter.

306. In sum, therefore, the presumption of territoriality survives in essence, for it is consistent with the scope of the Convention itself and with its underpinnings in international law. But that does not mean that, set against the background of the Convention and its jurisprudence, the presumption may not allow of the narrow exception which we have framed and applied in the case of the sixth claimant.

307. It follows that we conclude that the claims of the first five claimants are outside the jurisdiction or scope of the Act, but that the claim of Mr Daoud Mousa in respect of his son is within them.

The Queen on the Application of "B"& Ors v. Secretary of State for the Foreign and Commonwealth Office ("B") [2004] EWCA Civ 1344 (unreported, 18 October 2004).

308. At the time of oral submissions before this court it was known that in another case, *B*, the court of appeal was considering or had just finished considering the same issues (albeit in a wholly different context) as to the scope of jurisdiction under the Convention and the Act which we have had to consider in this case. After discussion with Counsel as to the ramifications of this coincidence, it was decided to await the judgment of the court of appeal in *B* before publishing our own judgment in this case, and indeed to give to the parties the opportunity to make submissions to us, if they wished to do so, as to consequences for this case of the decision in *B*. In the event, the parties availed themselves of that opportunity by serving further written submissions, but did not request a further hearing.

309. In *B* the applicants were (or alleged that they were) from Afghanistan and had sought asylum in Australia. They had there been detained in the Woomera Detention Centre ("Woomera") in South Australia. They had escaped and had sought refuge in the British consulate in Melbourne. They alleged ill-treatment and suffering at Woomera and sought asylum in Britain. The deputy high commissioner and the Foreign Office in London were consulted. The applicants were told by consular officials that they would either have to leave voluntarily or they would be returned to the Australian authorities. They settled for the first option. In their claim in these courts under the Act they alleged that there had been breaches of articles 3 and 5 of the Convention in that return to the Australian authorities had been in the face of a real threat of

inhuman and degrading treatment and indefinite and arbitrary detention. The fact that the relevant events relied upon occurred in the British consulate at Melbourne were relied upon as justifying jurisdiction under article 1 of the Convention and under the Act. Lord Phillips of Worth Matravers MR, giving the judgment of the court of appeal, said that the claim raised three issues (at para 25):

> "i) Could the actions of the United Kingdom diplomatic and consular officials in Melbourne fall 'within the jurisdiction' of the United Kingdom within the meaning of that phrase in Article 1 of the Convention?
>
> ii) Could the Human Rights Act apply to the actions of the United Kingdom diplomatic and consular officials in Melbourne?
>
> iii) Did the actions of the United Kingdom diplomatic and consular officials in Melbourne infringe a) the Convention and b) the Human Rights Act?"

The answers given by the court of appeal to these questions were as follows: (i) Yes, but only as a matter of assumption rather than decision (at para 66); (ii) Yes, on the basis that jurisdiction under the Act paralleled that under the Convention (at para 79); and (iii) No, because the grant of diplomatic asylum would have infringed the obligations of the United Kingdom under public international law (at para 96). The application therefore failed.

310. We have had to consider how we should treat *B* in this judgment. We are satisfied that it does not affect our judgment as to the outcome of this case. On the first issue, as to the scope of article 1 jurisdiction under the Convention, the court of appeal's review of (a more limited range of) Strasbourg jurisprudence is broadly similar to our own. It concludes with an assumption, based on *WM v Denmark*, that while in the consulate the applicants were "sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1" (para 66). On the second issue, as to the scope of the Act, it concludes, as we have done, that the extra-territorial scope of the Act matches that of article 1 of the Convention. We recognise that whereas our conclusion about the Act is effectively and, we think, essentially the same, it might be said that we have reached it, in the context of this case and the submissions made to us, by slightly different reasoning or perhaps by reasoning which is expressed somewhat differently.

