THEIRS BUT TO DO AND DIE?

GUARANTEEING SOLDIERS' RIGHT TO LIFE

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ABSTRACT

On 25 October 1855 Lord Cardigan led the Light Brigade in a fateful charge against a Russian artillery battery. Poet Laureate Lord Tennyson immortalised the cavalry's valour in verse.

> Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do & die,
> Into the valley of Death
> Rode the six hundred

Since then, British soldiers, sailors and pilots have been engaged in countless wars, conflicts and peacekeeping missions across the globe. Many have died in defence of the United Kingdom and her interests. What obligations do states have to armed forces personnel who lay down their lives?

This thesis is about guaranteeing armed forces personnel's right to life. It asks about the obligations states owe to their own armed forces under the European Convention on Human Rights. Military service exposes individual servicemen and women to countless dangers – the risk of being killed in enemy attack, friendly fire, the risks from hostile environments and infectious disease, difficult training exercises and the inherent risks surrounding weapons. This thesis examines whether states are under a duty to protect servicemen and women against such risks.

These risks are inherent to military service. Some, such as enemy attack, are virtually impossible to predict and guard against. The focus of this thesis is to establish realistic, practical and effective expressions of the right to life that fulfil states' obligations under human rights law, whilst also maintaining military efficacy, discretion and decision-making authority. In order to be effective human rights law must not impose unrealistic burdens on states. This thesis considers how to provide effective, balanced legal protection for servicemen and women that makes allowances for the realities of military service.

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ABBREVIATIONS

AJIL	*American Journal of International Law*
Am Phil Q	*American Philosophical Quarterly*
ASIL Proc	*Proceedings of the Annual Meeting of the American Society of International Law*
Baltic YBIL	*Baltic Yearbook of International Law*
BUILJ	*Boston University International Law Journal*
CIJCL	*Cambridge Journal of International and Comparative Law*
CJLJ	*Canadian Journal of Law and Jurisprudence*
CLJ	*Cambridge Law Journal*
CLP	*Current Legal Problems*
Crim LR	*Criminal Law Review*
EHRLR	*European Human Rights Law Review*
EJIL	*European Journal of International Law*
EL Rev	*European Law Review*
Geo Wash Intl LR	*George Washington International Law Review*
German LJ	*German Law Journal*
HCJ	High Court of Justice (Israel)
Hibernian LJ	*Hibernian Law Journal*
HUP	Harvard University Press
ICCPR	International Covenant on Civil and Political Rights
ICLQ	*International Comparative Law Quarterly*
ICLR	*International Criminal Law Review*
IJHR	*International Journal of Human Rights*
IRRC	*International Review of the Red Cross*
Isr LR	*Israel Law Review*
Isr YB Hum Rts	*Israel Yearbook on Human Rights*
J Crim L	*Journal of Criminal Law*
J Mil Ethics	*Journal of Military Ethics*
J Phil	*Journal of Philosophy*
JCSL	*Journal of Conflict and Security Law*
JR	*Judicial Review*
LJIL	*Leiden Journal of International Law*
LQR	*Law Quarterly Review*
MJ	*Maastricht Journal of European and Comparative Law*
OJLS	*Oxford Journal of Legal Studies*
NATO	North Atlantic Treaty Organisation
NQHR	*Netherlands Quarterly of Human Rights*
NY Rev Books	*New York Review of Books*
OUP	Oxford University Press
SALJ	*South Africa Law Journal*
UK	United Kingdom
UN	United Nations

USA	United States of America
Vand J Transnat L	*Vanderbilt Journal of Transnational Law*
Wis Intl LJ	*Wisconsin International Law Journal*
Yale LJ	*Yale Law Journal*
YB ECHR	Yearbook of the European Convention on Human Rights

INTRODUCTION

On 19 June 2013 the Supreme Court of the United Kingdom gave its judgment in *Smith and Others* v *Ministry of Defence*.[1] Their Lordships were asked to determine whether British soldiers enjoyed rights under the European Convention on Human Rights ("the Convention")[2] when deployed to armed conflicts overseas. Next of kin of five British soldiers killed on active duty in Iraq claimed the soldiers' right to life under Article 2 of the Convention had been violated.[3] This appeal concerned the British government's assertion that the Convention only applied to British territory and that by virtue of being deployed overseas the soldiers had no rights under the Convention at the time of their deaths.

The Supreme Court rejected the government's assertion. Following the recent judgment of the European Court of Human Rights ("the Court") in *Al-Skeini* v *United Kingdom*[4] their Lordships determined the UK's obligations under the Convention were not restricted to British territory and that British soldiers continue to enjoy Convention rights when deployed to armed conflicts abroad.[5] The Supreme Court's judgment did not discuss the nature, scope or extent of the UK's Article 2 obligations to its soldiers. Lord Hope DP hinted at his scepticism that the claimants could show the right to life had been violated in the circumstances.[6] This thesis seeks to answer the fundamental question posed by the Supreme Court's judgment: how to guarantee soldiers' right to life?

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[1] [2013] UKSC 41, [2014] AC 52.
[2] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.
[3] *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52, [1]-[8].
[4] 53 EHRR 18.
[5] *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52, [55] (Lord Hope DP).
[6] ibid, [81].

The aim of this thesis is to understand how to guarantee soldiers' right to life.[7] But more specifically, it is to determine the nature, extent and scope of states' obligations to their soldiers under Article 2 of the Convention. These obligations must be robust enough to require states to effectively and meaningfully protect their soldiers' lives against the risks inherent to military service. Yet those obligations must also avoid imposing unrealistic, impracticable or disproportionate burdens on states that would prevent the armed forces from functioning effectively.[8] This thesis will examine the extent of states' obligations to their soldiers at different stages of their service, including training and active combat. The thesis establishes rules of general application using situations in which British soldiers have been killed as case studies.

By answering the specific question of the appeal about the applicability of the Convention to soldiers serving overseas, their Lordships' judgment in *Smith* left even more questions unresolved. The nature of states' human rights obligations to their soldiers is an unresolved legal problem, the issue not having been litigated on its merits before domestic courts or the European Court. There have been significant scholarly contributions about states' human rights obligations to *civilian victims* of armed conflict[9] and an extensive body of law and literature on states' obligations to the enemy during armed conflict, including to

[7] "Soldiers" in the context of this thesis can be understood to include all military service personnel, including soldiers, sailors, pilots and marines.

[8] Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange 2013) 32.

[9] Daragh Murray (ed), *Practitioners' Guide to Human Rights Law in Armed Conflict* (OUP 2016); Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (CUP 2015); Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (CUP 2006); Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' 87(860) *IRRC* 737; William Abresch, 'A Human Rights Law of Armed Conflict: The European Court of Human Rights in Chechnya' 16(4) *EJIL* 741; Cordula Droege, 'The Interplay Between Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' 40(2) *Isr LR* 310; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' 98(1) *AJIL* 1.

enemy soldiers. But the issue of states' human rights obligations to their own *soldiers* has received comparatively little treatment. The UK is a member of NATO and has an active military, having been involved in countless conflicts and peacekeeping operations. The *Smith* judgment has important ramifications for the future of British military operations, both during domestic peacetime and conflict overseas. The thesis poses an important, current legal question.

This thesis adopts a number of different methods to answer the research question. I engage in a legal and philosophical analysis of Article 2 of the Convention to interpret the meaning and scope of that provision. Secondly I conduct a doctrinal exposition of the Court's case law on the right to life to develop a clear picture of the state's obligations under Article 2 and the general principles underlying those obligations. Finally I apply those general principles to real-life situations and consider the law in action.

SCOPE AND OMISSIONS

The state has an intuitive moral obligation to protect the soldier who 'places duty to the Crown above his own safety'.[10] This obligation arises because the military profession is 'monopolized' by the state.[11] The armed forces, as a state organ, wield an 'astonishing level of coercive force',[12] but individual soldiers are vulnerable to the excesses of state power. Human rights law specifically protects individuals against the state's organised

[10] Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations* (HC 2013-14, 931) Ev 93.
[11] Samuel P Huntington, *The Soldier and the State: The Theory and Politics of the Civil-Military Relationship* (HUP 1957) 14.
[12] Peter Feaver, *Armed Servants: Agency, Oversight, and Civil-Military Relations* (HUP 2003) 1.

power.[13] States can wield their tremendous coercive power to individuals' detriment, but also to *protect* individuals – protection being a 'key rationale for the state's existence'.[14] Human rights law can therefore impose obligations on states to protect their soldiers from the risks inherent to military service. This thesis explores how the human rights framework can give normative force to the moral intuition.

Other legal frameworks may offer a plausible way to protect soldiers' lives. For instance, states owe obligations to their soldiers in labour law – as the soldiers' employer, the state is bound to fulfil its contractual obligations. Duties may arise from the law of negligence. There may be other responsibilities owed under international law. This thesis does not consider how those frameworks might operate or whether they could provide effective legal protection for soldiers. The argument of this thesis is that human rights law offers *a* plausible framework, but that it may be only one of many.

Human rights law protects *everyone*. The Universal Declaration of Human Rights, signed in 1948, recognises that protection of the 'equal and inalienable rights of *all members of the human family*' is the 'foundation of freedom, justice and peace' in the world.[15] Rights in the European Convention are guaranteed to everyone within a contracting state's jurisdiction,[16] without regard to status and without discrimination.[17] The European Court has affirmed that the Convention applies to soldiers as well as civilians, but the extent of

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[13] Michael Freeman, *Human Rights: An Interdisciplinary Approach* (2nd edn, Polity Press 2011) 15-36.
[14] Jeremy McBride, 'Protecting Life: A Positive Obligation to Help' 24 Supp (Human Rights Survey) *EL Rev* 43, 54.
[15] Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217 A(III), UN Doc A/Res/217(III), Preamble (emphasis added).
[16] European Convention on Human Rights, Article 1. Chapter 1.
[17] European Convention on Human Rights, Article 14(1).

soldiers' Convention rights must take into account the 'particular characteristics of military life'.[18]

One of those 'particular characteristics' is armed conflict. Despite attempts by the international community to replace armed conflict with pacific resolution of international disputes,[19] war has not yet been consigned to the history books. Soldiers may be called upon to fight in defence of the realm, either at home or abroad. The International Court of Justice has determined that human rights treaties continue to apply during armed conflict.[20] The United Nations Security Council agrees.[21] Regional human rights tribunals have scrutinised military operations in the human rights framework.[22] The British Supreme Court has also noted that there is 'nothing that makes the Convention impossible or inappropriate of application to the relationship between the state and its armed forces as it exists in relation to overseas operations'.[23] The fact that soldiers are engaged in armed conflict does not mean they do not enjoy rights under the Convention, but the nature and scope of those rights may be different to civilians in domestic peacetime.

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[18] *Şen* v *Turkey*, App No 45824/99 (ECtHR, 8 July 2003) §1. See also *Engel* v *Netherlands* 1 EHRR 647, §§54, 59; *Grigoriades* v *Greece* 27 EHRR 464, §45.

[19] United Nations Charter (opened for signature 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Chapter VI.

[20] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, §25.

[21] UNSC Res 1894 (11 November 2009) UN Doc S/Res/1894 (2009), Article 1.

[22] See for example *Al-Jedda* v *United Kingdom* 53 EHRR 23; *Isayeva* v *Russia* 41 EHRR 39; *Abella* v *Argentina* Case No 11.137, Report No 55/97 of 14 April 1998; *Coard* v *United States* Case No 10.951, Report No 109/99 of 29 September 1999.

[23] *R (Smith)* v *Secretary of State for Defence and Another* [2010] UKSC 29, [2011] 1 AC 1, [195] (Lord Mance); *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52, [63] (Lord Hope DP).

Conduct of hostilities is governed by the law of armed conflict ("LOAC"). This generally permissive legal regime sets out 'rules of the game' for armed conflicts.[24] LOAC restricts the fighting to specific categories of people. It protects civilians, the wounded and others *hors de combat*. LOAC is designed to 'mitigate the human suffering of war',[25] but permits soldiers on opposing armies to attack each other with only limited restrictions.[26] Some issues are exclusively human rights law matters, others are exclusively LOAC matters, but a significant number of issues are governed by both regimes.[27] The European Court of Human Rights has taken a very cautious approach to LOAC in its case law. The Court has judged cases dealing with issues arising out of internal armed conflicts from Northern Ireland to the Caucasus,[28] as well as international armed conflicts involving Council of Europe member states' armed forces,[29] but has shown reluctance to analyse LOAC provisions.

In *Isayeva* v *Russia* the Russian Air Force dropped bombs on a civilian convoy, claiming to be attacking rebels who opened fire first.[30] The European Court of Human Rights accepted the nature of the separatist violence in Chechnya permitted the Russian authorities to use

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[24] David Turns, 'The Law of Armed Conflict (International Humanitarian Law)' in Malcolm D Evans (ed) *International Law* (4th edn, OUP 2010) 821.

[25] Frits Kalshoven and Lisbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (International Committee of the Red Cross, 2001) 12.

[26] First Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts ("AP1") (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512, Article 50(1).

[27] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, §106.

[28] See for example *Ireland* v *United Kingdom* 2 EHRR 25; *Menteş* v *Turkey* 26 EHRR 595; *Isayeva* v *Russia* 41 EHRR 39; *Chiragov* v *Armenia* 63 EHRR 9; *Varnava* v *Turkey*, App No 16064/90 (ECtHR, 18 September 2009); *Benzer* v *Turkey*, App No 23502/06 (ECtHR, 12 November 2013).

[29] *Al-Skeini* v *United Kingdom* 53 EHRR 18; *Hassan* v *United Kingdom*, App No 29750/09 (ECtHR, 16 September 2014).

[30] For more detailed facts see *Isayeva* v *Russia* 41 EHRR 39, §§11-29. *Isayeva* is examined in Chapter 3.1.2.3.

extreme measures to bring the emergency to a peaceful close,[31] the use of force did not meet required proportionality standards. It has been argued this judgment evokes LOAC rules on proportionality and targeting.[32] This might appear to justify the Court's omission to overtly consider LOAC in its interpretation of states' human rights obligations during armed conflicts. But LOAC and human rights law are described as 'different languages'.[33] It is not entirely convincing that the Court's *Isayeva* judgment attempted to unify LOAC and human rights law.

The Court's failure to mention LOAC has been put down to the fact this was an internal armed conflict, in which military action might have been conceptualised as a law-enforcement operation.[34] Indeed where a conflict takes place entirely within a state's own territory it may look more like a traditional law-enforcement case between the state and law-breakers, in which the human rights limits on states' coercive power is a more appropriate framework than LOAC's permissive stance on use of force. The relative lack of treaty norms regarding internal armed conflicts would tend to support this view. But the International Criminal Court has judged that LOAC treaties are applicable to internal armed conflicts as customary international law.[35] The argument might otherwise have been compelling.

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[31] ibid, §178. See also *Isayeva* v *Russia* 41 EHRR 38, §180.

[32] Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' 19(1) *EJIL* 161, 174.

[33] Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' 87(860) *IRRC* 737, 745.

[34] Andrea Gioia, 'The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: pas de deux* (OUP 2011) 247-48.

[35] *Prosecutor* v *Tadić* (Appeals Chamber) IT-94-1-AR72 (2 October 1995) §§97-98, 117, 119-125.

In *Hassan* v *United Kingdom* the Court was asked to determine the compatibility of administrative detention during armed conflict with Article 5 of the Convention.[36] Changing tack from its earlier decisions, the Court declared that though Article 5 does not permit administrative detention, the Court must not be 'prevented from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5'.[37] The Court "accommodated" administrative detention within the scheme of detention expressly permitted by Article 5.[38] This approach has been hailed as progress.[39] However it does not yet represent the Court's consistent practice. This thesis follows the Court's human rights approach, with references to LOAC where relevant for context, clarity, or definition.

Might LOAC give normative force to the moral intuition that states should protect their soldiers' lives? During armed conflict LOAC is the more directly-relevant applicable law and can add definition and context to flesh out the normative bones of the general human rights provision. This presents a number of challenges because the two regimes have fundamentally opposite approaches to use of force.[40] This incongruity leads to the objection that trying to protect soldiers' right to life is impossible or pointless. But LOAC has some fundamental limitations justifying this thesis' human rights approach. LOAC is comprised of a series of reciprocal multilateral agreements between states and customary international law. Parties to an armed conflict (whether they be states, armed groups or

[36] *Hassan* v *United Kingdom*, App No 29750/09 (ECtHR, 16 September 2014), §§65-111.
[37] ibid, §103.
[38] See Chapter 4.3.2.
[39] Lawrence Hill-Cawthorne, 'The Grand Chamber Judgment in *Hassan* v *UK*' (*EJIL:talk!*, 16 September 2014) <www.ejiltalk.org/the-grand-chamber-judgment-in-hassan-v-uk> accessed 16 October 2017.
[40] Geoffrey Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflicts' 1(1) *International Humanitarian Legal Studies* 76.

other non-state actors[41]) owe obligations to one another, not to individual enemy soldiers. If a state is found to have violated provisions of LOAC, it has responsibilities under international law to cease the wrongful conduct and make reparations.[42] But these responsibilities are owed to the wronged party, not to individual victims.[43] Whilst LOAC imposes certain duties on parties to armed conflict, it does not create justiciable rights for individuals.[44] Though international human rights law is found in multilateral agreements, those treaties recognise or create justiciable individual rights and establish international and regional enforcement mechanisms, such as the European Court of Human Rights.

More importantly, LOAC does not regulate the state's conduct towards its own soldiers. LOAC is the *lex specialis* that regulates how states treat nationals of adverse and neutral parties during armed conflict, but is silent on standards of behaviour and protection states must adopt in respect of their own soldiers.[45] Though LOAC does not *permit* states' ill-treatment of their troops, it does not *prohibit* it either – it is simply not what LOAC regulates. Conversely human rights law is designed to protect individuals against a state that has power over them,[46] most especially their own.

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[41] Application of LOAC to non-state actors is generally acknowledged but rarely examined. For a thorough analysis of the legal basis for applying LOAC to non-state actors see Daragh Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Groups' 20(1) *JCSL* 101.

[42] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) rule 150. See also International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83, Articles 30-31 of Annex to the Resolution.

[43] UNGA Res 56/83, Article 33(1) of Annex to the Resolution.

[44] GIA Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflicts' 1 *Isr YB Hum Rts* 191, 192.

[45] *Nuclear Weapons*, §§24-25. Turns, 'The Law of Armed Conflict', 823.

[46] Chapter 1.

In an interesting recent development the International Criminal Court ("ICC") has held that individuals can be liable in international criminal law for war crimes and crimes against humanity committed against their own troops. The ICC considered that provisions in LOAC protecting civilians and those *hors de combat* did not exhaustively limit the scope of protection to those categories of person.[47] The ICC based its reasoning on LOAC fundamental guarantees (such as freedom from violence or outrages upon personal dignity[48]) to anyone 'in the power of *a* Party to the conflict'.[49] The ICC's interpretation is that a state's own soldiers are also protected by the fundamental guarantees.[50] Limiting the protections of LOAC to *enemy* troops would be contrary to the aim of mitigating suffering in war according to the ICC.[51]

Under this approach, states may owe certain obligations to their own soldiers under LOAC. The persistent problem is that even if those obligations did exist, there is no individual enforcement mechanism.[52] The fundamental guarantees require states to treat people 'humanely', but are a series of primarily negative obligations that do not explicitly impose a duty to protect. Furthermore the *Ntaganda* case, which is ongoing, is a matter of international criminal liability. It may be appropriate for commanders to be criminally liable for their actions in respect of their own subordinates. This thesis takes no position on that matter, other than to say that the nature of the obligation is shifted. If commanders were required, as a matter of international criminal law, to take measures protecting their

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[47] *Prosecutor* v *Ntaganda (Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9)* ICC-01/04-02/06 (4 January 2017) < https://www.icc-cpi.int/CourtRecords/CR2017_00011.PDF> accessed 18 March 2017, §47.
[48] AP1, Article 75(2).
[49] ibid, Article 75(1) (emphasis added).
[50] *Ntaganda*, §47.
[51] ibid, §48.
[52] Certainly as a matter of British law, international treaties are not justiciable in domestic courts unless they have been integrated into the domestic legal order by primary legislation: *JH Rayner (Mincing Lane) ltd* v *Department of Trade and Industry* [1989] Ch 72.

soldiers, fulfilment of this duty would be driven by a desire to avoid criminal liability rather than recognition of any moral intuition that soldiers deserve to be protected and it would still not give soldiers any individually enforceable guarantees.

Force protection is a growing area of debate in LOAC. LOAC permits attacks on legitimate military targets that do not cause civilian deaths or damage to civilian objects that is disproportionate to the concrete and direct military objective pursued.[53] Protecting one's own soldiers from being killed is a military advantage. The question is whether commanders should be taking into account the safety of their own soldiers when calculating attacks on enemy targets.[54] Under this approach, states may be able to attack the enemy with greater force and risk more significant civilian casualties if it protects their own soldiers – even though restricting the horrors of war to combatants is one of the purposes of LOAC.

If the question were resolved in favour of the proposition, it could give rise to the principle that states should protect their soldiers' lives. But such a principle would not give soldiers any enforceable expectation or legal claim to be protected. Rather it would *permit* (but not require) the state to favour civilian losses over their own soldiers' deaths. The first problem with this approach is that it undermines the aim of restricting the horrors of war to combatants. The second is that any protection of soldiers derives from the state's self-interested pursuit of its own military advantage. It reduces the value of each soldier's life to the military advantage conferred by his survival.

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[53] AP1, Article 51(5)(b).

[54] For an interesting discussion of this question, see Ziv Bohrer and Mark Osiel, 'Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers' 46 *Vand J Transnatl L* 747.

This is not a project about LOAC, or about when killing in war is permissible. This thesis is not about whether human rights law, read in light of LOAC, permits attacks on enemy soldiers during armed conflict. If it were, the interplay between human rights law and LOAC would be an important feature of this thesis. This thesis is about states' human rights obligations to their own soldiers, during armed conflict but also during other situations such as training exercises. As such this thesis makes only minor references to LOAC where necessary.

It is an operating principle of this thesis that an Article 2-compliant military is a better military. Soldiers' morale must benefit from knowing the state has legal obligations to protect their lives. With this assurance, soldiers can go into battle knowing they have a fighting chance of success, not feeling like they have been sent like lambs to the slaughter. Additionally 'members of the armed forces are more likely to respect the human rights of those it comes into contact with if their own rights are respected'.[55] Once it is clear that human rights protect *everyone* including soldiers, soldiers have a vested interest in protecting and respecting the rights of others. If soldiers can easily violate the rights of others, their own rights become less valuable. An Article 2-compliant military's operations have greater legitimacy because 'It also avoids the apparent hypocrisy of a government engaging in armed conflict ostensibly in defence of human rights whilst failing to adequately protect the rights of its own people'.[56]

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[55] Select Committee on the Armed Forces, *Armed Forces Bill: Special Report of Session 2005-06* (HC 2005-06, 828-II) 167.

[56] Tony Blair justified the 2003 invasion of Iraq partly in terms of protecting Iraqi citizens' human rights against the oppressive regime: HC Deb 18 March 2003, vol 401, col 761. On using human rights to justify armed intervention in Iraq, see Thomas Cushman, 'The Human

The thesis considers soldiers' right to life. International human rights law instruments protect numerous rights, ranging from the right not to be tortured[57] to freedom to marry.[58] The treaties themselves do not recognise a hierarchy of rights.[59] Yet the European Court of Human Rights has recognised the special importance of the right to life amongst Council of Europe member states.[60] I focus on the right to life partly for brevity, but also because of the interesting and challenging interplay of human rights law and LOAC regarding lawful killing and the nature of armed conflict.

The thesis considers the right to life as protected by the European Convention. Though the right to life is an important provision in many other international and human rights instruments,[61] the European Convention treaty bodies have developed a significant jurisprudence on this issue. Occasional references will be made to other human rights treaties where it serves to illustrate a point. I use cases in which British soldiers have died as case studies. However my conclusions are intended to be of general application. The aim is to identify expressions of states' Article 2 obligations that are sufficiently flexible to take into account different operational capabilities and conditions of all Council of Europe

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Rights Case for the War in Iraq: A Consequentialist View' in Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (CUP 2005).

[57] European Convention on Human Rights, Article 3.

[58] ibid, Article 12.

[59] For an interesting study of the subject, see Koji Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights' 12 *EJIL* 917.

[60] *McCann* v *United Kingdom* 21 EHRR 97, §§149-50.

[61] International Covenant for the Protection of Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 6(1); American Convention on Human Rights (ACHR) (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Article 4(1); African Charter on Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 4(1).

member states. The use of British soldiers as case studies should not detract from my objective of identifying a general approach for the right to life under Article 2 of the European Convention. This thesis does not ponder whether states have different human rights obligations to soldiers in volunteer and conscripted forces.

OUTLINE OF CHAPTERS

This thesis has five Chapters. The first substantive Chapter examines the concept of jurisdiction for the purposes of the European Convention. Article 1 mandates states to protect and guarantee the Convention rights to everyone 'within their jurisdiction'. The meaning of jurisdiction defines the scope of states' Convention obligations and has been the subject of significant academic and judicial debate. States have argued before the European Court that their jurisdiction is limited primarily to their own territories, echoing the public international law jurisdiction principle. Chapter 1 details the different approaches the European Court has taken to defining jurisdiction and establishing the scope of states' Convention obligations. The European Court's general principles were tested by the British Supreme Court in two cases involving soldiers killed on active service in Iraq.[62] This Chapter analyses the Supreme Court's judgments in these cases and sets out the implications of this jurisprudence for future overseas military deployments.

Article 2 of the Convention guarantees the right to life, providing that no one shall be intentionally deprived of their life. The interpretation of this provision is of fundamental importance to the nature and scope of the right to life. "Deprivation of life" and "intention" are two vital concepts that have multiple possible meanings. It is therefore

[62] *R (Smith)* v *Secretary of State for Defence and Another* [2010] UKSC 29, [2011] 1 AC 1; *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

surprising that neither the Court nor Commission has engaged in thorough analysis of these key concepts. Chapter 2 conducts a primarily philosophical analysis of "deprivation of life" and "intention" to determine the core of the right to life.

Chapter 3 builds on the philosophical analysis of the previous Chapter with a detailed normative account of states' obligations under Article 2. In their jurisprudence, the Commission and Court have established that states are bound by the strictly textual obligation to refrain from intentional killing, as well as an implicit positive obligation to protect individuals from risks to their lives[63] and a procedural obligation to ensure effective enforcement of the right to life by investigating suspicious, unnatural and violent deaths.[64] Chapter 3 details the general principles of these obligations as developed in jurisprudence of the Convention.

Chapter 4 applies these general principles to a number of scenarios in which British soldiers were killed. The scenarios detail different elements of military service, including training, friendly fire and enemy combat. This Chapter considers some of the challenges of applying the general principles of the Court's jurisprudence to the military context. In particular the application of legal tests developed for domestic peacetime law-enforcement operations can have absurd or unreasonable results in the armed conflict paradigm. This Chapter therefore seeks to express the Article 2 obligations in a way that recognises effective protection for soldiers' right to life whilst not impinging on military efficacy. The Chapter considers whether, in each of the scenarios, the right to life has been violated and what could have prevented this violation.

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[63] *Osman* v *United Kingdom* 29 EHRR 245, §116.
[64] *Jordan* v *United Kingdom* 37 EHRR 2, §105.

Chapter 5 concerns effective implementation of the right to life, and the appropriate judicial approach to soldiers' right to life claims. Whilst Chapter 4 considered the standards of due diligence required *ex ante* of commanders and those making decisions that affect soldiers' right to life, this Chapter analyses how to review those decisions *ex post*. A number of different judicial practices are explored, including combat immunity and deference. The Chapter revisits the scenarios previously described to suggest the level of judicial scrutiny that should be applied in each case. Rather than a single standard of review, this Chapter favours variable standards according to the situation, recognising that judges are not best-placed to interrogate all kinds of military operations.

A final, general conclusion briefly discusses the challenges of guaranteeing soldiers' right to life and considers potential means of overcoming those challenges.

This thesis was finalised in May 2017.

CHAPTER ONE

JURISDICTION

INTRODUCTION

The European Convention on Human Rights ("the Convention")[1] guarantees certain fundamental rights to individuals. States parties to the Convention are under a number of obligations to guarantee and secure those rights and freedoms, but the scope of their obligations is limited. This Chapter seeks to answer the important preliminary question of whether states owe obligations under the Convention to their soldiers. Article 1 provides thus:

> The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.[2]

Everyone within a state's jurisdiction has enforceable rights against that state. The way in which jurisdiction is conceptualised and defined is therefore 'determinative of the … scope of the entire Convention system of human rights protection'.[3]

In its jurisprudence on Article 1, the European Court of Human Rights ("the Court") has judged that:

> The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringements of rights and freedoms set forth in the Convention.[4]

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.
[2] ibid, Article 1 (emphasis added).
[3] *Banković* v *Belgium (Admissibility)* 44 EHRR SE5, §65.
[4] *Ilaşcu* v *Moldova and Russia* 40 EHRR 46, §311.

Jurisdiction is the 'threshold criterion'[5] by which a prima facie link can be made between the state and the individual. The existence of this link entails states' obligations to the individual in question. Jurisdiction for the purposes of Article 1 is not the same as attribution and responsibility.[6] Jurisdiction relates to the state's relationship with the victims of human rights violations, whereas attribution determines the state's control over the perpetrators of those violations.[7]

The general position is that states normally exercise jurisdiction throughout their territories.[8] Article 1 does not make any explicit reference to national territory, but there is a rebuttable presumption that people in a state's territory are within that state's jurisdiction.[9] When a state loses control of part of its territory it might be unable to fulfil some[10] or all[11] of its Convention obligations in the territory over which control has been lost. When soldiers are in their barracks at Catterick, on a training exercise in Devon or on guard outside Buckingham Palace, they are presumed to be within the jurisdiction of the United Kingdom by virtue of being within British territory. But active service abroad is an important aspect of military life. British Army recruitment material lists travel as a major part of service.[12] For soldiers to be protected by the Convention rights, including the right to life, states must be bound by the Convention even beyond their own territories. It is 'common ground' that the Human Rights Act 1998, which gives further effect to the

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[5] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25(4) *LJIL* 857, 857.

[6] *Loizidou* v *Turkey (Preliminary Objections)* 20 EHRR 99, §61.

[7] Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 51.

[8] *Ilaşcu*, §313.

[9] *Assanidzé* v *Georgia* 39 EHRR 32, §139.

[10] *Ilaşcu*, §313.

[11] *Cyprus* v *Turkey (No 2)* 15 EHRR 509, §63.

[12] Ministry of Defence, 'The Regular Army' (*British Army*) <www.army.mod.uk/join/27081.aspx> accessed 13 June 2014.

Convention in British law, is 'capable of applying outside the territorial jurisdiction of the United Kingdom'.[13] But that does not automatically entail the application of the Convention everywhere in the world. The now-defunct European Commission on Human Rights ("the Commission") said there was no reason that the acts of a state's authorities abroad could not entail liability under the Convention[14] and academics have argued that 'there is no a priori reason to limit a state's obligation to respect human rights to its national territory'.[15] Whether soldiers are protected by the Convention when abroad depends upon the interpretation of jurisdiction.

In common parlance, the territory within which a state exercises its own sovereign authority may be referred to as a jurisdiction. The use of the "within" proposition in the English-language version of Article 1 could suggest, at first glance, that the obligation to respect Convention rights extends to everyone within the state's territory. But the French-language version of Article 1 (which is of equal authoritative value) requires states to secure the Convention rights to everyone '*relevant de leur juridiction*'.[16] In French, *"juridiction"* does not have the same territorial connotations as in English. *"Juridiction"* refers to the power or right to exercise legal authority. *Relevant* means under or subject to. One can be under or subject to legal or physical authority, but it does not make sense to say that someone is subject to territory. As such, the initial interpretation that Article 1 jurisdiction is coterminous with national territory is clearly wrong.

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[13] *R (Smith)* v *Secretary of State for Defence* [2010] UKSC 29, [2011] 1 AC 1, [5] (Lord Phillips P) quoting *R (Al-Skeini)* v *Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [24] (Lord Bingham).

[14] *Hess* v *United Kingdom* 2 DR 72, 73.

[15] Theodor Meron, 'The Extraterritoriality of Human Rights Treaties' 89 *AJIL* 78, 80.

[16] European Convention on Human Rights, Article 1 (Official French Version, emphasis added).

Section 1 of this Chapter sets out the normative framework on the scope of Convention obligations and the Commission and Court's interpretation of jurisdiction. The Supreme Court of the United Kingdom has twice considered that normative framework as it applies to soldiers deployed overseas. Their Lordships' different approaches to jurisdiction in those two cases is the focus of Section 2. The final Section discusses the consequences of these judgments for military deployments and states' obligations to secure soldiers' Convention rights.

1. LEGAL FRAMEWORK

The Convention's applicability is restricted to individuals within the jurisdiction of contracting states. The Court has confirmed that the Convention is only binding upon those states that consent to be so bound and that contracting states are not required to impose Convention standards on non-contracting states.[17] On numerous occasions the Commission and Court have examined the meaning of jurisdiction in the context of contracting states acting beyond their national territories. The Court has repeatedly ruled that 'The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory'.[18] Two approaches are discernible in the Commission and Court's jurisprudence. In the first, individuals are 'within the jurisdiction' of a state when they are under the physical or legal power and authority of the state. This is called the personal model of jurisdiction. States are bound by their Convention obligations under the second model of jurisdiction, called the territorial model, when they exercise effective control over a territory outside their national borders.

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[17] *Soering* v *United Kingdom* 11 EHRR 439.
[18] *Drozd and Janousek* v *France and Spain* 14 EHRR 745, §91.

1.1. PERSONAL MODEL

1.1.1. Cyprus v Turkey

In 1974 Turkey invaded Cyprus and by military force came to occupy the northern 40% of the island. The Cypriot government accused Turkish troops of widespread violations of the Convention. Before examining the merits of the application, the Commission had to determine whether the victims of these alleged violations were within Turkey's jurisdiction for the purposes of Article 1 despite being in sovereign Cypriot territory.[19]

The Commission decided:

> It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms *to all persons under their actual authority and responsibility,* whether that authority is exercised within their own territory or abroad.[20]

Even though Turkey had not extended its civil, criminal or political authority to northern Cyprus, its responsibility for violations of Convention rights would stem from its actual physical control over the local population. Those individuals under Turkey's actual control would be within its jurisdiction and Turkey would be obligated to secure their Convention rights.

The Commission further clarified that:

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[19] Cyprus has made a number of applications to the Commission and Court regarding the actions of Turkish authorities during the ongoing occupation of northern Cyprus: *Cyprus* v *Turkey (No 1)* 4 EHRR 482; *Cyprus* v *Turkey (No 2)* 15 EHRR 509; *Cyprus* v *Turkey (No 3)* 23 EHRR 244; *Cyprus* v *Turkey (No 3)* 35 EHRR 30. For more detailed facts, see *Cyprus* v *Turkey (No 1)*, 486-96.

[20] *Cyprus* v *Turkey (No 1)*, 586 (emphasis added).

> … nationals of a State, including registered ships and aircraft, are partly within its jurisdiction wherever they may be, and that authorised agents of a state, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad, *but bring other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property.* In so far as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[21]

The Commission makes it clear that individuals will be within a state's jurisdiction for the purposes of the Convention because of the control exercised over them by the state's agents, even where those agents are acting beyond the territories of their own state and the individuals would not normally be within that state's jurisdiction. Since the Convention can apply to the acts of state agents abroad, the Commission's competence cannot be 'limited to the examination of acts alleged to have been committed in the national territory of the High Contracting Party concerned'.[22]

The Commission remarked that state agents may bring an individual within that state's jurisdiction, but neither the Commission nor the Court has ever taken a position on who is a state agent. In their cases, the Commission and Court seem to have taken for granted that the individuals involved were acting on the state's behalf. The International Law Commission ("ILC") has published a series of draft articles determining state responsibility for internationally wrongful acts as a matter of public international law. A state is responsible for the conduct of its organs, which may exercise legislative, executive, judicial or any other functions.[23] This includes any individual or entity considered an organ for the purposes of a state's internal law.[24]

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[21] ibid (emphasis added).
[22] ibid.
[23] UNGA Res 56/83, Article 4(1) of Annex to the Resolution.
[24] ibid, Article 4(2).

States are also responsible for the conduct of individuals 'empowered by the law of that State to exercise elements of governmental authority'.[25] An individual's conduct is attributable to the state – so that those affected by that conduct are brought within the state's jurisdiction – when the individual is 'acting on the instructions of, or under the direction or control of that State'.[26] Police and armed forces exercise executive power and so count as organs of the state, but those exercising governmental authority might also include paramilitary organisations, security forces, diplomatic officials, or other agents.[27] Under international law, states must account for the acts of all these individuals, even when they exceed their legal authority or instructions.[28]

In the second of the *Cyprus* cases, the Commission approved of its earlier decision that persons and property are within the jurisdiction of a contracting state to the extent that the state exercises some control over them.[29] It further implied that Turkish jurisdiction over individuals in the occupied northern territories was exclusive, since Cyprus had 'been prevented from exercising its jurisdiction' by virtue of the occupation.[30] By the time the case came before the Commission, Turkey had established the "Turkish Federated State of Cyprus" as an independent state in the occupied territories. This state was unrecognised by the international community and it was not viewed by the Commission as an entity

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[25] ibid, Article 5.
[26] *Eureko BV* v *Poland* Partial Award and Dissenting Opinion, IIC 98 (2005) §132.
[27] For brevity, future references to 'state agents' shall be taken to include all individuals authorised to act on the state's behalf, whose actions would be attributable to the state under the provisions in Articles 4 and 5 of the ILC Draft Articles.
[28] UNGA Res 56/83, Article 7 of Annex to the Resolution; *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, §214.
[29] *Cyprus* v *Turkey (No 2)* §63.
[30] ibid.

capable of exercising jurisdiction over any part of the island.[31] Turkey's jurisdiction persisted, and it would be responsible for violations of the Convention imputable to it by virtue of the continued direct physical control exercised through its soldiers in the occupied territories.

1.1.2. Other Cases Employing the Personal Model

The Court and Commission have confirmed the *Cyprus* Commission's view in a number of cases.[32] Although there are differences in the facts of the various cases, the Court has applied the same general principle to all, namely that individuals are within a state's jurisdiction by virtue of being under the authority and control of state agents. Individuals arrested by state agents acting abroad have been judged to be within the state's jurisdiction from the moment they were taken into its agents' custody.[33] The detaining state will be liable for any violations of Convention rights occurring during that custody, even though their agents are acting beyond national territory.

In *Medvedyev,* a ship registered in Cambodia was intercepted, with the permission of the Cambodian government, on the high seas by a French naval vessel on suspicion of carrying narcotics. Upon boarding the vessel, French naval forces discovered a large quantity of drugs and confined the crew to quarters, setting a new course for France where the crew would be prosecuted. During their detention on the ship, the crew were within the jurisdiction of France, because France 'exercised full and exclusive control over the [ship]

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[31] ibid.

[32] *W* v *Ireland* 32 DR 211, 215; *Vearncombe* v *Germany and United Kingdom* 59 DR 186, 194.

[33] *Freda* v *Italy* 21 DR 250, 256; *Sánchez Ramirez* v *France* 86 DR 155, 162; *Öcalan* v *Turkey* 41 EHRR 985, §91.

and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner'.[34]

In all of these cases the state enjoyed some direct physical control over the applicant in the form of detention. In the *Cyprus* cases the mere presence of Turkish troops as occupying forces in the north of the island gave Turkey physical control over the local population. In another case involving the Turkish occupation of northern Cyprus, a Greek-Cypriot protestor was beaten to death in the neutral UN-controlled buffer zone.[35] Turkish soldiers allowed armed Turkish-Cypriot demonstrators into the buffer zone and participated in the murder of Anastassios Isaak. Although he was not in their custody, Isaak was subject to the Turkish forces' physical control and thus within Turkey's jurisdiction for the purposes of Article 1.[36]

In *Issa,* Turkish soldiers on operations in northern Iraq were alleged to have killed and mutilated a group of Kurdish shepherds. Turkish authorities denied having had troops in the relevant area, and it could not be proven that the bullets recovered from the shepherds' bodies had come from Turkish military weapons.[37] On the facts, the shepherds could have been within Turkey's jurisdiction. It was implicit in the Court's judgment in *Issa* that, had the physical evidence linked the murdered shepherds to Turkish soldiers, they would have been within the jurisdiction of Turkey.

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[34] *Medvedyev* v *France* 51 EHRR 39, §67.
[35] *Isaak* v *Turkey*, App No 44587/98 (ECtHR, 24 June 2008).
[36] ibid.
[37] *Issa* v *Turkey* 41 EHRR 27, §79.

As well as direct physical control in the form of detention, when the acts or omissions of diplomats or consular officials affect individuals' rights they fall within the state's jurisdiction. The Commission had recognised this much earlier than its decision in *Cyprus,*[38] which merely clarified that the principle was still valid. The Court and Commission have repeated the position in a number of subsequent cases. One applicant alleged that her husband had kidnapped their daughter and taken her to Jordan, but that the British embassy staff failed to do enough to return the girl to the applicant. Though this was unsubstantiated on the facts the Commission did make clear that 'even though the alleged failure of the consular authorities to do all in their power to help the applicant occurred outside the territory of the United Kingdom, it was still within the UK's jurisdiction within the meaning of Article 1'.[39]

When a group of East German citizens were denied an exit visa to travel to the West, they took refuge in the Danish Embassy in East Berlin. After 15 hours of failed negotiations, the Danish Ambassador requested the police to enter the embassy and remove the group. The Commission repeated the relevant passage from *Cyprus* and concluded that the individuals were within the jurisdiction of Denmark vis-à-vis the Ambassador's actions.[40] The migrants were considered to be within Danish jurisdiction even though the Ambassador was outside Denmark and the Commission did not consider the embassy to be part of Danish territory.

The Commission's decision in *M* v *Denmark* is interesting since it concerns individual rights that refer explicitly to territory. The applicants claimed that their right to move freely

[38] *X* v *Germany* VIII YB ECHR 158, 158.
[39] *X* v *United Kingdom* 12 DR 73, 74.
[40] *M* v *Denmark* 73 DR 193.

throughout Danish territory had been unlawfully infringed[41] and that they had been expelled from Denmark without due process of law.[42] The Commission determined that the embassy was not part of Danish territory and so the applicants' rights under the fourth and seventh Protocols to the Convention could not have been violated, whilst simultaneously finding that they were in fact within Danish jurisdiction for the purposes of their Convention rights. This demonstrates that the concept of jurisdiction is not wholly linked to notions of territory and that states can be liable under the Convention for the actions of their agents anywhere in the world.

The personal model has been developed by the Commission and Court to prevent an interpretation of Article 1 that would allow 'a State party to perpetrate violations of the Convention on the territory of another state, which it could not perpetrate on its own territory'.[43] The Court has quoted this passage verbatim from the view of the United Nations Committee on Human Rights. In a pair of cases,[44] the Human Rights Committee was asked to evaluate whether Uruguay had violated provisions of the International Covenant on Civil and Political Rights[45] by sending security forces to arrest and hold suspects in incommunicado detention in Argentina and Brazil, before transferring them

[41] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, as amended by Protocol No 11 (adopted 6 September 1953, entered into force 2 May 1968) ETS 46, Article 2(1).
[42] Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11 (adopted 22 November 1984, entered into force 1 November 1988) ETS 117, Article 1(1).
[43] *Issa*, §71.
[44] *López Burgos* v *Uruguay* 1 Selected Decisions of the Human Rights Committee 88, §12.3; *Celiberti de Casariego* v *Uruguay* 1 Selected Decisions of the Human Rights Committee 92, §10.3.
[45] (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

back to Uruguay for trial. The applicants in those cases were entitled to the protections of the ICCPR against Uruguay, due to being under the state agents' physical control.

The personal model is highly individualistic, the state's control over the individual being the nexus that establishes the obligation.[46] The essence of the personal model is that any state action that affects an individual's ability to exercise his Convention rights will be within that state's jurisdiction, even beyond the state's territory.[47] Where human rights are predicated on the assumption that all human beings are equal and that the rights contained in the Convention (as well as other human rights treaties) are inherent to all people,[48] there is no principled reason for a state to have obligations to individuals within its territory but not those *outside* its territory but nevertheless subject to its physical control. The personal model recognises that states possess enormous coercive power over individuals and that as a matter of fact that power is not necessarily limited to a state's territory.[49] This model is relevant for soldiers' status under the Convention when deployed to armed conflicts abroad, as will be shown.[50] The Commission and Court's other approach to jurisdiction is conceptualised as the state's control of territory, with states owing obligations to individuals located within territories it controls.

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[46] Françoise Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts' 31 *Revue de Droit Militaire et de Droit de la Guerre* 119, 122.

[47] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' 20(4) *EJIL* 1223, 1223.

[48] See for example ICCPR, Preamble.

[49] There are legal restrictions on the extent of state's power and authority. See for example: Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 311.

[50] Section 2.

1.2. TERRITORIAL MODEL

1.2.1. Loizidou v Turkey

In *Loizidou* the applicant was denied access to her property in Turkish-controlled northern Cyprus and had been detained by Turkish soldiers and Turkish-Cypriot police in the course of a peaceful demonstration.[51] She alleged numerous violations of her Convention rights regarding property and detention. The Court repeated the principle that the Convention is not limited to the contracting states' national territories. Individuals in foreign territory under the state's effective control will also be within that state's jurisdiction:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it *exercises effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised *directly, through its armed forces, or through a subordinate local administration.*[52]

Turkey had effective control of territory in the north of Cyprus through its military occupation. Effective control is a question of fact that depends upon all the circumstances. There is no specific legal threshold that must be reached in order for a state to have effective control over territory. In *Loizidou,* the sheer number of troops on the ground and the duration of the occupation were sufficient to establish Turkey's effective control, even though it did not directly administer the territory as part of Turkey.[53] Furthermore the "Turkish Republic of Northern Cyprus" ("TRNC"), a unilaterally-declared sovereign state in northern Cyprus, relied upon Turkish military presence for its survival.[54] It was thus a subordinate local administration and individuals under their nominal authority would be

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[51] For more detailed facts, see *Loizidou*, §§10-14.
[52] ibid, §62 (emphasis added).
[53] ibid.
[54] *Cyprus* v *Turkey (No 2)*, §17.

within Turkish jurisdiction. Turkey's lack of detailed control or involvement in the administration's policy was irrelevant.[55] Individuals within the territories claimed by the TRNC were within Turkey's jurisdiction, even though Turkey had no direct control over the TRNC governmental functions.

1.2.2. Other Cases Employing the Territorial Model

The Court repeated these principles in response to Transdniestrian separatists in Moldova. Both Moldova and Russia are Convention contracting states. Russian military and political support greatly strengthened the "Moldovan Republic of Transdniestria", which had unilaterally declared independence from Moldova.[56] Though not dependent upon Russian support for its survival, the separatist entity was under Russia's decisive influence.[57] Everyone in Transdniestria was therefore within Russian jurisdiction and Russia was obligated to secure Convention rights to those individuals.[58]

Catan v *Moldova and Russia* was another case arising out of the Transdniestrian separatist crisis[59] and concerned the Convention right to education.[60] The Transdniestrian separatist government criminalised use of the Latin alphabet, mandating use of Cyrillic and closing down schools using Latin script.[61] The Court considered its earlier judgment in *Ilaşcu.* On the basis of its earlier finding that Russia exercised effective control of the territory by

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[55] *Loizidou* v *Turkey (Merits)* 23 EHRR 513, §56.
[56] *Ilaşcu*, §382. For more detailed facts, see §§28-110.
[57] ibid, §392.
[58] ibid.
[59] *Catan* v *Moldova and Russia* 57 EHRR 4.
[60] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms ("Protocol No 1") (opened for signature 20 March 1952, entered into force 18 May 1954) ETS 9, Article 2.
[61] For more detailed facts see *Catan*, §§43-63.

virtue of its decisive influence over the separatist government,[62] the Court determined that Russia must prove it did not exercise jurisdiction over the territory in respect of the events complained of.[63] Nevertheless international law recognised the territory of the Moldovan Republic of Transdniestria as part of the sovereign territory of Moldova.[64] Though Moldova lacked effective control over the region, it was under a positive obligation to use 'all legal and diplomatic means available' to ensure those living in the territory continued to enjoy Convention rights.[65] The Court considered the Moldovan government had fulfilled this obligation by allocating funds and resources to ensure schools could continue operating using the Latin alphabet.

The applicants in *Chiragov* v *Armenia* claimed they had been deprived of their Convention right to property.[66] Nagorno-Karabakh is an autonomous region of Azerbaijan with a population of around 150,000. The Nagorno-Karabakh Republic declared its independence from Azerbaijan in 1991, but is as yet unrecognised by the international community. Armenian military support brought the territory within Armenia's effective control and the applicants were therefore within Armenia's jurisdiction.[67] In addition to military support for the separatist authorities, Armenia offered significant financial assistance. Furthermore the Court found substantial integration of Armenian and Nagorno-Karabakh political and judicial organisations and processes.[68] As the Court's judgments in *Ilașcu, Catan* and *Chiragov* demonstrate, effective control is not solely dependent upon military occupation but is also determined by other factors.

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[62] *Ilașcu*, §392.
[63] *Catan*, §112.
[64] *Catan*, §109.
[65] ibid, §110.
[66] Protocol No 1, Article 1. For more detailed facts see *Chiragov* v *Armenia* 63 EHRR 9, §§12-57.
[67] *Chiragov*, §§172-80.
[68] ibid, §§181-85.

In *Sargsyan* v *Azerbaijan* the Court reiterated the presumption that states exercise jurisdiction throughout their territory.[69] The applicant alleged a violation of his property rights when he was forcibly displaced from his home on the border of the Armenia-controlled Nagorno-Karabakh region.[70] The Azerbaijani government could not demonstrate that the applicant's village had ever been under separatist control.[71] The Court distinguished *Sargsyan* from *Catan* and *Ilașcu.* In those cases the territorial states' limited Convention obligations could be justified because another Convention state exercised effective control over the territory. The same cannot be said of this case. Recognising limitation of Azerbaijan's effective control would result in a vacuum in Convention protection for individuals in the relevant territories.[72]

The Court has not restricted itself to finding jurisdiction when states have control over the whole of a state's territory, or even large swathes of it, like in *Loizidou* and *Ilașcu.* The Court has stated that the presence of troops in an area will give the state effective control over the area in which they are active but not the whole territory of the state,[73] but aerial military action will not establish effective control without a concurrent ground-based military presence.[74] An occupation of longer duration may give control over a wider area, although this will depend upon the facts of the individual case. In a number of cases the Court has recognised that control over a building will suffice to satisfy the threshold and bring those inside the building within the state's jurisdiction, by virtue of the state's 'total,

[69] *Sargsyan* v *Azerbaijan* 64 EHRR 4, §139.
[70] For more detailed facts see *Sargsyan*, §§14-40.
[71] ibid, §142.
[72] ibid, §§147-51.
[73] *Issa*, §§74-75.
[74] *Banković*, §75.

exclusive de facto' control of the premises.[75] This model has important implications for soldiers' right to life during military occupation of foreign territories.

1.3. CONFUSION AND CLARIFICATION

For many years the personal and territorial models of control co-existed in relative harmony, even though the relationship between the two was never set out systematically and in spite of the confusion in deciding which might be applied where. Typically the personal model was employed in cases like *Freda, Vearncombe* and *Sánchez Ramirez,* where the territorial model could not apply but it would be inconsistent with the object and purpose of the Convention to deny the applicants any rights against the respondent states. The Court's Grand Chamber then gave its decision as to the admissibility of *Banković* v *Belgium,* which only confused matters further. The Grand Chamber based its decision solely on the territorial model of jurisdiction, without even mentioning the personal model.[76] But the Court continued to adopt the personal model in other cases (*Öcalan, Issa* and *Medvedyev* being noted examples). A decade of confusion was resolved, at least partially, when the Grand Chamber rendered its decision in *Al-Skeini* v *United Kingdom.*[77]

1.3.1. Banković v Belgium

In a NATO bombing raid on Belgrade, 16 civilians were killed when a missile hit a television station.[78] Those injured and the next of kin of the deceased brought an application to the Court against the states that had participated in the raid. In its admissibility decision, the

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[75] *Al-Saadoon and Mufdhi* v *United Kingdom (Admissibility)* 49 EHRR SE11, §88.
[76] *Banković*, §75.
[77] 53 EHRR 18.
[78] For more detailed facts, see *Banković*, §§6-11.

Court stated that the jurisdictional competence of states is 'primarily territorial'.[79] Any other bases of jurisdiction, beyond those recognised in customary international law and treaty provisions (such as the acts of consular and diplomatic officials), are 'exceptional and [require] special justification'.[80] The Court agreed with the respondent governments that the facts of the case did not fall within the terms of any of those justifications and to rule otherwise would be:

> … tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State.[81]

The Court noted the principles in the case law that extraterritorial jurisdiction would be recognised:

> … when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[82]

The need for the exercise of executive authority was required because of the Court's judgment that the Convention rights cannot be "divided and tailored", and that the positive obligation to secure them is only engaged when the state is in a position to secure them *en bloc*.[83]

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[79] ibid, §59.
[80] ibid, §61.
[81] ibid, §75.
[82] ibid, §71 (emphasis added).
[83] ibid, §75.

The principle that states' Convention obligations are not limited to their own territories has been repeated in case law, but the *Banković* Grand Chamber noted that the Convention is a 'multi-lateral treaty operating … in an essentially regional context'.[84] As such, the Convention should not apply outside the legal space of the Council of Europe territories. The Grand Chamber rationalised the Court's judgments in *Loizidou* and the *Cyprus* cases on the basis that the occupied territories remained part of the sovereign territory of Cyprus. Those territories form part of the *espace juridique* of the Council of Europe and the Convention would, in ordinary circumstances, be applicable there. The Convention should continue to apply to prevent a 'regrettable vacuum' in human rights protection for the people living in those territories.[85]

Academics have strongly criticised the judgment for its dubious references to public international law to the detriment of the object and purpose of the Convention, and for excessively limiting the Convention's application to the territories of states parties.[86] The *Banković* Court adopted a restrictive interpretation of jurisdiction resembling some of the doctrinal elements of jurisdiction in public international law, including the strong relationship to territory that limits a state's legal right to 'impose its will'.[87] Separated into the legal rights to enact and enforce law, jurisdiction in public international law governs the

[84] ibid, §80.
[85] ibid.
[86] See Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' 14(3) *EJIL* 529; Milanović, *Extraterritorial Application of Human Rights Treaties*; Erik Roxstrum, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case (*Banković et al.* v. *Belgium et al.*) and the Limits of Western Human Rights Protection 23 *BUILJ* 55; Loukis G Loucaides, 'Determining the Territorial Effect of the European Convention: Facts, Jurisprudence, and the *Banković* Case' 4 *EHRLR* 391.
[87] Loucaides, 399.

'extent of each state's right to regulate conduct or the consequences of activity'.[88] Some of the Court's reasoning is sound. Many of the Convention rights impose negative and positive obligations on states. The Court is correct that a state may need to exercise some governmental functions in a territory to be able to put in place the mechanisms and protocols to fulfil their positive obligations to people within that territory. For instance, in relation to the right to life,[89] the Court has judged that states are under a positive obligation to enact a domestic legal framework criminalising intentional deprivation of life.[90] Where a state does not exercise any governmental functions in respect of a territory, even though its agents may be active there, the state may not be able to put into place the necessary frameworks to fulfil the positive obligation. But this should not prevent the negative obligation continuing to bind state agents outside their territories. The right to life prohibits intentional killing.[91] States do not need to exercise any governmental control over foreign *territory* to prevent their agents from pulling the trigger. The judgment in *Banković* was arguably misguided.

The *Banković* judgment was 'inevitably politically charged'.[92] Eight weeks before the Grand Chamber handed down its judgment a United States-led coalition invaded Afghanistan. The Court's interpretation of jurisdiction in *Banković* might preclude the application of the Convention to the Afghanistan conflict, since at the time of the judgment the invading coalition did not have effective control of the country. Whilst such control might have

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[88] Lassa Oppenheim, *International Law* (Sir Robert Jennings and Sir Arthur Watts eds, 9th edn, Longman 1992) 456.

[89] European Convention on Human Rights, Article 2.

[90] Robin C A White and Claire Ovey (eds), *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 152; *Osman* v *United Kingdom* 29 EHRR 245, §§115-16; *Kılıç* v *Turkey* 33 EHRR 58, §62; *Kaya* v *Turkey*, App No 22535/93 (ECtHR, 29 March 2000) §85. See Chapter 3.2.1.

[91] Article 2(1). See Chapter 2. and Chapter 3.1.

[92] Max Schaefer, '*Al-Skeini* and the Elusive Parameters of Extraterritorial Jurisdiction' 5 *EHRLR* 566, 569.

solidified later and the invading forces might have come to exercise some governmental functions, in making its judgment the Court was arguably conscious of limiting potential cases to come out of the conflict. In spite of this, it is wrong to restrict a state's human rights obligations by reference to the limits of their domestic law. Jurisdiction for the purposes of the Convention is 'discerned from a factual scenario which arises by virtue of circumstance',[93] rather than formalistic ideas that limit the state's authority.

1.3.2. Al-Skeini v United Kingdom

In 2011, ten years after the *Banković* ruling, the Grand Chamber adjudicated *Al-Skeini.* During the US-UK military operations in Iraq, British troops killed five Iraqi nationals in separate incidents whilst on patrol in Basra City. A sixth individual, Baha Mousa, died whilst being held in security detention in a British military prison. The British government conceded that Baha Mousa was within British jurisdiction when he died by virtue of exclusive British control of the detention premises. The House of Lords, following *Banković,* ruled that the first five individuals were not within British jurisdiction at the material time for two reasons. First, because as a regional treaty the Convention supposedly could not apply outside the territories of the Convention's contracting states, and second because the UK did not have effective control of Basra.[94] The applicants brought an application to the Court.

In its judgment the Grand Chamber repeated the principle that a state's jurisdictional competence is primarily territorial and that jurisdiction is normally exercised throughout a

[93] Conall Mallory, 'European Court of Human Rights *Al-Skeini and Others v. United Kingdom* (Application No 55721/07) Judgment of 7 July 2011' 61(1) *ICLQ* 301, 310.
[94] *R (Al-Skeini)* v *Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [83] (Lord Rodger), [97] (Lord Carswell), [132] (Lord Brown).

state's national territory.[95] The Grand Chamber then detailed the 'exceptional circumstances capable of giving rise to the exercise of jurisdiction by a contracting state outside its own territorial boundaries'[96] that have been recognised by the Court in its jurisprudence. The first is:

> … the very broad principle that a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory.[97]

The Court then reaffirmed that 'the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction'.[98] Where state agents hold an individual in custody jurisdiction does not arise because of state control of the detention premises or vessel, but 'What is decisive in such cases is the *exercise of physical power and control over the person in question*'.[99] In cases where state agents exercise physical power and control over an individual, the Article 1 obligation extends to 'the rights and freedoms under Section I of the Convention *that are relevant to the situation of that individual*',[100] but not necessarily all of the Convention rights.

In its judgment the Court said that states may exercise jurisdiction abroad when it exercises public powers or governmental functions over a territory with the consent, invitation or

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[95] *Al-Skeini* v *United Kingdom* 53 EHRR 18, §131.
[96] ibid, §132.
[97] ibid, §133 (citing *Drozd and Janousek*, §91; *Loizidou (Preliminary Objections)* §62; *Loizidou (Merits)* §52; *Banković*, §69).
[98] ibid, §136.
[99] ibid (emphasis added).
[100] ibid, §137 (emphasis added).

acquiescence of the territorial government.[101] The Court referred to its earlier *Banković* decision and although the *Banković* Court rejected the 'cause-and-effect' notion of jurisdiction for single instantaneous acts – such as dropping a missile or firing a gun – the Court clarified in *Al-Skeini* that individuals affected by such acts will be within the state's jurisdiction where the state is also exercising public powers over the territory.[102] This was a somewhat disappointing turn by the Court. Though it goes on to say that those under the *direct* physical control of state agents are within the jurisdiction of that state,[103] this creates a lacuna in the law according to which a soldier could attack someone in another territory without the permission of the territorial state and the individual would have no enforceable Convention rights against that soldier.[104]

Several scholars have remarked that the Court's judgment is an odd fusion of the personal and territorial models, with states exercising jurisdiction over individuals when, through the exercise of public powers, they have authority and control over those individuals.[105] But that is a misreading of the Court's general principles of extraterritorial jurisdiction. The reference to public powers arguably pays lip-service to *Banković,* but jurisdiction does not arise solely from the exercise of public powers. The exercise of public powers model detailed in paragraph 135 of the Court's judgment is merely one discrete form of personal control, as evidenced by the Court numbering this separately from other models of authority and control in its judgment.

