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CO/953/2009; CO/9719/2009; CO/12803/2009;
CO/1684/2010; CO/2631/2010, C8620/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2015

Before :

MR JUSTICE LEGGATT

- -

Between :

Al-Saadoon & Others	**Claimant**
- and -	
Secretary of State for Defence	**Defendant**

- -

Michael Fordham QC, Danny Friedman QC, Dan Squires and Jason Pobjoy (instructed by **Public Interest Lawyers**) for the **Claimants**
James Eadie QC, Karen Steyn QC and Kate Grange (instructed by **Treasury Solicitors**) for the **Defendants**
Phillippa Kaufmann QC and Alison Pickup (instructed by **Leigh Day**) for the **Leigh Day Claimants**

Hearing dates: 20-23 October 2014

- -

Judgment

Mr Justice Leggatt:

I. INTRODUCTION

1. One of the legacies of the Iraq war is litigation. Many claims have been brought in the courts of this country arising out of the British military involvement in Iraq between 2003 and 2009. Although it is now some six years since British forces completed their withdrawal from Iraq, the litigation is not abating. Most of the claims involve allegations of ill-treatment, unlawful detention and, in some cases, unlawful killing of Iraqi civilians by British soldiers. These claims fall into two groups.

2. The first group consists of claims for judicial review in which the claimants are seeking orders from the court to require the Secretary of State for Defence to investigate alleged human rights violations. I will refer to these claims as the "public law claims". At the beginning of 2014 there were 190 public law claims, but since then another 875 claims have been added. I am told by Public Interest Lawyers, who represent all the claimants in the main proceedings brought by Al-Saadoon and others, that they expect at least 165 more claims to be added to the register of claims before the end of March 2015, bringing the total number of claims to at least 1,230. Separate judicial review proceedings have been brought by two individuals, Yunus Rahmatullah and Amanatullah Ali, who are represented by Leigh Day.

3. The second group of claims consists of claims for compensation brought against the Ministry of Defence. To date, more than 1,000 such claims have been issued: some

294 of these claims have been settled but the rest are still pending. I will refer to these claims as the "private law claims".

4. This judgment follows a trial of eleven preliminary issues raised by the public law claims. The directions for this trial were agreed between the parties to the Al-Saadoon proceedings and ordered by the court with the aim of clarifying the scope of the duty of the United Kingdom to investigate allegations of wrongdoing by British forces in Iraq. The issues have been argued by reference to the assumed facts of certain cases which the parties have selected as test cases. Because some of the issues are also relevant to the private law claims and to the claims of Mr Rahmatullah and Mr Ali, the claimants represented by Leigh Day also took part in the hearing.

5. The preliminary issues have required consideration of a large body of law. The bundles of authorities prepared for the hearing contained over 300 cases and other legal materials, many of which were cited in the written arguments. I am grateful to all the parties for their detailed written submissions. Above all, the oral argument was conducted with conspicuous skill and helped to distil the key points in issue.

The issues in brief

6. The source of the duty on the state to investigate allegations of wrongdoing on which the public law claimants rely is the European Convention on Human Rights, incorporated into English law by the Human Rights Act 1998. Whether, and if so to what extent, the Convention applies to the activities of British armed forces in Iraq has itself been the subject of extensive litigation. It is now clearly established, however, and is accepted by the Secretary of State, that anyone who was taken into the custody of British forces in Iraq had certain rights under the Convention which the United Kingdom was bound to respect: in particular, the right to life under article 2, the right under article 3 not to be tortured or subjected to inhuman or degrading treatment and the right to liberty under article 5. It is also clearly established that where a person who is within the jurisdiction of a Convention state is killed by agents of the state or dies in state custody or makes a credible allegation of torture or other serious ill treatment by state agents, the state has a duty to carry out an investigation. That investigation must be independent and it must be effective.

7. There are, however, two major areas of controversy about the scope of the duty to investigate which are the focus of the present preliminary issues. The first is whether, and if so when, the Convention applied to the use of force against Iraqi civilians who were not in the custody of British forces. In particular, the Secretary of State does not accept that (save during the period when the UK was an occupying power) individuals who were killed during security operations carried out by British forces in Iraq were "within [the UK's] jurisdiction" for the purpose of article 1 of the Convention such that the UK was bound to secure their right to life under article 2. If this is correct, it follows that the UK has no duty under the Convention to investigate the deaths of such individuals. The claimants dispute this and argue that the UK's jurisdiction under article 1 is of wider scope. The first preliminary issue is aimed at resolving this dispute.

8. The second major area of controversy is the extent to which, where individuals were within the jurisdiction of the UK, there is a duty to investigate alleged violations of their rights. As mentioned, it is clear that such a duty arises in cases of suspected

unlawful killing or serious ill-treatment. Two main points, however, are in dispute. One is whether, and if so when, the duty to investigate allegations of a violation of article 3 applies in cases where the nature of the allegation is not that the claimant was tortured or mistreated by British forces but that he was handed over to United States or Iraqi authorities in circumstances where there was allegedly a real risk that they would subject the claimant to torture or mistreatment. The claimants contend that the investigative duty of the UK extends to such "handover" cases but the Secretary of State contests this. Issues (2) to (4) are aimed at resolving these questions. The second main disputed point is whether, and if so when, there is a duty to investigate allegations that the claimant was unlawfully detained in violation of article 5. These questions are the subject of issues (5) to (7A).

9. The remaining three preliminary issues raise some further questions about the scope of the investigative duty under articles 2 and 3 of the Convention, including questions about the impact (if any) on that duty of the UK's international obligations under the United Nations Convention against Torture ("UNCAT").

10. Before addressing the preliminary issues, I will first outline the relevant background.

II. THE BACKGROUND

Phases of British military involvement in Iraq

11. The British military involvement in Iraq can be divided into three periods, which I will refer to as (i) the "invasion" period, (ii) the "occupation" period and (iii) the "post-occupation" period. The answers to some of the preliminary issues may differ as between these different periods.

The invasion period

12. On 20 March 2003 a coalition of armed forces led by the United States and including a large force from the UK invaded Iraq. By 5 April 2003 British troops had captured Basra and by 9 April 2003 US troops had gained control of Baghdad. Major combat operations in Iraq were formally declared complete on 1 May 2003.

The occupation period

13. Following the completion of major combat operations, the United States and the United Kingdom became occupying powers in Iraq within the meaning of article 42 of the Hague Regulations. With their coalition partners they created the Coalition Provisional Authority ("CPA") in order to exercise powers of government in Iraq on a temporary basis until a new Iraqi government could be established.

The post-occupation period

14. On 28 June 2004 sovereign authority was transferred from the CPA to a new Iraqi government. British forces remained in Iraq as part of a Multi National Force ("MNF") established pursuant to requests from the Iraqi government and resolutions of the UN Security Council to assist the Iraqi government in maintaining law and order. The role of the MNF was described as follows in a letter dated 5 June 2004 written to the President of the UN Security Council by the US Secretary of State:

> "Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security. …"

15. Successive resolutions of the UN Security Council authorised the MNF to "take all necessary measures to contribute to the maintenance of security and stability in Iraq" in accordance with this arrangement. The UN mandate for the MNF expired on 31 December 2008 though it was not until sometime in 2009 that British forces withdrew from Iraq.

The duty of the state to investigate deaths and ill-treatment

Article 2

16. Article 2 of the Convention states that "everyone's right to life shall be protected by law" and that (with certain specified exceptions) "no one shall be deprived of his life intentionally". The case law of the European Court of Human Rights has interpreted these provisions as imposing on contracting states two substantive obligations: an obligation not (through its agents) to take life without justification; and also, in certain circumstances, a positive obligation to take steps to protect the lives of those within the state's jurisdiction.

17. The European Court has also interpreted article 2 as imposing on contracting states an obligation to hold an effective investigation into any death where it appears that one or other of the state's substantive obligations has been, or may have been, violated and that agents of the state are, or may be, in some way implicated: see e.g. R (Middleton) v West Somerset Coroner [2004] 2 AC 182, para 3 (and the cases there cited). This "procedural" obligation has been inferred from the state's substantive duty to protect the right to life under article 2, read in conjunction with the state's general duty under article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention": see e.g. McCann v United Kingdom (1996) 21 EHRR 97, para 161; Jordan v United Kingdom (2003) 37 EHRR 52, para 105; Al-Skeini v United Kingdom (2011) 53 EHRR 18, para 163. The duty to investigate applies even in difficult security conditions, including in the context of armed conflict: Al-Skeini v United Kingdom at para 164.

18. The case law establishes that, in order to comply with article 2, the investigation must be effective, albeit that this is "not an obligation of result, but of means", and must have the following characteristics: (1) it must be undertaken by a person or body independent of the state agents who may bear responsibility for the death; (2) it must be reasonably prompt; (3) it must involve "a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory"; and (4) the victim's next of kin must be involved to the extent necessary to safeguard their legitimate interests. See e.g. Jordan v United Kingdom (2003) 37 EHRR 52, paras 106-109; R (Amin) v Secretary of State for the Home Department

[2004] 1 AC 653, para 20; Al-Skeini v United Kingdom (2011) 53 EHRR 18, paras 166-167; R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, para 64.

Article 3

19. Article 3 of the Convention states:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

As with article 2, this prohibition has been interpreted as having both a negative and a positive aspect. It imposes an obligation on the state not to subject anyone within its jurisdiction to torture or other treatment of the kind described; and also a positive obligation to take steps to protect an individual who is exposed to a real and imminent risk of serious harm of which the state authorities are aware. As I consider further in Part III of this judgment, the European Court has also found there to be "inherent" in article 3 an obligation on a contracting state not to send an individual to another state where there are substantial grounds for believing that the individual would face a real risk of being subjected to torture or other prohibited treatment. Three of the preliminary issues are concerned with this obligation, which I will refer to as the "non-refoulement obligation" after the international law principle of "non-refoulement" (or not surrendering a victim of persecution to his persecutor) with which it is associated.

20. As in the case of article 2, it has also been held that there is an obligation to conduct an investigation into a "credible allegation" or "arguable claim" that a person has been subjected to torture or to inhuman or degrading treatment in violation of article 3. Similar requirements of independence and effectiveness apply to such an investigation as apply to an investigation under article 2. I will consider the nature and scope of this investigative obligation in more detail in Part III of this judgment.

Judicial review claims

21. As I have indicated, the extent to which the Convention applied to the actions of UK armed forces in Iraq has been and remains controversial. The applicability of articles 2 and 3 to Iraqi civilians held in custody on British military bases was, however, first recognised by a Divisional Court on 14 December 2004 in R (Al-Skeini) v Secretary of State for Defence [2004] EWHC 2911 (Admin); [2007] QB 140.

22. Two public inquiries were subsequently established by the Secretary of State to investigate particular incidents. On 14 May 2008 the Secretary of State appointed a retired judge, Sir William Gage, to conduct an inquiry into the death of Baha Mousa, who was killed while in the custody of British forces on 14 September 2003, and the treatment of those detained with him. The three volume inquiry report including 73 recommendations was published on 8 September 2011.

23. A further investigation pursuant to articles 2 and 3 was sought by the relatives of Hamid Al-Sweady and others who were allegedly taken prisoner by British forces after a fire fight on 14 May 2004 and subsequently killed or mistreated. The need for such an investigation was eventually conceded by the Secretary of State for Defence in the course of proceedings in the Divisional Court in R (Al-Sweady) v Secretary of

State for Defence [2009] EWHC 2387 (Admin). On 29 November 2009 an inquiry was established to investigate these allegations. The inquiry was conducted by Sir Thayne Forbes. His report was published recently on 17 December 2014 and rejected most of the allegations.

24. On 10 February 2010 further proceedings for judicial review were commenced seeking orders or declarations from the court that the Secretary of State is obliged to investigate many more cases under articles 2 and 3. The Secretary of State responded to this influx of claims by establishing the Iraq Historic Allegations Team (IHAT) on 1 March 2010.

IHAT investigations

25. The original mandate of IHAT was to investigate those cases involving the death or alleged ill-treatment of Iraqi civilians in British custody which were the subject of judicial review claims. This was later widened to include some cases involving the allegedly unlawful killing by British soldiers of Iraqi civilians who were not in custody, without prejudice to the question of whether these cases were covered by the Convention.

26. According to information provided by the Secretary of State, IHAT is currently investigating 53 allegations of unlawful killing and 110 allegations of mistreatment. In total these allegations relate to 263 individuals.

The Ali Zaki Mousa proceedings

27. There have been two sets of proceedings in which claimants have argued that IHAT was not sufficiently independent to discharge the UK's duty of investigation under articles 2 and 3 and that full public inquiries were needed.

28. In R (Ali Zaki Mousa) v Secretary of State for Defence (No 1) [2011] EWCA Civ 1334 the Court of Appeal held that IHAT was not sufficiently independent because of the involvement of members of the Royal Military Police in the investigation of matters in which the Royal Military Police had been involved in Iraq. The Secretary of State responded to this decision by removing members of the Royal Military Police from IHAT and replacing them with other investigators.

29. In R (Ali Zaki Mousa) v Secretary of State for Defence (No 2) [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin), in judgments given on 24 May 2013 and 2 October 2013, a Divisional Court (consisting of the then President of the Queen's Bench Division and Silber J) found that IHAT as re-constituted was now sufficiently independent but that it was not effectively discharging the UK's investigative obligations under articles 2 and 3. The Court held that it was not appropriate to order a full public inquiry, but that there should be more streamlined inquiries undertaken using an inquisitorial approach on the model of coroner's inquests to investigate cases where a duty of investigation arises.

30. To date, only two inquiries have been established of the kind which the Divisional Court directed should take place. The reasons for this lack of progress in apparent dereliction of the UK's duties under articles 2 and 3 of the Convention is a matter which I will be exploring at a hearing in April.

31. In its judgment given on 24 May 2013, the Divisional Court recognised that there were "unresolved issues" of law relating to the applicability of the Convention. Following its second judgment, in an order made on 8 October 2013, the Divisional Court gave directions for the identification of "appropriate preliminary issues in test cases to resolve those issues". The issues identified through that process are those which I will now discuss.

III. ARTICLE 1 - JURISDICTION

32. The first preliminary issue is "whether article 1 of the Convention applies" in 19 test cases.[1] In 10 of these cases, involving individuals whose rights were allegedly violated while they were in British custody, the Secretary of State has now accepted that on the assumed facts the claimants were at the relevant time within the jurisdiction of the UK for the purpose of article 1. In the other nine test cases, the Secretary of State disputes this.

33. In addition, the Secretary of State has applied to have the claims of Yunus Rahmatullah and Amanatullah Ali dismissed on the ground that they are outside the scope of article 1, and a direction was given that this issue should be considered at the same time. The Secretary of State subsequently made the same concession in relation to these claims that the claimants were within the UK's article 1 jurisdiction during any period when they were in the custody of UK armed forces.

Article 1

34. Article 1 of the Convention provides:

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

Throughout the time that British armed forces were present in Iraq, the leading decision of the European Court of Human Rights on the territorial scope of article 1 was Banković v Belgium [2001] 11 BHRC 435. It seemed clear from that decision that the Convention did not apply to the activities of British forces in Iraq, other than on British military bases. However, on 7 July 2011, over two years after British troops had withdrawn from Iraq, the European Court issued its judgment in Al-Skeini v United Kingdom (2011) 53 EHRR 18 in which the Court restated the applicable principles and adopted a much more expansive interpretation of article 1. This wider interpretation has since been endorsed by the UK Supreme Court.

35. To provide the context for the points still in dispute about the application of article 1, I first need to summarise the approach taken in Banković and identify the points on which it has since been effectively overruled in Al-Skeini and other later cases.

Banković v Belgium

36. The Banković case arose out of a missile strike by NATO aircraft on a building in Belgrade in the territory of the then Federal Republic of Yugoslavia, which was not a party to the Convention. Claims were brought by relatives of people killed in the

[1] These include one private law claim, being that of Kamil Najim Abdullah Alseran.

attack against 17 states, all of which were members of NATO and parties to the Convention, alleging violations of their right to life under article 2. The European Court sitting as a Grand Chamber rejected the application as inadmissible on the ground that the individuals who were killed were not within the jurisdiction of the respondent states.

37. The following points may be noted about the Court's judgment in the Banković case:

i) The Court held that the concept of jurisdiction in article 1 is essentially territorial, and that it is only in exceptional cases that the Convention has any extraterritorial application (paras 59-63).

ii) Leaving aside certain special cases such as the activities of diplomatic or consular agents and ships flying a state's flag (para 73), the Court identified two bases on which a state may exercise extraterritorial jurisdiction: (a) where as a consequence of military occupation (whether lawful or not) the state exercises effective control over an area outside its national territory; and (b) where through the consent, invitation or acquiescence of the government of a foreign territory the state exercises all or some of the public powers normally to be exercised by that government (paras 60, 69-71).

iii) The Court rejected the notion that jurisdiction can be based simply on effective control over an individual (para 75). The reasons given were: (a) that this concept was limitless and tantamount to saying that jurisdiction would arise whenever an act imputable to a contracting state had an adverse effect on anyone anywhere in the world; (b) that the obligation in article 1 to secure "the rights and freedoms defined in Section 1 of this Convention" cannot be "divided and tailored in accordance with the particular circumstances of the extraterritorial act in question"; and (c) that such a notion of jurisdiction equated the question whether an individual falls within the jurisdiction of a contracting state with the question whether that person is a victim of a violation of rights guaranteed by the Convention, when these are separate and distinct conditions for the admissibility of an application. In holding that Convention rights cannot be "divided and tailored", the Court appeared to endorse the view that Convention rights constitute a single, indivisible package such that a contracting state is either obliged to secure all such rights to an individual (if the individual is within the state's jurisdiction) or none.

iv) The Court also rejected an argument that the concept of jurisdiction in article 1 should be interpreted as having wider application in order to avoid a "vacuum" in the protection of human rights provided by the Convention. In doing so the Court appeared to limit the extraterritorial application of the Convention to the "legal space (espace juridique)" of the contracting states, observing that the Convention is an essentially regional treaty and was not designed to be applied throughout the world (para 80).

v) The Court also appeared to limit the scope for developing a more expansive interpretation of jurisdiction in the future by implying that article 1, unlike the provisions of the Convention defining substantive rights, was not to be interpreted as a "living instrument" in accordance with changing conditions (paras 64-65).

Cases after Banković

38. Several of the decisions of the European Court in the period following its judgment in Banković did not appear consistent with the judgment in that case. Notably, in Issa v Turkey (2004) 41 EHRR 567, at para 71, a section of the Court expressed the view that a state may have jurisdiction over persons who are in the territory of another state "through its agents operating – whether lawfully or unlawfully – in the latter state". This was explained on the basis that:

> "art. 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."

This statement appears to treat the Convention as having universal, and not merely regional, application. Thus, had it been established (which on the facts it was not) that Turkish soldiers had taken the applicants' relatives into custody in northern Iraq, taken them to a nearby cave and killed them, the deceased would have been "under the authority and/or effective control, and therefore within the jurisdiction," of Turkey as a result of those extra-territorial acts.

39. Other decisions followed which were also difficult, if not impossible, to reconcile with the approach in Banković. These included:

i) Öcalan v Turkey (2005) 41 EHRR 45, where the applicant was treated as within the jurisdiction of Turkey when Turkish officials took custody of him from Kenyan officials on Kenyan territory (para 91);

ii) Al-Saadoon v United Kingdom (2009) 49 EHRR SE 11, where detainees in British-controlled military prisons in Iraq were held to fall within the jurisdiction of the UK by reason of "the total and exclusive *de facto*, and subsequently *de jure*, control exercised by the United Kingdom authorities over the premises in question" (para 88); and

iii) Medvedyev v France (2010) 51 EHRR 39, where a ship and its crew intercepted by the French navy in international waters were held to be within the jurisdiction of France on the basis that France had exercised "full and exclusive control" over them, at least *de facto*, from the time of the interception (para 67).

40. The question whether the decision in the Banković case remained authoritative or whether the Issa line of authority supported a wider interpretation of article 1 arose in the case of Al-Skeini.

The Al-Skeini case

41. The Al-Skeini case involved claims brought by relatives of Iraqi civilians who were allegedly killed by UK armed forces in Basra during the occupation period. Several of the deceased civilians were allegedly shot by British soldiers on patrol; one, Baha Mousa, was detained and taken to a British military base in Basra, where he was brutally beaten by British soldiers and died of his injuries. The claimants argued that in each case the UK had an obligation to carry out an investigation of whether there

had been a violation of article 2 of the Convention. The Secretary of State contested the claims on the basis that neither the Convention nor the Human Rights Act applied to acts that occurred in Iraq.