311. These jurisdictional issues, important as they were, did not affect the outcome of *B* in the light of the ultimate decision that there had been no infringement of Convention rights. That has led to a submission on the part of the Secretary of State in this case that the answer to issue (ii) in *B* was not part of the *ratio* of that case, since it was not necessary to its outcome: see *Re State of Norway's Application (No 1)* [1990] 1 AC 723 at 750. However, since we have come to our decision in this case independently of *B*, and since in any event the court of appeal's decision on their issue (ii) is consonant with our own, we do not think that we have to determine the question whether we are strictly bound as a matter of precedent by that decision. It goes without saying that we would wish to accord it significant weight even if it is not a strictly binding precedent.

312. In these circumstances, we revert to the question as to how we should in this judgment present and apply the court of appeal's reasoning in *B* and the parties' conflicting submissions about it. Since we view the court of appeal's decision as consonant with our own, since, moreover, the context of *B* was the much narrower and comparatively well trodden ground of embassies and consulates, and since it is apparent from Lord Phillips' judgment that the range of submission and citation (particularly in the context of article 1 jurisprudence) was less full than that with which we were assisted in this case (*cf B* at para 30), we have concluded that the best way to take account of the relevant submissions about *B* is under this separate heading. In doing so, we hope that we do no violation to our responsibilities. We have satisfied ourselves that, although what is stated in this judgment above was written before we saw *B* or were addressed by the parties on it, we have nevertheless fully taken it into account before perfecting this judgment.

313. As for the scope of the Convention, Mr Singh submits that on the whole *B* supports the argument which he addressed at the hearing, in particular in emphasising the role of international law in rationalising both the typical territorial and the possible extra-territorial reach of article 1 jurisdiction. For instance –

> "51. In *Bankovic*…[t]he EctHR equated the jurisdiction referred to in Article 1 with the jurisdiction enjoyed by a State under principles of public international law. It observed that this jurisdiction is primarily territorial. This conclusion is hardly surprising. Article 1 requires contracting States to secure to everyone within their jurisdiction the Convention rights and freedoms. For the most part this is an obligation that can only be performed by the State which has jurisdiction over the territory in which those rights and freedoms are enjoyed…
>
> 55. The Court in *Bankovic* recognised none the less that there were circumstances where the jurisdiction referred to in Article 1 was not territorial in nature. Such jurisdiction still fell to be identified according to principles of public international law…The jurisdiction recognised under public international law in relation to activities on board vessels bears a close comparison with territorial jurisdiction – see *Oppenheim's International Law* edited by the late Sir Robert Jennings QC and Sir Arthur Watts QC 9th Edition Vol 1 paragraph 287 and following…
>
> 56. …The obvious example of the exercise of jurisdiction on those outside a State's territory is the right recognised by International Law for a State to enact legislation affecting its citizens. *Oppenheim* describes the position as follows at paragraph 138:
>
> > "International law does not prevent a state from exercising jurisdiction, within its own territory, over its nationals travelling or residing abroad, since they remain under its personal authority…"

> 57. *Drodz* was a case where the Commission appears to have accepted that, had the judges seconded from France and Spain been lawfully exercising in Andorra the judicial authority of their respective States, jurisdiction would have existed for the purpose of Article 1."

314. Thus Mr Singh submitted that the rationale of international law can explain the extension of article 1 jurisdiction to any extra-territorial exercise of a state's authority whether legislative (over its own nationals), judicial (*Drodz*), or executive (the northern Cyprus cases). There was no need, however, for the exercise of state authority to be lawful under international law, as the northern Cyprus cases themselves demonstrated.

315. On the other hand Mr Greenwood submitted that the court of appeal's treatment of the Strasbourg jurisprudence affirmed the Secretary of State's case: for instance in stating that *Bankovic* was a case "of paramount importance" (at para 51); in doubting whether the reasoning in *Öcalan* could be reconciled with *Bankovic* (at para 59); and in interpreting the northern Cyprus cases as turning on a pragmatic view that northern Cyprus fell within the territorial jurisdiction of Turkey (at para 54). Even if *WM v. Denmark* was interpreted by the court of appeal more broadly than he would have wished, that was in the different context of embassies and consulates and even in that context the court went no further than to assume that article 1 jurisdiction was in place.

