HOUSE OF LORDS SESSION 2007–08
**[2008] UKHL 20**
*on appeal from: [2006] EWCA Civ 1689*

# OPINIONS
# OF THE LORDS OF APPEAL
# FOR JUDGMENT IN THE CAUSE

**R (on the application of Gentle (FC) and another (FC)) (Appellants) v The Prime Minister and others (Respondents)**

## Appellate Committee

**Lord Bingham of Cornhill**
**Lord Hoffmann**
**Lord Hope of Craighead**
**Lord Scott of Foscote**
**Lord Rodger of Earlsferry**
**Baroness Hale of Richmond**
**Lord Carswell**
**Lord Brown of Eaton-under-Heywood**
**Lord Mance**

**Counsel**

*Appellants*:
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Michael Fordham QC
Alex Bailin
(Public Interest Lawyers)

*Respondents*:
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*Hearing dates:*
11-13 FEBRUARY 2008

ON
WEDNESDAY 9 APRIL 2008

**HOUSE OF LORDS**

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**[2008] UKHL 20**

**LORD BINGHAM OF CORNHILL**

My Lords,

1. The appellants are the mothers of two young men, both aged 19, who lost their lives while serving in the British army in Iraq. Fusilier Gordon Campbell Gentle was serving with the 1st Battalion The Royal Highland Fusiliers when he was killed by a roadside bomb on 28 June 2004. Trooper David Jeffrey Clarke was serving with the Queen's Royal Lancers when he was killed by "friendly fire" on 25 March 2003. These deaths have been fully investigated at duly-constituted inquests conducted in the United Kingdom, and there are no outstanding questions about when, where and in what circumstances they respectively died.

2. The appellants contend that by virtue of sections 1 and 2 of the Human Rights Act 1998 and article 2 of the European Convention on Human Rights they have an enforceable legal right sounding in domestic law to require Her Majesty's Government to establish an independent public enquiry into all the circumstances surrounding the invasion of Iraq by British forces in 2003, including in particular the steps taken by the Government to obtain timely legal advice on the legality of the invasion. The corollary of this right is a duty binding on the Government to establish such an enquiry. It is a duty owed, the appellants say, to all members of our forces deployed to Iraq and their families, but would presumably be owed also to all military personnel liable to be deployed to Iraq (whether in the regular or the Territorial Army) and their families. In these proceedings the appellants do not ask the House to decide whether such an enquiry would be desirable in the public interest, a question inappropriate for consideration by the House in its judicial capacity, but only whether they have a right to require

such an enquiry to be held. Nor do they invite the House to consider whether the use of armed force by the United Kingdom in Iraq in 2003 was lawful or unlawful in international law. That question would also fall outside the remit of the public independent enquiry the appellants' claim, which would be directed to the process by which the Government obtained advice and not to the correctness of the advice it received or should have received. This gives the proceedings an appearance of unreality since, relying on a number of familiar documents now in the public domain, the appellants' underlying complaint (which they would have wished to advance) is that the UK went to war to achieve an unlawful aim, without proper United Nations sanction and on the strength of legal advice which was adverse or equivocal until very shortly before the invasion. The correctness of this complaint is not, I repeat, a matter which falls for decision in this appeal.

3. The thrust of the appellants' case, put very simply, is this. Article 2 of the Convention imposes a duty on member states to protect life. This duty extends to the lives of soldiers. Armed conflict exposes soldiers to the risk of death. Therefore a state should take timely steps to obtain reliable legal advice before committing its troops to armed conflict. Had the UK done this before invading Iraq in March 2003, it would arguably not have invaded. Had it not invaded, Fusilier Gentle and Trooper Clarke would not have been killed.

4. The bedrock of the appellants' argument is article 2 of the Convention which, so far as relevant, provides: "Everyone's right to life shall be protected by law". This apparently simple provision has been the subject of much judicial exegesis, the effect of which the House summarised in *R(Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, para 2:

> "The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. See, for example, *LCB v United Kingdom* (1998) 27 EHRR 212, para 36; *Osman v United Kingdom* (1998) 29 EHRR 245; *Powell v United Kingdom* Reports of Judgments and Decisions 2000-V, p 397; *Keenan v United Kingdom* (2001) 33 EHRR 913, paras 88-90; *Edwards v United Kingdom* (2002) 35 EHRR 487,

> para 54; *Calvelli and Ciglio v Italy* Reports of Judgments and Decisions 2002-I, p I; *Öneryildiz v Turkey* (Application No 48939/99) (unreported) 18 June 2002."

There have been further decisions since that summary was given, but it was not suggested in argument that they made it inaccurate or in need of modification.

5. This substantive obligation derived from article 2 has been supplemented by a procedural obligation, the effect of which the House also summarised in *Middleton*, para 3:

> "The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated. See, for example, *Taylor v United Kingdom* (1994) 79-A DR 127, 137; *McCann v United Kingdom* (1995) 21 EHRR 97, para 161; *Powell v United Kingdom* Reports of Judgments and Decisions 2000-V, p 397; *Salman v Turkey* (2000) 34 EHRR 425, para 104; *Sieminska v Poland* (Application No 37602/97) (unreported) 29 March 2001; *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105; *Edwards v United Kingdom*, 35 EHRR 487, para 69; *Öneryildiz v Turkey*, 18 June 2002, paras 90-91; *Mastromatteo v Italy* (Application No 37703/97) (unreported) 24 October 2002."

This procedural duty does not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice. There have again been further decisions on the procedural obligation, but it is not suggested that any modification of the summary is called for. In *Middleton* the House was required to consider whether the rules and authorities formerly governing inquests permitted the coroner to conduct an enquiry which fulfilled the UK's procedural obligation under article 2. It held that in some cases they did not. In such cases, the House ruled, the question "how, when and where the deceased came by his death" should be understood to mean "when,

where and by what means and in what circumstances the deceased came by his death": see para 35. In later Strasbourg authorities this approach has not been criticised as failing to meet the UK's obligation under article 2.

6. It is the procedural obligation under article 2 that the appellants seek to invoke in this case. But it is clear (see para 3 of *Middleton*, quoted above, *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105; *Edwards v United Kingdom* (2002) 35 EHRR 487, para 69; *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, paras 18-22) that the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently. Thus to make good their procedural right to the enquiry they seek the appellants must show, as they accept, at least an arguable case that the substantive right arises on the facts of these cases. Unless they can do that, their claim must fail. Despite the careful and detailed submissions of Mr Rabinder Singh QC on their behalf, I am driven to conclude that they cannot establish such a right.

7. As the summary in para 2 of *Middleton* makes clear, article 2 not only prohibits the unjustified taking of life by the state and its agents, but also requires a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. In either case the question whether the state unjustifiably took life or failed to protect it will arise in respect of a particular deceased person, as it did at the inquests pertaining to Fusilier Gentle and Trooper Clarke. There is in my opinion no warrant for reading article 2 as a generalised provision protective of life, irrespective of any specific death or threat. In the present case the appellants, tragically, lost their sons. But the right and the duty they seek to assert do not depend on their sons' deaths. If they exist at all they would have arisen before either young man was killed and would exist had both young men survived the conflict.