42. The English courts held that the claims fell outside the territorial scope of the Convention, with one exception. The exception was the case of Baha Mousa who was found by the Divisional Court to have been within the jurisdiction of the UK for the purpose of article 1 when he was killed at a British military base. On appeal the Secretary of State did not seek to challenge that finding. The Divisional Court held that none of the others who died was within the jurisdiction of the UK under the Convention, and this decision was affirmed on appeal by the Court of Appeal and by the House of Lords.

43. The House of Lords rejected the argument that the Human Rights Act applies only to acts done on the territory of the UK, holding that the territorial scope of the Act coincides with the territorial scope of the Convention. To the extent therefore that the Convention applies to acts done abroad, so does the Human Rights Act. However, the House unanimously held that the principles established by the European Court in Banković remained good law despite the apparently contradictory approach taken in Issa. Applying those principles, they concluded that the UK did not have jurisdiction over the claimants' relatives who were allegedly shot by British soldiers outside British military bases in circumstances where (i) Iraq was not within the territorial region covered by the Convention and (ii) the UK was not in effective control of Basra and the surrounding area at the relevant time: see R (Al-Skeini) v Secretary of State for Defence [2008] AC 153.

44. Six applicants (including one who had not been a party to the domestic proceedings) claimed just satisfaction from the European Court of Human Rights. The Court sitting as a Grand Chamber concluded that all the deaths had occurred within the jurisdiction of the UK and that, except in the case of Baha Mousa where a public inquiry had been established, there had been a breach of the procedural obligation under article 2 to carry out an effective investigation into the deaths of the applicants' relatives: see Al-Skeini v United Kingdom (2011) 53 EHRR 18. The Court took the opportunity in its judgment (at paras 130-142) to set out a comprehensive restatement of the general principles relevant to jurisdiction under article 1.

45. The Court began by repeating its earlier statements in Banković that a state's jurisdictional competence under article 1 is "primarily territorial" and that extraterritorial acts will constitute an exercise of jurisdiction under article 1 "only in exceptional cases" (para 131). The Court went on, however, to set out principles on which, exceptionally, a state can exercise such jurisdiction outside its own territory.

46. The Court followed Banković in holding, as one such principle, that article 1 applies where, "as a consequence of lawful or unlawful military action", a contracting state exercises "effective control of an area" outside its national territory (para 138). Where the requisite degree of control exists:

> "[t]he controlling state has the responsibility under art.1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those

> additional Protocols which it has ratified. It will be liable for any violations of those rights."

47. In addition, however, the Court identified circumstances in which article 1 may extend to acts which involve the exercise of authority and control over individuals outside the state's own territory even though the state does not have effective control over the relevant area (para 133). Three principles were said to be recognised in the Court's case law.

48. The first principle was said to be that acts of diplomatic and consular agents present on foreign territory may amount to an exercise of jurisdiction when these agents exert authority and control over others (para 134). The second was the principle recognised in Banković that extraterritorial jurisdiction can arise when, through the "consent, invitation or acquiescence" of the government of a foreign territory, a contracting state "exercises all or some of the public powers normally exercised by that government" (para 135). Third, the Court's case law was said to demonstrate that "in certain circumstances, the use of force by a state's agents operating outside its territory may bring the individual thereby brought under the control of the state's authorities into the state's art.1 jurisdiction". Four cases, all decided after Banković, were cited to show that this principle had been applied "where an individual is taken into the custody of state agents abroad" (para 136). These were the cases that I have mentioned above of: Issa v Turkey (2004) 41 EHRR 567; Öcalan v Turkey (2005) 41 EHRR 45; Al-Saadoon v United Kingdom (2009) 49 EHRR SE 11; and Medvedyev v France (2010) 51 EHRR 39. The Court rejected the notion that jurisdiction in these cases "arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held", and stated (para 136):

> "What is decisive in such cases is the exercise of physical power and control over the person in question."

49. The Court went on to say (at para 137):

> "It is clear that, whenever the state through its agents exercises control or authority over an individual, and thus jurisdiction, the state is under an obligation under art.1 to secure to that individual the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'."

50. The European Court also reinterpreted what it had said in Banković about the Convention "legal space (espace juridique)". The Banković decision had been taken by the House of Lords to mean that the Convention is of regional and not global scope and does not apply to acts done on the territory of a state which is not a member of the Council of Europe even when it would apply if the act had been done on the territory of a contracting state. In Al-Skeini, however, the Court treated Banković as deciding only that the importance of avoiding a "vacuum" in the Convention legal space was limited to cases where territory of one contracting state is occupied by the armed forces of another, and not as implying that jurisdiction under article 1 is restricted generally to the territory of contracting states (para 142).

51. In discussing the facts of the particular cases before it, the Court found that at the relevant time, which was during the occupation period, the UK (together with the United States) had assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government and, in particular, the UK had assumed authority and responsibility for the maintenance of security in South-East Iraq. The Court said (at para 149):

> "In these exceptional circumstances … the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of art. 1 of the Convention."

On this basis the Court concluded that in all six cases the death of the applicant's relative occurred within the jurisdiction of the UK for the purposes of article 1.

Smith v Ministry of Defence

52. In Smith v Ministry of Defence [2014] AC 52 (the "Susan Smith case"), the UK Supreme Court has recognised the judgment of the European Court in Al-Skeini as an authoritative exposition of the principles relevant to the issue of jurisdiction under article 1 of the Convention which should now be applied in British domestic courts.

53. In the Susan Smith case the claimants were relatives of British soldiers who were killed in Iraq. They claimed that the soldiers' deaths had been caused by negligence of the Ministry of Defence in failing to provide suitable equipment in breach of an obligation to safeguard their right to life guaranteed by article 2 of the Convention. The Ministry of Defence successfully applied to have the claims struck out on the ground that the Convention did not apply because the soldiers' deaths occurred outside the territorial jurisdiction of the United Kingdom. By a majority of 4-3, the Supreme Court allowed the claimants' appeal on this issue. In doing so, the Supreme Court expressly departed from the view taken by the majority of the appellate committee of the House of Lords in R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1 ("the Catherine Smith case") that the state's armed forces abroad are not within its jurisdiction for the purpose of article 1.

54. Lord Hope, with whom the other members of the Supreme Court agreed on the question of the jurisdictional scope of the Convention, outlined the history of the Al-Skeini case and analysed the judgment of the Grand Chamber in that case, which he described as providing a "comprehensive statement of general principles" for the guidance of national courts (see paras 27, 46).

55. In particular, Lord Hope extracted as a principle of general application that "extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual" (para 49). He reasoned (at para 52) that the exercise of such authority and control by the armed forces of the state over local inhabitants, which was held to found jurisdiction in Al-Skeini, presupposes that the state has such authority and control over its own armed forces who are its agents for this purpose and therefore brings them also within the state's article 1 jurisdiction.

The decision that the UK owed duties under article 2 of the Convention to its own armed forces serving outside its territory was therefore expressly based on the principle of control over individuals articulated in Al-Skeini by the European Court.

The status of Banković after Al-Skeini

56. As I have previously observed in Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB) at para 136, a disappointing feature of the judgment of the European Court in the Al-Skeini case is its lack of transparency in dealing with the Court's previous decision in Banković. Nowhere in the judgment did the Court expressly acknowledge that it was departing from its previous approach or explain its reasons for doing so. Nevertheless, as I also noted and as the Supreme Court confirmed in the Susan Smith case (at para 137), it is clear that the Court has indeed departed from its earlier approach in a number of fundamental respects.

57. The critical point of departure is the European Court's rejection in Al-Skeini of the notion that Convention rights constitute a single, indivisible package and cannot be "divided and tailored". As Lord Hope noted in the Susan Smith case (at para 38):

> "The effect of para 137 of the Al-Skeini judgment is that this proposition, which informed much of the thinking of the House of Lords in Al-Skeini (HL) and of the majority in Catherine Smith, that the rights in section 1 of the Convention are indivisible, is no longer to be regarded as good law. The extraterritorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents' authority and control, and it does not need to be more than that."

58. Holding that Convention rights can after all be "divided and tailored" opened the door to accepting the notion, which had been rejected in Banković, that extraterritorial jurisdiction can be based simply on the state's control over an individual. As Lord Hope said (at para 49 of the Susan Smith case):

> "The concept of dividing and tailoring goes hand in hand with the principle that extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached."

59. Another important respect in which the European Court departed from its previous decision in Banković was in reinterpreting the concept of the Convention "legal space". Lord Hope observed that, following the decision in Al-Skeini, Banković "can no longer be regarded as authoritative" on this point and that it is Issa that should be treated as "firmly in the mainstream of the Strasbourg court's jurisprudence on this topic" (para 47).

60. Further, although the judgment in Al-Skeini repeats earlier statements that jurisdiction under article 1 is "essentially territorial" and that extraterritorial jurisdiction is

"exceptional", it is apparent that these statements have now to be understood in a different and more attenuated sense. As explained by Lord Hope in the Susan Smith case (at para 30), the word "exceptional" is included "not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extraterritorially," but only "to make it clear that, for this purpose, the normal presumption that applies throughout the state's territory does not apply."

61. Finally, in endorsing an approach which goes well beyond what the Court had found in Banković to be the ordinary meaning and original intention of article 1, the European Court has effectively treated article 1 as a "living instrument". Thus, Lord Hope observed in the Susan Smith case (at para 30) that the words "to date" in para 131 of the Grand Chamber's judgment indicate that "the list of circumstances which may require and justify a finding that the state was exercising jurisdiction extraterritorially is not closed".

Subsequent decisions of the European Court

62. If there were any remaining doubt that the judgment of the European Court in Al-Skeini was intended to be an authoritative re-statement of the principles which determine when a state's jurisdiction under article 1 applies to activities outside its own territory, that doubt has been dispelled by two very recent further decisions of the European Court again sitting as a Grand Chamber.

63. In Hassan v United Kingdom [2014] ECHR 9936, in which judgment was given on 16 September 2014, the Court held that an individual captured by British forces in Iraq was, from the time of his capture until his later release from detention, under the authority and control of UK forces and therefore fell within the jurisdiction of the UK (paras 76-80). It is notable that the Court began its assessment of jurisdiction (at para 74 of the judgment) by quoting *verbatim* the whole of paras 130-142 of its judgment in Al-Skeini, which were said to summarise the applicable principles on jurisdiction within the meaning of article 1 exercised outside the territory of the contracting state.

64. The Grand Chamber adopted the same approach in Jaloud v The Netherlands, Application no 47708/08, in which judgment was given on 20 November 2014. This case concerned the shooting of an Iraqi civilian by Dutch soldiers at a vehicle checkpoint in South-East Iraq on 21 April 2004. After quoting the whole of paras 130-139 of its judgment in Al-Skeini, the Court went on to apply those principles and concluded that the Netherlands was asserting authority and control over persons passing through the checkpoint such that the death of Mr Jaloud occurred within its jurisdiction.

The application of the Al-Skeini principles

65. It is common ground between the parties that the principles which the court must apply in deciding which of the test cases fall within article 1 of the Convention are the principles articulated by the European Court in the Al-Skeini case. There is also some measure of agreement about the application of those principles. However, there are some significant points of disagreement. I will consider each of the relevant principles in turn.

Effective control over an area

66. As I have mentioned, the European Court confirmed in Al-Skeini (at para 138) that a state which exercises "effective control over an area" outside its national territory has the responsibility under article 1 to secure, within that area, the entire range of substantive rights set out in the Convention and those additional Protocols which the state has ratified. The Court also emphasised that jurisdiction in such a case "derives from the fact of such control" irrespective of whether it results from lawful or unlawful action (para 139).

67. Although the obligation to secure the entire range of Convention rights is the consequence of finding jurisdiction based on effective control over an area, given the nature of the test of control, I think it clear that this consequence also determines the degree of control required to establish jurisdiction. Once it is recognised that jurisdiction does not depend on whether the state's presence and activities in the relevant territory are lawful or unlawful, but solely on whether the state is as a matter of fact in a position to secure to people within the territory the rights guaranteed by the Convention, it follows that the test of effective control over the area will not be satisfied unless the state has the practical ability to secure the full package of Convention rights.

68. The only period for which it could seriously be argued that the UK had effective control over an area of Iraq is the occupation period. During that period the UK was an occupying power, with responsibility for Basra and the surrounding area in South-East Iraq. The contention that the UK had effective control over that area was, however, considered by the Court of Appeal in the Al-Skeini case and was rejected in forthright terms: see R (Al-Skeini) v Secretary of State for Defence [2007] QB 140. Brooke LJ, with whom Richards LJ agreed, said (at para 124):

> "In my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basra City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the Banković judgment, to secure to everyone in Basra City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is."

To similar effect, Sedley LJ said (at para 194):

> "On the one hand, it sits ill in the mouth of a state which has helped to displace and dismantle by force another nation's civil authority to plead that, as an occupying power, it has so little control that it cannot be responsible for securing the population's basic rights. On the other, the fact is that it cannot: the invasion brought in its wake a vacuum of civil authority which British forces were and still are unable to fill. On the evidence before the Court they were, at least between mid-2003 and mid-2004, holding a fragile line against anarchy."

69. On appeal the House of Lords endorsed these findings: see [2008] AC 153, para 83, per Lord Rodger (with whose judgment three of the other four law lords agreed).

70. The Grand Chamber referred to these findings in Al-Skeini v United Kingdom (2011) 53 EHRR 18, at para 80, and did not suggest that there was any reason to disagree with them. Further, in Hassan v United Kingdom [2014] ECHR 9936, at para 75, the Court noted that, whilst it had been unnecessary in the Al-Skeini case for the Court to determine whether the UK had effective control over the area in question:

> "the statement of facts in Al-Skeini included material which tended to demonstrate that the United Kingdom was far from being in effective control of the south-eastern area which it occupied, and this was also the finding of the Court of Appeal ..."

71. Because the question whether there is effective control over an area is one of fact, the findings of the Court of Appeal in the Al-Skeini case are not binding in this litigation. However, the claimants have not sought to adduce any evidence on this question and Mr Fordham QC did not pursue an argument that the UK had sufficient control over any part of Iraq at any relevant time to give rise to jurisdiction on this basis. That seems to me to be realistic. Thus, the claimants rest their case entirely on the principle of state agent authority and control over individuals. They rely in that regard both on the exercise of public powers by the UK and on the exercise of physical power and control.

Exercise of public powers

72. As discussed earlier, in the Al-Skeini case the European Court found that the United Kingdom, in assuming during the occupation period responsibility for the maintenance of security in South-East Iraq, exercised some of the public powers normally to be exercised by a sovereign government, and in these circumstances "through its soldiers engaged in security operations exercised authority and control over individuals killed in the course of such security operations." Those individuals thereby came within the jurisdiction of the UK for the purposes of article 1 of the Convention.

73. There is a disparity between this finding and the principle which the Court had identified earlier in its judgment (at para 135) that extraterritorial jurisdiction can arise when, through the "consent, invitation or acquiescence" of the government of the territory, a state exercises public powers normally exercised by that government. The UK was not exercising powers through the consent, invitation or acquiescence of the government of Iraq since at the relevant time there was no Iraqi government in existence.[2] Rather, the UK was assuming responsibility for seeking to maintain security in its role as an occupying power.

74. The inference that I draw is that the test of control over individuals, like the test of control over an area, is a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy. In order to determine in Al-Skeini whether the UK was exercising control over the individuals who were killed, the European

[2] See Smith v Ministry of Defence [2014] AC 52 at para 40.

Court evidently did not consider it relevant to inquire into whether the occupation of Iraq was lawful or not as a matter of international law. This makes sense. It would be perverse if a state was bound to secure an individual's right to life when its soldiers are conducting security operations or exercising other public powers lawfully on foreign territory; and yet if the state could show that it was acting unlawfully, the Convention would not apply.

75. The correctness of this interpretation is confirmed by the recent judgment of the Grand Chamber in Jaloud v The Netherlands (Application no 47708/08) given on 20 November 2014. As mentioned earlier, this case concerned the shooting of an Iraqi civilian by Dutch soldiers at a vehicle checkpoint on 21 April 2004. As in Al-Skeini, therefore, the incident occurred during the occupation period. The Netherlands Government argued that the death did not occur within its jurisdiction as the Netherlands was not an occupying power in Iraq and had not assumed any of the public powers normally exercised by a sovereign government. The Court rejected this argument. It held that the status of "occupying power" under international humanitarian law was not in itself determinative (para 142). The Court found that on the facts, although the Netherlands troops were stationed in an area of south-eastern Iraq where the forces were under the command of an officer from the UK, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating states, and retained full command over its contingent there (para 149). The checkpoint where Mr Jaloud was shot was manned by Dutch soldiers under the command of a Dutch officer and was set up in the execution of the mission of the MNF. In these circumstances the Court was satisfied that the Netherlands was asserting authority and control over persons passing through the checkpoint such that the death of Mr Jaloud occurred within its jurisdiction. What mattered, therefore, was the practical position on the ground in terms of the powers which the Netherlands was actually purporting to exercise and not the legality or legal basis of its operations.

The occupation period

76. In the light of the decision of the European Court in Al-Skeini, the Secretary of State has accepted that during the occupation period the UK was exercising public powers which would normally be exercised by the government of Iraq. He disputes, however, that this was the case during the other two periods of British military involvement in Iraq.

The invasion period

77. On behalf of the Secretary of State, Mr Eadie QC submitted that during the invasion period British armed forces were plainly not exercising public powers which would normally be exercised by the government of Iraq, as they were fighting a war against Iraqi forces.

78. Counsel for the claimants did not suggest that British forces were exercising public powers when engaged in major combat operations. However, they relied on the fact that, although major combat operations were not formally declared complete until 1 May 2003, the actual war fighting had ceased some time previously. British forces had been in control of Basra for several weeks and were effectively acting as a police force seeking to maintain order. The claimants argued that whether the UK was

exercising authority and control over an individual by virtue of exercising public powers which would normally be exercised by the government of Iraq is a question of fact in any particular case, and is not conclusively answered by identifying the date when major combat operations were formally declared complete or when the CPA was established or when the UK became an "occupying power" within the meaning of the Hague Regulations.

79. For the reasons already given, I accept this contention. Applying the approach which I derive from the Al-Skeini and Jaloud cases, the question whether British forces were exercising powers of a kind which would normally be exercised by the government of Iraq can only be answered by considering what function the soldiers concerned were actually performing in any given case. I accordingly turn to the facts of the single test case relating to the invasion period in which the question of article 1 jurisdiction is disputed.

PIL 6: Atheer Kareem Khalaf

80. This case concerns an individual, Atheer Kareem Khalaf, who was shot by a British soldier whilst queuing for petrol in Basra on 29 April 2003. According to the case narrative, when Mr Khalaf reached the front of queue he opened his car door and was about to get out when a British soldier ordered him to reverse his vehicle. He forgot that his car door was open and, when he reversed, the door hit a British soldier standing by the side of the car and knocked him down. The soldier stood up and pointed his gun through the driver's side window and shot Mr Khalaf in the stomach. The soldier then pulled Mr Khalaf, who was bleeding, out of the car, held his head and started hitting it against the pavement while another soldier started smashing the car window with his rifle. After another female soldier intervened, Mr Khalaf was taken to a military hospital but he later died of his wounds.

81. On behalf of the claimants, Mr Fordham submitted that on these assumed facts it is apparent that the soldiers at the petrol station including the soldier who shot and assaulted Mr Khalaf were performing a policing function of a kind normally exercised by a sovereign government.

82. The killing of Mr Khalaf is also the subject of a private law claim. In its defence to that claim served on 16 May 2014, the Ministry of Defence has averred that:

> "On the morning of 29 April 2003 two Warrior armoured vehicles containing seven soldiers from 1BW (Black Watch) were at the Andalus petrol station to support three staff and three auxiliary policemen in implementing the supply of rationed fuel to Iraqi civilians."

83. I think it clear that policing the supply of rationed fuel to civilians at a petrol station involves exercising authority and control over those civilians through the exercise of powers normally exercised by a country's own police force and that on the assumed facts the soldier who caused Mr Khalaf's death was carrying out such a function. Mr Khalaf was therefore within the jurisdiction of the UK for the purpose of article 1 when he was shot and assaulted.

The post-occupation period

84. The Secretary of State further contends that, when on 30 June 2004 the occupation ended, full sovereignty was vested in the new Iraqi government, with the consequence that the UK was not thereafter exercising public powers normally to be exercised by that government. In support of this contention, Mr Eadie QC cited an observation of Lord Hope in the Susan Smith case (at para 41) that, after the occupation of Iraq ended and the CPA ceased to exist, "[f]ull authority for governing the country had passed to the Interim Iraqi Government. The UK was no longer exercising the public powers normally to be exercised by that country's government".

