

# **European Human Rights – A Force for Good or a Threat to Democracy?**

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Since 1969 no convicted prisoner in the United Kingdom has been allowed to vote. This prohibition was imposed, without debate, by the *Representation of the People Act* 1969. For two years before that there was no statutory bar to prisoners voting by post, albeit that there were, in many cases, administrative restrictions that prevented them from doing so. Article 3 of the First Protocol to the European Convention on Human Rights, to which the United Kingdom is party, provides that:

‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’

In 2004 the Grand Chamber of the European Court of Human Rights, in the case of *Hirst v United Kingdom (No 2)*,<sup>1</sup> held that the blanket ban on prisoners voting violated Article 3 of the First Protocol. The United Kingdom was under a duty to give at least some prisoners the vote.

This decision provoked what Sir Nicolas Bratza, the then President of the Court, described as a virulent attack on the judges of the Strasbourg Court. In a lecture that he delivered in 2011,<sup>2</sup> he went on to say:

‘The vitriolic – and I am afraid to say xenophobic – fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years. We are, as a Court, not unused to criticism by Governments who think we have gone too far, by unsuccessful applicants and by NGOs, who think we have not gone far enough, and by certain sections of the media that miss no opportunity to attack the Court, often in intemperate and in inaccurate terms. But the scale and tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government has created understandable dismay and resentment among the judges in Strasbourg.’

His reference to the Westminster Parliament was well founded. On 10 February 2011 the House of Commons had a debate about the decision in *Hirst*. On a free vote a resolution was agreed to by 234 votes to only 22. This stated that ‘legislative decisions of this nature should be a matter for democratically-elected law makers’.

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<sup>1</sup> (2005) ECHR 681.

<sup>2</sup> Sir Nicolas Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) EHRLR 505.

The resolution went on to express support for ‘the current situation in which no prisoner is able to vote...’ This was a direct challenge to Strasbourg.

The making of such a challenge has not been restricted to Parliamentarians. Recently there has been vigorous public discussion between some of the most senior members of the judiciary as to the role of the Strasbourg Court. The first to attack that role was Lord Hoffmann, in the 2009 Judicial Studies Board Annual Lecture.<sup>3</sup> His theme was that the Human Rights Convention was flawed inasmuch as it had created the Strasbourg Court. That Court was making rulings about the meaning of the Convention that applied to all the different countries that made up the Council of Europe. It was, in effect, creating uniform legislation for these countries in areas that should have been left to the individual legislatures of the countries in question.

Since Lord Hoffmann’s lecture, Laws LJ, Arden LJ, and Lord Dyson MR from the Court of Appeal, Lords Sumption, Mance, Reed, Neuberger and Baroness Hale from the Supreme Court, and Lord Judge, recently retired as Lord Chief Justice, have all given lectures that have considered the role of the Strasbourg Court. Some have supported the Court; others have followed Lord Hoffmann in suggesting that the Court has been exceeding its proper role by second-guessing domestic courts. Those courts ought properly to have been left to reach their own conclusions on the application of the Convention to the circumstances prevailing in their own jurisdictions.

Some might say that enough has been said on this topic, but I recently expressed some view of my own at a public lecture in Oxford<sup>4</sup> and I have been encouraged to return to the topic this evening.

By way of background I should say a word about the Convention and the Court that it created, with apologies to those who know all this already.

The European Convention on Human Rights was a reaction against the horrific abuses of human rights that took place before and during the Second World War, followed by further abuses occurring within the newly formed Communist block. These led, in 1949, due in part to the initiative of Winston Churchill, to the founding of the Council of Europe, open to all European States that accepted the principle of the rule of law and were able and willing to guarantee democracy and fundamental human rights and freedoms. This excluded the Communist block, up to the fall of the Berlin wall, since when Russia and almost all the new democracies of Central and Eastern Europe have become members. One of the first tasks of the initial members of the Council of Europe was to draw up the European Convention on Human Rights and Fundamental Freedoms, under which, by Article 1, the parties agreed to secure to everyone ‘within their jurisdictions’ the rights and freedoms set out in the Convention.