8. It may be significant that article 2 has never been held to apply to the process of deciding on the lawfulness of a resort to arms, despite the number of occasions on which member states have made that decision over the past half century and despite the fact that such a decision almost inevitably exposes military personnel to the risk of fatalities. There are, I think, three main reasons for this:

(1) The lawfulness of military action has no immediate bearing on the risk of fatalities. Indeed, a flagrantly unlawful surprise attack such, for instance, as that which the Japanese made on the US fleet at Pearl Harbour, is likely to minimise the risk to the aggressor. In this case, as Mr Sumption QC for the respondents pointed out, Fusilier Gentle died after Security Council Resolution 1546 had legitimated British military action in Iraq, so that such action was not by then unlawful even if it had earlier been so.

(2) The draftsmen of the European Convention cannot, in my opinion, have envisaged that it could provide a suitable framework or machinery for resolving questions about the resort to war. They will have been vividly aware of the United Nations Charter, adopted not many years earlier, and will have recognised it as the instrument, operating as between states, which provided the relevant code and means of enforcement in that regard, as compared with an instrument devoted to the protection of individual human rights. It must (further) have been obvious that an enquiry such as the appellants claim would be drawn into consideration of issues which judicial tribunals have traditionally been very reluctant to entertain because they recognise their limitations as suitable bodies to resolve them. This is not to say that if the appellants have a legal right the courts cannot decide it. The respondents accept that if the appellants have a legal right it is justiciable in the courts, and they do not seek to demarcate areas into which the courts may not intrude. They do, however, say, in my view rightly, that in deciding whether a right exists it is relevant to consider what exercise of the right would entail. Thus the restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations – does tend to militate against the existence of the right: *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, paras 30, 65-67. This consideration is fortified by the reflection that war is very often made by several states acting as allies: but a litigant would be required to exhaust his domestic remedies before national courts in which judgments would be made about the conduct of states not before the court, and even if the matter were to reach the European Court of Human Rights there could be no review of the conduct of non-member states who might nonetheless be covered by any decision.

(3) The obligation of member states under article 1 of the Convention is to secure "to everyone within their jurisdiction" the rights and freedoms in the Convention. Subject to limited exceptions and specific extensions, the application of the Convention is territorial: the rights and freedoms are ordinarily to be secured to those within the borders of the state and not outside. Here, the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to

the authority of the respondents they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted (*R (Al-Skeini) v Secretary of State for Defence* (*The Redress Trust Intervening*) [2007] UKHL 26, [2008] 1 AC 153, paras 79, 129). The appellants seek to overcome that problem, in reliance on authorities such as *Soering v United Kingdom* (1989) 11 EHRR 439, by stressing that their complaint relates to the decision-making process (or lack of it) which occurred here, even though the ill-effects were felt abroad. There is, I think, an obvious distinction between the present case and *Soering*, and such later cases as *Chahal v United Kingdom* (1996) 23 EHRR 413 and *D v United Kingdom* (1997) 24 EHRR 423, in each of which action relating to an individual in the UK was likely to have an immediate and direct impact on that individual elsewhere. But I think there is a more fundamental objection: that the appellants' argument, necessary to meet the objection of extra-territoriality, highlights the remoteness of their complaints from the true purview of article 2.

9. Even if, contrary to my conclusion, the appellants were able to establish an arguable substantive right under article 2, they would still fail to establish a right to a wide-ranging enquiry such as they seek. Nothing in the Strasbourg case-law on article 2 appears to contemplate such an enquiry: *Jordan v United Kingdom*, above, para 128; *Bubbins v United Kingdom* (2005) 41 EHRR 458, para 153; *Taylor v United Kingdom* (1994) 79-A DR 127, 137; *McShane v United Kingdom* (2002) 35 EHRR 593, para 122; *Banks v United Kingdom* (Appn no 21387/05, 6 February 2007, unreported), pp 12-13; *McBride v United Kingdom* (2006) 43 EHRR SE 102, para 1, pp 109-110. In *Scholes v Secretary of State for the Home Department* [2006] EWCA Civ 1343, para 67, Pill LJ threw some doubt on the current applicability of the ruling in *Taylor*, but I do not think the authorities justify his doubt and Arden LJ, in paras 82-83, applied what I respectfully think is the correct approach. The procedural right under discussion is, as pointed out in para 5 above, a product of implication, and while the implication of terms may be both necessary and desirable it is a task to be carried out by any court, particularly a national court, with extreme caution. This is because states ordinarily seek to express the terms on which they agree in a convention such as this; terms which are not expressed may have been deliberately omitted; terms, once implied, are binding on all member states, and may be terms they would not have been willing to accept: *Brown v Stott* [2003] 1 AC 681, 703. I find it impossible to conceive that the proud sovereign states of Europe could ever have contemplated binding themselves legally to establish an independent public enquiry into the process by which a decision might have been made to commit the state's armed forces to war.

10. Both the judge (Collins J, [2005] EWHC 3119 (Admin) and the Court of Appeal (Sir Anthony Clarke MR, Sir Igor Judge P and Dyson LJ, [2006] EWCA Civ 1689, [2007] QB 689) dismissed the appellants' claim, despite the sympathy they felt for the appellants personally. Although my own reasons are simpler, and do little justice to the arguments of counsel, I reach the same conclusion. I would dismiss the appeal and invite written submissions on costs within 14 days.

**LORD HOFFMANN**

My Lords,

11. Trooper David Clarke and Fusilier Gordon Gentle were tragically killed in Iraq. Inquests have been held into the circumstances in which they died. The question in this appeal is whether the state has a duty under article 2 of the European Convention (right to life) to conduct a further and wider inquiry. It is well established that article 2 places upon the state in certain circumstances a duty to take reasonable steps to safeguard the lives of citizens and, if there has arguably been a breach of that duty, a procedural obligation to conduct an independent inquiry into whether it has been breached or not.

12. Mr Rabinder Singh QC, who appeared for the mothers of the two dead soldiers, said there had arguably been a breach of the state's duty under article 2 which ought to be investigated. That breach was a failure to take proper steps to ascertain whether participation in the invasion of Iraq would comply with international law. The Attorney-General had advised the government that the invasion would be authorised by UN Security Council resolution 1441, but Mr Singh said his advice had been given on inadequate grounds.

13. Mr Singh did <u>not</u> submit that article 2 created a duty on the state not to participate in a war which was not authorised by the United Nations charter. It would, in my opinion, have been a hopeless submission. First, it is inconceivable that article 2, in creating duties which the state undertook to accord to its citizens in domestic law, was intending that it should incorporate by reference its duties under the United Nations Charter or any other duties which operated exclusively at the level of international law, governing relations between states. Secondly, article 2 is concerned with dangers to life and the question of whether a war is authorised by a Security Council resolution has nothing

to do with the extent to which participation is dangerous. Trooper Clarke was killed by a shell fired by one of our own tanks on 25 March 2003, soon after the war, began but Fusilier Gentle was killed by a roadside bomb on 28 June 2004, long after Security Council resolutions had recognised the legality of the occupying forces and the occupation had become much more dangerous.