85. Lord Hope's observation was however purely *obiter*, as the question whether the UK exercised public powers in Iraq after the occupation ended was not in issue in the Susan Smith case and does not appear to have been the subject of argument. Insofar as Lord Hope was implying that in the post-occupation period there was no scope for the UK to exercise control over individuals through the exercise of public powers in Iraq, I respectfully do not think that this is factually correct. It is true that at the end of the occupation period full sovereign authority for governing Iraq became vested in the new Iraqi government. It does not follow, however, and is not the case, that the UK was no longer exercising public powers of a kind normally exercised by the country's government. As mentioned earlier, the MNF (of which British forces formed part) was asked by the Iraqi government and authorised by the UN Security Council to undertake a broad range of tasks to contribute to the maintenance of security in Iraq (see paragraphs 14-15 above). These tasks included arresting and interning people believed to constitute a threat to security, searching for weapons, and undertaking combat operations against insurgents. It is plain that the powers exercised in carrying out these tasks are powers of a kind that would normally be exercised by a country's own government and involve the exercise of authority and control over individuals.

86. It therefore seems to me that during the post-occupation period the role of the UK fell directly within the principle articulated by the European Court in Al-Skeini (at para 135) that jurisdiction may arise when "through the consent, invitation or acquiescence of the government of that territory, it exercises some or all of the public powers normally to be exercised by that government." Although, as discussed earlier, the consent of the government of the territory concerned is not necessary for the principle to apply, the British forces which remained in Iraq after the occupation ended in fact did so at the invitation of the Iraqi government and they exercised, with that government's consent, some of the powers in the field of security which would normally be exercised by the country's own government. The fact that they were authorised to carry out these functions by the United Nations Security Council does not affect the position.[3]

87. Four of the test cases concern individuals who were shot by British soldiers who were conducting security operations on various dates in the post-occupation period. According to the case narratives:

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[3] It has not been argued that the acts of British soldiers were attributable to the United Nations and not to the UK; nor could it have been in the light of Al-Jedda v Secretary of State for Defence [2008] 1 AC 332 and Al-Jedda v United Kingdom (2011) 53 EHRR 23, paras 84-84.

i) Captain Taleb (PIL 82), a senior officer in the Basra police service, was shot dead by British soldiers while driving home with his family on 17 December 2004 as his car approached a crossroads when he failed to stop immediately upon a spotlight being shone into the car.

ii) Raad Gatii Karim (PIL 129) was shot and killed by British soldiers in the early hours of 15 November 2006 during a raid of his family home in Basra.

iii) Yousif Naser (PIL 156) was killed by shots fired from a British tank when he ran to take cover after hearing gunshots as he was walking to work on 10 April 2007.

iv) Maytham To-ma Dahir Al-Salami (PIL 73) was shot in the head and killed by British soldiers, when British forces raided his family home in Basra in the early hours of 23 April 2007.

88. The assumed facts of these cases are similar to those of individuals who were held by the European Court in Al-Skeini to be within the jurisdiction of the UK on the basis that they were killed during the course of security operations. It is clear that British forces were in each case exercising police or military powers which would normally be exercised by the Iraqi government's own security forces. I accordingly find that on the assumed facts of each case the necessary jurisdictional link existed between the person who was killed and the UK for the purposes of article 1 of the Convention.

Exercise of physical power and control

89. The claimants also argue that, in any case of an individual shot by a British soldier, even if the soldier was not exercising authority and control by reason of exercising public powers, the shooting was an exercise of physical power and control which brought the individual within the jurisdiction of the UK. On behalf of claimants Mr Fordham QC submitted that using lethal or potentially lethal force by shooting falls squarely within the principle of control over individuals enunciated by the European Court in Al-Skeini and recognised by the UK Supreme Court in the Susan Smith case. He also relied on a group of cases in which the European Court has found jurisdiction in circumstances where individuals were killed by state agents without first being detained.

Non-detention cases

90. The first of these cases is Pad v Turkey, Application no 60167/00, judgment dated 27 June 2007, in which relatives of the applicants who lived in Iran near the border with Turkey were killed by gunfire from a Turkish helicopter. The applicants claimed that their relatives were in Iran when they were shot and killed. The Turkish government claimed that the deceased had illegally crossed the border into Turkey and did not dispute that they were within its jurisdiction when they were shot. The Court, at paras 53-54 of its judgment, appeared to consider that the killings occurred within Turkish jurisdiction even if they took place in Iran on the basis that a state can be held accountable for violations of the rights of persons in the territory of another state if they are under the state's "authority and control through its agents operating – whether lawfully or unlawfully – in the latter state" (the words used in Issa v Turkey (2004) 41 EHRR 567, quoted at paragraph 38 above). However, as jurisdiction was

conceded by Turkey, the issue did not have to be decided. I therefore do not think that any real weight can be placed on this case.

91. More significant is Isaak v Turkey [2008] ECHR 553, in which the Court held admissible a claim by the widow of a demonstrator who was beaten to death in the UN buffer zone separating the northern part of Cyprus controlled by Turkey from the rest of the island. He was killed by a mob armed with sticks and batons which included Turkish-Cypriot police officers. The Court held that, even though the acts complained of took place in the neutral UN buffer zone and therefore not within territory under the effective control of Turkey, the demonstrator was "under the authority and/or effective control" of Turkey through its agents and was therefore within Turkish jurisdiction when he was killed. This is accordingly a case in which jurisdiction was established on the basis of control over an individual, even though he had not been detained.

92. There were sequel cases. After Mr Isaak's funeral, Greek Cypriot demonstrators again crossed the ceasefire line. A number were shot by Turkish-Cypriot soldiers and their families pursued claims to the European Court of Human Rights. In one case, Solomou v Turkey [2008] ECHR 552, a demonstrator was shot and killed by Turkish-Cypriot soldiers while climbing a flagpole. It appears from the judgment (para 49) that the flagpole was situated in Turkish-Cypriot territory so that this case was not one involving extra-territorial jurisdiction. However, another individual, Ms Andreou, who was seriously wounded on the same occasion, was in Greek-Cypriot territory when she was shot. In deciding that the application was admissible, the Court held that:

> "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, had been such that the applicant should be regarded as "within [the] jurisdiction" of Turkey within the meaning of art. 1."

The Court repeated this statement in its judgment on the merits: see Andreou v Turkey, Application No 45653/99, 3 June 2008, p.11; [2009] ECHR 1663, para 25.

Position of the Secretary of State

93. The Secretary of State accepts in the light of the decisions of the European Court in Al-Skeini and Hassan that jurisdiction exists where claimants were in the custody of agents of the United Kingdom. Accordingly, in 10 of the test cases (including Alseran) where the claimant was allegedly detained by British forces, the Secretary of State has conceded that during any such period the claimant was within the UK's article 1 jurisdiction. The same applies in the case of Yunus Rahmatullah and Amanatullah Ali. The Secretary of State does not accept, however, that jurisdiction arises on the basis of the exercise of physical power and control over individuals in non-custody cases. In particular, he does not accept that the act of shooting an individual who has not been detained is itself an exercise of physical power and control which is sufficient to bring the individual within the UK's jurisdiction for the purpose of article 1 of the Convention.

94. In support of this position, Mr Eadie QC pointed out that all the cases cited by the European Court in Al-Skeini to illustrate the exercise of physical power and control as a basis of jurisdiction involved the detention of individuals by state authorities and that none of the cases which I have referred to above was mentioned. He further submitted that the Court in Al-Skeini cannot have considered that jurisdiction arose simply from the fact that the applicants' relatives were shot by British soldiers as the Court based its finding of authority and control on the "exceptional circumstances" that the UK was carrying out security operations having assumed in Iraq the exercise of some public powers normally exercised by a sovereign government. Mr Eadie also argued that if the physical act of shooting at a person who had not been detained was sufficient to bring that person within the state's jurisdiction, then so too would be the act of bombing which in the Banković case was held not to give rise to extraterritorial jurisdiction.

The position in principle

95. Whether the exercise of physical control over an individual outside a state's own territory should be sufficient to bring that individual within the scope of the Convention is far from obvious. However, once that principle is established, as it now is, I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. Nor as it seems to me can a principled system of human rights law draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first, such that in the first case there is an obligation to respect the person's right to life yet in the second case there is not.

96. Counsel for the Secretary of State submitted that there is a rational distinction between those who are under the complete authority and control of a state as a result of being taken into custody and those who are shot by agents of the state when they are not in custody. However, the very next point made in their written submissions seems to me to illustrate why this distinction is not a tenable one. They say:

> "Of course, if the person holding the gun is in such control of the situation that he is literally able to hold the gun to the individual's head, it may be that the individual is in fact detained."

Making the applicability of a system of human rights law depend on the distance between the gun and a person's head in a case where a person is shot is not a position which in my view can reasonably be sustained.

97. It is true that in Al-Skeini the European Court cited four cases involving individuals who had been "taken into the custody of state agents abroad": see (2011) 53 EHRR 18, para 136. However, the situation of a person taken into custody was given only as one application of a wider principle whereby the use of force by a state's agents outside its territory may bring an individual into the state's article 1 jurisdiction. While it is also correct that the Court did not mention the cases involving individuals shot by state agents outside the state's territory which I have referred to above, in particular Isaak and Andreou, the general principle articulated by the Court encompasses and explains the finding of jurisdiction in those cases. Nor can I

conceive that if in the case of Issa, for example, it had been established that, rather than taking the applicants' relatives to a cave before shooting them, the Turkish soldiers had simply gunned them down, the Court would have found that the deceased were not within Turkish jurisdiction because the soldiers did not exercise physical power and control over the deceased.

98. Once it is accepted, as it was in Al-Skeini, that the Convention rights can be "divided and tailored" and that where the state through its agents acting outside its territory exercises control over an individual it has an obligation under article 1 to secure those rights that are relevant to the situation of that individual, then the fact that an individual is taken into custody can only be relevant, as it seems to me, to the extent of the rights which must be secured. Thus, where an individual is in the custody of state agents, the state may have not only a negative obligation under article 2 not to kill unlawfully but an obligation in certain circumstances to take positive measures to protect the person's life. More extensive obligations under article 3 will also be owed. In addition, article 5 is relevant. On the other hand, where an individual is not in the state's custody (and the state is not exercising any governmental powers in the territory), the only relevant obligation so far as I can see will be the negative one under article 2 to refrain from unlawful killing.

The actual decision in Al-Skeini

99. As for the basis on which the Al-Skeini case itself was decided, even on the view for which the Secretary of State argues that physical control suffices to establish jurisdiction only where an individual is taken into custody, this clearly applied to Baha Mousa who was killed on a British military base. It might also have applied in the case of the fifth applicant's son, who allegedly died after British soldiers arrested him and forced him into a river where he drowned. Conversely, it does not appear that the Court could have found jurisdiction in relation to the third applicant's wife on the basis of physical control. She was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it was not known which side fired the fatal bullet. It was therefore impossible to conclude that she was shot by British troops. The fact is that the Court simply did not address the question of which cases involved the exercise of physical power and control over the deceased and which did not. The Court instead considered it sufficient to conclude that the requisite jurisdictional link in any event existed in all six cases on the basis that the individuals were killed in the course of security operations which involved the exercise of public powers.

100. Looking at the position more broadly, given the Court's acceptance in Al-Skeini of a general principle of jurisdiction under article 1 based on the exercise of control and authority over individuals, it is difficult to see how the existence of a "jurisdictional link" between the UK and individuals who were shot and killed by British soldiers in Iraq can rationally be confined to circumstances where the soldiers were at the time exercising public powers normally exercised by the Iraqi government. Such a requirement might be understandable if the concept of jurisdiction had been interpreted as requiring lawful authority and if it was indeed necessary to show that such powers were being exercised through the "consent, invitation or acquiescence" of the government of Iraq. As discussed earlier, however, it is apparent that the test does not depend on whether or not the state is duly authorised to exercise the relevant powers – just as the test of effective control over an area does not depend on whether

such control has been seized lawfully or unlawfully. Once the concept of jurisdiction is understood to be concerned with what a state actually does rather than with the legal basis or legitimacy of its activities, it does not make sense to limit the concept to some subset of circumstances in which the state exercises extraterritorial force over individuals. It would be illogical to treat the Convention as applicable when state agents detain an individual on territory over which they do not exercise control if the state agents purport to act as policemen but not if they simply abduct the individual. And in Al-Skeini the European Court expressly confirmed that the Convention is applicable in the latter situation also, as illustrated by the case of Öcalan v Turkey (2005) 41 EHRR 45. It would be similarly and equally illogical if the Convention applied when state agents shoot and kill an individual on territory over which they do not exercise control when the state agents purport to act as policemen but not if they simply assassinate the individual. The fact that state agents are purporting to exercise powers normally exercised by a sovereign government of the territory when they detain, or kill, an individual may make sense as a sufficient condition but not as a necessary condition of the exercise of jurisdiction by the state over that individual.

Reliance on Banković

101. As mentioned, the Secretary of State also argues that to interpret the control principle as applying whenever physical force is used to kill or injure someone on another state's territory would be inconsistent with the earlier decision of the Grand Chamber in Banković. Mr Eadie emphasised that the Court in Al-Skeini said nothing to suggest that it regarded Banković as wrongly decided. He also pointed out that in the subsequent case of Hirsi Jamaa v Italy (2012) 55 EHRR 21 the Court has referred to Banković with apparent approval and described it as applicable where "only an instantaneous extra-territorial act is at issue" (see para 73). He submitted that this supports a distinction between cases where individuals are detained and cases such as Banković involving only a momentary use of force.

102. As I have already indicated, it is clear on analysis that the Court in Al-Skeini did depart from its previous decision, in particular by recognising the exercise of control over an individual as a basis of jurisdiction, in direct contradiction to its holding in Banković. Hirsi Jamaa was a case where asylum-seekers were detained on board an Italian ship after their vessels had been intercepted. No question therefore arose as to whether an "instantaneous extra-territorial act" such as shooting or bombing was capable of constituting an exercise of physical power and control over an individual. Moreover, the context in which the Court referred to an "instantaneous extra-territorial act" was to draw a contrast with jurisdiction based on effective control of an area outside a state's national territory exercised as a consequence of military action. The Court did not discuss the scope of the principle of jurisdiction based on the exercise of control over an individual. In any event the law proceeds on the basis of principle, and not by drawing arbitrary distinctions to maintain a veneer of consistency. The essential question is whether, in relation to a principle which founds jurisdiction on the exercise of physical power and control over an individual, a coherent distinction can be drawn based on the length of time for which physical force is used, although not on the degree of such force – so that a massive but momentary use of force to kill an individual does not constitute a sufficient exercise of control over that individual to bring him within the state's jurisdiction but a slightly longer use of much lesser force to restrict his liberty does. I cannot see how such a distinction can rationally be drawn.

103. Mr Fordham QC was reluctant to contend that the Al-Skeini case has had the effect of overruling Banković. I would not be so hesitant. I certainly see no reason to accept that the 17 respondent states had jurisdiction over the applicant's relatives in that case simply by reason of their membership of NATO and the decision of the North Atlantic Council to bomb targets in the FRY. However, in so far as the Court held that people killed by bombing, if carried out by agents of a contracting state on the territory of another state, are not capable of coming within the jurisdiction of the contracting state, I am unable to see how that conclusion can stand with the principle of jurisdiction based on physical power and control recognised in Al-Skeini.

104. Mr Eadie QC further submitted that treating the physical control basis of jurisdiction as encompassing shooting or bombing would be tantamount to accepting the argument which the European Court expressly rejected in the Banković case (at para 75) that "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of article 1 of the Convention".

105. I do not accept that the principle established by the Al-Skeini case is as broad as this. It is not any adverse effect which, on the approach adopted in Al-Skeini, brings the person affected within the jurisdiction of a contracting state, but only the exercise of powers normally exercised by the government of the territory concerned or the exercise of physical power and control over that person. Thus, it would not be open, for example, to an individual situated in a foreign state to argue that an act done by a contracting state (not exercising public powers) which resulted in destruction or deprivation of his property brought him within the state's jurisdiction for the purpose of article 1 so as to engage the right to peaceful enjoyment of possessions set out in Protocol 1, article 1 of the Convention. Where, however, the act involves the use of coercive physical force over an individual, then it does seem to me to be the clear result of what the Court has decided in Al-Skeini that the affected individual is brought within the state's jurisdiction wherever in the world the exercise of such power takes place.

106. The essential principle that I derive is that whenever and wherever a state which is a contracting party to the Convention purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights. That is still a far-reaching principle of jurisdiction. It creates real and difficult problems as to how human rights law under the Convention can be accommodated to the realities of international peacekeeping operations and situations of armed conflict. There are strong reasons of policy for seeking to interpret the territorial scope of the Convention in a way which limits the extent to which it impinges on military operations in the field, particularly where actual fighting is involved. There is also reason to be concerned that, once the Convention is held to apply to the use of force in overseas military operations, then the inevitable consequence of any major foreign intervention such as the British involvement in Iraq will be a flood of claims. That this concern is not fanciful is shown by the very large number of claims which have in fact been brought in the English courts since the decisions in the Al-Skeini and Al-Jedda cases were issued by the European Court.

107. I do not think, however, that it would be an effective solution, even if it were legitimate, to seek to stem this tide by drawing a line between cases where force is

used to detain and cases where force is used to kill. By far the majority of both the public law and private law claims arising out of the British involvement in Iraq have been brought by individuals who were detained by British forces and who allege that their detention was unlawful and that they were ill-treated while in British custody. There are comparatively few claims alleging unlawful killing. In any event, in the light of the decision in Al-Skeini, most if not all of the claims involving the killing of individuals who had not been detained will fall within the jurisdiction of the UK on the basis that the deaths occurred during security operations which involved the exercise of public powers. That applies in relation to all the relevant cases which have been chosen as test cases for the purpose of this issue. Drawing a line in the manner contended for by the Secretary of State would therefore be largely futile as well as illogical. When the lesser use of force involved in apprehending someone has been held to bring that person within the article 1 jurisdiction of a contracting state, it makes no sense to hold that the greater use of force involved in killing someone does not have that effect.

Jurisdiction and breach

108. Mr Eadie QC also submitted that treating the very act of shooting an individual as bringing them within the scope of article 1 collapses the distinction between jurisdiction and breach. I disagree. To the contrary, it seems to me to make it all the more essential to draw that distinction.

109. As the Secretary of State accepts, it is now established that the detention of an individual by British forces in Iraq brought that person within the UK's jurisdiction for the purpose of article 1 of the Convention. It does not follow, however, that either the act of detention itself or anything done to the individual during his detention involved a breach of any Convention right. It equally does not follow that, because shooting an individual involves an exercise of physical power which brings that person within the UK's jurisdiction, there is any breach of a Convention right if the individual is killed or wounded. Whether there is such a violation depends on whether the use of force was justified.

110. It is certainly an unattractive prospect that, if the UK becomes involved in a war or peacekeeping operation overseas, every enemy soldier or civilian who is killed or wounded by British forces is entitled to an investigation into whether the killing or wounding was lawful and, if it was unlawful, to claim compensation from the UK. The same may very well be said of the ability of enemy soldiers and civilians detained by British forces to complain that their detention violates article 5 of the Convention. In Hassan v United Kingdom the European Court has gone some way towards addressing the latter concern. Although the Court held that, even in situations of international armed conflict, the Convention continues to apply and is not displaced by international humanitarian law, the Court also held that article 5 of the Convention must be interpreted and applied in a way which takes account of international humanitarian law. Thus, the Court read down article 5(1) by holding that detention is lawful where it is permitted by the rules of IHL, even though it does not fall within one of the cases set out in subparagraphs (a) to (f) of article 5(1).

111. It seems to me that the same approach must in principle apply to article 2. Thus, where the armed forces of a state kill someone in the course of an armed conflict the killing will be lawful provided it is consistent with IHL even if it results from use of

force which is not absolutely necessary to achieve any of the purposes set out in sub-paragraphs (a) to (c) of article 2. In addition, I think it important that courts should recognise their lack of institutional competence to judge actions or decisions taken on the battlefield or when seeking to maintain security in dangerous and hostile conditions. For similar reasons as apply in the context of combat immunity, the courts should afford a wide latitude or, to use the jargon of the Strasbourg case law, "margin of appreciation" when judging the legality of lethal force used in such circumstances: cf R (Long) v Secretary of State for Defence [2014] EWHC 2391 (Admin), paras 77-87.

Going no further than the European Court has gone

112. Mr Eadie's final argument on behalf of the Secretary of State on this issue was that, if the principle of jurisdiction based on state agent control over individuals is to be applied to the killing of an individual who has not been taken into custody, thus effectively overruling Banković, this is a step for the European Court to take. It should not be taken by a domestic court.

113. Mr Eadie referred to observations of Lord Hope in Ambrose v Harris [2011] 1 WLR 2435 at paras 17-20, in which he discussed the well known remarks of Lord Bingham in R (Ullah) v Special Adjudicator [2004] 2 AC 323, para 20, and endorsed the approach that the UK Supreme Court should not expand the scope of rights under the Convention further than the jurisprudence of the European Court of Human Rights clearly justifies – an approach which obviously applies with all the greater force to lower courts. Lord Brown (at para 86) and Lord Dyson (at paras 100-105) made similar cautionary remarks. I bear these statements in mind and they indeed seem to me apposite to some of the other preliminary issues which I am asked to decide.