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<sup>3</sup> Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009.

<sup>4</sup> Lord Phillips of Worth Matravers, *The Elastic Jurisdiction of the European Court of Human Rights*, University of Oxford, 12 February 2014.

Article 19 of the Convention made provision for a supranational court to police the Convention. Pursuant to this there was created a Court at Strasbourg to which individual citizens could bring applications against their own States for infringements of their human rights. The United Kingdom signed up to this right of individual petition in 1966, but not until 1999 did Parliament enact the *Human Rights Act*, which incorporates the Convention rights into our domestic law. This Act imposes an obligation on the executive to observe the Convention rights and entitles individuals to sue the executive if it fails to do so. When ruling on such suits the United Kingdom courts are required by the Act to take into account the jurisprudence of the Strasbourg Court. In a case called *Ullah*,<sup>5</sup> Lord Bingham declared: 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less'. This brought judgments of the Strasbourg Court into the public eye. Judgments of United Kingdom courts, striking down executive action on Convention grounds, or holding legislation to be incompatible with the Convention, as defined by the Strasbourg Court, have contributed to the controversy about the role of that Court.

At the heart of the debate lie three principles that are the creation of the Strasbourg Court: the doctrine that the Convention is a 'living instrument'; the margin of appreciation; and proportionality. Let me deal first with the 'living instrument' principle.

The 'rights and freedoms' that the signatories to the Convention agreed to secure within their jurisdiction are stated in very general terms. They include the right to life (Article 2), freedom from torture and degrading treatment (Article 3), the right to liberty (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). Article 14 forbids discrimination when giving effect to these rights. Because these rights are expressed in general terms, the Strasbourg Court often has to make a ruling as to whether or not conduct constitutes an infringement of a particular right. When it does so, the Court is not concerned with the meaning that those who originally signed the Convention would have intended the right to have. The Court treats the Convention as what it has described as a 'living instrument'. This means that in defining the scope of a right the Court will have regard to changes in social attitudes in the Member States of the Council of Europe. The Court recognizes that the scope of human rights changes over time.

The Court laid down this principle in 1978 when ruling in the case of *Tyrer v UK*<sup>6</sup> that a sentence imposed on a 15 year old youth of three strokes of the birch constituted inhuman and degrading punishment contrary to Article 3 of the Convention. Such punishment would not have been considered untoward by those who drafted the Convention in 1950. But the 'living instrument' doctrine requires

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<sup>5</sup> *R v Special Adjudicator; ex parte Ullah* [2004] UKHL 26 at para 20.

<sup>6</sup> (1978) 2 EHRR 1.

the Court to move with the times when defining in concrete terms what conduct does and what does not violate a particular right.

Lord Bingham described this as the protection of rights ‘in the light of evolving standards of decency that mark the progress of a maturing society’<sup>7</sup>. In principle I believe that most would regard the ‘living instrument’ doctrine as desirable. The original signatories to the Convention would surely have intended the Court to apply contemporary standards when enforcing human rights. But that exercise necessarily gives to the decisions of the Court a legislative effect. This is fine if the evolving standards are universal. But what if they are not? The Court’s answer is that where standards differ from one European country to another, the Court will to apply what it describes as a ‘margin of appreciation’.

This means that, within reason, the Court will leave it to the individual State to decide whether the particular human right is infringed, applying its own standards. It is particularly important for the Court to allow a generous margin of appreciation where respect for human rights involves an issue of ‘proportionality’. Some human rights, such as the right to life and the prohibition of torture are absolute. They must be observed come what may. Others are qualified. Article 8 is a good example. It provides that everyone has the right to respect for his private and family life, his home and his correspondence. It goes on to qualify this right, however, to permit interference with it, I quote:

‘such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

When deciding whether the interference with a right is justified under such a qualification, the Strasbourg Court has held that the principle of proportionality must be applied. Broadly speaking this means that the restriction of the right must be reasonable having regard to the effect that this will have in achieving the legitimate aim that is recognized by the qualification. The public authorities of the individual State are likely to be in a better position to evaluate this balance than the Court at Strasbourg and, accordingly, should be allowed a generous margin of appreciation.