316. We would accept that there is a rationalisation running through the court of appeal's judgment on this first issue as to the dominant relevance of principles of international law to explain both the primary case of territorial jurisdiction and the exceptions to it. It is possible to say that such a rationalisation lends support to the claimants' argument that what is critical here is the recognition of the United Kingdom as an occupying power for the purposes of the Hague Regulations and Fourth Geneva Convention. Ultimately, however, for all the reasons which we have given above in considering the full range of Strasbourg jurisprudence, we consider that the case of an occupying power is not like that of a consulate and has not been treated like one. The importance of consulates (and ships) in this context is, we think, that, although they are not formally part of the territory of the state which operates them, they are recognised in international law as constituting a close analogy to such territory. As Lord Phillips pointed out (at para 62 of *B*), under the 1963 Convention on Consular Relations consular premises are inviolable (article 31). As he remarked in connection with vessels flying a state's flag (at para 55), the jurisdiction recognised under international law in relation to vessels "bears a close comparison with territorial jurisdiction". Ultimately what counted in the northern Cyprus cases is that northern Cyprus was viewed as territory (however illegally, as Mr Singh himself remarks) within Turkey's jurisdiction (see para 237 above, and para 54 of *B*). We do not think that that rationalisation applies to occupied territory all over the world.

317. As for the scope of the Act, Mr Singh relies on the conclusion in *B*; and Mr Greenwood submits that it is wrong. We have come in effect to the same conclusion as the court of appeal, even if in places our reasoning, driven perhaps by the broader considerations in this case, is at some point or points somewhat differently expressed.

Thus we have principally in mind that whereas Lord Phillips says that the court's duty to construe the Act if possible in a way that is compatible with the Convention –

> "precludes the application of any presumption that the Human Rights Act applies within the territorial jurisdiction of the United Kingdom, rather than the somewhat wider jurisdiction of the United Kingdom that the Strasbourg Court has held to govern the duties of the United Kingdom under the Convention" (at para 78)

we have expressed essentially the same conclusion in the terms of paragraph 280 above. This marginal difference in formula makes no difference in this case.

Procedural requirements of articles 2 and 3 of the Convention

318. Articles 2 and 3 of the Convention provide as follows:

> "*Article 2*
>
> *Right to Life*
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."
>
> *"Article 3*
>
> *Prohibition of Torture*
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

319. Apart from the substantive provisions of these articles, the jurisprudence of the Court has drawn out of them, in support of the rights and freedoms contained within them, what may be called the implied procedural obligation of a proper and adequate

investigation into loss of life or torture or inhuman or degrading treatment or punishment. Mr Singh has traced the development of this implied obligation in a number of decisions of the Court concerning article 2 arising out of the insurgency of the Kurdish separatist movement in south-east Turkey, viz *Kaya v. Turkey* (1998) 28 EHRR 1, *Guleç v. Turkey* (1998) 28 EHRR 121, *Ergi v. Turkey* (unreported, 28 July 1998, ECHR), *Ogur v. Turkey* (unreported, 20 May 1999, ECHR), *Gül v. Turkey* (unreported, 14 December 2000 ECHR), and, most recently, *Özkan v. Turkey* (unreported, 6 April 2004, ECHR). He and Mr Greenwood have also drawn our attention to four decisions which concern the United Kingdom, the last two of which are decisions of the House of Lords: *McKerr v. United Kingdom* (2001) 34 EHRR 553, *Jordan v. United Kingdom* (2003) 37 EHRR 2, *R (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653, and *R (Middleton) v. West Somerset Coroner* [2004] UKHL 10, [2004] 2 WLR 800.

320. In essence, therefore, there is no dispute between the parties as to the relevant law, the principles of which we can take from the House of Lords. In addition, however, Mr Singh relies on the Court's Turkish decisions to illustrate the application of these principles to particular factual situations and especially to demonstrate the lack of sympathy shown by the Court to the submission, relied on by the Secretary of State in the present case, that difficulties created by situations of insurgency can excuse shortcomings in a state's investigative response to killings by their agents.