114. Mr Eadie submitted that the need for caution is all the greater where the issue relates to the territorial scope of the Convention. He referred to the view expressed by Lord Brown in R (Al-Skeini) v Secretary of State for Defence [2008] AC 153, para 107, that the House of Lords should not construe article 1 of the Convention as reaching any further than the existing Strasbourg jurisprudence shows it to reach. That view was endorsed in the Catherine Smith case by Lord Phillips PSC (at para 60) and Lord Hope (at para 93) and reiterated by Lord Brown (at para 147). Lord Phillips described the appellant's contention in that case that a state's armed forces fall within the state's jurisdiction for the purposes of article 1 when operating overseas as "novel" and said:

> "I do not believe that the principles to be derived from the Strasbourg jurisprudence, conflicting as some of them are, clearly demonstrate that the contention is correct. The proper tribunal to resolve this issue is the Strasbourg Court itself, and it will have the opportunity to do so when it considers Al-Skeini."

115. In the Susan Smith case Lord Hope (at para 44) again took as the guiding principle that "article 1 should not be construed as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach". He nevertheless went on, after analysing the decision of the European Court in Al-Skeini, to extract from it a proposition which was not articulated by the European Court but which Lord Hope identified (at para 50) as logically implicit in the decision and as "the premise from

which extraterritorial jurisdiction based on state agent authority and control has been developed" – that proposition being the contention described in the Catherine Smith case as "novel" that members of a state's armed forces serving overseas are within its article 1 jurisdiction.

116. At the time when the Al-Skeini case was decided by the House of Lords and the Catherine Smith case was decided by the Supreme Court there were indeed decisions of the European Court which were difficult if not impossible to reconcile with each other, most notably Banković and Issa. Since then, however, the European Court has given judgment in the Al-Skeini case and took the opportunity, as Lord Phillips anticipated that it might, to restate the applicable principles. Moreover, that restatement has been adopted by the UK Supreme Court in the Susan Smith case, and therefore represents domestic law binding on lower courts. When the logic of those principles is clear, as in my opinion it is, this court is required by the doctrine of precedent to apply that logic. It is not permissible, nor would it be desirable, to adopt an approach of waiting to see what Strasbourg says.

Application to the test cases

117. Applying the principle of jurisdiction based on the exercise of physical power and control to the five test cases mentioned earlier, the case of Mr Khalaf (PIL 6) falls squarely within that principle. It will be recalled that on the assumed facts he was shot in the stomach by a British soldier through the open door of his car and was then dragged out of the car by the soldier who hit his head against the pavement. On the view contended for by the Secretary of State, the Convention did not apply to Mr Khalaf at the time he was shot in the stomach, subject to a possible argument that his freedom of movement had already been restrained by the soldier who ordered him to reverse his car; and yet the Convention was applicable by the time his head was hit against the pavement because by that time his liberty had been restricted. For the reasons already given, I cannot accept that the existence or otherwise of Convention rights can or does depend on such sophistical, and to my mind unacceptable, distinctions. In my view, the position is much simpler. The whole sequence of events represented an exercise of physical power and control over Mr Khalaf which, on the principle of state agent control over individuals established by Al-Skeini, brought him within the UK's article 1 jurisdiction.

118. The same applies to each of the four test cases referred to at paragraph 87 above in which I have held that jurisdiction arose through the exercise of public powers. In each case I think it clear that on the assumed facts jurisdiction also arose through the exercise of physical power and control over the individual who was shot and killed.

Other cases

119. I have mentioned so far five of the nine test cases in which the Secretary of State disputes jurisdiction. I have concluded that all of those cases fall within the scope of article 1, both because the events occurred in the course of security operations in which British soldiers were exercising public powers and because they involved the exercise of physical power and control over the individuals concerned. The remaining four test cases raise additional issues, as do the claims of Yunus Rahmatullah and Amanatullah Ali.

PIL 3 and PIL 7: deaths in a British hospital

120. These two cases concern individuals who received medical treatment from British soldiers, were last seen in the custody of British forces and whose subsequent fate is unknown. In the first case (PIL 3) the claimant is the brother of Nahim Al-Mayahi who was hit by a bullet fired from the direction of British forces on 23 March 2003. According to the case narrative, he was last seen alive being carried, anaesthetised, on a stretcher to a British military helicopter. The claimant in the second case (PIL 7) is the father of Memmon Al-Maliki, a boy aged 12 who was seriously injured when playing outside his family home in Basra on 29 April 2003 after he picked up a munition which exploded. Memmon was taken by a British army patrol to a military hospital on a British army base. Although the claimant went to the hospital on several occasions, he was not permitted to see his son and later understood that Memmon had been taken to an American field hospital in Kuwait. He has never seen his son again nor learnt what happened to him.

121. The Secretary of State has argued that these individuals were not within the jurisdiction of the UK when they died or were last seen because they were never taken into custody. I cannot accept this. A seriously injured person who is carried on a stretcher to a military helicopter or treated at a military hospital is just as much under the physical power and control of agents of the state as someone who is arrested or held in a prison. The fact that the purpose of exercising such control is benign is relevant to whether there are grounds for suspecting a breach of article 2 but cannot affect the question of jurisdiction.

122. I note that, even before the decision of the European Court in the Al-Skeini case, the Secretary of State accepted in the Catherine Smith case that a soldier taken for treatment to a military hospital on a British army base in Iraq was within the jurisdiction of the UK: see R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, paras 32, 109, and 220. That concession was made because it was acknowledged that the army base was under the control of the UK. It makes no difference to the fact of such control whether the individual receiving treatment was a British soldier or an Iraqi civilian.

123. Additional support for this conclusion is provided by Hirsi Jamaa v Italy (2012) 55 EHRR 21, where the European Court held that Italy was exercising jurisdiction over migrants from Libya who were transferred to Italian ships after their vessels were intercepted at sea and returned to Libya. The Court rejected Italy's argument that the migrants did not fall within its jurisdiction in circumstances where no violence had been used and Italy was under an international obligation to save human lives on the high seas (paras 65-66 and 79). It was sufficient that Italy had exercised control over the applicants between the time of the interception and handing them over to the Libyan authorities.

124. I therefore conclude that in both these test cases the individual concerned was within the article 1 jurisdiction of the UK when last seen.

PIL 176: killing during a US-led operation

125. Wasim Shahib Talib Al-Kharsa (PIL 176) is one of ten claimants injured or whose relative was killed in a single security operation in the town of Majar-al-Kabir on the

night of 17 June 2007. The claimants allege that a number of unarmed Iraqi civilians were deliberately killed by British forces in a range of circumstances, including shooting from close range on the ground and shooting from a helicopter. Iraqi police reported that 36 people had been killed. Over 100 were reportedly injured. This particular claimant was a head teacher in a local school whose 18 year old son was shot dead while standing at the door of the family home after being woken by gunfire; he was shot many times in his head, abdomen and back.

126. The Secretary of State has said that this was a US operation and that no UK personnel took part in it. The only British involvement was that, because the operation took place within the UK's area of responsibility, UK forces were consulted in the planning of the operation and provided a refueling point for US helicopters 40 km away from Majar-al-Kabir.

127. The claimants submit that providing assistance in the planning of the operation and logistical support are governmental powers. Although I accept that this is at least arguable, I cannot see that performance of those limited functions is capable of amounting to the exercise of authority or control over individuals who were killed by US forces in the course of the operation. A duty to investigate could only arise, in my view, if there were any credible evidence to suggest that British forces actually took part and were responsible for any of the shootings.

PIL 45

128. The son of Ahmed Adweh (PIL 45), Lafteh Ahmed Adweh, was killed on 4 September 2003 in South-East Iraq. He was hit by a British army vehicle, which was part of a military convoy, and was killed instantly. According to the case narrative, the vehicle which hit Lafteh sped away and was followed by the rest of the column of vehicles.

129. It is not suggested that Lafteh was run down deliberately such that the physical control principle is applicable. The claimants argue, however, that the case falls within the public powers principle. It can, they say, safely be inferred that, whatever their particular mission at the time, the reason why the troops driving in the convoy were present in Iraq was to help provide security and thereby exercise powers that would normally be exercised by the Iraqi government. The soldiers were clearly on duty when the incident occurred. It follows, the claimants submit, that Lafteh's death occurred in the course of the exercise of public powers, or was "contiguous" to the exercise of such functions (in the expression used by the Grand Chamber in the Al-Skeini case at para 149), so that he was within the jurisdiction of the UK when he died.

130. I do not accept that this case falls within the public powers principle. It is necessary to remember that the underlying basis of jurisdiction is the exercise by state agents of "authority and control" over an individual. In the Al-Skeini case the European Court held that in conducting security operations – which involved house raids, arrests and detentions, carrying out street patrols and shooting at gunmen – British troops were exercising authority and control over individuals, and that this extended (in the case of the third applicant's wife) to a civilian who was caught in cross-fire. It cannot be said, however, that British troops were exercising authority and control over individuals simply by driving along a road. The test case, therefore, is not one of an

individual killed in the course of the exercise of public powers. It is simply a case where British soldiers who were present in Iraq have caused an accidental death. That is not sufficient to bring the case within the scope of article 1.

Rahmatullah and Ali

131. Yunus Rahmatullah and Amanatullah Ali were detained by British forces in February 2004 in an area of Iraq which was under US authority. Shortly afterwards they were transferred into the custody of US forces in accordance with a memorandum of understanding signed in 2003 (the "2003 MoU"), which established arrangements for the transfer of detainees between the armed forces of the US, the UK and Australia. The 2003 MoU included a provision for the state into whose custody an individual was transferred ("the accepting power") to return a detainee to the original detaining power without delay upon request. By the end of March 2004, Mr Rahmatullah and Mr Ali had been transported by US forces to Bagram Airbase in Afghanistan. They allege that, while in detention, they have been subjected to torture and other serious mistreatment.

132. In May 2011, an application was made on behalf of Mr Rahmatullah for a writ of *habeas corpus* directed to the Secretary of State for Defence and the Secretary of State for Foreign and Commonwealth Affairs. By this time Mr Rahmatullah had been imprisoned at Bagram Airbase, without charge or trial, for over seven years. The application was refused by a Divisional Court, but was granted on appeal. The Court of Appeal considered that there was sufficient reason to believe that Mr Rahmatullah's continued detention by the US was unlawful, and that the US would return him upon a request from the UK government, to justify the issue of the writ: see Rahmatullah v Secretary of State for Defence [2012] 1 WLR 1462. However, when a request to return Mr Rahmatullah was made to the US authorities, they did not return him to the UK, and in these circumstances no further order was made on the writ. Both the decision of the Court of Appeal to issue the writ of *habeas corpus* and the subsequent decision to make no further order on the writ were upheld on an appeal to the Supreme Court: see Rahmatullah v Secretary of State for Defence [2013] 1 AC 614. Mr Rahmatullah was not released from custody until June 2014. Mr Ali remains imprisoned.

133. As already mentioned, the Secretary of State has accepted that Mr Rahmatullah and Mr Ali were within the jurisdiction of the UK for the purpose of article 1 during any initial period when they were in the custody of British forces before they were transferred to US forces. He denies, however, that article 1 applies to any period after the transfer had taken place. Ms Kaufmann QC who represented Mr Rahmatullah and Mr Ali argued that, even after they had been handed over to US forces, they remained within the jurisdiction of the UK for the purpose of article 1. She relied in support of this argument on Hassan v United Kingdom [2014] ECHR 936, mentioned earlier, where the European Court held that Mr Hassan was within the jurisdiction of the UK throughout the whole period from the time of his capture by British troops until his later release from detention, even though he was held at a detention facility (Camp Bucca) which was officially a US facility and was guarded by US troops. The basis for this conclusion was that Mr Hassan was admitted to the Camp as a UK prisoner and, in accordance with the terms of the 2003 MoU, the UK was responsible for deciding whether he should be released. The Court thus considered that the UK

retained authority and control over those aspects of his detention relevant to his complaints under article 5: see Hassan, paras 78-79.

134. The findings in Hassan illustrate that a state may exercise authority and control over an individual even if the soldiers who are actually guarding him are soldiers of another state: what matters is that the contracting state has the power to decide whether the individual should be kept in detention or released. As with all questions of extraterritorial jurisdiction post-Al-Skeini, I understand the test of whether the state has such power to be a factual one so that analysis of legal rights and obligations is relevant only insofar as it is evidence of what the position is in practice.[4] Accordingly, if in relation to any period after Mr Rahmatullah and Mr Ali were transferred to US forces it were shown that as a matter of fact the British authorities had the power to decide whether they should be kept in custody or released, then I would consider that they were, for that period, within the jurisdiction of the UK for the purpose of article 5. Similarly, if it were shown in relation to any period that as a matter of fact the British authorities had the power to dictate how they were treated in custody, then I would consider that they were, for that period, within the jurisdiction of the UK for the purpose of article 3. I do not understand the claimants to suggest, however, that either of these tests was satisfied. Rather, it is their contention that, after they were transferred to US forces, the UK retained a degree of authority and control over them which, although insufficient to require the UK to secure their full article 5 or article 3 rights, gave rise to an obligation to take reasonable steps to secure their return from US custody and/or to prevent their transfer to Afghanistan in circumstances where there were substantial grounds for believing that they would be or were being unlawfully detained and/or mistreated.

135. There is nothing in Hassan which supports this contention. However, Ms Kaufmann also relied on Ilaşcu v Moldova and Russia (2005) 40 EHRR 46, where the applicants were detained and subjected to torture by the separatist regime in a region of Moldova (Transdniestra) which had declared its independence but was not recognised by the international community. The European Court found that this territory was under the effective control of the Russian Federation, which had troops stationed there and was supporting the separatist regime. On this basis the Court held that the applicants were within the jurisdiction of Russia at the relevant time. However, the Court also held that the applicants were within the jurisdiction of Moldova, even though Moldova did not have effective control over the territory where they were detained. The Court considered that, where a contracting state is prevented from exercising its authority over part of its national territory by "a constraining *de facto* situation" such as where a separatist regime is set up, the state does not thereby cease to have jurisdiction within the meaning of article 1. However, the Court held that in the circumstances the obligation of Moldova under article 1 was limited to an obligation to use all diplomatic, economic, judicial or other measures available to it to secure the rights defined in the Convention to those living in the territory: see Ilaşcu, para 331. The Court has subsequently reaffirmed this conclusion in Catan v Moldova and Russia (2013) 57 EHRR 4, paras 109-110. Ms Kaufmann submitted that in a similar way, when Mr Rahmatullah and Mr Ali were under the control of US forces, the UK nevertheless had an obligation under article 1 to take measures within its power to secure their rights under articles 3 and 5 of the Convention by requesting their return.

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[4] For example, the 2003 MoU does not appear to have been a legally enforceable agreement: see Rahmatullah v Secretary of State for Defence [2013] 1 AC 614, para 75.

136. I cannot accept this argument. Like Judge Bratza and the four other judges who joined his opinion dissenting on this point in Ilaşcu v Moldova and Russia (2005) 40 EHRR 46, I find it difficult to see how part of a state's territory over which it is prevented from exercising authority or control may nevertheless be within that state's "jurisdiction", once that concept is interpreted – as it has been interpreted by the European Court – in functional terms by reference to the practical ability of the contracting state to guarantee Convention rights. I find it equally difficult to see how article 1 can reasonably be interpreted as imposing, in some circumstances but not others where people are within a state's "jurisdiction", a watered down version of the obligation "to secure … the rights and freedoms" defined in the Convention. It is clear, however, that the premise of the "positive obligation" found in the Ilaşcu case was that the territory where the applicants were detained was recognised under public international law as part of Moldova. I see no justification for applying the approach taken in that case to the exercise of jurisdiction outside a state's own territory. I think it clear that all the situations in which contracting states have been found to exercise jurisdiction outside their own territory are based on having effective control, either over an area of territory or over an individual. The test in these situations is, as I have discussed, a factual one, based on the practical ability of the contracting state to guarantee either all or some Convention rights. No authority has been cited which suggests, let alone decides, that a state may exercise jurisdiction over an area of territory or over an individual outside its national boundaries in a different sense based on rights under public international law even when the state does not exercise effective control over the area or individual concerned; nor that there are any circumstances in which a contracting state may have an attenuated obligation under article 1 to use all diplomatic and legal means that it can to try to secure Convention rights to people outside its national territory. I therefore do not consider that there is any scope for holding that Mr Rahmatullah and Mr Ali were within the UK's article 1 jurisdiction after they were transferred to US forces unless either of the tests described in paragraph 134 above was satisfied for any period.

IV. ARTICLE 3 - HANDOVER

137. Issues (2) to (4) ask whether an investigative duty arises in "handover" cases and, if so, when and with what content. By "handover" cases are meant cases where the claimant, after being detained by British forces, was handed over to US or Iraqi authorities. The specific issues are as follows:

> "(2) Whether there is an investigative obligation which arises in all handover (Soering-type) cases where there is an arguable breach of the principle that detainees will not be transferred if, at the time of transfer, there was a real risk of torture or serious mistreatment.
>
> (3) If the answer to (2) is yes, what is the content of that investigative obligation?
>
> (4) If the answer to (2) is no, are there other circumstances in which an investigative duty arises in handover (Soering-type) cases and if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?"

138. The reference in the wording of these issues to "Soering-type cases" is to Soering v United Kingdom (1989) 11 EHRR 439, in which the European Court of Human Rights first articulated the "non-refoulement" obligation mentioned earlier (see paragraph 20 above). In Soering the Court held that it would be a breach of article 3 of the Convention for the UK to extradite the applicant to the state of Virginia in the United States to face murder charges when there was a real risk that, if convicted, he would be sentenced to death and exposed to conditions awaiting execution on "death row" for many years which would amount to inhuman treatment. In justifying this conclusion, the European Court drew on article 3 of UNCAT, which states:

> "1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

139. The non-refoulement obligation first identified in Soering has been affirmed and applied in many subsequent cases: see e.g. Chahal v United Kingdom (1996) 23 EHRR 413; Saadi v Italy (2009) 49 EHRR 30; Othman v United Kingdom (2012) 55 EHRR 1. It is not limited to cases where there are formal extradition or deportation proceedings and applies in any case where a contracting state proposes to transfer a person within its jurisdiction to another state in circumstances where there are substantial grounds for believing that the person would be in danger of being subjected to torture or other treatment prohibited by article 3: see e.g. Al-Saadoon v United Kingdom (2010) 51 EHRR 9, which involved the transfer of two individuals arrested by UK forces in Iraq to the custody of the Iraqi authorities. The European Court has also held that the non-refoulement obligation, like the prohibition of torture itself, is absolute – in the sense that it cannot be balanced against other factors such as considerations of national security: see e.g. Chahal v United Kingdom, paras 76-82; Saadi v Italy, para 138.

The parties' positions

140. It is the claimants' case that there is a duty to investigate any arguable breach of article 3, including an arguable breach of the non-refoulement obligation. The claimants accordingly contend that an investigative duty arises in all handover cases where there is an arguable claim that the person transferred to the custody of another state faced a real risk of torture or serious mistreatment. The Secretary of State disputes this. He maintains that the duty to investigate arguable breaches of article 3 is limited to cases where there is an arguable claim that an individual within the jurisdiction of the UK was subjected to torture or inhuman or degrading treatment.

The ECHR case law

141. There are two bases on which the European Court has found a duty to investigate arguable violations of article 3. Such a duty was first recognised in Aksoy v Turkey (1996) 23 EHRR 553. In that case the applicant was arrested on suspicion of terrorist activities and detained for a period which was in dispute but was at least 14 days. The Court found that while in detention the applicant was tortured and left with both arms paralysed. On his release the applicant was brought before a public prosecutor and told to sign a statement, which he said he could not sign as he was unable to move his hands. As well as finding a substantive breach of article 3, the Court held that the

failure to investigate whether the applicant had been tortured, despite the prosecutor's awareness of his injuries, amounted to a violation of article 13 of the Convention, which guarantees that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". The Court said (at para 98 of the judgment):

> "The nature of the right safeguarded under article 3 of the Convention has implications for art. 13. Given the fundamental importance of the prohibition of torture … and the especially vulnerable position of torture victims, art. 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.
>
> Accordingly, as regards art. 13, where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in art. 12 of [UNCAT], which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court's view, such a requirement is implicit in the notion of an 'effective remedy' under art. 13..."