Both friends and enemies of Strasbourg have criticized the Court on occasion for failing to allow a sufficient margin of appreciation. Lord Hoffmann put this criticism particularly robustly:

‘In practice the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandize its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.’<sup>8</sup>

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<sup>7</sup> *Reyes v R* [2002] UKPC 11 at para 26.

<sup>8</sup> Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009.

Lord Hoffmann provided three examples of this conduct.

The first was the refusal by the Strasbourg Court to countenance sensible exceptions that existed under English law to the rule that evidence provided under compulsion could not be used in criminal proceedings.

The second was the refusal by the Strasbourg Court to countenance the admission, in exceptional circumstances, of hearsay evidence in a criminal trial.<sup>9</sup>

The third was the condemnation by the Strasbourg Court of a carefully considered decision by the Secretary of State to extend the hours during which night flights could be permitted at Heathrow. Strasbourg held that this was an unjustifiable interference with the rights of local residents to respect for their private and family life.<sup>10</sup>

It is right to observe that in relation to two of these examples the Grand Chamber reversed the decisions of which Lord Hoffmann complained.

Strasbourg judges have not remained silent in the face of attacks such as these. I have already mentioned the speech of Sir Nicolas Bratza. He paid tribute to the role that the United Kingdom, and its Courts, had played in interpreting and applying the Convention. He pointed out that, in 2010, of some 1200 applications made to the Strasbourg Court against the United Kingdom, no less than 1,177 were declared inadmissible or struck out. Of the remaining 23, several ended in findings of no violation. In these circumstances he suggested that the United Kingdom had little to complain about.

Sir Nicolas was succeeded as President of the Strasbourg Court by Judge Dean Spielmann. In 2012 he had presented a paper on the margin of appreciation at the Center for European Legal Studies at Cambridge.<sup>11</sup> This emphasized the principle of subsidiarity, under which the primary responsibility for the enforcement of the Convention rights lies with the individual Member States of the Council of Europe, with the Strasbourg Court only intervening as a 'long-stop'. The margin of appreciation gives effect to this principle.

As to the margin of appreciation he said this:

'Pursuant to a recent trend in the jurisprudence of the European Court of Human Rights judicial self-restraint should prevail in the event that superior national courts have analysed in a comprehensive manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom.'

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<sup>9</sup> *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 110 (Fourth Section of the Court).

<sup>10</sup> *Hatton v UK* (2003) 37 EHRR 611.

<sup>11</sup> Judge Dean Spielmann, *Allowing the Right Margin; The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Centre for European Legal Studies, University of Cambridge, 29 February 2012.

Judge Spielmann returned to this topic in a speech to the Max Planck Institute at Heidelberg at the end of last year.<sup>12</sup> In the course of this, he said:

‘There is a more general point to emphasise here, that one might call the procedural aspect of the margin of appreciation. It is implicit in the very term used, “appreciation”. The competent domestic authority, which may be a court, or parliament, or the administration, must engage in a process of appreciation, or assessment, of the rights and interests at stake.’

It would seem to follow from this that Strasbourg will not hesitate to intervene if it considers that the domestic authority has interfered with a Convention right without giving adequate consideration to whether or not it was proportionate to do so.

The perception that the Strasbourg Court was not going far enough in applying the margin of appreciation was one that was shared by other Member States. This was reflected in the Brighton Declaration, affirmed by all 47 Member States at a meeting in Brighton under the Presidency of the United Kingdom on 20 April 2012. The opening paragraphs are significant. They reaffirmed the commitment of all the Member States to the Convention and, in particular, to the right of individual application to the Strasbourg Court. They added that this Court had ‘made an extraordinary contribution to the protection of human rights in Europe over the last 50 years’. However, the Declaration went on to state:

‘The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.... The role of the Court is to review whether decisions taken by the national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.’

In accordance with the wishes of the Member States, the Convention was amended last June by the 15<sup>th</sup> Protocol<sup>13</sup> to add the following recital:

‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights...’