14. Mr Singh therefore fell back on a claim that there was in the circumstances an independent duty, created by article 2, to take reasonable steps to investigate whether the invasion would, as a matter of international law, be lawful or not. What could give rise to such a duty, if the article created no duty to not embark upon an unlawful war? Mr Singh said it was because, if proper investigation had taken place, there was a good chance that the UK would not have taken part in the war or occupation and the soldiers would not have been killed.

15. My Lords, this is a "for want of a nail…" argument which I cannot accept. There are all kinds of things which, if the Government had acted differently, might have resulted in the UK not taking part in the war. A different assessment of our diplomatic interests or financial resources might have led to a different conclusion. Did the Government have a duty under article 2 to use, in Mr Singh's phrase, "due diligence" in the investigation of all these matters? Of course not. The question is not whether a better inquiry might have led to a different decision but whether article 2 created a legal duty to the soldiers to undertake such an inquiry.

16. Unless article 2 creates a duty not to go to war contrary to the United Nations Charter (a proposition for which, as I have said, Mr Singh does not contend) I cannot see how there can be an independent duty to use reasonable care to ascertain whether the war would be contrary to the Charter or not. What would be the purpose of such a duty if the Government owed no duty under article 2 to comply with the Charter? Of course it is desirable for all kinds of reasons that the Government should not act contrary to international law and that it should take reasonable steps to discover whether it is about to do so. But not, as it seems to me, to comply with article 2. For those reasons, I would dismiss this appeal. I also agree with the reasons given by my noble and learned friend Lord Bingham of Cornhill, which I have had the privilege of reading in draft.

**LORD HOPE OF CRAIGHEAD**

My Lords,

17. It is a hard thing for a court to say to the mothers of two young soldiers who lost their lives in the service of their country that it can do nothing for them in their campaign to have the circumstances that led up to these tragedies investigated. Had there been an issue which was capable of being reviewed by the courts – even arguably so – its duty would have been clear, and this application would have been successful. The problem lies in the nature of the issue which they wish to raise. It simply is not possible to link it to the only legal base on which the application is founded.

18. The first sentence of article 2(1) of the European Convention on Human Rights declares that everyone's right to life shall be protected by law. But this is not an absolute guarantee that nobody will be exposed by the state to situations where their life is in danger, whatever the circumstances. Those who serve in the emergency services risk their lives on our behalf to protect the lives of others. Those who serve in the armed forces do this in the knowledge that they may be called upon to risk their lives in the defence of their country or its legitimate interests at home or overseas. In *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, para 54, the European Court said that, when interpreting and applying the rules of the Convention, the court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces. This is not to say that those who are employed in the emergency services and the military are entirely outside its protection. That would be contrary to the declaration in article 1 that the rights and freedoms shall be secured to everyone within the jurisdiction of the contracting parties. In *Şen v Turkey,* 8 July 2003, application no 45824/99, p 8, the court observed that the Convention applies in principle to members of the armed forces and not only to civilians. But the extent of that protection must take account of the characteristics of military life, the nature of the activities that they are required to perform and of the risks that they give rise to.

19. *Engel v The Netherlands* was a case about the preservation of military discipline, as was *Şen v Turkey* and *Grigoriades v Greece* (1999) 27 EHRR 464 where the court said in para 45 that the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline. But the

statement in *Engel* was widely expressed and it is of general application. The proper functioning of an army in a modern democracy includes requiring those who serve in it to undertake the operations for which they have been recruited, trained and equipped, some of which are inherently dangerous. The jurisprudence which has developed from the decision in *Soering v United Kingdom* (1989) 11 EHRR 439 about decisions taken in this country to send people abroad to places where they face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment does not apply. The guarantee in the first sentence of article 2(1) is not violated simply by deploying servicemen and women on active service overseas as part of an organised military force which is properly equipped and capable of defending itself, even though the risk of their being killed is inherent in what they are being asked to do.

20. It is, of course, desirable that decisions to use the armed forces in this way should be taken on the basis of well researched and accurate information and careful and thorough consideration by governments. That is especially so when the legality of the operation may be in issue. In a recent debate in the House of Lords on War Powers and Treaties Lord Guthrie of Craigiebank, a former Chief of the Defence Staff, said that the services want to know that the country is behind them before they are committed, that they are supported by Parliament and that what they are being asked to do is legal: Hansard (HL Debates) vol 698 (31 January 2008), col 747. It is to the issue of legality that Mr Singh QC has directed attention in this case. What he seeks is an inquiry as to the circumstances in which the Attorney General came to state that the use of force for the invasion of Iraq would be lawful. But he accepts that he must first show that the respondents were arguably in breach of article 2(1) by failing to ensure with due diligence that the operation was lawful under international law.

21. The argument that the guarantee in article 2(1) was arguably breached in the cases of Trooper David Clarke and Fusilier Gordon Gentle is deceptively simple. It is accepted that in neither case was the immediate cause of death the action or failure of state agents. So the guarantee is not engaged in that sense. But Mr Singh says that a substantial and operative cause of their deaths was the respondents' failure to take steps to ensure that the invasion was lawful before committing troops to action. Otherwise, he says, the invasion would not have taken place and the deceased would not have been exposed to the risk of death in Iraq. This is because the then Chief of the Defence Staff, Admiral Boyce, said that he would not commit British troops to the invasion unless he received unequivocal advice from the Attorney

General that it would be lawful. Advice to that effect was communicated to him on 14 March 2003. But, says Mr Singh, the circumstances in which that advice was provided call out for an explanation, and an explanation has never been given. An inquiry may show that the advice was incorrect or that there was no proper basis for it. If so, the conclusion he invites is that the troops would not have been committed to the invasion at all.

22. This argument, simple as it is, does not stand up to examination. Crucially, the issue as to the legality of the invasion in international law has nothing to do with the state's obligation under article 2(1) of the Convention to protect the servicemen and women within its jurisdiction. When the Chief of the Defence Staff insisted on receiving unequivocal advice that the invasion would be legal he was not thinking of the physical risks that his troops would be exposed to. His concern was that, if it was not legal, they might be at risk of being prosecuted. As Lord Kingsland said in the debate I have already mentioned, the issue is essentially one of morale: Hansard (HL Debates) vol 698, col 790. An individual soldier needs to know that he will not be prosecuted for a war crime.

23. The International Criminal Court Act 2001 gave effect in domestic law to the Rome Statue of the International Criminal Court. It has raised awareness of the need to ensure that armed conflict takes place within the established framework of international law: see also the International Criminal Court (Scotland) Act 2001, asp 13. The definition of war crimes in article 8 of the Rome Statute, which is reproduced in Schedules 8 and 1 of these Acts respectively, is very wide. Much depends on the laws and customs applicable in international armed conflict. Rules of engagement can only go so far. The umbrella of an assurance that the conflict is lawful in international law is essential if soldiers are to feel confident that it is an operation that they can properly engage in. This is so too of their commanders, who under section 65 of the 2001 Act are responsible for the acts of their subordinates.