142. This decision was followed by a Grand Chamber of the Court in Aydin v Turkey (1997) 25 EHRR 251, para 103.

143. The second basis on which a duty to investigate arguable violations of article 3 has been found was first articulated in Assenov v Bulgaria (1998) 28 EHRR 652. In that case the applicant claimed to have been beaten while in police custody. The Court found it impossible to establish whether the applicant's injuries were in fact caused by the police as he alleged (para 100) but nevertheless considered that the evidence raised a "reasonable suspicion" of such ill-treatment (para 101). Following similar reasoning to that previously adopted in relation to article 2,[5] the Court held that:

> "where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of art. 3, that provision, read in conjunction with the State's general duty under art. 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation."

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[5] See paragraph 17 above.

The Court further stated (para 102):

> "This investigation, as with that under art. 2, should be capable of leading to the identification and punishment of those responsible ... If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

144. In addition to concluding that there had been a violation of article 3 on this basis, the Court also held that its findings that there had not been a thorough and effective investigation into the applicant's arguable claim of ill-treatment by state agents established a violation of article 13 (para 118).

145. The holding in the Assenov case that article 3 imposes an investigative duty similar to the procedural duty under article 2 was followed and applied by a Grand Chamber of the Court in Labita v Italy [2000] ECHR 161, para 131.

146. In Ilhan v Turkey (2002) 34 EHRR 44, paras 89-93, a Grand Chamber of the Court considered the relationship between the duty to investigate an arguable claim of torture or serious ill-treatment by state agents under article 13 and the procedural duty to investigate held to be implicit in article 3 itself. The Court distinguished between article 3 and article 2 and suggested that there is less scope or need to imply a procedural obligation in order to make article 3 effective – partly for the textual reason that article 2 requires the right to life to be "protected by law" whereas article 3 is phrased in purely substantive terms, and partly for the practical reason that in article 2 cases the victim is dead and knowledge of the circumstances may be largely confined to state officials so that "the initiative must rest on the state" to hold an investigation. The Court stated that article 13 "will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by State officials" and implied that it would only be appropriate or necessary to find a procedural breach of article 3 if the Court is unable to determine whether there has been a substantive breach of article 3 and that this is the result "at least in part" of the failure of the state authorities to conduct an effective investigation. The Court explained the finding of a procedural breach of article 3 in Assenov v Bulgaria and Labita v Italy on this basis. By contrast, in Ilhan the Court concluded that the applicant had suffered torture and dealt with the lack of an effective investigation as a breach of article 13.

147. I find it difficult to follow this reasoning. I could understand an approach that it is not necessary or appropriate to imply a procedural obligation into article 3 in order to make its protection effective because of the terms in which article 3 is expressed and/or because such protection is provided by the right to an effective remedy under article 13. I cannot, however, see any principled basis on which the existence of a procedural obligation under article 3 to investigate an allegation of ill-treatment can be held to depend on whether or not the European Court is subsequently able to conclude beyond reasonable doubt that ill-treatment in fact took place.

148. At all events, the European Court in later cases has continued to hold that article 3 itself imposes a procedural obligation to investigate and has continued to find breaches of this obligation, not only in cases where the evidence was insufficient to enable the Court to reach any conclusion as to whether there had been treatment prohibited by article 3,[6] but also in cases where the Court has found a substantive breach of article 3: see e.g. Satik v Turkey [2000] ECHR 466, paras 61-62; Toteva v Bulgaria [2004] ECHR 212, paras 57, 62, 66; Bekos v Greece (2006) 43 EHRR 2, paras 52-55; Boicenco v Moldova [2006] ECHR 765, paras 119-127; El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25, para 182; Dzhurayev v Russia (2013) 57 EHRR 22, para 187.

A threshold issue: the Nasseri case

149. I must first consider a threshold issue raised on behalf of the Secretary of State that the claimants' case is inconsistent with a decision of the House of Lords and that I am consequently bound by authority to hold that there is no duty to investigate an arguable breach of the non-refoulement obligation. The decision relied on is R (Nasseri) v Secretary of State for the Home Department [2010] 1 AC 1.

150. In the Nasseri case the claimant was a national of Afghanistan who entered the UK illegally and claimed asylum, having previously made an asylum claim in Greece. Under the Dublin II Regulation the Secretary of State decided to send the claimant back to Greece. The claimant alleged a real risk that the Greek authorities would return him to Afghanistan, where he would be tortured. He relied on the decision of the European Court in TI v United Kingdom [2000] INLR 211, which held that the non-refoulement obligation still applies when the risk of ill-treatment arises at one remove in this way. The Secretary of State nevertheless decided to send the claimant back to Greece without investigating whether the alleged risk existed, on the basis of a statutory provision which deemed Greece to be a safe country. The claimant applied for judicial review of the decision. One of his grounds was that the failure to investigate whether his removal to Greece would constitute a breach of article 3 was itself a breach of the UK's substantive obligations under article 3 because those obligations include an investigative duty.

151. The judge at first instance accepted this argument, holding that the investigative obligation established by cases such as Assenov v Bulgaria (1998) 28 EHRR 652 (which I consider below) is one of the substantive obligations imposed by article 3. However, the Court of Appeal allowed the Secretary of State's appeal from that decision. Laws LJ (with whom the other members of the court agreed) said at para 16:

> "The Assenov case ... was distinctly concerned to establish a duty to conduct "an effective official investigation" *after* a complaint of article 3 ill-treatment had arisen. Such an adjectival duty is very well established in the context of art. 2 of the ECHR (the right to life). But the Assenov case is not authority for the very different proposition that art. 3 of the ECHR includes an obligation to investigate a *future* risk of substantive violation …"

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6 See e.g. Khashiyev v Russia (2006) 42 EHRR 20, paras 174-178.

152. On a further appeal, the House of Lords endorsed this conclusion. Lord Hoffmann (with whom the other members of the appellate committee agreed) said that the judge had been mistaken in thinking that article 3 creates an obligation to investigate whether there is a risk of ill-treatment by the receiving state, independently of whether or not the risk actually exists. On a correct view, whether the removal of the claimant to Greece would infringe his article 3 rights depended solely on whether there actually was a risk that he would in consequence be subjected to treatment prohibited by article 3 and not on what process was followed before making the removal decision. In short, there is no "free standing duty to investigate": see [2010] 1 AC 1, paras 9-15.

153. On behalf of the Secretary of State, Mr Eadie QC submitted that this decision is a binding authority for the proposition that there is no duty to investigate an arguable breach of the non-refoulement obligation. He further submitted that the Nasseri case cannot be distinguished on the basis that the duty contended for in that case was to investigate an alleged risk of ill-treatment which lay in the future, whereas in the present cases the exposure to an alleged risk of ill-treatment which the claimants say should be investigated occurred in the past. Mr Eadie emphasised that any breach of the UK's non-refoulement obligation in handover cases occurred at the time of transfer and consisted in exposing the claimants to a *risk* of ill-treatment, not in any ill-treatment to which the claimants were afterwards subjected by agents of the receiving state. The subject matter of an investigation conducted after the event into an arguable breach of the obligation would therefore be the same as the subject matter of the investigation which the appellate courts in the Nasseri case held that there was no duty to carry out. As there was no duty to conduct such an investigation before transfer, Mr Eadie argued, there equally cannot be a duty to do so after transfer has taken place.

154. I accept the submission that any breach of the non-refoulement obligation is committed at the time of transfer. As the European Court explained in Vilvarajah v UK (1991) 14 EHRR 248 at para 107(2), "the nature of the Contracting State's responsibility under article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment". See also Cruz Varas v Sweden (1992) 14 EHRR 1, para 76; Mamatkulov v Turkey (2005) 41 EHRR 25, para 69; Al-Moayad v Germany (2007) 44 EHRR SE22, para 63. If the individual is subsequently ill-treated, he or she will generally not be within the jurisdiction of the sending state at that time nor will the sending state be a party to the ill-treatment. Equally, it is not an answer to an allegation of breach of the non-refoulement obligation to show that the individual was not, in the event, subjected to ill-treatment. This is illustrated by the case of Al-Saadoon v United Kingdom (2010) 51 EHRR 9, where the liability of the UK for exposing the applicants to a real risk of being condemned to death and executed was not avoided by the fact that, following the transfer, the charges of murder were reduced and replaced by charges that did not carry the death penalty nor by the fact that the Iraqi court had later set aside the charges.

155. There is nevertheless a material difference between an investigation into an alleged risk of ill-treatment which must be undertaken before a person can lawfully be transferred, and one which is merely adjectival and directed to finding out, after the event, whether the transfer was lawful or not. The difference can be illustrated by the fact that if the argument made in the Nasseri case had succeeded, then any subsequent investigation of whether there had been a breach of article 3 in transferring the claimant to Greece would have had to include, as part of its subject matter, not only

the question whether a real risk of ill-treatment existed at the time of transfer, but also the further question of whether there had been adequate investigation of the risk before the removal decision was made.

156. The issue in the Nasseri case was whether the non-refoulement obligation itself has a procedural aspect such that, as well as prohibiting the removal to another state of an individual who would face a real risk of treatment contrary to article 3, it also prohibits their removal without a prior investigation of whether such a risk exists. The case was not concerned with whether or not there is a procedural duty to investigate an arguable breach of the non-refoulement obligation, if such a breach is alleged after the event. Both Laws LJ in the Court of Appeal and Lord Hoffmann in the House of Lords drew this distinction in clear terms.

157. If anything, the Nasseri case seems to me to be unhelpful to the Secretary of State in that it was assumed by the judge at first instance that the investigative duty established by cases such as Assenov v Bulgaria is capable of applying to an arguable breach of the non-refoulement obligation, and this assumption does not appear to have been questioned on appeal. If there is *never* a duty to investigate an arguable breach of the non-refoulement obligation, then the argument made by the claimant in the Nasseri case could not even get off the ground. As I read the judgments of the appellate courts, however, they did not decide the case on that basis. Instead, as I have indicated, they decided the case by distinguishing between an adjectival duty to investigate allegations of breach after the event and a duty to investigate which is part of the substantive obligation.

158. Accordingly, I reject the Secretary of State's argument that the issue now raised has already been decided by an appellate court in this country. I must therefore consider the issue on its merits.

The position in principle

159. As I have indicated in my earlier outline of the case law, the basis which has emerged as the dominant explanation of the duty to investigate arguable claims of ill-treatment by state agents is that the implication of such a duty is necessary to secure the rights which article 3 protects and to make such protection effective. This rationale might be said to apply to every Convention right. Article 1 requires contracting states to secure to those within their jurisdiction all the rights defined in Section 1 of the Convention, and it would undoubtedly make the protection of those rights more effective if a state had to investigate every arguable breach of every Convention right. However, it would be exorbitant and unrealistic to suggest that by becoming a party to the Convention a contracting state has impliedly undertaken such a ubiquitous obligation. Nor has any such suggestion been made in the case law of the European Court of Human Rights. Leaving aside article 5 which I must consider later, the only Convention rights to which an investigative obligation has been held to apply are articles 2, 3 and 4. What distinguishes those rights from others is their fundamental importance, as reflected in the fact that they are the first rights referred to in the Convention and that no derogation from them is permitted (except from article 2 in respect of "deaths resulting from lawful acts of war").

160. The European Court has emphasised the fundamental nature of these rights when justifying the implication of an investigative obligation. For example, in the Al-

Skeini case (para 162) the Court stated that article 2 "ranks as one of the most fundamental provisions in the Convention". Similarly, both in Aksoy v Turkey (1996) 23 EHRR 553 at para 98, and in Assenov v Bulgaria (1998) 28 EHRR 652 at para 102, the Court stressed the "fundamental importance" of the prohibition in article 3. And in Rantsev v Cyprus and Russia (2010) 51 EHRR 1, where the Court held that there was a duty to investigate a complaint of trafficking contrary to article 4, the Court stated that "together with articles 2 and 3, article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe" (para 283).

161. A core part of the rationale for implying an investigative obligation is that the alleged violation would give rise to criminal liability. Thus, in article 2 cases the European Court has described the "essential purpose" of the investigation as being "to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility": see e.g. Nachova v Bulgaria (2006) 42 EHRR 43, para 110; Al-Skeini v United Kingdom (2011) 53 EHRR 18, para 162. The Court has also repeatedly emphasised that the investigation must be capable of leading to "the identification and punishment of those responsible": see e.g. Nachova, para 113; Al-Skeini, para 166. The same emphasis on the aim of identifying and punishing those with criminal responsibility for violating the relevant Convention right informs the article 3 cases: see the passages quoted earlier (at paragraphs 141 and 143 above) from the judgments in Aksoy v Turkey at para 98 and Assenov v Bulgaria at para 102. Again, in Rantsev, where the Court held that article 4 entails a procedural obligation to investigate situations of potential trafficking, it was said that the "the investigation must be capable of leading to the identification and punishment of individuals responsible" (para 288).

162. A further purpose of requiring an investigation into alleged violations of fundamental rights is simply to reveal the truth in such cases – with the benefits which this has of laying to rest suspicion or exposing the occurrence of serious wrongdoing and seeking to avoid a recurrence. The point has never been put better than by Lord Bingham when discussing the duty of investigation under article 2 in R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653, para 31:

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

A similar rationale applies where the subject matter of the investigation is an allegation of torture or serious ill-treatment of a gravity approaching that of torture.

Application to the non-refoulement obligation

163. As counsel for the Secretary of State observed, the non-refoulement obligation is itself an implied obligation. It is essentially because of the absolute nature and fundamental importance of the prohibition against torture as recognised in

international law that the European Court of Human Rights in Soering and later cases has held article 3 implies an obligation not to send a person to another state where he or she faces a real risk of such treatment.

164. Mr Eadie submitted that to recognise a duty implied in article 3 to investigate alleged breaches of the non-refoulement obligation would accordingly be to "heap implication on implication". I do not think that the fact there would be a double implication is of itself fatal to the argument. The fundamental and absolute nature of article 3, however, does not mean that every obligation comprised or found to be implicit in article 3 is of equal importance. There are, as it seems to me, at least three important differences between the infliction of torture or inhuman or degrading treatment and a breach of the non-refoulement obligation.

165. First, in terms of harm, exposing someone to a *risk* of ill-treatment cannot reasonably be equated with actually subjecting a person to such treatment. That distinction is in my view a real one, even though I recognise that it has not dissuaded the European Court from finding that the non-refoulement obligation is itself absolute in the sense that the risk of ill-treatment cannot be weighed against the reasons for seeking to transfer the individual to the state where the risk exists (see paragraph 139 above).

166. Second, in terms of culpability, a breach of the non-refoulement obligation can, as I read the case law, be committed without any *mens rea* or personal liability on the part of any state official. It is a strict obligation. A breach is established simply by showing the existence of substantial grounds for believing that the individual in question would face a real risk of being subjected to treatment contrary to article 3 if sent to the receiving state. There is no requirement that state officials should have knowledge of the risk. This is confirmed by the fact that, in assessing whether there has been a breach of the obligation, the court can have regard to information which has come to light subsequent to the transfer: see e.g. Cruz Varas v Sweden (1992) 14 EHRR 1, para 76; Vilvarajah v United Kingdom (1992) 14 EHRR 248, para 107(2); Mamatkulov v Turkey (2005) 41 EHRR 25, para 69; Al-Moayad v Germany (2007) 44 EHRR SE22, para 63; Al-Saadoon v United Kingdom (2010) 51 EHRR 9, para 125.

167. The third point, which is a function of the first two, is that whereas subjecting a person to torture or other inhuman or degrading treatment is contrary to the criminal laws of civilised societies, the same cannot be said of a breach of the non-refoulement obligation.

168. For these reasons, the non-refoulement obligation cannot in my view be regarded as having the same fundamental status as the prohibition against torture and inhuman or degrading treatment itself. Nor is it necessary to imply a duty to investigate an arguable claim that an individual has been transferred to another state in breach of the non-refoulement obligation in order to enforce the criminal law and ensure the identification and punishment of those guilty of criminal conduct.

The position on authority

169. The conclusion which I would reach as a matter of principle by considering the reasons for implying an investigative duty is consistent with the case law referred to earlier. In all the cases which have postulated a duty to investigate alleged violations

of article 3 the duty is expressed to be a duty to investigate an arguable claim or credible assertion of torture or other inhuman or degrading treatment by state agents. This is so both when the source of the investigative duty is treated as being article 3 itself (see e.g. the passage from the Assenov case quoted at paragraph 143 above) and when the duty is derived from article 13 (see e.g. the statement in Aksoy v Turkey quoted at paragraph 141 above). No case was cited in argument in which the European Court, let alone any domestic court, has said that there is a duty to investigate not just an allegation of ill-treatment committed by state agents but an allegation that state agents have exposed an individual to a risk of ill-treatment by others.

170. There are cases in which the European Court has held that a duty to investigate allegations of serious mistreatment may arise even where the individuals who inflicted the mistreatment were not agents of the state: see e.g. MC v Bulgaria (2005) 40 EHRR 20, para 151; Šečić v Croatia [2007] ECHR 1159, para 53. An example is 97 Members of the Gldani Congregation of Jehovah's Witnesses v Georgia (2008) 46 EHRR 30. The applicants in that case were members of a congregation of Jehovah's witnesses who were attacked in a theatre where they were meeting. Some of them were badly beaten. The attack was filmed and some of the assailants were clearly identifiable. Nevertheless, the Georgian authorities made no serious attempt to investigate the incident. The Court held that the duty under article 3 to conduct an effective official investigation into allegations of ill-treatment "cannot be considered in principle to be limited solely to cases of ill-treatment by state agents" (para 97) and that the attitude of total indifference shown by the Georgian authorities amounted to a breach of this obligation.

171. In Gldani and other such cases the alleged acts of ill-treatment were perpetrated within the state's jurisdiction. What is engaged in such cases is the positive obligation of the state to protect those within its jurisdiction from treatment prohibited by article 3, which may require the state to investigate a credible complaint of such ill-treatment with a view to identifying and punishing those responsible. It remains the case, however, that the duty to conduct an effective official investigation in such cases is a duty to investigate alleged ill-treatment; it is not a duty to investigate the conduct of state officials in exposing the individuals concerned to the risk of ill-treatment.

172. The European Court has expressly confirmed that the state's obligation to investigate ill-treatment, whether pursuant to article 3 or article 13, applies only in relation to ill-treatment allegedly committed within its jurisdiction: see Al-Adsani v UK (2002) 34 EHRR 11, para 38. This is also consistent with international law as embodied in article 12 of UNCAT, on which the Court drew in Aksoy v Turkey in recognising the investigative duty (see paragraph 141 above). It follows that, in ordinary circumstances at least, the duty to conduct an investigation does not apply to ill-treatment which takes place in another country to which the individual in question has been sent.

173. The claimants' contention that there is a duty to investigate an arguable breach of the non-refoulement obligation is largely founded on two recent decisions of the European Court, which I have not yet discussed. Much of the oral argument was focused on these two cases, and I will consider them next. Those cases apart,

however, I conclude that the case law does not support, and indeed is inconsistent with, the claimants' contention.

The El-Masri case

174. The first and principal case on which the claimants relied is El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25. Mr El-Masri was a German national who was arrested on entering Macedonia. He was taken by armed men in civilian clothes to a hotel in Skopje, where he was incarcerated for 23 days. During this time he was interrogated repeatedly about possible links with militant Islamic groups. He was then taken to Skopje Airport, where he was handed over to a CIA rendition team. They assaulted and stripped Mr El-Masri and forced a suppository into his anus. He was blindfolded, hooded, shackled and marched to a waiting aircraft. He was flown to Afghanistan and taken to a secret site used as a detention and interrogation facility by the CIA. On arrival he was kicked and beaten. He was kept in a small, dirty, concrete cell with no bed. Mr El-Masri was held in captivity in this place for over four months, without any contact with the outside world. At the end of that time he was returned to Germany via Albania.

175. On Mr El-Masri's application to the European Court of Human Rights for a remedy against Macedonia, the Macedonian Government denied all his allegations including that he had ever been detained. On examining the evidence, the Court sitting as a Grand Chamber found Mr El-Masri's allegations proved beyond reasonable doubt.

176. Mr El-Masri alleged violations of both the substantive and procedural aspects of article 3. The Court considered the procedural aspect first. After his release, Mr El-Masri had lodged a formal criminal complaint with the Macedonian authorities. However, the public prosecutor had rejected his complaint relying solely on a report from the Ministry of the Interior denying that Mr El-Masri had been detained by the Macedonian authorities, without making any other attempt whatever to investigate his allegations. The Court concluded (para 193) that this summary investigation "cannot be regarded as an effective one capable of leading to the identification and punishment of those responsible for the alleged event and of establishing the truth". On this basis the court found that there had been a breach of the investigative duty.

177. The Court also found that there had been breaches of Macedonia's substantive obligations under article 3 consisting in: (i) subjecting Mr El-Masri to inhuman and degrading treatment when he was detained in the hotel in Skopje (para 204); (ii) actively facilitating and not taking any measure to prevent his ill-treatment at Skopje airport by CIA agents (para 211); and (iii) breach of the non-refoulement obligation in transferring him into the custody of the US authorities in circumstances where there were substantial grounds for believing that he would be subjected to treatment contrary to article 3 (para 220). In relation to that transfer, the Court also made a specific finding (at para 221) that Mr El-Masri was subjected to "extraordinary rendition", defined as:

> "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment."