321. An authoritative summary of the requirements of the procedural obligation can thus be found in *Amin* and in particular in the ten propositions set out in the speech of Lord Bingham of Cornhill at para 20:

> "…The cases clearly establish a number of important propositions:
>
> (1) It is established by *McCann*, para 161, *Yasa v Turkey* (1998) 28 EHRR 408, para 98, *Salman*, para 104 and *Jordan*, para 105 that (as it was put in *McCann*):
>
> > "The obligation to protect the right to life [under article 2(1)], read in conjunction with the State's general duty under article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the state."
>
> (2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight: para 192 of the opinion of the Commission in *McCann*, set out at pp139-140.

(3) As it was put in *Salman*, para 99:

> "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman*, para 100; *Jordan*, para 103.

(4) The objective to ensure that there is some form of effective offical investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state: *Salman*, para 105.

(5) The essential purpose of the investigation was defined by the Court in *Jordan*, para 105:

> "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. 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."

(6) The investigation must be effective in the sense that (*Jordan*, para 107)

> "it is capable of leading to a determination of whether the force used in such circumstances 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."

(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (*Jordan*, para 106)

> "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."
>
> (8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, para 121), there must (*Jordan*, para 109) "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."
>
> (9) "In all cases", as the Court stipulated in *Jordan*, para 109: "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."
>
> (10) The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan*, para 143. But it is "indispensible" (*Jordan*, para 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force."

322. It follows that for an investigation into a death occurring allegedly at the hands of state agents to comply with the requirements of the procedural obligation, it must be official, ie initiated by the state; timely, ie in both initiation and completion; independent, ie both formally and practically, from those implicated in the events; open, ie to a sufficient element of public scrutiny as well as to the involvement of the next-of-kin; and effective, ie capable of achieving objective accountability of the state agents and thus of leading, as appropriate, to conclusions about all the circumstances, including the background issues, leading to the death, as well as about responsibility for it, and the identification and punishment of those responsible.

323. In addition, where the death occurs in state custody, the burden is on the state, and it is a particularly stringent one, to account for the death: for it is the duty of the state to protect those in its custody.

324. So much we think we can say is common ground. However, Mr Singh also wanted to emphasise the limited room for exculpating responsibility on the ground of the difficulties for the state of the contextual situation, even in the circumstances of insurrection. Thus in the Turkish cases, the Turkish government consistently sought to argue that the investigative duty had to be modified to reflect practicable expectations in a dangerous and troubled area of conflict. However, the Court has consistently rejected the idea that there is any displacement of the investigative duty

by reason of the the security situation: see *Kaya* at para 91, *Guleç* at para 81, *Ergi* at para 85, and *Özkan* at para 319, where, most recently, the Court said this:

> "It is mindful, as indicated in various previous judgments concerning Turkey, of the fact that loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey…However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of the clashes involving the security forces, the more so in cases such as the present where the circumstances are in many respects unclear."

325. An essentially parallel and equivalent obligation has been developed in the context of article 3, which is relevant to the case of Mr Mousa. It is not we think in dispute that the allegations concerning the circumstances of Mr Mousa's death are capable of engaging article 3: see *Ribitsch v. Austria* (1995) 21 EHRR 573 at para 38. The parallel investigative duty under article 3 has been developed in a series of cases, such as *Assenov v. Bulgaria* (1998) 28 EHRR 652 (at para 102), *Al-Adsani v. United Kingdom* (2001) 34 EHRR 273 (at para 38) and *Özkan* itself (at para 358).

The procedural obligation as applied on the facts

326. We will first consider the question whether the United Kingdom authorities have complied with the investigative obligations in connection with Mr Mousa's death, where we have held above that there is jurisdiction under the Convention and under the Act.

327. We have set out the basic facts concerning the consequences of the death at paras 88/89 above. Mr Mousa died on 14 or 15 September 2003. The SIB were immediately called in to investigate. The body was taken to a British military hospital. A home office pathologist, Professor Hill, was flown out from England to conduct a post mortem, since the local hospitals were on strike and doctors were unavailable. The scene of death was forensically examined, and photographs were taken of the deceased's injuries. The autopsy itself was carried out under difficult conditions, but an Iraqi doctor was present on behalf of the family. It is not clear how long after the death the autopsy took place. Nor is there any evidence as to when interviews with other detainees and soldiers at the time of arrest and at the prison were conducted. The evidence somewhat equivocally states that, whereas all the medics involved "were interviewed", "arrangements were made to interview" the other potential witnesses. The SIB investigation was concluded by early April 2004. The report was distributed to the unit's chain of command, but has not been made public.