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[101] ibid, §135.
[102] Marko Milanović, 'European Court decides Al-Skeini and Al-Jedda' (*EJIL:talk!* 7 July 2011) <www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda> accessed 19 June 2014.
[103] *Al-Skeini*, §136.
[104] See Marko Milanović, '*Al-Skeini* and *Al-Jedda* in Strasbourg' 23(1) *EJIL* 121, 131-32.
[105] Paolo Ronchi, 'The Borders of Human Rights' 128(Jan) *LQR* 20, 22.

The Court also confirmed that the Article 1 obligation will be engaged when, as a consequence of military action (whether or not that action is lawful for the purposes of international law) a state exercises effective control of a territory, either directly, through its armed forces, or through a subordinate local administration.[106] Unlike the personal model, the obligation under the effective control of territory doctrine requires the state to secure *all* the Convention rights in their negative and positive aspects.[107] The fact that a subordinate local administration survives by virtue of a state's support will engage the Article 1 obligation in respect of that territory, whether or not the state is actively involved in policy-making.[108]

Effective control of territory is a question of fact.[109] The Court may have regard of the strength of the state's military presence in the area,[110] as well as other indicators such as the extent to which the military, political or economic support bolsters the position of the local administration within the territory.[111] Territories under a state's effective control are not analogous to 'territories for whose international relations it is responsible'[112] and Article 56 of the Convention cannot be used to exclude a state's Convention responsibilities in occupied territories (which have a different status in international law than colonies and dependencies).[113]

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[106] *Al-Skeini*, §138 (citing *Loizidou (Preliminary Objections)*, §62).
[107] ibid.
[108] ibid.
[109] ibid, §139.
[110] ibid (citing *Loizidou (Merits)*, §16 and §56; *Ilaşcu*, §387).
[111] ibid (citing *Ilaşcu*, §§388-94).
[112] European Convention on Human Rights, Article 56(1).
[113] *Al-Skeini*, §140.

The Court made reference to the *espace juridique* principle, repeating that the Convention cannot bind states not parties to it,[114] and that it is a constitutional instrument of European public order.[115] It affirmed that where the armed forces of a Convention state occupy the territory of another Convention state, the occupying state will be bound by the Convention so as to prevent a 'regrettable vacuum' within the Convention legal space.[116] It clarified that this rule does not prevent application of the Convention beyond Council of Europe member states' territories and that it had never applied such a restriction in its case law.[117] Though the Convention is of 'essentially regional vocation',[118] that should not be understood as 'exclusively regional vocation'.[119] It has been argued that *Banković* was wrongly interpreted by the British judiciary and that that judgment did nothing more than exclude aerial bombardment from the list of circumstances giving rise to effective control.[120] Whether or not this is correct, the *espace juridique* principle can no longer be a realistic argument that states are not bound by the Convention beyond contracting states' borders.

Ultimately the *Al-Skeini* Court ruled that there is nothing in its case law or the Convention that restricts the scope of a state's obligations to its own territories, or even to territories within the Council of Europe's *espace juridique.* States are bound by their Convention obligations at home and abroad. When the state enjoys effective control of a territory, which is determined by the facts on a case-by-case basis, its obligations run to the full catalogue of rights and freedoms in Section I of the Convention. When the state has some

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[114] ibid, §141 (citing *Soering,* §86).
[115] ibid (citing *Loizidou (Preliminary Objections)*, §75).
[116] ibid, §142 (citing *Banković,* §80).
[117] ibid (citing *Öcalan*, *Issa*, *Al-Saadoon (Admissiblity)* and *Medvedyev*).
[118] *Banković*, §80.
[119] Angelika Nußberger, 'The Concept of Jurisdiction in the Jurisprudence of the European Court of Human Rights' 65 *CLP* 241, 266.
[120] Joanne Williams, '*Al-Skeini*: A Flawed Interpretation of *Banković*' 23 *Wis Intl LJ* 687, 689

physical control over individuals personally, its Article 1 obligations extend to securing rights relevant to the nature and extent of the control exercised, but not necessarily all the Section I rights. On the facts in *Al-Skeini,* the Court applied the personal model of jurisdiction. The United Kingdom,

> … through its troops engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the United Kingdom and the deceased for the purposes of Article 1 of the Convention.[121]

The Court did not even examine whether the UK had effective control of the territory, and resolved the issue by reference to the personal model.

The judgment in *Al-Skeini* is not a panacea for the troubles caused by differing interpretations of jurisdiction, but it did offer hope of giving domestic courts greater clarity in their decisions and undoing some of the 'residual confusion' after *Banković.*[122] The tenor of the *Al-Skeini* judgment is that 'control entails responsibility',[123] although some have suggested *Banković* would not be decided any differently today.[124] The judgment in *Al-Skeini* has come on a 'need-to-decide basis',[125] but it has confirmed that state agent authority and control is still a viable and legitimate model for determining if states owe someone an obligation under the Convention. It is not, as some have suggested, merely

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[121] *Al-Skeini*, §149.
[122] Anna Cowan, 'A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*' 1(1) *CJICL* 213, 227.
[123] Marek Szydło, 'Extra-Territorial Application of the European Convention on Human Rights After *Al-Skeini* and *Al-Jedda*' 12 *ICLR* 271, 291.
[124] Cowan, 225.
[125] Alasdair Henderson, 'War, Power and Control: The Problem of Jurisdiction' (*UK Human Rights Blog,* 14 July 2011) <ukhumanrightsblog.com/2011/07/14/war-power-and-control-the-problem-of-jurisdiction> accessed 18 June 2014.

'territorial-lite'.[126] Yet it is clear from the Court's ruling in *Al-Skeini* that an interpretation of Article 1 that restricts states' jurisdiction by reference to territory is untenable given states' ability to project their power globally and to impact individuals' rights in territories that they do not control.[127]

2. SOLDIERS BEFORE THE SUPREME COURT

The principles and rules established in the Court's case law have been developed in cases where individuals have been affected by the extraterritorial acts of state agents. Whilst the Commission in *Cyprus* said that authorised agents of the state remain within the state's jurisdiction when abroad in respect of alleged human rights violations they commit, neither the Commission nor the Court have affirmed that state agents abroad are within the state's jurisdiction in respect of alleged violations they *suffer*. The Court was recently seized of a case of a British soldier killed on active service in Iraq, but the applicant accepted a settlement from the British government before the case was litigated.[128]

However, the Supreme Court of the United Kingdom ("the Supreme Court") has twice grappled with the issue of whether British soldiers serving in conflicts abroad are within the jurisdiction of the United Kingdom and therefore entitled to protection of their Convention rights. Adjudicating the two cases, the Supreme Court was mindful that the Court had never examined similar facts to those raised and that its own judgments must be based on

[126] Cedric Ryngaert, 'Clarifying the Extra-Territorial Application of the European Convention on Human Rights' 28(74) *Utrecht Journal of International and European Law* 57, 59.
[127] Olivier de Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' 6(1) *Baltic YBIL* 185, 186.
[128] *Pritchard* v *United Kingdom*, App No 1573/11 (ECtHR, 18 March 2014).

the general principles established by the Court.[129] The Supreme Court reached different conclusions in the two cases, but the Court's judgment in *Al-Skeini* was handed down in the intervening period between them.

2.1. SMITH (NO 1)

2.1.1. Facts and Appellate History

In March 2003, US forces launched an invasion of Iraq in coalition with contingents from the UK, Poland, Australia and other nations. Following the ouster of President Saddam Hussein and his Ba'ath party, the victorious allies established the Coalition Provisional Authority ("CPA").[130] Coalition forces remained in Iraq as occupying powers until the CPA handed power to the Iraqi Interim Government in June 2004. Thereafter they remained in the country at the request of the Iraqi government to assist with peace-keeping and reconstruction. The last British forces withdrew in 2011.

Private J had enlisted in the Territorial Army in 1992, aged 21. He was mobilised for active service at the time of the invasion. In June 2003 he was deployed to camp Abu Naji in Basra, following brief acclimatisation training in Kuwait. He was billeted in an old athletics stadium in the city. By August, temperatures reached 50°C in the shade. J reported ill, saying he could not stand the heat. Over the next few days, he was given duties off the base. On 13 August 2003, J was found collapsed in a doorway in the stadium. He was rushed to military hospital on the base, but died of heatstroke.[131]

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[129] *Smith and Others* v *Ministry of Defence* [2013] UKSC 41, [2014] AS 52, [42] (Lord Hope DP). Hereafter "*Smith (No 2)*".

[130] UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

[131] Ministry of Defence, 'Private Jason Smith Killed in Iraq' (*Gov.uk*, 13 August 2003) <www.gov.uk/government/fatalities/private-jason-smith> accessed 22 May 2014. For more

Under British law deaths abroad must be subject to a coroner's inquest upon the body's return to the UK.[132] Accordingly there was an inquest once J was repatriated, although this inquest suffered from procedural shortcomings. The Secretary of State conceded that the coroner had been wrong to close the inquest before receiving the Ministry of Defence's Board of Inquiry report into circumstances in Iraq leading up to J's death. J's mother brought a claim to quash the original coroner's report and hold a new inquest to comply with standards established by Article 2 of the Convention.[133] The primary question raised before the courts was whether J was within the UK's jurisdiction whilst on active service in Iraq and whether therefore the British government was required to fulfil the procedural obligation in respect of his death.

The discussion of the merits was 'largely academic' since the Secretary of State conceded a fresh inquest.[134] The government also accepted that a soldier who dies on the military base abroad is within the state's jurisdiction, but contended that the state is not obligated to guarantee soldiers' rights once they are *outside* the military base. Since J died within the confines of the base, the Supreme Court was 'making observations on two extremely important and interesting questions but … not really deciding anything'.[135] Lady Hale questioned the value of the Supreme Court's judgment, with particular reference to the fact that 'a case is only authority for what it actually decides' and that this ruling would be

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detailed facts see *R (Smith)* v *Secretary of State for Defence and Another* [2010] UKSC 29, [2011] 1 AC 1, [1]. Hereafter "*Smith (No 1)*".

[132] *R* v *West Yorkshire Coroner, ex p Ronald Smith* [1983] QB 335.

[133] The Court has determined that Article 2 imparts upon states a procedural obligation to investigate deaths. The exact requirements of this procedural obligation are examined in Chapter 3.3.

[134] *Smith (No 1),* [2] (Lord Phillips P).

[135] ibid, [134] (Lady Hale).

merely advisory.[136] The Supreme Court nevertheless deemed the question of high importance and proceeded to examine the issue.[137]

In the High Court, Collins J ruled that J was within the UK's jurisdiction and enjoyed the protections of the Convention at the time of his death.[138] In the Court of Appeal, Sir Anthony Clarke MR, Keene and Dyson LJJ affirmed the judge's ruling.[139] The government appealed to the Supreme Court. Nine justices sat in judgment and delivered a 6-3 majority verdict in the government's favour, that British soldiers are within British jurisdiction inside the confines of the military base abroad, but not beyond it.

2.1.2. Lord Collins

In his leading judgment, Lord Collins repeated that the issue was academic.[140] He decided the case on the basis of the territorial model of jurisdiction, citing *Banković.* At the time of J's death, the UK had been responsible for the four south-easternmost of Iraq's eighteen governorates, where 8,000 troops were responsible for a population of almost three million, spread over roughly 40,000 square miles. Remembering that effective control of an area is a question of fact, established inter alia by the number of troops in the territory and the duration of control, Lord Collins was not satisfied that the UK could have had effective control of the area under its responsibility at the time of J's death.[141] The Court has never established a golden ratio of troops required to establish effective control, but to

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[136] ibid, [135] (Lady Hale) (quoting *Quinn* v *Leathem* [1901] AC 495, 506 (The Earl of Halsbury LC)).
[137] ibid, [2] (Lord Phillips P).
[138] *R (Smith)* v *Secretary of State for Defence and Another* [2008] EWHC 694 (Admin), [2008] 3 WLR 1284, [14]-[20].
[139] *R (Smith)* v *Secretary of State for Defence and Another* [2009] EWCA Civ 441, [2009] 3 WLR 1099, [29] (Sir Anthony Clarke MR).
[140] Smith (No 1), [220].
[141] ibid, [242].

put the numbers into perspective, in *Loizidou* 40,000 Turkish troops were stationed in northern Cyprus, an area of around 1,250 square miles and a population of almost 300,000. Although this suggests that Lord Collins considers there *is* a minimum ratio of troops to territory and population for the purposes of establishing effective control, His Lordship did not elaborate on whether he had considered other factors in his estimation such as the degree of hostility towards the occupying troops.

Lord Collins mentioned the references to public international law in *Banković*, which affirmed that states may exercise jurisdiction extraterritorially at the consent, invitation or acquiescence of the territorial state.[142] Lord Collins considered that British forces could not have been exercising jurisdiction on these grounds since the UK was a belligerent occupant at the material time.[143] Furthermore, since all legislative and executive power was vested in the CPA (in whose decision-making processes the UK had no substantive role) the UK could not be said to be exercising governmental functions in respect of the territory as required by *Banković.*[144]

Lord Collins went on to observe that the Commission's ruling in *Cyprus (No 1)* that extraterritorial acts or omissions bring affected individuals within the state's jurisdiction is inconsistent with the text of Article 1, which refers to the individuals themselves being within the state's jurisdiction rather than acts or omissions that affect them.[145] The personal model, Lord Collins said, is without foundation in the Court's case law and inconsistent with the *Banković* rule that jurisdiction is primarily territorial. Additionally it is

[142] The Commission approved of this principle in *X and Y* v *Switzerland* 9 DR 57, 71.
[143] Smith (No 1), [232].
[144] ibid, [227] (citing *Banković,* §71).
[145] ibid, [251].

dissonant with the concept of the Convention as an instrument of European public order operating in a regional context.[146] His Lordship made reference[147] to the Court's *Marković* judgment that an individual need not be in the territory of a state for the existence of a 'jurisdictional link',[148] but rejected the argument that this created a basis of jurisdiction separate to those confirmed in *Banković.*[149]

Lord Collins rationalised the Court's use of the personal model on the basis that many of the cases in which it was applied involved individuals detained by state agents acting abroad in anticipation of rendition to and trial within that state's territory. In *Öcalan,* the applicant was being transported back to Turkey to stand trial, as were the applicants in *Medvedyev.* It is common sense, Lord Collins said, that the Convention should apply to these individuals, but that does nothing more than create another exception to the prevailing *Banković* rule that jurisdiction is primarily territorial.[150]

The facts of this case, Lord Collins concluded, came nowhere close to being within the exceptions to territorial jurisdiction clarified by the Grand Chamber in *Banković.* The cases employing the personal model were inconsistent with that precedent and should not be considered authoritative. Soldiers off-base in conflict zones are not within the state's jurisdiction unless the state exercises governmental functions at the consent, invitation or acquiescence of the territorial state or the *Banković* criteria for effective control are met.

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[146] ibid, [289].
[147] ibid, [295]-[298].
[148] *Marković* v *Italy* 44 EHRR 1045, §54.
[149] *Smith (No 1)*, [299].
[150] ibid, [306].

2.1.3. Concurring Majority Judgments

The majority of the Supreme Court agreed with Lord Collins, although Lord Hope DP expressed his opinion that the Supreme Court must go no further than the European Court of Human Rights in determining the proper scope of Article 1, and that Strasbourg is the appropriate forum in which to clarify the issue.[151] Lord Rodger and Lord Walker also agreed with Lord Collins on the jurisdiction issue.[152] Lord Phillips gave a summary of the Court's case law and concluded that although several cases seemed to suggest that state agent authority and control could establish jurisdiction, 'the Strasbourg Court has not propounded any such general principle. Nor can such a principle readily be reconciled with the proposition, approved in *Banković,* that Article 1 jurisdiction is primarily territorial in nature'.[153]

Lord Phillips was not convinced by the argument that if individuals can be brought within the state's jurisdiction by virtue of being affected by state agents' acts, those state agents must themselves be within the state's jurisdiction.[154] His Lordship felt that armed forces were not analogous with diplomatic and consular officials. Furthermore, whilst he called it 'novel' that soldiers might be within the state's jurisdiction by virtue of their personal status and the control exerted over them by military discipline and civilian control, he found no principles in the Court's jurisprudence to support this contention.[155]

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[151] ibid, [92]-[93]. Lord Hope was perhaps pre-empting a change in the legal position since *Al-Skeini* was pending at the European Court at the time the Supreme Court handed down its judgment.
[152] ibid, [111] (Lord Rodger); [131] (Lord Walker).
[153] ibid, [47].
[154] ibid, [52].
[155] ibid, [60].

Lord Brown made references to his own judgment in *Al-Skeini,* and that of the Court in *Banković*. He also observed that in recent decisions the Court had omitted references to soldiers in its repetition of the *Cyprus* formulation of 'authorised agents of a State, including diplomatic or consular agents and armed forces'.[156] Lord Brown also expressed concern that extending the protection of the Convention to soldiers on overseas deployments might lead to a need to take measures that mitigate the risk to soldiers whilst creating an increased risk to the rights of civilians under the Convention and the laws of war.[157] His Lordship confirmed his agreement with the opinions of Lord Phillips and Lord Collins.[158]

2.1.4. Dissenting Judgments

Lord Mance wrote a powerful dissenting judgment. His Lordship was careful to point out that the level of control that the British forces enjoyed in south-eastern Iraq was not "effective control" for the purposes of establishing jurisdiction.[159] But he observed that when a state exercises jurisdiction over local people by occupying territory, 'it does so only because of the state's pre-existing authority and control over its own armed forces'.[160] The armed forces are the conduit through which jurisdiction flows from the state to the individual and it follows logically that soldiers are themselves within the state's jurisdiction. The emphasis on this pre-existing control reinforces His Lordship's opinion that the state's jurisdiction over its armed forces is 'essentially personal'.[161]

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[156] ibid, [143].
[157] ibid, [146].
[158] ibid, [148].
[159] ibid, [191].
[160] ibid, [188].
[161] ibid, [194].

According to Lord Mance, if a local population is to be within the state's jurisdiction, it is the *sine qua non* that its soldiers must first be within their jurisdiction. But the state does not need to have effective control over territory (and for the local population to be thus brought within its jurisdiction) in order for the soldiers to be within the state's jurisdiction. Otherwise there would be times that soldiers would be outside the state's jurisdiction and that the state would cease to owe them any duties under the Convention.[162] According to Lord Mance:

> Members of the armed forces serve under the same discipline and conditions wherever they are, and they are required to go wherever they are ordered. The relationship is not territorial, it depends in every context and respect on a reciprocal bond, of authority and control on the one hand and allegiance and obedience on the other.[163]

If soldiers are only within the jurisdiction of their own state when they exercise effective control over the theatre of operations, this adds an artificial territorial element to the nature of the armed forces and the basis on which they serve, undercutting the 'reciprocal bond' that was so important in Lord Mance's judgment. Lord Collins had mentioned several 'commonsense' exceptions to the general rule that jurisdiction is territorial.[164] Lord Mance felt that one of those commonsense exceptions should be that soldiers are within the state's jurisdiction when abroad.[165]

Lord Mance was of the opinion[166] that, at the relevant time, the CPA was the legitimate sovereign of Iraq (or as near as could be) and British troops were operating in south-

[162] ibid, [191].
[163] ibid, [192].
[164] ibid, [305]-[306].
[165] ibid, [192].
[166] ibid, [186].

eastern Iraq under the express consent given to them in CPA Order 17.[167] His Lordship accepted there was an element of circularity to his argument (since the CPA was brought into existence as a consequence of the military invasion),[168] but there was no other body that could claim to be the legitimate government of Iraq. As such, British troops were within the state's jurisdiction since they were present in the territory with the consent of the territorial government.

Lady Hale agreed with Lord Mance that soldiers must be within the jurisdiction of their state, wherever they are, and had nothing further to add to his judgment.[169] Lord Kerr added his own comments, although largely echoing Lord Collins. There was nothing in *Banković*, Lord Kerr said, that excluded the state from exercising jurisdiction over its armed forces whilst they were stationed abroad.[170] He expressed his disagreement with the indivisibility principle on the basis that in previous cases the Court had acknowledged that individuals were within a state's jurisdiction but could not possibly rely upon that state to protect all of the Convention rights in the circumstances.[171]

The majority in the Supreme Court were clear that although the Human Rights Act was not limited to British territory, the application of the Convention must be. By reference to the Court's ruling in *Banković*, their Lordships decided that soldiers are within the jurisdiction

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[167] Coalition Provisional Authority Order No 17 (Revised), 'Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq' CPA/ORD/27 June 2004/17. Available online at <www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf> accessed 21 May 2014.
[168] Smith (No 1), [186].
[169] ibid, [136].
[170] ibid, [325].
[171] ibid, [327] (citing *Drozd and Janousek*).

of the United Kingdom for the purposes of Article 1 when they are in British sovereign territory, in British-controlled territory (which may be the sovereign territory of another state), or on a British military base overseas, but not otherwise.

The Court's *Banković* judgment gave a restrictive interpretation of jurisdiction. On those general principles, the Supreme Court approved the notion that as soon as soldiers on overseas deployments leave the relative security of the military base, the state is absolved of its responsibility under the Convention to protect their rights. The ruling seems to prevent the emasculation of the military by human rights norms, preserving the 'ability of the British armed forces to operate as a professional body; one that is reliant upon mutual trust and respect to operate in extreme conditions' unencumbered by questions of how deployment might violate a soldier's Convention rights.[172]

Lord Collins said in *Smith (No 1)*:

> Nor are there policy grounds for extending the scope of the Convention to armed forces abroad. On the contrary, to extend the Convention in this way would ultimately involve the Courts in issues relating to the conduct of hostilities which are essentially non-justiciable.[173]

Whether it was the Supreme Court's aim or an unintended by-product of their judgment, military efficiency and the ability to wage war were prioritised over the rights of those men and women sent to do the fighting. Under this approach, commanders are free to command the armed forces on the battlefield without fear of future human rights claims because such claims have already been precluded by the Supreme Court's judgment. The

[172] Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion on British Fighting Power* (Policy Exchange 2013) 32.
[173] *Smith (No 1)*, [308].

Supreme Court arguably 'recoiled from an important opportunity to underline the true significance of human rights',[174] but applied the general principles as they stood after *Banković* to the reverse scenario of soldiers as victims rather than perpetrators of human rights violations.

The Court's *Al-Skeini* judgment was handed down soon after this appeal and confirmed that state agent authority and control is indeed a basis of jurisdiction under the Convention. Subsequently the Supreme Court was asked to consider whether British soldiers are within the UK's jurisdiction when on overseas deployments in another case. In this second case, the Supreme Court had the benefit of the Court's clarification in *Al-Skeini* to guide their judgment.

2.2. SMITH (NO 2)

2.2.1. Facts and Appellate History

The claims in *Smith and Others* v *Ministry of Defence* were based on three sets of facts, all taking place during the invasion and occupation of Iraq. The claims can be divided into what Lord Hope DP called the "Challenger" claims and the "Snatch" claims.[175] The "Snatch" claims arose out of two separate incidents, in which Private E and Private H were travelling in lightly-armoured Snatch Land Rovers. Both were killed when improvised explosive devices ("IEDs") were detonated level with their vehicles. Neither vehicle had been fitted with functioning electronic counter-measures ("ECMs"), which might have prevented their deaths.[176] The "Challenger" claims were brought in negligence law only. Corporal A and Trooper C were killed when other British soldiers misidentified them and fired on their

[174] Gary Slapper, 'The Right to Life on the Battlefield' 74(5) *J Crim L* 383, 383.
[175] *Smith (No 2)*, [9]-[10].
[176] These incidents are discussed again in Chapter 4.5.

position.[177] The claims of C's family were dealt with in another case, in which Lord Bingham said that whilst they were subject to the government's authority, soldiers abroad were not within the state's jurisdiction for the purposes of Article 1.[178] Jurisdiction was not a pertinent issue in *Gentle,* and Lord Bingham's remarks were not subject to proper examination or argument.[179]

In the High Court Owen J handed down judgment for the government, striking out the "Snatch" claims.[180] Quoting extensively from *Smith (No 1),* the judge was clear that the soldiers had not been within the UK's jurisdiction at the time of their deaths for the reasons given in the first case. In the Court of Appeal, Moses LJ dismissed the appeal and affirmed the judge's ruling.[181] Rimer LJ and Lord Neuberger P agreed[182] that the Court in *Al-Skeini* had revived the personal model but that the facts did not disclose sufficient authority and control in this case. Jurisdiction is not conferred, they agreed,

> … by the status of armed forces owing allegiance to one of the high contracting parties, but by virtue of the exercise of physical power and control through the agency of its armed forces in an area over which it exercised effective control.[183]

The families of Private E and Private H appealed to the Supreme Court. Seven justices judged the appeal, of whom five (Lord Walker, Lady Hale, Lord Kerr, Lord Mance SCJJ and Lord Hope DP) had sat in *Smith (No 1).* On the question of H and E being within UK

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[177] Ministry of Defence, 'Corporal Stephen Allbutt and Trooper David Clarke Killed In Iraq' (*Gov.uk*, 26 March 2003, updated 28 May 2009) <www.gov.uk/government/fatalities/corporal-stephen-allbutt> accessed 11 February 2014; *Smith (No 2),* [2]-[3]. See also Chapter 4.3.

[178] *R (Gentle and Another)* v *Prime Minister* [2008] UKHL 20, [2008] AC 1356, [8(3)].

[179] *Smith (No 1),* [136] (Lady Hale).

[180] *Smith* v *Ministry of Defence* [2011] EWHC 1676 (QB), [2011] HRLR 765, [46].

[181] *Smith* v *Ministry of Defence* [2012] EWCA Civ 1365, [2013] 2 WLR 27, [32].

[182] ibid, [65] (Rimer LJ), [66] (Lord Neuberger P).

[183] ibid, [30] (Moses LJ).

jurisdiction for the purposes of Article 1 the Supreme Court was unanimous. Lord Hope DP gave the leading judgment.

2.2.2. Lord Hope DP

At the time E and H were killed, power had passed from the CPA to the Iraqi Interim Government, at whose request British forces remained in Iraq aiding security and reconstruction efforts. The "Snatch" claims were not concerned with effective control of territory, or a vacuum in the Convention legal space, but with state agent authority and control.[184] In its judgment, the *Al-Skeini* Court had revived the state agent authority and control model of jurisdiction and determined that Convention rights can be 'divided and tailored'.[185] As Lord Hope understood it,

> The extra-territorial obligation of the contracting state is to ensure the observance of the rights and freedoms that are relevant to the individual who is under its agents' authority and control, and it does not need to be more than that.[186]

Extraterritorial jurisdiction for the purposes of Article 1 will depend upon the particular facts of a case.[187] The fact that the European Court had never dealt with a case with analogous facts to the present one was no cause for concern, since 'The whole structure of the judgment [in *Al-Skeini*] is designed to identify general principles with reference to which national courts may exercise their own judgment'.[188] His Lordship went on to identify three principles in the Court's *Al-Skeini* judgment that demonstrate that the majority ruling in *Smith (No 1)* could no longer be considered good law.

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[184] *Smith (No 2)*, [31] (Lord Hope DP).
[185] *Al-Skeini*, §§136-137.
[186] *Smith (No 2)*, [38].
[187] ibid, [42] (quoting *Al-Skeini*, §132).
[188] ibid, [46].

First:

> … the principle relating to state agent authority and control is to be regarded as one of general application. The words "whenever the state through its agents exercises authority and control over an individual, and thus jurisdiction", can be taken to be a summary of the exceptional circumstances in which, under this category, the state can be held to be exercising its jurisdiction extra-territorially.[189]

Extraterritorial jurisdiction is an exception, requiring special justification, to the territorial principle, but this should not be understood as creating an especially high factual threshold for establishing that individuals abroad are within the state's jurisdiction. "Exceptional" defines the frequency of the occurrence, rather than the nature of the legal position.[190]

Second, the judgment in *Al-Skeini* reconciled the inconsistency in the Court's preceding jurisprudence. State agent authority and control is not linked to territory, but relates to the control of an individual as the Court described that test in *Issa.*

> The fact that *Issa* is included in para 136 as one of the examples of cases that fall within the general principle of state agent authority and control is particularly noteworthy. It anchors that case firmly in the mainstream of the Strasbourg court's jurisprudence on this topic.[191]

Whereas the Supreme Court in *Smith (No 1)* had dismissed *Issa* and its like as aberrations for being inconsistent with *Banković*,[192] the Court's *Al-Skeini* judgment means that 'It is *Banković* which can no longer be considered authoritative' on the question of the personal model of jurisdiction.[193]

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[189] ibid.
[190] ibid.
[191] ibid, [47].
[192] *Smith (No 1)*, [307] (Lord Collins).
[193] *Smith (No 2)*, [47] (Lord Hope).

Finally, the Court laid to rest the notion that the Convention rights are indivisible. Regarding the *Banković* Court's decision that Convention rights cannot be divided and tailored according to the circumstances, Lord Hope observed:

> It was always going to be difficult to see how, if that was to be the guiding principle, it would be possible to accept that a state's armed forces abroad in whatever circumstances were within their jurisdiction for the purposes of Article 1 as its ability to guarantee the entire range of Convention rights would in many cases be severely limited.[194]

An 'all-or-nothing' approach to securing the Convention rights is inconsistent with the Court's ruling, like that of the Human Rights Committee, that the Convention cannot be interpreted in such a way as to allow state agents to behave like 'gentlemen at home, hoodlums elsewhere'.[195] But following the European Court's *Al-Skeini* judgment, it is clear that the state is only expected to secure to an individual the rights relevant to the nature and extent of the control exercised over him.[196]

In the context of assessing the state's responsibility for the acts of its armed forces abroad, 'it seems to be the premise from which extra-territorial jurisdiction based on state agent authority and control has been developed' that soldiers are within the state's jurisdiction, though the Court has never directly answered this question.[197] In *Cyprus (No 1)*, the Commission decided that armed forces remain within the jurisdiction of the state.[198] Lord Hope concluded:

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[194] ibid, [48].
[195] Francisco Messineo, '"Gentlemen at Home, Hoodlums Elsewhere"? The Extra-territorial Exercise of Power by British Forces in Iraq and the European Convention on Human Rights' 71(1) *CLJ* 15.
[196] *Smith (No 2),* [49] (Lord Hope).
[197] ibid, [50].
[198] *Cyprus* v *Turkey (No 1)*, 136.

> It is plain, especially when one thinks of the way the armed forces operate, that authority and control is exercised by the state throughout the chain of command from the very top all the way down to men and women operating in the front line. Servicemen and women relinquish almost total control over their lives to the state. It does not seem possible to separate them, in their capacity as state agents, from those whom they affect when they are exercising authority on the state's behalf. They are all brought within the state's Article 1 jurisdiction by the application of the same general principle.[199]

Lord Hope also referred to the provision enacted by the British Parliament that soldiers are always subject to military law, wherever they are in the world, in or out of uniform.[200]

It is further evidence of the level of control exercised over soldiers by the state that they are generally beholden to military law without territorial limit and may, in serious cases, be court-martialled anywhere in the world.[201] Lord Hope alludes to the fact that, as state agents, soldiers may by their actions bring individuals within the state's jurisdiction. But Lord Hope did not base his judgment that soldiers are within the state's jurisdiction on the fact that soldiers are the conduit through which the state exercises jurisdiction over others. Simply by virtue of being state agents, soldiers are themselves under the authority and control of the state, irrespective of whether they are capable of bringing others within their state's jurisdiction by their actions or controlling territory. This is quite a change from Moses LJ's dictum that soldiers are within the state's jurisdiction to the extent that they are the means by which a state controls territory.

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[199] *Smith (No 2)*, [52] (Lord Hope).
[200] ibid, [28]. Armed Forces Act 2006, s 367(1).
[201] Letter from then-defence minister Anna Soubry MP to author (6 June 2014).

Finally Lord Hope referred to the Court's practice, approved of by the Grand Chamber,[202] of using intrinsically non-binding instruments to aid in the interpretation of the Convention. Recommendation 1742 (2006)[203] of the Parliamentary Assembly of the Council of Europe provides:

> [M]embers of the armed forces are citizens in uniform who must enjoy the same fundamental freedoms and the same protections of their rights and dignity as any other citizen, *within the limits imposed by the specific exigencies of military duties*. In para 3 it was emphasised that members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks.[204]

Lord Mance's judgment in *Smith (No 1)* touched upon this recommendation, inasmuch as an armed conflict situation may mitigate the *extent* of the state's protective duty to its soldiers, but does not affect the *existence* of that duty.[205]

The *Smith (No 1)* judgment, Lord Hope concluded, should be departed from, since it is inconsistent with the Grand Chamber's guidance in *Al-Skeini*. In line with this guidance, soldiers deployed overseas are within British jurisdiction for the duration of their service. Accordingly, H and E were within British jurisdiction at the time of their deaths. This ruling:

> … would not be inconsistent with the general principles of international law, as no other state is claiming jurisdiction over them. The extent of that protection, and in particular whether the [Ministry of Defence] was under a substantive duty of the kind for which the Snatch Land Rover claimants contend, is the question which must now be considered.[206]

The other justices agreed with Lord Hope's opinion as to the question of jurisdiction.

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[202] *Demir and Baykara* v *Turkey* 48 EHRR 54, §74.
[203] Council of Europe (Parliamentary Assembly) 'Recommendation 1742 (2006): Human Rights of Members of the Armed Forces' (11 April 2006).
[204] *Smith (No 2)*, [54] (Lord Hope) (emphasis added).
[205] *Smith (No 1)*, [192] (Lord Mance).
[206] *Smith (No 2)*, [55] (Lord Hope).

In a complete reversal of its earlier position, the Supreme Court laid down a new bottom line: British soldiers are within the jurisdiction of the United Kingdom, no matter where they are. Without the European Court's explicit clarification in *Al-Skeini*, *Smith (No 2)* would not have come before the higher courts at all, as the first *Smith* judgment would have prevented such claims on the basis that the soldiers were not within British jurisdiction at the time of their deaths. Similarly the Supreme Court's renewed investigation of the jurisdiction question as it relates to soldiers deployed overseas would not have been necessary if the House of Lords' interpretation of *Banković* had been correct. The European Court's judgment in *Al-Skeini* both enabled and necessitated that the Supreme Court change tack.

In light of the European Court's judgment in *Al-Skeini,* it is apparent that the issue of the Convention's applicability to soldiers on active service overseas needed clarifying. Whereas Lord Collins restated without question the House of Lords' *Al-Skeini* judgment that jurisdiction on the basis of state agent authority and control did not exist,[207] the European Court said the exact opposite. The Court of Appeal in *Smith (No 2)* accepted that the personal model of state agent authority and control *does* exist in principle.[208] However Moses LJ was not convinced that the command structure and culture of obedience was the right sort of authority and control to satisfy the jurisdiction requirement, especially

[207] *R (Al-Skeini)* v *Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [116-[127] (Lord Brown), [73]-[77] (Lord Rodger).
[208] *Smith* v *Ministry of Defence* [2012] EWCA Civ 1365, [2013] 2 WLR 27, [24] (Moses LJ).

considering the emphasis placed in the European Court's *Al-Skeini* judgment on the detention and internment cases.[209]

It is unclear whether the Court would agree with the British Supreme Court that soldiers are within the state's jurisdiction by virtue of the control and discipline characteristic of service in a modern military. It has been observed that the European Court has relied upon the personal model where it would be unjust or arbitrary to deny that the state owed the applicants any responsibility under the Convention but where jurisdiction cannot be established on the territorial model.[210] The Supreme Court relied upon the personal model in *Smith (No 2)* to ensure that British soldiers will continue to enjoy their Convention rights when deployed overseas, even though the UK may not have effective control of the territory to which its soldiers are deployed.

3. IMPLICATIONS FOR OVERSEAS DEPLOYMENTS

The Supreme Court in *Smith (No 2)* took the position that British soldiers are always within British jurisdiction. In their Lordships' estimation, the military command structure and the culture of obedience and discipline characteristic of modern militaries[211] equate to 'authority and control' for the purposes of Article 1 of the Convention. As the law currently stands, British soldiers are within British jurisdiction wherever they are in the world.

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[209] ibid, [31].

[210] Milanović, *Extraterritorial Application of Human Rights Treaties*, 186.

[211] For a detailed study of military professionalism, obedience and the armed forces' relationship with civilian government, see Samuel P Huntington, *The Soldier and the State: The Theory and Politics of the Civil-Military Relationship* (HUP 1957).

3.1. ON BASE

During their sojourn in Iraq and Afghanistan British forces established bases that became the headquarters for their operations in those countries. Some of those bases were existing civilian facilities commandeered for military use – such as Basra Airport in Iraq – or purpose-built installations – like Camp Bastion in Afghanistan. The European Court said in the detention cases that the 'full, exclusive de facto' control of premises will establish jurisdiction on the grounds of effective control of territory.[212] Although the *Al-Skeini* Court said that physical control over individuals engaged the state's Convention responsibility in the detention cases, it did not expressly contradict the earlier ruling that the base was under the state's effective control.[213]

Within the confines of the military base, soldiers are within the state's jurisdiction, as conceded by the Secretary of State in *Smith (No 1)*, on the basis of the effective control of the territory covered by the base. Thus the state is obligated to secure the full range of Convention rights to all those inside the base.[214] Though it is unlikely that the European Court would rule that a military base is not under the effective control of the state, the extent to what might qualify as a base is dubious. The territory regarding which the territorial model was established is 40% the total area of the island of Cyprus, 1,250 square miles. Camp Bastion, the largest UK base in Afghanistan, is about 14 square miles,[215] but the Court has never defined a threshold at which something is considered "territory". What is also unclear is how the state might go about securing all the Convention rights within its bases abroad, and how limitations of those rights necessitated by the specific

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[212] *Al-Saadoon (Admissibility)*, §88.
[213] *Al-Skeini*, §136.
[214] ibid, §138.
[215] Sharon Kearn, 'Camp Bastion Doubles in Size' (*Gov.uk*, 18 May 2010) <www.gov.uk/government/news/camp-bastion-doubles-in-size> accessed 23 May 2014.

exigencies of each particular armed conflict situation, government objectives and available facilities would fall within the permitted limitations of rights provided for in the Convention.

Soldiers' claims to be within the state's jurisdiction and therefore entitled to protection of their Convention rights when on overseas deployments are strongest when they are within a military base. The state is presumed to have the 'full, exclusive de facto' control of the territory on which the base is built, establishing that everyone within the base is also within the state's jurisdiction for the purposes of Article 1. Furthermore the control and authority exercised through the military command structure is just as present within the overseas base as it is for the garrison at Catterick. Thus the state's jurisdiction is also established through the personal model.

3.2. Off-Base and in the Heat of Battle

In the heat of battle, it will be unlikely that a state will have effective control over the battlefield. The fact of fighting is fairly decisive evidence that there is at least strong resistance to the soldiers' control of the area. But even without control of the territory, even in the heat of battle, soldiers continue to operate within the constraints of the chain of command and are subject to British authority and control. They thus remain within British jurisdiction for the purposes of Article 1. Granted that without the territorial basis of jurisdiction, the soldiers' position vis-à-vis the state may be weaker than on the base, but the Court's *Al-Skeini* principles, as applied to soldiers by the Supreme Court in *Smith (No 2)*, make it clear that this level of personal control suffices to establish the threshold criterion for application of the Convention.

It should be noted that although the current legal position is that British soldiers are always within British jurisdiction for the purposes of the Article 1 obligation to secure the Convention rights, the extent of that obligation will vary according to the exact circumstances. Whilst the *existence* of the state's protective duty to its solders is not affected by involvement in armed conflict or overseas deployment,[216] the steps that states are required to take in order to fulfil that protective duty will vary according to the circumstances. Whilst human rights law acknowledges that the extent of states' duty to respect and protect individual rights may be limited in certain circumstances that does not mean that individual rights do not exist or cannot be applied to difficult situations.[217] It would be unreasonable and unworkable to expect states to take the same measures for its troops in difficult wartime situations as for civilians in peaceful domestic settings. In the form of the limitation clauses included in the expression of many rights, the Convention recognises that 'human rights compliance does not mean one size-fits-all solutions'.[218]

3.3. Occupying Army

Under the law of armed conflict, '[t]erritory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'.[219] In some cases an occupying power will have effective control over the occupied territory for the purposes of Article 1 of the Convention. However effective control for Article 1 and

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[216] *Smith (No 1),* [192] (Lord Mance).

[217] Defence Committee, UK Armed Forces Personnel and the Legal Framework for Future Operations (HC 2013-14, 931) ev 45.

[218] ibid.

[219] Convention Respecting the Laws and Customs of War on Land and Annex (adopted 18 October 1907, entered into force 26 January 1910) ("Hague IV"), Article 42 of the Annex to the Convention.

occupation under the laws of armed conflict are not necessarily coterminous. The European Court in *Al-Skeini* did not discuss whether the UK enjoyed effective control over south-eastern Iraq, even though it recognised the UK's status as an occupying power in international law.[220] The House of Lords in that case had been clear that the UK did not have effective control for the purposes of Article 1.[221]

If, on the facts of each case, occupying troops are found to have effective control of the occupied territory for the purposes of Article 1, then the state would be responsible for securing the Convention rights to those soldiers as well as the local population. A state's dominance over territory is a question of fact, determined inter alia by the strength of the military presence.[222] Other factors may be taken into consideration and the strength of any insurgency will be relevant in the court's examination of the question. A particularly active insurgency in opposition to the occupation will reduce the chance that the fact of occupation per se establishes effective control.

Despite the clarification given in *Al-Skeini*, the rules regarding jurisdiction are still 'highly fact-sensitive and case-specific'.[223] Under the personal model British soldiers occupying territory abroad will be within British jurisdiction, regardless of whether their occupation amounts to effective control of the territory. Within the base, both the personal and spatial models apply, unaffected by the question of occupation and effective control of territory outside the base. Outside the base, the personal model will continue to apply in

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[220] *Al-Skeini*, §143.
[221] *R (Al-Skeini)* v *Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, [83] (Lord Rodger).
[222] *Al-Skeini*, §139 (citing *Loizidou (Preliminary Objections)*, §16; *Ilaşcu*, §387).
[223] Henderson, 'War, Power and Control: The Problem of Jurisdiction'.

almost all circumstances. If, during an occupation, effective control can be established on the facts, then soldiers will be in as strong a position when outside the base as inside it, since both the personal and spatial models of jurisdiction can apply. This applies especially to when soldiers are out on patrol but not actively engaged in combat.

3.4. INTERNATIONAL ORGANISATION-LED OPERATIONS

Where states contribute troops to missions led by international organisations, such as the United Nations Peacekeeping Forces in Cyprus ("UNFICYP") – the state's responsibility for those soldiers' Convention rights may be at its weakest. In missions organised and led by the international organisation, nations may contribute contingents of troops and place those troops at the disposal of the organisation. In those circumstances the organisation is responsible in international law for the conduct of those soldiers.[224] Where the soldiers are under the control of the organisation, the command structure that was so instrumental in their Lordships' decision in *Smith (No 2)* is altered.[225] As such the state yields final command authority over the soldiers to the international organisation. British soldiers forming the UK's UNFICYP contingent serve on a 'six month tour of duty as *United Nations soldiers* and … wear UN berets'.[226]

In these circumstances the soldiers' actions may be attributable to the international organisation under international law rules of attribution. But attribution and jurisdiction

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[224] International Law Commission, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April – 3 June and 4 July – 12 August 2011) UN Doc A/66/10, Article 7.

[225] Moshe Hirsch, *The Responsibility of International Organisations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995) 66.

[226] Ministry of Defence, 'The British Army in Cyprus' (*British Army*) <www.army.mod.uk/operations-deployments/22728.aspx> accessed 2 July 2014.

are different concepts. The former determines a state's control over the perpetrator of an alleged violation, whilst the latter establishes a state's control over the *victim*. As such the UN may be responsible for acts of British soldiers in UNFICYP, but the UK does not totally yield control and authority over its troops – for instance in matters of discipline. States are therefore bound to their Convention obligations relevant to the nature and extent of their continuing control. Committing troops to command of an international organisation does not absolve the sending state of its obligations to those troops, although the scope of its obligations under the Convention may be somewhat limited because of states' reduced control over day-to-day operations.

No international organisations are party to the Convention (although the European Union has committed itself to acceding to the Convention[227]) and are thus not bound to secure the rights therein contained. When participating in missions led and directed by an international organisation, British troops do not have enforceable Convention rights against the organisation. Arguments may still be advanced about the UK's obligations to its soldiers. Once command has shifted away from the UK, the state does not have total authority and control over its troops to bring them fully within its jurisdiction, although it is still bound to the Convention obligations relevant to the nature and scope of its control. Though this is an infrequent occurrence, there is still a lacuna in the protection of soldiers' rights. Therefore the substantive discussion of this thesis is not concerned with soldiers participating in international organisation-led missions.

[227] Treaty on European Union, as amended by the Treaty of Lisbon (opened for signature 13 December 2007, entered into force 1 December 2009) 2702 UNTS 47938, Article 6(2).

It should be noted that where an international organisation merely authorises military action, that is insufficient for soldiers' conduct to be attributable to the organisation.[228] The organisation must assume full control and operational authority over the troops. Thus when the British military intervention in Iraq was legitimised by the UN Security Council,[229] the UN did not assume control of military action, nor did it have authority over soldiers' conduct. Full control and authority remained with the UK and the soldiers therefore continued to be within British jurisdiction for the purposes of Article 1.

4. DIVIDING AND TAILORING

In its *Al-Skeini* judgment, the Grand Chamber clarified that the Convention rights can be 'divided and tailored' according to the circumstances.[230] When individuals are brought within the state's jurisdiction by virtue of the authority and control exercised over them by a state agent, the state is bound to respect the Convention rights relevant to the nature and extent of the control.[231] It has not been judicially established which rights are relevant to the nature and extent of the command structure. States should be required to abide by negative obligations arising out of the Convention. The right to life prohibits intentional deprivation of life,[232] and the state should remain bound by this obligation during overseas deployments. This raises the issue of what constitutes an intentional deprivation of life, and this is examined in Chapter 2.

Whether states can be liable for failing to uphold their positive obligations to soldiers deployed overseas is less certain. The positive obligations require states to take positive

[228] *Al-Jedda* v *United Kingdom* 53 EHRR 23
[229] UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.
[230] *Al-Skeini*, §§136-37.
[231] ibid.
[232] European Convention on Human Rights, Article 2. See Chapter 3.1.

steps, not only to refrain from acting in a way that violates an individual's rights, but to secure those rights. This requires states to prevent individual rights *from being* violated. In many cases enacting and enforcing a legal regime that deters and punishes wrongdoing (in criminal prosecutions or civil actions for damages where appropriate) will satisfy this obligation. The state may make provisions in military law imposing civil or criminal liability on soldiers in order to fulfil its positive obligations. But the greater problem is how to protect soldiers from human rights violations perpetrated by the enemy. Human rights law continues to apply in times of armed conflict,[233] and human rights are not a 'fair-weather friend to humanity'.[234] How states might fulfil their positive obligations in times of armed conflict is the question posed after *Smith (No 2).*

The fact that positive obligations often require some exercise of public powers to implement legal or regulatory frameworks is the reason that states are not required to respect all the rights under the Convention where they do not exercise control of territory. But when it comes to guaranteeing the rights of its own soldiers, the state is in a far stronger position to implement the necessary frameworks to fulfil positive obligations. The right to life imposes upon states the positive obligation to protect individuals from risks to their lives.[235] The state is capable of taking measures to protect soldiers from the risks of deployment that do not require control of the territory. Such measures might include ensuring soldiers are equipped to defend themselves.[236] Because of the control that the state retains over the whole armed forces during their deployment, the state is capable of putting into place mechanisms for fulfilling the positive obligation to soldiers that it could

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[233] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, §25.
[234] Elizabeth Wicks, *The Right to Life and Competing Interests* (OUP 2010) 79.
[235] See Chapter 3.2.
[236] See Chapter 4.

not put into place for the local civilian population without effective control of the territory and governmental powers.

CONCLUSION

It has been shown in this Chapter that the state has continuing human rights obligations to its soldiers under the Convention when they are on active service overseas. The British Government tried to exclude their liability for deaths of soldiers in Iraq on the basis that those soldiers were not within British jurisdiction at the time of their deaths. As the law currently stands, the extent of the state's obligation to secure the Convention rights under Article 1 will be dictated by the specific circumstances of each case. Certainly the Government cannot prevent domestic courts or the European Court of Human Rights examining the merits of each case or scrutinising its actions by recourse to the argument that jurisdiction is a primarily territorial principle.

In the absence of contradictory rulings from the European Court, this thesis is predicated on the assumption that the Supreme Court's interpretation of the *Al-Skeini* general principles and their application to soldiers on overseas deployments in *Smith (No 2)* was correct, and that soldiers are within the jurisdiction of the state at all times. Lord Hope's judgment that soldiers are within the state's jurisdiction during foreign deployments was based on the state's authority and control over those soldiers themselves. It is fair to assume that, if states exercise control over individuals or territory abroad by virtue of their military activities, soldiers may be the conduit through which the state exercises its jurisdiction and must therefore be within the state's jurisdiction themselves. But according to Lord Hope's judgment, the fact that soldiers are within the state's jurisdiction is not predicated on the assumption that those soldiers are or capable of exercising jurisdiction

over others. His Lordship makes a normative claim that soldiers are within the state's jurisdiction that cannot be refuted simply by saying the soldiers are not exercising jurisdiction over other individuals or territory. Having established that soldiers are within their state's jurisdiction at all times, including when deployed abroad, I will turn now to challenges of interpreting Article 2 of the Convention.

CHAPTER TWO

ARTICLE 2 – INTERPRETATIVE CHALLENGES

INTRODUCTION

Article 2 of the Convention guarantees the right to life, which is the first substantive right recognised in the Convention. Article 2 provides:

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

Individuals are thus protected from being intentionally deprived of their lives. The Court and the now-defunct Commission have adjudicated numerous right to life applications but have never formally defined an intentional deprivation of life. This Chapter sets out some fundamental philosophical and legal principles regarding the correct interpretation of Article 2 and the approach the Court and Commission have adopted.

In their decisions and judgments the Court and Commission have not specifically discussed the meaning of these key terms, though a pattern is discernible in their jurisprudence. The text of Article 2 recognises a negative obligation, a prohibition on intentional killing except

in certain circumstances.[1] The Commission has only ever considered that an action constitutes a deprivation of life. Neither body has said so explicitly but the Commission and Court's practice appears to exclude the possibility of deprivation by omission. The Commission and Court have however recognised that Article 2 creates an implicit positive obligation to take 'appropriate steps to safeguard life'.[2] In certain well-defined circumstances failing to take reasonably practicable measures to protect people can constitute a violation of Article 2,[3] though not a deprivation of life. Section 1 examines the concepts of action and omission to determine the philosophical underpinnings of this distinction.

Section 2 analyses the nature of intention and the role it plays in the right to life. Other human rights treaties protect individuals against *arbitrary* deprivation of life.[4] For the purposes of the European Convention, intention is the quality rendering a deprivation of life unlawful. There are different philosophical approaches to intention, which is also an important component of domestic criminal legal systems. The Court and Commission have taken an inconsistent approach to intention and its role in Article 2. Failing to define this key concept has led to inconsistencies in the interpretation of the Convention. Together

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[1] See Chapter 3.1.

[2] *Association of Parents* v *United Kingdom* 14 DR 31, 32.

[3] *Osman* v *United Kingdom* 29 EHRR 245, §116.

[4] "Every human has being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant for the Protection of Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 6(1).
"Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." American Convention on Human Rights (ACHR) (opened for signature 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Article 4(1).
"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life." African Charter on Human and Peoples' Rights (opened for signature 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, Article 4(1).

with Chapter 3, this Chapter establishes a vital frame of reference for the specific questions addressed in this thesis.

This Chapter seeks to afford conceptual precision to "deprivation of life" and "intention". It is vital to understand what could be considered an intentional deprivation of life and what *should* be. The analysis in this Chapter helps to define the relationship between the negative and positive obligations, giving clarity to the nature and extent of legal tests established in the Court and Commission's jurisprudence, which are discussed in Chapter 3. As Chapter 4 will demonstrate, in many situations in which soldiers are killed the negative obligation to refrain from intentional killing could be said to be engaged. In many of these circumstances the narrow and exhaustively-defined exceptions to that general prohibition could not be applicable. This has the potential to impose unrealistic and impractical burdens on states. In defining the key negative obligation concepts of deprivation of life and intention, this Chapter gives theoretical grounding to new expressions of states' obligations to their soldiers advanced in Chapter 4.

1. DEPRIVATION OF LIFE

Freedom from being deprived of one's life is the cornerstone of Article 2. The Court and Commission have not set out their understanding of life itself, although some key principles have emerged from the case law. First, human embryos do not have a right to life.[5] The lack of a uniform approach to abortion law amongst Council of Europe member states[6] means that Article 2 does not confer a right to be born upon a foetus.[7] From this we can

[5] *Evans* v *United Kingdom (No 2)* 46 EHRR 34, §§54-56.
[6] The margin of appreciation doctrine, which heavily influenced this judgment, is detailed in Chapter 5.4.
[7] *Vo* v *France* 40 EHRR 12, §§80, 85.

infer that life has a beginning (though there is disagreement as to when exactly it begins). Second, the right to life does not include a right to die.[8] This suggests that life is self-sustaining but ordinarily ends naturally without human intervention. There are many theological, philosophical and scientific conceptions of life[9] but in the absence of conclusive judicial direction, this thesis is predicated on an understanding of life as a system of self-sustaining internal biological processes that distinguishes living beings from inanimate objects.

Conceptual analysis typically begins with a verbal definition of relevant terms[10] and this is a helpful starting point in defining a deprivation of life. To deprive is to take something, to prevent someone from having or using it.[11] Deprivation of life might be taking life, or preventing someone from having life. We speak idiomatically of "taking life", but if life is correctly understood as a system of self-sustaining internal biological processes, it is not an object and cannot be taken. If "prevention" is understood in its truest sense of stopping something from occurring before it happens[12] then the prohibition on deprivation of life would only secure the right of *future* people (who are not yet living) to *become* alive.[13]

This literal interpretation of deprivation as taking or preventing makes sense when life is conceptualised as the quality distinguishing living from inanimate objects. According to that view, deprivation of life would be something that takes from someone the quality that

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[8] *Pretty* v *United Kingdom* 35 EHRR 1, §39.
[9] For a general summary, see Elizabeth Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 1-21.
[10] Robin Barrow, *The Philosophy of Schooling* (Routledge 2015) 9.
[11] "deprive" in Catherine Soanes and Angus Stevenson (eds), *Oxford Dictionary of English* (2nd revd edn, OUP 2006) 486.
[12] "prevent" in Soanes, 1350.
[13] This interpretation contradicts the Court's judgments in abortion cases.

distinguishes them as a living being. But this distinguishing quality is a system of processes. Therefore deprivation can be understood as something that interrupts and stops these biological processes occurring inside the body – it prevents life from continuing and deviates from the natural course of things. "Depriving", "interrupting" and "stopping" all imply some kind of action. Does this mean that deprivation of life requires action or can there also be deprivation of life by omission?

If deprivation of life is something that stops self-sustaining biological processes it implies a causal requirement. Deviation from the normal course of things must have been *caused* by something – that deviation does not happen ordinarily otherwise it would not be a deviation. Though we idiomatically refer to omissions as causes ("my plants died *because* I failed to water them") there is a plausible metaphysical account that omissions *cannot* be causes.[14] This suggests that deprivation of life by omission is impossible and that broadly supports the Court's practice. In order to define deprivation of life for the purposes of Article 2 and determine whether deprivation by omission is possible, I will discuss the philosophy of action and omission.

A plain language approach to these terms is too broad and inexact. In everyday speech the lack of precision is not so important, but when determining the scope of states' legal obligations it is vital that terms are defined clearly. This is particularly true in the case of the negative obligation because the exceptions to the general prohibition on intentional killing are so narrowly-defined. Philosophical analysis pinpoints the meaning of key terms in a way that gives the state's legal obligations a degree of coherence and precision and

[14] Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) 52-55.

makes those obligations realistic and reasonable on a practical level. The aim of this thesis is to determine reasonable, realistic and effective protection for soldiers' right to life, so honing the meaning of these key concepts is particularly important.

To illustrate some different conceptions of intention, I shall refer to a simple trolley problem. The trolley problem was first introduced by Philippa Foot as a thought experiment for answering ethical dilemmas[15] and a well-established body of literature draws on this device.[16] Imagine a runaway trolley barrelling down the tracks. Ahead a spur line branches off the mainline. The tracks ahead are clear but a villain has tied Jack to the tracks of the spur line and he has no way to escape. Sally stands beside the track, next to a lever. Pushing this lever will switch the points, diverting the trolley down the spur. Sally pushes the lever, diverting the trolley. Jack is killed.

1.1. WHAT IS ACTION?

There is no overall agreement about the exact nature of action, although there is general consensus among philosophers that action is something *done by* someone, rather than something that merely *happens to* them. *Doing* is an imprecise verb that, interpreted liberally, might include blinking, blushing, sneezing, or other behaviour one usually describes as an automatic reflex or passive. *Doing* implies bodily movement, which can be understood as a 'change in the relative position of the parts of the body, not merely

[15] Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect' in Basil Blackwell (ed), *Virtues and Vices* (OUP 1978); originally published in 5 *The Oxford Review* 5.
[16] See for example Peter Unger, *Living High and Letting Die* (OUP 1996); Judith Jarvis Thomson, 'Killing, Letting Die, and the Trolley Problem' 59 *The Monist* 204; Thomson, 'The Trolley Problem' 94 *Yale LJ* 1395; Francis Kamm, 'Harming Some to Save Others' 57 *Philosophical Studies* 227.

holding still'.[17] But blinking, sneezing and other passive behaviour involve bodily movements. If action is the 'origin of movement'[18] but not all bodily movements are actions,[19] there must be some element setting actions apart from passive or reflex movements. What is this element?

Consider the trolley problem. The lever is pushed in the course of Sally's bodily movement. A myriad of internal processes manifest in the overt movement of her body in such a way that she places herself in a position to push the lever, puts her hand on it and pushes it. Instead of pushing the lever, suppose Sally falls. Her body has moved. The lever was pushed in the course of her body's movement from one position to another. There is some quality that distinguishes the bodily movement in the first scenario from the bodily movement in the second scenario. In many definitions, action is bodily movement that is intentional under some description.[20] When Sally pushed the lever, the *LEVER-PUSHING* was intentional under some description of intention. When Sally fell, the *LEVER-PUSHING* was not intentional. Intention has been described in many different ways.[21]

1.1.1. A Causalist Approach

Davidson conceptualises intention as the "primary reason" for movement.[22] The primary reason for movement has two aspects.[23] First the agent must have a pro-attitude towards

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[17] Michael S Moore, *Act and Crime: The Theory of Action and Its Implications for Criminal Law* (OUP 1993) 45.

[18] Thomas Aquinas, *Summa Theologica* (Fathers of the English Dominican Province tr, Burns Oates and Washbourne 1937) 164.

[19] David Pears, 'Two Problems about Reasons for Actions' in Robert Brinkley et al (eds), *Agent, Action, and Reason* (Blackwell 1971) 139.

[20] Donald Davidson, *Essays on Action and Events* (OUP 1980) 46.

[21] Intention for the purposes of distinguishing action from mere movement is distinct from legal intention, which is the focus of Section 2.