178. On behalf of the claimants, Mr Fordham QC submitted that in discussing the lack of an effective investigation the Court did not differentiate between the various substantive breaches of article 3 disclosed by Mr El-Masri's claim, one of which was a breach of the non-refoulement obligation. Mr Fordham submitted that the Court thus implicitly treated the allegation of this breach as a matter which the Macedonian state had a duty to investigate.

179. There is no explicit discussion in the judgment of the Grand Chamber of the question whether the state's duty to investigate arguable breaches of article 3 extends to an alleged breach of the non-refoulement obligation. Nor in my view does the decision support the claimants' case in that regard. Rather, the opposite. The Court stated the principle as being that there should be an effective official investigation "where an individual raises an arguable claim that he has suffered treatment infringing art. 3 at the hands of the police or other similar agents of the state" (para 182). This formulation does not encompass an arguable breach of the non-refoulement obligation. Moreover, the breach of the procedural aspect of article 3 found by the Court related to the failure to investigate Mr El-Masri's criminal complaint. The subject matter of that complaint was his "ill-treatment by state agents and their active involvement in his subsequent rendition by CIA agents": it was this "*prima facie* case of misconduct on the part of the security forces of the respondent State" which warranted an investigation (para 186). Thus the allegations which were held to require an effective investigation went well beyond an alleged breach of the non-refoulement obligation and involved criminal wrongdoing by state agents. I see nothing in this decision which would justify an inference that a duty to investigate arises whenever an arguable claim is made that a person was exposed to a real risk of treatment contrary to article 3 by reason of their transfer to another state.

Dzhurayev v Russia

180. The second case on which the claimants particularly rely is Dzhurayev v Russia (2013) 57 EHRR 22, decided by the First Section of the European Court a few months after the El-Masri case.

181. The facts, as found by the Court (at para 138), were that the applicant was kidnapped by unidentified persons in Moscow, detained by his kidnappers in Moscow for one to two days, then forcibly taken by them to an airport and put on a flight to Tajikistan, where he was immediately detained by the Tajik authorities. In considering whether there had been a breach of article 3, the Court began by examining whether the applicant's forcible return to Tajikistan exposed him to a real risk of treatment contrary to article 3 and concluded that it did (para 176).

182. The Court next applied the principle that where state authorities are aware that an individual within their jurisdiction faces a real and imminent risk of torture or other inhuman or degrading treatment, including such ill-treatment administered by private individuals, they have a positive duty to take reasonable "operational" measures to prevent that occurring. The Court identified this principle by analogy with its case law concerning article 2,[7] and held that it is capable of applying where the risk involves transfer to another state (paras 179-180). On the facts the Court found that the failure of the Russian authorities to take any measures to protect the applicant

[7] See e.g. Osman v United Kingdom (2000) 29 EHRR 245, para 115.

against his forcible transfer to Tajikistan, in particular through a Moscow airport, amounted to a violation of this positive obligation (paras 183-185).

183. The Court also held that the Russian authorities had a duty to conduct an effective investigation into the applicant's abduction and his ensuing exposure to ill-treatment and torture in Tajikistan (para 190). They noted that the relevant information and complaints were brought to the attention of the Russian authorities immediately after the applicant's abduction and said (para 191):

> "It became obvious at a certain stage that the applicant had a prima facie case under art. 3 of the Convention that warranted an effective investigation at the domestic level. While there may have been some doubt immediately after the applicant's abduction in Moscow by unidentified persons as to the role played by Russian State agents in the incident, the complaint about his ensuing transfer to Tajikistan through a Moscow airport in breach of all legal procedures should have triggered the authorities' utmost attention, inasmuch as the applicant's representatives claimed that State agents had been actively or passively involved in that operation."

The Court found that such investigative steps as had been taken were flawed in numerous respects amounting to a breach of the procedural obligation under article 3.

184. Finally the Court found that Russia was also liable under the Convention on account of the involvement of agents of the Russian state in the applicant's forcible transfer to Tajikistan. The Court considered that he could not have been put on board an aircraft and flown to Tajikistan without the authorisation, or at least acquiescence, of the Russian authorities (para 202). The Court found the case "all the more disturbing" because the transfer to Tajikistan took place outside the normal legal system and with the aim of circumventing the fact that the applicant had been granted temporary asylum in Russia and could not lawfully be extradited (para 204).

185. Again, I do not consider that this decision supports the claimants' contention that a duty to investigate arises whenever there is an arguable claim that an individual was transferred to another state where he faced a real risk of ill-treatment. As in El-Masri, in the Dzhurayev case the principle was stated as being that "there should be an effective official investigation into any arguable claim of torture or any ill-treatment by state agents" (para 187). What triggered the duty to investigate, in the Court's opinion, was the role played or which may have been played by Russian state agents in the applicant's abduction and transfer, and in particular the implication which arose from the applicant's transfer through a Moscow airport in breach of all legal procedures that state agents had been actively or passively involved in an illegal operation.

Conclusion on issue (2)

186. I conclude that the cases on which the claimants rely do not support their primary position that there is an investigative obligation which arises in all handover cases where there is an arguable breach of the principle that detainees must not be transferred if, at the time of transfer, there was a real risk of torture or other serious

mistreatment. In my opinion, the contention that an investigative obligation arises in all such cases is inconsistent both with principle and with authority, and I accordingly reject it.

Issue (4): when does a duty to investigate arise in handover cases?

187. Having answered "no" to (2), issue (3) is not applicable and I proceed to issue (4) which asks whether there are any circumstances in which an investigative duty arises in handover cases. It seems to me that there are two bases on which, in principle, a violation of article 3 could occur in a handover case which there would be a duty to investigate.

Perpetrating mistreatment

188. It is possible, first of all, to envisage a situation in which an individual is handed over by a contracting state to agents of another state who torture or mistreat the detainee under the direction or at the instigation of the contracting state. Under general principles of criminal and civil liability, someone who instructs or procures another person to commit an act of torture or other prohibited act is in principle responsible for its commission in the same way as the person who physically carries it out. Furthermore, in such a situation it could be said that the contracting state was exercising physical power and control over the victim of ill-treatment such that the victim remained within the state's jurisdiction for the purpose of article 1. It therefore seems to me that in such circumstances the same duty of investigation would arise as in any other case where there is an arguable claim that an individual has been subjected to ill-treatment by agents of the state within its jurisdiction.

Aiding or assisting mistreatment

189. A second possible situation is one in which it cannot be said that the contracting state which handed over the detainee continues to exercise control over the detainee after the handover has taken place but there is nevertheless a sufficient level of involvement in torture or other serious mistreatment to which the detainee is subsequently subjected to amount to complicity in such treatment on the part of the contracting state.

190. It does not seem to me that any distinction can legitimately be drawn in relation to the duty to investigate between acts of torture or other serious ill-treatment and acts which constitute complicity in such treatment. Both have the same grave nature and the need to expose the facts and to identify and punish those responsible is the same in each case. If in any handover case, therefore, there is an arguable claim that the state which transferred the detainee is responsible for violating article 3 through complicity in torture or other serious mistreatment inflicted by agents of the receiving state, it seems to me that an investigative duty would arise.

191. The need to ensure that those who are complicit in torture are held criminally responsible is reflected in article 4 of UNCAT, which states:

> "1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an

attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

192. The question then arises of what amounts to "complicity" for these purposes. A natural place to look for a principle on which responsibility may be based is article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001 (the "ILC Draft Articles"). This provides:

> "Aid or assistance in the commission of an internationally wrongful act.
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State."

193. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), judgment of 26 February 2007, the International Court of Justice referred to article 16 of the ILC Draft Articles when discussing what constituted complicity in genocide, and affirmed its status as customary international law.

194. In principle it seems to me that transferring a person into the custody of another state, if done with knowledge of the relevant circumstances, could amount to assistance giving rise to responsibility in accordance with article 16 for complicity in acts of torture or other serious mistreatment by the receiving state.

195. An argument might be made that article 16 of ILC Draft Articles is only applicable if the receiving state is also a party to the European Convention on Human Rights so that the act committed by the receiving state is itself a violation of article 3 of the Convention. However, I think that such an approach would be unduly narrow. The relevant focus is on the conduct of the transferring state and on identifying when that state may be held to have violated article 3. It cannot matter for this purpose whether or not the receiving state which perpetrates the treatment is also a member of the Council of Europe and has undertaken an international obligation to respect article 3. The wrongfulness of assisting in torture is the same irrespective of whether the party which actually inflicts the torture is subject to the same legal regime. Complicity need not involve joint liability.

196. An alternative approach to relying on article 16 of ILC Draft Articles, which avoids any problem about whether as a matter of construction article 16 applies, would be to

fashion a similar principle of responsibility for complicity in torture or other prohibited treatment by interpretation of article 3 of the Convention itself.

197. Where difficult questions seem to me to arise is in relation to the requirement of knowledge. What constitutes sufficient "knowledge of the circumstances" of the wrongful act? In particular, in a handover case what degree of certainty or imminence of mistreatment must the transferring state perceive at the time of handover in order to render the transferring state responsible not just for exposing the individual concerned to a risk of mistreatment (i.e. a breach of the non-refoulement obligation) but for complicity in the mistreatment itself? Another important question is whose knowledge counts as that of the state for this purpose. Must it be that of a person who is responsible for the decision to hand over the individual concerned or can the knowledge of other state agents be relevant?

198. Although article 16 of ILC Draft Articles was referred to, none of these questions was explored in argument, and I do not think it would be right for me to express any views about the answers to them in circumstances where – as I will shortly indicate – they do not arise on the assumed facts of the test cases chosen for the purpose of this issue.

Content of any investigative obligation

199. As for the content of any such investigative obligation which arises in a handover case, its essential aims must be – as in other cases of alleged violations of article 3 requiring an investigation – to find out the true facts and identify those responsible for any criminal conduct. The obligation is therefore to conduct an investigation which is effective in the sense of being designed to achieve these aims as well as being independent.

Test cases

200. There are two test cases. The first case (PIL 11) concerns a claimant, Ali Lafteh Eedan, who was arrested twice by British forces – first, on 9 May 2003, and then again on 11 August 2008. He claims that following his first arrest he was taken by British soldiers to Camp Bucca, where he was detained for 45 days. According to the case narrative, the claimant was ill-treated at Camp Bucca, which throughout his time there was administered by the US army. The second arrest followed a raid on his home by UK and US forces. He claims that he was badly beaten by the soldiers and was then taken to a British operating base at Basra Airport. From there he was flown to a US base, Camp Cropper in Baghdad, where he was detained for 10 days before being released. He alleges that at Camp Cropper he was subjected to serious ill-treatment.

201. The second case (PIL 168) is that of another claimant, Ahmed Abdul-Sadeh, who was arrested in a raid by US and UK armed forces in August 2008. He also claims to have been badly assaulted and abused at the time of his arrest. He was also taken to the British operating base in Basra before being transported to US custody at Camp Cropper where he allegedly suffered serious ill-treatment.

202. In each of these cases allegations are made of ill-treatment by British forces at the time of arrest which may require investigation under article 3. The fact, however, that the claimant was in each case handed over to US forces and allegedly then suffered

serious ill-treatment while in US custody is not itself a complaint requiring an investigation under article 3. As discussed, to trigger a duty to carry out such an investigation would in my view require an arguable claim that British forces were complicit in the ill-treatment allegedly perpetrated by US forces. There are no facts alleged in the test case narratives which meet that threshold.

V. ARTICLE 5 - DETENTION

203. Issues (5) to (7) raise the question whether, and if so when, there is a duty to investigate alleged violations of article 5. The specific issues are as follows:

> "(5) Does an investigative obligation arise in respect of all cases of detention which are arguably in violation of article 5 ECHR?
>
> (6) If the answer to (5) is yes, what is the content of that investigative obligation?
>
> (7) If the answer to (5) is no, are there other circumstances in which an investigative duty arises in cases involving arbitrary detention in violation of article 5 and if so, what are the features necessary to trigger that investigative duty? What would the content of any such investigative obligation be?"

Six test cases have been selected for the purpose of these issues.

Issue (5): the claimants' primary case

204. The claimants' primary case, as reflected in the terms of issue (5), is that there is a duty to investigate all cases of detention which are arguably in violation of article 5 of the Convention. The claimants submit that the necessity of an investigation lies in the fundamental importance of the right protected, in this case the prohibition of arbitrary detention, and the state's duty under article 1 to secure this protection to everyone within its jurisdiction. The claimants further argue that the European Court of Human Rights has recognised an investigative obligation, where relied on, in unlawful detention cases, for the same reasons and applying the same test ("arguable claim") as in article 3 cases.

205. Looking at the question as one of principle, I can see no need or justification for interpreting article 5, either alone or when read with article 1, as imposing on a contracting state a duty to investigate every arguable claim that a person has been detained in violation of article 5. As discussed in the previous part of this judgment, the primary purposes of an investigation, where it is required in relation to possible violations of articles 2 and 3, are to bring to light serious wrongdoing and ensure that those guilty of criminal conduct are identified and punished. In most cases where an allegation is made of detention which is arguably in violation of article 5, there is no secret or dispute about the fact of the individual's detention and by whom, where and for how long he or she has been detained. The issue is whether the detention is or was lawful. If the individual is still being detained at the time when this issue is raised, article 5(4) provides a right "to take proceedings by which the lawfulness of his

detention shall be decided speedily by a court and his release ordered if the detention is not lawful". If the issue is raised after the person's release, article 5(5) provides that "[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation." These rights provide remedies in relation to arguable breaches of article 5 which are established by the terms of article 5 itself and which in ordinary circumstances may be taken to be sufficient. Nor does a finding that a person has been detained unlawfully by the state generally imply that any state official responsible for the detention is or may be guilty of a crime. It cannot therefore be said that an investigation is needed in order to ensure that the individuals responsible are punished.

206. I will return later to the El-Masri case on which the claimants rely in relation to article 5 as well as article 3. I will say now, however, that it does not support the proposition that there is a duty on the state to hold an investigation whenever an arguable claim is made that the detention of an individual violated article 5. Nor is there any domestic authority or any other decision of the European Court which provides any support for that contention.

207. I accordingly give the answer "no" to the question raised by issue (5). Issue (6) therefore does not arise and I proceed to issue (7), which asks whether there are particular circumstances in which an investigative duty arises in article 5 cases.

Enforced disappearance

208. The Secretary of State accepts that there is a category of case involving arbitrary detention in violation of article 5 where a duty to investigate arises. These are cases where there is an arguable claim that a person within the jurisdiction of the contracting state has been the subject of "enforced disappearance".

International law

209. Enforced disappearance is a concept recognised in international law and is a practice which is internationally condemned. It involves detention outside the protection of the law where there is a refusal by the state to acknowledge the detention or disclose the fate of the person who has been detained. Its cruelty and vice lie in the facts that the disappeared person is completely isolated from the outside world and at the mercy of their captors and that the person's family is denied knowledge of what has happened to them.

210. The phenomenon of enforced disappearance came to international attention as a result of its widespread practice by dictatorships in South and Central America during the 1970s. The first significant step taken by the United Nations towards protection against enforced disappearance was the creation in 1980 of a special working group on the subject. In 1992 the UN General Assembly adopted the (non-binding) UN Declaration on the Protection of All Persons from Enforced Disappearance. This stated:

> "The systematic practice of disappearance is of the nature of a crime against humanity and constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to

> torture: it also violates or constitutes a grave threat to the right to life."

211. On 3 October 2005 the Parliamentary Assembly of the Council of Europe adopted Resolution 1463 on enforced disappearances, which stated:

> "1. 'Enforced disappearances' entail a deprivation of liberty, refusal to acknowledge the deprivation of liberty or concealment of the fate and the whereabouts of the disappeared person and the placing of the person outside the protection of the law.
>
> 2. The Parliamentary Assembly unequivocally condemns enforced disappearance as a very serious human rights violation on a par with torture and murder, and it is concerned that this humanitarian scourge has not yet been eradicated, even in Europe."

212. On 20 December 2006 the United Nations adopted a binding instrument, the International Convention for the Protection of All Persons from Enforced Disappearance (the CED). The CED entered into force on 23 December 2010 and has so far been signed by 94 states, 44 of which have acceded to or ratified the Convention. Those states include many members of the Council of Europe, although they do not yet include the UK.

213. Article 2 of the CED defines "enforced disappearance" as follows:

> "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

There is a question as to whether the fourth element of this definition – that is, placing the person outside the protection of the law – is simply a consequence of the other elements or an additional requirement. The drafting committee could not reach agreement on this point and left the wording in a state of "constructive ambiguity" which state parties to the CED may interpret in their own way.[8]

214. Article 12 of the CED provides:

> "1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. …

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[8] See Marthe Lot Vermeulen, '*Enforced Disappearance*' (Intersentia, 2012) p.56.

> 2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint."

In accordance with the principle which I discuss in paragraph 276 below, it is relevant to take into account this duty to investigate enforced disappearance when interpreting the Convention.

215. In addition, the CED requires each state party to take the necessary measures: (i) to ensure that enforced disappearance constitutes an offence under its criminal law (article 4); (ii) to hold criminally responsible "any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance" and a "superior" of such a person (article 6); and (iii) to make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness (article 7). The fact that enforced disappearance is a serious criminal matter for which individuals involved in its commission should be held criminally responsible supports the need for an investigation where reasonable grounds for suspecting that a person has been subjected to enforced disappearance exist.

Convention case law

216. The European Court of Human Rights has consistently held that article 5 requires state authorities to investigate an arguable claim of enforced disappearance.

217. In Kurt v Turkey (1999) 27 EHRR 373 the applicant was the mother of a young Kurdish man who claimed that she had last seen her son at a house in their village surrounded by Turkish soldiers and village guards on a date some 4½ years before the judgment of the European Court was given. She had never seen or heard from her son since. The Turkish government denied that the applicant's son had been detained by agents of the Turkish state and suggested that he had either been kidnapped by the Kurdish Workers' Party (PKK) or had left the village to join the PKK.

218. The Court saw no reason to question findings of fact made by the Commission (i) that the applicant had last seen her son in the circumstances that she claimed, (ii) that there was no credible basis for the suggestion of PKK involvement and (iii) that he had indeed been detained by the Turkish authorities. The Court held that article 2 was not engaged because there was no concrete evidence that the applicant's son was dead. The Court found, however, that there was a "particularly grave" violation of article 5 (para 129). After referring (in paras 122-123 of the judgment) to the guarantees contained in article 5 and emphasising in particular the importance of prompt judicial intervention as required by article 5(3) and (4), the Court said (at para 124) that:

> "the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, article 5 must be seen as requiring the authorities to take effective measures to safeguard

> against the risk of disappearance and to conduct prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."

219. The Court also said (at para 125) that:

> "[the applicant's] detention … was not logged and there exists no official trace of their subsequent whereabouts or fate. This fact in itself must be considered a most serious failing since it enables those responsible for the act of deprivation of liberty to conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee. In the view of the Court, the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of article 5 of the Convention."

220. In addition, the Court held that an investigation was required pursuant to article 13. At para 140 of the judgment the Court concluded that:

> "where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purpose of article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. Seen in these terms, the requirements of article 13 are broader than a Contracting State's obligation under article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible."

221. These principles first articulated in the case of Kurt have been repeated and followed in a series of later cases.

222. For example, in Cyprus v Turkey (2002) 35 EHRR 30 the Court sitting as a Grand Chamber considered an application by the Republic of Cyprus arising out of the Turkish military invasion of Northern Cyprus in 1974. The application included a claim by the Republic of Cyprus that some 1491 Greek Cypriots were still missing, 20 years after the invasion. It was alleged that these people had last been seen alive in Turkish custody and that the Turkish state had failed ever to account for their fates. Turkey asserted in response that there was no evidence that any of the missing people were either still alive or being kept in custody.

223. The Grand Chamber (basing its judgment on the assessment of the facts by the Commission) concluded that there was no concrete evidence to prove that any of the missing persons had been unlawfully killed, but that the circumstances of their disappearance gave rise to an arguable claim that Turkey had violated article 2 and there had been a continuing violation of the procedural obligation to conduct an

effective investigation into their fate. Similarly, the Court found no substantive violation of article 5 since there was no concrete evidence that the missing persons had ever been in Turkish custody. However, citing Kurt, the Court found (at para 150) that:

> "… there has been a continuing violation of article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared."