Let me pause to say where I stand in the debate. We did not take the lead in promoting and signing the European Convention on Human Rights because we

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<sup>12</sup> Judge Dean Spielmann, *Allowing the Right Margin; The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 13 December 2013.

<sup>13</sup> 24 June 2013.

considered that this was desirable to restrain our own shortcomings. We did so because we believed that the Convention was needed to prevent abuses of human rights by others. And we signed up to a Court to police the undertakings of the Member States, including our own. It has performed a most valuable function in doing this. Without it the Convention would have been toothless. To our surprise, the Court has, on occasion, found us wanting. But that has on many occasions been salutary.

Nonetheless, there have been some occasions, and they have probably been a growing number of occasions, where the Court has intervened to prefer its own views to that of courts of Member States that have not erred in the principles that they have applied, but only, in the view of the Court, in the result of their application. In some of these cases the Court has afforded the Member State concerned an insufficient margin of appreciation.

In a recent speech Judge Robert Spano of the Court acknowledged this by saying that criticisms of the Court's activism were 'not, in any sense, to be considered as wholly without foundation'.<sup>14</sup> I hope and believe that the Court will pay regard to the emphasis on subsidiarity and the margin of appreciation that has been inserted in the Preamble to the Convention.

I now want to leave discussion about the Court's interpretation of individual human rights and turn to significant extensions that it has made, not to the scope of the Convention, but to the ambit of its application. The implications of this have yet to be fully worked out.

Article 1 of the Convention provides that the parties 'shall secure to everyone within their jurisdiction' the rights and freedoms guaranteed by the Convention. What did they mean by 'within their jurisdiction'? If you look at the *travaux préparatoires* to the Convention, which is something that you are entitled to do, it seems clear that they meant 'within the territories over which they exercised jurisdiction'.

Lord Dyson identified this in a lecture that he gave for Essex University at the beginning of this year.<sup>15</sup> Does the 'living instrument' principle apply so as to permit the Strasbourg Court to give a wider meaning to 'jurisdiction' than it bore when the Convention was negotiated? This was a question considered by the Grand Chamber in the case of *Bankovic v Belgium* in 2001.<sup>16</sup>

The claims in *Bankovic* were in respect of deaths or injuries caused in Belgrade by airstrikes by NATO forces intervening in the Kosovo conflict in 1999. The issue was whether the victims were 'within the jurisdiction' of the NATO countries involved. The applicants sought to equate jurisdiction with control in the context of individual human rights. Because the lives of the victims came under the control of the NATO

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<sup>14</sup> Judge Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, Lecture at Jesus College, Oxford, 30 April 2014.

<sup>15</sup> Lord Dyson, *The Extraterritorial Application of the ECHR: Now on a firmer footing, but is it a sound one?*, Essex University, 30 January 2014.

<sup>16</sup> (2001) 11 BHRC 435.

forces, they were bound to respect the 'right to life' protected by Article 2. The Grand Chamber rejected this submission. It also rejected the suggestion that the meaning of 'jurisdiction' could vary over time under the 'living instrument' doctrine.

In this context the Court remarked:<sup>17</sup>

'...the scope of Article 1... is determinative of the very scope of the Contracting Parties positive obligations and, as such, of the scope and reach of the entire Convention system of human rights' protection'.

The Court held that the concept of 'jurisdiction' was essentially territorial. The Convention primarily governed the manner in which the Member States treated those within the territories that they governed, although there were some exceptions recognised by international law.

The Court also rejected the suggestion that you could divide and tailor the obligations under the Convention so that there could be circumstances in which only some of the Convention rights had to be secured by a State. Applying the Convention on a territorial basis engaged a State's obligations in relation to all Convention rights.

On one view, however, the Court had already made a very significant departure from the territorial basis of jurisdiction. At the same time that the European Convention on Human Rights was being negotiated the signatories were also party to the United Nations Convention on the Status of Refugees. This required a signatory to give asylum to a person who faced persecution if sent back to his own country.