[22] Davidson, 27.

movements with a given quality. The pro-attitude may be wanting, desiring, urging, or any number of values that could be interpreted as the agent being amenable towards movements of that type.[24] Second the agent must believe that the movement *has* the desired quality. For brevity I shall call this the desire/belief. In the trolley problem, Sally wanted to move her body in such a way that made the lever move, and believed that moving her body in a particular way would make the lever move. According to Davidson's account, this desire/belief *caused* her movement. The desire/belief accounts for the movement, and so the movement is an action.

Davidson's definition of intention is attractive. It succeeds in placing an individual bodily movement within its wider 'social, economic, linguistic or evaluative context'[25] and neatly differentiates action from mere happenings. When Sally falls and her body accidentally pushes the lever, there was no action according to Davidson's definition. Her bodily movement was not caused by a desire to move her body in a way that had the quality of pushing the lever and a belief that moving her body in the way she did had that quality. Where there is no desire/belief that corresponds to a movement, there is no action. The difference between actions and mere happenings on Davidson's description is intentional and causational. Actions are movements *caused* by the relevant desire/belief. Any reflex reactions are also neatly excluded from Davidson's description of action, since the movement cannot be described in terms of a desire/belief.

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[23] ibid, 3-4.
[24] ibid, 4.
[25] ibid, 10.

Davidson's hypothesis does not address causal deviance. In our trolley scenario, suppose Sally wants to move in a way that pushes the lever and believes that moving in a certain way will move the lever. This makes her nervous and her hands shake, pushing the lever. The desire/belief *did* cause the movement, albeit indirectly. Though the lever was pushed, it is tenuous to describe it as action. Mele and Moser rescue the causality thesis by requiring the desire/belief and the final event to be proximate.[26] Where the relevant desire/belief is the *direct* cause of the movement, that movement is action. But a movement cannot be considered intentional where desire/belief-inspired nervousness fills a temporal gap between the acquisition of the desire/belief and the pertinent movement.[27]

Foley offers an alternative remedy to the causal deviance problem. When Sally's hands shake, her bodily movement was not intentional and accordingly it was not an action because it was not done in the 'right way'.[28] According to Foley's view, Sally's desire/belief relates to movements of a specific type. She intended a deliberate movement and falling over or shaky hands are not deliberate movements. This 'right way' requirement gets around the problem of causal deviance, whilst acknowledging that there may be a delay between the desire/belief and the ultimate event.

A number of different processes occur when Sally acts. She moves her body, pushes the lever, switches the points, diverts the trolley, kills Jack. The causal hypothesis interprets

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[26] Alfred R Mele and Paul Moser, 'Intentional Action' in Alfred R Mele (ed), *The Philosophy of Action* (OUP 1997) 235.

[27] This begs the question that time is linear and that the temporal order and causal order are the same. For an interesting insight into the possibility of backwards causation, see Kurt Gödel, 'A Remark about the Relationship between Relativity Theory and Idealistic Philosophy' in Paul Arthur Schilpp (ed), *Albert Einstein: Philosopher-Scientist* (Harper 1959).

[28] Richard Foley, 'Deliberate Action' 86 *Phil Rev* 58, 62.

action expansively. Accordingly any one of these processes, or indeed the whole chain of events, may be called Sally's action. Davidson asserts that these processes are merely different ways of describing the same event, so that Sally's bodily movement is equivalent to killing Jack.[29] If this is the case, each "description" is explicable by reference to the same causes and consequences.[30]

This hypothesis uses a coarse-grained approach to action individuation. Such an approach might describe Sally's action as *JACK-KILLING*, which includes all the pertinent processes between Sally's bodily movement and Jack being killed. On this coarse-grained approach, each description of the action is explicable by reference to the same causes and consequences. For instance, points-switching is a consequence of Sally's bodily movement and a cause of Jack's death. However, this does not fit with the description of action as intentional bodily movement, since it includes events that are not bodily movements. Points-switching is a consequence of Sally's bodily movement, but it is not a bodily movement itself.

Furthermore the coarse-grained approach to action individuation complicates the desire/belief, which is the prerequisite for movements to be actions. If we take a coarse-grained approach to action individuation and describe Sally's action as *JACK-KILLING*, the desire/belief must include a whole host of events that are more than mere bodily movements. Sally's desire/belief must be to move in a way that sets off a chain of events, rather than to just move her body. A fine-grained approach to action individuation sees

[29] Davidson, 4.
[30] Alvin J Goldman, *A Theory of Human Action* (Prentice-Hall 1970) 2-3.

the many elements as different events and only describes the actual bodily movement as action.

Action individuation is no longer fashionable or relevant, according to some.[31] But it determines whether Sally has actually acted in the trolley problem. If the action is *JACK-KILLING*, Sally must want to move her body in a way that has the quality of killing Jack, and believe that moving her body in *this* way has that quality. This confuses two types of intention – the intention that distinguishes action from mere movement, and the intention relating to the consequences the agent sought. It is not just a question of whether Sally moved her body in a way that was intentional, but also whether she intended the consequences of that movement. This definition of action is insufficiently precise. Davidson's is only one hypothesis of action. I shall now consider an alternative in order to build conceptual clarity that will assist in determining how to guarantee soldiers' right to life.

1.1.2. The Non-Causalist Reply

Davidson's causalist hypothesis distinguishes actions from mere happenings on the basis of their different causal histories. Actions stem from particular causes (on Davidson's account, the pertinent desire/belief) whereas mere happenings have no such causal background. However, Frankfurt suggests that 'it is not part of the nature of an action to have a prior causal history of any kind'.[32] Frankfurt asserts that causalist hypotheses direct attention away from the actual event. His model of action is concerned with the state of

[31] Alfred R Mele, 'Introduction' in Mele, 2.
[32] Harry G Frankfurt, 'The Problem of Action' 15(2) *Am Phil Q* 157, 157.

affairs at the time of the bodily movement itself.[33] What matters is that the movement, at the time it occurs, occurs under the '*person's guidance*'.[34] Like Davidson, Frankfurt posits that action is a bodily movement that is intentional, but adopts a different conception of intention.[35]

Action is movement the agent controls. Bodily movement occurring under the agent's control is purposive behaviour. Frankfurt defines purposive behaviour as movement guided by some mechanism making adjustments to compensate for the effects of extraneous forces on that movement.[36] Pupil dilation, for instance, serves the function of allowing more light into the eye and is guided according to local mechanisms in the body sensing the level of ambient light. Though this is purposive movement, it is not action since it is not guided by the agent themselves.[37] In our trolley problem, when Sally moves her arm to push the lever, she controls the movement. That is to say, it does not happen as the body's automatic reflex response to external environmental stimuli. If Sally falls, her bodily movement is guided by external forces rather than her own control. If Sally's nerves make her hands shake, the shaking is a reflex reaction outside her control.

Sally guides the movement of her body to push the lever. Her desires and beliefs about her action may explain *why* she moved her body this way, but make no difference as to whether her movement is action. The only relevant factor is that she was in control of her movements. In order to push the lever, her movements are complex and form a

[33] ibid, 158.
[34] ibid (emphasis in original).
[35] ibid, 159.
[36] ibid, 160.
[37] ibid, 159.

meaningful pattern. Her movements go beyond merely raising an arm here and tapping a foot there. The sophistication of her movements requires a certain level of guidance and must be considered action.[38] When Sally falls she is not controlling the movement of her body. She does not push the lever in a controlled and coherent pattern of movements. As such, Sally acts when she pushes the lever, but not when she falls into it.

O'Shaughnessy defined control in terms of *trying*.[39] If Sally falls, the movement of her body is a response to the laws of gravity pulling it to the ground. When Sally purposefully pushes the lever, she does so by *trying* to push it. Trying to bring about an act-neutral event is the kernel of action.[40] Such an event is one that can occur independently of action. Pushing the lever is act-neutral, since it can occur without agent action – such as when Sally accidentally falls into it.[41] O'Shaughnessy explains trying as 'whatever one takes to be needed if, the rest of the world suitably co-operating, one is to perform the action'.[42] This trying hypothesis recognises that human beings are not omnipotent and are at the mercy of extraneous forces. Trying is the psychophysical event that bridges the gap between internal will and external reality.[43] It foresees that an agent may act even though they do not succeed in bringing about the desired state of affairs. Unlike Davidson's hypothesis, the trying model clearly distinguishes between intentional bodily movements and the desired consequences of those movements.

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[38] ibid. This does not mean that simple movements like arm-raising or foot-tapping are not action. Frankfurt's suggestion is that movements forming a complex and coherent pattern are more likely to be occurring under the agent's guidance. He gives the example of a pianist, the movements of whose fingers form a complex pattern that is coherent and meaningful. Compare that to someone having a seizure, whose thrashing about does not form a coherent pattern. The pianist controls the movement of her finger, whereas the movements of the person's body during the seizure are outside his control.

[39] Brian O'Shaughnessy, 'Trying (As the Mental "Pineal Gland")' in Mele, 53.

[40] ibid, 57.

[41] ibid, 56-57.

[42] ibid, 56.

[43] ibid, 58.

Ginet offers another perspective, which says action is something done by an agent that is not nomically necessitated.[44] Nomic necessity is when the application of the laws of nature to the antecedent state of the world requires that *this*, rather than any other event, transpires.[45] Sally acts when she pushes the lever, it was not determined by the laws of nature. The lever-pushing could just as well not have happened. However when Sally falls to the ground, this occurs as an operation of the laws of nature (more specifically the laws of gravity). The laws of nature determined the trajectory of her fall, as a result of which the lever was pushed. Sally did not act.

The problem with this hypothesis is that agents may create states of affairs by their actions, and the application of the laws of nature to that state of affairs might result in an event that cannot be considered action. Suppose Sally tied Jack to the tracks of the mainline. Barring intervention by another force, the trolley will continue down the mainline, hit Jack and kill him. His death occurs as a matter of nomic necessity. Application of the laws of nature to a pre-existing state of affairs requires it (unless someone switches the points). But Sally has, by her action, created the state of affairs. Jack's death is nomically necessitated, but this is only the case because of Sally's action. This may well be another question of act-individuation.

All three of these models approach the question in different terms with different conceptions of intention, but all involve an element of agent control. Whether that be Frankfurt's guidance, O'Shaughnessy's trying or Ginet's free action, bodily movements that

[44] Carl Ginet, 'Reasons Explanation of Action: An Incompatibilist Account' in Mele, 106.
[45] ibid.

are outside the agent's own control are not actions. Action under the causalist or non-causalist hypothesis can be something that stops the body's self-sustaining internal biological processes.[46] On either of these models, Sally acted when she pushed the lever and therefore deprived Jack of his life. Her fall was not action, neither was her shaky hands. Neither of these bodily movements constitute a deprivation of life. It seems like a sensible conclusion that deprivation of life requires an agent to have acted, because an action is under the agent's control (somehow defined). This is an important factor in determining the scope of states' obligations to their soldiers. Omissions are 'simply absent actions',[47] but omissions may be intentional under the descriptions of intention offered by the causalist and non-causalist models. Omissions can occur under the same control as actions. So should omissions also constitute a deprivation of life?

1.2. Intentional Omissions

In order to demonstrate how omissions can be intentional under the causalist and non-causalist definitions, I shall alter the trolley problem slightly. Imagine the points are set to divert the trolley down the spur. Pushing the lever will switch the points to send the trolley down the mainline and save Jack. Jack is Sally's mortal enemy. She knows pushing the lever will save him but desires that he should die, so does nothing. The trolley continues along its path, hits and kills Jack. Sally made no movement, she was utterly still. Since bodily movement is a requirement of action, she cannot have acted. But her inaction can still be intentional.

[46] This is the definition of deprivation of life. See Section 1.
[47] Moore, 53.

Under Davidson's hypothesis, she has a positive attitude towards moving her body in a way that does not alter the trolley's course and a belief that standing still will have that quality of not changing the trolley's course. On the non-causalist account, her behaviour might also be described as intentional. She did not *move,* but she *was* in control of her body. She was standing still by *trying* to stand still. Her standing still is not nomically necessitated – indeed, she must be in control of herself otherwise the laws of gravity would cause her to collapse in a heap on the ground. Frankfurt supports his hypothesis of guidance with the analogy of a car coasting down a hill. The driver is content with its speed and trajectory, so does not touch the steering wheel or brakes. But he is in a position to intervene and alter the car's course if he were so inclined.[48] Sally is in a similar position vis-à-vis the runaway trolley. She *can* intervene but chooses not to. She thus has a degree of control over herself *and* the situation.

Sally did not act, therefore she cannot have deprived Jack of his life if deprivation of life is correctly understood as an action that stops someone from living. But she was in control of her body. Chisholm suggest that this is goal-directed behaviour falling short of action. In this scenario Sally believes she has the power to prevent a state of affairs from obtaining, but does not do so.[49] The causalist and non-causalist models of action may both be sensible hypotheses, but they both lead to difficulty when applied to this scenario. If bodily movement by itself cannot be action, but the "intention" by which movement is considered action can also refer to a *lack of movement,* does the distinction between movement and action become untenable? It is difficult to dismiss this concern when attempting to define whether omissions are capable of constituting a deprivation of life and sketch the extent of soldiers' Article 2 guarantees. Compare this scenario with the first, in which Sally diverts

[48] Frankfurt, 160.
[49] Roderick M Chisholm, 'The Structure of Intention' 67(19) *J Phil* 633, 647.

the trolley onto the spur line to kill Jack. In both scenarios, Sally is in control of her body, but she only deprives Jack of his life when she pushes the lever. What is the reason for this discrepancy? The answer may lie in the theory of causation. I shall turn to this now.

1.3. CAUSATION

Causation[50] is a relationship between two or more objects, events, or properties. Hume neatly summarised the relationship as one of necessity, inasmuch as 'if the first object had not been, the second never had existed'.[51] This is a good starting point, which supports the common conception of "causes" as things that make a difference.[52] The nature of the relationship itself and of the relata is subject to considerable debate.[53] For present purposes it is sufficient to assume that causation exists and that it is a relationship between two items. It is generally acceptable that causation requires that a law of physical necessity exists. Some events occur as a physical necessity as a result of the laws of nature.[54] Ginet would say these events are nomically necessitated. When Sally pushes the lever and diverts the trolley down the spur line (killing Jack), what is the nature of the metaphysical relationship between her bodily movement and Jack's death? Most importantly for the question of whether omissions can constitute a deprivation of life, what is the nature of the metaphysical relationship between Sally's lack of bodily movement and Jack's death when Sally does nothing and allows the trolley to continue on its fatal path?

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[50] Here I refer to causation in a metaphysical, rather than legal, sense.

[51] David Hume, *An Inquiry Concerning Human Understanding* (first published 1748, Peter Millican ed, OUP 2007) 56.

[52] David Lewis, 'Causation' 70 *J Phil* 556, 557.

[53] For a useful summary of the various propositions, see Jonathan Schaffer, 'The Metaphysics of Causation' (*Stanford Encyclopaedia of Philosophy*, 19 March 2014) <plato.stanford.edu/entries/causation-metaphysics/> accessed 21 June 2015.

[54] Roderick M Chisholm, 'The Agent as Cause' in Myles Brand and Douglas Walton (eds), *Action Theory* (Reidel 1976) 200-201.

Counterfactual dependence, as expressed by Hume, can be an effective test of causation.[55] It creates a "but-for" test of causation. If the proposition 'but for *LEVER-PUSHING*,[56] *POINTS-SWITCHING*[57] would not have happened' is true, we may call *LEVER-PUSHING* the cause of *POINTS-SWITCHING*. Though attractive, this test of causation can lead to false results when one takes a lax approach to language. Schaffer argues that "disconnections", that is absences or omissions, can be causative because they fulfil this "but-for" test.[58] But if one accepts Moore's view that absences and omissions are mere nothings and that there are no negative values,[59] how can nothing cause anything? If there is no *LEVER-PUSHING*, and *POINTS-SWITCHING* occurs anyway, there must be some other condition that is sufficient to make *POINTS-SWITCHING* happen. It is a simple case of 'over-determination' to say that *NO-LEVER-PUSHING* caused *POINTS-SWITCHING*.[60] If *POINTS-SWITCHING* occurs without *LEVER-PUSHING*, even if it occurs as a result of the laws of nature or nomic necessity, *NO-LEVER-PUSHING* is not a cause of *POINTS-SWITCHING* or anything it entails.

By *LEVER-PUSHING*, Sally makes a causal contribution to Jack's death. *LEVER-PUSHING* did not occur as a result of the laws of nature, Sally *did* it. *POINTS-SWITCHING* (including trolley-diverting and Jack's death) occurred as a result of her bodily movement. *LEVER-PUSHING* was a sufficient causal condition of the trolley diverting onto the spur line and killing Jack.[61] *LEVER-PUSHING* (rather than *NO-LEVER-PUSHING*) caused the trolley to divert and kill Jack

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[55] Jonathan Schaffer, 'Disconnection and Responsibility' 18 *Legal Theory* 399, 408.

[56] Though on a fine-grained action individuation Sally's action is merely her bodily movement (in the course of which the lever is pushed), for brevity I shall refer to this as *LEVER-PUSHING*.

[57] *POINTS-SWITCHING* should be understood as including everything that follows, including trolley-diverting and Jack's death.

[58] Schaffer, 'Disconnection'.

[59] Moore, *Causation*, 53.

[60] Phil Dowe, 'Good Connections: Causation and Causal Processes' in Howard Sankey (ed), *Causation and the Laws of Nature* (Kluwer 1999) 260.

[61] Chisholm, 'Agent as Cause', 201.

(rather than carry along the mainline and spare him).[62] Suppose the points are set so the trolley will continue down the mainline, but Sally is mistaken and thinks *LEVER-PUSHING* will divert the trolley and save Jack. She pushes the lever, switches the points, diverts the trolley down the spur line and kills Jack. Though she desired a better outcome, Sally still made a positive causal contribution to Jack's death. She acted. She caused it.

Suppose the points are set to divert the runaway trolley down the mainline and Sally does nothing – she stands motionless and allows the trolley to continue along its path, killing Jack. She made no causal contribution to Jack's death. It would have happened in the same way if she were not there, according to the laws of nature. She may be morally responsible for what happened, but it would be false to say she *caused* it.[63] It has been argued that only positive factors can be truly causal.[64] An omission (that is, a non-act) has no place in the causal structure of an event.[65] This is because an omission or absence is itself a counterfactual proposition of what happened.[66] When we speak in a casual everyday manner about absences as causes ('my omission to give the plants water caused them to wither and die') this is actually a proposition about what would have happened in an alternative world had the absent object actually been present ('the plants bloom because I give them water'). This does not mean that the absence itself is causative. It is merely a figure of speech.

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[62] This "(rather than…)" locution is based on a model of establishing metaphysical causation by using causal alternatives and effectual differences. For more detail on this model, see Jonathan Schaffer, 'Contrastive Causation' 114 *Phil Rev* 327.
[63] Chisholm, 'Agent as Cause', 208.
[64] DM Armstrong, 'The Open Door: Counterfactual versus Singularist Theories of Causation' in Sankey, 177.
[65] ibid, 181.
[66] Dowe, 261.

In proper metaphysical terms, an omission is nothing and cannot have any connection to an event if the world is understood in terms of positive values. Whereas when Sally pushes the lever there is a causal relationship between her action and Jack's death, the same cannot be said for when she stands and watches the trolley continue along its path. Her omission might satisfy a description of intention, but it has no causal relationship to the trolley's path, since there were other conditions sufficient to cause that. She had an opportunity to change the trolley's path, but did not do so.

Causation itself is not sufficient to establish that a movement was action. When Sally fell over and her body pushed the lever in the course of her fall, the movement of her body made a positive causal contribution to Jack's death. The same can be said for Sally's nervous shaky hands in the third scenario. But these movements did not occur under Sally's control. Control over oneself requires a causal contribution to a given event in order for it to be action, but this reliance is mutual, inasmuch as making a causal contribution to the event does not equal action without that causal contribution having occurred under the agent's control.

Deprivation of life implies a causal requirement. A deprivation of life is something that stops the body's self-sustaining internal biological processes. This is an interference that is not nomically necessitated. Deaths that occur normally as a result of the laws of nature are not deprivations of life for the purposes of Article 2. To be a deprivation of life, death must result from some human agency. Since omissions or absences cannot be causative, omissions cannot *cause* a deprivation of life. People may be morally responsible or indeed

legally liable for their omissions,[67] but not for a deprivation of life. Causation is thus the key to defining a deprivation of life. This trolley problem has demonstrated that soldiers have only been deprived of their lives when their death results from an action. States may be legally liable for omissions, but failing to protect soldiers' lives cannot constitute a deprivation of life because of the implicit causal requirement.

1.4. Action- and Omission-Based Liability

McCann v *United Kingdom* was the Court's first Article 2 case.[68] SAS soldiers shot dead three suspected terrorists in Gibraltar.[69] The three had been deprived of their lives by the soldiers' actions. In a subsequent case the Court said the prohibition on intentional deprivation of life was irrelevant because the applicant did not allege anyone wanted or tried to kill her.[70] The Court's practice regarding deprivation of life has followed the distinction of action and omission. The Court has not yet faced a set of facts in which the distinction on the basis of action, omission and causation becomes unhelpful.

"Commission by omission" is grounds for criminal liability under provisions in domestic and international criminal legal systems. The Convention does not criminalise individual behaviour and the Court is not concerned with *personal* responsibility for deaths,[71] but this is not fatal to the comparison. Criminal law exists to protect individuals from wrongdoing, in a similar way to human rights law. In our trolley problem, suppose the points are set to

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[67] Negligent omission in tort law is a good example of when omissions can result in legal liability. States are also liable under Article 2 for their omissions in certain well-defined circumstances: see Chapter 3.2.
[68] 21 EHRR 97.
[69] For more detailed facts, see §§12-80.
[70] *LCB* v *United Kingdom* 27 EHRR 12, §36.
[71] *McCann*, §173.

divert the runaway trolley down the spur line and Sally does nothing to prevent Jack being killed. Her malice may make her criminally liable under some provisions in domestic law, but there has been no deprivation of life for the purposes of Article 2 of the Convention. Failing to prevent a death does not constitute a deprivation of life, although the Court has developed a positive obligation to protect individuals from risks to their lives.[72]

In the international legal order a state is responsible for actions *and* omissions attributable to it that constitute violations of their obligations.[73] The Convention on the Prevention and Punishment of the Crime of Genocide outlaws the killing of national, ethnical, racial or religious groups.[74] Genocide has been called the 'ultimate human rights problem'[75] and the Genocide Convention is sometimes described as an international human rights treaty.[76] The Genocide Convention lists the acti rei of the crime of genocide.[77] Acts *and* omissions have both formed the subject-matter of prosecutions before the ad hoc international tribunals,[78] omission itself being counted as an *act* of genocide. As well as having specific genocidal intent, the omission itself must be advertent.[79]

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[72] *Osman* v *United Kingdom* 21 EHRR 245, §116. See Chapter 3.2.
[73] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83, Article 2 of Annex to the Resolution.
[74] Convention on the Prevention and Punishment of the Crime (Genocide Convention) (adopted 9 October 1948, entered into force 12 January 1951) 78 UNTS 277, Article 2.
[75] UN Doc E/CN.4/Sub.2/1948/SR.3, §6.
[76] *Prosecutor* v *Kayishema and Ruzindana* (Judgment) ICTR-95-1-T (21 May 1999) §88.
[77] Genocide Convention, Article 2(a)-(e).
[78] See *Prosecutor* v *Kovacevic and Drljaca* (Indictment) ICTY-97-24 (12 March 1997) §9; *Prosecutor* v *Kambanda* (Judgment and Sentence) ICTR-97-23-S (4 September 1998) §40(1).
[79] William Schabas, *Genocide in International Law* (CUP 2000) 157.

The most obvious act of genocide that may be committed by omission is the deliberate infliction of 'conditions of life calculated to bring about [the group's] physical destruction'.[80] Such conditions of life might include placing people on a subsistence diet or withholding appropriate accommodation.[81] Omissions cannot be causative and the Genocide Convention prohibits 'deliberately *inflicting*' such conditions of life,[82] which implies some causal requirement. This causal requirement may be satisfied by interning people in concentration camps where the inadequate conditions prevail. Like Sally tying Jack to the tracks and waiting for the trolley to come and kill him, these 'slow-death measures'[83] might be defined as omissions but necessarily involve some causative action earlier in the causal chain.

In several European states' domestic criminal law systems, omissions can incur criminal liability. The French Penal Code imposes a fine and imprisonment when people fail to notify authorities of an impending felony that might yet be prevented,[84] and even imposes a duty to prevent crime where it does not endanger the individual to do so.[85] In Germany, those who allow an offence to proceed despite having a duty to prevent it may be

[80] Genocide Convention, Article 2(c).
[81] Schabas, 170.
[82] Genocide Convention, Article 2(c) (emphasis added).
[83] Florian Jessburger, 'The Definition and the Elements of the Crime of Genocide' in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009) 100.
[84] "Le fait, pour quiconque ayant connaissance d'un crime dont il est encore possible de prévenir ou de limiter les effets, ou dont les auteurs sont susceptibles de commettre de nouveaux crimes qui pourraient êtres empêches, de ne pas en informer les autorités judiciaires ou administratives est puni de trois ans d'emprisonnement et de 45,000 euros d'amende." Code Pénal, art 434-1.
[85] "Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende." Code Pénal, art 223-6.

prosecuted.[86] In the event of an accident or emergency, those who might be expected to help in the circumstances but fail to do so may also be criminally liable.[87] In any of these circumstances the individual has not acted yet might still be guilty of a criminal offence. They have not caused anything, rather failed to prevent something.

Yet in each of these systems the law creates a *separate* offence of failing to prevent the crime. In either France or Germany, Sally's failure to prevent Jack being killed is not tantamount or equivalent to when Sally pushed the lever and killed him. In English law, people may be guilty of gross negligence manslaughter when they fail to save someone to whom they owe a duty.[88] The moral opprobrium attached to gross negligence manslaughter is much lower than to murder, as reflected in the difference in sentencing.[89] It has been thoroughly argued that causation is the justification for increased liability in criminal law.[90] Human rights law does not recognise a difference in culpability on the basis of causation but the Court replicates the distinction between causal acts and non-causal omissions in interpreting the Convention.

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[86] "Wer es unterläßt, einen Erfolg abzuwenden, der zum Tatbestand eines Strafgesetzes gehört, ist nach diesem Gesetz nur dann Strafbar, wenn er rechtlich dafür einzustehen hat, daß der Erfolg nicht eintritt, und wenn das Unterlassen der Verwirklichung des gesetzlichen Tatbestandes durch ein Tun entspricht." Strafgesetzbuch of 13 November 1998, BGBl 3322, §13(1).

[87] "Wer bei Unglücksfällen oder gemeiner Gefähr oder Not nicht Hilfe leistet, obwohl dies erförderlich und ihm den Umstände nach zuzumuten, insbesondere ohne erhebliche eigene Gefähr und ohne Verletzung anderer wichtiger Pflichten möglich ist, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft." Strafgesetzbuch of 13 Novmeber 1998, BGBl I 3322, §323c.

[88] *R* v *Bateman* [1925] All ER 45.

[89] Murder in England and Wales carries a mandatory sentence of imprisonment for life pursuant to the Murder (Abolition of Death Penalty) Act 1965, s1(1). According to the Offences Against the Person Act 1861, s5, manslaughter carries a discretionary sentence of life imprisonment, according to which actual sentences are given by judges on an individual basis.

[90] Moore, *Causation and Responsibility*.

Lord Diplock criticised the use of the phrase 'actus reus' to describe the physical element of an offence because it suggests that only positive acts can give rise to criminal liability.[91] His Lordship recommended it would be more appropriate to talk in terms of the accused's 'conduct' more broadly,[92] thus allowing commission by omission to form the physical element of an offence.[93] It is interesting that criminal codes, which are traditionally drafted more restrictively so as to preserve the presumption of innocence,[94] should criminalise omissions in certain circumstances since omissions involve no action and no causation. Thus Sally's failure to save Jack might entail criminal liability in England, France or Germany, but would not constitute a deprivation of life for the purposes of Article 2(1). In 2013 a mother allowed her son to starve and was subsequently found guilty of gross negligence manslaughter.[95] Had she stabbed her son, she would have been guilty of murder. Though she was held legally responsible for his death, her *inaction* was not tantamount to action. She did not deprive her son of his life, but she failed to prevent his death.

Domestic and international criminal law supports the Court's practice of defining deprivation of life as action. Though domestic law criminalises failing to save someone in certain circumstances, it does not conflate that failure with killing. The philosophy of action, omission and causation gives a plausible metaphysical underpinning to this approach. Omissions cannot be causative, therefore cannot halt the body's ordinarily-self-sustaining internal processes. This establishes the broad principle, upon which the framework for guaranteeing soldiers' right to life will be constructed, that only action

[91] *R* v *Miller* [1983] 2 AC 161 (HL), 174.
[92] ibid.
[93] ibid, 176.
[94] Article 6(2) of the European Convention guarantees that anyone accused of a crime shall be presumed innocent until found guilty.
[95] BBC, 'Amanda Hutton guilty of starving Hamzah Khan to death' (*BBC News*, 3 October 2013) <bbc.co.uk/news/uk-england-24388175> accessed 3 November 2015.

causing death constitutes a deprivation of life. If the state fails to prevent a soldier being killed (especially by enemy troops), this failure may entail liability under the positive obligation but there is a plausible metaphysical account that it cannot constitute a deprivation of life. Whether a deprivation of life constitutes a violation of Article 2 depends upon the meaning of "intention" and I turn to this now.

2. INTENTION

How should this intentionality requirement be interpreted? The correct approach to intention is not simply a question of determining the quality that distinguishes deprivations of life that constitute a violation of the right to life from those that do not. It is a matter of coherently interpreting the whole of Article 2. Article 2(1) prohibits intentional deprivation of life, but the exceptions to this general rule make no mention of intention. Article 2(2) provides that a deprivation of life will not violate the right to life where certain conditions are met. It is uncertain whether this means that *all* intentional deprivation of life is prohibited and accidental killing is also prohibited to the extent the requirements of Article 2(2) are not met; or that *only* intentional deprivation of life is prohibited but may be justified in the circumstances listed in Article 2(2). The focus of this Section is examining the meaning of intention and its role in the right to life.

In the Convention's initial drafts, the right to life was little more than a repetition of the vague guarantee to 'life, liberty and security of person' found in the Universal Declaration of Human Rights.[96] The British delegation presented a draft to the Committee of Experts in which intentional killing was prohibited, but deaths occurring in the course of listed law-

[96] "Everyone has the right to life, liberty and security of person." Travaux Préparatoires to the Convention, Doc A 809, Article 3(1)(a). See also Universal Declaration of Human Rights (UDHR), adopted 10 December 1948, UNGA Res 217 A(III), UN Doc A/Res/217(III), Article 3.

enforcement operations would 'not be regarded as intentional'.[97] Under this proposal only deliberate killings by state agents for reasons other than those mentioned in the Article would be capable of constituting a violation of the right to life. The intentional use of lethal force in a permitted law-enforcement operation would not be considered intentional for the purposes of the prohibition on intentional killing, suggesting that death in such a situation would be viewed as a side-effect of the overarching law-enforcement purpose. The Committee vacillated between the two options before agreeing on a new draft that closely followed the British proposal. This new draft removed the explicit reference to intention from the exception clauses.[98] This draft closely resembles the final adopted form of the right to life.

Intention is an ordinary English word. It has been remarked that the 'common coinage of speech acquires a different value in the pocket of the lawyer than when in the layman's purse'.[99] Intention is one such word with a more precise definition in law than in popular speech[100] and an even more precise definition in philosophy. It was established above that

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[97] "(1) No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as intentional when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent an escape from lawful custody; (c) in action lawfully taken for the purpose of quelling a riot or insurrection or for prohibiting entry to a clearly defined place to which access is forbidden on grounds of national security."
Travaux Préparatoires to the Convention, Doc CM/WP1 (50) 2: A915, Article 4.

[98] "(1) Everyone's right to life shall be protected by law. (2) No one shall be deprived of his life intentionally, save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (3) Deprivation of life shall not be regarded as a contravention of the preceding paragraph when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent an escape from lawful custody; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."
Travaux Préparatoires to the Convention, Doc CM/WP4 (50) 9: A1372, Article 3.

[99] *R* v *Caldwell* [1982] AC 341, 357 (Lord Edmund-Davies).

[100] Max Radin, 'Intent, Criminal', *Encyclopaedia of the Social Sciences VII* (1967) 126.

deprivation of life results from actions, and actions are bodily movements that are intentional under some description. The focus of this Section is a different kind of intention, which might be best described as *INTENTION-WITH-WHICH*.

Recall our trolley problem. A runaway trolley barrels down the tracks. Ahead a spur line branches off the mainline. The tracks ahead are clear but a villain has tied Jack to the tracks of the spur line and he has no way to escape. Sally stands beside the track, next to a lever. Pushing this lever will switch the points, diverting the trolley down the spur. Sally pushes the lever, diverting the trolley, killing Jack. By pushing the lever, she acts – that is, she makes a bodily movement that is intentional. The *INTENTION-WITH-WHICH* she did so was switching the points and killing Jack. This type of intention is a 'conduct-controlling pro-attitude'.[101] It is not merely a desire but displays a level of commitment to bringing about a certain state of affairs.[102]

INTENTION-WITH-WHICH is a proposition about the states of affairs that one will bring about by one's actions. It relates to inchoate acts that are either not yet completed or not yet commenced.[103] Anscombe suggests that *INTENTION-WITH-WHICH* is the benchmark that determines whether one's action was successful.[104] Consider that Sally thought the points were set to divert the trolley down the spur line. Wanting to save Jack from the oncoming trolley and believing that pushing the lever would switch the points so the trolley would continue along the mainline, Sally pushed the lever. Sally desired to save Jack. She did not succeed but her pro-attitude to saving Jack controlled her conduct. Thus *INTENTION-WITH-*

[101] Michael Bratman, *Intention, Plans, and Practical Reasoning* (HUP 1987) 20.
[102] ibid.
[103] Michael Thompson, *Life and Action* (HUP 2008) 91-92
[104] Elizabeth Anscombe, *Intention* (OUP 1963) 56-57.

WHICH is a proposition about the future that countenances the possibility that action can be intentional but unsuccessful.

Sally pushed the lever and killed Jack. Jack was deprived of his life and this deprivation can be described as intentional – and unintentional. The deprivation of life was unintentional in the sense that killing Jack was not Sally's goal. She did not act in a way designed, calculated and directed towards bringing about *this* particular consequence. But she brought about this consequence intentionally, in the sense that it was the result of a goal-directed action (the fact it was directed towards a different consequence is immaterial) and because it was action that was done intentionally.[105] It is difficult to see how "intentional action" can be distinguished from "action" if the latter is described as *intentional* bodily movement[106] except by reference to the agent's intended consequences. When I raise my hand just for the sake of it, the only consequence I intend by my action is to have raised my hand. Intentional action may be described as action done in the right way – that is, the agent controls his movement in the way he wanted. This is a significant principle when it comes to guaranteeing soldiers' right to life, as will be shown in Chapter 4.[107]

[105] Intentional action in the sense of occurring as an operation of intention (intention in the sense of a pertinent desire/belief or guidance). For more detail on the philosophical division of intention into future-intention, intention-with-which and intentional-action, and a summary of attempts to unify the three divisions, see Kieran Setiya, 'Intention' (*Stanford Encyclopaedia of Philosophy*, 31 August 2009, revised 20 January 2104) <plato.stanford.edu/entries/intention> accessed 14 February 2017.

[106] Section 1.

[107] Chapter 4.3.

2.1. INTENTION IN CRIMINAL LAW

In English criminal law intention is the lynchpin of many offences. It is said to be 'a decision to bring about [the proscribed result], in so far as it lies within the accused's power'.[108] For most crimes the accused's intention makes their actions criminal. Direct intention in German criminal law follows a similar principle. The narrow concept of *Absicht* or desired outcome is 'what the actor means to achieve'.[109] Intention is a requirement for criminal liability in German law, except where statute provides that negligence is sufficient to establish fault.[110] Similarly, the French Penal Code declares that intent is a crucial element of crime.[111] Direct intention has been described as 'criminal awareness and desire' in a commentary to the Penal Code.[112] Under this approach, soldiers would only have been intentionally deprived of their lives when the agent deliberately set out to kill them. But domestic criminal legal systems also recognise broader conceptions of intention.

The right to life establishes a general prohibition on intentionally killing people, but the fact that direct intent is a common feature in criminal legal systems does not necessarily limit the scope of Article 2 to cases where people kill with direct intent. There are differing interpretations of intention that might be applied to the prohibition on intentional killing in Article 2. In English criminal law, 'one intends consequences that one chooses to produce: thus the death of another person is intended if it is chosen as an end in itself, or as a means

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[108] *R* v *Mohan* [1976] QB 1, 11 (James LJ).

[109] Greg Taylor, 'Concepts of Intention in German Criminal Law' 24(1) *OJLS* 99, 106; Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th edn, Duncker and Humblot 1996) 297.

[110] "Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht." Strafgesetzbuch of 13 November 1998, BGBl I 3322, §15.

[111] "Il n'y a point de crime ou de délit sans intention de le commettre." French Penal Code, Article 121(3).

[112] "la conscience et la volonté infractionnelles" R Merle and A Vitu, *Traité de Droit Pénal*, no 542.

to an end'.[113] In the trolley problem described above, suppose Sally is Jack's sole beneficiary and she wants to kill him so she can inherit his spectacular wealth. Under this approach to intention, Sally intends to kill Jack as much as the person who kills for its own sake. Courts in England and Wales are entitled to find a defendant acted intentionally when he realised that a given consequence was a 'virtual certainty (barring some unforeseen intervention)' of his actions and proceeded to carry them out anyway.[114] An accused can be convicted of a crime where commission of that crime was a necessary consequence of pursuing their ultimate goal, whether or not there was direct intent to commit the crime itself.[115]

In English criminal law, intention encompasses 'all the necessary consequences of an action including the means to the end and any consequences intended along with the end'.[116] But mere foresight of a consequence is not necessarily equated with intending that consequence. In *R* v *Cunningham,* a test was established whereby a guilty verdict may result in cases where an accused 'has foreseen that the particular kind of harm might be done [as a result of their actions] and yet has gone on to take the risk of it'.[117] Similarly, intention and desire are different concepts.[118] The position in English law is that an act might be considered intentional where the accused recognises that 'the natural

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[113] Andrew Ashworth, *Principles of Criminal Law* (5th edn, OUP 2006) 176.
[114] *R* v *Woollin* [1999] 1 AC 82, 96 (Lord Steyn), quoting *R* v *Nedrick* [1986] 1 WLR 1025, 1038 (Lord Lane CJ).
[115] Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Blameworthiness* (Ashgate 2002) 4.
[116] *Hyam* v *DPP* [1975] AC 55, 73 (Lord Hailsham LC).
[117] CS Kenny, *Outlines of Criminal Law* (JWC Turner ed, 16th edn, CUP 1952) 186, cited with approval in *R* v *Cunningham* [1957] 2 QB 396, 399 (Byrne J).
[118] John Finnis, 'Intention and Side Effects' in RG Frey and Christopher W Morris (eds) *Liability and Responsibility* (CUP 1991) 35.

consequences of his act would be [the proscribed result], and although that was not his wish, yet that he was reckless whether he did it or not'.[119]

Determining intention from foresight of the foreseeable consequences is not an exact science, and 'when people say that a man must be taken to intend the natural consequences of his acts, they fall into error: there is no "must" about it; it is only "may"'.[120] Although this dictum comes from a family law case, it adds to the understanding of intention. A person intends the consequence he decides to bring about, whether as an ends in itself or as means to another end; where he foresees a consequence of an action and pursues that course of action being reckless or negligent as to whether the consequence occurs, he may also be said to have intended the consequence.

The *dolus eventualis* principle is a conception of intention that is broader than direct intent. The *dolus eventualis* test has two limbs. First the agent must recognise the prohibited consequence is a possible result of their actions. This is similar to the *Cunningham* test for subjective recklessness in English criminal law. But there is an additional volitional element. The agent must accept or condone the harmful result because it is the 'necessary means to his end', even if he honestly would have preferred that the prohibited result had not occurred.[121]

[119] *R* v *Pembliton* LR 2 CCR 119, 122 (Blackburn J).
[120] *Hosegood* v *Hosegood* [1950] 66 TLR (Pt 1) 735, 738 (Denning LJ).
[121] Markus D Hubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 241.

The German Federal Court of Justice heard the seminal modern case, the *Leather Strap Case,* in 1955.[122] The two defendants plotted to rob their friend, but decided against restraining him with a leather belt because of the risk he might asphyxiate and die. When they carried out their plan, they failed to incapacitate their friend and resorted to throttling him with the belt. In the struggle he asphyxiated and died, despite their attempts at resuscitation.[123] The Federal Court of Justice upheld their conviction. Despite having initially discounted the plan to restrain their friend with a belt because of the associated risks, they reverted to that plan. This demonstrated they recognised the risk and reconciled themselves to the possibility of killing their friend.

In another German case the xenophobic defendant set fire to a Turkish immigrant's kebab shop to encourage the family to leave Germany. He caused extensive damage to the property but also injured one of the patrons.[124] The trial court found the defendant lacked the requisite intention to be convicted of attempted homicide. The Federal Court of Justice remitted the case for retrial, clarifying that the test for *dolus eventualis* is satisfied where a defendant 'considered the occurrence of the proscribed result to be a not entirely distant possibility and, further, he approved of it or reconciled himself to it for the sake of attaining his desired goal'.[125]

The volitional element of *dolus eventualis* is such that defendants must have approved of the proscribed result, either as an end in itself or as a necessary by-product of achieving his primary goal. A defendant will not satisfy the volitional limb where he 'earnestly, and not

[122] BGH 5 StR 35/55, Judgment of 22 April 1955.
[123] More detailed facts are reproduced in Hubber and Hörnle, 229-30.
[124] BGH 5 StR 573/99, Judgment of 22 February 2000; facts reproduced in Taylor, 99.
[125] ibid; translation quoted in Taylor, 100.

merely in a vague way, relied on the non-occurrence of a fatal result'.[126] When South African Olympic athlete Oscar Pistorius stood trial for murdering his girlfriend, the Court of Appeal held that Pistorius had foreseen that shooting through the bathroom door might kill whomever was behind it and that he reconciled himself to that risk when he opened fire.[127] He did not believe he was shooting at his girlfriend and killing *her* was not his goal, but Pistorius did not act in a way that deliberately minimised the chance of a fatal outcome.[128]

Intention is a way of describing someone's action or the consequences their actions bring about. In criminal law, bringing about a proscribed result is a crime if it is brought about intentionally – whether "intentionally" relates to the consequence itself or the means by which it is brought about. An expansive interpretation of intention suggests that individuals intend the consequences they foresee as the results of their actions, even if they do not directly desire to bring about those exact consequences. How broadly should the Article 2 intentionality requirement be drawn? On the basis of that approach, how does Article 2 apply to *unintentional* deaths? The Convention is not a criminal law instrument, but these concepts of intention paint a broad view of different approaches that will inform discussion about soldiers' right to life. The Commission and Court have taken an inconsistent approach to the question of intention.

2.2. NARROW INTERPRETATION

Distinctions between intention and inadvertence hark back to biblical antiquity, with passages from Numbers prescribing different punishments for intentional and inadvertent

[126] ibid.
[127] *Director of Public Prosecutions, Gauteng* v *Pistorius* (96/2015) [2015] ZASCA 204, 32.
[128] Pistorius' case is examined in more detail in Chapter 4.3.2.1.

sin.[129] A narrow reading of intention would echo this distinction and limit the Article 2 prohibition to where the consequence itself was intentional (and not just brought about intentionally). The Article 2(2) exceptions would therefore define situations in which intentional use of lethal force is permitted. The Court has repeatedly determined that intentional killing *is* permitted in certain circumstances and a "shoot-to-kill" policy is not a per se violation of Article 2.[130] The negative obligation under Article 2 would not be engaged when someone dies as the unintended consequence of state agents' actions (even if it is brought about intentionally).

In 1969 the Commission considered the case of *X* v *Belgium*.[131] The applicant's husband was standing in a crowd when he was struck by a safety bullet, allegedly fired by a nearby policeman. He later died in hospital.[132] There is nothing to suggest that, assuming the policeman actually fired the fatal shot, it was the officer's purpose to kill the applicant's husband. Indeed the use of safety-bullets (a less lethal ammunition often used in crowd-control) suggested that the police officers did not directly intend to kill anyone (in the sense that death was not the consequence they sought to bring about). Declaring the application inadmissible, the Commission said explicitly that 'an Application can only be based on this Article in so far it alleges that death was intentionally inflicted and in violation of the provisions of Article 2'.[133]

[129] Numbers 15:27-31 (King James Version).
[130] *McCann* v *United Kingdom* 21 EHRR 97, §200; *İlhan* v *Turkey* 34 EHRR 36, §76.
[131] XII YB ECHR 174.
[132] For more detailed facts see *X*, 174-80.
[133] *X*, 184.

Firstly the Commission requires the applicant to allege that the killing was intentional *and* that it was in violation of the right to life. This reinforces the position later taken by the Court that intentional killing is not a per se violation of the Convention. Under the restrictive model, the Court would have to make a finding of fact relating to the individuals' intention in each case. Although the Commission in *X* does not say so in as many words, it can be inferred that where it is determined that the killing was not an intended consequence of action, the right to life will not have been violated, even if that consequence is brought about intentionally in the sense that the action of using force was intentional. The Commission went on to say in this case that, had the policeman fired the fatal shot, the death was an unintended consequence of a lawful act of self-defence, and that in such circumstances there was no need to examine the case on its merits.[134]

Though the use of less lethal ammunition suggests that officers would not be acting with the purpose of killing anyone when they discharged their weapons, no "less lethal" weapon 'can be guaranteed to be non-lethal'.[135] The officer may not have directly intended to kill the applicant's husband, but was he reckless as to the result of his firing his weapon? Did he appreciate that he might kill someone and carry on anyway? Since the application was declared inadmissible on the grounds there was no evidence the killing was intentional, it suggests the Commission was working on the assumption of a narrow interpretation of Article 2 that the prohibition applies only to deprivation of life that is a directly intended consequence. However the Commission did not discuss or analyse what intention actually means. Application of this model of intention to soldiers' right to life claims may help avoid

[134] ibid, 192.

[135] 'Armed Policing: Use of Force, Firearms and Less Lethal Weapons' (*College of Policing: Authorised Professional Practice*, 23 October 2013) <www.app.college.police.uk/app-content/armed-policing/use-of-firearms-and-less-lethal-weapons/> accessed 12 September 2014.

unreasonable results, such as certain training accidents constituting an "intentional deprivation of life" that cannot be justified under the Article 2(2) exceptions.[136]

A second option is a more expansive reading of the right to life. Article 2(1) recognises a general prohibition on intentional deprivation of life, but the law-enforcement exceptions in Article 2(2) omit any mention of intention. A wider interpretation of the Article would be that state agents' use of force resulting in someone's death would be capable of constituting a violation of the right to life, whether or not death was the directly-intended consequence of agents' action, a foreseen consequence of their action (in line with *dolus eventualis* or *Cunningham* recklessness) or even a totally unforeseen result of their action. Such an interpretation would preclude the need for an expansive and coherent theory of intention, since even unintentional deaths would be capable of constituting a violation of the right to life. Unlike the restrictive approach favoured in *X* v *Belgium,* the lack of intent to kill would not absolve the state of liability under Article 2. This might be considered to subtly write intention out of Article 2. I shall now turn to a case in which the broader interpretation was adopted.

2.3. INCLUSIVE INTERPRETATION

The facts of *Stewart* v *United Kingdom*[137] are similar to those of *X* v *Belgium*. At a riot during the on-going "Troubles" in Northern Ireland, a patrol of soldiers armed with guns loaded with rubber bullets was attacked by rioters. Corporal S aimed his weapon at a rioter and opened fire. At the moment of discharging his weapon, a blow to the shoulder disrupted the Corporal's aim. The applicant's son, a boy of thirteen, died when the rubber

[136] See Chapter 4.2.
[137] 7 EHRR CD 453.

bullet struck him in the head.[138] The British government sought to rely on the restrictive approach taken in *X* v *Belgium,* arguing that the death was in no way intentional, especially considering the use of less-lethal rubber bullets, and accordingly the right to life could not have been violated.

The Commission rejected this submission. It based its decision on its earlier interpretation that Article 2 is not solely concerned with intentional killing. In *Association of Parents* v *United Kingdom* the Commission interpreted the concept that 'Everyone's right to life shall be protected by law' in Article 2(1) to have created an obligation that goes further than the admonition that "thou shalt not kill".[139] Taken with the Article 1 obligation to secure the Convention rights to everyone within their jurisdiction,[140] the Convention confers upon states the duty to take 'appropriate steps to safeguard life'.[141] In many subsequent cases the Commission and Court have built upon this idea that respecting and securing individuals' right to life involves a more strenuous obligation on the state than simply refraining from killing.

The *Parents* decision recognised that Article 2 was not meant solely to prohibit intentional *killing*. In *Stewart* the Commission moved the emphasis, saying that

> … the exceptions enumerated in paragraph 2 indicate that this provision is not concerned exclusively with *intentional* killing. Any other interpretation would hardly be consistent with the object and purpose of the Convention or with a strict interpretation of the general obligation to protect the right to life. In the Commission's opinion the text of Article 2, read as a whole, indicates that

[138] Facts adopted from *Stewart*.
[139] *Association of Parents* v *United Kingdom* 14 DR 31, 32.
[140] See Chapter 1.
[141] *Parents*, 32.

> paragraph 2 does not primarily define the situations when it is permitted to intentionally kill an individual, but defines the situations where it is permitted to "use force" which may result, as the unintended consequence of the use of force, in the deprivation of life.[142]

The Commission's decision was based firstly on the wording of Article 2. Whilst paragraph 1 is explicit in its prohibition on *intentional* killing, paragraph 2 details the exceptions to the general prohibition without any specific mention of intention. Thus the Commission interpreted the Convention to include unintentional killing within the scope of Article 2. It has since been argued, in support the Commission's reasoning, that if that state's liability was to be excluded in respect of deaths that were not the directly-intended consequence of a state agent's action, the Article 2(2) exceptions should have been written into the first paragraph as exceptions *solely* to that prohibition.[143] Alternatively it should have been made more explicit in the text of the Convention that the scope of the negative obligation to refrain from killing is strictly limited to the use of force intended to kill.

The fact that the text of Article 2 makes explicit reference to the death penalty suggests this inclusive interpretation of intention was the approach the drafters envisioned.[144] Capital punishment is an instance in which state agents *intentionally* kill someone. Death is brought about intentionally and it is the direct purpose of the action.[145] The fact that the death penalty is included in the same clause as the general prohibition on intentional killing, but the law-enforcement provisions are in a separate clause suggests that they do

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[142] *Stewart*, 458 (emphasis added).

[143] Leo Zwaak, 'Right to Life (Article 2)' in Pieter van Dijn et al (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 395.

[144] The death penalty exception is detailed in Chapter 3.1.1.

[145] It could be argued that the direct purpose of the action is punishing the condemned or bringing justice to his victims, but I would call those the *motives* behind the action rather than the direct intent.

not govern the same kind of deprivation of life. This supports a more inclusive interpretation of intention that is broader than directly-intended consequences.

Secondly the nature of the exceptions further convinced the Commission that states must account for deaths that, though not the directly-intended consequence of the agent's action, are *brought about* intentionally.[146] The paragraph 2 exceptions are all situations in which state agents might use force in the course of a law-enforcement operation. Lethal force should be restrained to preventing an immediate, deadly act.[147] This reflects the implied proportionality requirement the Court has identified in its jurisprudence.[148] It may be appropriate, in personal defence in the face of deadly force, to fight fire with fire. But the number of cases in which a resort to lethal force is appropriate to effect a lawful arrest will be small. This is especially true since killing the suspect frustrates the aim of making an arrest – 'you cannot arrest a corpse'.[149]

The Court has said it will never be appropriate to use lethal force against a suspect who is not dangerous and poses no threat to life and limb.[150] Similarly there are less violent means of quelling a riot than the use of lethal force, such as water cannon and tear gas. These less lethal methods are more likely to be employed than firearms or other lethal weapons, but there is still a chance someone might be killed. The nature of the aims permitted is such that state agents will rarely have a legitimate reason to directly intend killing a suspect, and that will translate into a sparing use of force directly intended to kill.

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[146] *Stewart*, 458.
[147] PAJ Waddington, '"Overkill" or "Minimum Force"?' [1990] *Crim LR* 695, 706.
[148] Chapter 3.1.2.1.
[149] John Smith, 'The Right to Life and the Right to Kill in Law' 144 *NLJ* 354, 354.
[150] *Nachova* v *Bulgaria* 42 EHRR 43, §95.

As such it would be inappropriate to restrict the right to life to prohibiting directly intended killing.

The right to life can be violated even though killing was not the state agent's direct purpose. In *Parents* the Commission suggested states must take positive action, as well as refrain from certain actions, in order to properly fulfil their Article 2 obligations. In turn this encouraged a more expansive approach to intention, by suggesting that a restrictive interpretation of the extent and role of intention does not reflect the Article's purpose and ethos. Under this more inclusive approach, intent to kill loses its paramount relevance in determining whether Article 2 has been violated. This expansive view of intention reasonably restricts use of force in ordinary law-enforcement contexts but may present significant challenges for establishing realistic and reasonable standards for guaranteeing soldiers' right to life.

2.4. INTENTION AT THE EUROPEAN COURT

X and *Stewart* were decisions of the now-defunct Commission. The Commission's remarks in *Stewart,* reproduced above, have been repeated in numerous decisions of the Court. In *Gül* v *Turkey* Turkish police in the volatile south-eastern provinces received a tip-off about the identity of Kurdish Workers' Party members. The applicant's son was one of those identified. Armed police went to search his property. Police knocked and the applicant's son started unlocking the door. At the sound of the locks turning, the police opened fire and shot through the door. The applicant's son was killed.[151]

[151] For more detailed facts, see *Gül* v *Turkey* 34 EHRR 28, §§12-23.

The Court repeated the quote from *Stewart* about Article 2 defining situations where it is 'permitted to "use force" which may result, as an unintended outcome, in the deprivation of life'.[152] The Court went further to say that even though there was no direct intention to kill, the force used was so disproportionate that the lack of intent was irrelevant.[153] In this case, the Court did not question whether or not the police had intended to kill the applicant's son (in terms of it being the directly-intended consequence of their action, or merely brought-about intentionally) or whether they had acted recklessly in their use of force. For the purposes of Article 2, the Court said, it did not have to be established that the killing was intentional.[154] It might seem that the Court has subtly written intention out of Article 2, and its inclusion in the text is merely illusory. Article 2 expressly prohibits intentional deprivation of life, yet the Court's judgment is that states can violate the right to life even where their agents kill accidentally.

It is not conclusive proof of a violation that death was a directly-intended consequence of action. The Court has adopted an expansive interpretation of intention that mirrors the broader understanding and role of intent in criminal law though it has not explicitly declared this to be its practice. The negative limb of Article 2 applies where there has been a deprivation of life resulting from intentional action, even if killing is not the directly-intended consequence of that action. It is one thing to fire a gun and hit the wrong target, or to wound fatally when only incapacitating force was intended. It is quite another for the gun to discharge accidentally (for instance as a result of malfunction). In either case, deprivation of life is not the directly-intended consequence of the action. In the first

[152] *Gül*, §77.
[153] ibid, §80. The concept of proportionality is discussed in Chapter 3.1.2.1.
[154] ibid.

scenario, there is an intentional action, whereas there has not in the second. The Court has dealt with this issue in *Yaşaroğlu* v *Turkey.*

In *Yaşaroğlu* the applicant's husband was suspected of burglary. He fled when police officers came to question him. He continued to run when the officers fired warning shots. The officers gave chase for over a mile. Chasing Yaşaroğlu through a field, one of the officers stumbled and his weapon misfired. Yaşaroğlu was killed when the bullet hit him in the chest.[155] This was a pure accident and a case that the Court accepted was highly unusual.[156] The Court accepted that Article 2 requires states to create a 'system of adequate safeguards against arbitrariness and abuse of force and even against avoidable accidents'.[157] Nevertheless on the facts of the case there was nothing to suggest that the officer intended to kill, or that death occurred in circumstances capable of engaging the state's liability under Article 2.[158] Death that occurs as a total accident is not capable of engaging the negative obligation of Article 2. But death that is *brought about* intentionally may constitute a violation of the right to life, even if that is not the consequence the agent directly intended.

The Court in *Gül* appears to have judged that the prohibition on intentional deprivation of life is better expressed as a prohibition on intentional actions causing death. But the

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[155] For more detailed facts see *Yaşaroğlu* v *Turkey*, App No 45900/99 (ECtHR, 20 June 2006) §§9-32 (available in French only).

[156] "La Cour observe qu'elle se trouve confrontée à un cas particulier." ibid, §51.

[157] dans le cadre d'un système de garanties adéquates et effectives contre l'arbitraire et l'abus de force, et meme contre les accidents evitables." ibid, §48.

[158] "Ainsi, aucun élément ne permet de déduire ≪au-delà de tout doute raisonnable≫ que le mort a été infligée intentionellement au mari de la requérante ni que le décès de celui-ci est survenu dans des conditions susceptibles d'entraîner la responsibilité de l'État." ibid, §55.

Court's approach has been inconsistent. The *Stewart* dictum forms a cornerstone of the Court's Article 2 jurisprudence and is repeated in every deprivation of life case. In spite of the *Gül* judgment, it appears that intention for the purposes of Article 2 is more expansive than the directly-intended consequence and includes consequences that the agent foresaw as potentially resulting from his actions. Confusingly the Court has also adopted the narrower interpretation of intention in a number of cases. This has mostly happened in cases where the Convention does not provide a justification for the deprivation of life but to judge that Article 2 had been violated would be an unreasonable result.[159] The inconsistency of the Court's approach makes it difficult to determine what intention actually is. Though this does allow some room for adopting a narrow, direct-intent approach to intention in respect of intentional deprivation of soldiers' lives.

CONCLUSION

The Commission and Court have not explicitly adopted an interpretation of intention or stated the role it plays in defining the nature and scope of the right to life. Intention is the quality that distinguishes whether or not a deprivation of life constitutes a violation of Article 2. The lack of clarity is therefore surprising. The definition of intention appears to vary at the Court's discretion, though the exercise of this discretion has avoided the absurd results that would have been inevitable with a fixed definition, since any rigid understanding of the concept would be over- or under-inclusive.

For instance, in *Parents* the children died from adverse reactions to a vaccine. The state did not directly intend the children to die, but their deaths were brought about intentionally (in the sense of resulting from intentional action directed in pursuit of a

[159] For example *LCB* v *United Kingdom* 27 EHRR 12.

specific goal). An inclusive approach to intention would consider this an intentional deprivation of life contrary to Article 2(1). Since the exceptions in Article 2(2) do not include a situation like this one, the vaccination programme would constitute a violation of the right to life.

On the other hand, too narrow an approach to intention would inhibit the Court's ability to scrutinise state agents' actions. In *Stewart* Corporal S did not directly intend to kill anyone – as evidenced by his use of rubber bullets and the fact he aimed at rioters' legs. That does not mean his use of force should not be scrutinised. But under a narrow interpretation of intention as directly-intended consequences intentionally brought about, the use of force in *Stewart* would not constitute an intentional deprivation of life, thus it would be unnecessary to determine whether the use of force was absolutely necessary and proportionate.

The Court has taken a common sense approach to intention so as to avoid absurd results such as these. The reliance on common sense is hardly steady ground upon which to establish a principled standard for protecting individuals' right to life. The fact that the Court *needs* to exercise discretion to avoid absurd results is the symptom of a larger problem – that Article 2 has been poorly drafted. A faithful interpretation of Article 2 would suggest that intentional deprivation of life (on a narrow understanding of intention) is prohibited absolutely, except for execution of the death penalty in accordance with rule of law principles.[160] Recognising the realities of policing modern societies, law-enforcement authorities may, in the circumstances defined in Article 2(2), use force that

[160] The death penalty clause is examined in detail in Chapter 3.1.1.

might result in death. A potential pitfall with this approach is that it requires a robust definition of "use of force", which would need to have some reference to the *INTENTION-WITH-WHICH* the agent acted.