224. Similar violations of article 5 by reason of the failure to conduct an effective investigation have been found in many other cases involving allegations of enforced disappearance: see Çakici v Turkey (2001) 31 EHRR 133; Timurtaş v Turkey (2001) 33 EHRR 6; Taş v. Turkey (2001) 33 EHRR 15; Çiçek v Turkey (2003) 37 EHRR 20; Bazorkina v Russia [2006] ECHR 751; Luluyev v Russia [2006] ECHR 967; Varnava v Turkey [2009] ECHR 1313; Er v Turkey (2013) 56 EHRR 13. In most of these cases the Court also held that the failure of the state concerned to carry out an effective investigation into the disappearance involved a violation of article 13.

225. I take the key principle established by these disappearance cases to be this. Where there is an arguable claim that a person has been taken into state custody and has not been seen since, there is a duty on the state under article 5 to investigate what has happened to that person: see Kurt v Turkey, para 128; Çakici v Turkey, para 104; Timurtaş v Turkey, para 103; Taş v. Turkey, para 84; Cyprus v Turkey, para 147; Çiçek v Turkey, para 164; Bazorkina v Russia, para 146; Luluyev v Russia, para 122; Varnava v Turkey, para 208; Er v Turkey, para 103. The cases also support the proposition that, in such a case, there is a duty of investigation with the wider purpose of leading to the identification and punishment of those responsible for the disappearance – albeit that the source of this duty has been located in article 13 rather than in article 5 itself (whether alone or read in conjunction with article 1): see Kurt v Turkey, para 140; Çakici v Turkey, para 113; Timurtaş v Turkey, para 111; Taş v. Turkey, para 91; Çiçek v Turkey, para 178; Er v Turkey, para 111.

Other cases

226. The Secretary of State contends that, except in cases of enforced disappearance, there is no duty under the Convention to investigate allegations that a person's detention violated article 5. As positive support for this contention, Mr Eadie QC relied on Gisayev v Russia [2011] ECHR 76. That case concerned the abduction, torture, and unlawful detention of a Russian citizen of Chechen origin for fifteen days by agents of the Russian Federation. During this time the applicant was held in three different locations, none of which was an official place of detention. The Russian government subsequently denied any knowledge of or responsibility for the applicant's detention. The Court concluded that during the relevant period "the applicant was held in unacknowledged detention in complete disregard of the safeguards enshrined in article 5, and that this constitutes a particularly grave violation of his right to liberty and security under article 5" (para 153). There was, however, no suggestion that article 5 imposed a duty to investigate the applicant's detention, although the Court

found that there was an obligation to conduct an effective official investigation into his allegations of ill-treatment under article 3.

227. It does not appear to have been argued in the Gisayev case that an investigative duty arose under article 5. The applicant did, however, contend that the failure to conduct an effective investigation into his complaints under article 5, as well as his complaints under article 3, was a violation of his right to an effective remedy guaranteed by article 13. The Court found that there had been a violation of article 13 in connection with article 3 but not in connection with article 5. As regards the latter, the Court referred to its "established case-law" according to which "the more specific guarantees of article 5(4) and (5), being a *lex specialis* in relation to article 13, absorb its requirements" and said that, in circumstances where a substantive violation of article 5 had been found, "no separate issue arises in respect of article 13, read in conjunction with article 5" (para 161).

228. The citation given for the reference to "established case-law" was to an earlier decision of Court, also given by its First Section, in Medova v Russia [2009] ECHR 70. In that case the applicant's husband had been abducted by armed men. He was never found and was presumed dead. The Court did not find it proved that the armed kidnappers were themselves state agents but found that on the facts there was a breach of the state's positive obligation under article 5 to protect his liberty. The Court concluded that there had been a breach of the investigative duty under article 2 but found no separate violation of article 13 read in conjunction with article 5, for the same reasons as were repeated in the Gisayev case (see para 133 of the judgment). The First Section of the Court also applied the same reasoning for finding no separate violation of article 13 in Chitayev & Chitayev v Russia, Application No 59334/00, judgment 18 January 2007.

229. I cannot reconcile the reasoning of the First Section of the Court in these cases with the decision in Kurt, followed in some of the other cases mentioned earlier, that article 13 requires a "thorough and effective" investigation into the disappearance of a person under the control of the state which is capable of leading to the identification and punishment of those responsible. Nor do I see how in such a case where criminal conduct by state agents is potentially involved and the state is denying that the person who disappeared was ever detained, it can be said that the specific guarantees of article 5(4) and (5) "absorb the requirements" of article 13 for an effective remedy. The right to *habeas corpus* under article 5(4) is clearly ineffective when the detained person is deprived of all contact with the outside world and the very fact of their detention is concealed or denied. Nor is the victim's right to compensation for unlawful detention under article 5(5) likely to be effective let alone a sufficient remedy without a meaningful investigation into the truth of what happened and the crimes that may have been committed.

230. The point can nevertheless be made, and was indeed made cogently by Mr Eadie QC, that – with the exception of the El-Masri case which I will soon consider – the only cases in which the European Court of Human Rights has held there is a duty under any provision of the Convention to investigate an alleged breach of article 5 are all cases of enforced disappearance where the person concerned was taken into custody and never seen again.

The claimants' alternative case

231. The claimants contend that the circumstances in which a duty to investigate an alleged violation of article 5 arises are not limited to cases of enforced disappearance. The alternative case advanced by Mr Fordham QC – in the event that the court should answer "no" to issue (5), as I have done – is that an investigative duty arises in all cases where detention takes place beyond the reach of the courts, even if such detention is not secret or unacknowledged. What marks out this category of case, he submitted, is that the detainee has been denied the essential safeguards guaranteed by article 5, in particular judicial scrutiny of the detention and the right of *habeas corpus* under article 5(4). The denial of those safeguards, Mr Fordham argued, constitutes a "grave violation" of a person's right to liberty which warrants an official investigation.

232. The authority on which Mr Fordham principally relied in support of this argument is the case of El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25, which I have discussed earlier in the context of article 3. There were also findings in that case, which I will consider now, of breaches of article 5.

The El-Masri case

233. I have already summarised (at paragraphs 174-175 above), and do not repeat, the facts of the El-Masri case. In relation to the period of 23 days during which Mr El-Masri was detained by Macedonian agents at a hotel in Skopje, the Court noted (at para 236) that:

    i) His detention was not authorised by a court, as required under domestic law, nor were any records kept of his detention (or, if kept, they were not produced).

    ii) Mr El-Masri was held incommunicado, not only without access to a lawyer, but without being allowed to contact his family or a representative of the German embassy; he was therefore deprived of any possibility of challenging the lawfulness of his detention and was left completely at the mercy of those holding him.

    iii) The hotel in which he was confined was an extraordinary place of detention outside any judicial framework, and "such a highly unusual location adds to the arbitrariness of the deprivation of liberty".

234. On these facts and given the absence of any attempt by the Macedonian government to explain or justify the detention, the Court concluded that "the applicant was held in unacknowledged detention in complete disregard of the safeguards enshrined in article 5, and that this constitutes a particularly grave violation of his right to liberty" (para 237).

235. In relation to the period when Mr El-Masri was detained in Afghanistan by the CIA, the Court considered that it should have been clear to the Macedonian authorities that, when handed over into the custody of the US authorities, Mr El-Masri "faced a real risk of a flagrant violation of his rights under article 5". In these circumstances the Court found that the Macedonian authorities "not only failed to comply with their

positive obligation to protect the applicant from being detained in contravention of article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer" (para 239).

236. Overall, the Court concluded that Mr El-Masri's abduction and detention amounted to "enforced disappearance" as defined in international law, and that in circumstances where the conditions of such "enforced disappearance", although temporary, extended over the entire period of his captivity, the Macedonian government was responsible for violating his rights under article 5 during that entire period (para 240).

237. Importantly for present purposes, the Court also found that Macedonia had violated article 5 "in its procedural aspect" by failing to conduct any meaningful investigation into "the applicant's credible allegations that he was detained arbitrarily" (paras 242-243). The only justification given for treating article 5 as involving a duty to conduct an investigation was the following statement (at para 233 of the judgment):

> "The Court emphasises in this connection that the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, art. 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (see *Kurt v. Turkey).*"

It may be noted that this passage is in almost identical terms to the passage from the judgment in the case of Kurt which I have quoted at paragraph 218 above.

238. There seem to me to be difficulties with this direct application of the reasoning in Kurt, which was concerned with permanent disappearance, to the case of El-Masri. In particular, the El-Masri case was not one of a person who "has been taken into custody and has not been seen since". Thus, part of the rationale at least for investigating a case of enforced disappearance is to find the missing person, or if the person is dead to establish that fact and find out when and how the person died. That rationale was not applicable in Mr El-Masri's case as he was no longer missing when allegations were made that he had been detained arbitrarily which, so the Court held, triggered a duty of investigation. Indeed, it was Mr El-Masri who made the allegations.

239. Nevertheless, even though the parallel is not complete, there plainly were significant similarities between the El-Masri case and earlier cases of enforced disappearance in which the European Court had held that an investigative duty arose. In particular, Mr El-Masri was detained secretly in places which were not official places of detention and were outside any protection of the law. There was no official record of his detention. His detention was never authorised by a court and was not subject to any form of judicial scrutiny or control. He was held incommunicado, not only without access to a lawyer but without any contact with his family or anyone in the outside world. No one was informed of his detention. And it was followed by a refusal of the

state authorities to acknowledge that they had detained Mr El-Masri or what his fate had been while he was missing. The European Court considered that, although temporary, the circumstances of Mr El-Masri's abduction and detention were nevertheless such as to amount to "enforced disappearance" as defined in international law (see para 240 of the judgment). Applying the definitions which I have quoted at paragraphs 211 and 213 above, it is difficult to disagree with that conclusion.

Issue (7): discussion

240. It may be that not all the features present in the El-Masri case are essential in order for an investigative duty to arise under article 5. I cannot, however, accept the claimants' contention that the absence of judicial scrutiny or control is by itself sufficient. I can see no adequate justification for imposing a duty to investigate if the fact that the individual has been detained and the basic facts about their detention – in particular, where, when and on whose authority the individual was detained – have not been concealed or wilfully denied by the state. Allegations about the conditions in which the detainee has been held may raise issues under article 3 but are not the subject matter of article 5. Furthermore, as already indicated, where there has been no concealment of the basic facts about a person's detention, an argument that their detention is or was unlawful is a matter which can most suitably be determined by a court in proceedings to obtain their release and/or compensation for any period of false imprisonment. Unless the potential illegality is such as to involve criminal liability on the part of individuals there is no need or warrant for any separate or additional investigation by the state.

241. As for the content of any such investigative obligation where it arises, the essential requirements must be – as in other situations where an investigative obligation is implied and as confirmed by Kurt and other disappearance cases – that the investigation is independent and effective in the sense of being capable of uncovering the facts and leading to the identification and punishment of individuals who have committed criminal offences.

242. Further than this it does not seem to me sensible or desirable to go in expressing any opinion which is not directed to the particular facts of particular cases. I therefore turn to consider the assumed facts of the six test cases which have been selected for the purpose of these issues.

Application to the test cases

243. Shawkat Mahmoud Ibrahim Al-Nadawi (PIL 1) was a conscript in the Iraqi army who wished to surrender to the British and did so in the first few days of the war in March 2003. He was detained for around three months before being released. Mr Al-Nadawi has made allegations of ill-treatment during his detention which, assuming they are credible, would require investigation. It is apparent from the assumed facts, however, that the International Committee of the Red Cross became involved in monitoring his detention after around two weeks. It is also clear from the case narrative that this was not a case of secret detention or enforced disappearance but of the internment of a prisoner of war.

244. Haidar Abdul Karim Al-Doori (PIL 57) was arrested by British forces on 21 December 2003 on suspicion of hiding weapons and a number of weapons were discovered at his house on arrest. He alleges that on arrival at the British headquarters following his arrest he was kicked and punched. Mr Al-Doori was taken to a British military detention facility where he was imprisoned for six months before being released in June 2004. For the first 28 days he was held in solitary confinement but after that he was held as part of a larger group of detainees and permitted to see his parents who came to visit him. In my view, there is nothing in the assumed facts of this case which would give rise to a duty to conduct an investigation.

245. Hamid Dinar Hussein Alloui Al-Khafaji (PIL 121) was arrested at his home on 21 July 2006 and detained at a British military base on suspicion of being a member of a terrorist organisation. For the first 29 days of his detention he was held in solitary confinement and interrogated on several occasions. Thereafter, he was held in cells with other internees and received visits from his family. On one such visit in April 2007 he swapped places with his brother and walked out of the base. During his detention Mr Al-Khafaji was given documents which explained the reason for his detention and that his status was subject to regular reviews. Again, there is nothing in the assumed facts of this case which in my view triggered a duty to conduct an investigation.

246. Adil Abid-ali Jurayyah (PIL 143) and Hmood Khalil Hmood (PIL 144) were both arrested in the early hours 11 January 2007 and taken to a British facility at Basra airport for questioning. They were released later the same day. These cases are plainly not in the category which give rise to a duty of investigation.

247. Lastly, Shakir Hilal Al-Fahdawi (PIL182) and his son were stopped and arrested by British soldiers in western Iraq on 12 April 2003 (i.e. during the invasion period). They were taken to a facility known to them as "Station 22" where they were interrogated. They allege that during the first three days they were ill-treated. They were released after 22 days. There was no official place of detention called "Station 22" and the Secretary of State has found no record of their detention. I do not consider, however, that the fact that no record of the claimant's detention has been found is sufficient by itself to trigger a duty to investigate the claim that they were unlawfully detained. The facts alleged do not suggest that this was a case which had the characteristics of an enforced disappearance.

248. I conclude that there is no duty under the Convention to investigate any of the violations of article 5 alleged in any of the test cases.

249. I would add that counsel for the claimants in their written submissions set out lengthy general criticisms of the UK detention system in Iraq based on quotations from evidence given in the Basa Mousa inquiry, which considered the detention procedures applicable at the time of his death in September 2003, and other sources. The claimants alleged that there were substantive breaches of article 5 in the detention and review procedures operated at all times.

250. I consider these submissions to be misplaced for two reasons. First, if it had been relevant to consider factual matters of this kind, evidence of them would have been needed. It is, as counsel for the claimants must know, not permissible to make factual allegations in legal submissions without any supporting evidence. No direction for

the service of evidence in relation to these issues was requested by the claimants or made by the court, and none was served. Secondly, however, the allegations were in any event irrelevant to the preliminary issues. The aim of issues (5)-(7) is to decide questions of law about whether or when a duty to investigate arguable violations of article 5 arises in individual cases. A small number of cases have been chosen to test those questions and narratives of the facts which are to be assumed in each of these cases have been agreed. Evidence about whether there actually have been breaches of article 5 in these or any other cases is therefore of no relevance or assistance. For these reasons, I have disregarded this part of the claimants' submissions.

Issue (7A): the effect of IHL

251. There is a further issue (7A) relating to article 5:

> "Is article 5 ECHR modified or displaced by international humanitarian law during an international armed conflict?"

252. At the time when this issue was added to the list of preliminary issues, the Secretary of State was arguing, and the claimants were disputing, that during the invasion and occupation periods when detention by British forces in Iraq was subject to the rules of international humanitarian law (IHL) governing international armed conflicts and belligerent occupation, IHL operated as a *lex specialis* which displaced, or alternatively modified, article 5 of the Convention. The reason for adding issue (7A) was that, if the Secretary of State's primary case that IHL displaced article 5 altogether was correct, there could be no question of the UK having a duty to investigate arguable breaches of article 5 during the invasion and occupation periods because there could be no such breaches. Alternatively, if article 5 was modified by IHL, this could potentially affect the questions of whether or when an investigative duty could arise.

253. Since then, the European Court has decided the case of Hassan v United Kingdom [2014] ECHR 936, to which I have referred earlier. In the light of the judgment of the Grand Chamber in that case, the Secretary of State did not maintain the argument that during an international armed conflict article 5 is displaced by IHL. For their part the claimants accepted that the Grand Chamber has decided that article 5 is modified in relation to detention taking place during an international armed conflict in that its provisions must be interpreted in a manner which takes into account the applicable rules of IHL. In particular, the Court held that the grounds set out in subparagraphs (a) to (f) of article 5(1) on which the deprivation of liberty is permitted should be "accommodated, as far as possible," with the internment of prisoners of war and civilian detainees under the Geneva Conventions.

254. The extent of the modification to article 5 required to take account of IHL and what it involves in practice remain in dispute between the parties. That question may need to be addressed on a later occasion. For present purposes it is sufficient to note that interpreting article 5 in the light of IHL potentially has significant implications for the claimants' allegations that detentions during the invasion and occupation periods involved breaches of article 5(1), (3) and (4). On the basis of the judgment in Hassan, if the detention of an individual was permissible under IHL, it was not necessary that it should fall within any of the specific cases listed in article 5(1); and article 5(3) is therefore also not applicable: see Hassan v United Kingdom [2014] ECHR 936, paras

103-106. The Court also recognised (at para 106) that it might not be practicable in the course of an international armed conflict for the legality of detention to be determined by an independent "court" in the sense generally required by article 5(4) and that the periodical review of detention by a "competent body" in accordance with articles 43 and 78 of the Fourth Geneva Convention may be sufficient, provided the "competent body" is impartial and follows a fair procedure and provided the first review takes place shortly after the person is taken into detention, with subsequent reviews at frequent intervals.

255. The modification of article 5 in these ways undermines the claimants' contention that the absence of judicial control over detention involves a flagrant breach of article 5. It accordingly provides, in relation to the invasion and occupation periods, an additional reason why such circumstances are not sufficient to trigger a duty to hold an investigation.

VI. UNCAT

256. Issues (8) and (9) are as follows:

> "(8) Does UNCAT and/or customary international law (CIL) give rise to domestically enforceable legal rights?
>
> (9) If the answer to (8) is yes,
>
> (a) When do those rights arise i.e. is there any limitation on the scope of those rights?
>
> (b) Do those rights make a difference to the scope of an investigative obligation arising under the ECHR; and if so in what respect?
>
> (i) If so, what is the content of that investigative obligation?
>
> (ii) Does the scope of any investigative obligation go beyond the scope of any investigative obligation which would arise under article 3 ECHR; and if so, in what respects?"

The reference in issue (8) to "UNCAT" is to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984.

257. These issues have been formulated in sweepingly wide terms. In addressing them, I think it essential to focus firmly on their practical significance for the public law claims. As Mr Fordham QC had explained at an earlier directions hearing, there were two reasons for asking the court to decide issues about the effect of UNCAT. First, the claimants were seeking to rely on UNCAT as an alternative source of a duty to investigate allegations of torture or other inhuman or degrading treatment perpetrated by British forces in Iraq in any case to which the Convention does not apply. As it is, in all five test cases chosen to illustrate these issues the alleged mistreatment occurred when the claimant was in the custody of British forces, and the Secretary of State now

accepts that in such cases the claimant was within the UK's jurisdiction for the purpose of article 1 of the Convention. The Secretary of State also accepts that, where in such a case there is an arguable breach of article 3, an investigative duty arises. There is therefore no need for the claimants to rely on UNCAT to establish the existence of such a duty.

258. The claimants' second reason for raising these issues is to establish that any investigation of alleged ill-treatment by British forces in Iraq should include an inquiry into whether the UK complied with articles 10 and 11 of UNCAT. I quote those provisions below. The claimants seek to support this contention by arguing that UNCAT gives rise to rights and obligations which are enforceable by private individuals against the state in English domestic law.

Relevant provisions of UNCAT

259. UNCAT came into force on 26 June 1987. It was ratified by the UK on 8 December 1988. The treaty currently has 156 State Parties.

260. Article 1 of UNCAT contains a definition of torture. Article 2 provides:

> "1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
>
> 3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

261. Articles 10 and 11 on which, as mentioned, the claimants specifically rely are in the following terms:

> "Article 10
>
> 1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
>
> 2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.
>
> Article 11
>
> Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons

> subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture."

262. The claimants also rely on the duty to investigate imposed by article 12 of UNCAT. This states:

> "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."

In addition, article 13 requires each State Party to ensure that "any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities". Pursuant to article 16, the obligations contained in articles 10, 11, 12 and 13 apply not only to torture but also to other forms of cruel, inhuman or degrading treatment or punishment.

Territorial scope of UNCAT

263. There is a question as to the territorial scope of UNCAT which turns on what is meant by the words "in any territory under its jurisdiction" used in (among other provisions) articles 2, 11, 12 and 13. The Secretary of State takes a narrow view of this phrase and does not accept that it applies to any part of Iraq at any time when British forces were present in Iraq. It is therefore his position that UNCAT did not require the UK to take any measures to prevent acts of torture (or other forms of cruel, inhuman or degrading treatment) by its soldiers in Iraq.

264. A wider interpretation of the territorial scope of the Convention is taken by the CAT Committee, established under article 16 of UNCAT. In its General Comment No 2 (2008), at para 16, the CAT Committee has stated that the phrase "any territory under its jurisdiction" includes "all areas where the State exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control in accordance with international law". Thus, in the view of the Committee:

> "The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only onboard a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities or other areas over which a state exercises factual or effective control."