There was an exception to this obligation, however, where there were reasonable grounds for considering that the refugee posed a threat to national security. By a series of decisions the Strasbourg Court has interpreted the Human Rights Convention so as to impose obligations similar to those of the refugee Convention, but with some important differences. In *Soering*<sup>18</sup> and *Chahal*,<sup>19</sup> two cases involving the United Kingdom, Strasbourg held that it was a breach in this country of a person's Article 3 rights to deport him to a country where he would face a serious risk of suffering torture or inhuman treatment. This was so even if he posed a grave threat to national security.

I have always taken the view that the signatories to the Human Rights Convention had never intended to prohibit the deportation of undesirable aliens to their own countries on the ground that their human rights would not be respected once deported. It would nonetheless be abhorrent to do this if they were going to face death or torture if deported. But what if they faced less serious infringements of other human rights if deported?

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<sup>17</sup> At para 65.

<sup>18</sup> (1989) 11 EHRR 439.

<sup>19</sup> (1996) 23 EHRR 413.



Should it be a bar to the deportation of a terrorist suspect that his home country would not respect his right to freedom of expression or freedom of religion? On a number of occasions the Strasbourg Court considered this question in respect to Article 6 – the right to a fair trial. It commented that it ‘would not exclude this possibility’ if the person risked a *flagrant* denial of a fair trial in his own country. The word *flagrant* was intended to convey a breach of entitlement to a fair trial that was so fundamental as to amount to ‘a nullification, or destruction, of the very essence of the right’.

Very many years passed before Strasbourg held that this exacting test had been satisfied. Then came the case of *Abu Qatada v UK*.<sup>20</sup> Mr Abu Qatada was a Jordanian citizen who faced trial in Jordan on terrorist charges. The United Kingdom was anxious to deport him to Jordan because we believed that he posed a threat to the national security of this country. He resisted deportation on the ground, inter alia, that there was a real risk of a *flagrant* breach of his right to a fair trial if returned to Jordan because of the likelihood that evidence obtained by torture would be used against him.

I presided over his case in the House of Lords and we rejected his claim, but it was subsequently upheld by the Strasbourg Court. Ultimately Mr Abu Qatada returned to Jordan of his own volition relying on assurances that evidence obtained by torture would not be admitted against him, but before he did so, Strasbourg’s decision provoked a wave of hostile reaction in this country. This case and the earlier cases of *Chahal* and *Soering*, were, in my view, as I have indicated, examples of the Strasbourg Court extending the meaning of jurisdiction beyond the territorial concept that it had for those who signed the Convention.

This has resulted in an overlap, and a degree of conflict, between the Human Rights Convention and the Refugee Convention. Strasbourg has, however, always been very sensitive to the importance attached by Member States to control of immigration, which perhaps explains the paucity of cases in which Strasbourg has struck down deportation on the ground of the treatment that an alien would receive if returned to his own country. So this extraterritorial extension of jurisdiction under the Convention has so far had limited practical effect.

I am not sure that this is true of another respect in which Strasbourg has recently extended the meaning of ‘jurisdiction’ in the Convention. Article 2 of the Convention protects the right to life. It prohibits the State from taking life and imposes on the State a duty to take reasonable steps to protect life. Strasbourg has held that this includes an obligation to hold a thorough investigation into any death that may have resulted from a breach of the State’s duty.

Claims under the *Human Rights Act* for failures to carry out investigations into deaths occurring outside the territory of the United Kingdom have raised a stark issue as to whether those deaths occurred within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention. That issue came before the

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<sup>20</sup> [2012] ECHR 56.

House of Lords in the case of *Al-Skeini*.<sup>21</sup> Members of the British armed forces had killed four Iraqi civilians and were alleged to have killed a fifth. Their relatives brought judicial review proceedings against the Secretary of State alleging that he had a duty under Article 2 to investigate the deaths. The House of Lords, other than Lord Bingham, who preferred to reserve his opinion on the point, held that the Iraqi victims had not been within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention when they were killed. This conclusion was firmly founded on the decision of the Grand Chamber in *Bankovic*. Conflicting *dicta* in a subsequent decision of a single section of the Court called *Issa v Turkey*<sup>22</sup> were dismissed as incompatible with *Bankovic*.