By prohibiting the *intentional* deprivation of life the Convention's drafters sought to recognise a right to life with strictly-defined exceptions. But in so doing they made an internally coherent theory of Article 2 impossible. No matter how intention is interpreted there will always be cases where that interpretation yields unexpected and unreasonable results. The problem is compounded by the fact there is an exhaustive list of exceptions to the general prohibition on intentional killing. An expansive interpretation of Article 2 to include foreseen consequences of actions and consequences intentionally brought-about as well as the directly-intended outcomes would be a more appropriate limit on states' physical power. But the limited exceptions make that untenable in cases that do not involve a "use of force" in the law-enforcement context. The suggestion that there may be other implicit exceptions to the general prohibition rather undercuts the desire to recognise a robust and strictly-defined right to life. This Chapter has examined the interpretative difficulties of Article 2 and attempted to define key concepts to give a theoretical underpinning to a framework for guaranteeing soldiers' right to life. Chapter 3 considers the existing legal requirements of states' obligations as developed in the Court and Commission's jurisprudence.

CHAPTER THREE

ARTICLE 2 – THREE OBLIGATIONS

INTRODUCTION

Article 2 of the European Convention on Human Rights recognises that everyone's right to life shall be protected by law and that no-one shall be deprived of their lives intentionally except in certain circumstances. The Court and Commission have adjudicated numerous right to life cases. In this jurisprudence the Court and Commission have detailed three distinct but related obligations. The text of Article 2 imposes a negative obligation on states to refrain from intentionally killing people. The previous Chapter detailed the interpretative difficulties of key concepts of "deprivation of life" and "intention". Section 1 of this Chapter concerns the scope and exceptions to the prohibition on killing.

In addition to the strictly textual negative obligation, the Commission and Court have inferred that the obligation to protect everyone's right to life by law[1] includes a positive obligation to take appropriate steps to safeguard life against the criminal acts of third parties,[2] inherently dangerous activities,[3] or even to protect people from themselves.[4] Section 2 sets out the parameters of this positive obligation. Finally the obligation to protect the right to life by law entails a procedural obligation to put in place effective mechanisms for enforcing the right to life, including the duty to investigate deaths that are suspicious, violent or unnatural.[5] This procedural obligation is detailed in Section 3.

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[1] European Convention on Human Rights, Article 2(1).
[2] *Osman* v *United Kingdom* 29 EHRR 245, §116.
[3] *Öneryıldız* v *Turkey* 41 EHRR 20, §90.
[4] *Keenan* v *United Kingdom* 33 EHRR 38, §92.
[5] *Jordan* v *United Kingdom* 37 EHRR 2, §105.

The aim of this thesis is to define realistic, reasonable and effective standards of protection for soldiers' right to life. In order to build a coherent framework, it is necessary to demonstrate how existing models are not fit for this purpose. This Chapter analyses the legal tests developed by the Court and Commission and elucidates key principles of their jurisprudence. In the next Chapter, these tests and principles will be applied to real case studies in which soldiers have died.

1. NEGATIVE OBLIGATION

Article 2(1) creates a general rule prohibiting intentional deprivation of life. Deprivation of life can be understood as an action that causes the body's self-sustaining internal biological processes to cease.[6] There is a plausible metaphysical basis for claiming that omissions cannot constitute a deprivation of life since they are not causative.[7] Although there are theories of intention in philosophy and criminal law,[8] the Court and Commission have taken a flexible approach to intention where its definition depends upon the circumstances.[9] A deprivation of life may be "intentional" where killing was the direct purpose with which someone acted, or if it was merely brought about intentionally in the sense of being brought about in pursuit of some other goal. The tenor of the Court's judgments is that killing by use of force is prohibited.

The Convention binds states parties to it so this prohibition on intentional deprivation of life applies to the state. States only act through their servants and agents, so it is those who wield the state's power who are bound by this obligation. The Court has never taken a

[6] Chapter 2.1.
[7] Chapter 2.1.3-4.
[8] Chapter 2.2.1-2.
[9] Chapter 2.3-5.

position on who is a state agent. In its jurisprudence it appears to take for granted that individuals involved were acting on the state's behalf. The International Law Commission ("ILC") has set down a series of draft articles on determining state responsibility for internationally wrongful acts. States are responsible for the conduct of their organs, which may exercise legislative, executive, judicial, or other functions.[10] This includes any individual or entity that counts as an organ for the purposes of the state's internal law.[11]

States are also responsible in international law for conduct of individuals 'empowered by the law of that State to exercise elements of governmental authority'.[12] An individual's conduct is attributable to the state – and the state must be held accountable for that conduct – when the individual is 'acting on the instructions of, or under the direction of that State'.[13] Police and armed forces exercise executive power and so count as organs of the state, but those exercising governmental authority might also include paramilitary organisations, security forces or other agents.[14] Under international law states must account for the acts of all these individuals, even when they exceed their legal authority or instructions.[15]

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[10] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83, Article 4(1) of Annex to the Resolution.

[11] ibid, Article 4(2) of Annex.

[12] ibid, Article 5 of Annex.

[13] *Eureko BV* v *Poland* Partial Award and Dissenting Opinion, IIC 98 (2005) §132.

[14] For brevity, future references to 'state agents' shall be taken to include these bodies and all other individuals authorised to act on the state's behalf, whose actions would be attributable to the state under the provisions in Articles 4 and 5 of the International Law Commission's Draft Articles.

[15] UNGA Res 56/83, Article 7 of Annex; *Armed Activities on the Territory of the Congo Case (Democratic Republic of the Congo* v *Uganda)* [2005] ICJ Rep 168, §214.

The ILC's role is to codify and progressively develop international law. The Articles on State Responsibility are an important product of the ILC's work but are not binding as such. Nevertheless numerous courts and tribunals have made direct or oblique references to them in their decisions. Even before the Articles were drafted and adopted the International Court of Justice ("ICJ") had referred to the principle that 'the conduct of any organ of a State must be regarded as an act of that State' and observed that this principle was a well-established rule of a customary character.[16] Later the ICJ observed that Article 4 of the ILC Articles reflects customary international law.[17] The International Centre for Settlement of Investment Disputes also accepts the Articles as a 'codification of customary international law'.[18] Although the European Court of Justice has not explicitly referred to the ILC Articles, Advocates General have relied upon them in their opinions.[19] The Human Rights Committee has not directly referred to the Articles either, but has adopted a position on the attribution of conduct to states that strongly resembles the Article 4 provisions.[20] As a generally-accepted norm of international law, I shall accept the ILC definition of state agents for the purposes of this thesis.

The general proposition of Article 2(1) is that state agents are prohibited from killing people. Yet states may violate Article 2 even where nobody dies. In the majority of cases in which state agents do not *actually* kill the relevant Convention right is the Article 3

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[16] *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62, §62.
[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 2, §385.
[18] *Noble Ventures* v *Romania* (ICSID Case No ARB/01/11) Award of 12 October 2005, §69.
[19] See for example Case C-470/03 *AGM-COS.MET Srl* v *Suomen valtio and Lehtinen* [2007] ECR I-2749, Opinion of AG Kokott, §84 (notes 29-32).
[20] Human Rights Committee, 'General Comment 31 on the Nature of the General Legal Obligations on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, §4.

freedom from torture and inhuman or degrading treatment.[21] Nevertheless the Court has judged that Article 2 can be engaged where state agents' actions put lives at risk and could potentially cause death.[22] State agents' reckless or negligent use of force should not be excused simply because nobody *actually* died.[23] The Court decides whether the 'degree and type of force used' entails the application of Article 2 in cases where nobody dies.[24] The general principle is that state agents are prohibited from killing, but there are exceptions to this rule, which I shall examine now. It is necessary to understand these exceptions in order to analyse how they may apply in the context of soldiers' deaths.

1.1. DEATH PENALTY

The fact that someone was intentionally killed by state agents does not automatically mean that their right to life was violated. It has been called the 'paradox of Article 2'[25] that a provision designed to protect human life creates a 'concept of permissible deaths'.[26] But the right to life is not an unqualified right to *live* (as reflected by the Court's approach to abortion[27]), rather a right not to be killed except in accordance with the law. It is important to note that it is 'not life, but the *right* to life' that Article 2 protects.[28]

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[21] *İlhan* v *Turkey* 34 EHRR 36, §76.
[22] *Petrov* v *Bulgaria,* App No 63106/00 (ECtHR, 10 September 2010) §39.
[23] *Makaratzis* v *Greece* 41 EHRR 49, §55.
[24] *Goncharuk* v *Russia,* App No 58643/00 (ECtHR, 4 October 2007) §74.
[25] Fionnuala Ní Aoláin, 'The Evolving Jurisprudence of the European Convention concerning the Right to Life' 19 *NQHR* 21, 23.
[26] Elizabeth Wicks, *The Right to Life and Conflicting Interests* (OUP 2010) 87.
[27] *Evans* v *United Kingdom (No 2)* 46 EHRR 34; Vo v France 40 EHRR 12.
[28] JES Fawcett, *The Application of the European Convention on Human Rights* (2nd edn, Clarendon Press 1987) 37 (emphasis added).

The first exception to the general prohibition on intentional killing is capital punishment. The text of Article 2 is 'careful to protect the legality of capital punishment'.[29] Execution of the death penalty does not, by itself, constitute a violation of the right to life, provided it is carried out within a general rule of law framework.[30] However the Sixth Protocol to the Convention prohibited capital punishment except in times of war.[31] The Thirteenth Protocol later abolished the capital punishment exception in its entirety.[32] The capital punishment exception still appears in the text of Article 2, but the effect of the protocols is to essentially abolish the exception.[33]

A handful of states are yet to ratify the additional protocols concerning abolition of the death penalty. However the Court is satisfied there is clear 'confirmation of the abolitionist trend' amongst Council of Europe member states.[34] The increasing number of ratifications, together with the practice of requiring new member states to abolish the death penalty upon ratification of the Convention and 'consistent state practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances'.[35] Capital punishment as a means of maintaining military discipline would constitute a violation of soldiers' right to life. As

[29] AH Robertson, 'The Contribution of the Council of Europe to the Development of International Law' 59 *ASIL Proc* 201, 205.
[30] European Convention on Human Rights, Article 2(1).
[31] "A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war…" Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (opened for signature 28 April 1983, entered into force 1 March 1985) ETS 114, Article 2.
[32] "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances (opened for signature 3 May 2002, entered into force 7 January 2003) ETS 187, Article 1.
[33] For an interesting discussion of this development, see Jon Yorke, 'The Right to Life and Abolition of the Death Penalty in the Council of Europe' 34 *EL Rev* 205.
[34] *Öcalan* v *Turkey* 41 EHRR 44, §164.
[35] *Al-Saadoon and Mufdhi* v *United Kingdom (Merits)* 51 EHRR 9, §120.

such, the only remaining exceptions to the general prohibition on killing by state agents are the so-called 'law-enforcement exceptions'.[36]

1.2. LAW-ENFORCEMENT EXCEPTIONS

Human rights adjudication usually consists of two stages. The first stage identifies a limitation on enjoyment of a right. The second stage determines whether that limitation is justifiable according to a set of established standards.[37] Under Article 2 of the Convention state agents are generally prohibited from killing people. However this is not an absolute prohibition and where state agents *do* kill, it can be justifiable. The ethos of human rights law is protecting people.[38] State agents may use force to achieve this aim, and it may be permissible for them to kill in order to protect people from unlawful violence, to effect a lawful arrest or prevent the escape of a person lawfully detained, or in action lawfully taken to quell a riot or insurrection.[39]

Death resulting from an absolutely necessary use of force in pursuit of one of the law-enforcement objectives in Article 2(2)(a)-(c) will not constitute a violation of the right to life. Any use of force for a purpose other than those listed constitutes a per se violation of Article 2.[40] The problem for guaranteeing soldiers' right to life is that when soldiers are killed by their own state, it is rarely a result of force used in pursuit of the law-enforcement

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[36] Sarah Joseph, 'Denouement of the Deaths on the Rock: The Right to Life of Terrorists' 14 *NQHR* 5, 7.

[37] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' 24 *CJLJ* 109. Grégoire CM Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 55-64.

[38] Navanethem Pillay, 'What are Human Rights For? A Personal Reflection' in Daniel Moeckli et al (eds), *International Human Rights Law* (OUP 2010) 4.

[39] European Convention on Human Rights, Article 2(2).

[40] *Makhauri* v *Russia*, App No 58701/00 (ECtHR, 4 October 2007), §§119, 125.

exceptions. This is primarily the case because soldiers are not the target of their own state's use of force (that force is ordinarily directed against the enemy), but also because armed conflict is not a law-enforcement operation and the three objectives detailed in Article 2(2) do not translate well into the armed conflict paradigm, as will be shown in Chapter 4.

In the absence of uniform law-enforcement regulations and practices throughout Council of Europe member states domestic law and pertinent norms of international law define '*unlawful* violence', '*lawful* arrest' and 'action *lawfully* taken'. Thus whether a use of force was permissible is partly dependent upon domestic law and practice. For instance where police use force to effect a lawful arrest the first question is whether the arrest itself was lawful under domestic law. If the arrest was unlawful the use of force was not permitted under Article 2. States are the primary guarantors of Convention rights[41] and enjoy a margin of appreciation when deciding how best to implement Convention rights in their own legal systems according to their own assessment of the 'reality of the pressing social need', albeit under the Court's supervision.[42]

State agents are permitted to use force in pursuit of the permitted law-enforcement objectives listed in Article 2(2)(a)-(c). But this does not give them carte blanche to kill. Article 2(2) restricts the use of force to where it is absolutely necessary, such that state agents are not 'left in a vacuum when exercising their duties'.[43] Circumstances may justify

[41] *McKerr* v *United Kingdom* 34 EHRR 20, §117.
[42] *Handyside* v *United Kingdom* 1 EHRR 737, §48.
[43] *Makaratzis*, §59.

a use of force (which may result, as an unintended consequence, in death[44]) but it does not necessarily follow that in those circumstances intentionally lethal force is always permitted. The text of the Convention restricts *when* state agents may use force but also the *degree* of force permitted.

1.2.1. Absolute Necessity

Article 2(2) does not give blanket authorisation to use force in the course of specified law-enforcement operations. State agents may only use force where it is absolutely necessary to achieve the Article 2(2)(a)-(c) objectives. It must be absolutely necessary, in principle, that some degree of force should be used and the degree of force *actually* used must be no more than absolutely necessary. This absolute necessity test is 'stricter and more compelling' than the test applied to limitations on other Convention rights.[45] The ordinary understanding of absolute necessity is that the law-enforcement aim cannot be secured by any other means than the use of force. It has been suggested this strenuous test reflects the exalted position of the right to life in the human rights regime.[46] Use of force will only be justified where it is absolutely necessary. Something is necessary when it is essential or required.[47] Use of force must be unavoidable to achieve the law-enforcement objective for it to be justified.

The use of force must be absolutely necessary to achieve the law-enforcement objective but the degree of force used must also be no more than absolutely necessary. Determining

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[44] *Stewart* v *United Kingdom* 7 EHRR CD 453, 458.
[45] *McCann* v *United Kingdom* 21 EHRR 97, §149.
[46] ibid; Juliet Chevalier-Watts, 'A Rock and a Hard Place: Has the European Court of Human Rights Permitted Discrepancies to Evolve in their Scrutiny of Right to Life Cases?' 14 *IJHR* 300, 302.
[47] "necessary" in Catherine Soanes and Angus Stevenson (eds), *Oxford Dictionary of English* (2nd revd edn, OUP 2006) 1175.

whether the degree of force was no more than absolutely necessary is a proportionality test. Proportionality is about striking the correct balance between individual rights and competing community interests[48] and this concept features in much of the Convention jurisprudence. Proportionality seeks to ensure that the appropriate means are employed to achieve a particular aim and includes many different factors.[49] The basic tenet is that action taken in pursuit of a particular goal must not inflict greater harm than it seeks to prevent.[50] Lord Diplock once remarked that 'you must not use a steam hammer to crack a nut, where a nutcracker would do'[51] – proportionality is about using the right tools for the job. This means that state agents are required to use the least lethal degree of force possible to achieve the law-enforcement objective. It might be absolutely necessary, in principle, to use force, but if state agents use a greater degree of force than absolutely required by the circumstances it constitutes a violation of Article 2.

Absolute necessity and proportionality depend upon all the circumstances of a case.[52] In *McCann* three IRA operatives plotted to detonate a car bomb causing massive loss of life in Gibraltar. SAS soldiers followed the three and later shot them dead.[53] The soldiers admitted to shooting to kill.[54] The severity of the threat to the people of Gibraltar meant that the use of force was absolutely necessary to prevent detonation of the bomb.[55] In the circumstances the degree of force used was not disproportionate because of the nature of

[48] Richard Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' [2005] *EHRLR* 504, 506.
[49] *Güleç* v *Turkey* 28 EHRR 121, §71.
[50] Helen Frowe, The Ethics of War and Peace: An Introduction (Routledge 2011) 10.
[51] *R* v *Goldstein* [1983] 1 WLR 151, 155.
[52] *Isayeva* v *Russia* 41 EHRR 38, §181.
[53] For more detailed facts see *McCann* v *United Kingdom* 21 EHRR 97, §§13-64.
[54] ibid, §199.
[55] ibid, §200.

the harm it sought to prevent.[56] The soldiers considered the use of force was absolutely necessary and the Court deferred to their assessment of the need for force.[57]

State agents are not infallible and often work with limited intelligence, which may not tell the full picture. In *McCann* for instance intelligence suggested that the three IRA operatives were armed, that a car bomb had been placed in Gibraltar and that they were capable of detonating it remotely with a simple push-button device. This intelligence, though credible, turned out to be false.[58] Nevertheless the use of force will not constitute a violation of Article 2 where it is 'based on an honest belief which is perceived, for good reasons, to be valid at the time'.[59] Similarly in *Bubbins* v *United Kingdom* armed police shot dead a man who aimed a rifle at them through his window.[60] The rifle turned out to be fake, but the officers could not possibly have known this and honestly believed, for good reasons, their lives were in danger. There was no violation of Article 2, in spite of the officers' mistake.[61]

The 'honest belief' rule contradicts the idea of absolute necessity as an objective value. The use of force cannot be objectively necessary when the determination of need is based on one state agent's subjective perception of the risk. However the Court's approach recognises that state agents are better-placed to determine the correct course of action in

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[56] ibid. Though the degree of force used in the split-second the soldiers fired their weapons was justified, the right to life was violated because other approaches could have been taken so that a use of force was not necessary. See Section 1.2.2. below.
[57] *McCann*, §200.
[58] The operatives *were* planning to detonate a car bomb and after further investigation a car loaded with explosives was found in Marbella.
[59] *McCann*, §200.
[60] For more detailed facts see *Bubbins* v *United Kingdom* 41 EHRR 24, §§8-69.
[61] ibid, §§138-40.

the heat of the moment. The Court has repeatedly recognised the need to take action against criminals and terrorists to protect individuals and society at large. Requiring objective verification of perceived facts before proceeding to use force would:

> impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others.[62]

The use of force will constitute a violation of Article 2 if the degree of force used is disproportionate to the aim pursued. At a superficial level proportionality can be described as a consequentialist principle, inasmuch as any action taken must cause as little harm as possible. Proportionality might mean not shooting an unarmed man, but a bare parity of arms test is somewhat rudimentary.[63] In *Finogenov* v *Russia* a group of Chechen separatists took over 700 civilians hostage in Moscow's Dubrovka Theatre. They were armed with machine guns and rigged the building with explosives. The Russian authorities pumped narcotic gas into the building to disable the terrorists and free the captives. The authorities calculated the gas would not be lethal to those inside the theatre, but that some might suffer adverse reactions to the gas or even die. 129 hostages died during the operation.[64]

Under a basic parity of arms test the Russian authorities might have been justified in storming the building with high-powered weapons and explosives. Such an approach would have posed a far greater risk to the captives than the use of the less-lethal gas, especially since attempts to storm the building might have led the separatists to detonate their explosives. Storming the building would have constituted a disproportionate use of

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[62] *McCann*, §200.
[63] Ní Aoláin, 24.
[64] For more detailed facts see *Finogenov* v *Russia* 61 EHRR 4, §§8-29.

force since less invasive means were available to securing the hostages' rescue. The gas used was far less powerful than the separatists' weapons, but proportionality means more than just relative strength of arms. The use of the gas allowed the authorities to end the hostage crisis whilst minimising the risk to those inside the theatre – hostages and captors alike (although many of the Chechen captors were shot dead in the course of the operation). Proportionality requires using the least invasive means possible.

Absolute necessity and proportionality are symbiotic concepts determining whether the use of force is lawful for the purposes of Article 2. Use of force is not absolutely necessary where other means suffice to achieve the desired aim. The fact that state agents are acting in pursuit of a permitted objective does not, by itself, legitimise the use of force if other measures are available. Furthermore the use of force must be proportionate to the level of the threat. Article 2 would be ineffective if, whenever the use of force is justified in principle, any degree of force is justified in practice. Force may be justified to break up a riot, but that does not mean state agents may drop a bomb on the rioters. Considering the nature of soldiers' role, these principles will pose significant challenges when applied to military operations in armed conflict situations.

In making decisions about use of force state agents are expected to take account of surrounding circumstances, such as the possibility of harming innocent bystanders and securing adequate medical response. But the proportionality analysis can be affected by the speed with which a situation evolves,[65] the information available to the authorities[66] and other factors. This is especially so as the decision to use force will often be taken in the

[65] *Giuliani and Gaggio* v *Italy* 54 EHRR 10, §254.
[66] *McCann*, §200.

heat of the moment when there is little time for detailed, objective assessments.[67] All the more important then that law-enforcement operations are planned in such a way as to minimise all threats to life.[68]

1.2.2. Planning

The Court has said that the use of lethal weapons will only be proportionate in response to a threat of violence. Use of lethal weapons against non-violent individuals is disproportionate, even if use of those weapons were the only way to prevent the individuals' escape.[69] But the use of lethal force may be proportionate where a suspect is violent or dangerous. In *Farrell* v *United Kingdom* the applicant's husband was robbing a man making a deposit to a bank's night safe. Soldiers stationed on a nearby rooftop believed he was attempting to bomb the bank and shot him as he fled. The soldiers had not been provided with radios and so were unable to summon police to arrest the suspect.[70] The Commission declared the application admissible but it was never examined on its merits. It raises the question of whether state agents should be armed with less-lethal weapons and other means of effecting the Convention's law-enforcement aims without recourse to lethal force. It is in this regard that the planning of the operation becomes a relevant consideration.

In *McCann* the SAS shot the IRA operatives dead on the basis of the intelligence they had received, which stated the bomb was in place and could be detonated remotely at the push

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[67] Francesco de Sanctis, 'What Duties do States Have with Regard to the Rules of Engagement and the Training of Security Forces under Article 2 of the European Convention on Human Rights?' 10 *IJHR* 31, 37.
[68] *McCann*, §213.
[69] *Nachova* v *Bulgaria* 42 EHRR 43, §95.
[70] For more detailed facts see *Farrell* v *United Kingdom* 30 DR 96, 96-97.

of a button. The Court was satisfied that, on the basis of the information available to them, in the moment they opened fire, the soldiers used a proportionate degree of force.[71] However the fatal shootings were only the final split-seconds of a long and complex operation. At various stages in that operation it would have been possible for police or the SAS to arrest the operatives without the need for fatal force. The authorities failed to act upon those opportunities (in which a use of lethal force would not have been necessary) because of a need to catch the operatives "red-handed" to ensure successful future prosecutions.

The Court was unsympathetic to the authorities' pleas and found the operation had been planned and conducted in a way that made use of lethal force inevitable and that state agents had failed to take account of the operatives' right to life.[72] It was entirely within the authorities' power to arrest the would-be bombers at the border before they even entered Gibraltar. Had they done so, a proper investigation of the vehicle would have revealed no bomb and prevented a situation in which the use of force was necessary.[73] In the split-second the soldiers opened fire lethal force *was* absolutely necessary, but only because the authorities managed the situation in a way that made the use of force inevitable. In the context of the whole law-enforcement operation less invasive means could have been taken that would have achieved the goal of protecting the population from unlawful violence. As such this was not an absolutely necessary and proportionate use of force.[74] In *Finogenov* the use of the gas was disproportionate insofar as adequate medical assistance

[71] *McCann*, §200.
[72] ibid, §213.
[73] ibid, §§203-205.
[74] ibid, §§205, 213.

was not on hand to respond to its adverse effects. The operation was not planned and conducted so as to minimise the risk to life, constituting a violation of Article 2.[75]

The rationale for this position is much the same as for proportionality generally. The right to life becomes ineffective at protecting individuals if state agents are permitted to wait until they have no other option but to use intentionally lethal force. Force, especially lethal force, should be a last resort. The UN Basic Principles on the Use of Force and Firearms state that lethal force should not be used except where unavoidable.[76] When the SAS waited until they could catch the IRA operatives "red-handed", they increased the risk to innocent bystanders. Obviously there was a greater risk the bomb would detonate, but there was also an increased chance that innocent bystanders would be harmed by the SAS' use of force. The need for careful planning is an essential consideration in protecting soldiers' right to life in all military operations. I shall now turn to the question of states' liability for the deaths of innocent bystanders resulting from the use of force in law-enforcement operations.

1.2.3. Collateral Damage

The state is liable for deaths occurring as the unintended consequence of state agents' use of force, not just for directly-intended deaths.[77] The legal position is that killing is prohibited except in certain circumstances. The Convention does not confine use of force to *suspects* in a law-enforcement operation. The use of force may endanger the lives of others than the suspects being targeted. Innocent bystanders may also be killed. The

[75] *Finogenov*, §266.
[76] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' UNGA Res 45/166 (18 December 1990) UN Doc A/Res/45/166, Articles 2 and 5.
[77] *Stewart*, 458. See Chapter 2.2.

Court has had to determine states' liability for deaths of innocent bystanders, or so-called "collateral damage", on numerous occasions. When innocent bystanders are killed it raises the question of whether the force used was excessive or unrestrained, since the proportionality requirement prohibits use of force that inflicts greater harm than that it seeks to prevent. Unrestrained force is never proportionate and cannot be justified under the Convention, no matter how grave the emergency.[78] The approach to collateral damage is important in the context of soldiers' right to life. Soldiers may be collateral damage in attacks on enemy troops.[79] In such cases, the Court's jurisprudence on collateral damage in law-enforcement cases may offer interesting insights into the correct approach.

In *Andronicou and Constantinou* v *Cyprus* Lefteris took his girlfriend Elsie hostage in his apartment. He opened fire at police when they broke into the property to save Elsie. In the exchange of fire Elsie and Lefteris were both killed.[80] The Court determined the use of force was absolutely necessary and proportionate to the legitimate aim of freeing Elsie and defending themselves against Lefteris.[81] Elsie was an innocent bystander who was sadly caught in the crossfire. The Court determined her right to life had not been violated.[82] The use of force was proportionate because Lefteris was armed and posed a serious threat to Elsie's life and the lives of the police themselves.[83] There was no evidence Lefteris would

[78] Tom Campbell, 'The Rule of Law, Legal Positivism and States of Emergency' in Simon Bronitt et al (eds), *Shooting to Kill: Socio-Legal Perspectives on the Use of Force* (Hart 2012) 5.
[79] Chapter 4.4.
[80] For more detailed facts see *Andronicou and Constantinou* v *Cyprus* 25 EHRR 491, §§9-87.
[81] ibid, §193.
[82] ibid, §192.
[83] ibid, §185.

kill Elsie, but the police could not discount that possibility given his history of violence towards her.[84]

Elsie's right to life was not violated because she died as a result of a use of force that was absolutely necessary and proportionate in defence of individuals (Elsie herself and the police) from unlawful violence.[85] Her death was brought about intentionally (in the sense of resulting from action directed towards achieving a given purpose and that action was intentional[86]) but the Court essentially ignored the "intentional deprivation of life" language and instead appeared to adopt an arbitrariness standard – her death was not a violation of the right to life because it resulted from lawful use of force and was not just merely capricious. A use of force that is absolutely necessary and proportionate for one of the law-enforcement objectives excuses deaths of innocent bystanders as well as the suspects, but the Court did not explain why. Article 2 does not specify that only deaths of suspects are permitted. Perhaps the Court's decision recognises the difficulties of policing modern societies and the fact that force is permitted only in difficult, tense, fast-changing situations where it is not realistic to expect that *no* innocent bystanders will be killed. Not all "collateral damage" is permissible, though.

Isayeva v *Russia* concerned events occurring during the "Chechen War". Red Cross aid workers led civilians seeking to flee the beleaguered Chechen capital, Grozny, down a humanitarian corridor to seek refuge in the neighbouring province of Ingushetia. Russian authorities closed the border with Ingushetia and turned the refugees back. On their

[84] ibid, §184.
[85] ibid, §193.
[86] See Chapter 2.2.

return to Grozny, Russian Air Force jets dropped a number of bombs on the convoy. The Russian government claimed armed rebels using the convoy as a shield for their movements had fired at the planes. At least sixteen civilians were killed in the attack.[87]

The applicants claimed there were only civilians in the convoy, but the Court gave the Russian government benefit of the doubt and accepted that, given the extraordinary security situation in Chechnya at the time, the use of force *could* have been necessary *if* concealed fighters had indeed fired at the planes.[88] The Court strongly criticised the degree of force used. Having identified two trucks each transporting an estimated 20 fighters, the pilots dropped 12 heavy, unguided bombs, each with a blast radius of over 300 metres.[89] Such weapons posed a mortal danger to the civilians, who were innocent bystanders. The weapons were totally indiscriminate and therefore not appropriate to whatever aim the pilots were pursuing.[90]

The general principle in the Court's case law is that an innocent bystander's right to life is not violated when he dies during a law-enforcement operation, provided the force used was justified as absolutely necessary and proportionate. Thus the law-enforcement exceptions to the general principle on intentional killing also excuse the killing of innocent bystanders, not just suspects. The Court thoroughly discussed collateral damage in *Finogenov.* Faced with the possibility of hundreds of civilian deaths and the disruption associated with terrorist attacks, it was absolutely necessary to use force to end the crisis.[91]

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[87] For more detailed facts see *Isayeva* v *Russia* 41 EHRR 39, §§11-29.
[88] ibid, §178.
[89] ibid, §195.
[90] ibid, §199.
[91] *Finogenov*, §221.

The Court conceded it is 'not in a position to indicate to member states the best policy in dealing with a crisis of this kind'.[92] Nevertheless it went on to consider whether the threat posed to the hostages was justified in the circumstances and whether the state ought to be liable for the deaths of innocent bystanders in all cases.

The hostages' deaths were unintentional. The Court considered the authorities' use of gas to be a use of force within the meaning of Article 2(2).[93] Though it is not a "weapon" in the conventional sense of the word, the Court's previous rulings state that "force" includes non-conventional weapons and personal physical violence.[94] The gas was not harmless as the Russian government claimed.[95] But the Court denied the applicants' submission that the gas was intended or calculated to kill anyone,[96] instead calling the gas a 'non-lethal incapacitating weapon' in line with the UN Basic Principles on the Use of Force.[97]

States face real difficulties responding to terrorism,[98] in terms of apprehending the terrorists and protecting their population from violence.[99] States may use force to protect their people but the Court has qualified this permission by noting that law-enforcement operations must be sufficiently regulated by national law to protect individuals from arbitrariness and abuse of power.[100] In the circumstances of *Finogenov*, the Russian authorities had reasonable cause to believe there would be major loss of civilian life if the

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[92] ibid, §223.
[93] ibid, §203.
[94] *McShane* v *United Kingdom* 35 EHRR 23, §101.
[95] *Finogenov*, §201.
[96] ibid, §202.
[97] UNGA Res 45/166.
[98] *Finogenov*, §212.
[99] *Ramírez Sánchez* v *France* 45 EHRR 49, §116.
[100] *Finogenov*, §207.

separatists detonated their explosives.[101] Despite the threat to civilians from the use of force the authorities had 'every reason to believe that a forced intervention was the "lesser evil" in the circumstances'.[102] The risk to hostages was acceptable on the basis they already faced a more serious threat from the separatists and that the risks posed by the authorities' rescue attempts offered a greater chance of survival for a greater number of the hostages than if the separatists detonated their explosives.

Use of indiscriminate weapons is always disproportionate.[103] Indiscriminate weapons are incapable of distinguishing between their targets and innocent bystanders, therefore posing a high risk of collateral damage. LOAC makes a distinction between combatants and non-combatants.[104] Combatants may be legitimately targeted at any time, but non-combatants are protected from attack.[105] Indiscriminate weapons incapable of distinguishing military from civilian targets or causing excessive collateral damage are prohibited.[106] The Court appears to have borrowed this concept from the laws of war, although its application of this principle is not always thoroughly convincing.

When discussing the issue of indiscriminate weapons the Court had already determined that collateral damage, or the death of innocent bystanders, does not constitute a per se

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[101] ibid, §220.
[102] ibid, §226.
[103] ibid, §231.
[104] Non-combatants are defined as being anyone who is not a combatant: First Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (AP1) (adopted 8 June 1977, entered into force 8 December 1978) 1125 UNTS 17512, Article 50(1). Combatants are defined in the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 4(A)(1)-(2).
[105] AP1, Article 51(3).
[106] AP1, Article 51(4).

violation of Article 2 if the action causing their deaths was absolutely necessary and proportionate (though it failed to discuss its reasoning).[107] Indiscriminate weapons might lead to a level of collateral damage that is disproportionate to the threat posed and the aims pursued, as was the case in *Isayeva*.[108] The use of indiscriminate weapons should not, as a rule, be considered proportionate. But the Court in *Finogenov* determined that the gas used against the separatists was not indiscriminate. This seems like an illogical decision, since it is impossible to target certain individuals by pumping a narcotic gas through a building's ventilation system. In the circumstances the gas was just as unselective as the bombs dropped on the civilian convoy in *Isayeva*. But the Court distinguished *Finogenov* on its facts. Key to its reasoning was that, though the gas affected them as equally as their captors and they were at risk of suffering adverse reactions to it, the hostages were left with a 'high chance of survival' if they received adequate medical attention.[109] The civilians in *Isayeva* did not have the same chance of survival.

So whilst indiscriminate weapons are more likely to be disproportionate, the Court's approach allows for nuances deriving from varying degrees of force employed by state agents in the course of their law-enforcement duties. The gas in *Finogenov* was indiscriminate, but was not calculated to be lethal, so the right to life was not violated. If the gas was stronger and likelier to be lethal, Article 2 would have been violated. There is a point at which the use of force crosses the proportionality threshold and becomes unlawful and that is not totally dependent upon whether the force used is indiscriminate. Only indiscriminate force that threatens harm greater than that it seeks to prevent will constitute a violation of Article 2.

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[107] *Andronicou*, §193.
[108] *Isayeva*, §199.
[109] *Finogenov*, §232.

The Court has not decisively concluded that collateral damage is prohibited or allowed. So much depends upon the exact circumstances of each case. Article 2 does not prohibit collateral damage per se. But the Court has totally failed to share its reasoning on this point and rather takes for granted that the Convention does not explicitly state that only suspects' deaths are permitted. In a situation like *Andronicou and Constantinou,* use of force killed the very person it was designed to protect but this did not constitute a violation of her right to life. Considering the law-enforcement exceptions permit use of force to protect and safeguard life (ironic though it is that killing may be necessary to accomplish that) it is surprising and disappointing the Court has not established more robust principles for collateral damage.

German courts have adopted an alternative approach, according to which deaths of innocent bystanders are never justifiable. The German Federal Diet passed the Aviation Security Act,[110] §14(3) of which empowered military forces to shoot down a hijacked aircraft that was going to be used in a 9/11-type attack scenario. In the case of a hijacked commercial passenger plane such an action would necessarily involve the deaths of a high number of innocent passengers. The German Federal Constitutional Court had to resolve the question of whether this power violated the constitutional guarantee to life and dignity in the Basic Law. In its judgment the Constitutional Court examined in detail the effects of the law on passengers' right to life.[111]

[110] Gesetz zur Neuregelung von Luftsicherheitsaufgaben of 11 January 2005, BGBl I 78.
[111] 1 BvR 357/05, Decision of 15 February 2006.

Article 1 of the German Basic Law provides in absolute terms that 'Human dignity is untouchable'.[112] Pursuant to Article 2(2) 'Everyone has the right to life and bodily integrity. Freedom of the person is inviolable',[113] although this may be subject to statutory limits. In its protection of untouchable human dignity the German Basic Law exceeds the Convention's provisions, though the Convention was inspired [114] by the Universal Declaration on Human Rights, which was drafted in recognition of individuals' inherent dignity.[115]

If a hijacked passenger plane is to be used as a weapon with the intention of killing both the passengers and those at an identified target site, shooting down the aircraft (thereby killing those on board, hijackers and passengers alike) might well qualify as a use of force to protect the individuals at the target site. In a 9/11-type scenario the individuals at the target site might significantly outnumber the passengers. Shooting down the plane may save many more than its kills, but the Constitutional Court judged it would be an affront to passengers' dignity to be sacrificed for the sake of the people at the target site, even though those passengers would die in the attack anyway.[116] The Constitutional Court said that 'Human life and dignity enjoy the same constitutional protection without regard to the

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[112] "*Die Würde des Menschen ist unantastbar.*" Although usually rendered in English as "inviolable" this translation does not capture the subtle nuance of *Unantastbarkeit*. Human dignity, according to the Basic Law, is not only inviolable, but is immune to any kind of assault. See Kai Möller, 'On Treating Persons as Ends: The German Aviation Security Act, Human Dignity and the German Federal Constitutional Court' [2006] *PL* 457, 458.

[113] "Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich."

[114] European Convention on Human Rights, Preamble.

[115] Universal Declaration on Human Rights, Preamble.

[116] 1 BvR 357/05, §132.

individual's lifespan'.[117] The tenor of the judgment is that 'collective goods may not, under any circumstances, outstrip individual rights'.[118]

If it were possible to sacrifice one life to save many (or in any quantum where more are saved than killed) then the right to life would become status-based, inasmuch as the right not to be killed would depend upon whether one's death might save others' lives.[119] Whilst in practice only the passengers' right to life would be violated in such a scenario as this, in principle it debases the rights of all, since anybody might have ended up on that plane or could be in a similar position in the future. Whilst the lives of the passengers are worth no less than the lives of those at the target site, the authorities must balance the value of 'saving those who *can* be saved against the worthwhileness of desisting from shortening lives that in any case *will* shortly be extinguished'.[120]

The Constitutional Court's decision was based on the guarantee of dignity, which does not feature in the Convention. It is not certain how the European Court of Human Rights would react to a concrete situation of a similar nature. Innocent bystanders' deaths do not constitute a per se violation of Article 2.[121] *Finogenov* looks similar but must be distinguished from any hijacked aircraft example. Collateral damage was acceptable in *Finogenov* but force was used in order to *save* the hostages and they had a fair chance of

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[117] "Menschliches Leben und menschliche Würde genießen ohn Rücksicht auf die Dauer der physischen Existenz des einzelnen Menschen gleichen verfassungsrechtlichen Schutz." ibid.
[118] Oliver Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act' 7 *German LJ* 761, 772.
[119] FM Kamm, *Morality, Mortality* vol 2 (OUP 1996) 272.
[120] John Kleinig and Tziporah Kasachkoff, 'Civil Emergencies and Claims of Innocence' in Bronitt et al (eds), *Shooting to Kill*, 32.
[121] *Andronicou*, §192; *Finogenov*, §226.

survival. In the hijacked aircraft example, the use of force would aim to save those at the target site but not the passengers themselves. With little chance of survival those passengers become little more than a sacrifice to save others. Use of force in this scenario is not an attempt to save the passengers at all. The same cannot be said for *Finogenov*. The use of force in that case was instrumental to saving the hostages. Though some sadly died along the way they were not sacrificed to save the rest, since they had a chance of survival as well.

In a pure hostage-taking scenario, closer to the facts of *Finogenov,* the Constitutional Court may take a different approach. Accidentally killing a hostage is not the same as sacrificing someone to save others. The Court has not dealt with a hijacked plane scenario, though its practice suggests that use of force downing the aircraft might be absolutely necessary and strictly proportionate, therefore legitimate, in a 9/11-type scenario. Use of force killing innocent bystanders will not necessarily be disproportionate or unreasonable. The principles on collateral damage and the use of indiscriminate weapons identified in the Court's jurisprudence will help build the legal framework for guaranteeing soldiers' right to life. The strictly textual obligation to refrain from killing is only the first of three right to life obligations. The Convention is mostly concerned with regulating what states *may not* do, but also recognises a positive obligation on states to do certain things.[122] The Court has used the duty to take appropriate steps to safeguard life as the basis for the rule that the authorities are under the positive obligation to protect individuals from threats to their lives.[123] I shall now turn to this positive obligation.

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[122] JG Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 102-103.
[123] *Osman* v *United Kingdom* 29 EHRR 245, §116.

2. POSITIVE OBLIGATION

2.1. LEGAL AND ADMINISTRATIVE FRAMEWORK

The first sentence of Article 2 mandates that the right to life shall be protected by law. It is reasonably implicit that states are thereby required to make legal provision prohibiting taking of life by individuals. Unlike the negative obligation, which applies to state agents, these must be general legal rules to prohibit killing by state agents and private individuals alike. Criminal liability of some kind must follow when someone is deliberately killed.[124] There may be lesser degrees of criminal liability for unintentional killing.[125] At its most basic, states' positive obligation is to provide an effective deterrent against unlawful killing.[126]

States are also required to enforce this law by establishing a fair and effective judicial system. If courts are ineffective at holding people criminally responsible for intentionally killing people, the right to life becomes meaningless.[127] The purpose of the right to life is protecting people from being killed except in accordance with the law. Enacting a law prohibiting killing does not, by itself, fulfil that aim. States must make a real commitment to securing the right to life by prosecuting and punishing those who kill. Of course states enjoy a margin of appreciation in terms of their prosecutorial discretion. Intentional killing must be criminalised, but that does not mean the state must prefer charges in all cases, nor do victims have a right that charges will be brought.[128] A state's decision not to prosecute will not violate the right to life unless it is an arbitrary decision or part of a systematic

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[124] *Kılıç* v *Turkey* 33 EHRR 58, §62.
[125] David Harris, 'The Right to Life under the European Convention on Human Rights' 1 *MJ* 122, 122.
[126] Robin CA White and Claire Ovey (eds), *Jacobs, White and Ovey: The European Convention on Human Rights* (5th edn, OUP 2010) 152.
[127] *Kaya* v *Turkey* 28 EHRR 1, §86.
[128] *Calvelli and Ciglio* v *Italy*, App No 32967/96 (ECtHR, 17 January 2002) §51.

attempt to prevent punishment of crimes.[129] Depending upon the circumstances it may be sufficient that individuals are accountable in civil law,[130] and disciplinary procedures may also satisfy this obligation.[131] In armed conflict situations, where soldiers are killed by enemy troops, the strict requirements of this principle may need to be relaxed or altered.

The obligation to establish a legal and administrative framework entails a responsibility to regulate potentially dangerous activity.[132] The exact nature of the risk determines what steps states must take but the Court has said that states:

> must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.[133]

States have a fairly wide margin of appreciation to determine how to satisfy the need for regulation and the Court accepts there are different avenues to ensure Convention rights.[134] In addition to inherently dangerous activities, states are also required to protect people from risks to their lives from unlawful violent acts of third parties.

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[129] *Dujardin* v *France* 72 DR 236, 243.
[130] *Vo* v *France* 40 EHRR 12, §90.
[131] *Calvelli*, §51.
[132] *Öneryıldız* v *Turkey* 41 EHRR 20, §90.
[133] ibid.
[134] *Gorgiev* v *Former Yugoslav Republic of Macedonia*, App No 49382/06 (ECtHR, 19 April 2012) §43.

2.2. PROTECTION AGAINST RISK

A good deal of literature suggests the Convention has horizontal effect and is capable of protecting individuals *inter se*.[135] But the Convention is addressed to states and can only bind states parties to it.[136] As such the prohibition on intentional deprivation of life applies only to state agents. Nevertheless 'protection is a key rationale for the state's existence'[137] so states are required to protect people's lives from being avoidably put at risk.[138] The obligation to enact and enforce criminal law prohibiting killing partly fulfils this protective duty but the Convention requires more extensive measures than that. This includes protecting people from third parties' criminal acts.[139] As the negative obligation protects people from being unlawfully killed by state agents, the positive obligation mandates that states protect people from being unlawfully killed by private individuals as well.

This is a far-reaching obligation, but as with all Convention obligations it must be 'realisable and functional'.[140] States are not under a general obligation to prevent all violence,[141] nor must states prevent every claimed risk from eventuating.[142] Yet the Court has consistently judged the right to life is fundamental to the Convention and to the democratic societies of the Council of Europe. The right to life will be violated when individuals can show

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[135] See for example Andrew Clapham, *Human Rights in the Private Sphere* (OUP 1993); Stephen Sedley, 'The Spider and The Fly: A Question of Principle' in L Gostin (ed), *Civil Liberties in Conflict* (Routledge 1988) 40-41; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423; Colm O'Cinneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' 4 *Hibernian Law Journal* 77.

[136] *Soering* v *United Kingdom* 11 EHRR 439.

[137] Jeremy McBride, 'Protecting Life: A Positive Obligation to Help' 24 Supp (Human Rights Survey) *EL Rev* 43, 54.

[138] *LCB* v *United Kingdom* 27 EHRR 212, §36.

[139] *Osman* v *United Kingdom* 29 EHRR 245, §116.

[140] Maija Pitkänen, 'Fair and Balanced Positive Obligations: Do They Exist?' [2012] *EHRLR* 538, 542.

[141] *W* v *Ireland* 32 DR 190, 200.

[142] *Kontrová* v *Slovakia,* App No 7510/04 (ECtHR, 31 May 2007) §49.

> that authorities did not do *all that could be reasonably expected of them* to avoid *a real and immediate risk to life* of which *they have or ought to have knowledge*. This is a question which can only be answered in the light of all the circumstances of any particular case.[143]

In *Osman* v *United Kingdom* a schoolteacher became infatuated with one of his pupils and, after a campaign of harassment, shot and injured the boy and killed his father.[144] The general position in English law is that police owe no duty of care to prevent crime, and cannot be held liable for failing to protect a member of the public at large from an unknown criminal.[145] The Court did not say that English law in this regard was contrary to the Convention, rather that the House of Lords had wrongly applied the principle to the facts of the case. In the spirit of giving Convention rights greater 'practical effect',[146] the Court clarified the position that when the aggressor and his victim are identifiable and the threat is serious and reasonably foreseeable state agents are under a duty of care to prevent this risk from materialising.[147] The Court recognised this obligation though it is not explicitly mentioned in the text of Article 2, and the positive obligation now features heavily in the Court's jurisprudence. How it can apply to soldiers will depend upon all the circumstances of each case.

2.2.1. Real and Significant Risks

The Court may have regard to all the facts of a case when deciding whether a threat is real and significant. The question of reality also turns on the foreseeability of the threat. An

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[143] *Osman*, §116 (emphasis added).
[144] For more detailed facts see *Osman*, §§11-89.
[145] *Hill* v *Chief Constable of West Yorkshire* [1989] AC 53 (HL) [63-64] (Lord Keith).
[146] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004) 17.
[147] *Osman*, §116.

aggressor's history of violence or crime might be a relevant consideration.[148] The obligation to take protective measures does not depend solely on there being an history of violence but the absence of such a reputation will contribute to the 'unforeseeability of later acts of grave violence'.[149] A threat is less likely to be significant where the aggressor has no history of mental illness or is not considered unstable following psychiatric assessment.[150] Threats must generally be made to specific individuals, but membership of a generally at-risk class will lend weight to the severity of a threat.[151] Political, ethnic, religious, professional or other affiliations might be aggravating factors in assessing the risk. States must weigh these factors when determining whether and what protective measures to take.

States must protect people against risks of unlawful violence but also against any other risks fitting the 'real, significant and immediate' criteria, including medical conditions.[152] Such risks might include dangers of exposure to radiation, or the risks of infection from contagious disease. The *Parents* case was one in which a government-administered vaccination programme was allegedly unsafe.[153] Hospitals (public and private) must adopt appropriate measures for protecting patients' lives.[154] States are also required to take steps to limit individuals' opportunity to self-harm as are consonant with respect for human dignity and individual autonomy. This can include an obligation to prevent suicide, especially for people in detention.[155] Operation of this principle in respect of soldiers poses

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[148] *Opuz* v *Turkey* 50 EHRR 28, §134.
[149] *van Colle* v *United Kingdom* 56 EHRR 23, §96.
[150] *Osman*, §118.
[151] *Akkoç* v *Turkey* 34 EHRR 51, §81; *Koku* v *Turkey*, App No 27305/95 (ECtHR, 31 May 2005) §132.
[152] *LCB*, §36.
[153] *Association of Parents* v *United Kingdom* 31 DR 32, 32.
[154] *Tarariyeva* v *Russia* 48 EHRR 26, §74.
[155] *Keenan* v *United Kingdom* 33 EHRR 38, §92.

significant challenges considering the inherent dangers of military service, which will be discussed in Chapter 4.

2.2.2. Knowledge

States can only be expected to protect against risks of which they are aware. What constitutes actual or constructive knowledge varies in the circumstances. Authorities that have been told about a risk to life are under an obligation to at least investigate the veracity of the risk. Where states fail to do so, the right to life will have been violated since they cannot be said to have taken appropriate steps to safeguard life.[156] States are considered to have constructive knowledge of a risk where they are informed of a threat but do not ascertain how serious it is. Where the authorities have no actual knowledge of a threat and cannot be considered to have constructive knowledge of a threat, they cannot be expected to take any protective knowledge, no matter how serious the risk.[157] In the healthcare cases contemporary medical science must understand the risk as such,[158] in addition to the requirement that authorities must know (or ought reasonably to know) the individual is at such a risk.[159]

2.2.3. Reasonably Practical Measures

When there is a real and significant risk, of which the authorities are or ought reasonably to be aware, states must take such reasonably practicable measures as are within the scope of their powers to mitigate the harm. Even where the risk cannot be completely avoided,

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[156] *Akkoç*, §82.
[157] *Denizci* v *Cyprus*, App No 25316/94 (ECtHR, 23 May 2001) §§376-77.
[158] *LCB*, §37.
[159] *Kats* v *Ukraine* 51 EHRR 44, §106.

states must still try.[160] But authorities do not have to move heaven and earth to prevent any harm at all. To hold otherwise would certainly be a disproportionate burden on the authorities. It is not reasonable to expect the state to take a course of action that requires an 'impractical diversion of resources'.[161] What is reasonable depends upon the circumstances. The Court has been very careful in determining what level of response states are expected to take, having in mind the 'difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[162]

The positive obligation is difficult to pin down. Because the Court has defined the parameters of the obligation in terms of the cases that have come before it, there are a number of specific factual situations in which one might say the positive obligation applies and has or has not been fulfilled. But other than those outlined above, the Court has not given any more detailed, principled guidelines. Cases are decided on their facts. The Court has established relatively strict principles, such that applicants must demonstrate a grave failing on the part of the state to protect them. In *Osman* the Court held that on the facts of the case the authorities could not be expected to have known the risk against the family was serious.[163] There is nothing to suggest the list of situations in which the Court has already recognised a duty to protect people is exhaustive or the strict requirements universal. In the context of soldiers' right to life the principles identified here will shape the expression of new legal standards.

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[160] *Opuz*, §130.
[161] *Kılıç*, §76.
[162] *Osman*, §116.
[163] *Osman*, §121.

The negative and positive obligations form the substantive limb of the right to life. The Court has also recognised a procedural obligation under Article 2, without which there cannot be full and effective protection of the right to life. An obligation to refrain from killing except in narrowly-construed circumstances cannot be enforced unless there is some investigation into the circumstances of an individual's death. Authorities cannot be held to account for failing to protect an individual from avoidable harm without some evaluation of the situation and the state's response to it. As such the Court has set out detailed procedural requirements forming the third obligation under Article 2.

3. PROCEDURAL OBLIGATION

The obligation to investigate deaths arises where individuals die as a result of state agents' use of force, but also in suspicious or unexplained circumstances. Without investigation the state cannot be held to account for disproportionate or unjustified uses of force, and individuals cannot be punished in accordance with the law. The investigative duty arises as soon as the authorities became aware of a violent, suspicious or unnatural death, whether or not the deceased's family make a formal application for an investigation.[164] The purpose of such an investigation is to

> secure the effective implementation of domestic laws which protect the right to life, and, in those cases involving state agents or bodies, to ensure accountability for deaths occurring under their responsibility.[165]

Investigations need not be criminal in the first instance. In England and Wales suspicious and unnatural deaths are examined at inquest by a coroner, who determines the identity of

[164] *Ergi* v *Turkey* 32 EHRR 18, §82.
[165] *Jordan* v *United Kingdom* 37 EHRR 2, §105.

the deceased and the circumstances of his death.[166] Professional organisations may undertake their own internal investigations when deaths result from state agents' use of force. Disciplinary proceedings may suffice in circumstances involving allegations of professional misconduct in which a criminal trial may be inappropriate.[167] Additionally police may be expected to hold a criminal investigation, which may lead to prosecution of those allegedly responsible for the death. This will be the case especially where private individuals have killed. It is not just killings by state agents that require effective investigation.[168]

The Court has set a number of standards for investigations to be fair and effective and fulfil Article 2 requirements. Firstly impartial investigators who are fully independent of those implicated in the events must conduct investigations.[169] Especially when state agents kill, this requirement is designed to prevent institutions closing ranks to protect one another. It is insufficient that investigators were not involved in the killing – they must be hierarchically, institutionally and practically independent of the accused.[170] The investigation must reach its own conclusions on the basis of the evidence, and failure to gather appropriate evidence is a violation of this requirement.[171] To some degree investigations must be open to public scrutiny, or at least to the deceased's family.[172] These requirements pose some challenges for soldiers' deaths in armed conflict, where it

[166] The Coroners Rules 1984, SI 1984/552, r36.
[167] *Powell* v *United Kingdom* 30 EHRR CD 362.
[168] *Menson* v *United Kingdom* 37 EHRR CD 220, 12-13.
[169] *Güleç*, §78.
[170] *Al-Skeini* v *United Kingdom* 53 EHRR 18, §172.
[171] *Kaya* v *Turkey* 28 EHRR 1, §89.
[172] *Öğur* v *Turkey* 31 EHRR 40, §92.

may be impossible or unsafe to allow non-military investigators to gather evidence or where public hearings are restricted by the imperatives of national security.[173]

Investigations must be capable of determining a cause of death and identifying the culprit.[174] That is not to say the procedural obligation has been violated when no perpetrator is found, but the investigation must, in principle, be capable of locating those responsible by diligently following all lines of inquiry. Whatever form the investigation takes it must be completed in a reasonably prompt and expeditious manner.[175] The Court has said the duty to investigate is not abrogated in difficult security situations. The Kurdish conflict did not exempt Turkey from having to perform full and proper investigations in its southeastern provinces, despite the on-going anti-terrorist operations there.[176]

States' investigative duties also apply when someone in a position of enhanced vulnerability vis-à-vis the state's coercive powers dies, even though state agents may have had no hand in the individual's death. The state is required to show the death did not result from the actions of its own agents, and where it cannot, will be liable for a violation of Article 2.[177] The Court has acknowledged that detainees are far more exposed than others to the state's powers.[178] When someone dies in custody there is a strong presumption of fact the state is in some way responsible because of the level of control exercised over the detainees. Though an individual might not have been killed by state

[173] See Chapter 4.7.
[174] *Assenov* v *Bulgaria* 28 EHRR 652, §102.
[175] *Yaşa* v *Turkey* 28 EHRR 408, §§102-104.
[176] *Güleç*, §81.
[177] *Velikova* v *Bulgaria*, App No 41488/98 (ECtHR, 18 May 2000) §70.
[178] *Keller* v *Russia*, App No 26824/04 (ECtHR, 17 October 2013) §81.

agents, the state is still expected to account for the death because 'the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities'.[179]

Whilst the procedural obligation enforces an important principle of accountability, some suggest it is ultimately ineffective at protecting the individual.[180] The state has a significant advantage in proceedings because, no matter how impartial the investigation, it is still carried out under the state's auspices. The Court has recognised that, especially where people die as a result of the use of force, the true circumstances in which the death occurred are known only to the state agent.[181] Determining whether the use of force was objectively necessary and proportionate is a significant challenge for any investigation because it is impossible to recreate the exact circumstances in which force was used. But if the state is not required to investigate its agents' use of force, or the circumstances in which people meet an unnaturally premature death, state agents can use force with impunity with little chance of being held to account and authorities can fail to protect against the most extreme risks without effective scrutiny. How states fulfil their procedural obligation in respect of soldiers is an important aspect of guaranteeing soldiers' right to life.

CONCLUSION

Fulfilling these three obligations ensures effective protection of the right to life. Taken together they restrict the state's own physical power, ensure protection from the misdeeds of others and guarantee accountability when life is lost. This Chapter has set out the principles of the established obligations. Article 2 creates a framework for protecting the

[179] *Salman* v *Turkey* 34 EHRR 17, §100.

[180] Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?' 21(3) *EJIL* 701.

[181] *Leonidis* v *Greece*, App No 43326/05 (ECtHR, 8 January 2009) §67.

right to life and the general principles examined here flesh out that framework. All the cases from which those principles derive involved civilian victims, and the obligations analysed in this Chapter are by no means exclusive. In the next Chapter I shall apply the general principles to real situations in which soldiers have been killed, explore some of the difficulties this creates, and suggest new legal standards that create effective right to life protection for soldiers.

CHAPTER FOUR

SOLDIERS' RIGHT TO LIFE – SEVEN SCENARIOS

INTRODUCTION

Chapter 2 set out some of the interpretative difficulties of Article 2 of the European Convention and Chapter 3 discussed the Court's approach to the right to life. During a soldier's military service, there will be many occasions in which the state's obligations under Article 2 are engaged, from training exercises through to deployment on combat operations. This Chapter applies those general principles, identified in Chapter 3, to real situations in which British soldiers have been killed. By examining and analysing a number of scenarios this Chapter determines the shortcomings of existing right to life obligations, resulting from the Court's jurisprudence and the limitations in the wording of Article 2. The Chapter suggests new approaches for protecting soldiers' right to life.

Section 1 examines a training exercise in the UK, in which a soldier died as a result of hyperthermia. The second section examines another training incident, where a young recruit was accidentally shot and killed. In Section 3 soldiers in Iraq were killed in a friendly fire accident having been misidentified as enemy soldiers by another British soldier. Section 4 considers a soldier who was killed as collateral damage when his comrades opened fire on a man attacking him. Section 5 explores issues raised by soldiers killed by improvised explosive devices. In Section 6 I shall consider state's obligations in respect of soldiers' deaths in a conventional combat scenario. States' procedural obligation to investigate suspicious, violent or unnatural deaths is the focus of Section 7. The case studies in this Chapter have been selected because they represent a broad range of different risks to soldiers in various contexts.

1. EXPOSURE

Marine B was taking part in a training and selection exercise for the SAS, the United Kingdom's special forces corps. The exercise consisted of a timed 40-mile hike over rough ground in the Brecon Beacons, with trainees navigating between a series of checkpoints whilst carrying equipment weighing 55lbs and a rifle. Progression to the next stage of the training required soldiers to complete the course within 20 hours. Trainees must complete the course without any resupply of water or other rations, meaning they must carry everything they could need for the duration of the exercise.[1] Marine B was taking part in the exercise on one of the hottest days of the year, when temperatures reached 30°C. B was found dead 750 yards from the final checkpoint. The inquest into his death heard that he had suffered a fatal cardiac arrest.[2] Three more soldiers died undertaking the same exercise in similar weather conditions in summer 2013.[3] An inquest into their deaths held that the three men died as a result of hyperthermia.[4]

1.1. NEGATIVE OBLIGATION

The first question this scenario poses is whether the state's liability is engaged under the negative obligation. Article 2 recognises a negative obligation prohibiting state agents from intentionally depriving people of their lives, except in accordance with the law.[5] A state

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[1] Nick Brown, editor-in-chief of Jane's International Defence Review, quoted in Gerry Holt, 'Soldier Deaths: How Dangerous is Military Training Allowed to Be?' (*BBC Magazine*, 15 July 2013) <www.bbc.co.uk/news/magazine-23311575> accessed 8 April 2015.