328. Soon after the death Brigadier Moore, the local commander, had gone to considerable lengths to apologise to the deceased's father and brother and to assure them that those responsible for any crime would be brought to justice; an official statement of

apology was published in a local newspaper; and there were further meetings between the family and a senior officer. However, the father's evidence is that he has not even seen Professor Hill's report, let alone anything further; and that he was told that he could not appoint an Iraqi lawyer in the case.

329. At the time of the main hearing before us, at the very end of July 2004, there was no further information about the outcome of the report. Its conclusions are unknown. It is not even known whether it has been possible to assign any responsibility of a direct or indirect nature: whether any culprit or culprits have been identified; whether any prosecutions are contemplated. The only clue to any of this is the opaque statement made by Captain Logan (of SIB headquarters in England, who was deployed to Iraq between 10 June and 12 October 2003) that "At this time [sc at the time of the interviews or arrangements for interview?] "there was no evidence to suggest who had been involved in any mistreatment apart from the soldier restraining the deceased at the time of his death" (at para 44 of Captain Logan's first witness statement), which suggests that at most one person guilty of mistreatment, but only one, has been identified. Although there has been evidence of a rather general nature about the difficulties of conducting investigations in Iraq at that time – about basic security problems involved in going to Iraqi homes to interview people, about lack of interpreters, cultural differences, logistic problems, lack of records, and so forth – without any further understanding of the outcome of the SIB's report, it is impossible to understand what, if any, relevance any of this has to a death which occurred not in the highways or byways of Iraq, but in a military prison under the control of British forces. Indeed, Mr Greenwood's skeleton argument (at para 101(3)) accepts that the fact that Mr Mousa "died in the custody of British forces and allegedly at the hands of British forces meant that some of the practical difficulties of carrying out an investigation into his death did not arise".

330. Although Captain Logan says that identity parades were logistically very difficult, detainees were moved to a different location, and some military witnesses had returned to the UK, she also says that these problems only delayed the process but did not prevent it taking place "satisfactorily" (at para 47 of his witness statement). There is nothing else before us to explain the dilatoriness of the investigative process: which might possibly be compared with the progress, and open public scrutiny, which we have noted seems to have been achieved with other investigations arising out of possible offences in prisons under the control of US forces. As for the SIB report itself, on the evidence before us (see para 54 above) that would not contain any decision as to the facts or any conclusions as to what has or might have happened.

331. In these circumstances we cannot accept Mr Greenwood's submission that the investigation has been adequate in terms of the procedural obligation arising out of article 2 of the Convention. Even if an investigation solely in the hands of the SIB might be said to be independent, on the grounds that the SIB are hierarchically and practically independent of the military units under investigation, as to which we have doubts in part because the report of the SIB is to the unit chain of command itself, it is difficult to say that the investigation which has occurred has been timely, open or effective.

332. As for its timeliness, Mr Greenwood submits that the complaint under this heading is premature: but we are unable to accept this submission now nearly a year after Mr Mousa's death, particularly in circumstances where this issue had been ordered to be

heard at the hearing in July as a preliminary point together with the issues on jurisdiction. It was for that hearing that the Secretary of State's evidence needed to be prepared. 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.

333. Mr Greenwood submitted, in a part of his argument which almost formed a bridge between his submissions on jurisdiction and his submissions on the article 2 investigative duty but which was formally part of the former, that the application of the Convention to an Iraqi held in British custody during the period of the occupation "would create a raft of intractable legal issues".

334. Thus he raised the following questions: Could such a prisoner be handed over to the Iraqi authorities for trial in circumstances where he could face the death penalty? What if the British authorities had not been able to conduct a post mortem or to investigate the death with the assistance of the SIB? What about other Convention rights, such as the right to respect for private and family life and the right to freedom of thought, conscience and religion?