The victims in *Al-Skeini* were Iraqi nationals, who were not subject to the law of the United Kingdom. This was not true of a claim subsequently brought against the Secretary of State for Defence by a Mrs Smith.<sup>23</sup> Her son had died of hypothermia while serving with the army in Iraq. Just as in the case of *Al-Skeini*, her claim was for a full investigation of the circumstances of her son's death pursuant to Article 2 of the Convention. She claimed that as a member of our armed forces he was subject to the jurisdiction of the United Kingdom while serving in Iraq and thus within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

Her claim succeeded in the Court of Appeal, one member of which was Lord Justice Dyson. I presided over the appeal by the Secretary of State in the Supreme Court. Because of the importance of the case, we sat nine strong to hear the appeal instead of the usual five. By a majority of six to three we allowed the Secretary of State's appeal. I gave the leading judgment for the majority. We accepted that Private Smith, as a serving soldier, was subject to the jurisdiction of the United Kingdom as a matter of domestic law, but held that this did not mean that he fell within the jurisdiction of the United Kingdom for the purposes of Article 1. That jurisdiction was essentially territorial, as laid down in *Bankovic*. Lord Collins, an international jurist of the highest standing, began his conclusions as follows:

'*Bankovic* made it clear that Article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions... It is hardly conceivable that in 1950 the framers of the Convention would have intended the Convention to apply to the armed forces of Council of Europe states engaged in operations in the Middle East or elsewhere outside the contracting states.'

This was precisely my view. However, Lord Mance wrote a lengthy and powerful dissent, to which Lady Hale and Lord Kerr subscribed. He stated:

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<sup>21</sup> *R (Al-Skeini) v Secretary of State* [2007] UKHL 26.

<sup>22</sup> (2004) 41 EHRR 567.

<sup>23</sup> *R (Smith) v Secretary of State for Defence* [2007] UKSC 29.

<sup>24</sup> At para 303.

‘In my judgment the armed forces of a state are, and the European Court of Human Rights would hold that they are, within its jurisdiction within the meaning of art 1 and for the purposes of art 2, wherever they may be.’<sup>25</sup>

It was not long before Strasbourg proved Lord Mance right.

In 2011 the unsuccessful Iraqi claimants in *Al-Skeini* took their case to the Grand Chamber.<sup>26</sup> The Grand Chamber held that the House of Lords’ decision in that case was wrong. It propounded clearly, for the first time, the following principle:

‘It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 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” – compare *Bankovic*.’<sup>27</sup>

The Court held that the British soldiers engaged in security operations in Basrah exercised sufficient authority and control over the Iraqis who were killed to bring them within the jurisdiction of the United Kingdom for the purposes of Article 1.

So Lord Mance and those who supported him in *Smith* have been proved correct. In his lecture delivered at Essex University in January Lord Dyson hailed the Grand Chamber’s decision as putting the Strasbourg jurisprudence back on track. He described *Bankovic* as an aberration that had thrown the jurisprudence off course for ten years. He observed that the fundamental principle of jurisdiction was the exercise of power and control over the individual and that, once this was appreciated, the territoriality principle lost its special significance.<sup>28</sup>

Well, I think that Lord Dyson was correct to conclude that the test of ‘control and authority’ replaces, and subsumes, the test of territoriality. And it is arguable that it is a more principled test. I do not accept, however, that it is the test of jurisdiction that those who framed the Convention intended should apply. *Bankovic* was not an aberration. It was a very carefully considered decision of the Grand Chamber intended to provide definitive guidance on the meaning of jurisdiction. And I believe that the Grand Chamber was correct to identify that the meaning that those responsible for the Convention intended ‘jurisdiction’ to bear was essential territorial. I also believe that the Grand Chamber was correct in principle to hold that the ‘living instrument’ doctrine did not apply to the meaning of jurisdiction. The decision in *Al-Skeini* was a significant extension by the Strasbourg Court of its jurisdiction.