[2] BBC, 'Royal Marine's Death "Natural Causes"' (*BBC*, 17 January 2011) <www.bbc.co.uk/news/uk-wales-mid-wales-29217824> accessed 8 April 2015.

[3] BBC, 'Soldier Deaths: Third SAS Training Reservist Dies' (*BBC*, 31 July 2013) <www.bbc.co.uk/news/uk-wales-23511938> accessed 11 February 2014.

[4] BBC, 'SAS Selection Deaths: Coroner Delivers Neglect Conclusion' (*BBC*, 14 July 2015) <www.bbc.co.uk/news/uk-wales-33512416> accessed 14 July 2015.

[5] See Chapter 2.1. and 3.1.

agent is any person whose acts are attributable to the state under the secondary rules of state responsibility in international law.[6] In the United Kingdom maintenance of a standing army is subject to Parliamentary consent.[7] Thus the British armed forces operate pursuant to the state's legal authorisation and soldiers' acts may be attributable to the state. There can be no doubt that, when acting in their official capacity, soldiers are state agents. But was B intentionally deprived of his life? I shall first examine whether his death constituted a deprivation of life, and then whether it was intentional.

1.1.1. Deprivation of Life

The twin requirements for deprivation of life are action and causation, specifically that action causes death.[8] Action is bodily movement that is intentional under some description.[9] In Chapter 2, I examined causalist and non-causalist models of action. The causalist definition of action is a bodily movement caused by a pertinent desire/belief. That is, a desire or pro-attitude towards actions possessing a certain quality, and a belief that a given movement has that quality.[10] A non-causalist definition of action is bodily movement occurring under the agent's control or guidance.[11] Both models give a plausible definition of action.

Marine B was following orders by taking part in the exercise. Though he had voluntarily joined the army in the first place and volunteered himself for SAS selection, he was

[6] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83, Article 4(1) of Annex to the Resolution. See Chapter 3.1. above.
[7] Bill of Rights 1689 (1 Will & Mary Sess 2 c90). Such consent was most recently renewed in the Armed Forces Act 2016.
[8] Chapter 2.1.
[9] Chapter 2.1.1.
[10] Donald Davidson, *Essays on Actions and Events* (OUP 1980) 3-4.
[11] Harry G Frankfurt, 'The Problem of Action' 15(2) *Am Phil Q* 157, 158.

following orders the day he participated in the exercise. His superior officers acted when they issued his orders. Whether the order was given verbally or in writing, the officer performed a bodily movement that was intentional, in the sense it was caused by a pertinent desire/belief or occurred under his control. On a simple counterfactual account of causation,[12] giving the order to go on the exercise *did* cause Marine B's death. Had that order not been given, he would not have taken part in the exercise. His fatal cardiac arrest was the result of an increase in body temperature resulting from the combination of strenuous physical activity and high temperature. Without the order to take part in the exercise Marine B would not have been performing the strenuous physical activity that caused his death. On its face this is a situation in which an act caused death, and should be considered a deprivation of life for the purposes of Article 2.

There is a time delay between the act (*SPEECH*) and the eventual consequence (*DEATH*). The possibility of intervening factors, which break the causal link between act and consequence, increases in correlation with the temporal distance between the two events. The mere fact of temporal distance is insufficient to break the causal link though. Consider if Officer O shot Marine B. The act (*TRIGGER-SQUEEZING*) and the consequence (*DEATH*) occur almost in the same instant and it would be difficult to deny a causal link. But what if Officer O administered a slow-acting poison, and Marine B died days or weeks later? The act and the consequence are not temporally proximate but the *POISONING* still caused *DEATH*. The same can be said for the order to participate in this exercise. The time delay does not sever the causal link between *SPEECH* and *DEATH*.

[12] Counterfactual dependence is a simple test of causation first expressed by Hume. See Chapter 2.1.3.

But is there sufficient *causal* proximity between *SPEECH* and *DEATH* to establish that this is in fact a deprivation of life? The counterfactual account is true inasmuch as, without his superiors' orders, Marine B would not have taken part in the exercise and would not have died. However *SPEECH* is not a necessary precondition for *DEATH*, since that might result from many other events. Furthermore *SPEECH* is not, by itself, sufficient to cause *DEATH*. In this case Marine B would not have died had the weather been less hostile, or if he decided not to participate, or withdrew when he started feeling unwell. It is sufficient to cause death where the four conditions (namely the order, the weather, Marine B's choice to participate and to continue the exercise) are all present. *SPEECH* clearly has some causal relationship with *DEATH*, but it is not a necessary condition for *DEATH* to occur[13] nor sufficient to cause death by itself. The act of *SPEECH* is thus an 'insufficient but non-redundant part of an unnecessary but sufficient condition'.[14] *SPEECH* has a significant but not inexorable causal link to B's *DEATH*. But should it still be considered the *cause* of B's *DEATH*?

A fine-grained individuation is the best way of defining action because it limits the understanding of action to movements a person actually performs, excluding extraneous factors beyond their control or outside the scope of the particular movement.[15] Assuming the command was given orally, a fine-grained individuation would understand *SPEECH* as the action in this scenario.[16] For that to cause death it depends upon alignment of other conditions. First Marine B must understand the *SPEECH* as an order and comply with it. Second it depends upon certain weather conditions. Finally it depends upon Marine B

[13] *SPEECH* of this kind was a necessary condition for *DEATH* to occur in this way. But generally *SPEECH* is not a necessary condition for *DEATH* to occur in any circumstances – had the order not been given, Marine B might have died in other circumstances.

[14] John L Mackie, *The Cement of the Universe: A Study of Causation* (Clarendon Press 1980) 62.

[15] See Chapter 2.1.1. for more detail on action individuation.

[16] If the order was given in writing, *SPEECH* can be substituted for *WRITING*, assuming that includes delivering the written command to Marine B.

continuing with the exercise until *DEATH* occurs. This dependence on other factors might be considered enough to break the causal link, since the ultimate consequence can only occur when multiple factors align, of which action is only one. But that argument might be adduced for any action.

Consider Officer O shot Marine B. The action, properly individuated is *FINGER-MOVING.* This squeezes the trigger. The consequent *DEATH* depends upon a number of external factors, such as whether the trigger squeezes and the gun actually fires, the presence of a bullet in the chamber, the effects of wind and gravity on the bullet's trajectory and whether the bullet actually hits the target in a way capable of causing *DEATH*. These factors are outside the scope of the individual movement, or outside the control of the actor completely. Yet in such a case we would have no difficulty in describing *FINGER-MOVING* as causing *DEATH*. If we did not it is hard to see what *would* be an "action causing death" (that is the definition of 'deprivation of life'[17]). Therefore the dependence of a consequence upon alignment of factors external to the action cannot be a principled reason to claim that the order to participate in this exercise did not constitute a deprivation of life.

There seems to be no legitimate metaphysical basis for denying the order to participate in the training caused a deprivation of Marine B's life. The Court has dealt with cases posing similar facts to these using the positive obligation framework, without questioning whether the negative obligation is actually engaged. It seems self-evident to the Court that the negative obligation is not engaged on facts such as these but that decision has not been justified and appears arbitrary. On a logical application of the text of Article 2, this *was* a

[17] Chapter 2.1.

deprivation of Marine B's life. Whether this deprivation constitutes a violation of his right to life depends upon whether it was intentional. I shall shortly return to interpretations of intention and their implications for this scenario.

If an interpretation of intention were adopted that described this scenario as an intentional deprivation of life, there is a prima facie violation of the negative obligation. Intentional deprivation of life may be justified in certain circumstances according to Article 2(2).[18] Since Marine B did not die as a result of a use of force that was absolutely necessary in pursuit of a permitted law-enforcement objective (there was no use of force here at all), there is no valid justification for the intentional deprivation of life and therefore there has been a violation of Article 2. The limited exceptions to the general prohibition on intentional killing may be a valid policy reason for determining that the order-giving *SPEECH* did not constitute a deprivation of life in this scenario. But there are parallels to this scenario in which it would be unthinkable to suggest that the order-giving *SPEECH* did not constitute a deprivation of life.

Consider the death marches Ottoman forces carried out between 1915 and 1918. Thousands of Armenian men, women and children died when forced to march to concentration camps in the Syrian desert.[19] The act was *ORDER-GIVING* (or rather the movement that conveyed the order) and compliance with the order involved exposure to hostile weather and extreme physical exertion. It would be difficult to argue that the

[18] The requirements of the law-enforcement exceptions are detailed in Chapter 3.1.2.

[19] For more information see Christopher J Walker, *Armenia: The Survival of a Nation* (Croom Helm 1980) 200-203; James Bryce and Arnold Toynbee, *The Treatment of Armenians in the Ottoman Empire, 1915-1916: Documents Presented to Viscount Grey of Falloden* (Ara Sarafian ed, Gomidas 2000) 635-49.

Armenian death marches did not constitute a deprivation of life, even though the action and consequence are the same as in the SAS selection exercise. Perhaps the two situations can be distinguished by reference to the consequences of non-compliance with the order. In Marine B's case, he would have been unable to join the SAS if he failed to complete the exercise, which may have been disappointing for him but hardly a matter of life-and-death. In the death marches, those who disobeyed the order to march were shot.

There are other contextual differences between the two scenarios. The SAS training exercise was designed to test soldiers and determine their physical capability for service in the special forces, but it was not supposed to kill them. The Armenian death marches were tantamount to execution. The contextual difference roughly boils down to the intention of the person giving the orders. Where intention is given so broad an interpretation as to include consequences that are brought-about intentionally as well as directly-intended,[20] the distinction between the two scenarios collapses. Though Marine B's *DEATH* was not the directly-intended consequence of Officer O's *SPEECH*, it was brought about by intentional action. Having established there are no legitimate grounds except policy reasons on which to deny Marine B's death constituted a deprivation of life for the purposes of Article 2, I shall now turn to whether it can be considered an *intentional* deprivation of life.

1.1.2. Intention

Article 2 prohibits *intentional* deprivation of life, intention being the quality that distinguishes deprivations of life that violate Article 2 from those that do not. The Court and the Commission's approach to intention has been inconsistent. From the case-law it appears that the facts of an individual case determine whether intention is understood in

[20] See Chapter 2.2.

its narrow sense of a directly-intended consequence brought about by action directed towards that purpose, or more broadly to include consequences that were not the directly-intended purpose of the action but that were brought about in pursuit of some specific purpose.

In *Stewart* the Commission declared that Article 2(2) defines the situations in which state agents are permitted to 'use force which might result, as an unintended consequence of the "use of force", in deprivation of life'.[21] The Court has repeated this phrase in almost all its negative obligation judgments, and it has been used as the basis that 'intentional' for the purposes of Article 2 is broader than direct intent. Corporal S, who fired the fatal shot in *Stewart,* used rubber bullets and aimed at the rioters' legs. The facts suggested that S was not acting with the direct purpose of killing anyone, but less-lethal weapons are never guaranteed to be non-lethal.[22] It cannot be ignored that it was a possible consequence of Corporal S' action that someone might die. The Commission in *Stewart* took the approach that the negative obligation's scope is broader than just deaths brought about as the direct purpose of state agents' actions.

The Court has followed this approach in many subsequent cases. In *Giuliani and Gaggio* the carabiniere fired a warning shot during a violent protest. The bullet unexpectedly killed a protestor.[23] The Court repeated the *Stewart* dictum and held the negative obligation *was*

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[21] *Stewart* v *United Kingdom* 7 EHRR CD 453, 458. See Chapter 2.2.4. for more detail.

[22] 'Armed Policing: Use of Force, Firearms and Less Lethal Weapons' (*College of Policing: Authorised Professional Practice*, 23 October 2013) <www.app.college.police.uk/app-content/armed-policing/use-of-firearms-and-less-lethal-weapons/> accessed 12 September 2014.

[23] For more detailed facts see *Giuliani and Gaggio* v *Italy* 54 EHRR 10, §§12-24.

engaged but that the killing was justified under the law-enforcement exceptions.[24] This was the case because, though there was no evidence the carabiniere deliberately tried to kill the protestor, there was a chance someone might be killed as a result of his action.[25] This approach echoes criminal law principles of subjective recklessness or *dolus eventualis* that intention encompasses consequences that were foreseen and willingly risked.[26] The Russian government did not directly intend to kill the hostages in *Finogenov* but there was an intentional deprivation of life in that case because of the risk of death posed by using the gas. Similarly Cypriot police did not directly intend to kill the hostage in *Andronicou*. In these cases the Court has explicitly said the deprivation of life was intentional. Either "intention" encompasses foreseen consequences, or Article 2 governs unintentional as well as intentional killing.

It was not Officer O's direct purpose to cause Marine B's death, but there was a risk that he might die on the exercise. The risk is increasingly obvious considering the high temperatures and the fact other soldiers have died undertaking this exercise in the past. The officers demonstrated they were prepared to accept this risk by ordering the exercise to proceed as planned. The approach to intention adopted by the Commission and Court in *Stewart, Giuliani, Finogenov, Andronicou* and others suggests that either this was an intentional deprivation of life, or otherwise that Article 2 governs unintentional as well as intentional deaths. On either understanding, Marine B's death constitutes a violation of Article 2.

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[24] ibid, §194.

[25] The Court said, at §193, the shot fired risked injury or even death. It did not consider it necessary to examine whether the bullet had in fact been fired as a warning shot but ricocheted off flying debris, because the risk of death or injury existed on the basis of the carabiniere's position and aim.

[26] Chapter 2.2.2.

However the Commission and Court's approach to intention has been inconsistent. In *Parents* the Commission determined there had not been an intentional deprivation of life.[27] The Commission remarked that the British government knew of the risk of adverse reactions to vaccines, but that 'it cannot be deduced from this that Government *intend* such consequences to occur'.[28] Later case-law, which suggests Article 2 covers deaths intentionally brought-about and merely foreseen, seems to contradict this decision that only directly-intended deaths brought-about intentionally constitute a violation of Article 2. In *LCB* v *United Kingdom* the Court determined the negative obligation was not engaged. The applicant's father served in the British Armed Forces and was stationed at Christmas Island during nuclear weapons tests. She alleged her father's exposure to radiation caused her childhood leukaemia.[29] There was no suggestion the state intended to harm her or her father, and the Court proceeded to consider whether sufficient steps had been taken to safeguard the applicant's life.[30]

In both of these cases the Commission and Court talk about the intention to kill or do harm. Causing harm or death was not the state agents' direct purpose in acting, but it must have been seen as a possible result of their actions.[31] But the Commission and Court adopted a stricter meaning of intention. In *Bakan* v *Turkey* police gave chase to a fleeing suspect.

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[27] *Association of Parents* v *United Kingdom* 14 DR 31, 32.
[28] ibid, 33 (original emphasis).
[29] For more detailed facts see *LCB* v *United Kingdom* 27 EHRR 212, §§10-16.
[30] ibid, §36.
[31] Regarding *LCB*, contemporary medical opinion agreed that pre-conception paternal radiation exposure did not materially contribute to the incidence of childhood cancers like leukaemia (see R Wakeford and EJ Tawn, 'Childhood Cancers and Sellafield: The Legal Cases' 14(4) *Journal of Radiological Protection* 293; *Reay* v *British Nuclear Fuels* [1994] Env LR 320). Nevertheless it was a possibility that the applicant's father might be exposed to harmful radiation.

One of the officers fired warning shots from his gun. One of the bullets ricocheted and killed the applicant's husband.[32] The Court concluded the negative obligation was not engaged because the applicant's husband's death was the result of 'bad luck, the bullet causing the fatal wound having hit the victim as a result of ricochet'.[33] The risk of this occurring was minute but the police officer must have recognised the possibility that someone might die as a result of his firing warning shots. The Court's approach to this case suggests that the negative obligation is actually a prohibition on state agent killing by use of force, and that firing warning shots was not a use of force. But the same could be said for the warning shots the carabiniere fired in *Giuliani.* The Court's practice seems to have no principled basis at all.

If the correct approach to 'intentional deprivation of life' is that Article 2 only forbids actions whose direct purpose is to kill, the order to participate in the training exercise does not constitute an intentional deprivation of B's life since death was merely foreseen as a remote risk. But the same may also be said of the Armenian death marches, or Nazi death marches during the Holocaust. The direct intention could be said to have been prisoner transfer, which carried a foreseeable risk that some might die along the way.

Article 2 creates a framework in which an intentional deprivation of life is a prima facie violation of the right to life, but this presumption can be rebutted when death results from a use of force that is absolutely necessary and proportionate. A narrow approach to intention would restrict the Court's ability to check state agents' use of force against these

[32] For more detailed facts see *Bakan* v *Turkey*, App No 50939/99 (ECtHR, 12 June 2007) §10.

[33] "La mort du proche des requérants est le résultat de la malchance, la balle à l'origine de la blessure mortelle ayant atteint la victim par ricochet" ibid, §55.

important standards. For example in *Finogenov* the Russian authorities did not directly intend anyone to die as a result of the use of gas.[34] Under a restrictive approach to intention, the hostages' deaths would not constitute an intentional deprivation of life. Accordingly there would be no need to discuss whether the force used was absolutely necessary and proportionate. The Court could infer from the facts that killing was the authorities' direct purpose, but this inference resembles a more expansive interpretation of intention and undermines the notion in *Parents, LCB* and *Bakan* that accidents do happen and should not be treated severely.

In *Gül* the Court took another approach entirely. The police officers' intentions were irrelevant, the Court said, because they used force so utterly disproportionate that it could not be justified under Article 2.[35] In *Gül* the Court appear to have written intention out of Article 2, but in *Yaşaroğlu* the Court confirmed pure accidents do not engage the negative obligation at all.[36] So on this approach the intentionality requirement attaches to the action causing deprivation of life, rather than the outcome of that action. But this approach is hopelessly broad. In Marine B's case the action of *SPEECH* was intentional, inasmuch as the officer meant to move his body in such a way. The deprivation of life, resulting from intentional action, therefore constitutes a prima facie violation of Article 2. Marine B's right to life was therefore violated, since none of the law-enforcement provisions apply in this situation.

[34] *Finogenov* v *Russia* 61 EHRR 4, §218.
[35] *Gül* v *Turkey* 34 EHRR 28. See Chapter 2.2.5.
[36] *Yaşaroğlu* v *Turkey*, App No 45900/99 (ECtHR, 20 June 2006) §55.

Whether Marine B's death constitutes a violation of Article 2 depends upon the interpretation of intention. According to an expansive approach, Marine B's death was a foreseen outcome of the exercise and this satisfies the intentionality requirement. Under a narrow approach, this was not an intentional deprivation of life since the officers did not directly intend Marine B's death as a consequence of their actions. The Court has shown some degree of consistency in the sort of facts in response to which they adopt each interpretation of intention. The inclusive definition has been applied to genuine law-enforcement cases – to which the Article 2(2)(a)-(c) exceptions might apply. The Court has adopted the narrow, direct-intent definition where the law-enforcement exceptions cannot apply and logical application of the Convention would lead to unreasonable results.[37]

On the basis that the law-enforcement exceptions cannot apply to this case, the sensible approach would be to adopt the narrow definition of intention, such that the negative obligation is not engaged by Marine B's death. I think this is the approach the Court would take if faced with this set of facts. This is arguably the correct conclusion, but the Court should not conclude whether there has been a prima facie violation of Article 2 by reference to whether there is an exception that might justify it – this is hardly a robust and rigorous way of safeguarding individuals' right to life. To call this an intentional deprivation of life would, I believe, distort the meaning of that phrase beyond what the Convention's drafters envisaged. It seems more appropriate to consider this case within the positive obligation framework of the duty to take sufficient steps to safeguard life. I shall turn to this now.

[37] There have still been anomalies, such as the *Bakan* judgment, in which the law-enforcement exceptions could be applicable but where the Court has nevertheless adopted a narrow definition of intention.

1.2. POSITIVE OBLIGATION

States' obligations under Article 2 are more strenuous than a bare admonition that state agents shall not kill.[38] In addition to the prohibition on intentional deprivation of life, states are required to protect individuals from risks to their lives from the criminal acts of third parties,[39] from the risks of inherently dangerous activities,[40] health conditions,[41] and must even protect people from themselves in certain circumstances.[42] These are all different articulations of the same principle that the state is under a duty to protect people where it can, applied to different contexts.

In *Öneryıldız* v *Turkey* a methane explosion in a municipal rubbish tip destroyed neighbouring homes and killed the applicant's family members.[43] The Court judged the state should have taken measures to prevent the explosion, especially since they knew an accident of this type was possible and likely.[44] The Court ruled the obligation to safeguard life extends to regulating 'any activity, whether public or not, in which the right to life might be at stake'.[45] It has been remarked that training exercises, such as that in which Marine B died, emphasise 'endurance rather than peril'.[46] That does not mean the exercise poses no threat to life, or there is no danger inherent in the extreme endurance of soldiers participating.

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[38] See Chapter 3.2.
[39] *Osman* v *United Kingdom* 29 EHRR 245, §116.
[40] *Öneryıldız* v *Turkey* 41 EHRR 20, §90.
[41] *LCB*, §36.
[42] *Keenan* v *United Kingdom* 9 EHRR 913, §91.
[43] For more detailed facts see *Öneryıldız*, §§10-18.
[44] ibid, §101.
[45] ibid, §71.
[46] Nick Brown, quoted in Holt.

Risks from prolonged exposure to temperature extremes are known. Dehydration can be serious when left untreated. The temperatures on the day Marine B died were very warm by British standards but this heat, by itself, was by no means fatal. However, B was carrying a heavy pack, had limited supply of water and was undergoing extreme physical exertion. Research published in medical journals indicates soldiers are at increased risk of overheating (and susceptible to health conditions arising from dangerous increases in core body temperature), even in much cooler temperatures and when the exercise is far less strenuous than in Marine B's case.[47] Given the warm weather the day of B's death and the extreme nature of the exercise, there was an inherent risk to his life against which the Army should have taken some protective measures. The authorities must have known of the risk to his life, given the temperature and the nature of the risk. There should have been some regulation of this training that was capable of protecting B's life.

Exercises such as these are designed to prove trainees' physical aptitude.[48] The British Army invokes the 'train hard, fight easy' mantra in defence of its strenuous training regime.[49] There is an obvious advantage to pushing soldiers to their limits in training exercises. War is neither easy nor safe. But soldiers can be better prepared for those dangers by properly rigorous training. The difficulty is that suffering is the whole point of the training B was undertaking. The training is supposed to be hard to build up soldiers' endurance in adverse conditions. This is even more pertinent for the SAS, given the nature of the special forces' role. The Health and Safety Executive recognised the legitimate

[47] See Alan Porter, 'The Death of a British Officer-Cadet from Heat-Illness' 355(9203) *The Lancet* 569.
[48] Colonel Lincoln Jopp MC (retd), quoted in Holt.
[49] Joe Glenton, 'The Military Slogan "Train Hard, Fight Easy" is More Than Just Rhetoric – As The Latest Deaths Show' (*Independent*, 17 July 2013) <www.independent.co.uk/voices/comment/the-military-slogan-train-hard-fight-easy-is-more-than-just-rhetoric--as-the-latest-deaths-show-8713746.html> accessed 9 January 2015.

operational reasons for making the training difficult.[50] How then to balance this legitimate policy interest with the obligation to protect B's life?

A state's interest in having a well-trained military capable of operating effectively in adverse conditions does not allow it to play fast and loose with soldiers' lives. Neither does it excuse states from responding appropriately to mortal risks. The exercise during which B died is intentionally difficult so that only the best are able to complete it. But that should not mean that trainees take part on a "succeed or die" basis. The easiest way to prevent the risk to B's life would have been to cancel the exercise. But this would weigh unfairly against the legitimate interest of training an elite military force capable of extreme endurance in hostile environments. Positive obligations are designed to protect individuals but should not place impractical or unrealistic burdens on states.[51] There may be less drastic measures that would have mitigated the risk to B's life whilst preserving the exercise's training goals.

The inquest into B's death heard that B was in the top 10% of trainees. In addition to checkpoints along the route where soldiers' progress was monitored, B carried a locator beacon. Instructors at the final checkpoint became concerned that B had not yet crossed the finish line and checked his location using the signal from the locator beacon. By that time, he was already dead.[52] The Army had put in place a system to protect the soldiers, but that system was inadequate. The locator beacon told instructors nothing more than B's

[50] Health and Safety Executive, 'Statement on Joint Police/HSE Investigation into Brecon Beacons Deaths' (*Health and Safety Executive*, 27 February 2014) <press.hse.gov.uk/2014/statement-on-joint-policehse-investigation-into-brecon-breacons-deaths/> accessed 9 April 2015.

[51] *Kılıç* v *Turkey* 33 EHRR 58, §76.

[52] BBC, 'Royal Marine's Brecon Beacon Death "Natural Causes"'.

location. The fact B was stationary might have meant he had stopped to answer a call of nature or admire the view. By the time this signal has been stationary long enough to pique instructors' concern, the trainee will have been in difficulty for some time. Furthermore the current system requires instructors to closely monitor the locator beacons at all times, which may be impractical.

States' duty to safeguard life should not be so onerous that authorities are burdened with impossible obligations. For example the Court has held that when a man was suffering a heroin overdose it was sufficient that police officers put him into the recovery position. They were not required to try to resuscitate him as an ambulance had already been called.[53] When a young woman died of sepsis her father alleged her right to life had been violated by negligent medical treatment.[54] Hospitals must adopt appropriate measures to protect patients' lives,[55] but this obligation is satisfied where adequate provision is made for securing high professional standards among physicians.[56] Where a person's life is at risk from a medical condition their right to life will not have been violated simply because they die. But the state must take steps to alleviate any risks.

In B's case the steps taken were insufficient. This is especially so because the increased risk was created by the state itself. The Army's training regime exposed B to an enhanced level of risk and failed to adequately compensate for that in the measures it took to protect him. After B's death, an Army official remarked procedures had been changed so that, in future,

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[53] *Scavuzzo-Hager* v *Switzerland*, App No 41773/98 (ECtHR, 7 February 2006) §67.
[54] For more detailed facts see *Z* v *Poland*, App No 46132/08 (ECtHR, 13 November 2012) §§9-20.
[55] *Tarariyeva* v *Russia* 48 EHRR 29, §74.
[56] *Z*, §76.

search parties would be sent sooner when a trainee failed to show up on time.[57] This might go some way to remedying the failings that led to B's death, yet the deaths of three trainees in July 2013 demonstrate there are still systemic problems in ensuring safety during this exercise.[58] The other problem with the existing framework is that instructors are given inadequate information so are unable to respond to problems in a timely manner that reduces the risks.

The locator beacon system is ineffective. B might not have died if measures had been in place that enabled him to contact instructors when he started feeling unwell. Equipping him with a radio or flare gun may suffice. The problem with these measures is they rely upon B's self-assessment of his condition. He might not have been able to tell the symptoms of hyperthermia from the general fatigue caused by physical exertion. Furthermore driven by determination to complete the exercise and proceed to the next round of selection training, he might have tried to carry on in spite of feeling unwell. In such circumstances the Court has already held the 'national authorities cannot legitimately hide behind the imprudence of the victims'.[59]

A more effective means of protecting B's life would have been to fit him with a heart-rate monitor to measure his vital signs. Such monitors are cheap and widely commercially available. This would enable instructors to intervene when it became apparent he was

[57] Lieutenant Colonel Frederick Kemp, quoted in BBC, 'Royal Marine's Brecon Beacons Death "Natural Causes"'.
[58] BBC, 'SAS Selection Deaths: Coroner Delivers Neglect Conclusion' (*BBC*, 14 July 2015) <www.bbc.co.uk/news/uk-wales-33512416> accessed 14 July 2015.
[59] "… la Cour n'estime pas que les autorités nationales puissant légitimement se retrencher derrière l'imprudence les victims." *Kalender* v *Turkey*, App No 4314/02 (ECtHR, 15 December 2012) §49.

gravely ill. Any of these measures would at least give Marine B a better chance of survival without making the exercise any easier, satisfying the state's positive obligation to safeguard life whilst preserving the legitimate policy objective of producing elite troops.

On balance there is no absolute duty to prevent people dying but states are obligated to take such reasonably practicable measures as are within their scope of powers to protect individuals from risks to their lives. The system to protect soldiers on this exercise was insufficient. More could have been done to improve Marine B's chances of survival once he ran into difficulty, but which would not have compromised the value of the exercise in terms of testing and improving soldiers' endurance. The fact the state *created* the enhanced risk and *exposed* B to it should not necessarily, by itself, constitute a violation of Article 2. But the failure to implement an effective contingency plan to combat the risk suggests the United Kingdom did indeed violate B's right to life.

In this scenario I have come to the conclusion the negative obligation is not engaged. This question hinged upon the approach to intention. The Court has adopted both narrow and expansive interpretations of Article 2's intentionality requirement. If this case constituted an intentional deprivation of life it could not be excusable under the Article 2(2) law-enforcement exceptions. The Court has generally applied a narrow definition of intention in cases where those exceptions are inapplicable to the facts. I shall now turn to a second training accident, in which a recruit was shot.

2. MIXED ROUNDS

Recruit W joined the Royal Marine Commandos straight from school aged 18.[60] In his seventh week of training W was participating in a three-day exercise on Woodbury Common that included an early-morning simulated attack on the trainees' camp. Participants were given blank ammunition for the exercise, which simulates real gunfire without any bullets.[61] Training regulations mandated an armed sentry to guard against terrorist attacks, and this duty rotated among instructors. The first sentry took two magazines of live ammunition, which he passed on to his relief at the end of his sentry duty.

Corporal M took up the guard and loaded one of the live magazines into his rifle, storing the other in his ammunition pouch. At the end of his sentry duty he passed his rifle, containing one of the live magazines, onto his relief but kept the other live magazine in his ammunition pouch. During the simulated attack he inadvertently loaded the live rounds into his rifle. It was dark and undergrowth obscured his aim when he opened fire in the trainees' general direction. W was standing almost directly in front of him, 20 yards away. M fired 13 live rounds before he realised his mistake. W was fatally shot in the neck and shoulder.[62]

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[60] BBC, '"Lack of Training" Caused Marine Death' (*BBC*, 6 June 2001) <www.news.bbc.co.uk/1/hi/wales/1374214.stm> accessed 10 December 2014.

[61] Blank ammunition contains a wad of cotton or paper in place of a bullet, but is otherwise the same as live ammunition. Firing blank rounds creates a flash-bang like live ammunition but without firing the bullet.

[62] Health and Safety Executive, 'Record of Crown Censure of Ministry of Defence (Royal Navy) Following the Fatal Accident to Recruit Alan Wayne Richard on 31 March 2000' (19 January 2005) available online at <www.hse.gov.uk/foi/releases/crowncensure.pdf> accessed 10 December 2014.

2.1. NEGATIVE OBLIGATION

2.1.1. Deprivation of Life

Article 2(1) provides that no one shall be intentionally deprived of their life, which prohibits state agents from intentionally killing people. A deprivation of life is an action that causes death.[63] Action has numerous definitions[64] but there is general consensus that action is bodily movement controlled by the agent. Corporal M's action is *FINGER-MOVING*. He controls the movement of his body, which is neither a reflex reaction nor movement occurring due to the laws of nature. It can be described as occurring under M's guidance, or in terms of his positive attitude to movements having a certain quality and a belief that this movement had that quality. M acted and this ultimately brought about W's death.

There is a causal relationship between M's *FINGER-MOVING* and W's *DEATH*. A simple counterfactual account of this relationship determines that *ceteris paribus* without M's action, W would not have died. M's action set in motion a chain of events resulting in physical changes to W's body, which interrupted his otherwise self-sustaining internal biological processes. This causal relationship is not affected by the fact that *FINGER-MOVING* could only cause *DEATH* if certain external factors aligned, such as there being a bullet in the chamber, the gun actually firing, the effects of wind and gravity on the bullet's trajectory and so on.

As such M's action deprived W of his life. This case is somewhat clearer than Marine B's death.[65] In that case Officer O's order was an action that ultimately resulted in B's death. But the difference is that Officer O's orders only exposed B to external forces, it did not

[63] Chapter 2.1.
[64] Chapter 2.1.1.
[65] Section 1.

make any physical changes to B's body. In this case M's action changed W's body (by tearing holes in it with bullets) and as a result of those physical changes W could not continue to live. It is somewhat easier to reconcile the action in this case with a simplistic understanding of deprivation of life because of those physical changes to W's body. Additionally M's action might constitute a "use of force" that could, in some circumstances, justifiably result in someone's death pursuant to Article 2(2). B's death occurred in circumstances in which the law-enforcement exceptions could never apply.

2.1.2. Intention

Deprivation of life constitutes a violation of Article 2 where it is intentional. Corporal M did not act with the direct purpose of killing W. The Commission and Court have considered a number of cases in which the deprivation of life did not satisfy the Article 2 intentionality requirement because the agent did not act specifically with the purpose of bringing about death.[66] In *X* v *Belgium* the use of rubber safety bullets demonstrated that the police officer who fired the fatal shot did not directly intend to kill anyone.[67] Similarly the Commission determined there had not been an intentional deprivation of life when children died as a result of a government-administered vaccine.[68] The doctors did not act with the purpose of bringing about the children's deaths. Where intentionality attaches to the consequences W was not intentionally deprived of his life.

But the Commission and Court have also adopted a more expansive interpretation of intention in the decided cases. In *Stewart* the Commission said that Article 2 does not primarily define the situations in which state agents may use lethal force but the

[66] *X* v *Belgium* XII YB ECHR 174.
[67] ibid, 184. See Chapter 2.2.3. above.
[68] *Association of Parents* v *United Kingdom* 14 DR 31, 32.

circumstances in which they may use force that might have deprivation of life as an unintended consequence.[69] The Commission's approach has been the basis for subsequent cases in which the Court has determined there was an intentional deprivation of life even though killing was not directly intended. In those cases the intentionality requirement was satisfied where it was a reasonably foreseeable result of the agent's actions that someone might die,[70] or where deprivation of life was brought about intentionally.[71]

Corporal M believed he was firing blank rounds. Blanks contain no bullet but are not totally safe. As such the deprivation of life might have been sufficiently foreseeable to satisfy a broadly-defined intentionality requirement. The force generated by igniting gunpowder can shatter bone, causing injury and death if the barrel is pressed close to the body. If Corporal M's rifle had been loaded with blank rounds as he believed, and he pressed the barrel to W's temple and squeezed the trigger, W's death would have been sufficiently foreseeable for this to constitute an intentional deprivation of life. In those circumstances it would make no difference that M believed the rifle was loaded with blanks. But W was 20 yards away when M opened fire. At this distance the force generated by the gunpowder igniting (which can be deadly at point blank range) has dissipated and is harmless. Had the rifle been loaded with blanks as M believed, W's death would have been insufficiently foreseeable for M's *FINGER-MOVING* to constitute an intentional deprivation of life under the *Stewart* approach.

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[69] *Stewart*, 458.

[70] See for example *Giuliani and Gaggio* v *Italy* 54 EHRR 10; *Finogenov* v *Russia* 61 EHRR 4; *Andronicou and Constantinou* v *Cyprus* 25 EHRR 491.

[71] Consequences can be brought about intentionally in the sense the agent acted in pursuit of a particular goal. The agent intentionally brings about the natural consequences of that action, whether or not the specific consequence was the goal in pursuit of which they acted. See Chapter 2.2.

Furthermore the Court has adopted the *Stewart* approach in cases where the action was intended as a use of force. In *Giuliani* for instance the carabiniere did not directly intend to kill the protestor, though he did deliberately discharge his firearm as a warning. In *Finogenov* the gas was used to incapacitate hostage-takers. Police in *Andronicou* fired their weapons to save a hostage. These were all law-enforcement contexts where the state agents were using physical power in pursuit of their law-enforcement objectives. Contrast this with M's action. He did not intend to use force – using force was neither the consequence he directly intended nor a consequence he foresaw. Given the factual context this scenario bears greater resemblance to *Parents* than to *Stewart* and a broad approach to intention in this case may be inappropriate.

Use of live rounds in this exercise was a tragic mistake. M thought he was loading blank rounds into his rifle. State agents are not infallible and the Court has repeatedly recognised this. Where state agents honestly believe, for good reasons, that a use of force is absolutely necessary, the use of force does not constitute a violation of Article 2 even if the information later turns out to be false.[72] In *McCann* the SAS officers honestly believed, on the basis of available intelligence, it was absolutely necessary to use force against the IRA operatives. Similarly in *Bubbins* the police believed they were in danger when a man aimed a gun at them. They were in no *actual* danger since the gun was a highly-detailed replica.[73] The Court deferred to their assessment of the need for force in the situation.[74] But the mistakes in these cases are distinct from M's mistake.

[72] *McCann* v *United Kingdom* 21 EHRR 97, §200.
[73] *Bubbins* v *United Kingdom* 41 EHRR 24, §§10-63.
[74] ibid, §204.

The 'honest mistake' rule has only been used to excuse the use of force in law-enforcement situations where facts subsequently emerge suggesting the use of force did not satisfy the 'absolutely necessary' test in Article 2(2). But Corporal M did not make a mistake about whether force was absolutely necessary. He did not fire his gun because he mistakenly thought it was necessary to use force. The Court has never used the 'honest mistake' rule to suggest a deprivation of life was unintentional. Similarly the fact that M mistakenly loaded live ammunition into his rifle does not mean the resultant deprivation of life was unintentional. His mistake about the live ammunition is a plausible basis for adopting a narrow approach to intention, such that only directly-intended consequences are "intentional" for the purposes of Article 2. But his action (*FINGER-MOVING*) was done with the purpose of squeezing the trigger. Squeezing the trigger and all the natural consequences of that (including W's death) were brought about intentionally. Under some definitions of intention, there was an intentional deprivation of life in this case.

I have argued it is wrong to determine the meaning of intention (and therefore the scope of Article 2) on the basis of whether there is an applicable exception to justify a prima facie violation of the Convention.[75] Article 2 creates a presumption that the right to life is violated where there has been an intentional deprivation of life. This presumption can be rebutted according to the law-enforcement provisions of Article 2(2). Where the rebuttals are so narrowly-defined and "intentional deprivation of life" is interpreted broadly the law places an impossible burden on states. If W's death was an intentional deprivation of life there is a presumed violation of Article 2 that cannot be rebutted since W did not die as a result of a use of force that was no more than absolutely necessary in a law-enforcement operation as envisaged by Article 2(2). Depending upon the approach to intention, this

[75] Section 1.1.2.

case may engage the negative obligation, but also raises issues under the positive obligation to protect individuals from threats to their lives.

2.2. POSITIVE OBLIGATION

States must protect individuals from risks to their lives. In addition to taking positive measures to defend people against criminal acts of third parties,[76] state authorities must also regulate and monitor inherently dangerous activities.[77] Even when used correctly in experienced hands, use of firearms is inherently dangerous and should therefore be strictly controlled. Yet training exercises such as these are a routine part of military life. Unlike the exceptional danger that arose from the rubbish tip in *Öneryıldız* the use of firearms and its associated risk is commonplace for soldiers.

In *Stoyanovi* v *Bulgaria* the applicants' son was an experienced paratrooper taking part in a parachute jump from a helicopter. When he made his jump he hit his head on the helicopter's tyre and was knocked unconscious. He fell freely and died when he hit the ground, having never regained consciousness.[78] The Court judged it is part of the 'essential functioning' of the armed forces that soldiers engage in activities posing a risk to life.[79] The parachute jump in question was considered to be an 'ordinary part of military duties' for the applicants' son.[80] The fact these inherently dangerous activities are commonplace does not mean that states are not required to monitor those activities. On the contrary, it can be argued the case for regulation of such activities is stronger since people are exposed to

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[76] *Osman*, §116.
[77] *Öneryıldız*, §90.
[78] For more detailed facts see *Stoyanovi* v *Bulgaria*, App No 42980/04 (ECtHR, 9 November 2010) §§6-11.
[79] ibid, §61.
[80] ibid.

the risks more frequently and the probability of harm occurring is therefore greater. The applicants in *Stoyanovi* did not allege the state intended to harm their son, or that his death was the result of insufficient control or regulation of the exercise.[81] But the Court reinforced the principle that

> Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum.[82]

In W's case, there was a published armed sentry procedure including provisions designed to prevent cross-contamination of live and blank ammunition. The existence of these regulations demonstrates the Army acknowledged existence of a real and significant risk of cross-contamination and the accidents that might result from it. If the regulatory framework was not implemented and followed rigorously, the Army could reasonably suspect there was a significant risk of an accident of the type that killed Recruit W.

There were general systemic issues with the safety of this exercise and existing safety regulations were not followed correctly. The Health and Safety Executive ("HSE") recorded a Crown Censure of the Ministry of Defence,[83] noting there *were* published regulations for safe armed sentry procedures and safe handling of live ammunition. These regulations stated two magazines of live rounds were to be given to the sentry, taped together (that is, not loaded into the weapon) and that a written record would be made to trace the live

[81] ibid, §62. The applicants alleged the investigation into their son's death had been insufficient to discharge the state's procedural obligation under Article 2.
[82] ibid, §61.
[83] As an emanation of the Crown the armed forces are immune from prosecution under health and safety legislation. However the Health and Safety Executive may record a Crown Censure in respect of circumstances where, but for Crown immunity, it could have secured a conviction. Health and Safety at Work etc Act 1974, s 48(1).

magazines.[84] Instructors were not provided with a copy of these regulations and the procedures were not cross-referenced in the training manual they received. The officer in charge on the day in question was inexperienced and unaware of safety protocols for the armed sentry procedure.

There were clear provisions regulating the armed sentry procedure. But these regulations were not adequately complied with, nor was there sufficient oversight from superior officers. The HSE investigator remarked that organisational arrangements for ensuring commanders were aware of the armed sentry procedure were weak.[85] The investigator noted a 'complete absence of any structured proactive monitoring of whether the controls in the [armed sentry procedure] were being applied or complied with'.[86] There was some degree of supervision of training, but this was geared to ensure the provision of quality instruction rather than to monitor safety.[87] On the basis the armed sentry procedure was not explicitly pointed out to troop commanders, the military authorities ought to have known the regulatory framework would not be implemented rigorously and there was a real risk of an accident occurring of the type that killed W.[88]

In order that states are not burdened with impossible responsibilities the Court stated that when faced with threats to individuals' lives, states must take such reasonable measures as are within the scope of their powers,[89] but are not required to take steps that would

[84] HSE Crown Censure, 5-6.
[85] ibid, 4.
[86] ibid, 6.
[87] ibid.
[88] On constructive knowledge see Chapter 3.2.2.2.
[89] *Osman*, §116.

involve an 'impractical diversion of resources'.[90] In the present case very simple measures could have been taken that would have decreased the likelihood of this accident happening or even prevented it outright. The system of regulating the inherently dangerous activity was already in place, just poorly executed. The armed forces could have prevented this accident by making copies of the armed sentry procedure available to training instructors, or even incorporating it into the training manual. Furthermore senior officers supervising the quality of training should also have been tasked with monitoring implementation of safety regulations.

The Court said in *Stoyanovi* that where the state authorises or organises inherently dangerous activities and properly enacts and implements an appropriate and effective system ensuring the safety of participants, death resulting from 'negligent conduct of an individual or the concatenation of unfortunate events' does not constitute a violation of Article 2.[91] Such blanket statements are unhelpful and shortsighted. In Recruit W's case existing safety regulations were not implemented properly. But this displays negligence on the part of instructors and their superiors. Furthermore W was killed as a result of a series of events unfolding in an unfortunate way. Had he not been directly in front of Corporal M, W would not have been shot. Individuals' negligent conduct and the 'concatenation of unfortunate events' can demonstrate the regulatory system is either insufficient or at least not implemented properly. Negligence and fate unfolding can be symptoms of a greater problem. Yet the Court was willing to base Article 2 liability on negligence and fate in

[90] *Kılıç*, §76.
[91] *Stoyanovi*, §61.

Kalender,[92] demonstrating the approach seems to be based on the Court's discretion rather than principle.

The military authorities took measures to regulate the use of live rounds in armed sentry procedures to prevent cross-contamination with the blanks used in training, but the implementation of this regulatory framework was poor. The Court in *Öneryıldız* made clear it is insufficient merely to enact a regulatory framework without enforcing it.[93] The use of live rounds is inherently dangerous, and there was an obvious risk that someone could be harmed if the live rounds became mixed in with the blanks. This accident might have been prevented if the military authorities had circulated the regulations to training instructors and monitored safety as well as quality of training. Admittedly training exercises are supposed to be difficult, to prepare soldiers for the tasks ahead.[94] The risk to Marine B in the Brecon Beacons above was incidental to the nature of the exercise inasmuch as the exercise was designed to challenge his physical endurance. The same cannot be said for the risk to Recruit W. The risk to W came from elements external to the exercise, which should have been kept strictly separate.

Both of the scenarios dealt with so far considered training exercises in the United Kingdom. I have argued the negative obligation is not engaged on the basis of adopting a narrow interpretation of intention, which the Court has favoured when a more inclusive interpretation of 'intentional deprivation of life' would lead to results that are absurd in the context of the training exercise paradigm. In both of these cases more could have been

[92] *Kalender*, §49.
[93] *Öneryıldız*, §§94-96.
[94] Section 1.2.

done to prevent the soldiers from dying. Marine B and Recruit W died in accidents during training, but how does Article 2 apply to combat operations? I shall turn to this question now.

3. FRIENDLY FIRE

During the 2003 invasion of Iraq British soldiers from two battlegroups were ordered to secure a vital supply line. This required securing crossings of the Shatt Al-Basra canal and controlling civilian movements in and out of Basrah city. Lieutenant P's 2nd Royal Tank Regiment ("RTR") squadron secured a major bridge over the canal with three Challenger II tanks. The squadron knew the main threat to their position was from an enemy-held university compound to the north-east. A small concrete dam, which did not appear on out-dated battlegroup command maps, crossed the canal to the north of Lieutenant P's location. A squadron of The Queen's Royal Lancers ("QRL") assumed a defensive position at the dam in two Challenger II tanks.

There were a number of miscommunications to the RTR squadron regarding arcs of fire, command boundaries and the relative positions of friendly troops. Lieutenant P was disoriented and, believing he was facing the university compound, misidentified the QRL squadron as enemy troops. He launched heavy artillery shells on the QRL position. Corporal A and Trooper C were killed, and several others were left with life-changing injuries.[95]

[95] The facts of this case form the basis of one of the claims in *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52 (hereafter "*Smith (No 2)*"); the facts are given in the judgment of Lord Hope DP. More detailed facts appear in the Army Board of Inquiry Report into the incident, available at <webarchive.nationalarchives.gov.uk/20121203132830/http://www.mod.uk/NR/rdonlyres/C

3.1. PRELIMINARY ISSUES: EXTRATERRITORIALITY AND ARMED CONFLICT

The incident occurred outside the territory of the United Kingdom and outside the Council of Europe's *espace juridique*. However states are still bound by the Convention when they act abroad. States must guarantee Convention rights to everyone 'within their jurisdiction'.[96] Jurisdiction is the 'threshold criterion' for establishing whether individuals have enforceable Convention rights against the state.[97] The usual presumption is that states exercise jurisdiction throughout their own territories,[98] but also when they exercise effective control over foreign territory.[99] Considering this accident took place during active hostilities between British and enemy troops in the region, it might not be certain the UK exercised effective control over the territory to engage Convention obligations.

However Council of Europe member states must guarantee Convention rights to anyone under their authority and control anywhere in the world.[100] British soldiers are always under the United Kingdom's authority and control, even when deployed abroad:

> Once the concept of jurisdiction is understood to be concerned with what a state actually does rather than with the legal basis or legitimacy of its activities, it does

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2384518-7EBA-4CFF-B127-E87871E41B51/0/boi_challenger2_25mar03.pdf> accessed 18 November 2014 (hereafter "Board of Inquiry (1)").

[96] European Convention on Human Rights, Article 1. See Chapter 1.

[97] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' 25(4) *LJIL* 857, 857.

[98] *Ilaşcu* v *Moldova and Russia* 40 EHRR 46, §313.

[99] *Loizidou* v *Turkey (Preliminary Objections)* 20 EHRR 90, §62.

[100] *Cyprus* v *Turkey (No 1)* 4 EHRR CD 482, 586; *Al-Skeini* v *United Kingdom* 53 EHRR 18, §136. Chapter 1.1.2.

> not make sense to limit the concept to some subset of circumstances in which the state exercises extraterritorial control over individuals.[101]

The High Court recently echoed the Supreme Court's ruling in *Smith (No 2)* that soldiers are within British jurisdiction for the purposes of Article 1 when deployed abroad.[102]

The United Kingdom was obliged to guarantee A and C's right to life under the Convention, even though they were killed overseas. But they were killed during a period of active hostilities. There is no provision in the Convention explicitly stating Convention rights are applicable in times of armed conflict. Article 15 of the Convention expressly permits derogation from Convention provisions in times of 'war or public emergency threatening the life of the nation'.[103] Where there has been a valid derogation, the Convention still applies but states may do things that would not ordinarily be permitted under the Convention. In the absence of a valid derogation[104] states continue to be bound by *all* of their Convention obligations. The International Court of Justice has clarified its position that human rights treaties continue to be in force during armed conflicts, a view echoed by the UN Security Council.[105] There was no valid derogation in this case so the United Kingdom was still bound by its obligations to A and C under the Convention.

Conduct of hostilities is governed by the laws of armed conflict ("LOAC"). LOAC makes specific provision for protecting those who do not participate in combat and for restricting

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[101] *Al-Saadoon and Others* v *Secretary of State for Defence* [2015] EWHC 715 (Admin), [100] (Leggatt J).
[102] ibid, [116] (Leggatt J); *Smith (No 2)*, [55] (Lord Hope DP).
[103] Article 15(1).
[104] As defined by Article 15(3).
[105] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, §25; UNSC Res 1894 (11 November 2009) UN Doc S/Res/1894 (2009), Article 1.

the means and methods of warfare.[106] LOAC does not protect soldiers against their own state – it is silent on how states should treat their own soldiers.[107] This is not to say that LOAC permits states to mistreat their soldiers, but it does not prohibit that mistreatment either. As such Corporal A and Trooper C may not have any enforceable cause of action against the United Kingdom under LOAC. However the continued application of the Convention protects soldiers against arbitrary or excessive use of state power during overseas deployments.

Though this accident took place during active hostilities abroad when LOAC applied, the established legal position is that the Convention continues to apply during armed conflicts and states must guarantee the Convention rights to individuals under their authority and control, even outside their own territories. These preliminary issues identified here could be postulated away if this scenario was reimagined as taking place during one of the current armed conflicts within Council of Europe member states (notably Turkey, Georgia and Ukraine) or a hypothetical armed conflict in British territory.

3.2. NEGATIVE OBLIGATION

A and C were killed as a result of a state agent's actions. Lieutenant P pushed a button that fired artillery rounds at the QRL position. His body moved, under his control, in such a way that pushed the button. This movement caused A and C's deaths. Whether P's action resulted in their deaths depended upon various other factors aligning, although this is insufficient to break the causal link. A and C were thus deprived of their lives. If this

[106] LOAC is contained in a number of international instruments, in particular the four Geneva Conventions of 1949 and their Protocols, and customary international law. International Committee of the Red Cross, 'War and Law' (*International Committee of the Red Cross*) <www.icrc.org/en/war-and-law> accessed 7 March 2017.
[107] See Introduction.

deprivation of life was intentional there is a rebuttable presumption that Article 2 has been violated.

This situation is quite different from when Recruit W was killed during training.[108] First the context was totally different. Recruit W's training exercise was designed to be challenging but there was not supposed to be any danger to trainees (who were still very early in their training), and certainly no danger from firearms. In this case, Lieutenant P was acting in an armed conflict situation – this was not training, the dangers and risks were real and an inherent characteristic of the activity. Corporal M did not act to purposefully bring about Recruit W's death. When he squeezed the trigger of his rifle he was not trying to cause any harm. But Lieutenant P's action was deliberate and calculated to cause harm to his targets.

This may or may not have been an intentional deprivation of life depending upon one's approach to intention. On the Court's broadest interpretation the fact that P acted intentionally when he pushed the button suffices and it is unnecessary to examine whether he intended to bring about A and C's deaths.[109] Under this approach Article 2's intentionality requirement attaches to the act, rather than the consequences it causes. Considering the definition of action as intentional bodily movement,[110] the distinction between action and intentional action collapses. P controlled the movement of his body in the way he wanted to do it. This is consistent with the Court's approach in *Yaşaroğlu* that a

[108] Section 2.
[109] *Gül*, §77.
[110] Chapter 2.1.

reasonably foreseeable death is not an intentional deprivation of life in the absence of an intentional action.[111]

On the narrowest understanding of intention, an intentional deprivation of life is a directly-intended deprivation of life. Not only must death result from an intentional action, the agent must also have wanted to bring about these consequences and acted specifically in order to bring them about.[112] Given the armed conflict context and the heavy artillery weapons P used, we can reasonably surmise that P directly intended to kill the people at the target site and that he acted intentionally to bring this about. But he did so on the mistaken belief he had targeted enemy soldiers. Two questions arise. First is the effect of P's mistake on his intention. Secondly is the legal relevance of this mistake.

3.2.1. Intention and Mistakes

Direct intention unifies three philosophical senses of intention as intention for the future, *INTENTION-WITH-WHICH* and intentional action.[113] Lieutenant P acted intentionally. But did he bring about the consequence he intended to? He wanted to fire his weapons – this was not like *Yaşaroğlu* where the officer's gun misfired. He wanted to attack the QRL position – this was not a case of his shot landing wide of the target. Everything happened as he wanted it to, with the exception of whom he killed. He wanted to kill his targets and acted in a way that would bring this about.

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[111] *Yaşaroğlu*, §55.
[112] This unifies the three sense of intention in philosophy. Chapter 2.2.
[113] Chapter 2.2.

The *INTENTION-WITH-WHICH* Lieutenant P acted was killing enemy soldiers. In philosophy, *INTENTION-WITH-WHICH* an agent acts places the action within a wider social context and illustrates the agent's aims.[114] It is a 'conduct-controlling pro-attitude'.[115] P's desire to bring about particular consequences still controlled his conduct, whether or not he actually accomplished the specific aims he set out to. Indeed *INTENTION-WITH-WHICH* is a statement about action taken in pursuit of a specific goal but which recognises the possibility of failure.[116]

In domestic criminal law, P intended the consequences he foresaw as resulting from his conduct.[117] In 2013 South African Olympic Gold-medallist Oscar Pistorius was awoken in the middle of the night by what he thought was an intruder. He shot four times through a closed bathroom door. It turned out there was no intruder. Pistorius' girlfriend, Reeva Steenkamp, was behind the bathroom door. She was pronounced dead at the scene.[118] Pistorius claims to have believed Steenkamp was in bed. At his trial the judge applied a *dolus eventualis* test and found Pistorius had not foreseen that his action would result in Steenkamp's death. He was thus acquitted of murder.[119]

The Director of Public Prosecutions appealed. The South African Supreme Court of Appeal held the judge posed the *dolus eventualis* test incorrectly. It made no difference that Pistorius did not foresee killing Steenkamp. What was relevant for the *dolus eventualis* test

[114] Chapter 2.2.
[115] Michael Bratman, *Intention, Plans, and Practical Reasoning* (HUP 1987) 20.
[116] Elizabeth Anscombe, *Intention* (OUP 1963) 56-57.
[117] Chapter 2.2.2.
[118] For more detailed facts see *State* v *Pistorius* (CC13/2013) [2014] ZAGPPHC 793.
[119] ibid, 3329.

was whether he foresaw killing the person behind the bathroom door.[120] Pistorius had, in fact, foreseen that shooting through the bathroom door might kill *whomever* was behind it and reconciled himself to that possibility. The fact he was mistaken as to the person's identity did not affect his liability under this inclusive criminal law approach to intention.[121]

On this understanding of intention, P's misidentification of the QRL squadron does not affect his intention to kill them. Suppose Sally intends to kill her husband, but kills Jack (whom she mistakenly believes to be her husband). Sally killed Jack intentionally. She killed him because she thought he was her husband, but that is her motive rather than her intent. The intent to kill attaches to Jack, whether or not he is who Sally thought he is.[122] Pistorius' trial judge discussed the notion of error *in objecto.*[123] Sally intended to kill Jack – her motive for doing so was that she thought he was her husband. Pistorius intended to kill Steenkamp – his motive was he thought she was an intruder. In the same way, Lieutenant P intended to kill Corporal A and Trooper C – his motive was he thought they were enemy troops.

Article 2 creates a framework within which states must justify their agents' actions that kill people. The point of Article 2 is safeguarding human life and limiting in quite strict terms when it is permissible for state agents to kill people. This encourages an expansive interpretation of the intentionality requirement. If Lieutenant P's mistake about his targets' identity renders this an unintentional deprivation of life, his use of force would not

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[120] *Director of Public Prosecutions, Gauteng* v *Pistorius* (96/2015) [2015] ZASCA 204, [32].
[121] ibid, [31].
[122] JRL Milton, 'A Stab in the Dark: A Case of *Aberratio Ictus*' 85 *SALJ* 115, 118.
[123] *State* v *Pistorius*, 3325.

constitute a prima facie violation of Article 2 and would therefore not have to be justified according to the absolute necessity and proportionality requirements.[124]

The correct conclusion is that this was indeed an intentional deprivation of life. Lieutenant P moved his body intentionally such that it constituted action. This action resulted in A and C's deaths. P acted intentionally (in the sense of controlling the movement of his body according to how he wanted to move his body), he brought about A and C's deaths intentionally (in the sense of their deaths occurring in the course of his action to bring about a particular state of affairs) and he directly intended their deaths (inasmuch as their deaths was the outcome he was pursuing when he acted. His mistake about their identity is not a plausible basis for claiming that he did not intentionally deprive A and C of their lives.

3.2.2. Law-Enforcement Exceptions

Intentional deprivation of life can be justified where it is absolutely necessary and proportionate to achieving the law-enforcement objectives established in Article 2(2)(a)-(c). Lieutenant P targeted A and C believing they were enemy soldiers, but there is no evidence he felt they would imminently attack him or anyone else. Though Article 2(2)(a) permits use of force where absolutely necessary in defence of unlawful violence, lethal force is only permissible to prevent an imminent, deadly act.[125] The Court defers to state agents' heat-of-the-moment assessment of necessity,[126] but in this case Lieutenant P could not have honestly believed, for good reason, that a deadly attack was imminent. His use of force

[124] Chapter 3.1.2.
[125] *Nachova* v *Bulgaria* 42 EHRR 43, §95.
[126] *McCann*, §200; *Bubbins*, §204.

was not in pursuit of one of the law-enforcement objectives, so the intentional deprivation of life is not justified.

This is just the first problem of applying the law-enforcement provisions to the armed conflict paradigm. It is a matter of fact that during conflict use of force is not limited to situations like those listed in Article 2(2)(a)-(c). Soldiers on opposing armies attack each other without provocation. This is permissible under the applicable LOAC.[127] This is the second challenge of applying the law-enforcement provisions to armed conflicts. Article 2(2) permits use of force to counter *unlawful* violence, but under the applicable legal regime it is not unlawful for enemy soldiers to attack each other.[128] Suppose the QRL squadron were Iraqi soldiers as Lieutenant P believed and they were preparing to attack his position. Lieutenant P did not use force to protect himself against unlawful violence since LOAC permits this attack. Lieutenant P might be forgiven for his misidentification of his comrades as enemy soldiers, but under the Convention his use of force was not justifiable. The lack of an applicable exception to the general prohibition on intentional deprivation of life in this instance means that Corporal A and Trooper C's right to life was violated in its negative aspect.

This may be the correct position, but it raises questions about how appropriate it is to apply law-enforcement provisions to armed conflict situations and whether there is room

[127] First Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts ("AP1") (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512, Article 50(1).