24. The question whether the invasion was lawful was, without doubt, of cardinal importance to the decision whether it was proper to commit British troops to the invasion. But it was no more relevant to the article 2(1) Convention right of each individual than the question whether it had the approval of the Cabinet or of Parliament. And there is a further objection. The issue of legality in this area of international law belongs to the area of relations between states. Article 2 of the

Charter of the United Nations declares that the organisation and its members shall act in accordance with the principles that it sets out. The third of these principles is:

> "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

Application of the guidance that this principle offers in the conduct of international relations between states is a matter of political judgment. It is a matter for the conduct of which ministers are answerable to Parliament and, ultimately, to the electorate. It is not part of domestic law reviewable here or, under the Convention, in the European Court at Strasbourg.

25. Mr Singh submitted that international law was not irrelevant to the Convention rights of a decision by the state to expose individuals to the risk of serious harm. In modern administrative law, he said, there were no no-go areas that could never be inquired into. The principle was one of judicial restraint, not abstention: *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, para 140. He referred to article 15(1) which permits a contracting party to take measures derogating from its obligations under the Convention provided, among other things, such measures are not inconsistent "with its other obligations under international law". Other references to international law are to be found in article 7, article 26 and article 1 of Protocol 1. But in *Bankovic v Belgium* (2001) 11 BHRC 435, para 62, the European Court said that article 15 itself was to be read subject to the "jurisdiction" limitation in article 1 of the Convention. It is concerned with the setting of minimum standards in the domestic legal order, not with the conduct of international relations between states. Furthermore, as Mr Sumption QC pointed out at the outset of his argument, one must be careful to distinguish between cases where the question is whether judicial restraint ought to be exercised and cases where the matter at issue is legally irrelevant. In this case the question of international law falls into the latter category.

26. Mr Singh sought to overcome these difficulties by comparing this case with *R v Secretary of State for the Home Department, Ex p Launder* [1997] 1 WLR 839. In that case the Secretary of State said that he had taken account of the applicant's representations that his extradition to Hong Kong would be a breach of the (then unincorporated) European

Convention on Human Rights in reaching his decision that the applicant should be extradited. At p 867E-F I said that, if the applicant was to have an effective remedy against a decision which was flawed because the decision-maker had misdirected himself on the Convention which he himself said he took into account, the House should examine the substance of the argument. But the context in which I made that observation was a case where the Secretary of State was dealing with the applicant's rights under domestic extradition law. He chose to do this by reference, among other things, to the Convention. If he misunderstood its provisions he was, according to the ordinary principles of domestic law, reviewable. Here the Attorney General was not dealing with rights or obligations in domestic law when he was considering what international law had to say about the legality of the invasion. The only question he was concerned with was whether the invasion was lawful in international law. That question as such is not, as Mr Singh accepts, reviewable in the domestic courts. Nor can it be linked to the state's obligations under article 2(1). The Attorney General did not say, when he was considering the issue of legality, that he was addressing his mind to the Convention rights of the troops for whom the Chief of the Defence Staff was responsible.

27. In this situation Mr Singh's argument does not get over the first hurdle that he set for himself – that there was arguably a breach of the substantive obligation in article 2(1) to protect life. Had he done so, he would have faced further difficulties when he reached the second hurdle – whether the procedural obligation requires that there be an inquiry into the circumstances that he says ought to be inquired into. The question that he seeks to raise is one that falls well outside the matters that should be investigated if a death occurs where the substantive obligation has or may have been violated which were identified in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 3; see also *Bubbins v United Kingdom* (2005) 41 EHRR 458, para 105. This is not to say that the question is unimportant. But an inquiry of that kind cannot be used for continuing the intense public and political debate that these tragedies and other similar cases have given rise to ever since the invasion took place.

28. As I said at the outset, it is not possible to link the request for an inquiry to the Convention right on which the application is founded. There is no escape from the conclusion that the issue which these applications seek to raise is unarguable. For the reasons given by my noble and learned friends Lord Bingham of Cornhill, Lord Hoffmann and Lord Rodger of Earlsferry whose speeches I have had the

opportunity of reading in draft and with which I entirely agree, and for these further reasons of my own, I would dismiss the appeal.

**LORD SCOTT OF FOSCOTE**

My Lords,

29. Having had the privilege of reading in advance the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann I find myself in complete and respectful agreement with the reasons they have given for dismissing the appeal in this sad case. I would like particularly to associate myself with the comments made by Lord Bingham in the final three sentences of paragraph 9 of his opinion. There is nothing I can usefully add and I, too, would dismiss this appeal.

**LORD RODGER OF EARLSFERRY**

My Lords,

30. The appellants are the mothers of two British soldiers who were killed in Iraq. Mrs Clarke's son, Trooper David Clarke, was killed on 25 March 2003 by a shell from a British tank, while Mrs Gentle's son, Fusilier Gordon Gentle, was killed by a roadside bomb on 28 June 2004, the very day on which the British occupation of Iraq ended and sovereignty passed to the Iraqi Interim Government. While no inquest into the death of Trooper Clarke was possible, an inquest was held into the death of another soldier who had been killed in the same incident. In July 2007, the narrative verdict of the coroner at the end of that inquest, containing criticisms of what had happened, covered the circumstances of Trooper Clarke's death. In November 2007 the coroner in the inquest into the death of Fusilier Gentle returned a narrative verdict criticising the lack of certain equipment. These inquests clarified the circumstances surrounding the deaths of the two soldiers.

31. The appellants want a further public inquiry, not into the immediate circumstances of their sons' deaths, but into the legality of the decision of the Government to go to war with Iraq. They petitioned

for leave to appeal to this House on the basis that an appeal would present "the best opportunity for [the] most anxious question [the legality of the war on Iraq] to be the subject of judicial consideration." In fact, however, the issue canvassed in the appeal was quite different.

32. At the hearing, counsel for the appellants did not suggest that the decision to invade Iraq was unlawful in domestic law terms. Nor did he ask the House to decide whether it was unlawful under international law. It would therefore be improper for your Lordships to express any view, whether expressly or by implication, on the legality of the invasion of Iraq.

33. What Mr Singh QC submitted was this. He argued that article 2 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") gives the appellants a right to have a public inquiry into the steps by which the Government reached the view that it would be lawful, under international law, to invade Iraq - and, so, decided to participate in the invasion in which their sons were killed. More particularly, he submitted that, in return for British soldiers risking their lives, the Government had to take all reasonable steps to satisfy itself of the legality under international law of the military action in which they would have to fight. The Government had failed to exercise "due diligence" in that regard. Had it done so, arguably, it would have concluded that an invasion would be unlawful. In that event the Government would not have participated, and Trooper Clarke and Fusilier Gentle would not have been killed. Arguably, therefore, there had been a breach of the Government's substantive obligation under article 2 to protect the lives of Trooper Clarke and Fusilier Gentle. In these circumstances article 2 required the Government to set up an independent public inquiry into the steps by which ministers had reached the conclusion that it would be lawful to invade Iraq.