265. For present purposes I will assume, without deciding, that the interpretation of the CAT Committee is correct and that the UK's relevant obligations under UNCAT were therefore applicable throughout the period of UK operations in Iraq in places where people captured or arrested by British forces were detained.

266. The claimants' contention, reflected in issue (8), is that UNCAT gives rights to individuals which are directly enforceable in English law, either as a result of the

ratification of the treaty by the UK or because its provisions have the status of customary international law (CIL). For the reasons I am about to state, I do not consider that either basis of the claimants' case is tenable nor that, even if it were, it would in any event lead to their desired conclusion as to the content of any duty to investigate allegations of mistreatment.

Status of treaties in domestic law

267. It is a basic principle of British constitutional law that a treaty to which the UK is a party does not become part of domestic law unless and until it has been incorporated into the law by legislation: see JH Rayner v Department of Trade and Industry [1990] 2 AC 418, 476-477, 500; R v Lyons [2003] 1 AC 976, paras 27, 39-40. Were it otherwise, there would, for example, have been no need for Parliament to enact the Human Rights Act in order to make the Convention part of English law. The rationale underlying the principle lies in the doctrine of the separation of powers. In a Parliamentary democracy, Parliament and not the executive makes laws. If treaties entered into by the executive were to be recognised by the courts as part of English law without the need for legislation, that would effectively empower the executive to make law without the approval of Parliament.

268. This is not to say that treaty obligations are never relevant in determining what rights and obligations exist in English domestic law. Where the meaning of a statute is unclear, there is a presumption that Parliament did not intend to legislate in a manner inconsistent with international obligations of the UK: see e.g. R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696, 747-748, 760. Likewise, in interpreting and developing the common law, the courts may have regard to international obligations of the UK including in the field of human rights: see e.g. A v Secretary of State for the Home Department (No 2) [2006] 2 AC 221, para 27; Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 283; R v Lyons [2003] 1 AC 976, para 27. A provision of domestic law may also make the existence of a domestic right dependent on whether the UK has a particular international obligation. For example, in Al-Jedda v Secretary of State for Defence [2008] 1 AC 332, in order to establish whether the claimant's internment was unlawful under the Human Rights Act, it was necessary for the courts to determine the extent of the UK's international obligations under UN Security Council Resolution 1546 and article 103 of the UN Charter: see Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB), para 210. In none of these situations, however, do the courts give direct legal effect to a treaty obligation.

269. The claimants founded their argument on the principle of legality, which they submitted "supplies the answer" to issue (8). By virtue of that principle, the claimants contended, UK public authorities owe a duty in domestic public law not to override fundamental rights, including those contained in international human rights treaties such as UNCAT, absent clear authority to do so in primary legislation. However, this contention in my view mischaracterises the principle of legality, which is a principle of statutory interpretation, not a broad principle as to how the courts should develop the common law. The principle of legality requires general words in legislation to be construed compatibly with fundamental human rights on the basis that Parliament cannot have intended, by using general words, to override such rights: see e.g. R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 131; AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868, para 152. As

observed by Lord Phillips in Ahmed v Her Majesty's Treasury [2010] 2 AC 534, at paras 111-112, the principle is a weaker form of the rule of interpretation enacted in section 3 of the Human Rights Act. Thus, the principle of legality only operates, first of all, where there already exists domestic legislation which the court is required to construe; and secondly, it is premised on the rights in question already being part of domestic law. The principle of legality does not, therefore, provide any support for the claimants' proposition that the UK's international human rights obligations are domestically enforceable.

Customary International Law

270. The alternative way in which the claimants put their case is on the basis that the relevant provisions of UNCAT have the status of customary international law (CIL) and that CIL forms part of English domestic law. However, neither of these propositions is made out. Notwithstanding observations of Lord Denning in Trendtex Trading Corp v Central Bank of Nigeria [1977] QB 529, 554, which are often cited, the general view is as stated in *Brownlie's Principles of International Law* (8th Edn, 2012) p.68:

> "The position in England is not that custom forms *part* of the common law (how can foreign states of whatever legal tradition make the common law?), but that it is a *source* of English law that the courts may draw upon as required."

See also R v Jones (Margaret) [2007] 1 AC 136, 155, para 11. Trendtex is best understood as a case which established a particular common law rule which made English law coextensive with CIL in the field of state immunity.

271. In any event, to show that a rule has the status of CIL requires evidence that it represents the general practice of states and is recognised as having the force of law. The materials referred to by the claimants indicate that there is a duty to investigate war crimes and prosecute the suspects which is recognised as a norm of CIL,[9] and I do not doubt that this applies to allegations of torture. However the materials relied on do not appear to me to demonstrate a general state practice accepted as law that all credible allegations of inhuman or degrading treatment by state officials must be investigated. Furthermore, the claimants have not attempted to show that the obligations imposed by articles 10 and 11 of UNCAT have achieved the status of CIL.

272. In Keyu v Secretary of State for Foreign & Commonwealth Affairs [2015] QB 57, [2014] EWCA Civ 312, it was argued that the British government had a duty to investigate an incident in which civilians were allegedly killed by British soldiers in Malaya in 1948. One of the arguments made was that a duty at common law to investigate the deaths arose pursuant to CIL. In support of this argument the claimants in Keyu relied on what the Court of Appeal described as "a kite flown by Lord Steyn" in In re McKerr [2004] 1 WLR 807, when he said (at para 52): "At a late stage of the appeal … I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law." This thought was not pursued in In re McKerr itself, where the House of Lords held that

[9] See e.g. Geneva Convention III, art 130; Geneva Convention IV, art 147; and the International Committee of the Red Cross, *Customary International Humanitarian Law*, rule 158.

the imposition of a duty at common law to investigate deaths would be inconsistent with the statutory framework regulating this area. That framework comprises both statutory provisions for the holding of coroners' inquests and also the Human Rights Act, which introduced an investigative duty to the extent required by the Convention from the date when the Act came into force: see [2004] 1 WLR 807, para 32, per Lord Nicholls. Following this approach, the Court of Appeal in Keyu rejected the argument that there was any role for CIL to play on the ground that the Human Rights Act has set the parameters within which a right to an investigation can be claimed and has left no scope for the imposition at common law of a wider duty to investigate by reference to CIL: see [2015] QB 57, paras 101-106.

273. Applying the reasoning of these decisions, which is binding on this court, the very fact that a duty to investigate allegations of torture and inhuman or degrading treatment contrary to article 3 of the Convention forms part of English domestic law pursuant to the Human Rights Act precludes the development of a parallel but non-identical duty in this area derived from CIL.

Scope of article 12 of UNCAT

274. I think it unnecessary to explore these questions further because, even if it were the case that UNCAT gave rise to domestically enforceable rights, I see nothing to suggest that article 12 of UNCAT imposes a broader duty of investigation on a state party than article 3 of the Convention. Quite apart from the question mentioned earlier of its territorial scope, the trigger for an investigation under article 12 ("reasonable ground to believe that an act of torture has been committed") would appear, if anything, to set a higher threshold than is required under article 3 of the Convention, where a "credible assertion" or "arguable claim" is sufficient. Moreover, there is nothing in the wording of article 12 (or any other provision of UNCAT) which requires an investigation carried out under article 12 of UNCAT to examine whether there has been a failure to comply with article 10 or article 11. Nor do any of the comments and reports of the CAT Committee cited by the claimants support such a proposition. Nor have the claimants cited any authority or commentary which suggests that such matters must be examined in an article 12 investigation.

275. Therefore, even if an affirmative answer was given to issue (8), I cannot see that this would assist the claimants to establish their case that there is a right to an investigation derived from UNCAT, either directly or via CIL, which is broader in scope than that which arises under article 3 of the Convention and in particular which supports the conclusion that any investigation of alleged ill-treatment by British forces in Iraq should include an inquiry into whether the UK complied with articles 10 and 11 of UNCAT.

Reference to UNCAT in interpreting article 3

276. The claimants do not in fact need to succeed in their ambitious claim that UNCAT gives rise to enforceable rights in domestic law in order to argue for the relevance of UNCAT. In accordance with article 31(3)(c) of the Vienna Convention, it is relevant in interpreting the Convention, as an international treaty, to take into account other applicable rules of international law. The guiding principle was stated by the European Court of Human Rights in Al-Adsani v UK (2002) 34 EHRR 11, para 55:

> "The Convention ... cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part."

In accordance with this principle the European Court has drawn on UNCAT in interpreting article 3 – including in the Soering case where, as mentioned earlier, the Court took account of the non-refoulement obligation in article 3 of UNCAT in implying a similar obligation in article 3 of the Convention. In the same way in Aksoy v Turkey (1996) 23 EHRR 553, para 98, the Court took into account article 12 of UNCAT in holding that there is a duty on the state to carry out a thorough and effective investigation of allegations of torture.

277. Relying on UNCAT in this way, however, again runs into the same fundamental problem for the case about the scope of the investigative duty which the claimants wish to make. That problem is that there is nothing in the text of UNCAT which requires an investigation carried out under article 12 to examine whether there has been compliance with article 10 or 11. Nor have the claimants cited any authority which suggests that there is such a requirement. Nor can I see any reason in principle why such a requirement should be implied.

278. It does not follow that those provisions have no relevance when an investigation is carried out. Where there is a duty to investigate an allegation of torture or other serious ill-treatment under article 3 of the Convention, the duty can only be discharged by an investigation which is thorough and effective. In R (Ali Zaki Mousa) v Secretary of State for Defence [2013] EWHC 1412 (Admin); [2013] HRLR 32, at para 148, the Divisional Court described as follows the scope of the article 2 investigative duty of the state in the case of deaths in custody:

> "In our judgment, the article 2 investigative duty of the State in the case of deaths in custody is only discharged by a full, fair and fearless investigation accessible to the victim's families and to the public into each death, which must look into and consider the immediate and surrounding circumstances in which each of the deaths occurred. These circumstances will ordinarily include the instructions, training and supervision given to soldiers involved in the interrogation of those who died in custody in the aftermath of the invasion. It should also identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures."

In my view, similar principles must apply to the investigation of allegations of serious ill-treatment.

279. When in such an investigation consideration is given to the instructions and other arrangements for the custody and treatment of people detained by British forces and to the training received by those involved in the custody, interrogation or treatment of

such individuals, the obligations of the UK under articles 10 and 11 of UNCAT will form a relevant part of the background. The investigator may think it right to examine what steps were taken to comply with those international obligations. Whether that is so, however, must depend upon the circumstances of the particular case, including the nature, extent and context of any ill-treatment which may be found to have occurred. Moreover, whether or to what extent it is appropriate to examine such matters will be a matter of judgment which the investigator is best placed to decide. I do not think it would be right for the court to prescribe in general terms any further than it has already done in the Ali Zaki Mousa case the necessary scope of any investigation.

280. Five test cases have been selected for the purpose of these issues. In the way the issues have been argued, however, I do not think that anything is gained by considering the assumed facts of these cases.

VII. ARGUABLE BREACH

281. The final preliminary issue is as follows:

> "(10) Can an investigative obligation under articles 2 (or 3) arise in circumstances where there was no arguable substantive breach of articles 2 (or 3) of the ECHR; and if so, in what category of case?"

282. It is clear that the duty to investigate a death is not part of the substantive duty imposed on the state by article 2 to protect the right to life. It is an ancillary or adjectival duty, implied from article 2 read in conjunction with article 1, in order to make the state's substantive duty effective in practice. As Lord Bingham put it in R (Gentle) v Prime Minister [2008] AC 1356, para 6, the investigative duty is "parasitic upon the existence of the substantive right, and cannot exist independently". It follows that the duty arises only where there is reason to believe that there has been, or may have been, a violation of the substantive right: see R (Middleton) v West Somerset Coroner [2004] 2 AC 182, para 3; R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, paras 84, 97, 150 and 202. The trigger for an investigation is sometimes expressed as "grounds for suspicion" and sometimes as an "arguable breach" of one of the substantive obligations imposed by article 2. I do not understand there to be any subtle difference between these formulations. Rather, they are two ways of expressing the same test.

283. Exactly the same analysis applies to the duty to investigate violations of article 3. Again, as confirmed by the House of Lords in R (Nasseri) v Secretary of State for the Home Department [2010] 1 AC 1, the investigative duty is not a "free standing obligation". It depends on the existence of the substantive right, and arises where there is reason to believe that the substantive right has been, or may have been, violated. Again, different formulations of the trigger for an investigation can be found in the cases. The European Court has sometimes referred to a "credible assertion" that there has been ill-treatment contrary to article 3: see e.g. Labita v Italy [2000] ECHR 161, para 131; Boicenco v Moldova [2006] ECHR 765, para 120; Khashiyev v Russia (2006) 42 EHRR 20, para 177; Bekos v Greece (2006) 43 EHRR 2, para 53; Hassan v United Kingdom [2014] ECHR 936, para 62. In other cases the requirement is expressed as an "arguable claim": see e.g. Assenov v Bulgaria (1998) 28 EHRR 652, para 102; Satik v Turkey [2000] ECHR 466, para 62; Toteva v

Bulgaria [2004] ECHR 212, para 62; El-Masri v Former Yugoslav Republic of Macedonia (2013) 57 EHRR 25, para 182; Dzhurayev v Russia (2013) 57 EHRR 22, para 187. Again, I do not understand there to be any relevant difference between these formulations.

284. As both parties pointed out in their written submissions, there are certain categories of case in which it has been held that the circumstances of a person's death themselves trigger a duty to investigate it. It is common ground between the parties that these categories include (1) cases in which a person has been killed as a result of the use of force by state agents and (2) deaths in custody. Other categories are identified in the judgment of Lord Mance in R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, para 210. The proper analysis of such cases, however, is not that an investigative obligation can arise in circumstances where there was no arguable substantive breach of article 2; rather it is that the very circumstances in which the person died create a reasonable suspicion that there may have been a breach of article 2 – a suspicion which can only be dispelled (or confirmed) by an impartial investigation of the facts.

285. I accordingly think it clear that the answer to the question asked in issue (10) is "no".

286. It does not seem to me necessary or relevant for present purposes to consider in any further detail the categories of case in which a duty to investigate a death has been held to arise from the very nature of the circumstances in which the death occurred. The only further question which I need to address is whether a duty to investigate arises on the assumed facts of the single test case which the parties have asked the court to consider in connection with this issue.

Military road traffic cases: PIL 45

287. The test case is the claim of Ahmed Adweh (PIL 45) whose son, Lafteh, was hit and killed by a British military vehicle on 4 September 2003. I have already outlined the assumed facts of this case at paragraph 128 above when considering the issue of jurisdiction, for which it is also a test case. On that issue I concluded that the relevant events do not come within the scope of the UK's jurisdiction under article 1. For the purpose of the present issue, however, I will consider whether there is a duty to investigate if I am wrong in that conclusion.

288. Mr Friedman QC, who made oral submissions on this issue on behalf of the claimants, argued that there is a duty to hold an investigation into this case on four different grounds. Even article 1 applied in this case, the basis on which it did so might not be consistent with some of these grounds, but I will assume for present purposes that they are all in principle available.

289. First, Mr Friedman submitted that this is a case of an individual killed as a result of the use of force by agents of the state. I cannot accept this. A vehicle can certainly be used as a weapon or as an instrument of coercion. An example is the case of McShane v United Kingdom (2002) 35 EHRR 23, cited by Mr Friedman, where a pedestrian was knocked down and killed by an armoured personnel carrier which was being used to break down a barricade during a riot. There is nothing in the assumed facts of the present case, however, to indicate that the vehicle which hit the claimant's son was being used for any purpose other than the ordinary one of conveyance or that

the collision was anything other than an accident, which according to the case narrative occurred when the driver swerved to try to avoid a ditch in the middle of the road.

290. Mr Friedman secondly submitted that driving a military vehicle as part of a convoy on a public road is an inherently dangerous activity which gives rise to an "operational duty" on the state to take appropriate measures to minimise the risk that it will result in loss of life. The circumstances in which an "operational" duty may arise under article 2 are limited to situations in which there is a "real and immediate risk to life": see e.g. Osman v United Kingdom (1998) 29 EHRR 245, para 115; Van Colle v Chief Constable of the Hertfordshire Police [2009] 1 AC 225, paras 28-32. Although it is possible to envisage situations in which driving a vehicle could engage this test – for example, driving at reckless speed through a busy town centre – there is nothing is the assumed facts of the present case which could arguably bring it into this category. That would be so in my view even if the vehicle which hit Lafteh was travelling at high speed – an inference which Mr Friedman sought to draw although it is not one of the assumed facts stated in the case narrative.

291. Mr Friedman relied, thirdly, on the general duty of the state pursuant to article 2 to have adequate systems in place to protect the lives of people within its jurisdiction. He suggested that the systems for addressing the risk of death caused by road traffic collisions with military vehicles were arguably deficient, thus giving rise to a duty to investigate whether Lafteh's death resulted from the inadequacy of such systems. This suggestion seems to me equally without merit. The mere occurrence of a fatal road traffic accident or, at most, an act of negligent driving on the part of a soldier posted in Iraq does not, without more, provide any basis for inferring that there were defective or insufficient systems aimed at avoiding such an occurrence. Some further and more specific evidence would be required to raise such an inference.

292. The fourth way in which Mr Friedman put the claimants' case is, in my view, the only one which is reasonably arguable. He submitted that, even if the collision itself did not involve any arguable breach of article 2, the conduct of the soldiers in driving away after the collision did. According to the case narrative, the claimant's son (Lafteh) was thrown into the air by the impact of the collision and landed some distance away. It is reasonable to suspect that the driver of the truck which hit Lafteh, and probably other people in that vehicle or other vehicles in the convoy, must have been aware that a potentially fatal accident had occurred. Yet the truck sped away and the rest of the column of vehicles followed. No one stopped to come to the young man's assistance and see whether his life could be saved.

293. There may have been good or at least sufficient reason why none of the vehicles stopped. I am persuaded, however, that on these assumed facts it is at least arguable that the collision created a real and immediate risk to life of which the soldiers were aware that gave rise to an operational duty to take appropriate steps to try to save the life of the person who was hit. It appears that such steps would have been in vain, since according to the case narrative Lafteh died immediately as a result of the injuries he suffered. However, there is no reason to suppose that those in the convoy knew this. On this narrow basis, if I had concluded that the deceased was within the article 1 jurisdiction of the UK, I would have found that a duty to investigate was triggered. A main aim of any such investigation would be to find out what rules of engagement or orders applied in such a situation and whether, for example, vehicles

were instructed not to stop if an accident occurred because of a perceived risk of coming under attack. In view of my conclusion on jurisdiction, however, no duty on the state to carry out such an investigation arises.

VIII. CONCLUSIONS

294. For the reasons given, my answers to the questions raised by the preliminary issues are in summary as follows:

Article 1 jurisdiction

(1) Article 1 of the Convention applies, not only in cases where the individual concerned was in the custody of British forces in Iraq (including for the purpose of medical treatment), but also in those test cases where the individual was shot by a British soldier both (a) because such shootings occurred in the course of security operations in which British forces were exercising public powers that would normally be exercised by the government of Iraq and (b) because shooting someone involves the exercise of physical power over that person. Article 1 does not apply in cases where British military vehicles were involved in road traffic collisions.

Article 3 handover

(2) There is no duty to investigate arguable claims that there was a breach of the "non-refoulement obligation" through the transfer of the detainee into the custody of another state at a time when there was a real risk of torture or serious mistreatment.

(3) In light of the answer to (2), issue (3) does not arise.

(4) An investigative duty would arise in a handover case if there is an arguable claim that agents of the UK were complicit in the torture or serious mistreatment of an individual by agents of another state. Where a duty arises, its content must be the same as in any other case where there is a duty to investigate an arguable breach of article 3.

Article 5 detention

(5) There is no duty to investigate all cases of detention which are arguably in violation of article 5 of the Convention.

(6) In light of the answer to (5), issue (6) does not arise.

(7) An investigative duty arises in cases where there is an arguable claim that the arbitrary detention of an individual in violation of article 5 amounts to an enforced disappearance. The content of the duty is the same as in those cases where there is a duty to investigate an arguable breach of article 2 or 3.

(7A) Article 5 of the Convention is not displaced by international humanitarian law during an international armed conflict but is modified in that its provisions must be interpreted in a manner which takes into account the applicable rules of international humanitarian law.

UNCAT and CIL

(8) UNCAT does not give rise to domestically enforceable legal rights either directly or via customary international law (CIL).

(9) In light of the answer to (6), issue (9) does not arise. UNCAT has no direct effect on the scope of any investigative obligation which arises under article 3 of the Convention.

Arguable breach of articles 2/3

(10) An investigative obligation under article 2 (or 3) of the Convention cannot arise in circumstances where there was no arguable substantive breach of article 2 (or 3).