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<sup>25</sup> At para 199.

<sup>26</sup> (2011) 53 EHRR 589.

<sup>27</sup> At para 137.

<sup>28</sup> Lord Dyson, *The Extraterritorial Application of the ECHR: Now on a firmer footing, but is it a sound one?*, Essex University, 30 January 2014.

Whether or not it was legitimate, is this extension a matter for regret? I believe strongly in the protection of fundamental human rights and there is much to be said for States being required to respect the rights of all within their authority and control. The consequences of the decision in *Al-Skeini* are, however, likely to prove far reaching.

In *Smith v Ministry of Defence*<sup>29</sup> (another case called *Smith*) claims were brought under Article 2 by relatives of soldiers killed in Iraq when Snatch Land Rovers in which they were patrolling were blown up. The breaches of Article 2 alleged included failure to provide better armoured vehicles and allowing soldiers to patrol in Snatch Land Rovers.

The majority of the Supreme Court rejected an application to strike out these claims. Giving the leading judgment Lord Hope held:

‘[t]here have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the State, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failure of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under Article 2 of the Convention.’<sup>30</sup>

I was present in the Chamber of the House of Lords when the effect of this judgment was being debated and some suggested that it would lead to judicial review of decisions taken by commanders in the field of battle. This was to exaggerate the consequences of the decision but its full implications have yet to be worked out.

Compared to the issue of the Court’s jurisdiction, Strasbourg’s decision in *Hirst* about prisoners’ votes seems small beer. And yet that case has provoked the more severe reaction. Mr Cameron has said that the idea of a prisoner voting makes him feel sick and the House of Commons, in the resolution to which I referred at the beginning of this lecture, has passed a resolution defying Strasbourg. More recently, a joint Parliamentary Committee, on which I served as the only cross-bencher, sat to advise Parliament on the appropriate response to Strasbourg’s judgment in *Hirst*. The primary issue proved to be not whether the decision in *Hirst* was good or bad. It was whether Parliament should pass an Act that deliberately flouted the decision, or pass an Act that gave effect to it. International law requires this country to comply with decisions of the Strasbourg Court, because we signed up to a Convention agreeing to do just that. But it is a fundamental principle of our unwritten constitution that Parliament is supreme, and some members of the Committee felt strongly that Parliament should demonstrate that supremacy by defying Strasbourg.

Happily, respect for the rule of law prevailed, and the Committee advised that Parliament should comply with the judgment in *Hirst* by giving the vote to any

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<sup>29</sup> [2013] UKSC 41.

<sup>30</sup> At para 63.

prisoner sentenced to less than 12 months' imprisonment. This is how our Report dealt with the issue of principle:

'...the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system. While we are part of the system we incur obligations that cannot be the subject of cherry picking... A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would give succor to those states in the Council of Europe who have a poor record of protecting human rights and who may draw on such action as setting a precedent that they may wish to follow.'

That surely is the point. We did not sign up to the Human Rights Convention because of concern about our own respect for human rights. We did so because of concern about the behaviour of others. Even so we have, on occasion, rightly been found wanting by the Strasbourg Court – by way of example in denying basic rights to prisoners, in discriminating against homosexuals, in detention of terrorist suspects without trial, in permitting decisions to be founded on evidence not shown to the losing party. But these shortcomings have been insignificant compared to the violations of human rights of which other members of the Council of Europe have been held guilty by Strasbourg.

In the earlier part of this lecture I expressed the view that the Court needs to be more sensitive to the requirements of subsidiarity and of the margin of appreciation, as identified in the Brighton Declaration. In the latter part I have suggested that the Strasbourg Court has extended its jurisdiction in ways that may be open to question. But when the countries of the Council of Europe are looked at as a whole, the influence of the Strasbourg Court has been beneficial. I have given examples where Strasbourg has rightly found this Country wanting. I could give many more in relation to other members of the Council of Europe. Europe needs the Convention and Europe needs the Court. I have no hesitation in expressing my conclusion that Strasbourg is a powerful force for good.