34. In fact, an inquiry with that remit would almost certainly miss the real target of the appellants' complaint and their real aim in prosecuting this appeal. It is idle to suppose that the Government, in general, or the Attorney General, in particular, had failed to inform themselves adequately on the relevant law relating to the invasion. As a result of Britain's position as one of the permanent members of the Security Council, the Foreign Office Legal Advisers have recognised expertise in Security Council law and practice. This expertise was available to the Government. Doubtless, additional advice could have been obtained, if necessary. When Ms Wilmshurst resigned as a Legal Adviser, on 18 March 2003, she did not suggest that she or anyone else had lacked for

information on the legal question. On the contrary, she clearly felt that she had all the information she needed to reach her view that the invasion would be unlawful without a second Security Council resolution.

35. Equally, Ms Wilmshurst did not criticise the Attorney General for failing to inform himself on the question. Her criticism was that, despite having the requisite information and having initially considered that an invasion would be unlawful, for no good reason he had subsequently changed his mind - once, in giving his written opinion on 7 March, and, again, in his written statement on 17 March. In her view - because of points of which he was fully aware - the Attorney General's advice was quite simply wrong. The appellants also think that it was wrong. Therefore the inquiry which they really want is one that would investigate why – as they see it - the Attorney General changed his mind and gave the wrong advice, and how the Government came to go to war on the basis of that wrong advice.

36. Understandably, the appellants themselves do not distinguish between Trooper Clarke and Fusilier Gentle. But, in terms of international law, the cases are different. Trooper Clarke was killed shortly after the invasion in March 2003 when the Government relied on Security Council Resolutions 678, 687 and 1441 as authority for using force against Iraq. By the time Fusilier Gentle was killed, the Security Council had adopted Resolution 1511, authorising the creation of the multinational force, and Resolution 1546, governing the position when sovereignty passed to the Iraqi Interim Government. There can be no doubt whatever that those Resolutions gave authority for the operations of the multinational force, of which Fusilier Gentle was a member, on 28 June 2004. So it is Trooper Clarke's case which raises the issue about the legal situation at the time of the invasion.

37. Mr Singh did not argue that article 2 of the Convention imposed a duty on the Government not to take part in an invasion that was unlawful in international law because it had not been authorised by the Security Council. In my view, he was correct not to do so. The recitals to the Convention show that, while it was conceived as a means for taking forward "certain of the rights" in the United Nations Universal Declaration of Human Rights, its focus was on achieving greater unity among the members of the Council of Europe. This was to be done by promoting effective political democracy and a common understanding and observance of the human rights in question within those states. In other words, the Convention was concerned with securing respect for

certain human rights within the domestic legal systems of member states rather than with scrutinising the status of their actions under wider international law. The terms of article 2 are wholly consistent with that approach.

38. Moreover, there is nothing to suggest that the countries which agreed article 2 intended to go further and to use it to impose on member states a fresh obligation to abide by article 2(4) of the United Nations Charter – an obligation which was already incumbent on them under the Charter. Any suggestion that this obligation was implied is particularly implausible when the Charter contains its own system of remedies for breaches of article 2(4). Not only would a further remedy under the Convention have been redundant, but, by creating the possibility of disputes being ventilated in some national courts, it would have risked undermining, rather than reinforcing, the authority of the organs of the United Nations under the Charter. That cannot have been the intention.

39. Since article 2 did not impose an obligation on the Government not to take part in an invasion that was unlawful under international law, Mr Singh was left with his artificial pis aller of a duty to hold an inquiry into the steps taken by the Government to satisfy itself of the legality of the invasion under international law. This was apparently to be derived from three obligations under article 2. The first is the general duty to protect life. The second, stated perhaps too broadly, is a positive obligation on the authorities to take reasonable steps to protect an individual whose life is at risk from the acts of a third party. That duty applies only where there is a "real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party": *Osman v United Kingdom* (1998) 29 EHRR 245, para 116; *Re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135, para 20, per Lord Carswell. The third obligation is to initiate an effective public investigation into any death occurring in circumstances where it appears that one of the substantive obligations under article 2 has been, or may have been, violated and it appears that agents of the state have been, or may have been, in some way implicated: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, para 3, per Lord Bingham of Cornhill.

40. Since the duty to hold an independent inquiry arises only when it is arguable that there has been a breach of a substantive obligation under article 2, the crucial question is whether, by virtue of article 2, the Government was under a substantive obligation to take reasonable steps to ascertain the lawfulness of the invasion under international law. Mr

Singh could point to no authority for implying such an obligation into article 2. I am satisfied that there was no such obligation.

41. In the first place, if – as I have held - article 2 did not oblige the Government not to take part in an invasion that was unlawful under international law, then an implied obligation under the same article to take reasonable steps to ascertain the lawfulness of the invasion would be futile. The Government would still have been free to invade, whatever the outcome of taking the steps.

42. The supposed obligation would elevate procedure over substance. If the invasion were lawful, a government which got the answer to the legal question right, but had not exercised due diligence in doing so, would be in technical breach of the obligation. On the other hand, if the war were unlawful, a government which got the answer wrong, but had exercised due diligence in doing so, would not be in breach of the obligation. Being, thus, merely procedural, the obligation would not go to the heart of the matter. An inquiry into the performance of that obligation would likewise not go to the heart of the matter and would satisfy nobody.

43. Furthermore, any implied obligation in article 2 must be necessary for achieving the overall purpose of the article - to protect the right to life. The risk to soldiers' lives is not affected, however, by whether a military operation is lawful or unlawful under international law. Indeed, as my noble and learned friend, Lord Bingham of Cornhill, has pointed out, an unlawful attack enjoying the element of surprise may actually be safer for the invading forces. Therefore, while there may be all kinds of moral and political reasons why states should take care to ensure that their military operations are lawful under international law, reducing the risk to the lives of the troops whom they order into battle is not one of them. There is accordingly no basis for implying into article 2 an obligation on the Government to take reasonable steps to satisfy itself of the legality of the invasion under international law.

44. Finally, on any view, the advice on the legal position was only one of many factors - most of them, presumably, in the sphere of international politics - which were in play when the Government decided to take part in the invasion of Iraq. In that situation it would be simplistic to suppose that any lack of diligence in investigating the legal position could be regarded as a relevant cause of the deaths of two specific soldiers, Trooper Clarke and, a fortiori, Fusilier Gentle, for the

purposes of article 2 of the Convention. As Mr Sumption QC observed, in the type of inquiry which the appellants envisage, questions about the actions of Government ministers would crowd out the fate of these two young men, who would fade into the background. An inquiry of that kind has nothing to do with article 2.

45. For these reasons, which are essentially the same as those of my learned friends, Lord Bingham and Lord Hoffmann, I would dismiss the appeal.

**BARONESS HALE OF RICHMOND**

My Lords,

46. On 11 March 2003, the Chief of the Defence Staff asked the Prime Minister for what he later called "an unambiguous black and white statement saying that it would be legal for us to operate if we had to". The next day, the Legal Adviser to the Ministry of Defence wrote to the Legal Secretary to the Law Officers, recording that he had advised the Chief of the Defence Staff that he could properly give his order committing United Kingdom forces "if the Attorney General has advised that he is satisfied that the proposed military action . . . would be in accordance with national and international law". The Treasury Solicitor also indicated that a clear statement from the Attorney General that military action would be lawful was required, not only by the military but also by the civil service, who might be involved in giving assistance to the military effort.