[128] There are several exceptions and limitations to this generally permissive rule, such as the prohibition on certain means and methods of warfare. For example weapons 'inflicting unnecessary suffering' are banned: AP1, Article 35(2).

for an implicit armed conflict exception to the general prohibition on intentional killing.[129] Article 2 defines the situations in which force is justifiable by reference to the applicable law and this makes application of the law-enforcement provisions to armed conflict operations untenable. Attacks that directly target civilians are prohibited,[130] as are those causing disproportionate civilian harm,[131] but LOAC otherwise defines "unlawful" violence in quite restrictive terms. This might make it impossible to justify soldiers' use of force during armed conflict under the Convention – not only when they launch an unprovoked attack against the enemy, but potentially also when they act in self-defence. This would unacceptably impinge the armed forces' ability to act and would result in the possibility of enemy soldiers claiming the UK had violated their right to life, even though the attack was permitted under applicable LOAC.

If the Convention is to avoid placing unreasonable burdens on states, an armed conflict exception to the general prohibition on intentional deprivation of life should permit state agents to use force against enemy combatants, even where there is no threat of immediate attack. Any such exception should recognise that the permitted law-enforcement objectives in Article 2(2) includes by implication acts of war that are lawful for the purposes of LOAC. The problem with implying an armed conflict exception in this way is that use of force is pursuit of lawful acts of war would still have to pass the absolute necessity threshold, since Article 2(2) permits use of force that is absolutely necessary in pursuit of the recognised objectives.

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[129] An alternative approach is for the Council of Europe's Parliamentary Assembly to enact an additional Protocol detailing an armed conflict exception to Article 2 to address issues identified in this thesis.

[130] AP1, Article 48. A civilian is any person who is not a combatant: AP1, Article 50(1). Combatants are defined in the Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 4(A)(1)-(3), (6) and AP1, Article 43.

[131] AP1, Article 57(1)(c).

There may be room for the Court to imply an armed conflict exception to Article 2 and the Court has shown its willingness to interpret the Convention creatively. There is no explicit mention of an armed conflict exception in the text of Article 2, but this should not prevent construction of one. The lack of explicit textual reference to a positive obligation to protect people's lives did not prevent the Court interpreting the Convention in such a way as to recognise one.[132] Such an implied exception could justify use of force against enemy soldiers, but it does not automatically follow that states are justified in killing *their own* soldiers. One approach might be to permit honest mistakes in targeting so that friendly fire accidents such as this one do not constitute a violation of Article 2, but would not justify deliberate killing of friendly troops. For instance, summary executions for military offences would not permitted under the armed conflict exception.

Article 15 of the Convention provides that states may derogate from their Convention obligations in 'times of war or public emergency threatening the life of the nation'. States are permitted to take measures that would otherwise violate Convention rights to the extent required by the exigencies of the situation. This includes deaths resulting from lawful acts of war.[133] But states must explicitly invoke this power by informing the Council of Europe's Secretary General.[134] Since Article 15 explicitly declares that deaths resulting from lawful acts of war will not constitute a violation of the right to life where a valid derogation is made, a good faith interpretation of Article 2 should not include an implied

[132] Chapter 3.2.
[133] European Convention on Human Rights, Article 15(2).
[134] ibid, Article 15(3).

exception having similar effect. Such an interpretation would permit states to get around the need to derogate and avoid judicial scrutiny of the derogation.[135]

The failure to derogate from the Convention has not stopped the Court from interpreting other Articles to include implicit armed conflict exceptions. In *Hassan* v *United Kingdom* the Court had to consider whether the capture and detention of an Iraqi national during the occupation of Iraq violated the Article 5 freedom from detention without trial.[136] The Court considered that the detention complained of did not fall within any of the circumstances permitting detention.[137] However, LOAC did permit states to take measures during armed conflict to detain without trial prisoners of war or individuals threatening security.[138] The Court was reminded of its judgment in *Golder* v *United Kingdom* that the Convention must be interpreted in harmony with other applicable norms of international law.[139]

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[135] When adjudicating derogations from the Convention the Court must first determine whether there is a 'war or other public emergency threatening the life of the nation' that justifies derogation, and then whether the actual derogation measures are strictly required in the circumstances. See for example *Greece* v *United Kingdom* II YB ECHR 174; *Lawless* v *Ireland (No 3)* 1 EHRR 15.

[136] For more detailed facts see *Hassan* v *United Kingdom*, App No 29750/09 (ECtHR, 16 September 2014), §§10-29. Article 5 provides that 'No one shall be deprived of his liberty' except in one of the circumstances enumerated in sub-paragraphs (a)-(f).

[137] *Hassan*, §97.

[138] "The Detaining Power may subject prisoners of war to internment." Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 21.
"The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 42.

[139] ibid, §100. See *Golder* v *United Kingdom* 1 EHRR 524, §29 citing Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Articles 31-33.

The Court agreed that it was not prevented from 'taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5'.[140] The Court concluded that Article 5 can be interpreted as permitting detention without trial of prisoners of war and civilians posing a threat to security in line with provisions of LOAC.[141] Insofar as detention complied with LOAC and certain procedural safeguards were put in place, it did not constitute a violation of Article 5. The Court's approach in *Hassan* presents an interesting model for future attempts to interpret the Convention harmoniously with LOAC.[142]

The Court's approach in *Hassan* was to "accommodate" internment permitted in LOAC within the regime of permitted detention under Article 5. It did so even though the UK had not exercised its right to derogate from its Convention obligations. In a similar way, soldiers' legal permission to attack enemy soldiers without provocation during armed conflict may be "accommodated" within the range of permissible exceptions to Article 2. Such an accommodation may be appropriate because it recognises a limited remedy to the disharmony between the Convention and LOAC and cannot be misunderstood as a reinterpretation of more general application. Perhaps the best solution to the issues addressed in this thesis is for the Council of Europe's Parliamentary Assembly to enact a new Protocol to the Convention specifically permitting the use of lethal force against enemy combatants in accordance with LOAC during armed conflicts.

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[140] *Hassan*, §103.

[141] ibid, §104.

[142] Cedric De Koker, '*Hassan* v *United Kingdom*: The Interaction of Human Rights Law and International Humanitarian Law with Regard to the Deprivation of Liberty in Armed Conflicts' 31(81) *Utrecht Journal of International and European Law* 90.

The need for an implied armed conflict exception to the negative obligation arises because soldiers on opposing armies are not acting unlawfully by attacking one another, and so the permitted exception of 'defence against *unlawful* violence' cannot apply. In non-international armed conflicts, defined as ongoing hostilities between a state and an organised non-state armed group (of which the IRA is a good example),[143] the LOAC rules about minimising suffering and civilian damage continue to bind parties to the conflict.[144] However the International Committee of the Red Cross agrees that members of non-state armed groups who engage in hostilities against the state would ordinarily be considered to be committing an offence under domestic criminal law.[145] Soldiers' use of force against members of non-state armed groups can thus fall within the parameters of the Article 2(2)(a) law-enforcement exception for protecting individuals against unlawful violence.[146]

Formal derogation from Article 2 remains an option. As yet no state has ever invoked its right to do so. It may be that states wish to avoid the negative political effects of explicitly declaring they will deliberately kill people and immunise themselves against the legal consequences. Perhaps the prevailing *Banković* wisdom that the Convention does not apply beyond the Council of Europe *espace juridique* except in strictly limited

[143] International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (*International Committee of the Red Cross*, March 2008) <www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> accessed 23 May 2017.

[144] Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950), Common Article 3.

[145] International Committee of the Red Cross, 'Fourth Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report' (*International Committee of the Red Cross*) <www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf> accessed 23 May 2017.

[146] For a summary of this approach in relation to internment under Article 5, see Ed Robinson, 'The European Convention on Human Rights in Non-International Armed Conflict – Revisiting *Serdar Mohammed*' (*EJIL:talk!*, 22 August 2016) <www.ejiltalk.org/the-european-convention-on-human-rights-in-non-international-armed-conflict-revisiting-serdar-mohammed/> accessed 23 May 2017.

circumstances[147] meant no states considered derogation was necessary for their overseas military operations. The European Court's ruling in *Al-Skeini*[148] was the basis for the British Supreme Court's ruling in *Smith* that soldiers are within British jurisdiction when deployed abroad. The British government has since announced plans to derogate from the Convention in respect of future overseas deployments.[149]

The government claims the move is to curtail the 'industry of vexatious claims' against service personnel under human rights law.[150] Critique of this ostensible motivation aside,[151] the exact terms of future British derogation are unclear. Article 15 permits derogation from the right to life in respect of 'lawful acts of war',[152] and derogations can be a useful tool in making sense of the interplay between LOAC and human rights law.[153] The Policy Exchange think tank supports derogation and prioritisation of LOAC.[154] It remains to be seen whether the British government intends to derogate from its Article 2 obligations to *enemy* soldiers (which, considering that LOAC and human rights law take vastly different

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[147] *Banković* v *Belgium (Admissibility)* 44 EHRR SE5, §80

[148] 53 EHRR 18.

[149] Peter Walker and Owen Bowcott, 'Plan for UK military to opt out of European Convention on Human Rights' (*The Guardian*, 4 October 2016) <https://www.theguardian.com/uk-news/2016/oct/03/plan-uk-military-opt-out-european-convention-human-rights> accessed 18 April 2017.

[150] Ministry of Defence, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' (*Gov.uk*, 4 October 2016) <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations> accessed 18 April 2017.

[151] See for example Noam Lubell and Daragh Murray, 'Why human rights law is not a threat to the British armed forces' (*The Conversation*, 4 October 2016) <https://theconversation.com/why-human-rights-law-is-not-a-threat-to-the-british-armed-forces-66504> accessed 18 April 2017; Marko Milanović, 'UK to Derogate from the ECHR in Armed Conflict' (*EJIL:talk!*, 5 October 2016) <https://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/> accessed 18 April 2017.

[152] Article 15(2).

[153] Marko Milanović, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (OUP 2016).

[154] Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces From Defeat by Judicial Diktat* (Policy Exchange 2015).

approaches to use of force, might be a good idea), or whether the terms of the derogation will also include an abdication of their responsibility to protect *British* soldiers from enemy attack. It is also unclear whether a "lawful act of war" would include friendly fire accidents.

Though no state has taken advantage of its right to derogate from the right to life, the Court should not rush to hollow out individuals' Article 2 protections to avoid apparently unreasonable results simply because the state has not availed itself of the available justification. In this case, Corporal A and Trooper C were intentionally deprived of their lives, and there is no applicable exception to justify it. Had the UK lodged a valid derogation notice with the Council of Europe in respect of combat operations in Iraq, this might not have constituted a violation of Article 2.[155] But the UK had not communicated notice of derogation to the Secretary General and accordingly there has been a violation of Article 2 in its negative aspect. This case also raises questions under the positive obligation. Is this an accident the Army could have prevented?

3.3. POSITIVE OBLIGATION

The Court declared in *Osman* that states are obligated to protect individuals' lives in '*certain well-defined circumstances*'.[156] One such circumstance is where individuals' lives are threatened by the criminal acts of third parties. It defined another in *Öneryıldız.*[157] The

[155] This depends upon a number of conditions. First, the derogation itself must be valid. Second, the Court would have to determine whether the attack was a lawful act of war. If the QRL squadron had been Iraqi soldiers as P believed, his use of force would have been lawful for the purposes of LOAC. But LOAC does not regulate a state's actions towards its own soldiers, so this use of force is not governed under LOAC at all. Furthermore the Court is free to develop its own definition of "lawful act of war" and is bound to use LOAC as *lex specialis*.

[156] *Osman*, §116.

[157] *Öneryıldız*, §90.

Court also determined that hospitals must take positive measures to protect patients' lives[158] and states have special obligations towards people in their custody.[159] The Court has recognised these obligations over a number of years on a case-by-case basis, rather than all at once. The Court has never indicated that this is an exhaustive list of circumstances in which states must take positive measures to safeguard life. There is room to identify new expressions of the positive obligation to fit factual scenarios not yet considered by the Court.

Under the existing positive obligations the state was not required to take positive measures to safeguard A and C's lives. The QRL squadron was not at risk from criminal acts. If the QRL squadron had been Iraqi soldiers as Lieutenant P believed, it would have been lawful for him to target them under LOAC. Since LOAC does not regulate states' conduct towards their own soldiers, Lieutenant P's action was not unlawful for the purposes of the applicable legal regime, so the obligation to protect A and C from *unlawful* violence is not engaged.[160] Armed conflict is an inherently dangerous activity but the risks involved cannot be removed entirely. States should be required to take measures to protect their soldiers but the Court has not yet articulated how this legal obligation would work in practice. I propose that states' responsibility to safeguard soldiers' lives should manifest in an obligation to take reasonably practicable measures to avoid an unjustifiable increase in the risks to soldiers' lives. There is a persistent background risk to soldiers' lives for the duration of armed conflict, which cannot be wholly predicted, planned-for or prevented.

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[158] *Tarariyeva* v *Russia* 48 EHRR 29, §74.

[159] *Mižigárova* v *Slovakia*, App No 74832/01 (ECtHR, 14 December 2010) §89.

[160] LOAC is silent on how states must treat their soldiers. Whilst under the terms of LOAC it is not *unlawful* for Lieutenant P to target friendly troops, it is not necessarily *permitted* for him to have done so either.

But states must not, by their own actions or omissions, increase that risk without justification.

States should be under an obligation to prevent friendly fire wherever possible, although military commanders should enjoy a degree of discretion to determine how best to limit the chances of such accidents occurring. In many cases the Court has accepted it is not its role to dictate what actions states should take.[161] The Court retains the power to scrutinise the efficacy of concrete measures actually taken but does not lay down codes of conduct in the abstract. Thus it should be for states to determine how to protect their troops from friendly fire, according to the general principle established by the Court and subject to the Court's supervision.

In this case friendly fire resulted from disorientation on unfamiliar ground and a lack of up-to-date information about relative troop locations. An unjustifiable increase in the risk to soldiers from friendly fire might be prevented by ensuring troop locations are properly disseminated and soldiers are properly trained in orienteering. Naturally the fact that soldiers are fully trained will not prevent all accidents. For that reason the threshold for a violation of Article 2 should be quite high. In order for the right to life to have been violated states must have made substantial, unjustifiable failings that increased the risk of friendly fire. In so doing the standards set would protect soldiers from unjustifiable risks but also take account of the fact that armed conflict is a volatile and unpredictable situation in which circumstances can change rapidly.

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[161] *de Wilde, Ooms and Versyp* v *Belgium (Merits)* 1 EHRR 373, §93; *Golder*, §45; *Brannigan* v *United Kingdom* 17 EHRR 539, §59.

Better communication could have prevented the accidental targeting of the QRL squadron. The accident was not caused by rapidly-changing circumstances or by unexpected troop movements. In fact, squadrons had been stationed in the same positions for a number of days (although individuals stationed at each post had changed). In this case there was a failure to properly disseminate vital information about troop positions relative to the RTR squadron at the bridge. This increased the existing background risk of friendly fire posed by disorientation and identification difficulties in unfamiliar terrain. There was no justification for this failure. Reasonably practicable measures to prevent this unjustifiable increase in the risk would have been to mark arcs of fire and relative positions of friendly troops on RTR maps and making all members of the squadron of the troop aware of them.

In other positive obligation cases the Court has emphasised the importance of the state's knowledge of the risk. In the existing positive obligation frameworks states are required to take reasonable precautionary measures to prevent risks eventuating where authorities know or ought reasonably to know of a real and immediate risk to individuals' lives.[162] This standard should be adopted, in a slightly modified form, in the framework for protecting soldiers' lives from risks in armed conflict. Military commanders know, or ought reasonably to know, there is a general background risk to soldiers' lives in armed conflict – that risk comes from a multitude of sources, but it is safe to assume there is always a risk of some kind. Where commanders know or ought reasonably to know their actions increase that risk and they cannot justify that increase, it will constitute a violation of the right to life.

[162] *Osman*, §116; *van Colle* v *United Kingdom* 56 EHRR 23, §103; *Öneryıldız*, §§99-101.

In regard to the present case, all care must be taken to ensure soldiers are aware of friendly troop positions where they are known. Lieutenant P was not made aware of the QRL position and there was no justification for this failure. This accident happened against the backdrop of tension and hostility between British and Iraqi soldiers but there had been no change in circumstances for a number of days. The QRL soldiers had already identified the enhanced risk of friendly fire posed by their proximity to the RTR squadron at the bridge. A regimental liaison officer was dispatched to RTR command and assurances were given that the RTR knew of the dam's location and were aware of their orders regarding command boundaries and arcs of fire.[163] The RTR commanding officer noted the QRL position but did not disseminate the information before setting off to battlegroup command to receive his orders. He should have realised that, given the proximity of the two squadrons, his failure to make the QRL position known to his troops would increase the chance of friendly fire.

It is important to remember that, even if P received the proper information, he might *still* have misidentified the QRL as enemy soldiers, given his disorientation and that the attack took place at night. Had the information been properly cascaded to the RTR squadron there was little more the state could do to combat other contributory factors. Ensuring troops are fully aware of the relative location of friendly troops should suffice to discharge the obligation to take reasonably practicable steps to prevent unjustifiable increases in the risk. In this case reasonably practicable steps were not taken and the RTR commander should have been aware of the increased risk of friendly fire resulting from his subordinates' insufficient knowledge of the proximity of friendly troops. Accordingly Corporal A and Trooper C's right to life was violated in its positive aspect.

[163] Board of Inquiry (1), C.13.

States should be required to take positive steps to prevent unjustifiable increases in the risks to soldiers' lives during armed conflict. In this case the soldiers who died were deliberately targeted by friendly soldiers on the basis of misidentification. This action also constitutes an intentional deprivation of life that cannot be justified according to any of the law-enforcement exceptions to the general prohibition on killing. The Court has held that collateral damage does not constitute a per se violation of Article 2.[164] How might Article 2 protect soldiers who are killed during attacks on a different target?

4. CROSSFIRE

During the 2003 invasion of Iraq soldiers were commanded to control movements in and out of Az-Zubayr. Specific instructions on how to achieve this aim were not given, so the RTR established a number of vehicle check-points ("VCPs") on roads in and out of the town. At one such VCP soldiers used three Challenger II tanks to control passage along the road. Sergeant R was among them. R was wearing combat body armour, but his enhanced combat body armour ("ECBA") was withdrawn a few days earlier due to kit shortages. Having lately checked a vehicle and sent it on its way, R was dismounted when a local man, Z, approached and began throwing stones at him. R fired his weapon at Z but the gun jammed. He assumed a defensive position whilst attempting to clear the blockage, signalling to his colleagues he was in difficulty. Believing Z was holding a hand grenade, R's mounted comrades trained their weapons on him. Gunner G fired several rounds from a tank-mounted machine gun. Due to discrepancies between the gunner's line of sight and the weapon's position on the tank, the gun is inaccurate at close range, for which the

[164] Chapter 3.1.2.3.

gunner must compensate when taking aim. Though not in G's line of sight, R was killed.[165] The Army Board of Inquiry Report into his death found that, had he been wearing ECBA, R would have survived.[166]

4.1. NEGATIVE OBLIGATION

4.1.1. Intentional Deprivation of Life

Gunner G acted. His body movement was intentional under some description.[167] He moved his body in such a way as to squeeze the trigger and fire the weapon. His bodily movement was a sufficient causal condition of R's death. On a simple counterfactual account, without G's bodily movement the gun would not have fired and R would still be alive. More precisely, without G's bodily movement R would not have been killed *this way*. There is a causal link between G's action and R's death, such that there has been a deprivation of life for the purposes of Article 2.

Whether this deprivation of life violates Article 2 depends upon whether it was intentional. G acted intentionally. The Court determined in *Gül* that the agent's intention for the future is irrelevant.[168] On that approach the intentionality requirement attaches to the action rather than its consequences. G acted intentionally in the sense he moved his body in a controlled way and in the way he wanted. He also brought about R's death intentionally.

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[165] Ministry of Defence, 'Sergeant Steven Roberts' (*Gov.uk*, 24 March 2003, updated 28 May 2009) <www.mod.gov.uk/government/fatalities/sergeant-steven-roberts> accessed 12 February 2014. The facts are given in detail in the Army Board of Inquiry Report into Sergeant R's death, available at <http://webarchive.nationalarchives.gov.uk/20121203141954/http://www.mod.uk/NR/rdonlyres/D5015226-A05C-44B3-AA22-F3C2345A5C26/0/boi_sgt_roberts.pdf> accessed 18 November 2014 (hereafter "Board of Inquiry (2)").

[166] ibid, 88.

[167] Chapter 2.1.

[168] *Gül*, §77.

He acted in pursuit of a specific goal, and R's death was a reasonably foreseeable (though accidental) consequence of his action. R's death was not the consequence G *wanted* or *tried* to bring about, but he brought it about by intentional action. This satisfies the intention test in most cases where state agents use force in execution of their duties.[169]

G did not directly intend to kill R, inasmuch as he was not acting specifically with the desire and purpose of bringing about R's death. On the Court's narrowest interpretation of intention this was not an intentional deprivation of life. But this approach has usually been adopted in cases where, on the basis of the facts, it would be unreasonable to determine there was an intentional deprivation of life.[170] G deliberately used force. *Andronicou* represents a close factual approximation to this case. In that case, police officers used force to save a woman who had been taken hostage and she was killed in the process. The fact they meant to save her did not mean she was *unintentionally* deprived of her life. The same can be said of this scenario.[171]

This scenario differs from that of Corporal A and Trooper C. In that case Lieutenant P directly targeted the QRL position. He was mistaken as to the identity of the troops at that location, but he meant to fire in their direction. His mistake about their identity was not enough to render their deaths an *unintentional* deprivation of life.[172] In this case G meant to fire his weapon, but his shots hit the wrong target. This does not alter the fact he acted intentionally or that R was intentionally deprived of his life. The two cases are different but

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[169] See for example the Commission's dicta in *Stewart* and cases that follow it; *Finogenov*; *Andronicou; Giuliani*.
[170] For instance, *Parents*; *LCB*.
[171] But the Court appeared to adopt a looser arbitrariness standard in *Andronicou*. See Chapter 3.1.2.3.
[172] Section 2.1.2.

the nature of intention (both in philosophy and for the purposes of Article 2) is such that in neither case can the deprivation of life be considered unintentional.

Sergeant R's superiors acted when they gave the order to redistribute his ECBA. In the same way as the order for Marine B to participate in the SAS training exercise,[173] giving this order was an action – it involved a controlled bodily movement. The Board of Inquiry noted that R would have survived had he been wearing ECBA. It can be surmised that but for the superior officers' order, R would not be dead. This establishes a causal link between the order and R's death. R's death depended upon other factors outside the scope of *ORDER-GIVING* (such as R actually wearing his ECBA correctly) but this does not break the causal link.

However in Sergeant R's case there was an intervening act of the state that arguably supersedes the effect of *ORDER-GIVING* as the cause of R's death. G's bodily movement that squeezed the trigger is a more proximate cause. As well as being closer in time, the *TRIGGER-SQUEEZING* is sufficient to have caused R's death (if fate so aligns[174]). *ORDER-GIVING* was incapable of causing R's death without someone else subsequently acting. The *ORDER-GIVING enabled* R's death to some extent, but it cannot be considered the true cause of it. *TRIGGER-SQUEEZING* is the act of the *actual* killer that broke the causal link between the *ORDER-GIVING* and *DEATH*. There is a clear case that the trigger-squeezing constituted an intentional deprivation of life and accordingly a presumption that Article 2 was violated. This presumption can be rebutted if Sergeant R's death resulted from a use of force no more than absolutely necessary to secure one of the objectives listed in Article 2(2).

[173] Section 1.1.1.
[174] Section 1.1.1.

4.1.2. Law-Enforcement Exceptions

In this case, the most apposite of the three law-enforcement exceptions is the defence against unlawful violence. Certainly G's action was a use of force. He believed Z was holding a hand grenade and R was in danger. He can be considered to have honestly believed he was defending R against violence. The fact he was mistaken about the severity of the threat against R does not mean he was not acting in pursuit of personal defence and the Court defers to state agents' personal appreciation of the risk in a given situation.[175] G was defending R from violence but it remains to be seen whether this violence was unlawful.

In domestic criminal legal systems Z's actions would constitute unlawful violence. It is a crime to approach people and start throwing rocks at them. If this scenario were hypothetically taken out of the armed conflict scenario there would be no doubt this was unlawful violence. G honestly believed Z was holding a hand grenade, so use of force would be justified in principle under Article 2(2)(a). However this case took place during armed conflict, when LOAC applied. LOAC restricts conduct of hostilities to combatants and prohibits attacks on civilians or civilian objects.[176] Civilians are not permitted to attack soldiers in return for this protection. It was later determined that Z was a civilian but the soldiers at the VCP could not have known this for certain at the material time. Had Z been an Iraqi soldier his attack would not have been unlawful under applicable LOAC and G was not acting in defence of *unlawful* violence.

[175] *McCann*, §200; *Bubbins*, §204.
[176] AP1, Article 48.

In this scenario, G and Z's actions are judged according to different legal standards. Z's actions are tested against LOAC rules, and G's actions are judged according to more restrictive Article 2 law-enforcement rules. To some extent, this is made inevitable by the drafting structure of Article 2. The right to life permits use of force to defend against "unlawful violence" but the text of the Convention does not include a coherent internal theory of what "unlawful violence" is. What is unlawful must be determined by reference to the applicable legal regime. In this case the legal regime governing Z's actions is LOAC. Gunner G may have acted lawfully for the purposes of LOAC, but this thesis is not about whether he committed a lawful act of war. The pertinent question is whether his action, which constituted an intentional deprivation of Sergeant R's life, was a permitted use of force under Article 2(2) – and, accordingly, whether Sergeant R's right to life was violated. The question is not whether *Z* violated R's right to life. As such, his actions are not tested against the law-enforcement standards.[177]

The difficulty of applying the textual law-enforcement exceptions to the armed conflict paradigm becomes clear at this point. The law-enforcement framework seeks to reconcile the fundamental challenge of protecting *everyone's* right to life with recognition that it may be necessary to use force (which might result in death) against an individual in order to protect the majority or society at large. It does so by defining permissible use of force in strict, narrow terms.[178] Within that framework it is unacceptable for soldiers to attack enemy soldiers, even in self-defence, because the enemy soldier is not acting "unlawfully" for the purposes of the applicable LOAC. In the friendly fire case[179] the law-enforcement

[177] Additionally, Iraq is not a Convention contracting state and is not bound by its standards. As such, even if Z were an Iraqi soldier (as G believed) he would not have owed any Convention obligations to Sergeant R.
[178] Chapter 3.1.2.
[179] Section 3.

exceptions did not justify an unprovoked attack on (what was identified as) the enemy. But as this case illustrates, the law-enforcement provisions would not permit use of force against enemy soldiers even in self-defence. This is untenable and, more so than in the friendly fire case, demonstrates a greater need for an implied armed conflict exception to the general prohibition on intentional killing in Article 2.

Perhaps the most sensible solution to this problem is to omit the reference to illegality in Article 2(2)(a) and permit use of force in defence against bare violence, whether or not it could be described as unlawful under applicable legal systems. This would eliminate the impractical situation in which British soldiers in Iraq are permitted to attack enemy soldiers under LOAC, but are prohibited from doing so, even in self-defence, under Article 2. This would also relieve human rights tribunals of the task of determining complex issues arising under LOAC. To some extent this dodges the question of how to integrate LOAC and human rights law during armed conflicts. But determining an integrated and harmonious framework in which LOAC and human rights complement one another is not the human rights tribunals' job, nor is it the question posed by this thesis.[180]

If an implicit armed conflict exception to Article 2 permitted use of force in personal defence (even against violence that could be described as "lawful" under the applicable legal regime) human rights tribunals would not need to resolve conflicts of laws. In a case such as this one, though LOAC applies, the soldiers are also bound by UK law and military law. Under which body of law must the violence be considered "unlawful" for a use of

[180] Considering the text of Article 2 and explicit references to lawfulness it may be impossible to reconcile right to life protection with the permissive LOAC regime without creative interpretation of the Convention, in respect of Article 2 and the derogation principle in Article 15.

force to satisfy the Article 2(2)(a) criteria? Removing the "unlawful" element of the law-enforcement provisions during armed conflicts renders the conflict of laws question moot, since the Court does not have to determine that force was used in defence of *unlawful* violence.

In this scenario G used force to defend R from violence. Whether Z was a civilian or an Iraqi soldier does not affect G's right to use force in R's defence. Article 2 determines that the force used must be no more than absolutely necessary in pursuit of the permitted aim. Absolute necessity turns on the facts of each individual case. In this case G believed Z was holding a hand grenade. His mistake does not render his use of force a per se violation of Article 2, since the Court defers to state agents' appreciation of the circumstances.[181] The honest mistake rule should be preserved for an implied armed conflict exception because of the extreme and fast-changing circumstances in armed conflicts. Considering the honest belief that Z was threatening R with a hand grenade and the fact R was unable to defend himself, the use of force against Z was justified in principle.

The Court includes strict proportionality as part of the absolute necessity criterion.[182] According to this test the force used must be proportionate to the aim pursued and not inflict greater harm than it seeks to prevent. In this case, G's use of force was not "no more than absolutely necessary", and therefore a violation of Article 2, if less powerful weapons would have achieved the same aim. The troops did, in fact, try several other weapons before resorting to the tank-mounted machine gun, but all failed.[183] This was not an

[181] *McCann*, §200; *Bubbins*, §204.
[182] Chapter 3.1.2.1.
[183] Board of Inquiry (2).

automatic recourse to the most powerful weapon available. The soldiers believed there was an immediate threat to their comrade and themselves from a hand grenade. They perceived there was little time to act in R's defence. On the basis of this perception of the threat and the fact other weapons failed, the use of the tank-mounted machine gun is not disproportionate.

The question of proportionality is also an important concept in LOAC, although under that permissive regime it figures in the context of limiting the risk of harm to civilians and civilian objects. The proportionality requirement should be retained for the implied armed conflict exception, on the basis it permits soldiers to cause as much harm as is required by the exigencies of the situation but encourages them not to be gratuitous or gung-ho in their use of force. Under LOAC G's action would not be considered disproportionate because it did not create a risk to civilians that outweighed the military objective it sought.

This answers the question of whether the use of force against Z was justified in the affirmative. But that does not mean there has been no violation of *R*'s right to life. In this situation R was an innocent bystander who died as a result of a use of force intended to defend him. The Court is clear that though state agents' use of force might expose innocent bystanders to danger or even kill them, this will not, by itself, constitute a violation of Article 2.[184] The Court emphasised the role of proportionality in uses of force posing a threat to innocent bystanders.[185]

[184] Chapter 3.1.2.3.
[185] *Finogenov*, §199.

In *Finogenov* the risk posed to the hostages from the gas the authorities used was a '"lesser evil"' than the possibility of their captors blowing up the building.[186] In that case Russian authorities were forced to weigh the possibility of *some* hostages being killed as a result of their use of narcotic gas with the probability that *many more* would die if the separatist captors detonated their explosives. The gas posed a risk of harm but it was a smaller risk than the explosives and there was a higher chance that more hostages would survive the effects of the gas than would survive the explosives. This was particularly the case if adequate medical assistance was ready and prepared to attend those suffering an adverse reaction to the gas.[187] If Z had been holding a hand grenade as G believed, the risk to all the soldiers (including R) was greater than the risk to R from using the machine gun.

Part of the Court's position on collateral damage is that it will not constitute a violation of Article 2 if innocent bystanders die as a result of state agents' use of force provided the force is proportionate and not indiscriminate.[188] The Court's position recognises people are unpredictable and it is impossible to know how circumstances might change in a split-second. As has been demonstrated above state agents are not in total control of the consequences of their actions,[189] and the Court has recognised deaths can constitute an intentional deprivation of life even when death is the 'unintended consequence' of the use

[186] ibid, §226.
[187] ibid, §232. *Finogenov* is discussed in Chapter 3.1.2.3.
[188] *Andronicou*, §193.
[189] When action is individuated according to a fine-grained approach the agent's action is bodily movement, nothing more. When Gunner G moves his finger, squeezing the trigger and killing Sergeant R, his action is *FINGER-MOVING*. The eventual outcome of that action (Sergeant R's death) is dependent upon many factors either beyond the scope of G's *FINGER-MOVING*, or completely outside his control, such as weather conditions.

of force.[190] States would be under an impossible burden if collateral damage were never permissible, especially in the context of armed conflict situations.

States are under an obligation to act proportionately on the basis of facts available to their agents. The risk of Sergeant R being caught in the crossfire would have been far smaller had the soldiers used weapons with greater short-range accuracy, or indeed if Gunner G had adequately compensated for the machine gun's inaccuracy. But on the basis of the soldiers' honest belief Z had a hand grenade and the failure of other weapons, this was not a disproportionate use of force. The machine gun, though powerful and inaccurate, is not an indiscriminate weapon.[191] It is capable of being aimed. In the present case it was not aimed properly. This was unfortunate but it does not mean the use of force was disproportionate. On balance Sergeant R's right to life was not violated in its negative aspect. This depends upon an implicit armed conflict exception to the general prohibition on intentional killing that omits reference to legality in Article 2(2)(a). In the absence of such an interpretation of the Convention, Sergeant R's right to life was violated. This scenario also raises issues under the positive obligation.

In the analysis of this scenario I have suggested an implied armed conflict exception to the general prohibition on intentional deprivation of life. The general prohibition should continue to apply during armed conflict. The references to "law" in the law-enforcement provisions creates a confusing conflict of laws because of the overlapping legal regimes and involves human rights tribunals in determining the legality of actions under a regime over which they have no competence. Furthermore it leads to absurd results, since in many

[190] *Stewart*, 458.
[191] See Chapter 3.1.2.3.

cases soldiers' use of force against enemy soldiers could not be justified by Article 2(2). This would be the most apposite law-enforcement exception but it is inapplicable since Article 2(2) only permits use of force in defence against *unlawful* violence and LOAC permits soldiers to attack enemy troops. An armed conflict interpretation of Article 2 that omitted references to "unlawful" in Article 2(2) would allow application to armed conflicts of those legal standards established by the Court in peacetime, without any impractical or unreasonable results. Since those standards are heavily fact-dependent, the Court is able to take the exigencies of armed conflict into account when judging the facts of each case.

4.2. POSITIVE OBLIGATION

There are various circumstances in which the Court has recognised that states must protect people from risks to their lives.[192] I have suggested a new category of positive obligation for soldiers during armed conflict, according to which states are required to take reasonably practicable steps to prevent an unjustifiable increase in the risk to soldiers' lives. In the friendly fire case above, the failure to properly disseminate information regarding troop locations increased the risks of friendly fire and that failure could not be justified in the circumstances. How could this test apply to this case? The decision to relieve Sergeant R of his ECBA might have increased his risk of being killed (either by enemy soldiers or in a friendly fire accident as was actually the case).

Part of the obligation to prevent unjustifiable increases in the risks to soldiers' lives in armed conflict should include a requirement that states take reasonably practicable measures to ensure soldiers are properly trained and equipped to defend themselves. R had initially been supplied with ECBA but this was recalled due to equipment shortages.

[192] Chapter 3.2., Section 3.3.

The Board of Inquiry into Sergeant R's death noted that, in light of equipment shortages, ECBA was reallocated according to an assessment of need. As a matter of priority it was allocated to infantry. These soldiers were deemed to be at greatest risk of attack since their operations are conducted on the ground. Secondly it was given to those travelling in non-armoured vehicles. R was considered to be at low risk from enemy attacks, because as a member of an artillery troop he was expected to spend the majority of his time in a heavily-armoured vehicle.[193] Once ECBA was allocated to high-priority groups the remainder was given to artillery troops on the basis of what sizes remained.[194] There were insufficient sets of ECBA in Sergeant R's size.

Sergeant R had no ECBA but he was still provided basic body armour that offered 95% similar protection to the ECBA when worn correctly.[195] Considering R was part of an artillery troop and not generally expected to face the enemy on foot, the increase in the risk to R's life by reallocating his ECBA was negligible. At the time his ECBA was redistributed it was not anticipated R would be spending time dismounted from his tank. The order had been given to control movements in and out of Az-Zubayr but specific instructions were not given about how to achieve that goal. The commanders who took R's ECBA cannot have known he was going to be spending time dismounted. Furthermore R's commander briefed the troop on conduct of VCPs, stating that soldiers should never dismount the tank alone.[196] If this order had been complied with, when R's weapon jammed there would have been another dismounted soldier who could have assisted him, without needing to use the tank's weapons. Commanders can expect their orders to be

[193] Board of Inquiry (2), 23.
[194] ibid, 25.
[195] ibid.
[196] ibid, 17.

obeyed,[197] and there was nothing to suggest the commanders knew or ought reasonably to have known R would be dismounted alone.

Even if reallocation of ECBA constituted a substantial increase in the existing background risk to R's life, it was not unjustified. In an ideal world kit shortages would not occur. But where there are shortages it is not unreasonable to distribute available kit on the basis of an assessment of need. The Court has recognised that positive obligations should not place an undue burden on states or require an 'impractical diversion of resources',[198] especially in the context of 'policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[199] It is legitimate to allow that, in armed conflict situations, those difficulties faced by state agents in domestic peacetime are magnified. When fighting a war on foreign territory supply of kit and questions of resources generally can be problematic. Requiring states to provide the complete complement of kit for all soldiers deployed is an unrealistic burden, considering difficulties in establishing supply lines.

In this case it was not possible to provide R with ECBA on the basis of resource availability and operational priorities. Distribution of ECBA was done on an objective assessment of need and was not totally arbitrary. The in-theatre decision to reallocate Sergeant R's ECBA does not constitute an unjustifiable increase in the risk to his life. But the government's failure to procure sufficient equipment might constitute a violation of the obligation to take

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[197] Especially considering the culture of obedience and discipline characteristic of modern military service. See Samuel P Huntington, *The Soldier and the State: The Theory and Politics of the Civil-Military Relationship* (HUP 1957).
[198] *Kılıç*, §76.
[199] *Osman*, §116.

reasonably practicable measures to ensure soldiers are adequately equipped to defend themselves.

Before the Iraq conflict began British Army chiefs petitioned the government for exemption from procurement restrictions to enable them to procure kit, including ECBA, in anticipation of military intervention. Constraints had been placed on military activities, including procurement, so as not to prejudice ongoing negotiations with the Iraqi government at the UN.[200] Exemption was eventually granted although attempts at finding a diplomatic solution to the Iraq problem deteriorated more quickly than anticipated. Although the ECBA order was fulfilled quickly, the final shipment would only be delivered *after* British troops had already been deployed to the Persian Gulf.[201] Late changes to deployment plans and difficulties in establishing reliable supply chains further frustrated attempts to get the new ECBA to the soldiers who needed it.[202] The factors preventing timely delivery of the ECBA were either beyond the government's control or resulted from genuine political and operational pressures. States do not operate in a vacuum and it would be unreasonable to suggest R's lack of ECBA constituted a failure by the state to properly equip its soldiers and thereby an unjustifiable increase in the risk to their lives. This is especially the case since the standard body armour offered 95% similar protection to the ECBA.[203]

This case poses operational issues that are unavoidable to some degree. The question remains whether the UK should have deployed soldiers with insufficient equipment. If

[200] Board of Inquiry (2), 74.
[201] ibid, 75-76.
[202] ibid, 77, 80-85.
[203] ibid, 25.

answered in the negative states would only be permitted to deploy those soldiers for whom it had the correct equipment, which might negatively impact the war effort. Furthermore it would require states to have this equipment on-hand and ready at a moment's notice, posing questions of storage capacity and availability of funds to purchase it all. It is possible the failure to procure sufficient ECBA for all troops deployed to Iraq constitutes a violation of the right to life but this would place an undue burden on states. Crucially procurement might be an issue with which the Court should not concern itself. Procurement is a political matter and subject to Parliamentary censure. Where the Court allows states a margin of appreciation in dealing with terror and domestic law-enforcement,[204] it certainly should not be its place to so bluntly tell states how to spend taxpayers' money.

Although in this case Sergeant R was killed by the actions of another British soldier the greatest risk to soldiers deployed to armed conflicts overseas comes from enemy soldiers. What measures must states take to protect their own soldiers during engagement with the enemy and fulfil the positive obligation arising under Article 2? Are issues under the negative obligation also raised? I shall now address two scenarios posing these questions.

5. IMPROVISED EXPLOSIVE DEVICES

The 2003 invasion of Iraq toppled the Ba'athist regime. Thereafter the country was occupied by a coalition of forces from states including the United Kingdom, United States and others. During the occupation insurgents attacked the occupying forces using improvised explosive devices ("IEDs"). In one such attack a patrol went to investigate a bomb blast in Al-Amarah. The patrol was travelling in a convoy of Snatch Land Rovers.

[204] *Finogenov*, §223.

Designed to withstand small arms fire, these lightly-armoured vehicles offer passengers no protection from explosives, including IEDs. In addition to their structural weaknesses the vehicles used by the patrol that day had not been fitted with any electronic counter-measures ("ECMs") that would have prevented the detonation of an IED. As the convoy headed towards the site of the bomb blast, an IED was detonated level with the lead vehicle. Private H and Second Lieutenant S were killed.[205]

Seven months later a similar incident occurred. Two Snatch Land Rovers were travelling in convoy with an escort of three heavily-armoured Warrior tanks. Both Snatch Land Rovers were fitted with ECMs, but had yet to be fitted with a new component. Private E was driving one of the Snatch Land Rovers. Between the Iraqi Police Headquarters in Al-Amarah and the British Army base at Camp Abu Naji, an IED was detonated level with Private E's vehicle. Private E and Captain L were killed in the explosion and another soldier was seriously injured.[206]

5.1. NEGATIVE OBLIGATION

At first glance, the negative obligation is not engaged in this case. The four soldiers were killed by enemy combatants rather than British state agents. This suggests that the UK did not commit an intentional deprivation of life. But the soldiers were following orders at the time of their deaths. When their superior officers gave H, S, E and L their orders, they acted. On a simple counterfactual account of the incident, the soldiers' deaths would not have occurred in this way without their superiors' *ORDER-GIVING*. There is a *prima facie*

[205] The facts of this case form the basis of one of the claims in *Smith (No 2).* The facts are given in the judgment of Lord Hope DP, [4]-[6].
[206] *Smith (No 2)*, [7]-[8] (Lord Hope DP).

causal link between the officers' orders and the soldiers' deaths, which satisfies the deprivation of life requirement of Article 2.[207]

The commanders must have known that sending the soldiers on patrol exposed their lives to risk. The fact they proceeded to give such an order suggests they were reconciled to the risk occurring. This satisfies a broadly-interpreted intentionality requirement. The commanders did not directly intend the soldiers to be killed, but foresaw the possibility of that consequence and were content to risk it. If *ORDER-GIVING* constitutes a deprivation of life, it may also be considered intentional, giving rise to a violation of the negative obligation. None of the Article 2(2) law-enforcement exceptions are applicable in this situation,[208] so the soldiers' right to life was violated.

If every situation in which a commander issues an order resulting in soldiers being killed by enemy troops constitutes an intentional deprivation of life and violation of Article 2, it represents an impossible burden on military operations. Commanders cannot effectively fulfil their duties if every order they give can be construed as an unjustifiable, intentional deprivation of life. This unreasonable result can be avoided because the acts of the actual killers (in this case, the enemy troops who detonated the IEDs) are more proximate to the soldiers' deaths. Though the *DEATH* would not have occurred in these circumstances were it not for the commanders' *ORDER-GIVING*, the intervening acts of the actual killers break the causal link between *ORDER-GIVING* and *DEATH*.[209] *ORDER-GIVING* enabled *DEATH* to some degree

[207] Chapter 2.1. established that a deprivation of life is an action causing death.
[208] Section 1.1.2. The law-enforcement exceptions are detailed in Chapter 3.1.2.
[209] See discussion of Sergeant R's ECBA in Section 4.2.

but it would be over-determination to say it caused *DEATH*. Under this approach the *ORDER-GIVING* does not constitute a deprivation of life.

In this case it may also be appropriate to adopt a narrower definition of intention. On a strict direct intent approach, the commanders did not purposely act in order to bring about the soldiers' deaths. Even if *ORDER-GIVING* constitutes a deprivation of life, it could not be considered intentional. This may be the correct approach on the facts of this case, but a blanket rule would be inappropriate. Consider the trench tactics of the First World War. Commanders ordered waves of soldiers to march into a hail of fire towards the enemy trench. Such assaults were rarely successful. Were the commanders to order their troops into a near-certain death situation such as that, it may be appropriate to consider their *ORDER-GIVING* an intentional deprivation of life.

In this case it would be unreasonable and impractical to determine that the commanders' order constituted an intentional deprivation of life, even though there is a causal link between *ORDER-GIVING* and *DEATH* and a broad intentionality requirement is satisfied. Yet it would be unjust to claim that states owed no obligation to their soldiers in this situation. It is partly in response to facts such as these, in which the negative obligation does not easily apply but it would be unjust to deny existence of a duty, that the Commission and Court developed the positive obligation. This case raises questions about the state's obligation to protect H, S, E and L from enemy attack.

5.2. POSITIVE OBLIGATION

States are required to take such reasonably practicable measures to prevent an unjustifiable increase in the risk to soldiers whilst deployed on active duty abroad. There was a constant background risk to soldiers serving in Iraq for the duration of their tour. The state must make sure this risk is not increased without justification, but this does not necessarily translate into an absolute duty to prevent soldiers from being killed. Sending soldiers out on patrol increased the risk they would be attacked and killed, but the Court has been clear that positive obligations should not impose impractical burdens on states. It would be unreasonable and unrealistic to expect states to keep soldiers cloistered in the base until the war is won.

There was definitely an increased risk to soldiers going out on patrol. Soldiers are never completely safe when deployed to armed conflicts, but they are arguably safest *within* the military base. Soldiers are at the lowest risk of death within its confines for a number of reasons. First, there is safety in numbers. Secondly, the base is stocked with supplies and equipment – not just weapons and ammunition, but food, water and medical supplies. Thirdly, soldiers on base have access to equipment and support that may be unavailable in the field, such as satellite and radar technology. Soldiers are better equipped and prepared to defend themselves in the event of an attack on the base than they are out in the open, even though the base is a prominent fixed target for the enemy. This presumption is rebuttable in certain circumstances but in general soldiers' risk of being killed by enemy attack is lowest on the base and this forms a baseline. Commanders must not increase their vulnerability without justification. When H, S, E and L were sent out on their various patrols they lost the protection of the base and their vulnerability to enemy attack increased.

In its cases the Court has ruled that states must know, or ought reasonably to know, that a person's life is at risk before they can be required to take protective measures.[210] This knowledge requirement is preserved for the purposes of the unjustifiable increase in the risk test. The state cannot be expected to protect against risks of which it has no knowledge. In other positive obligation cases the Court required the threat to be reasonably specific before protective measures are mandated. During the "Troubles" in Northern Ireland the Commission refused to accept that a woman should receive police protection against the IRA. In that case, there was a general threat of sectarian violence to the public at large but nothing to suggest the applicant was at any enhanced, specific risk. In addition, the threat came from unknown members of a subversive underground organisation so more specific measures were not required.[211] Individual protection can only be required when an identifiable victim is threatened, but the Court has recognised that states are also under a duty to protect society at large from the criminal acts of third parties.[212] This is only the case where authorities can identify the perpetrator of these criminal acts,[213] and in such cases the threshold for satisfying the positive obligation is very low.[214]

Such strict thresholds do not provide an effective level of protection to soldiers in armed conflict situations. Whilst we can say there was a risk to soldiers out of the base, it is impossible to identify where the threat came from. IED attacks were fairly common during the Iraq conflict, but it could not be predicted where the devices would be planted, how

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[210] *Osman*, §116.
[211] *W* v *United Kingdom* 32 DR 190.
[212] *Mastromatteo* v *Italy*, App No 37703/97 (ECtHR, 24 October 2002) §69.
[213] *Maiorano* v *Italy*, App No 28634/06 (ECtHR, 15 December 2009) §§119-22.
[214] *Mastromatteo*, §78.

they detonate, when they might be detonated, or the explosion's blast radius. Similarly an individual victim cannot be ascertained. There was a general risk to every soldier on patrol or otherwise off the base, there is no way of telling *which one* may be attacked. There is such a lack of specifics here that under the positive obligations already recognised by the Court in domestic peacetime cases, the state would not be required to take any protective measures.

But consider this comparison. In early 2008, Prince Harry completed an operational tour of Afghanistan.[215] His deployment was a closely-guarded secret in the Ministry of Defence so as to protect Prince Harry and the soldiers serving with him. Had there been threats against Prince Harry personally, then the state would have been required to take operational measures to protect him, because of the more specific nature of the threat. After details of his deployment were publicised on a US website, Prince Harry returned to the UK. In this case there was an identifiable individual against whom the threats were directed. It is simple enough to take measures to protect one person. For Prince Harry, those protective measures were to fly him home. But when soldiers are targeted at random simply because they are soldiers (rather than because they are third in line to the British throne, as Prince Harry was at the time), it becomes more difficult to know what measures to take.

In the domestic peacetime cases, the Court has held that states must have knowledge of the specific nature of the threat in order to be able to protect people against it. But in armed conflict that knowledge may not be forthcoming. Whilst the standard of knowledge

[215] 'Military Career' (*Prince Henry of Wales*, 2015) <www.princehenryofwales.org/prince-harry/biography/military-career> accessed 17 December 2015.

required in existing case law is too high for the armed conflict paradigm, it cannot constitute a violation of Article 2 if commanders did not know of the risk. Given the hostile insurgency ongoing at the material time and the increasing use of IEDs and other non-conventional methods of warfare to attack the occupying troops, it can be considered that the Army must have known there was an increased risk to everyone leaving the base. This was a general threat of attack. But considering the specific nature of the Snatch Land Rovers and the increasing use of IEDs, commanders must have known the risk from IEDs was enhanced for soldiers travelling in Snatch Land Rovers outside the base.

The Army may be considered to have exposed the soldiers to an unjustifiably increased risk by sending them out on patrol in the lightly-armoured Snatch Land Rovers. Soldiers would not have been exposed to the risks posed by IEDs at all if they had never been sent out on patrol. But human rights law should not place unrealistic burdens on states. If human rights law prohibited exposing soldiers to *any* risk at all it would severely frustrate the military's objectives. Suggesting that the battlefield commander's decision to send troops out on this mission had ipso facto unjustifiably increased the risk to soldiers' lives would be unrealistic and make the proper functioning of the military impossible.

The risk posed by IEDs to soldiers on these patrols would have been greatly reduced had the soldiers been travelling in heavily-armoured vehicles such as Challenger II or Warrior tanks. Use of these stronger vehicles would not prevent IED attacks occurring, but it would mitigate the risk to soldiers' lives in the event of such an attack because they offer greater protection against explosives. The decision *not* to use Challenger II or Warrior tanks in this situation might constitute an unjustifiable increase in the risk to soldiers' lives, but the

military was simultaneously undertaking *other* missions. It is easy to look at these two missions in isolation and say the soldiers should have been travelling in heavily-armoured battle tanks. But regard must be had to the wider context in which the missions took place. Commanders must make an assessment of how best to distribute the available equipment. The question of how to prevent an unjustifiable increase in the risk to soldiers' lives should not boil down to limiting missions to those for which the ideal equipment is available.

Based on equipment availability and an assessment of need, stronger vehicles were used where it was deemed the soldiers were at an even greater risk from enemy attacks. To do otherwise would unfairly prejudice one soldier's safety to protect another. In deciding how to allocate available equipment, commanders can only work with what they have. Where the mission fulfils an important military objective and equipment is allocated on the basis of an objective assessment of need, soldiers can be considered to have been equipped as well as possible considering asset availability. It would be unreasonable in such circumstances to conclude that the commanders' operational decisions had unjustifiably increased the risk to soldiers' lives.

Soldiers sent out on patrol in Snatch Land Rovers were at increased risk from IED attacks. The increased risk from the use of Snatch Land Rovers (rather than, say, Warrior tanks) is not unjustifiable since commanders allocated limited resources on the basis of their assessment of need. There is another pertinent issue in this case. In the first incident the Snatch Land Rover had not been fitted with the ECMs that would have prevented detonation of IEDs. Soldiers travelling in the vehicle had no defence against IEDs at all. The lack of ECMs does not render the increased risk unjustifiable because that equipment was

not available. Commanders could not have done anything to mitigate the risk to the soldiers' lives from IEDs without frustrating military objectives and efficacy. The "unjustifiable increase in risk" test is not intended to impose impossible burdens on commanders, but to prevent soldiers being exposed to risks that can be reasonably avoided.

In the second incident commanders demonstrated they understood the risks from IEDs and other attacks and sent the patrol with an escort of three heavily-armoured Warrior tanks. The tanks shielded the Snatch Land Rovers from other threats, but not from IEDs. Furthermore the Snatch Land Rovers had been fitted with ECMs but not with a vital additional element. In the first incident, the lack of ECMs did not render the increase in the risk unjustifiable because the equipment was unavailable. In this case the additional element that could have saved E and L's lives was in the base waiting to be retrofitted to their vehicle. The failure to fit this additional element was not justified on the basis of asset availability or an objective assessment of need. The use of Snatch Land Rovers does not constitute an ipso facto unjustifiable increase in the risk if reasonably practicable measures are taken to mitigate that risk, but failure to take those measures without justification constitutes a violation of the positive obligation. In this case, sending the patrol out in Snatch Land Rovers constituted an increase in the extant risk to the soldiers' lives that cannot be justified. E and L's right to life was violated.

In-theatre operational decisions should not be subjected to such harsh scrutiny that battlefield commanders are afraid to act and the military is unable to perform its function. It might be impractical to submit battlefield decisions to the same level of scrutiny as might

be suitable for domestic peacetime situations,[216] but the realities of military life should not be used as an excuse for failing to protect soldiers' human rights.[217] Operational difficulties in allocating resources is only the most obvious symptom of a larger problem. Can procurement decisions be taken to have violated soldiers' right to life, if soldiers are left with insufficient equipment to defend themselves against enemy attack? Blaming the bureaucrats is an attractive option, but procurement decisions must be made to ensure the military is prepared for all eventualities. That means having lightly-armoured, fast vehicles like the Snatch Land Rover *as well as* the heavy-duty Challenger II and Warrior tanks. Indeed then-Defence Secretary Des Browne said the use of Snatch Land Rovers helped foster a positive relationship between the Iraqi population and occupying troops – creating an image of British soldiers as liberators and co-operators than that imperialist dominators.[218]

There are vast differences in the capabilities of individual Council of Europe member states, and any implied Article 2 obligation in procurement matters needs to be able to take into account varying resources and responsibilities of different member states. For instance, whilst British soldiers might face the challenges associated with being engaged in conflict or peacekeeping in far-flung territories, other militaries might be fighting battles in their own territories, against other states or against separatist movements.[219] Other member states may have entrusted national defence to another state and maintain only a small ceremonial military.[220] In many cases in which soldiers are killed during armed conflict, lack of equipment may be a relevant factor that increased the risk to their lives. However there

[216] *Smith (No 2)*, [66] (Lord Hope DP).
[217] *Grigoriades* v *Greece* 27 EHRR 464, §45.
[218] HC Deb 26 June 2006, vol 448, col 4.
[219] For example in Ukraine.
[220] For example Andorra, whose external defence is primarily the responsibility of France and Spain.

will be many other factors contributing to the increased risk, including the commanders' distribution of available equipment. It is unlikely that a procurement decision would be considered to have resulted in an unjustifiable increase in the risk to soldiers' lives except in the most extreme cases.

The positive obligation to prevent unjustifiable increases in the risk to soldiers' lives is of general application to all in-theatre operational decisions. It might be said the requirements of this obligation are not strict enough, but imposing greater obligations on states to protect soldiers' lives would put the military in the difficult position of having to defer to human rights law when making operational decisions. Realistic and fair positive obligations will subtly integrate human rights considerations into military decision-making in a way that commanders might recognise as nothing more than good soldiering but which offers meaningful and effective protection of soldiers' right to life against enemy attacks. This scenario considered the state's obligations to protect its soldiers' right to life against IEDs. I shall now turn to a scenario in which a soldier was killed in a conventional combat situation.

6. COMBAT

Lance Corporal Y was deployed to Iraq at the beginning of the 2003 invasion. His regiment was tasked with securing the coast and port towns to enable disembarkation of reinforcements and supplies from the Persian Gulf. Y and his mortar troops were assaulting Iraqi military positions in Az-Zubayr. Iraqi soldiers fought back, attacking Y's troop with rocket-propelled grenades.[221] Y broke through the escape hatch of his

[221] BBC, 'Scots Battalion Loses Soldier' (*BBC News*, 25 March 2003) <news.bbc.co.uk/1/hi/Scotland/2883615.stm> accessed 3 September 2017.

armoured vehicle to man a machine gun.[222] He was killed when a grenade detonated near him, and later received a posthumous Mention in Despatches for his gallantry.[223]

6.1. NEGATIVE OBLIGATION

Article 2 prohibits intentional deprivation of life. Lance Corporal Y was following orders at the time of his death. The commander's bodily movement, which conveyed the order to go into battle, occurred under his control. *ORDER-GIVING* was therefore an action.[224] On a simple counterfactual account, Lance Corporal Y would not have died in this way but for the commander's order. The act of *ORDER-GIVING* has a causal relationship with Y's death. *ORDER-GIVING* might therefore be considered a deprivation of life. The commander must have realised there was a significant risk that Y would be killed in enemy attack during the course of this mission. This is because LOAC, which governs the conduct of hostilities, defines soldiers as legitimate targets of attack.[225] This reasonably foreseeable consequence of *ORDER-GIVING* satisfies a broadly-interpreted intentionality requirement.[226] As such it might be argued that *ORDER-GIVING* constituted an intentional deprivation of Y's life contrary to Article 2.

Article 2(1) recognises the general prohibition on intentional killing, whilst Article 2(2) defines the exceptions to that general rule. Death resulting from a use of force that is no more than absolutely necessary in pursuit of a permitted law-enforcement objective will

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[222] BBC, 'Soldier's Name Carved on Memorial' (*BBC News*, 5 September 2004) <news.bbc.co.uk/1/hi/Scotland/3629228.stm> accessed 3 September 2017.
[223] Ministry of Defence, 'Lance Corporal Barry Stephen' (*Gov.uk*, 24 March 2003, updated 28 May 2009) <www.gov.uk/government/fatalities/lance-corporal-barry-stephen> accessed 3 September 2017.
[224] Chapter 2.1.1.
[225] AP1, Article 50(1).
[226] See Chapter 2.2.3.

not violate the right to life. Even though the Court has recognised non-conventional weapons and personal physical violence as "use of force",[227] it would be difficult to construe *ORDER-GIVING* in this way. Furthermore as it was not done in pursuit of a permitted law-enforcement objective, if *ORDER-GIVING* is interpreted as an intentional deprivation of life it must constitute a violation of Article 2.

If every order given to soldiers during armed conflict could be interpreted as an intentional deprivation of life it would unreasonably burden the state and hamper military efficacy. In the context of counter-terrorist operations the Court has been careful to avoid imposing restrictions on law-enforcement agencies that might prejudice officers' own safety or the safety of the public at large.[228] The framework for protecting soldiers' right to life should follow this approach. Although there is a plausible metaphysical account that *ORDER-GIVING* constitutes an intentional deprivation of life, *ORDER-GIVING* by itself was insufficient to cause Y's death. The acts of the enemy soldiers who attacked Y have a more proximate causal link to his death. Though in some circumstances it may be appropriate to conflate *ORDER-GIVING* with intentional deprivation of life,[229] in this scenario it is more appropriate to consider that the state's Article 2 obligation to Y was to protect him against a risk to his life.

6.2. POSITIVE OBLIGATION

The Court has developed a positive obligation in its case law, such that states are required to protect individuals against being avoidably killed in certain well-defined circumstances. The positive obligation framework devised by the Court in its decided cases does not translate well to the armed conflict paradigm and can lead to unreasonable or unexpected

[227] *McShane* v *United Kingdom* 35 EHRR 23, §101.
[228] *McCann*, §200.
[229] Such as the Armenian death marches. See Section 1.1.

results. Conduct of hostilities is governed by LOAC, which has a generally permissive stance towards use of force. Taken with the violent nature of armed conflict, soldiers face a constant background risk when deployed to armed conflict. But the Convention continues to apply, even during active combat. The Court has affirmed that the Convention must be interpreted to take into account the 'particular characteristics' of military life, including combat.[230]

Commanders must justify increasing the extant risk to soldiers' lives. That means taking reasonably practicable measures to avoid the increased risk or minimise the harm caused should the risk eventuate. An increased risk is not justifiable if reasonably practicable measures were not taken that could have avoided the risk or minimised the harm it caused. If the soldiers' right to life framework is to be reasonable and effective, it must be practical. As such, the existence of a risk to soldiers' lives in armed conflict does not constitute a per se violation of Article 2. But commanders have a duty not to increase that risk.