335. We have not, however, been deterred by our consideration of these difficulties from our conclusions. They illustrate perhaps the significance of the essentially territorial aspect of jurisdiction and the importance of maintaining a firm control over the exceptions to that territorial principle. However, where a prisoner held in the custody of British forces has been tortured or killed, such difficulties, which can no doubt find their own proper resolutions, in our judgment shrink before the importance of state accountability, not only under the Hague and Geneva conventions, but under our own domestic views of human rights. Despite problems in the investigative process, the evidence is that they were overcome.

336. We hold that there has been a breach of the procedural investigative obligation under articles 2 and 3.

337. As for the first five cases, the current issue, in terms of article 2, only arises if we are wrong about the question of jurisdiction. We will therefore deal with the matter in less detail than we would otherwise have done. In our judgment, however, on the hypothesis that these claims had fallen within the scope of the Convention and the Act, the duty would not have been complied with. That is not perhaps surprising, since in all these cases, as in the case of Mr Mousa, the United Kingdom authorities were proceeding on the basis that the Convention did not apply. Thus the immediate investigations were in each case conducted, as a matter of policy, by the unit involved: only in case 4, that concerning Mr Waleed Muzban, was there any involvement of the SIB, and that was stood down, at any rate before being re-opened (at some uncertain time) upon a review of the file back in the UK. The investigations were therefore not independent. Nor were they effective, for they essentially consisted only in a comparatively superficial exercise, based on the evidence of the soldiers involved themselves, and even then on a paucity of interviews or witness

statements, an exercise which was one-sided and omitted the assistance of forensic evidence such as might have become available from ballistic or medical expertise.

338. In this connection, a letter from the Treasury Solicitor dated 27 July 2004 was made available to the court during the hearing. This gave an "update" of the SIB review which had been requested of the relevant five cases, apparently after the initiation of these proceedings (Pickering witness statement, paras 8 and 13). In the first two, concerning the deaths of Mr Hazim Al-Skeini and Mr Muhammad Salim, the SIB had recommended that an investigation be conducted: this was carried out by a colonel in personal services (army), who concluded that the use of force fell within the rules of engagement. We do not have his reports. In case 4, concerning the death of Mr Waleed Muzban, an SIB investigation had apparently been re-opened even before the general request for a review of these five cases. Witnesses have been re-interviewed (save for the suspected firer) and ballistic tests "are in progress" which include tests on the vehicle, which has been recovered. This new investigation has not been completed. In cases 3 and 5, the SIB recommended that further investigations were unnecessary. Save for case 4, therefore, the files are all closed. It does not seem to us that this letter takes matters any further. There has been no further discovery. To some extent, however, the case of Mr Muzban would seem to demonstrate that forensic investigations which were not conducted in the first place have proved to be possible.

339. In connection with these cases, Mr Greenwood's main submission was that, in extremely difficult situations, both in operational terms in the field and in terms of post event investigations, the army and the authorities had done their best. He particularly emphasised the following aspects of the evidence. There was no rule of law in Iraq; at the start of the occupation there was no police force at all, and at best the force was totally inadequate, as well as being under constant attack; although the Iraqi courts were functioning, they were subject to intimidation; there was no local civil inquest system or capability; the local communications systems were not functioning; there were no mortuaries, no post mortem system, no reliable pathologists; the security situation was the worst ever experienced by seasoned soldiers; there was daily fighting between tribal and criminal gangs; the number of troops available were small; and cultural differences exacerbated all these difficulties.

340. We would not discount these difficulties, which cumulatively must have amounted to grave impediments for anyone concerned to conduct investigations as they might have liked to have carried them out. However, irrespective of Mr Singh's submission, in reliance on the Turkish cases, that security problems provide no excuse for a failure in the article 2 investigative duty, we would conclude that, on the hypothesis stated, the investigations would still not pass muster. They were not independent; they were one-sided; and the commanders concerned were not trying to do their best according to the dictates of article 2.