47. At that stage, the Attorney General's written advice of 7 March 2003 was very far from clear and unambiguous. The case for military action rested solely on United Nations authorisation. This in turn depended upon whether non-compliance with UN Security Council Resolution 1441 revived the authorisation "to use all necessary means" given by resolution 678 in 1990. The revival question was controversial enough. But more controversial still was whether revival depended upon a UN Security Council decision that resolution 1441 had not been complied with, or whether it would be sufficient if there were "strong factual grounds" to conclude that Iraq was in breach. The Attorney General judged that a court might well conclude that a further resolution was required, but "equally the counter view can be reasonably

maintained". The "safest legal course" would be a further resolution, establishing that the Council had concluded that Iraq had failed to comply with resolution 1441, even if it did not authorise the use of force in so many words. On 17 March 2003, however, having obtained the Prime Minister's unequivocal view that Iraq had committed further material breaches, the Attorney General advised Parliament of his concluded view that "the authority to use force under resolution 678 has revived and so continues to this day". The order to begin the invasion was given the following day.

48. Why were the Chief of the Defence Staff and the Treasury Solicitor so concerned? Not, we may be sure, because they thought that the risk to the lives of military and civil service personnel would be greater if the war was unlawful than if it were lawful. They were concerned about the legal consequences. Whether there was much substance in those concerns may be open to doubt. The United Kingdom is party to the Charter of the United Nations which defines when one state may lawfully use force against another. We have therefore accepted that we cannot go to war just because we see good reason to do so. We have also committed ourselves to the Rome Statute of the International Criminal Court 1998 (1999, Cm 4555). Crimes within the jurisdiction of the Court are genocide, crimes against humanity, war crimes and the crime of aggression: article 5.1. However the Court cannot exercise its jurisdiction over the crime of aggression until a definition and other conditions have been adopted, which cannot be before 2009: see article 5.2. Hence the UK's International Criminal Court Act 2001 only provides for the arrest and surrender of people accused of genocide, crimes against humanity and war crimes, which are also made offences in domestic law. The Prosecutor of the ICC has received many communications related to concerns about the legality of the armed conflict in Iraq. In response, he has explained that the Court has only a mandate to examine *conduct during the conflict* and not whether *the decision to engage* in it was legal. He has also considered allegations of war crimes against Iraqi civilians, but even where there was a reasonable basis for believing that these had been committed, they did not reach the required threshold of gravity for the Prosecutor to take action.

49. However, the Attorney General's advice of 7 March 2003 did point out that:

> "Two further, though probably more remote possibilities, are an attempted prosecution for murder on the grounds that the military

> action is unlawful and an attempted prosecution for the crime of aggression. Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognised by the common law which can be prosecuted in the UK courts."

That argument was later rejected by this House in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136. Crimes under customary international law are not automatically incorporated into domestic law and it is no longer open to the courts to recognise new common law crimes.

50. But even if the prospect of prosecution for engaging in an unlawful war (as opposed to conducting a war unlawfully) is remote, the Chief of the Defence Staff and Treasury Solicitor were surely right in principle to seek the assurance which they did. Flight Lieutenant Kendall-Smith was court-martialled for disobeying a lawful command when he refused to return to Iraq in June 2005. It was accepted by the Crown that for there to be an offence (then under section 34 of the Air Force Act 1955) the order in question must not have been an order to do something which was unlawful in domestic or international law. The Judge Advocate ruled that this order was not unlawful because it had been given after the United Nations Resolutions authorising the activities of the multi-national force. But he also ruled that it is no defence that the defendant believed that the order was not lawful. The individual's duty is to obey the order, as long as it is not obviously contrary to law. There is no defence of conscientious objection to the order (compare the position under the German Constitution, as indicated in the ruling of the 2nd Wehrdienstsenat of the Bundesverwaltungsgericht of 21 June 2005, BVerwG 2 WD 12.04). This places the individual British service man or woman in a very difficult position. If he or she obeys the order and it is not in fact lawful, then he or she could in theory face prosecution for the illegal act. Under the ICC Statute, the more sceptical he or she is about the legality of the order, the less possible it might be to rely on a defence of superior orders: see article 33. If he or she disobeys the order and it is in fact lawful, then he or she will probably face a court martial for disobeying it. A state which expects its soldiers to obey their orders irrespective of their own views on the lawfulness of those orders should, it seems to me, owe a correlative duty to its soldiers to ensure that those orders are lawful. Operationally it is obvious that the burden should lie on the person giving rather than the person receiving the orders.

51. Trooper David Clarke joined the army in 2000 when he was only 16. He was sent to Kuwait in February 2003, shortly after his 19th birthday, in readiness for the invasion. The actual invasion began on 20 March 2003. Trooper Clarke drove a Challenger 2 tank with the Queens Royal Lancers. Five days after the invasion he was killed. Another Challenger 2 tank, from the 2nd Royal Tank Regiment, had mistaken his tank for an enemy vehicle and opened fire, killing two and seriously injuring two others. No mortal remains of Trooper Clarke were ever found. The army conducted three separate investigations. The first was by the Special Investigation Branch of the Royal Military Police, with a view to discovering whether a person subject to military discipline had committed an offence under military law. An independent review of that investigation by the Army Prosecution Authority concluded that no charges should be laid. The second was a Land Accident Investigation team report into the procurement and other measures which might be taken to prevent any similar accidents occurring in future. The third was a Board of Inquiry under section 135 of the Army Act 1955. This is an internal Army mechanism designed to get at the facts and to identify lessons. It does not inquire into the cause of death, which is a matter for the Coroner. Coroner's inquests can be heard if the mortal remains are returned to this country. In Trooper Clarke's case, there were no mortal remains. But his family were treated as interested parties in the Inquest into the death of Corporal Allbutt who died in the same incident.

52. Fusilier Gentle joined the Army in October 2003, aged 18. After 24 weeks' training, he was posted to Basra in May 2004. A month later he was 'top cover sentry' in a Land Rover escorting a convoy of civilian vehicles. This meant that he had to put his head up out of the vehicle. A roadside bomb was detonated nearby and Fusilier Gentle was killed by shrapnel. A Special Investigation Branch inquiry and the Army Prosecuting Authority decided against any prosecution, although the latter did consider whether there was a case against the Force Logistics Officer. A Board of Inquiry concluded that the bomb would have been inhibited by more up to date counter-measures had they been fitted to the vehicle and that improved body armour should be provided for those undertaking top cover duties. There has been an inquest into the cause of death.