This duty may manifest in different ways. In some cases it may be a responsibility to allocate equipment based on an objective assessment of relative needs.[231] But the obligation is not merely to take steps to minimise the harm caused if a risk should eventuate. It also extends to taking steps to avoid increasing the risk ab initio wherever possible. The surest way of protecting Lance Corporal Y in this case would have been to not order him into battle. However the law must be realistic and adapt to the requirements of the situation.

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[230] *Şen* v *Turkey*, App No 45824/99 (ECtHR, 8 July 2003) §1. See also *Engel* v *Netherlands* 1 EHRR 647, §§54, 59; *Grigoriades* v *Greece* 27 EHRR 464, §45.

[231] See Section 4.

The decision to *not* send troops into battle would have been most effective at protecting Y from harm and avoiding the risk of enemy attack, but it is a wholly unreasonable measure that places impractically strict limitations on commanders' discretion over day-to-day military functioning and the conduct of hostilities. Soldiers must have an effective and enforceable right to life, but human rights law must not prevent states from fulfilling important military objectives in the national interest.

6.2.1. Aerial Bombardment

Engaging Lance Corporal Y and his comrades in a ground-based assault against entrenched, fortified and well-armed enemy positions placed them at a significantly increased risk. Commanders could have avoided this increase entirely by preferring aerial bombardment of enemy positions in Az-Zubayr. Bombing the city from the air would have accomplished the military objective of pushing Iraqi forces away from the coast and destabilising the regime's military. It may even have proved more effective at fulfilling this objective than a ground offensive. Aerial bombardment would also have avoided exposing troops to the increased risk of being attacked and killed. The commanders' decision to engage ground troops rather than order an aerial assault must be justified, otherwise Lance Corporal Y was exposed to an unjustifiably increased risk and his right to life was violated.

Positive obligations must not require an impractical diversion of resources, especially where those resources are limited.[232] Bombing the enemy from the air was physically possible. Aerial bombardment was therefore a measure the military could have taken,

[232] *Kılıç* v *Turkey* 33 EHRR 58, §76.

without an impractical diversion of resources, that would have effectively accomplished the military objective and fulfilled the Article 2 obligation of avoiding risk to Lance Corporal Y. But such a measure might not have accorded with the United Kingdom's other Convention obligations, or indeed its obligations arising from other international legal norms. If a measure that would effectively avoid or minimise the risk to soldiers' lives is *physically* practicable but *legally* prohibited, the increased risk to soldiers by not pursuing that avenue is not unjustified and the right to life is not violated.

The state's obligation to guarantee Lance Corporal Y's right to life does not exist in a vacuum. In the context of protecting Y it appears as though aerial bombardment of Az-Zubayr would have been preferable to ground assault. But the commander's duty to Y cannot be isolated from states' Convention obligations to others. The Iraqi troops and military installations in Az-Zubayr were dispersed through a densely populated urban area. Aerial bombing of those targets has the potential to kill civilian bystanders as well as military targets. Indeed modern warfare and increased urbanisation mean civilians are increasingly likely to find themselves in the theatre of operations,[233] making this a particularly relevant legal problem.

Assuming that civilians in Az-Zubayr were within the UK's jurisdiction at the time of Lance Corporal Y's death, the UK's obligation to guarantee his right to life must strike a balance with its obligation to enemy civilians. When acting beyond their national borders, states exercise jurisdiction over citizens of territories under their effective control[234] and over

[233] Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Brill 1993) 12, 21.
[234] *Al-Skeini* v *United Kingdom* 53 EHRR 18, §135.

individuals under the authority and physical control of their agents.[235] Aerial bombardment does not, by itself, establish effective control over territory.[236] On this model of extraterritorial jurisdiction the UK owed no Convention obligations to the citizens of Az-Zubayr. However the Court has typically applied the personal model of jurisdiction in cases where the effective control of territory test is not satisfied but it would be inconsistent with the object and purpose of the Convention to deny the existence of the state's legal duty.[237]

The personal model of extraterritorial jurisdiction has been applied in many cases where individuals were within state agents' custody,[238] but this is by no means its only application. In *Al-Skeini* v *United Kingdom* British soldiers on patrol in Basra had shot dead five Iraqi nationals in five separate incidents.[239] The Court did not discuss whether the UK exercised effective control of territory, but resolved this case by reference to the personal model of jurisdiction. The soldiers had physical power over the five men they killed, such as to establish a jurisdictional link between the UK and the Iraqi men.[240] This was about a physical power to act in a way that affected their enjoyment of their Article 2 right to life, though that physical control fell short of detention.

This is similar to the control the British Supreme Court recognised in *Smith* v *Ministry of Defence*.[241] British soldiers are within the UK's jurisdiction wherever they are in the world

[235] ibid, §136.
[236] ibid, §135.
[237] Chapter 1.1.3.
[238] See for example *Öcalan* v *Turkey* 41 EHRR 985; *Medvedyev* v *France* 51 EHRR 39.
[239] For more detailed facts see *Al-Skeini*, §§9-62. A sixth man died in detention.
[240] ibid, §149.
[241] *Smith (No 2)*, [52] (Lord Hope DP).

by virtue of the command structure and the nature of military service.[242] The personal model does not require an individual to be in state agents' *direct* physical control in the form of custody. The personal model is more about the state's power to affect individuals' enjoyment of their rights. It is hard to see why firing a gun suffices to establish a personal jurisdictional link but dropping a bomb does not. Though aerial bombardment is insufficient to establish effective control of territory, it does give the UK control over the affected individuals' enjoyment of the right to life.[243] Notwithstanding the military context, individuals killed in such an aerial bombardment are intentionally deprived of their lives contrary to Article 2(1).[244]

Article 2(2) permits deaths resulting from use of force in pursuit of the law-enforcement objectives. Aerial bombardment would be carried out with the express purpose of destroying Iraqi military capabilities, but not to defend people from unlawful violence, effect a lawful arrest or quell a riot. In the absence of a valid derogation subject to Article 15(2), the law-enforcement provisions do not permit aerial bombardment of the city. Article 2 might be interpreted to contain an implicit armed conflict exception to the prohibition on intentional killing.[245] Omitting reference to illegality in Article 2(2)(a) would permit soldiers to use force against enemy soldiers in self-defence or defence of another. On those terms, it might be permissible to bomb Iraqi military installations from the air, but it is still uncertain that such an interpretation would allow pre-emptive strikes that are not in *direct* defence against a specific threat. Supposing Article 2 could be interpreted in such

[242] Chapter 1.2.2.
[243] In the sense that it intentionally deprives them of their lives in circumstances other than the use of absolutely necessary force in pursuit of permitted law-enforcement objectives.
[244] It remains to be seen whether the state has any obligations to enemy soldiers under the Convention, and that question is beyond the scope of this thesis. However the Court has already determined that the state's Convention obligations extend to enemy civilians.
[245] See Section 4.1.2.

a way as to permit aerial bombardment of Iraqi military installations, there is still the problem of collateral damage.

Although the Court has not outlawed collateral damage in the course of law-enforcement operations, the deaths of innocent bystanders will only be permissible when state agents complied with the provisions of Article 2(2) and used force that was no more than absolutely necessary to achieve their aim.[246] One requirement of absolute necessity is that a use of force is proportionate to the aim it seeks to achieve.[247] In the context of attacking targets dispersed amongst innocent bystanders the Court has already ruled that aerial bombardment with heavy, unguided missiles is indiscriminate (and therefore disproportionate) because it fails to limit the use of force to the actual targets, with a high degree of collateral damage likely.[248]

The Court has declared it 'incomprehensible' that state agents were not equipped with less lethal weapons when there was a clear expectation of violence and disorder.[249] Together with the prohibition on indiscriminate weapons, aerial bombardment of Az-Zubayr using heavy, unguided missiles falls foul of the UK's obligation to civilians brought within its jurisdiction by virtue of the attack. Though aerial bombardment was the most effective means of avoiding an increased risk to Lance Corporal Y's life, the risk to soldiers' lives cannot permissibly be reduced by violating the rights of others.

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[246] *Andronicou*, §193.
[247] Chapter 3.1.2.1.
[248] *Isayeva* v *Russia* 41 EHRR 39, §199.
[249] *Güleç* v *Turkey* 28 EHRR 121, §71.

It is somewhat counter-intuitive to prohibit a measure that would protect British soldiers on the basis that it would violate the rights of *enemy* civilians. But it is an operating proposition of this thesis and an established legal principle that human rights law protects *everyone* within a state's jurisdiction. That protection is not based on allegiance but simply by virtue of being human. I argued that the protection of soldiers' rights is important to guaranteeing the rights of those with whom they come into contact.[250] The reverse is also true. If soldiers are permitted to deliberately violate the rights of others in order to protect themselves, their own rights are no longer inviolable and the protection from being killed depends upon whether one's death might save others' lives.[251] Guaranteeing soldiers' right to life cannot be separated from respecting the rights of others.

Nevertheless the use of more targeted aerial weapons, capable of discriminating between their actual targets (that is, enemy soldiers and military installations) and the innocent civilian bystanders would not necessarily contravene the state's obligation to respect the rights of the civilians within their jurisdiction. If a targeted aerial strike, for instance with unmanned aerial drones using precision satellite targeting, was capable of hitting its targets without causing any collateral damage, unaffected civilian bystanders are not "brought within" British jurisdiction at all.[252] Such targeting takes time and requires intelligence of enemy positions and movements. In the circumstances of this case, the Iraqi troops were concealed around the city, making aerial identification difficult. Furthermore prompt neutralisation of the Iraqi military near the coast was imperative for enabling

[250] See Introduction.
[251] See Chapter 3.1.2.3.
[252] If the individuals are unaffected, the state has not exercised a physical power over them that has affected their enjoyment of their rights. As such, under the principles of the personal model they are not 'brought within' the jurisdiction of the state. The UK did not have effective control of the territory and aerial bombardment cannot confer effective control. As such the unaffected individuals are not within British jurisdiction at all and have no enforceable rights against the UK.

reinforcements and supplies to land. The prohibitive time and resources required for accurate targeting means that aerial bombardment is not a reasonably practicable measure. Since commanders are only required to do what is reasonably practicable in the circumstances to prevent an unjustifiable increase in the risk, the commander's decision to send Lance Corporal Y on a ground offensive rather than an impracticable aerial assault was not an unjustifiable increase in the risk.

In the same way as states' responsibility to guarantee their soldiers' right to life cannot disregard the rights of others within their jurisdiction, states must also consider their duties and obligations under other norms of international law when protecting soldiers against increased risk. Conduct of hostilities is governed by LOAC, which permits attacks on enemy troops and military positions.[253] Commanders may also target objects that 'make an effective contribution to military actions' and whose destruction, capture or neutralisation offers a 'definite military advantage'.[254] Deliberate direct attacks on civilians are expressly forbidden.[255] Whilst LOAC does not prohibit collateral damage per se, commanders must not attack legitimate targets where the attack will cause incidental civilian casualties or damage to civilian objects that is 'excessive in relation to the concrete and direct military advantage' the attack confers.[256]

Iraqi troops and military installations in the city of Az-Zubayr were legitimate military targets. Aerial bombardment of those targets is not, by itself, contrary to LOAC. But in the broader context of the situation it may be. If the army dropped heavy, unguided missiles

[253] AP1, Article 50(1).
[254] ibid, Article 52(2).
[255] ibid, Article 51(1).
[256] ibid, Article 51(5)(b).

on the city, this may by unlawful for not distinguishing between legitimate (military) and illegitimate (civilian) objects. Just like Article 2 of the Convention, LOAC prohibits use of indiscriminate weapons. If a measure for protecting soldiers' lives results in a violation of states' obligations under LOAC, it is not a reasonable course of action. If aerial bombardment violates LOAC, this offers some justification to the increased risk of a ground-based assault.

Some have suggested it is a 'moral wrong' for commanders to expose their own soldiers to increased risks in the name of protecting enemy civilians.[257] The LOAC proportionality principle requires commanders to balance military advantage against the risk of collateral damage. There is some debate over whether this includes a duty to minimise the risk to the state's *own* soldiers. But soldiers are necessarily exposed to greater risks in the name of limiting the horrors of war.[258] If commanders are required to uphold the principle of distinction and limit civilian casualties as far as possible, it seems inevitable that military service carries a 'nontrivial level of risk'.[259]

States are permitted to risk collateral damage in pursuit of military advantage, provided the collateral damage is not excessive. If "military advantage" for the purposes of this rule included protection of the state's own forces, it might be the case that an attack could permissibly risk greater civilian damage if doing so reduced the risk to soldiers. As such,

[257] Asa Kasher, 'Operation Cast Lead and Just War Theory' 37 *Azure* 43, 66; Asa Kasher, 'The Principle of Distinction' 6 *J Mil Ethics* 152, 166.
[258] Avishai Margalit and Michael Walzer, 'Israel: Civilians and Combatants' 56 *NY Rev Books* 21, 21.
[259] Iddo Porat and Ziv Bohrer, 'Preferring One's Own Civilians: May Soldiers Endanger Enemy Civilians More Than They Would Endanger Their State's Civilians?' 47 *Geo Wash Intl LR* 99, 103.

LOAC may already evoke the approach proposed in this thesis that commanders must take measures to minimise the risk to soldiers. It may be through this principle that Article 2 considerations of soldiers' right to life are subtly integrated into military decision-making.

The problem with this approach is that it defines soldiers' lives in terms of military advantage. It may support commanders' choice of aerial bombardment instead of sending in ground troops to volatile areas, but it does not impose upon the state any obligation to protect troops from other risks such as tropical illnesses or adjustment disorders. Furthermore this approach does not confer on the individual soldier any enforceable legal right against the state. The question of states' obligations to their own soldiers under LOAC is complex and ongoing.[260] Whether or not "military advantage" includes protection of a state's own forces, the state still has an enforceable legal obligation to protect its soldiers' right to life.

Article 2 requires states to avoid the risk to soldiers' lives wherever possible. But in armed conflict commanders are frequently required to take decisions that involve placing soldiers at risk. Viewed in isolation, aerial bombardment of Az-Zubayr was a reasonably practicable measure that would have achieved the military objective and avoided exposing Lance Corporal Y to any increased risk. But in light of the state's obligations to respect the right to life of everyone within its jurisdiction and its LOAC responsibility to refrain from causing disproportionate civilian harm, aerial bombardment may not be a reasonable course of action at all. Some accommodation must be reached. If soldiers' right to life guarantees

[260] For an interesting discussion of this question, see Ziv Bohrer and Mark Osiel, 'Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties vs. Safeguarding Soldiers' 46 *Vand J Transnatl L* 747.

are to be effective, they must be practical and realistic and not require states to take measures that would violate its other obligations under the Convention or under other international legal agreements. In so doing, it must recognise it is acceptable to expose soldiers to some degree of risk.

6.2.2. Reasonably Practicable Measures

Aerial bombardment of Az-Zubayr was not a reasonable course of action to protect Lance Corporal Y against increased risks. Though pursuit of this option would have avoided exposing him to increased risk, it might have violated the United Kingdom's obligations under LOAC and its responsibility to respect the right to life of those brought within its jurisdiction. The decision to send in ground troops rather than order an aerial bombardment in these circumstances is justified. But that does not mean that the increase in the risk to Lance Corporal Y's life was justifiable. The state must also demonstrate that it took reasonably practicable measures to protect him from attack by ensuring Lance Corporal Y was as well-equipped to defend himself as circumstances allowed.

Lance Corporal Y and his mortar troop were heavily armed, enabling them to attack enemy positions and defend themselves. The troop also had use of an armoured personnel carrier, which offered them some protection against enemy attack. More powerful weapons and a stronger vehicle might have given the soldiers a better chance of survival in the event of attack. But Lance Corporal Y's death occurred during large-scale operations in Az-Zubayr and nearby Basra. In the context of ongoing hostilities and competing demands for limited resources, it was not possible to give Y better equipment without prejudicing another soldier's ability to defend himself, or unreasonably limiting the scope of hostilities to allow greater concentration of equipment in the hands of fewer troops.

Provided that available equipment was allocated to soldiers on the basis of an objective assessment of their relative needs and the type of threat a troop was expected to face, the decision not to equip Y's troop with more powerful weapons or stronger vehicles will not constitute an unjustifiable increase in the risk. Soldiers' right to life should not impose unreasonable or impractical burdens on commanders, who have to make do with what limited resources they have in the theatre of operations. Article 2 considerations should be subtly integrated into commanders' decision-making, rather than creating rigid frameworks that undermine military efficacy.

In this case, Lance Corporal Y was equipped as well as the circumstances would allow, considering the nature of his mortar troop's role, ongoing hostilities involving large numbers of British troops and competing demands for available resources. Sadly in war not all casualties can be prevented, even where soldiers are well-equipped to defend themselves. That does not automatically mean that the risk to soldiers' lives was unjustifiably increased. On balance, Lance Corporal Y's right to life was not violated. Though it was possible to protect him against enemy attack by aerial bombardment of enemy positions, to do so would have constituted a violation of LOAC or the Convention rights of others.

I have applied the same unjustifiable increase in the risk test to all the armed conflict scenarios. In the previous IED scenario, the soldiers *were* killed as a result of enemy attack – the nature of the attack was merely unconventional. The risk of enemy attack is the same. What differs is the source of the *increase* in the risk. The state's Article 2 obligation

to their troops should be to prevent an unjustifiable increase in the risk to their lives, and all the armed conflict scenarios detailed in this Chapter have been about the increased risk to soldiers' lives resulting from commanders' decisions. In this scenario, the question is whether the increase in the risk was the result of "bad soldiering", that is commanders' misguided operational judgments about deploying troops. In the previous IED and Crossfire scenarios, the increased risk was caused by procurement, equipping or training decisions earlier in the chain of events. These differing sources of increased risk may attract different degrees of judicial scrutiny, as will be discussed in Chapter 5.

According to this expression of the positive obligation states must show the increased risk to soldiers' lives was justified by an objective assessment of need and asset availability, or the needs of the mission, or other factors. It requires battlefield commanders to take care for their subordinates' lives but without restricting them so much that the Army cannot function. The Court has also recognised that Article 2 imposes a procedural obligation on states to investigate deaths, and I turn to this now.

7. PROCEDURAL OBLIGATION

In all of the scenarios detailed in this Chapter, soldiers have lost their lives in unnatural, violent or suspicious circumstances. In all of them there are questions as to whether the state owed any substantive obligations under the right to life and whether those obligations were fulfilled. In its interpretation of the right to life the Court has judged the text of Article 2 contains an implicit procedural obligation for states to investigate unnatural or suspicious deaths. When read in conjunction with states' general duty under

Article 1 to secure the Convention rights to everyone within their jurisdiction,[261] there must be an effective investigation to give effect to the guarantee that everyone's right to life shall be protected by law. In terms of the negative obligation the duty to investigate can determine whether state agents exceeded their powers (and censure those agents where necessary).[262] The obligation to investigate is not limited to when state agents kill, but to all suspicious or unnatural deaths.[263]

The House of Lords notes the procedural obligation is 'parasitic'.[264] It depends upon application of the substantive obligations of the right to life, and exists to test whether the positive or negative obligations have been complied with. As well as checking that state agents' use of force in law-enforcement contexts is not excessive, investigations monitor whether states have fulfilled their positive obligations to take appropriate steps to safeguard life. The duty to investigate is not abrogated in difficult security situations. The Kurdish conflict did not exempt Turkey from its obligation to perform full and proper investigations into deaths in its south-eastern provinces.[265] States are not absolved of their responsibility to investigate when soldiers die in armed conflict abroad or in training accidents at home. What constitutes a full and proper investigation will depend upon the circumstances of each case.

The investigation must determine whether the state has established a proper framework of laws and precautions that are capable of protecting life to the greatest extent that is

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[261] Chapter 1.
[262] *Kaya* v *Turkey* 28 EHRR 1, §86.
[263] *Menson* v *United Kingdom* 37 EHRR CD 220, 12-13., App No 47916/99 (ECtHR, 6 May 2003)
[264] *R (Gentle)* v *Prime Minister* [2008] UKHL 20, [2008] AC 1356, [5]-[6] (Lord Bingham).
[265] *Güleç* v *Turkey* 28 EHRR 121, §81.

reasonably practicable, and that that framework has been properly implemented and observed. For our soldiers the investigation must discover whether the risk of friendly fire was unjustifiably increased, or if the state had done everything reasonably practicable to ensure its soldiers are properly trained and equipped to defend themselves against enemy attacks. Effective investigations into whether states have complied with their Article 2 obligations must be impartial and independent.[266] The investigation must gather appropriate evidence, reach conclusions based on that evidence[267] and be open to public scrutiny.[268] The investigation must be capable of identifying the cause of death and, where appropriate, those responsible.[269] The obligation to investigate arises as soon as the authorities become aware of a violent, suspicious or unnatural death.[270]

British law requires there to be an inquest into all deaths occurring abroad when the deceased's remains are repatriated.[271] Current practice in the British military is that the remains of all service personnel killed on a tour of duty are repatriated to the United Kingdom. As such all military deaths are investigated in court. Coroners determine the deceased's identity and cause of death.[272] The courts have also ruled that coroners should assume their inquests are the means of fulfilling the state's procedural obligation and should therefore examine the 'broad circumstances' in which the death occurred.[273]

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[266] ibid, §78.
[267] *Kaya*, §89.
[268] *Öğur* v *Turkey* 31 EHRR 40, §92.
[269] *Assenov* v *Bulgaria* 28 EHRR 652, §102.
[270] *Jordan* v *United Kingdom* 37 EHRR 2, §105.
[271] *R* v *West Yorkshire Coroner, ex p Ronald Smith* [1983] QB 335.
[272] Coroners' and Justice Act 2009, s 5.
[273] *R (Middleton)* v *West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182, [47] (Lord Bingham).

It is expected that criminal proceedings are brought when death results from individuals' unlawful actions, but in many circumstances where soldiers are killed by enemy combatants it would be impossible to initiate criminal proceedings. On a practical level, the killer may not be identifiable. It is unrealistic to expect military police to conduct an investigation into *which* enemy soldier killed each British soldier on the battlefield. Such is the nature of war that the actual killer may already have been killed. Modern means of waging war are such that the "killer" may be the pilot of an unmanned aerial vehicle operating the so-called drone from thousands of miles away. At law, it is not clear whether enemy soldiers are bound by UK law[274] and in what circumstances the UK would have the right and power to try enemy soldiers under its own criminal law, and indeed what role LOAC would play in such a trial.

In order to determine whether the relevant obligations have been complied with the coroners' courts must be able to examine issues such as operational decision-making and procurement. Dealing in detail with complex subject matter might unreasonably increase coroners' workload and delay verdicts.[275] Internal military investigations may be a more appropriate forum in which to fulfil the procedural obligation in respect of soldiers' right to life. For purely practical reasons the military is better-placed to conduct the physical investigation and evidence-gathering in the first instance and has expertise to deal with the

[274] The reach of the state's legal power beyond its own territories is a question of jurisdiction in public international law. See for example Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014); Malcolm N Shaw, *International Law* (6th edn, CUP 2008); Harold G Maier, 'Jurisdictional Rules in Customary International Law' in Karl M Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer Law International 1996). Note that the public international law notion of jurisdiction and the state's power to apply its own law to foreign nationals or beyond its own territories is a legal question about states' relationships. Jurisdiction in human rights law (which see Chapter 1) is the threshold criterion for determining whether states owe obligations under human rights law to a particular individual.

[275] Pursuant to Article 6(1) of the Convention, in determination of their civil rights and obligations individuals are entitled to judgment without undue delay.

complex issues involved. The Court has said that internal investigations *can* suffice to satisfy states' procedural obligation.[276] But the problem with this solution is that investigations must be completely independent.

In *Al-Skeini* the Court found the UK failed to fulfil the procedural obligation because the investigation conducted by the Royal Military Police Special Investigation Branch was kept entirely within the military chain of command. There was no oversight by any external body.[277] The Royal Military Police did not appear sufficiently independent of those soldiers implicated in the applicants' relatives' deaths because they report within the same chain of command.[278] The same problem arises if investigations into soldiers' deaths are conducted by the military itself. Although the Court has accepted that in some circumstances 'less effective methods' of investigation may have to suffice in volatile security situations,[279] that does not abrogate the independence requirement.

In some cases analysed in this Chapter the Army has held an internal Board of Inquiry. These investigative panels discuss the circumstances of the accidents in forensic detail. It is unrealistic to expect the Army to hold a Board of Inquiry into every military death. Usually they are held when there is an indication of systemic problems in military operations. As such the Boards of Inquiry are, by themselves, insufficient to discharge the procedural obligation. Though the Boards are comprised of senior officers, they are not drawn from the same regiment as the soldier who was killed. That goes at least some way to give the appearance of independence.

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[276] *Calvelli and Ciglio* v *Italy*, App No 32967/96 (ECtHR, 17 January 2002) §51.
[277] *Al-Skeini*, §172.
[278] ibid.
[279] ibid, §164.

Deaths should be examined by a body independent of the military chain of command. Whilst coroners' inquests can fulfil this investigative function and conduct an inquest upon repatriation of all deaths occurring abroad, it may be more appropriate to have a dedicated investigative body to examine each case. Not only does that relieve pressure on coroners' courts, a dedicated body can be comprised of a number of individuals from military, legal, medical or other backgrounds to provide a well-rounded and independent report of the broad circumstances in which an individual died. Inclusion of military and lay members means the investigative body can examine the evidence and render an informed decision on military necessity and unjustifiable risks.

In armed conflict situations, particularly those overseas, it is more appropriate for soldiers to complete the initial evidence-gathering process when it is safe to do so. The Court accepts that in certain circumstances it may be extremely difficult to conduct a full investigation immediately.[280] The security situation may not permit immediate forensic examination of a site and evidence may be lost, destroyed or rendered unusable by such time as examination is possible. This should not, by itself, constitute a violation of the procedural obligation. States' investigative duty should not require them to put other people's lives at risk for the sake of gathering evidence. This is particularly the case for deaths during actual engagement with the enemy.

Given the realities of armed conflict it is unreasonable to expect detailed forensic reports in all cases. When states are under an obligation to ensure soldiers are properly trained and

[280] *Kaya*, §89.

equipped to defend themselves against hostile attack,[281] forensic evidence of the attack itself may be of less value than equipment logs and asset visibility reports, which more adequately describe how well-equipped soldiers were at the material time and in general. This raises the independence question again. Safety and circumstances permitting, the independent investigative body should have oversight of the evidence-gathering process.

One problem plaguing the procedural obligation in respect of soldiers' deaths is the requirement that investigations are open to public scrutiny. Military Boards of Inquiry Reports are published (although names and some sensitive security details are redacted) and coroners' verdicts are publicised. The suggested independent investigative body must also hold hearings in public and publicise its findings. States should nevertheless retain the right to keep information secret where disclosure would prejudice national security or the safety of troops still serving. Its reports should be circumspect when talking about military tactics and methods. It is important, however, that this deference to national security is not abused and used as an excuse to cover up unfortunate failings that lead to soldiers' deaths.

One major problem for the procedural obligation is the scientific and jurisdictional competence of the investigators to deal with the relevant legal and factual issues. The Armed Forces themselves are probably better-placed than a court to determine whether soldiers are properly trained for war and to decide what is good soldiering. But allowing the Armed Forces to keep investigations into soldiers' deaths "in-house" violates the vital independence requirement. Similarly military investigators might not be the appropriate

[281] Section 5.

people to question procurement issues. Arguably, neither are the courts, since procurement is a political issue and subject to Parliamentary scrutiny. The requirement to investigate deaths to determine whether substantive obligations have been upheld raises important questions on the appropriate limits of judicial intervention in military operations. Chapter 5 discusses that issue.

CONCLUSION

There are particular challenges in applying Article 2 to military deaths, especially those occurring in the context of armed conflict overseas. The Court's jurisprudence establishes numerous tests and frameworks in relation to negative and positive obligations, but those frameworks have evolved in cases arising out of domestic peacetime and were designed for those circumstances. Application of the Convention's strict wording within those frameworks to the armed conflict paradigm can have unreasonable or absurd results. This Chapter has identified the general principles of the negative, positive and procedural obligations from the Court's jurisprudence and constructed a new framework for protecting soldiers' right to life in a way that makes reasonable allowances for the realities of armed conflict.

How then to enforce this framework? The challenge of applying Article 2 to military operations and protecting soldiers' right to life does not end with defining new expressions of legal obligations. A fundamental issue is how to ensure states are complying with the requirements established in this framework and are taking the necessary steps to safeguard soldiers' lives against the risks inherent in military service. Numerous avenues of enforcement exist. One such is to sue the state for a violation of Article 2. Bringing a right

to life claim before the court raises issues about judicial competence and the appropriate limits of judicial intervention. I shall turn to this matter in Chapter 5.

CHAPTER FIVE

ADJUDICATING SOLDIERS' RIGHT TO LIFE CLAIMS

INTRODUCTION

Article 13 of the European Convention provides:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[1]

States must create mechanisms for people to vindicate their Convention rights, although they enjoy a degree of discretion in how to implement the right to an effective remedy.[2] When soldiers are killed their next of kin can claim a violation of their right to life in court, and this can constitute an effective remedy for the purposes of Article 13. But how should the judge proceed? This Chapter examines the standard of review courts should apply to soldiers' right to life claims.

This thesis' aim is determining how to guarantee soldiers' right to life under Article 2 of the Convention. Chapter 4 outlined several real-life scenarios in which British soldiers died and applied to those scenarios general principles of Article 2 jurisprudence as developed in the case law of the Court and the now-defunct Commission.[3] Chapter 4 detailed standards of behaviour and due diligence required of state agents in the position to make decisions affecting soldiers' right to life. This Chapter is about how courts review those decisions and the limits of judicial scrutiny.

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 222.

[2] *Vilvarajah* v *United Kingdom* 14 EHRR 248, §122.

[3] The general principles are identified in Chapter 3.

Military service poses a number of serious risks to soldiers' lives. Training exercises are designed to test the limits of soldiers' endurance and teach them to use powerful weapons. During deployment to conflict situations soldiers are at constant risk of being targeted by enemy troops, adjustment disorders and other health issues,[4] as well as the potential for friendly fire accidents. Chapter 4 recognised states' obligation to protect soldiers' lives by taking reasonably practicable measures to avoid an unjustifiable increase in the risk. What standard of review should judges adopt when determining whether an increase in the risk was justifiable, or which protective measures were reasonably practicable in the circumstances? The scenarios detailed in Chapter 4 are repeated in this Chapter to illustrate the most appropriate judicial approach to soldiers' right to life claims.

It is clear from the text and the European Court's interpretation of the Convention that the purpose of Article 2 is preserving and safeguarding human life, which is essential to 'all the aspirations and needs of a human being to enjoy an existence in unharmed dignity'.[5] Article 2 needs to have a prophylactic effect. Effective protection of the right to life requires states to integrate Article 2 principles such as necessity and proportionality[6] into their decision-making processes. States needs to consider soldiers' human rights ex ante, not just give post hoc compensation to victims. This Chapter considers how the courts can review the integration and implementation of Article 2 considerations into military decision-making.

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[4] For instance Private J died of heatstroke due to insufficient adjustment to the climate and conditions prevailing at the time of his deployment. *R (Smith)* v *Secretary of State for Defence and Another* [2010] UKSC 29, [2011] 1 AC 1, [1] (Lord Phillips P).

[5] Christian Tomuschat, 'The Right to Life: Legal and Political Foundations' in Christian Tomuschat et al (eds), *The Right to Life* (Martinus Nijhoff 2010) 3.

[6] Chapter 3.1.2.1.

The European Court has judged that primary responsibility for guaranteeing individuals' Convention rights rests with national authorities.[7] Legislative and executive bodies must have a role in 'the definition and furtherance of fundamental values'.[8] Their role is quite different to that of courts in implementing human rights protections. Legislative and executive bodies determine the practicalities of how to guarantee human rights according to a framework of general principles. Courts determine how well the regime concords with those general principles and whether the limitations on enjoyment of rights stipulated by legislative and executive bodies are necessary for society. This Chapter focuses specifically on the role of courts.

Other judicial and quasi-judicial proceedings may be initiated when soldiers are killed. As previously noted, under British law, coroners' inquests investigate violent, unnatural or unexplained deaths, or when someone dies in state custody[9] to ascertain the identity of the deceased and the time, place and manner of their death.[10] Inquests are held automatically upon repatriation of people killed abroad.[11] The military is an emanation of the Crown and therefore immune from prosecution under health and safety legislation. However the Health and Safety Executive ("HSE") may record a Crown censure in respect of soldiers' deaths where, but for Crown immunity, it would have secured a conviction.[12] Coroners' inquests and HSE investigations do not apply the law of the Convention to the specific

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[7] *McKerr* v *United Kingdom* 34 EHRR 20, §117.
[8] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs a Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart 2003) 350.
[9] Coroners and Justice Act 2009, s 1.
[10] ibid, s 9.
[11] *R* v *West Yorkshire Coroner, ex p Roland Smith* [1983] QB 335.
[12] Health and Safety at Work etc Act 1974, s 48(1).

circumstances under investigation. They ask different questions governed by different statutory regimes. Accordingly this Chapter focuses on the appropriate judicial approach when the state is sued for an Article 2 violation.

Soldiers' right to life claims raise a host of difficult issues that might fall on the boundaries of what judges do. In the context of an Article 2 challenge, courts might be asked to adjudicate decisions taken by professional bodies such as the best way in which to conduct training exercises, or political matters like procurement of equipment and troop deployment. Judges may lack expertise to scrutinise and make reasoned judgments about such matters, or might lack the authority and legitimacy of electoral accountability to challenge political decisions. Courts must adopt a standard of review that takes account of the constitutional and institutional factors limiting their competence, but which also secures genuine implementation and effective enforcement of general right to life principles in military operations. This standard of review must reduce arbitrariness and enforce the rule of law, but without encroaching on military discretion and effectiveness.

Section 1 considers the combat immunity doctrine, adopted by British courts in soldiers' negligence claims, which posits that soldiers owe one another no duty of care in negligence law during actual enemy engagements. This is a very restrictive standard of review that precludes judicial scrutiny when certain factual conditions are met. Section 2 details the *Wednesbury* unreasonableness principle that limited judicial review of public authorities' decisions to whether a course of action was within the range of reasonable actions a reasonable decision-maker could take. Section 3 examines the more inclusive proportionality analysis that British judges now routinely apply in human rights

adjudication and judges' practice of deferring to decisions made by Parliament and the government. Section 4 analyses the European Court of Human Rights' margin of appreciation doctrine, which grants states a degree of discretion in how they implement the Convention in their own societies. Section 5 examines some of the reasons for these restrictive standards of review. Section 6 revisits the scenarios discussed in Chapter 4 to set out the standard of review judges should adopt in different contexts and to determine what questions judges should be asking in adjudication of soldiers' right to life claims.

1. COMBAT IMMUNITY

The Crown Proceedings Act 1947 permitted individuals to sue the Crown in tort and contract as of right.[13] But s 10 of the Act indemnified the Crown against negligence claims in respect of death or personal injury suffered by members of the armed forces as a result of other soldiers' negligent acts or omissions.[14] This exemption applied when death or personal injury occurred during "service" for the purposes of entitlement to a war pension.[15] Individual servicemen are also indemnified against liability in negligence for death or personal injury resulting from their negligent acts or omissions.[16] This exemption was suspended in 1987,[17] although the Secretary of State retains the power to reinstate that immunity where it appears expedient to do so by reason of national emergencies or warlike operations overseas.[18] That power has never yet been utilised. There is no statutory bar to judicial scrutiny of combat operations in soldiers' tort claims, but the development of the common law combat immunity doctrine limits judicial involvement in conduct of hostilities.

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[13] s 1.
[14] s 10(1).
[15] s 10(1)(b).
[16] ibid.
[17] Crown Proceedings (Armed Forces) Act 1987, s 1.
[18] ibid, s 2.

During the Boer War the Privy Council held that 'where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals'.[19] In a Second World War case, the Australian High Court relied on this judgment and determined that soldiers are not under any common law duty of care to avoid harm to such civilians or civilian property as may appear in the theatre of operations during engagement with the enemy.[20] In 1982 Gibbs CJ confirmed that soldiers' immunity from civil liability for injuries caused by negligence during enemy contact 'accord[s] with common sense and sound policy'.[21] In a concurring judgment Stephen J granted that 'Public policy may require that, at some point in the continuum from civilian-like duties performed by servicemen in peacetime to active service in wartime, what would otherwise involve actionable negligence should not give rise to a cause of action'.[22]

In *Mulcahy* v *Ministry of Defence* the Court of Appeal of England and Wales approved the combat immunity doctrine that soldiers are not liable for harm they cause during enemy engagement, explicitly extending the doctrine to include harm occasioned to friendly soldiers in terms similar to s 10 of the Crown Proceedings Act 1947.[23] Nor is the state vicariously liable as the soldier's employer. The claimant was a British soldier who served in the Gulf War. Mulcahy's troop was positioned in Saudi Arabia, firing into Iraq. He was standing in front of a gun carriage when Sergeant U negligently fired the howitzer, causing permanent hearing damage.[24] Mulcahy sued the Ministry of Defence in negligence,

[19] *Ex p Marais* [1902] AC 109, 144 (The Earl of Halsbury LC).
[20] *Shaw Savill & Albion Co ltd* v *Commonwealth* (1940) 66 CLR 344, 361 (Dixon J).
[21] *Groves* v *Commonwealth* (1982) 150 CLR 113, 117.
[22] ibid, 135.
[23] [1996] QB 732.
[24] ibid, 737 (Neill LJ).

claiming that as Sergeant U's employer the government was vicariously liable for his negligence.[25]

Neill LJ asked whether it would be fair, just and reasonable to impose a duty of care in the circumstances,[26] having regard to the 'position and role of the tortfeasor and any relevant policy considerations'.[27] Two of the conditions for imposing a duty of care in the English law of negligence were satisfied,[28] but Neill LJ concluded it would not be fair, just and reasonable to impose a duty of care on servicemen in the heat of battle (or, by extension, on the state as the soldiers' employer).[29] The doctrine cannot apply in peacetime and the state can still be liable for harm caused by the negligent acts or omissions of soldiers who are not engaging the enemy.[30]

The combat immunity doctrine states that, in the course of actual engagement with enemy forces, the law will not impose on soldiers a duty to act with care for the safety of their comrades. Liability in negligence law is based on failure to act in accordance with an acceptable standard of behaviour. The effect of the combat immunity doctrine is that, in the course of actual engagement with the enemy, there is *no* acceptable standard of behaviour against which to judge soldiers' actions. The lack of an established standard of acceptable behaviour means there can be no liability for soldiers' actions or omissions in the course of battle, even though there may be such a duty where the enemy is not present

[25] ibid, 740 (Neill LJ).
[26] ibid, citing *Dorset Yacht Co ltd* v *Home Office* [1970] AC 1004, 1077 (Saville LJ).
[27] ibid, citing *Marc Rich & Co AG* v *Bishop Rock Marine Co ltd* [1996] AC 211, 237, 240-41 (Lord Steyn).
[28] See *Caparo Industries plc* v *Dickman* [1990] 2 AC 605.
[29] *Mulcahy*, 749-50.
[30] *Jebson* v *Ministry of Defence* [2000] 1 WLR 2055.

but all other conditions are the same. This model of judicial restraint may be an appropriate approach in soldiers' right to life claims.

Combat immunity is a very restrictive standard of review. The judge does not need to consider whether a soldier acted negligently once certain factual conditions are met – namely that at the time the soldier was allegedly negligent, he was actually engaged with enemy forces and it would not be fair, just and reasonable to impose a duty of care in the circumstances. But the doctrine is even more restrictive because it posits that the soldier is under no legal duty at all once that factual condition is met. In adopting this doctrine judges might be accused of changing the scope or nature of a legal duty so as to legitimate soldiers' actions that, in other circumstances, would violate a legal duty. The same criticism has been levelled at Israeli judges.

The Israeli High Court of Justice ("HCJ") hears cases that fall outside the jurisdiction of ordinary courts but that require judgment in the interests of justice.[31] Though Israel has no codified constitution, Basic Law: Human Dignity[32] and Basic Law: Freedom of Occupation[33] have been considered to have constitutional status and to have vested the HCJ with power of judicial review.[34] The HCJ has heard cases arising out of armed conflict situations and has been clear that the law continues to apply in the course of battle. Any other approach

[31] Basic Law: The Judiciary, 5744-1984, II Sefer Ha-Chukkim 5744, No 78, §15(c).
[32] 5752-1992, Sefer Ha-Chukkim 5752, No 1391.
[33] 5754-1994, Sefer Ha-Chukkim 5754, No 1454.
[34] CA 6821/93 *United Mizrahi Bank* v *Migdal Cooperative Village* 49(4) PD 221. See judgment of Barak P. Chief Justice of Israel Aharon Barak called this development a 'constitutional revolution': Aharon Barak, 'Constitutional Revolution: Protected Human Rights' 1 *Law and Government* 9, 9-13. Some HCJ justices have criticised this view, considering that Basic Laws are merely procedural limitations rather than being constitutional and substantive limitations on legislative and executive bodies: *United Mizrahi Bank*, judgment of Cheshin and Zamir JJ.

would contradict the idea that 'the state fights in the name of the law and in the name of upholding the law'.[35] But in such cases the HCJ has, more often than not, found in the government's favour – acknowledging the state's role in guaranteeing individual rights, but refusing to permit those rights to become the spade that buries the state.[36]

Former Chief Justice of Israel Aharon Barak has written extra-judicially that judges must be prepared to change or redefine legal norms to permit actions that otherwise fall foul of established legal standards.[37] The judgment in *Public Committee Against Torture in Israel* v *Government of Israel* ("*PCATI*") is a good example of this practice.[38] Between September 2000 and late 2005 the Israeli Defence Forces killed almost 450 people, around one third of whom were civilians,[39] in targeted killings.[40] The HCJ enforced the law of armed conflict that civilians are protected from attack as long as they do not directly participate in hostilities,[41] but adopted a definition of "direct participation in hostilities" that arguably legitimised the government's practice of targeted killings in the circumstances.[42] The HCJ interpreted the law in such a way that the government had not violated its legal obligations, just as the Court of Appeal in *Mulcahy* interpreted the law in such a way that the government had no legal obligations (of the type claimed) in the circumstances.

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[35] HCJ 168/91 *Marcus* v *Minister of Defence* 45(1) PD 467, 470-1.
[36] EA 2/84 *Neiman* v *Chairman of the Elections Committee for the Eleventh Knesset* 39(2) PD 225, 310.
[37] Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2008) 51.
[38] HCJ 769/02.
[39] In the law of armed conflict, "civilians" are defined as anyone who is not a member of the categories set out in Article 4(A)(1)-(3) and (6) of the Third Geneva Convention: First Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts ("AP1") (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512, Article 50(1); Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Article 4(A)(1)-(3), (6).
[40] HCJ 769/02, slip op. §2.
[41] ibid, §26. AP1, Article 51(3).
[42] ibid, §§34-37. See generally Kristen E Eichensehr, 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings' 116 *Yale LJ* 1873.

Mulcahy and *PCATI* are not directly comparable. *PCATI* was a judicial review claim that the government's targeted killing programme was unlawful, whereas *Mulcahy* was a simple negligence claim. But both cases arose out of conflict situations and in both cases judges interpreted the law in such a way as to alter the nature and scope of legal duties. The Court of Appeal in *Mulcahy* engineered the law so that they would not have to interrogate whether a reasonable soldier in Sergeant U's situation would do the same or whether he had acted negligently so as to violate a duty of care. This redefinition of the scope of legal duties avoids judicial involvement in the actual conduct of hostilities.

Nevertheless judges must still determine whether the factual conditions are met in order for the combat immunity to apply. Technological advances and the changing nature of warfare mean that "enemy engagement" is not restricted to face-to-face combat on the battlefield. As in Mulcahy's case soldiers can attack enemy targets from considerable distance, whilst the risks to their own lives from the enemy is relatively low. Unmanned combat aerial vehicles (so-called "drones") can be piloted from thousands of miles away but the pilot is still engaging the enemy. It is a matter of judicial discretion whether it is fair, just and reasonable to impose upon the drone pilot in those circumstances a duty to act with reasonable care for safety of comrades and such civilians or civilian objects as appear in the theatre of engagement. The British Supreme Court discussed whether it would be fair, just and reasonable to impose a duty of care upon soldiers in the circumstances in *Smith* v *Ministry of Defence*.[43] Lord Hope judged the court could not make this determination without a proper hearing on the merits of the case and it would be

[43] *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] 1 AC 52, [97]-[100] (Lord Hope DP). Hereafter "*Smith (No 2)*".

inappropriate to strike out the claims in a preliminary procedure.[44] Thus combat immunity is not a blanket doctrine excluding judicial investigation of military operations, though it does exclude detailed scrutiny of actual enemy engagement. This avoids placing undue legal burdens on commanders, who are better-placed than judges to decide what counts as good soldiering.

There is a strong argument in favour of the combat immunity doctrine in close combat with the enemy, because soldiers are in a life-and-death situation and have to make decisions without time to consider the safety of their comrades. That argument becomes less convincing the further soldiers are from the action. In *Mulcahy,* Sergeant U was not in significant danger when he fired the howitzer and taking care not to cause harm to his comrades would not have prejudiced his own safety. Similarly the drone pilot is in no personal danger so can reasonably be expected to take care for the wellbeing of their comrades on the ground.

Another justification for the combat immunity doctrine is that the original statutory exemption only applied when a soldier was killed or injured in circumstances that made him (or, in case of death, his spouse or next of kin) eligible for a war pension or other state benefits for killed and wounded personnel. Numerous statutory instruments and other legislative provisions regulate a comprehensive system of veterans' benefits. The state already accepts responsibility to provide for those killed or injured in its service and perhaps it was in the judges' minds in *Mulcahy* to prevent double liability for these kinds of incidents. US federal judges have taken a similar approach, judging that the federal

[44] ibid, [101].

government is not liable in negligence for deaths or personal injury of service personnel, partly because of existing veterans' benefits schemes.[45] Under British government plans to derogate from the Convention in future conflicts, the government has suggested that combat immunity will be extended and soldiers' compensation claims will be dealt with under an expanded internal scheme, although it is not clear if this is also part of the derogation plan.[46]

Though combat immunity is a negligence law doctrine, it applies to facts arising out of military operations. It offers an interesting perspective on the judicial approach to adjudicating cases involving soldiers, the standards they can reasonably expect of one another and their rights against the state *qua* employer. It also resonates to some extent with states' right to derogate from Article 2 in times of war.[47] Where a state purports to have derogated from Article 2 in respect of deaths resulting from lawful acts of war, the judge must make a preliminary determination as to whether the derogation itself is valid and whether death did indeed result from a lawful act of war (however that might be defined). The result of this preliminary determination may be to preclude judicial scrutiny of the necessity and proportionality of the state's actions.

In the same way the combat immunity doctrine precludes judicial scrutiny of soldiers' actions on the basis of a preliminary determination that it is not fair, just and reasonable to impose a duty of care in the circumstances. In the absence of an Article 15 derogation,

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[45] *Feres* v *United States* 340 US 135.

[46] Owen Bowcott and Damien Gayle, 'Combat Immunity Plan Will Deny Soldiers Justice, says Law Society' (*The Guardian*, 14 February 2017) <www.theguardian.com/uk-news/2017/feb/14/soldiers-denied-justice-combat-immunity-plans-military-court> accessed 16 February 2017.

[47] Article 15.

immunity from liability on the basis of such a preliminary determination is not an effective way of ensuring the state is fulfilling its obligation to guarantee soldiers' right to life. Combat immunity is a restrictive standard of review in negligence actions. In administrative law, British judges have adopted the similarly-restrictive *Wednesbury* unreasonableness principle, which I turn to now.

2. WEDNESBURY

The administrative law of England and Wales permits people to challenge public bodies' exercise of powers. People can seek a number of discretionary remedies in an application for judicial review when public bodies exercise legal powers in violation of the law granting those powers or common law principles.[48] The primary focus of judicial review is not the substance of a public body's decision but whether the decision-making process conformed to the law.[49] Review of the merits of public bodies' decisions is limited to ascertaining whether the decision was so unreasonable that no reasonable decision-maker could reasonably have made that decision.[50] The British Supreme Court recently reiterated that the relevant question is whether a decision 'lies within the range of decisions which are open to a rational decision-maker'.[51]

The *Wednesbury* unreasonableness principle recognises that 'a public authority may exercise a genuine choice between competing policy objectives and contrasting methods of

[48] Senior Courts Act 1981, s 31(1).
[49] *R* v *Chief Constable of North Wales, ex p Evans* [1982] 1 WLR 1155, 1173F (Lord Brightman).
[50] *Wednesbury*, 230 (Lord Greene MR).
[51] *AXA General Insurance ltd* v *Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868, [43] (Lord Reed).

implementation'.[52] In such a situation judges must be careful to preserve decision-makers' discretion and limit their own scrutiny. Judges should not invalidate political decisions merely because they would have reached a different conclusion if they possessed the decision-making power. There is more than one way of solving many problems and determining the right approach is a choice for Parliament and the government. The judges' role is to ensure the approach was lawful and in accordance with legal principles. *Wednesbury* is not about '"Which view is the better one?"'.[53] The relevant question is whether this decision is one that a reasonable decision-maker would have taken, which involves very little detailed examination of the merits of a decision.

Wednesbury unreasonableness is a limited standard of review. Yet the Court has observed that judicial review proceedings employing the *Wednesbury* test can be an effective remedy for the purposes of Article 13. In *Vilvarajah* the applicants alleged they would suffer inhuman and degrading treatment if they were deported to Sri Lanka,[54] giving rise to a violation of their rights under Article 3 of the Convention.[55] They also claimed that the *Wednesbury* unreasonableness standard denied them an effective remedy in domestic law. The Court accepted the government's claim that no reasonable Secretary of State would deport someone who would suffer inhuman or degrading treatment upon repatriation, and that since the *Wednesbury* test determines whether a decision was reasonable, the

[52] TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' 65(3) *CLJ* 671, 679.
[53] *R* v *Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 515 (Laws LJ).
[54] For more detailed facts see *Vilvarajah*, §§9-80.
[55] The non-refoulement principle prevents states deporting people when they may suffer human rights violations in the receiving state: Convention Relating to the Status of Refugees (opened for signature 28 July 1951, entered into force 22 April 1954) 189 UNTS 150, Article 33(1). *Cruz Varas* v *Sweden* 14 EHRR 1, §§169-70.

applicants had not been denied an effective remedy in this case.[56] This limited scrutiny of official decision-making may be of useful application in soldiers' right to life claims.

But the Court's support for *Wednesbury* is not absolute. The applicants in *Smith and Grady* v *United Kingdom* were administratively discharged from the military when their superiors discovered they were homosexual.[57] They sought judicial review of their discharge. The Court of Appeal asked whether the ban on homosexuals serving in the military was unreasonable according to the *Wednesbury* standard. Though Simon Brown LJ expressed some sympathy for the applicants the prohibition could only be struck down if it 'outrageously defies logic or accepted moral standards'.[58] The Ministry of Defence's justification[59] was not unreasonable.

Before the European Court of Human Rights the applicants alleged a violation of their Article 8 right to respect for private and family life, alone and in conjunction with the Article 14 freedom from discrimination, in addition to a claim that they had been denied an effective remedy. Article 8 permits such exceptions as are 'in accordance with the law and [are] necessary in a democratic society'.[60] The Court found that the *Wednesbury* unreasonableness standard did not permit judges to examine whether the limitation on the applicants' rights was necessary in a democratic society, or indeed whether the actual

[56] *Vilvarajah*, §123-25. See also *Soering* v *United Kingdom* 11 EHRR 439, §121.
[57] For more detailed facts see *Smith and Grady* v *United Kingdom* 29 EHRR 493, §§11-28.
[58] *R* v *Ministry of Defence, ex p Smith and Others* [1996] QB 517, 541.
[59] Quoted by Simon Brown LJ at 529-31.
[60] European Convention on Human Rights, Article 8(2).

means of implementing that limitation were proportionate to the legitimate aim it pursued.[61]

Wednesbury is not a totally useless standard of review in human rights adjudication, as the *Vilvarajah* judgment shows. But the Court demonstrated in *Smith and Grady* that the correct application of *Wednesbury* will depend upon the nature of the right claimed. The Court's approach to these two cases can be criticised as inconsistent. If no *reasonable* Secretary of State would deport someone who will face inhuman and degrading treatment, surely no *reasonable* Secretary of State would limit the right to Article 8 unless it was necessary in a democratic society to do so? But defining "unreasonableness" in this way adds another layer of interpretation and risks obscuring the necessity and proportionality requirements. Human rights adjudication requires a more rigorous standard of review than traditional administrative law, and using the same language might be confusing for applicants, respondent governments and judges alike.

Wednesbury remains the applicable standard of review in cases that do not allege violation of Convention rights.[62] It may also be an appropriate standard of review in some soldiers' right to life claims, depending upon the facts of the case and the nature of the state's obligation to the soldier in the circumstances. British courts now routinely apply a proportionality test to human rights adjudication. This proportionality analysis sometimes involves a degree of deference to Parliament or the government.

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[61] *Smith and Grady*, §138.

[62] *R (Association of British Civilian Internees: Far East Region)* v *Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397, [37] (Dyson LJ).

3. PROPORTIONALITY

Proportionality is a much more intensive standard of review than *Wednesbury* unreasonableness. The judge is not limited to asking whether a legislative or executive decision was reasonable, but must actually examine the merits of that decision. Proportionality is the standard by which prima facie violations of Convention rights might be justifiable. For example when someone dies as a result of state agents' use of force it will not constitute a violation of Article 2 where the use of force was absolutely necessary in pursuit of one of the Article 2(2) law-enforcement objectives and the force used was proportionate to achieving that aim.[63] The judge must weigh the good – that is preventing harm of a certain type – against the bad – that is causing harm of another type.[64] In *McCann,* the European Court had to consider whether the good (preventing detonation of a bomb and the resultant large-scale death and personal injury) outweighed the bad (killing three IRA operatives).[65]

In order to perform this balancing analysis, judges must assess whether something has positive or negative values. States are permitted in certain circumstances to place limitations on enjoyment of fundamental rights. The effect of this limitation will have a particular negative value that depends upon the importance of the right that is limited and the extent of the limitation. The objective sought by the limitation will have a particular positive value, as will the necessity of the limitation. In weighing the pros and cons of authorities' actions British judges have sometimes deferred to assessments and choices made by legislative and executive bodies. In some circumstances Parliament and the government are better-placed to determine how to respond to a particular issue. To

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[63] Chapter 3.1.2.

[64] See generally Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 401-14.

[65] *McCann* v *United Kingdom* 21 EHRR 97. See Chapter 3.1.2.

greater or lesser extent judges will defer to the will of Parliament or the government on matters falling within a discretionary area of judgment.

3.1. Discretionary Areas of Judgment and Deference

Courts recognise the special relationship Parliament and the government enjoy with the people. Legislative and executive bodies are uniquely placed to form an informed opinion of the public interest, whether serving that interest requires limiting enjoyment of a Convention right, and the terms of that limitation. Accordingly judges identify a discretionary area of judgment, a category of decisions in which they should be slow to question assessments and choices made by Parliament and the government. Examples of issues falling within the discretionary area of judgment are some matters relating to national defence[66] and macro-economic policy.[67] The discretionary area of judgment has been criticised as creating a justiciability doctrine excluding judicial scrutiny of certain kinds of decision.[68]

The principle acknowledges there are certain questions that judges are less well-equipped to take, but does not totally exclude judicial scrutiny of those questions. It is useful to contrast the discretionary area of judgment principle with the "political questions" doctrine developed by US federal judges. So called "political questions" fall outside the purview of judicial scrutiny. Brennan J listed some of the characteristics of political questions in *Baker* v *Carr:*

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[66] *Marchiori* v *Environment Agency* [2002] EWCA Civ 3, [33]-[38] (Laws LJ).
[67] *R* v *Secretary of State for the Environment, ex p Nottinghamshire County Council* [1982] AC 240; *R* v *Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521.
[68] Hunt, 'Sovereignty's Blight'.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without resolute lack of the respect due coordinate branches of government; or of an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[69]

This is a long list of features and federal judges may decline to hear a case if any one of them is present. Cases raising political questions are non-justiciable – that is, not suitable for judicial resolution. The political questions doctrine does not exclude judicial scrutiny of issues that have a political flavour, since many cases will have ramifications for politics. But judges cannot hear cases whose subject matter concerns a power granted to Congress or the President, or which would require the court to assume legislative or executive powers and responsibilities. This reflects the strong separation of powers doctrine underlying the US constitutional settlement. Because the existence of a political question renders a case non-justiciable, Brennan J warned against 'semantic cataloguing' of cases on the basis of the category of decision under challenge.[70]

The political questions doctrine has been criticised as judicial abdication.[71] Yet by the same token, disregard for the will of legislative and executive bodies is a failure to properly weigh

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[69] *Baker* v *Carr* 369 US 186, 217.

[70] ibid.

[71] Eileen Kaufman, 'Deference or Abdication? A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security' 12(1) *Washington University Global Studies Review* 95, 159.

competing interests and might also constitute abdication of the judicial role.[72] The abdication criticism is weak since judges do not strike out cases on the basis of the category of decision under challenge. For instance command of the armed forces is specifically reserved to the President in the US Constitution.[73] That does not mean all matters relating to military operations constitute non-justiciable political questions, since there is in certain circumstances a 'threshold constitutional duty [which] can be judicially identified and its breach judicially determined'.[74] The judge must determine whether there *is* a political question, which is itself a delicate exercise in constitutional adjudication.

The political questions doctrine is similar to the discretionary area of judgment principle inasmuch as judges identify categories of decision that legislative and executive bodies are better-placed to take. But the US judicial approach to issues within those categories of decision is quite different to that of British judges. The political questions doctrine is an 'idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected and unrepresentative judiciary'[75] precluding judicial scrutiny of certain questions within the constitutional competence of legislative and executive organs. The discretionary area of judgment, however, does not give Parliament and the government carte blanche to do whatever they please. It merely signals to judges that they should ascribe some normative weight to legislative and executive assessments and choices when conducting the vital proportionality analysis. The discretionary area of judgment principle may appear

[72] Paul Daly, *Proportionality and Deference in Administrative Law: Basis, Application, and Scope* (CUP 2012) 30.
[73] Article II, Section 1.
[74] *Berk* v *Laird* 429 F.2d 302, 304-305.
[75] *Allen* v *Wright* 468 US 737, 750.

abstentionist but in comparison to the US political questions doctrine British judges retain significant powers of review of matters falling within the discretionary area of judgment.

Courts cannot "remake" policy decisions and assume legislative or executive powers.[76] Lord Steyn approved of a judicial light touch in matters within the discretionary area of judgment,[77] and Lord Bingham warned that Parliament and the government make policy, not judges.[78] As such judges defer to legislative and executive assessments or choices and do not seek to substitute their own assessment of the social need for that of the lawful decision-maker. When judges defer they lend normative weight to decision-makers'[79] assessment of the existence of social needs and how to meet those needs most effectively on the grounds of democratic mandate or institutional competence. How much normative weight courts lend government or military commanders in soldiers' right to life claims will depend upon the facts of each case.