341. That is not to say, however, that, in other circumstances, we would ignore the strategic difficulties of the situation. The Turkish cases are all concerned with deaths within the state party's own territory. In that context, the Court was entitled to be highly sceptical about the state's own professions of difficulties in an investigative path which it in any event may hardly have chosen to follow. It seems to us that this scepticism cannot be so easily transplanted in the extra-territorial setting. Even within a state party's own (nominal) territory, such as Cyprus and Moldova, there may come

a point when that state's responsibility can only be measured against what is possible, and not against entirely objective standards: see the discussion of Moldova's accountability in *Ilaşcu* at paras 333/335 (cited at para 197 above), where the relevant concepts seem to be on the one hand the state's best endeavours ("must endeavour, with all the legal and diplomatic means available to it") and on the other hands the realms of possibility ("to what extent a minimum effort was nevertheless possible"). It seems to us that a similar approach may well be required at a point before a state has totally lost control of its territory to secessionist or foreign forces. For similar reasons no doubt, the "effective control of an area" exception is based on a concept of "effective" control. Without effective control, as was proved in the cases of northern Cyprus and MRT, it hardly seems fair and proportionate to measure responsibility save in terms of best endeavours and the possible. For these reasons, just as we would have been reluctant, on a preliminary point and merely on paper, to be required to decide the issue between the parties as to "effective" control (see para 257 above), so we would be reluctant to decide, since it is unnecessary, the issue, which is perhaps the other side of the same coin, as to the manner in which best endeavours and sheer practicalities engage with each other in this context.

Other Remedies

342. Even in the case of the first five claimants, where we have found that there is no jurisdiction under the Convention, we should perhaps emphasise, before concluding, that there may well be remedies under other instruments or by other means. The Secretary of State and the United Kingdom government have always accepted in these proceedings that the conduct of British forces in Iraq should and do remain subject to stringent standards of control and accountability. They acknowledge that relevant provisions of domestic criminal law govern the activities of British forces overseas, for the protection of those with whom they come into contact, and they point out that the Army Prosecuting Authority has recommended that charges be brought in the case of Mr Mousa, although this is still subject to further inquiries (Pickering, para 10). They also say that, although, as a matter of established principles of international law, Iraqi courts lack jurisdiction over British forces during the period of occupation, there remains jurisdiction in England to bring actions in tort in respect of the conduct of British forces in Iraq: see *Bici v. Ministry of Defence* [2004] EWHC 786 (QB) (unreported, 7 April 2004), a successful claim in negligence and trespass arising out of a shooting in Kosovo on the part of British peace-keeping forces. Thirdly, they point to protective international regimes such as under the Hague and Geneva Conventions. For these purposes, Mr Greenwood was prepared to accept that there was a general principle of international law that a state which is responsible for a violation of a rule of international law has an obligation to make restitution.

343. Mr Singh on the other hand was anxious to emphasise the inadequacies of alternative remedies. While he accepted that there were either substantive obligations on the United Kingdom under other conventions or substantive liabilities in criminal law or the law of tort which could be enforced against wrongdoers, there was, he submitted, no other source of law which imposes the highly developed procedural obligation which arises under articles 2 and 3 of the Convention and which therefore polices and makes effective the substantive rights there protected. For instance, he submits that the express requirements in the Fourth Geneva Convention in connection with grave

breaches (article 146) will not assist where a violation of articles 2 or 3 does not amount to a "grave breach", or where no allegation has been made, or where a responsible individual cannot be identified. In general, he submits that, whereas the other conventions and customary international law are designed to maintain international standards, the Convention alone is designed, or best designed, to ensure the remedy of individual rights. However, we have not been required to bring these matters to a decision.

Conclusion

344. In sum, we conclude that the case of Mr Baha Mousa's death in the custody of British forces in Iraq comes within the scope of the Convention and of the Act as falling within the jurisdiction of the United Kingdom; and also that there has been a breach in his case of the procedural investigative obligation arising under articles 2 and 3 of the Convention; but that the other claims litigated in these preliminary issues, that is to say claims (1) to (5) arising out of shootings of Iraqis by British forces in the field fail on the ground that those shootings occurred outside the jurisdiction of the United Kingdom and thus outside the scope of the Convention and of the Act. There may be other remedies, but we are not here concerned with that.

345. We would not end this judgment without expressing our gratitude to Mr Singh and Mr Greenwood, to their juniors, and to those instructing them, respectively for the quality of their submissions, both written and oral, and for the efficient help which we have received in the presentation and hearing of this difficult and troubling case.