53. Not surprisingly, the mothers of these young men wanted to know how and why their sons had died. The circumstances surrounding their deaths must have raised many questions in their minds. The Army inquiries took time and they did not feel that they had been kept fully informed. They felt, with some justification, that even in a situation of armed conflict these particular deaths might have been avoided. But on

top of those inquiries they wanted to know why their sons had been sent to Iraq at all. What they really want is an inquiry into whether or not the conflict in which their sons died was lawful. The original claim form sought "a declaration that as article 2 ECHR has been violated an independent inquiry must be held and that its remit is to examine all the circumstances of these deaths including whether the decision to use force against Iraq was lawful". If the use of force was lawful, it would be of some comfort to know that their sons had died in a just cause. If it was not, there might at least be some public acknowledgement and attribution of responsibility and lessons learned for the future. If my child had died in this way, that is exactly what I would want. I would want to feel that she had died fighting for a just cause, that she had not been sent to fight a battle which should never have been fought at all, and that if she had then some-one might be called to account.

54. However, the only way to compel such an inquiry is through article 2 of the European Convention on Human Rights. This requires, not only that the state itself shall not take life, and should have a system of laws in place to protect the right to life, but also "that the authorities [should], do all that can reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge": *Osman v United Kingdom* (1998) 29 EHRR 245, para 116. The duty to respect and protect life can only be made effective by implying an ancillary duty to hold an independent inquiry into deaths where this duty may have been broken: *McCann v United Kingdom* (1995) 21 EHRR 97. There is no point in banning the secret police from killing people in their custody if no-one will ever find out when they do. But there can be no duty to hold an inquiry unless what has happened is at least arguably a breach of the substantive duty to respect and protect life.

55. For the reasons explained earlier, I wish that we could spell out of article 2 a duty in a state not to send its soldiers to fight in an unlawful war. States should protect their soldiers from the consequences of having in practice to obey orders whether or not they are lawful. It might be possible to discover such a duty in the words from *Osman* quoted in the previous paragraph. Sending troops into battle involves a real and immediate risk to their lives, let alone to the lives of others. While it cannot reasonably be expected that states will decline to commit their troops to a lawful war, because states must be allowed to defend themselves and to assist in international efforts to restore peace and stability, it might reasonably be expected that they would decline to commit their troops to an unlawful war. If the European Court of

Human Rights in Strasbourg wishes to take article 2 so far, I would be surprised but not at all unhappy.

56. But I do not think that we can go so far. It goes way beyond what member states might have thought that they were committing themselves to in 1950. Although the Convention is a living instrument, not to be interpreted only according to its original intention, we must tread very carefully before implying obligations which are not already there: *Brown v Stott* [2003] 1 AC 681. This is not because any decision of ours would be binding upon the other member states of the Council of Europe: it would not. It is because we are interpreting the Convention rights in the light of the jurisprudence of the Strasbourg court as it evolves over time: see *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20. Parliament is free to go further than Strasbourg if it wishes, but we are not free to foist upon Parliament or upon public authorities an interpretation of a Convention right which goes way beyond anything which we can reasonably foresee that Strasbourg might do.

57. I cannot reasonably foresee that Strasbourg would construct out of article 2 a duty not to send soldiers to fight in an unlawful war. The lawfulness of war is an issue between states, not between individuals or between individuals and the state. As already seen, the Statute of the International Criminal Court has not yet changed that. Furthermore, the lawfulness of a war has no direct link with the risk to the soldiers' lives. Soldiers are just as likely to die in a just cause as in an unjust one. Fusilier Gentle died shortly after United Nations Security Council Resolution 1546 of 8 June 2004, which on any view legitimated the multi-national force's attempts to restore security and stability in Iraq: see *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58; [2008] 2 WLR 31. A totally unjustified surprise attack may be much less risky than a properly declared war. It would not meet the real concerns in this case to decide that Trooper Clarke's death required an article 2 inquiry while Fusilier Gentle's did not.

58. A further reason not to spell such a duty out of article 2 is that it would require both the domestic courts of this country, and the European Court of Human Rights in Strasbourg, to rule upon the legality of the use of force against Iraq in international law. This is beyond our competence. The state that goes to war cannot and should not be the judge of whether or not the war was lawful in international law. That question can only be authoritatively decided, not by us or by Strasbourg, but by the international institutions which police the international

treaties governing the law of war. But if there were such a right, the domestic courts would have to do their best to decide if it had been broken, because the Human Rights Act 1998 requires us to decide whether or not a public authority has acted compatibly with the Convention rights.

59. In reality, all that the nation state can do is to use its best endeavours to conform its actions to international law, just as all that anyone else can do is to use their best endeavours to conform their actions to the law. That is why the appellants' lawyers have fallen back on the claim that the Government should have taken reasonable care ('used due diligence') to ascertain whether the war was lawful before ordering its troops into battle. Of course we all hope that Governments will take reasonable care, especially before making such momentous decisions as this. But the point of taking reasonable care is to discover what you can and cannot do. If you do not owe a duty to individual soldiers not to send them to fight in an unlawful war, it makes no difference whether or not you take reasonable care to discover whether or not it was lawful. You could have sent them anyway.

60. In my regretful view, therefore, the appeal fails at the first hurdle. It is not a breach of the substantive duty in article 2 to send the troops to fight in an unlawful war. Hence the article 2 duty to investigate does not arise. But had it been otherwise, I would have been inclined to accept the other planks in the appellants' argument. As I understand it, it is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate it must. The subject matter cannot preclude this (although, as is already clear, I do agree with the Court of Appeal that it is a factor tending against interpreting a right in such a way as to require the courts to do this). Nor have I much difficulty with the proposition that these soldiers were within the jurisdiction of the United Kingdom when they met their deaths. If Mr Baha Mousa, detained in a military detention facility in Basra, was within the jurisdiction, then a soldier serving under the command and control of his superiors must also be within the jurisdiction: see *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2007] 3 WLR 33. The United Kingdom is in a better position to secure to him all his Convention rights, modified as their content is by the exigencies of military service, than it is to secure those rights to its detainees.

61. For these reasons, agreeing with all your lordships in the result, and in substantial agreement with the reasoning of my noble and learned

friends, Lord Bingham of Cornhill, Lord Hoffmann and Lord Hope of Craighead, I would dismiss this appeal. I do so with sorrow, but my sorrow is nothing to that of all the families and friends of soldiers who have died without knowing whether they were fighting in a just cause. History must be the judge of that.

**LORD CARSWELL**

My Lords,

62. This appeal is a reminder, if such were ever needed, of the weight of responsibility which rests upon those who make decisions to send members of the Services to fight a war. The appellants' sons sadly lost their lives when serving with the Army in Iraq, and the appellants understandably want answers to a number of questions about the Government's decision to take part in the invasion of that country. In the opening paragraph of their printed case they state that the appeal concerned the approach taken by the Government to the legality of the invasion, and in their petition for leave to appeal they stated that an appeal would present the best opportunity for that question to be the subject of judicial consideration. Mr Singh QC did not ask the House to pronounce directly on the legality of the invasion and it would not be proper for your Lordships to attempt to do so. The question is one which has been the subject of much debate and more speculation, but it is clear that the proper place for it is in the court of public opinion and the forum of Parliament, not before this House sitting in its judicial capacity. It is equally clear, however, that the appellants' quest for a public inquiry into the process by which the decision to join in the invasion was reached is an attempt to get as near as possible inquiring into that very issue.

63. The issues which have been argued in the appeal may be termed the justiciability issue, the engagement issue and the relevance issue. The Court of Appeal decided the case before them on the justiciability issue, whether such matters fall outside the category of issues on which the courts may pronounce judicial decisions, and did not pronounce on the engagement issue. Mr Singh presented cogent arguments to the effect that the area is not strictly one which is not justiciable, but falls within the class of decisions on which the courts will exercise a degree of judicial restraint, and that the present matter involves questions of law which the courts can and should decide. I would prefer, however, to

reserve my opinion on the correctness of these arguments for another occasion.

64. I do so because I am persuaded, like the other members of the Committee, that the outcome of the appeal should be determined by reference to the other issues. It was common case that the procedural obligation of investigation which the European Court of Human Rights has declared to be implied from the duty arising under article 2 of the Convention is ancillary or parasitic, that is to say, it does not arise unless there is a substantive breach of article 2. The appellants' argument therefore cannot be sustained unless they can establish that the decision to join in the invasion of Iraq without a further resolution from the UN Security Council was, arguably at least, a breach of article 2. For the reasons given by your Lordships I am satisfied that article 2 does not impose a duty on a state not to participate in a war which is not authorised by the Charter of the United Nations. It is not necessary for me to lengthen this opinion by repeating those reasons, with which I respectfully agree. The question of judicial restraint accordingly does not arise, for in the absence of such a duty there can be no question of a substantive breach of article 2 and the ancillary duty of investigation is not triggered.

65. Similarly, the relevance issue must be decided in the respondents' favour. If, contrary to my opinion and that of your Lordships, it is arguable that the decision to invade Iraq involved a substantive breach of article 2, neither that decision nor the lack of diligence in investigating the legal position can be considered a relevant cause of the deaths of the two soldiers. There are to my mind three reasons for this conclusion, all of which have been articulated by your Lordships. First, by the nature of their profession soldiers expect to undertake risks which are not ordinarily incurred by civilians and to endure the possibility of wounds and death in the performance of their duty. Secondly, it does not necessarily follow that if a government is advised that it is doubtful whether to go to war would be a breach of international law, it would refrain from doing so. In any event, the appellants' expressed desire is to investigate the degree of diligence shown by the Government in ascertaining the legality of joining in the invasion. On the facts before the House the legal position appears to have been researched in depth, and what the appellants really want to know is why the Attorney General's advice changed. Thirdly, there is not a sustainable connection between the legality of a war and the safety of the service personnel sent to conduct it. As my noble and learned friend Lord Bingham of Cornhill has pointed out, an illegal surprise attack like that on Pearl Harbor may involve much less risk for them than one which is undertaken after all

proper public consideration and international support. I am accordingly satisfied that the question of a possible breach of article 2 is not relevant to the deaths of the soldiers or, as Mr Sumption QC put it on behalf of the respondents, their deaths are too remote.

66. Having reached these conclusions, I do not need to discuss the question whether the occurrence of the fatal incidents took place within the jurisdiction of the United Kingdom for the purposes of article 1 of the Convention, although on the authority of the views expressed in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2007] 3 WLR 33 that appears questionable. Nor will the appellants get any further by seeking to bring the matter within the jurisdiction by claiming that the decision to go to war was made in the United Kingdom. For the reasons set out in paragraph 8 of Lord Bingham's opinion, I consider that the Strasbourg authorities do not support such an argument and that the presentation of such an argument highlights the remoteness of their complaints from the true purview of article 2.

67. I accordingly have come to the conclusion, in concurrence with your Lordships, that notwithstanding my very real sympathy for the appellants in their grievous personal loss, their appeal cannot be sustained and must be dismissed.

**LORD BROWN OF EATON-UNDER-HEYWOOD**

My Lords,

68. No member of the Committee could fail to be moved by the plight of these appellants and others like them, the mothers of soldiers killed on active service in Iraq. Your Lordships naturally recognise too that the appellants' suffering is the greater because of their understandable concern that the invasion may not have been lawful in the first place. But however sympathetic your Lordships may be to the appellants' plea for a public inquiry to address and resolve the questions that so trouble them—most notably perhaps, whether the invasion was lawful under international law, how the Attorney-General came to his opinion that it was, and whether perhaps the Government was not in any event intent upon hostilities—your Lordships could only order such an inquiry if article 2 of the European Convention on Human Rights requires it.

69. Each of your Lordships has reached the clear conclusion that the appellants' argument for an inquiry under article 2 must fail. That too was the conclusion reached by Collins J at first instance (who cannot be criticised for refusing permission to claim judicial review on the ground that it was unarguable) and by the Court of Appeal (who expressly granted the necessary permission not on the basis that the claim had any real prospect of success but rather because it thought there was compelling reason to hear it).

70. It is impossible to argue that article 2 of the Convention was ever intended or is now apt to guarantee or police compliance by member states with article 2(4) of the Charter of the UN and, unsurprisingly, Mr Rabinder Singh QC shrinks from doing so. But realistically, once that is recognised, his whole case unravels. Obviously all armed conflict, whether lawful or not, is likely to result in deaths. But article 2 is not violated merely because a death occurs in war, even an unlawful war. Of course some deaths occurring during military conflict overseas do call for an inquiry (whether required under article 2 your Lordships need not decide) into whether sufficient precautions have been taken by the state to safeguard their service personnel. The March 2006 inquest held at Oxford into the deaths of six Royal Military policemen on 24 June 2003, killed whilst defending a police station in Iraq, provides an example of this. The coroner there examined in depth the adequacy of the transport, communications equipment and support provided to those concerned and made recommendations to the Secretary of State for improvements. But such inquests are held irrespective of the legality of the overseas operation in question and that itself could never properly be an issue in the case.

71. So many of your Lordships' speeches have so amply demonstrated all of this that I propose to content myself merely with a general concurrence in everything already said. I too would dismiss the appeal.

**LORD MANCE**

My Lords,

72. The appellants contend that Article 2 contains, first, a substantive duty, owed by the Government of the United Kingdom to soldiers whose

lives would be put at risk during a war, to exercise due diligence before going to war to ensure that it would be lawful to do so under international law; and, second, a procedural duty, in the event of a soldier dying in a war which may arguably have been entered into in violation of that substantive duty, to initiate an effective public and independent inquiry into whether due diligence was in fact exercised.

73. On this appeal, these two strands of the appellants' case stand or fall together. The appellants submit that there is a causative link between the alleged duties and their sons' sad deaths, in that, but for breach of the substantive duty of due diligence, the Government would not have gone to war, and their sons would not have died. Thus, they say, the "circumstances" of their sons' deaths (see *R (Middleton) v. West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, para. 3) go back to and include the decision-making process leading to the war. This is although, as my noble and learned friend, Lord Hope of Craighead has pointed out, the Government's concern about the legality of the Iraq war was unrelated to the physical risks that soldiers would incur during any war.

74. The reasoning in the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, which I have had the benefit of reading in draft, demonstrates in my view why the appellants cannot succeed on either strand of their case. I agree with them that there is no basis for any inquiry into the circumstances of the sad deaths of Trooper Clarke and Fusilier Gentle beyond that which has taken place at inquests already held. I too would dismiss this appeal accordingly.