Deference involves a judicial determination of the limits of decision-making powers, and leaving decision-makers' choices unmolested to the extent that they remain within the scope of the decision-maker's authority.[80] Judges then consider the 'crunch constitutional question'[81] of whether the decision-maker's choices conform to Convention standards of

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[76] *R (Mahmood)* v *Secretary of State for the Home Department* [2001] 1 WLR 840, [33] (Laws LJ), [37]-[40] (Lord Phillips MR).
[77] *R (Daly)* v *Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [28].
[78] *A* v *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [29].
[79] "Decision-makers" may include Parliament, the government, local councils, civil servants, military commanders or any body or individual exercising public decision-making powers.
[80] *R (ProLife Alliance* v *British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185, [75] (Lord Hoffmann).
[81] Jeffrey Jowell, 'Judicial Deference: Servility, Civility, or Institutional Capacity' [2002] *PL* 502, 508.

proportionality. Deference is criticised as a 'flawed and unprincipled doctrine'.[82] It suffers a lack of conceptual clarity since judges rarely describe what they are doing when they defer. Academic literature identifies two species of deference: deference as submission and deference as respect.[83] There is no clear distinction between the two and whether judges are submitting to, or merely respecting the will of legislative or executive decision-makers largely depends upon the individual point of view.

Submissive deference is when judges ascribe so much normative weight to decision-makers' choices that they fail to critically examine the proportionality of a measure. Courts should 'find it hard to upset the balance which the [decision-maker] had struck' when Parliament or the government has undertaken its own proportionality assessment of a policy.[84] Courts recognise that in some areas they are 'not entitled to differ from the opinion' of Parliament or the government.[85] Respectful deference means judges lend *some* normative weight to parliamentary or government decisions:[86] 'the more purely political (in a broad or narrow sense) a question is … the less likely it is to be an appropriate matter for judicial resolution'.[87] For instance the court gave normative weight to Parliament and the government's assessment of a genuine risk to national security and how unrestricted

[82] Richard A Edwards, 'Judicial Deference under the Human Rights Act' 65 *MLR* 859, 863.
[83] David Dyzenahus, 'The Politicis of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (OUP 1997).
[84] *Belfast City Council* v *Miss Behavin' ltd* [2007] UKHL 19, [2007] 1 WLR 1420, [36]-[37] (Lady Hale).
[85] *Secretary of State for the Home Department* v *Rehman* [2001] UKHL 47, [2003] 1 AC 153, [53] (Lord Hoffmann).
[86] Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration 2008) 256.
[87] *A* v *Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [29] (Lord Bingham).

enjoyment of certain rights might exacerbate that threat.[88] On that basis the court had to determine whether the chosen measures were proportionate and legally justifiable.

When ascribing positive and negative values, deference means accepting that a restriction on a Convention right has a positive value – for instance, that it protects the rights and freedoms of others, or protects society at large. The negative obligation of the right to life prohibits intentional deprivation of life, except in circumstances provided by law. An intentional deprivation of life is a restriction on enjoyment of this right and has a negative value. But the state can argue that this restriction was necessary for the protection of others.[89] A judge who defers to this assessment accepts that the restriction on enjoyment of the right (that is, the intentional deprivation of life) has a positive value in terms of protecting rights and freedoms of others. The question the judge then asks is whether protecting the rights, freedoms and safety of society at large is worth limiting an individuals' right to life.

Deference means accepting that the measures adopted by legislative or executive bodies have a positive value. Courts are 'less well-equipped' than Parliament and the government to make certain kinds of decision about how to respond to society's needs. Judges are therefore respectful of these decisions and lend them normative weight in the proportionality analysis. Although deference does not always create a presumption of

[88] ibid. The facts are stated in the judgment of Lord Bingham, [1]-[4].

[89] The law-enforcement objectives in Article 2(2) are all concerned with protecting individuals or society at large from violent and unlawful behaviour.

proportionality, it does tip the scales in the state's favour to some extent. The extent judges defer to Parliament and the government depends upon the facts of each case.[90]

3.1.1. When Courts Defer

Judges agree they should defer to the view of Parliament as to what is in the interest of the public generally[91] and have defined a number of principles regarding the 'scope of the discretionary area of judgment'.[92] First, greater deference should be paid to Acts of Parliament than to executive decisions or subordinate measures.[93] Parliamentary supremacy historically shielded primary legislation from judicial review. Parliament has sole legislative authority in the UK[94] and the lack of binding "higher law" such as a codified constitution meant judges had no right to challenge Parliament.[95] Nothing in the HRA gives judges the power to strike down Acts of Parliament, but it does provide that Acts must be interpreted consistently with Convention rights where possible.[96] Judges are not required

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[90] John Dyson, 'Some Thoughts on Judicial Deference' [2006] *JR* 103, 108.
[91] *R* v *Lambert* [2002] QB 1112, 1124 (Lord Woolf CJ).
[92] *International Transport Roth GmbH* v *Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, [81] (Laws LJ).
[93] ibid, [83] (Laws LJ).
[94] *Case of Proclamations* (1611) 12 Co Rep 74 (Sir Edward Coke).
[95] All statutes are of equal weight and can be enacted, amended or repealed with a simple parliamentary majority. Yet scholars and judges have discussed a category of "constitutional" statutes, which are immune from implied repeal and form the bedrock of the British constitutional settlement (see *Thorburn* v *Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, [62]-[64] (Laws LJ). Laws LJ details an indicative list of "constitutional" statutes. Though in practice these statutes will never be amended or repealed there is nothing in law to prevent that. Nevertheless some have suggested the Human Rights Act creates a 'higher-order framework, a constitutional order' akin to a codified constitution. See Jeffrey Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP 2003) 68.
[96] s 3(1).

to disregard the will of Parliament when determining whether there has been a violation of a Convention right.[97]

Second, there is greater scope for deference to Parliament and the government where the Convention right 'requires a balance to be struck, much less so where the right is stated in terms that are unqualified'.[98] Parliament is a democratically-elected representative body that is better-attuned to public sensitivities and is uniquely placed to determine what the public interest requires. Parliament and the government must determine whether and how to limit enjoyment of Convention rights. Judges defer to the assessment of the need for a limitation and the means of accomplishing it, but must then determine whether the correct balance has been struck between protecting individual rights and pursuing majority interests.

Thirdly, judges must defer to decision-makers 'where the subject-matter in hand is peculiarly within their constitutional responsibility'.[99] Defence of the realm is the executive's prerogative. National security decisions are not immune from judicial scrutiny[100] but courts have conceded the framework of the British constitutional settlement places greater emphasis on democratic processes for resolving grave matters of state. Command of the armed forces is a matter of royal prerogative exercised by the

[97] *Poplar Housing and Regeneration Community Association ltd* v *Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [69] (Lord Woolf CJ).
[98] *R* v *DPP, ex p Kebilene* [2000] 2 AC 326, 281 (Lord Hope).
[99] *Roth*, [85] (Laws LJ).
[100] ibid.

government.[101] In this area courts may be prepared to lend greater weight to government decisions than, for example, in the sphere of criminal justice, which is more within the courts' constitutional responsibility.

Finally courts are more deferential to Parliament or the government where 'the subject-matter lies more readily within [their] actual or potential expertise'.[102] Some questions are well outside judges' area of expertise and they should be reticent to make merits decisions on such subject-matter. These four principles identify when judges might defer, but there is 'no magic legal or other formula' to identify public bodies' discretionary area of judgment or the extent to which judges ought to defer to those decision-makers.[103] In these circumstances judges might proceed directly to analyse the proportionality of a government measure, having made an assumption that the measure was necessary for the purposes of the limitation clause it invokes.

3.1.2. Why Courts Defer

The first justification for deference is democratic legitimacy. Unlike Parliament judges are not representative and not accountable to the people through elections. Courts should not unnecessarily overturn elected bodies' decisions because, 'However slow, obtuse and maddening the democratic process may be, there is a legitimacy about decisions of elected institutions to which judges, however enlightened, can never lay claim'.[104] Majority rule creates a rebuttable presumption that elected politicians' decisions are supported by a

[101] For an interesting discussion of suggestions for and implications of subjecting command of the armed forces to parliamentary consent see David Jenkins, 'Constitutional Reform Goes to War: Some Lessons from the United States' [2007] *PL* 258.
[102] *Roth*, [87] (Laws LJ).
[103] Jowell, 'Servility, Civility, or Institutional Capacity', 599.
[104] Leonard Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' [2002] *JR* 137, 144-45.

plurality (if not a majority) of voters. A second justification for deference is the separation of powers principle. Judges are not policy-makers and should refrain from dictating policy to elected officials. Judges determine the extent of individuals' moral rights against the state, whilst Parliament and the government must be left to devise policy on the basis of utilitarian calculations of the public good.[105] But judges should not defer to legislative and executive bodies solely on the basis of their 'superior constitutional status'.[106] Electoral accountability and the separation of powers justify minimal deference.[107]

Judges defer to the greater competence of Parliament and the government on certain issues where courts lack expertise[108] and greater presumptive weight attaches to decisions of bodies with 'institutional capacity' to make those decisions.[109] Courts lack detailed knowledge of some issues to be able to question the merits of parliamentary or government decisions. For instance judges are not best-placed to question allocation of a limited budget.[110] This is not the 'normal function of courts'[111] and judges lack expertise to do so. The time and resources required for judges to acquire the relevant knowledge is prohibitive. Judges may therefore address the legality of the budget allocation but cannot

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[105] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1988) 22.
[106] Jowell, 'A Question of Competence', 67.
[107] Alison Young, 'In Defence of Due Deference' 72 *MLR* 554, 556; Dominic McGoldrick, 'The Boundaries of Justiciability' 59(4) *ICLQ* 981, 986. Minimal deference means judicial respect for parliamentary or government decisions. Judges will not overturn decisions solely because their own philosophical preference differ from the decision-makers', but do not lend those decisions any greater normative weight than that. See Aileen Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).
[108] Johan Steyn, 'Deference: A Tangled Story' [2005] *PL* 346, 352.
[109] Jowell, 'Servility, Civility, or Institutional Capacity'.
[110] *R* v *Cambridgeshire Health Authority, ex p B* [1995] 1 WLR 898, 906E (Sir Thomas Bingham MR).
[111] Dyson, 'Some Thoughts on Judicial Deference', 106.

dictate the "right" allocation of finite resources.[112] This is an important consideration in soldiers' right to life claims.

When courts defer, judges still test the proportionality of the state's actions. But the standard of review is somewhat less rigorous than if there is no deference because the court attaches normative weight to the state's actions by taking for granted that the measures were necessary in the circumstances. This takes account of judges' role in the constitutional settlement and their limited expertise of some topics. The deference principle echoes the Court's practice of not substituting its own assessment of a situation for that of the state agents present at the time.[113] It is nevertheless a more rigorous approach than the *Wednesbury* unreasonableness standard adopted in traditional administrative law cases because it actually considers the relative values of the state's actions and individual rights. Judges adopt these standards of review in public law proceedings. Deference respects greater expertise of legislative and executive bodies, as well as preserving their discretion. It bears some resemblance to the margin of appreciation doctrine developed by the European Court of Human Rights, which I turn to now.

4. STRASBOURG AND THE MARGIN OF APPRECIATION

The Court and Commission afford states a degree of discretion in how to implement Convention rights within their jurisdiction.[114] The margin of appreciation doctrine reflects a number of challenges in adjudicating individuals' applications against state parties. Primary

[112] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 190-91.
[113] Chapter 3.1.2.
[114] See Chapter 1 for the meaning of jurisdiction in this context.

responsibility for implementing Convention rights rests with national authorities,[115] subject to the Court's supervision.[116] The Convention establishes a '*universal* minimum standard' of protection according to which states may choose the implementation of those general principles that best fits within their society, as long as it does not fall below the minimum standard.[117]

The Commission decision in *Greece* v *United Kingdom* laid the groundwork for what later developed into the margin of appreciation doctrine. The British government sought to derogate from certain of its Convention obligations in respect of a national emergency in Cyprus and had lodged a notice with the Council of Europe's Secretary-General to that effect.[118] The Commission determined it was competent to determine whether there was a threat to the life of the nation sufficient to justify derogation from the Convention and whether the measures taken by the British government were strictly required for national security,[119] but that it should accord a 'certain measure of discretion' to the government to determine what is strictly required in the circumstances.[120]

In another derogation case the Court heard Commission President Sir Humphrey Waldock's argument that governments must balance complex factors to maintain law and order. The Convention must recognise that governments have a choice of many different options and

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[115] *McKerr*, §117.
[116] *Handyside* v *United Kingdom* 1 EHRR 737, §48.
[117] Paul Mahoney, 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgments' [1997] *EHRLR* 364, 369 (original emphasis).
[118] Article 15(3) requires such notice for a valid derogation.
[119] Article 15(1) provides that 'in times of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation'.
[120] *Greece* v *United Kingdom* II YB ECHR 174, 176.

the Court is restricted to considering whether the chosen option was within the range of options that would be lawful under the Convention. It is immaterial that the Court would choose a different option. The public interest in effective government 'requires a decision in favour of the legality of the government's appreciation' of its powers.[121]

The doctrine was born out of derogation cases in which the national authorities were considered better-placed than international judges to determine whether derogation was absolutely necessary 'By reason of their direct and continuous contact with the pressing needs of the moment'.[122] It was first applied to a non-derogation context in *Iversen* v *Norway*.[123] The Court confirmed this application in the subsequent *Belgian Linguistics Case*.[124] The margin of appreciation is a practice of the supranational judiciary and has no place in domestic courts.[125] It is nevertheless relevant to determining how judges might approach soldiers' right to life claims. The doctrine has two main principles.

4.1. THE BETTER-POSITION RATIONALE

According to the 'better-position rationale'[126] states' domestic authorities are better-placed to identify how to answer society's needs whilst protecting individual rights within their own jurisdictions. Rights in Articles 8-11 can be limited according to what is 'necessary in a democratic society'. National legislatures and governments are in a better position to

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[121] Quoted in Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity, and Primarity in the European Convention on Human Rights* (Brill 2009) 244. See *Lawless* v *Ireland (No 3)* 1 EHRR 15.

[122] *Ireland* v *United Kingdom* 2 EHRR 25, §207.

[123] VI YB ECHR 278.

[124] *Belgian Linguistics Case (No 2)* 1 EHRR 252.

[125] *Brown* v *Stott* [2000] UKPC D3, [2003] 1 AC 681, 703 (Lord Bingham).

[126] Steven Greer, *The Margin of Appreciation and Discretion under the European Convention on Human Rights* (Council of Europe 2000) 8.

determine their own societies' needs and how best to answer those needs. The European Court:

> … cannot disregard those legal and factual factors which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing, it cannot assume the role of the competent national authorities … [which] remain free to choose the measures they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.[127]

The European Court concedes that 'by reason of this direct and continuous contact with the vital forces of their countries, state authorities are in a better position than the international judge to give an opinion' of what limitations on Convention rights are necessary in the circumstances of each case.[128] The European Court is the final arbiter of the Convention[129] but state authorities are responsible for defining Convention rights within the parameters of their limitation clauses according to their own societies' needs. The Court has not used the language of margin of appreciation in negative obligation cases but has nevertheless recognised states' discretion in policing their own societies. In *Giuliani,* a carabiniere fired a warning shot at a protestor. The bullet ricocheted and killed him.[130] But the Court noted the discretion states enjoy in the 'choice of the means to be used' in law-enforcement.[131] The Court has deferred to state agents' assessment of whether force was necessary and proportionate in the heat of the moment,[132] which also

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[127] *Belgian Linguistics Case (No 2)* 1 EHRR 252, §10.
[128] *Handyside* v *United Kingdom* 1 EHRR 737, §48.
[129] ibid, §49.
[130] *Giuliani and Gaggio* v *Italy* 54 EHRR 10, §§12-30.
[131] ibid, §251.
[132] See for example *McCann* v *United Kingdom* 21 EHRR 97, §200; *Giuliani and Gaggio,* §189; *Bubbins* v *United Kingdom* 41 EHRR 24, §§138-40.

reflects the fact that decisions about law-enforcement are better taken by those closer to the action, albeit under the Court's supervision.

In terms of the positive obligation to protect people from risks to their lives under Article 2, the Court has afforded states a fairly broad measure of discretion. The Court notes the difficulties states face in protecting society from terrorist violence,[133] and respects the military and technical choices the authorities make during law-enforcement operations even though 'with hindsight, some of the decisions taken by the authorities may appear open to doubt'.[134] States are better-placed than the Court to determine the most appropriate measures to protect someone against a threat to their life. Additionally the Court recognises that 'an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in respect of priorities and resources'.[135] This principle is useful when determining the correct judicial approach to soldiers' Article 2 claims.

The Court has applied the margin of appreciation doctrine to right to life cases in which the state was under a positive obligation to take measures protecting individuals from risks. The margin of appreciation preserves states' discretion of how to protect individuals in light of competing priorities and other factors. The Court has nevertheless determined that states' discretion in deciding on measures to protect individuals' lives is narrower than, for example, when deciding what measures to take to protect their property.[136] The margin of

[133] *Ramírez Sánchez* v *France* 45 EHRR 49, §116.
[134] *Finogenov* v *Russia* 64 EHRR 1, §212.
[135] *Öneryıldız* v *Turkey* 41 EHRR 20, §107.
[136] *Budayeva* v *Russia* 59 EHRR 2, §175.

appreciation recognises states' discretion and the fact that there are 'different avenues to securing Convention rights'.[137] This reflects the second principle, that of consensus.

4.2. EUROPEAN CONSENSUS

States enjoy a wider degree of discretion to define appropriate limits to Convention rights in the absence of a common approach to a particular issue among Council of Europe member states. Where there is consensus among states regarding the scope and extent of exceptions to Convention rights, states enjoy less discretion because of the existence of a better-developed general principle of how to protect Convention rights in response to particular social needs. In *Handyside* the British government prohibited publication of a sex education book for children,[138] claiming prohibition was necessary for protection of public morals.[139] This censorship fell within the UK's margin of appreciation since the European Court found no 'uniform conception of public morals' in member states' law and practice.[140] The fact the book had been published in several other member states was not persuasive because the conception of public morality was not common to the member states.

Divergences such as different conceptions of public morality as remarked upon in *Handyside* are common. Among the Council of Europe's 47 member states there is

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[137] *Fadeyeva* v *Russia,* App No 55723/00 (ECtHR, 9 June 2005) §96.
[138] For more detailed facts see *Handyside*, §§9-23.
[139] Article 10 of the Convention guarantees freedom of expression but that right 'maybe subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary in a democratic society*, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, *for the protection of public health or morals*, for the protection of the reputation or rights of others, for preventing the disclosure of evidence received in confidence, or for maintaining the authority and impartiality of the judiciary' (Article 10(2), emphasis added).
[140] *Handyside*, §48.

tremendous variety in terms of constitutional settlements, social attitudes, political priorities and domestic pressures. But all come under the umbrella of the Convention. The same rules apply to fighting Chechen separatists in Russia as policing a riot in Northern Ireland. In addition to states' relative operational capabilities in terms of resources, each state faces particular law-enforcement challenges from the perspective of domestic legal provisions and the nature and scope of crime in their society. The consensus model allows states leeway in determining the approach to the specific problems in their own societies.

The margin of appreciation will be much narrower where a 'particularly important facet' of a right is at stake.[141] The objective of the Article 2 negative obligation is to prevent state agents killing. In terms of safeguarding human life, this is the most important facet of states' obligations. States' margin of appreciation will therefore be narrow. There is potential for lack of consensus regarding the legal definition of "unlawful violence", "lawful arrest" and "riot" for the purposes of the Article 2(2) law-enforcement exceptions, although this only creates a small degree of divergence about the circumstances in which state agents are permitted to use force that might result in death. That is not equal to a broad degree of discretion over whether a use of force is absolutely necessary in the exact circumstances of the case or the degree of force used.[142]

The lack of a general consensus among Council of Europe member states will typically grant states a broad discretion, but the scope of that discretion will depend upon the nature of

[141] *Evans* v *United Kingdom (No 2)* 46 EHRR 34, §77. See also *X and Y* v *Netherlands* 8 EHRR 235, §§24, 27; *Dudgeon* v *United Kingdom* 4 EHRR 149; *Goodwin* v *United Kingdom* 35 EHRR 18, §90.

[142] See Chapter 3.1. for more detail on the negative obligation.

the right in question and the aims pursued by that right.[143] The Court will 'generally respect the legislature's policy choice' about the scope of Convention rights unless that choice is without reasonable foundation.[144] States have broad discretion to balance Convention rights with competing private or public interests.[145] The 'lowest common denominator' approach[146] means there must be a high degree of consensus among member states before a state's practice violates the Convention.

4.3. JUSTIFYING THE MARGIN OF APPRECIATION

The Court has increasingly applied the margin of appreciation doctrine in its judgments, and upon its entry into force the Fifteenth Protocol will insert explicit reference to the doctrine into the Convention's preamble.[147] The doctrine reflects the Court's subsidiary nature.[148] The Court is mindful of its role as a supranational tribunal and that its remit extends to supervising states' implementation of the Convention in the context of concrete applications. The Court's role has been compared to that of a federal constitutional court.[149] The Court cannot determine what national policy *should* be, but supervises the conformity of policy with Convention principles and the enforcement of those general principles. The doctrine has been criticised as being confused,[150] but it is of useful application in the Court's adjudication of applications against national governments.

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[143] *Smith and Grady*, §88.
[144] *Dickson* v *United Kingdom* 46 EHRR 41, §§77-78.
[145] *Evans* v *United Kingdom (No 1)* 43 EHRR 21, §62.
[146] David Harris et al (eds), Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights (3rd edn, OUP 2014) 11.
[147] Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 24 June 2013, not yet in force) CETS 213, Article 1. As of March 2017, 33 states have ratified the Protocol, including the UK.
[148] *McKerr*, §117.
[149] Paul Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' 11 *HRLJ* 57, 65.
[150] Adrian Lester, 'Universality versus Subsidiarity: A Reply' [1998] *EHRLR* 73.

Firstly the margin of appreciation reflects the fact that member states have consented to be bound by the Convention's terms and this means guaranteeing the Convention rights to all those within their jurisdiction.[151] Member states have primary responsibility for protecting Convention rights. States are capable of protecting and guaranteeing Convention rights internally through their own political and judicial mechanisms. It is vital for the Convention's effectiveness that states are regarded as competent at protecting Convention rights and that the Court avoids undermining legitimate policy decisions. The Court's proper role is to oversee protection of human rights within each member state and to advise on best practice in individual cases.

The margin of appreciation doctrine also recognises differences in social attitudes among member states and changes in those social attitudes. The Convention is a 'living instrument which ... must be interpreted in light of present-day conditions',[152] and the margin of appreciation permits evolutionary interpretation of Convention rights. Whereas there has been a general trend towards liberalising social attitudes to matters like marriage equality,[153] recognition of transsexual rights[154] and abortion,[155] attitudes towards use of force by state agents have become more restrictive. But these general trends are not uniform and there is still divergence among member states on these issues. The margin of appreciation gives effect to these differences and the evolution of Convention principles.

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[151] European Convention on Human Rights, Article 1.
[152] *Tyrer* v *United Kingdom* 2 EHRR 1, §31.
[153] *Oliari* v *Italy*, Apps Nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).
[154] *Goodwin*; *L* v *Lithuania* 46 EHRR 22.
[155] *RR* v *Poland*, App No 27617/04 (ECtHR, 26 May 2011).

The margin of appreciation also prevents the Court judging state practices against its own philosophical or political preferences, thus striking the correct balance between the utopia of human rights as a concept and the realities of human rights law. The Court should be circumspect when denouncing states' legitimate policy decisions because the Convention's effectiveness depends upon states' continuing consent to be bound by the Convention and the Court's judgments.[156] The margin of appreciation may be the European Court's way of walking the political tightrope between ensuring effective oversight of national authorities and stepping on states' toes. The doctrine recognises that the Court is not a fourth-instance tribunal.[157] It does not represent a 'gratuitous reading-in of a pro-government criterion'[158] but reflects the nature of the Court and its role, which is to supervise states' implementation of Convention rights and to ensure state authorities strike the correct balance between individual rights and community interests.

In cases arising out of armed conflict or national security incidents the Court has granted states a broad margin of appreciation. In *Finogenov* the Court observed the difficulties faced by the Russian authorities in combatting violent Chechen separatism and the particular challenges of that case, given the hostage-takers' training and equipment and the authorities' lack of control of events inside the theatre.[159] In *Isayeva* the Court recognised that states' counter-terrorism operations could legitimately include deployment of military units armed with powerful weapons.[160] Similarly in *McCann* the Court considered the deployment of elite SAS units was acceptable in the context of terrorist

[156] For an interesting analysis of the role of consent in international law see Başak Çalı, *The Authority of International Law: Obedience, Respect, and Rebuttal* (OUP 2015).
[157] *García Ruiz* v *Spain*, App No 30544/96 (ECtHR, 21 January 1999) §28.
[158] Mahoney, 'Judicial Activism and Judicial Self-Restraint', 83.
[159] *Finogenov*, §§212-13.
[160] *Isayeva* v *Russia* 41 EHRR 38, §180.

attack.[161] These judgments 'draw a clear line between the strategic political choices' that are outside the Court's purview and the tactical operational choices that remain subject to its scrutiny.[162]

In *Al-Skeini* the Court repeated its jurisprudence that the Article 2 procedural obligation continues to apply in armed conflict.[163] Difficult security circumstances do not absolve states of their obligations, although the Court has allowed states some discretion during conflicts about employing less-effective investigative means and methods than would be required during peacetime.[164] But the Court has not faltered in holding states to their obligation to take all reasonable steps to conduct an effective investigation.[165] What constitutes "reasonable steps" depends upon the circumstances, but the fact of conflict is insufficient to fundamentally alter the nature of the obligation itself.[166]

In conflict and national security situations the Court has given states some degree of discretion in right to life cases, acknowledging difficult factual circumstances and limited operational choices. State authorities are better-placed to understand what is needed in a particular situation and the Court has been careful to avoid imposing unreasonable and impractical burdens on states. As such the Court will not necessarily rule out a plausible and justifiable approach to a national security or conflict situation, so long as the

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[161] *McCann*, §183.
[162] *Finogenov*, §215.
[163] *Al-Skeini* v *United Kingdom* 53 EHRR 18, §164. See for example *Güleç* v *Turkey* 28 EHRR 121, §81; *Ergi* v *Turkey* 32 EHRR 18, §§79, 82; *Özkan* v *Turkey*, App No 21689/93 (ECtHR, 6 April 2004) §§85-90, 309-20, 326-30; *Kanlibaş* v *Turkey*, App No 32444/96 (ECtHR, 8 December 2005) §§39-51.
[164] *Bazorkina* v *Russia* 46 EHRR 15, §121.
[165] *Kaya* v *Turkey* 28 EHRR 1, §§86-92; *Khashiyev* v *Russia* 42 EHRR 20, §§156-66; *Musayev* v *Russia*, App No 57941/00 (ECtHR, 26 July 2000) §§158-65.
[166] *Al-Skeini*, §§168-76.

Convention principles are adhered to. Arguably this is no different than the approach to domestic peacetime law-enforcement operations, where each case is decided on a thorough study of its particular facts and where the "appropriate" response is heavily dependent upon those facts. The margin of appreciation model and underlying justifications for it will be instructive in determining the correct level of judicial intervention in soldiers' right to life claims.

5. REASONS FOR LIMITED JUDICIAL SCRUTINY

Some justifications for limited standards of review are constitutional factors about the Court's role in relation to legislative, executive and professional bodies. Others relates to institutional factors like the composition of the judiciary and the nature of the adjudicative function. Some authors claim limited standards of review cannot be justified by reference to constitutional arguments,[167] but the two categories are overlapping and mutually enforcing to some extent.

Constitutional factors for judicial restraint focus on courts' relationship with legislative and executive branches of government and judges' lack of electoral accountability. Judges cannot assume legislative or executive power since those functions are constitutionally delegated to other bodies. Lord Steyn mused that the separation of powers principle is not a serious justification for judicial deference.[168] But standards of review in British courts (and to some extent the European Court's margin of appreciation doctrine) reflect this respect for legislative and executive bodies' decision-making authority. The *Wednesbury*

[167] Jeffrey Jowell, 'Servility, Civility, or Institutional Capacity', 601; Thomas Raine, 'Judicial Review under the Human Rights Act: A Culture of Justification' 1 *North East Law Review* 81, 105; Aileen Kavanagh, 'Deference or Defiance', 191.
[168] Steyn, 'Deference', 352.

principle and the deference doctrine both display significant respect for the constitutional limits of judges' power.

Judges frequently have to resolve conflicts between individual rights and public interests. Some suggest that the public will should be a guiding principle in resolving those conflicts.[169] Legislative and executive bodies derive legitimacy from being popularly elected. This electoral legitimacy supports their decisions, which judges ought to respect to the extent they are not contrary to law.[170] Judges are not subject to popular electoral accountability[171] and must be careful to avoid the 'countermajoritarian difficulty' that arises from annulling decisions made by elected officials.[172] However electoral accountability does not make legislative and executive bodies infallible and the fact a policy represents the 'settled will of a democratic assembly' is not conclusive reason for upholding that policy.[173]

Soldiers' right to life claims may pose questions that courts are ill-equipped to answer because of their constitutional relationship with other branches of government. Judicial

[169] Richard Bellamy, 'The Constitution of Europe: Rights or Democracy?' in Richard Bellamy et al (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995) 160-62.
[170] *Rehman*, [63] (Lord Hoffmann).
[171] Judges in England and Wales and British Supreme Court justices are appointed by The Queen on the advice of an independent commission. Judges of the European Court of Human Rights are elected to a non-renewable nine-year term by the Council of Europe's Parliamentary Assembly by a majority of votes cast from a list of three candidates nominated by each member state (European Convention on Human Rights, Article 22; Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention (opened for signature 13 May 2005, entered into force 1 June 2010) CETS 194). British and European Court judges are not subject to direct popular election.
[172] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 16-17.
[173] *R* v *Lichniak* [2001] UKHL 47, [2003] 1 AC 903, [41] (Lord Bingham).

freedom from electoral accountability enables judges to 'apply their best independent judgment' to legal disputes,[174] but this may justify restricted standards of review of some issues to avoid usurping legislative and executive powers. Legislative and executive bodies have lawful decision-making authority in respect of some issues, and their decisions have some increased legitimacy because of legislative and executive bodies' electoral accountability. But this does not make those decisions immune from judicial scrutiny – it merely limits the type of questions judges can ask about those decisions. Whilst courts may declare legislative and executive decisions "unlawful" judges cannot "remake" the decision for themselves. Judges must be sensitive to the presumption that elected bodies are acting on their assessment of the public interest and with public support.

Institutional arguments for judicial restraint concern judges' lack of expertise of complex issues. Judges have particular experience and expertise of determining the correct interpretation and application of the law to specific facts. But they lack expertise to make decisions about the facts for themselves. There is call for greater deference to legislative and executive bodies when the subject-matter 'lies more readily within the[ir] actual or potential expertise'.[175] Judges' lack of detailed expertise of certain matters requires an approach that is respectful of those bodies possessing relevant, specialist knowledge. This also relates to the principle of judges' testing conformity with law of legislative and executive decisions but not assuming powers to make that decision anew.

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[174] James R Rogers, 'Why Expert Judges Defer to (Almost) Ignorant Legislators: Accounting for the Puzzle of Judicial Deference' in James R Rogers et al (eds), *Institutional Games nad the US Supreme Court* (University of Virginia Press 2006) 28.
[175] *Roth*, [87] (Laws LJ).

The nature of the adjudicative function itself limits judicial practices. Courts hear legal disputes arising out of concrete facts on a mostly post-hoc basis[176] and only those cases that are actually brought to them.[177] Judges generally cannot give advisory opinions.[178] Legislative and executive bodies can make sweeping legal decisions[179] whereas judicial decisions are only authority for what they actually decide.[180] The nature of adjudication therefore limits judicial scrutiny to whatever is needed to resolve the dispute at bar. Judges resolving legal questions are hemmed in by the terms of a particular case and cannot always see the "big picture". This prevents judges dictating how legislative and executive bodies should exercise their powers.

The rationale for judicial restraint is that judges are not best-placed to make certain kinds of decisions and the standards of review they employ reflect the limitations of their role by giving other branches of government benefit of the doubt. The European Court of Human Rights recognises that national authorities are better-equipped to implement Convention rights at the domestic level because of their proximity to and understanding of their country-specific issues and priorities. Judges resolving soldiers' right to life claims must recognise they are not best-placed to make certain decisions about military strategy or

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[176] Though the executive must sometimes obtain prior judicial approval to exercise its own powers, such as search and arrest warrants.

[177] In the majority of instances courts lack competence to take a case of their own motion. Contempt of court proceedings are a notable exception, although these only occur in the context of other proceedings.

[178] For a description of early English judges' advisory opinions see Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* (Yale University Press 1997) 10-50. The European Court may issue advisory opinions regarding interpretation of the Convention at the Council of Ministers' request (European Convention on Human Rights, Article 47). To date the only such opinion was *Advisory Opinion on Certain Legal Questions Concerning the List of Candidates Submitted With a View to the Election of Judges to the European Court of Human Rights* (ECtHR, 12 February 2008).

[179] Alison Young, 'In Defence of Due Deference', 559.

[180] *R (Smith)* v *Secretary of State for Defence and Another* [2010] UKSC 29, [2011] 1 AC 153, [134] (Lady Hale).

tactics, procurement, training, deployment, or resource allocation because of their lack of expertise and lack of subject-matter-specific decision-making authority. Judges should adopt an appropriate standard of review that recognises the limits of their constitutional and institutional competence.

According to Koskenniemi international law is an argumentative process that attempts to remove politics from international relations and build normative frameworks to govern inter-state relationships.[181] As such international law can be criticised as being so divorced from reality and context that it is utopian and impracticable, or so influenced by context and politics that it sets minimal thresholds legitimising all but the most heinous behaviour, thus becoming apologetic for bad practices. International law must find the middle ground between the two extremes of apology and utopia in order to be effective, being idealistic enough to achieve its aims, but sufficiently realistic that it can be implemented and enforced. The same argument can be applied to human rights law and practice.

Judges must adopt realistic standards for reviewing states' behaviour, which do not place undue burdens on states and are flexible enough to apply to difficult factual scenarios including military operations. This Chapter has detailed different standards of review that take account of the facts of a claim and the nature of relief sought so as not to take a utopian approach to law, whilst being careful not to weigh these contextual factors so heavily that the thresholds of lawful behaviour are set too low. Divorcing law from reality runs the risk of "underlegitimising" state actions, but overestimating the mitigating

[181] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005).

strength of contextual factors risks "overlegitimising".[182] The judge must adopt a standard of review that finds the right balance between these two extremes.[183] Restrictive review may be appropriate to avoid criticisms of utopia, but standards of review should not be so restrictive that judges become apologists for state action.[184]

There is no 'one-size-fits-all' approach to adjudicating soldiers' right to life claims.[185] This Chapter has demonstrated that judges may apply varied standards of review, with the intensity of judicial scrutiny depending upon the facts of the case and the nature of relief sought. Some are more restrictive, limited to more general questions of what a reasonable decision-maker would do. Others are more intensive, asking in more detailed terms whether this was a defensible act. Yet others perform the vital proportionality balancing act, taking cues from legislative, executive and professional bodies about the positive value of their acts.

A rigid judicial approach to soldiers' right to life claims is apt to cause unjust results. Chapter 2 considered the meaning of intention and how a fixed definition of this key concept would produce unfavourable results in some cases.[186] In a similar way a fixed standard of review will not suit all cases. A restrictive standard, like combat immunity, may be appropriate in some cases arising out of enemy combat, but in other circumstances would be so permissive as to render human rights law ineffective and apologist. Conversely an intensive review might be appropriate for interrogating effectiveness of

[182] ibid, 67.
[183] Barak, 165.
[184] Koskenniemi, 17.
[185] *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52, [76] (Lord Hope DP).
[186] Chapter 2.2.

investigations but would impose unrealistic burdens on the Army in other circumstances and be difficult for the judges to hand down reasonable, well-reasoned judgments because of their lack of expertise.

Human rights law speaks the language of proportionality. Interferences with some Convention rights may be justifiable to the extent the interference is proportionate to a legitimate goal.[187] Proportionality is about using the right tools for the job.[188] Judicial scrutiny is the same. Courts must adopt a standard of review that reflects the facts of the case, the nature of the claim and the relief sought. Such a standard must allow the court to uphold soldiers' right to life by recognising reasonable, practicable obligations on states, whilst also pre-empting constitutional, institutional and procedural limitations of judicial office and the adjudicative function.

The correct standard of review judges should apply to soldiers' right to life claims depends upon the circumstances. British courts and the European Court of Human Rights have employed variable standards of review depending upon the context of the case at bar. British judges have adopted narrow, restrictive standards of review such as the combat immunity doctrine and *Wednesbury* unreasonableness because of their lack of specific knowledge or out of respect for lawful decision-making authority of legislative and executive bodies. In the same way, they have deferred to those bodies' assessments of

[187] The rights protected in Articles 8-11 of the Convention may be subject to such limitations are 'necessary in a democratic society' in pursuit of certain specified goals. The European Court has inferred a proportionality requirement into this analysis. Article 2 also provides for limits on enjoyment of the right to life where absolutely necessary, which the European Court has also interpreted as meaning the limitation is proportionate. See Chapter 3.1.2.1.

[188] *R* v *Goldstein* [1983] 1 WLR 151, 155 (Lord Diplock).

social needs when conducting the crucial proportionality analysis in human rights adjudication. The degree of deference depends upon the situation. Similarly the European Court has developed the margin of appreciation doctrine to reconcile its supervision of member states with principles of subsidiarity and consensus. The question then is the intensity of review judges should adopt when adjudicating soldiers' right to life claims.

6. SOLDIERS' RIGHT TO LIFE CLAIMS

The right to life is not expressed in absolute terms. Article 2 provides that no-one shall be intentionally deprived of his life.[189] But Article 2(2) establishes lawful exceptions to this general prohibition on killing.[190] Several other Convention rights are expressed in similar terms, with the first clause of the Article guaranteeing the right and a second clause providing for legitimate interferences with that right.[191] Other international human rights documents replicate this drafting structure. This has given rise to a two-stage adjudication process. The first stage establishes there has been an interference with enjoyment of a right. If there has been an interference the court must determine whether that interference is justifiable according to the terms of the limitation clause and the general proportionality principle.[192]

Human rights adjudication has two thresholds. The interference threshold is the point at which the state's acts constitute an interference with enjoyment of a fundamental right. If the act does not reach this threshold there has been no violation of the right and the

[189] Chapter 2.1.
[190] Chatper 3.1.
[191] Articles 8-11.
[192] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' 24 *CJLJ* 109. Grégoire CM Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009) 55-64.

adjudication process ends there. The text of Article 2 strictly prohibits intentional deprivation of life. An intentional deprivation of life (however defined) thus satisfies the interference threshold. The Court has also inferred that Article 2 imposes a positive obligation to take operational steps to protect people from risks to their lives in certain well-defined circumstances.[193] The interference threshold is met when there is a significant risk to someone's life of which state authorities know or ought reasonably to know.[194]

If states' actions reach the interference threshold the court must determine whether the interference is justified according to relevant legal norms and principles.[195] The justification threshold is the point at which the court is satisfied the action is justifiable. Article 2(2) establishes the negative obligation justification threshold. An intentional deprivation of life does not constitute a violation of the right to life where death results from use of force that is no more than absolutely necessary in pursuit of one of the listed law-enforcement objectives. These limited circumstances in which use of force is permitted are defined strictly. Judges do enjoy some limited room for manoeuvre to vary the justification threshold by respecting state agents' perceptions, formed in the heat of the moment, about whether use of force was indeed absolutely necessary.[196]

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[193] *Osman*, §116.

[194] Chapter 3.2.

[195] Some rights are expressed in absolute terms. For instance Article 3 of the European Convention provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 3 has no limitation clause. There are no circumstances in which states may permissibly subject someone to torture or inhuman or degrading treatment or punishment. Any interference with the Article 3 right constitutes an ipso facto violation of the Convention.

[196] *McCann*, §200; *Bubbins*, §§138-40.

The positive obligation justification threshold is met when the authorities take reasonably practicable measures to protect someone against a risk to their lives. Expressing the justification threshold in terms of what is "reasonably practicable" gives judges greater discretion to employ different standards of review of the state's acts. Because the state must only do what is reasonable, there is significant scope for balancing this obligation with competing rights and interests. Similarly the procedural obligation must conform to a number of judicially-defined standards, which the court can vary according to the circumstances.

This Chapter has detailed different standards of review illustrating potential judicial approaches to soldiers' legal claims in various contexts. These different practices may inspire judicial approaches to interference and justification thresholds in soldiers' right to life claims. The courts must take account of their constitutional and institutional disadvantages when adjudicating cases such as these. The crunch question is whether the harm caused by restricting enjoyment of the right to life[197] is proportionate to the positive value thereby accomplished. Whilst being sensitive to their own limitations and other bodies' lawful decision-making authority, the court must balance soldiers' right to life against competing rights and interests. The scope for this balancing varies according to the circumstances.

[197] A restriction on enjoyment of the right to life can be understood as an intentional deprivation of life contrary to Article 2(1); a risk to someone's life of which the state knew or ought reasonably to have known; or a violent, unnatural or suspicious death engaging the obligation to investigate.

6.1. EXPOSURE

Marine B was taking part in an SAS training and selection exercise in the Brecon Beacons.[198] The exercise involved a 40-mile hike over rough ground, to be completed within 20 hours. Trainees had to navigate between checkpoints carrying a 55lb equipment pack and rifle, with no resupply of water or provisions for the duration of the exercise.[199] Trainees were equipped with a locator beacon, with which instructors could monitor their progress. Marine B took part in the exercise on the hottest day of the year, when temperatures reached 30°C. He was found dead 750 yards from the final checkpoint, having suffered a fatal cardiac arrest brought on by hyperthermia.[200] In the summer of 2013, three more soldiers died in similar circumstances.[201] The inquest into their deaths held that the three men died as a result of hyperthermia.[202]

In Marine B's case both the negative obligation to refrain from intentional deprivation of life and the positive obligation to protect individuals from known risks are engaged. Depending upon key concepts of deprivation of life[203] and intention[204] Marine B's death constitutes a prima facie violation of Article 2.[205] His death was not the result of a use of force that was absolutely necessary in pursuit of the Article 2(2) law-enforcement

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[198] See Chapter 3.1.

[199] Nick Brown, editor-in-chief of Jane's International Defence Review, quoted in Gerry Holt, 'Soldier Deaths: How Dangerous is Military Training Allowed to be?' (*BBC Magazine*, 15 July 2013) <www.bbc.co.uk/news/magazine-23311575> accessed 8 April 2015.

[200] BBC, 'Royal Marine's Death "Natural Causes"' (*BBC*, 17 January 2011) <www.bbc.co.uk/news/uk-wales-mid-wales-29217824> accessed 8 April 2015.

[201] BBC, 'Soldier Deaths: Third SAS Training Reservist Dies' (*BBC*, 31 July 2013) <www.bbc.co.uk/news/uk-wales-23511938> accessed 11 February 2014.

[202] BBC, 'SAS Selection Deaths: Coroner Delivers Neglect Conclusion' (*BBC*, 14 July 2015) <www.bbc.co.uk/news/uk-wales-33512416> accessed 14 July 2015.

[203] Chapter 2.1.

[204] Chapter 2.2.

[205] Chapter 4.1.

objectives.[206] The strictly-defined exceptions to the general prohibition on intentional killing leave little room for balancing competing rights and interests, reflecting the special importance of the right to life in the scheme of Convention rights.[207] The judge must answer the particulars of the applicant's claim. If Marine B's next of kin alleged an intentional deprivation of life the court would be obliged to answer this question, though it is more likely, as it was in *LCB*, that the applicants would allege a violation of the positive obligation to protect Marine B's life against risks.[208]

The judge's primary duty is to determine whether Marine B's right to life was violated, but more broadly courts should encourage integration of Article 2 considerations into planning and conduct of military operations. To do so judgments must constructively identify what went wrong. The negative obligation framework of absolutely necessary and proportionate use of force in pursuit of specific law-enforcement objectives is inappropriate in the context of Marine B's death. This was not a case of a misinterpretation or misapplication of the necessity and proportionality principles, and so the negative obligation framework does not offer any practical lessons for the military.

There is a degree of uncertainty and flexibility about the Convention text's meaning.[209] Interpreting and defining the scope of states' Convention obligations is a distinctly judicial task and judges should use the flexibility in the Convention to their advantage in shaping a judgment that is most relevant to the facts. In so doing judges can effectively encourage integration of Article 2 principles into military operations and procure the prophylaxis to

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[206] Chapter 3.1.
[207] *McCann*, §§149-50.
[208] *LCB* v *United Kingdom* 27 EHRR 12, §36.
[209] Chapter 2.

make Article 2 more effective. Examining Marine B's death within the positive obligation framework gives judges the opportunity to identify what went wrong and what the Army can do to prevent recurrence of this accident.

6.1.1. Positive Obligation

The interference threshold for the positive obligation is a risk to someone's life, of which the authorities knew or ought reasonably to have known. If a risk falls below the interference threshold the authorities are not obliged to protect against it. If such a risk eventuates because the authorities did not attempt to prevent it, the right to life has not been violated. The Commission and Court have given judgments to this effect in the past. In *W* v *Ireland* the Commission decided the applicant was not at any special risk from sectarian violence. She faced the same risks as every other ordinary member of the public, such that the state was not required to take measures to protect her specifically.[210] Similarly the interference threshold was not met in *Osman*[211] or *van Colle*,[212] where the Court determined the authorities did not have sufficient knowledge of the risk. If Article 2 is to avoid imposing impracticable burdens on states the authorities cannot be expected to protect people against risks of which they are unaware. Judges have significant latitude to vary the interference threshold – in part because the positive obligation has no explicit textual anchor, leaving judges somewhat freer to develop the positive obligation's scope.

Training is meant to be hard. The state has a legitimate policy objective of having a well-trained military that is capable of and ready to operate in challenging conditions, including enemy combat. Marine B was undertaking a training exercise for selection to the SAS, the

[210] *W* v *Ireland* 32 DR 190, 200.
[211] §121.
[212] *van Colle* v *United Kingdom* 56 EHRR 23, §§102-103.

UK's special forces corps. The purpose of the exercise was to enable commanders to identify the most capable trainees and eliminate the others. This legitimate policy objective weighs against the responsibility to protect soldiers' right to life. Training will naturally expose soldiers to some element of risk in order to test their aptitude and endurance, but that does not mean that *every* risk represents an interference with their right to life.

As such the interference threshold is raised so that the Army must only protect against significant risks. Commanders do not have carte blanche to make training so difficult that trainees participate on a "succeed or die" basis. The court must recognise the value of training and of making training difficult, that some risks are inevitable and not all of them are significant enough to constitute a violation of Article 2. The risk to Marine B came from the nature of the exercise itself, and the state has some latitude in this regard, but the risk was significant. The exercise did not just test his endurance but actually placed him in real danger – enough to reach the interference threshold.

The second limb of the interference threshold is that the authorities knew of the risk. Judges must be sensitive to the state's understanding of the risk at the material time. The European Court has ruled that judges cannot permit hindsight to unduly influence their assessment of the facts and cannot substitute their own appreciation of the risk for that of the relevant person at the material time.[213] The pertinent question for the judge is whether the authorities knew of the risks, or on the basis of the evidence available ought reasonably to have known. This is a low standard of review. Whilst such restrictive

[213] *McCann*, §200; *Bubbins*, §139; *Osman*, §116.

standards can work in the state's favour, in terms of constructive knowledge of the risk the low standard increases judicial scrutiny because the interference threshold is met in a higher number of cases. Instructors cannot have known that Marine B would have a heart attack. They could not predict the exact harm B would suffer, they must have recognised the health risks from participating in this exercise. When three soldiers died in similar circumstances in 2013 the commanders certainly had constructive (if not actual) knowledge of the risk because of previous deaths.

In this case there was a significant risk to Marine B's life. The government's legitimate policy objective of having a well-trained army means that some level of risk to trainees' lives from the rigours of training is acceptable, but only to a point. The court must adopt a standard of review that reflects this. The interference threshold must be high enough that it grants discretion to the military to conduct training exercises according to its prescriptions of good soldiering, and so that the right to life is not unrealistic or utopian. But it must also be low enough to ensure judicial scrutiny of significant risks.

6.1.2. Reasonably Practicable Measures

Once it is established there is a significant risk of which the authorities knew or ought reasonably to have known, the interference threshold is met. Accordingly the state must demonstrate it took reasonably practicable measures within the scope of its powers to defend against that risk. In its jurisprudence the European Court talks about reasonably practicable measures that do not pose 'an impractical diversion of resources'.[214] How the court determines whether the justification threshold is met depends upon the circumstances.

[214] *Kılıç* v *Turkey* 33 EHRR 58, §76.

States enjoy a broader degree of discretion over how they fulfil the positive obligations than negative obligations. Since positive obligations require states to take specific steps and the vast differences in operational capacities of Council of Europe member states and varying priorities for public funds and resources it is more difficult to impose specific burdens on states. Meanwhile negative obligations are a specific prohibition on certain acts. It is easier to enforce this prohibition with greater uniformity. Commanders have a range of operational options to improve safety on exercises. In order to preserve that operational discretion and to respect the commanders' better understanding of good soldiering the court should ask whether the instructors took any reasonable measures to protect the soldiers lives.

This is a very restrictive standard of review. The Army has a high degree of control over training exercises. It can implement changes to procedure to make exercises more difficult or to improve safety. In Marine B's case the only factor over which the authorities had no control was the weather. As unpredictable as British weather can be, this high degree of control invites a higher degree of judicial scrutiny. Similarly the purpose of training is preparing soldiers for the future in a challenging but safe way. Training is meant to replicate the challenges of combat operations so that soldiers are prepared for the real thing. But unlike the real thing training poses none of the operational difficulties such as unpredictable enemy attacks or unreliable supply lines. This justifies a more intensive standard of review. But in order to maintain military discretion and respect commanders' greater expertise the court must refrain from dictating the correct approach.

In Marine B's case the risk came from the nature of the exercise itself. The court must recognise the state's legitimate policy objective of having a well-trained army, that achieving that objective involves exposing soldiers to some degree of risk, and that commanders are well-placed to determine how to make training safe whilst fulfilling the vital training objective. The standard of review must ask more than merely whether the instructors acted reasonably, but also whether alternative measures could have been more effective. The court can explore potential alternatives and ask whether the instructors should have pursued one of those alternative routes to protecting Marine B.

This is not a matter of the *court's* preference or what the *judge* would do in that situation. The judge lacks decision-making authority and expertise to say whether the Army should have given Marine B a radio or a heart-rate monitor or whatever alternative. But the court can ask whether the locator beacon given to Marine B was sufficient and whether it was reasonable not to take further measures. Though this still talks in terms of reasonableness, it is a more intensive standard of review because the court asks about the available alternatives.

6.2. Mixed Rounds

Recruit W was taking part in an exercise that included a simulated attack. An armed sentry was posted to guard against terrorist attack. Instructors undertook this duty on a rotating basis. The sentry was given two magazines of live rounds, which he was supposed to pass on to his relief at the end of his sentry duty. Corporal M took up the guard and loaded one of the live magazines into his rifle, storing the other in his ammunition pouch. At the conclusion of his sentry duty, he handed the rifle (containing one live magazine) to his relief but kept the second live magazine in his ammunition pouch. During the simulated attack

he inadvertently loaded the live magazine into his rifle and opened fire. He fired in the trainees' general direction, but heavy undergrowth obstructed his aim and he could not see in the darkness. W was almost directly in front of him, about 20 yards away. M fired 13 rounds before he realised he had loaded live ammunition into his rifle. W was fatally shot in the neck and shoulder.[215]

Published guidelines regulated how to conduct the armed sentry procedure safely. These guidelines were not sufficiently distributed to instructors or effectively implemented. This was a systemic failure. Proper implementation and enforcement of the regulations would reduce the risk of future systemic failures, although that cannot ever totally prevent human error. It is more appropriate to deal with this within the framework of the positive obligation. But like Marine B's case the negative obligation is also engaged.

Corporal M did not use force in pursuit of one of the law-enforcement objectives in Article 2(2). The strictly-defined exceptions to the prohibition on intentional killing do not permit any balancing exercise. If Recruit W's next of kin alleged this was a violation of the negative obligation the judge would have to answer this question and find a violation. There is greater scope for balancing the right to life against competing interests and priorities within the framework of the positive obligation.

[215] BBC, '"Lack of Training" Caused Marine Death' (*BBC*, 6 June 2001) <news.bbc.co.uk/1/hi/wales/1374214.stm> accessed 10 December 2014; Health and Safety Executive, 'Record of Crown Censure of Ministry of Defence (Royal Navy) Following the Fatal Accident to Recruit Marine Alan Wayne Richard on 31 March 2000' (19 January 2005) available online at <www.hse.gov.uk/foi/releases/crowncensure.pdf> accessed 10 December 2014.

In Marine B's case the risk was inherent to the exercise. The state has a legitimate policy interest in having a well-trained army. In Marine B's case this restricted judicial scrutiny to significant risks because of the need to ensure commanders' ability and discretion to conduct training exercises in the best way to achieve that policy objective. In this case the risk came from an external factor. The Army felt the need to use an armed sentry to protect the soldiers from the threat of terrorist attack. But the armed sentry procedure was not necessary to achieve the training objective itself. This incidental risk warrants a lower interference threshold. But the court should also be sensitive to the Army's perception of the need to defend against terrorist attacks, and respectful of the Army's appreciation of how to accomplish this aim. Again this does not give commanders carte blanche to expose soldiers to significant risks. The risk of an accident of this type occurring was slim but foreseeable.

Live ammunition is inherently dangerous. Though use of firearms and live rounds are routine features of military service that does not mean the Army is not required to protect soldiers against the associated risks.[216] There are two approaches to this issue. The first is that this is an everyday risk that the Army already appreciates and have taken steps to mitigate. As an everyday risk it is not sufficiently significant to meet the interference threshold. No amount of planning can prevent human error and Recruit W's death was just a tragic accident.

The second approach is that this accident, resulting from the use of live rounds, represents a systemic failure to properly regulate inherently dangerous activities, warranting more

[216] *Stoyanovi* v *Bulgaria*, App No 42980/04 (ECtHR, 9 November 2010) §61.

intensive review. More rigorous scrutiny can ensure the Army is taking sufficient and reasonable precautions to control use of live ammunition. The court should ask not only whether the Army acted reasonably but also whether they could have taken other reasonably practicable measures to prevent this accident.

If, in the likely event the court found that the Army failed to take reasonably practicable measures to guard against the risk of cross-contamination, the judge may identify how the measures were insufficient. In this case it is because the armed sentry procedure was not properly implemented. The mere existence of guidelines is not enough. They must be implemented and enforced properly. The court can observe the specific failings the Army must remedy but leave it to commanders to determine how to do so.

Commanders have significant control over training exercises. Together with the fact that training is designed to ensure soldiers are prepared for future operations, this control warrants a higher degree of judicial scrutiny. Training is supposed to sort the wheat from the chaff but that should not be on a "succeed or die" basis. Training comes with none of the operational challenges of actual armed conflict. The legitimate policy interest of a strong and well-trained army and judicial respect for good soldiering means the Army has a broad degree of discretion to conduct training exercises exposing soldiers to risk. But the court is not restricted to narrow questions about whether the Army acted reasonably in what it did – it should also ask whether the Army acted reasonably in *not* doing something that might have been more effective.

6.3. FRIENDLY FIRE

During the 2003 invasion of Iraq, British soldiers from two battlegroups had been given orders to secure a vital supply line. Part of this task required securing the crossings of the Shatt Al-Basra canal and controlling civilian movements in and out of the city of Basrah. Lieutenant P was part of a squadron of the 2nd Royal Tank Regiment ("RTR") that had secured a major bridge over the canal with three Challenger II tanks. The squadron had been told that the main threat to their position was from an enemy-held university compound to the North-East of the bridge. A small concrete dam, which did not appear on outdated battlegroup command maps, crossed the canal a little to the north of Lieutenant P's position. A squadron of The Queen's Royal Lancers ("QRL") assumed a defensive position at the dam in two Challenger II tanks. Corporal A and Trooper C were among them. There had been a number of miscommunications regarding arcs of fire, command boundaries and the relative positions of friendly troops. Lieutenant P was disoriented and, believing he was looking in the direction of the university compound, misidentified the QRL squadron as enemy troops. He opened fire on the QRL position, killing A and C and leaving several others with life-changing injuries.[217]

This is another case that engages both the negative and positive obligations. The facts of this case more obviously disclose an intentional deprivation of life. Unlike Marine B, who died of a heart attack brought on by extreme physical exertion, or Recruit W who was accidentally killed when live rounds became mixed in with blank ammunition, this was a genuine deprivation of life. Despite Lieutenant P's mistake about his targets' identity, this

[217] The facts of this case form the basis of one of the claims in *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52; the facts are given in the judgment of Lord Hope DP. More detailed facts appear in the Army Board of Inquiry Report into the incident, available at <webarchive.nationalarchives.gov.uk/20121203132830/http://www.mod.uk/NR/rdonlyres/C2384518-7EBA-4CFF-B127-E87871E41B51/0/boi_challenger2_25mar03.pdf> accessed 18 November 2014 (hereafter "Board of Inquiry (1)").

was intentional.[218] In the absence of legitimate reason to use force, this interference with Corporal A and Trooper C's right to life constitutes a violation of Article 2.[219] The positive obligation can be expressed as a duty to take reasonably practicable steps to avoid an unjustifiable increase in the existing risk to soldiers' lives during conflict. This case also falls foul of this requirement.

6.3.1. Negative Obligation

The text of Article 2 fixes the negative obligation interference and justification thresholds. Though judges have some degree of discretion to define the terms of those provisions – for example in interpreting the intentionality requirement – once there has been an intentional deprivation of life there is a prima facie violation of Article 2. This is in marked contrast to the more flexible positive obligation, where the court can conclude that the risk was insufficiently serious to engage the duty to take positive operational measures. In respect of the negative obligation the court can raise the interference threshold by adopting a strict definition of intention, such that only those killings that were the intentionally-brought-about directly-intended consequences of the soldiers' intentional actions engage the negative obligation.[220] A court might determine that A and C were not intentionally killed because P thought he was targeting enemy troops. But this approach is not entirely plausible considering potential distinctions between intention and motive.[221]

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[218] Chapter 4.3.2.1.
[219] Chapter 4.3.2.
[220] Here I refer to intention in its philosophical sense and unity of the three elements of intention. Chapter 2.2.2.
[221] Chapter 3.3.2.1. See *Director of Public Prosecutions, Gauteng* v *Pistorius* (96/2015) [2015] ZASCA 204.

Whereas under the positive obligation, which lacks an explicit textual anchor, the court can balance the need to protect the soldiers' lives against competing interests and objectives, the strict wording of the negative obligation does not permit the same kind of approach. There is some room for sensitivity to the particular state agent's appreciation of events at the material time. The court can and should accept Lieutenant P honestly believed, for good reasons, that use of force was necessary at the material time, unless his assessment was totally unreasonable. However if the use of force was not in pursuit of one of the permitted objectives the killing does not satisfy the strict textual element of the justification threshold and therefore constitutes a violation of Article 2.

Articles 8-11 of the Convention include clauses allowing limitations of rights therein protected when it is 'necessary in a democratic society' in the interests of several loosely-defined goals such as "public safety". These concepts are broad and could encompass many different restrictions. This represents the fact the Convention is a consensus document that must be capable of applying to 47 signatory states with vastly different legal systems, social needs and operational capabilities. This gives judges broad scope to defer to legislative and executive bodies because the rights are susceptible to extensive limitation. Similarly the limitation need only be 'necessary in a democratic society'. On this point courts are able to defer to legislative and executive bodies, partly on account of those bodies' decisions bearing some electoral accountability.

The negative obligation under Article 2 is very different. Instead of a number of general principles, limitation of the right to life is only permitted in narrowly-defined circumstances. Use of force constitutes a violation of Article 2 when it is not in pursuit of a

permitted law-enforcement objective, even where no one dies.[222] Furthermore the use of force must be absolutely necessary for success of that objective. The court can defer to officers' assessment of absolute necessity to some degree, but no degree of deference will legitimate use of force for any reason other than the objectives listed in Article 2(2). Whilst other rights can be balanced against various competing rights and interests, the right to life enjoys an exalted position in the Convention scheme[223] such that only certain interests can legitimately weigh against it.

In this case the use of force was not legitimate for the purposes of Article 2. Lieutenant P was not acting in pursuit of a permitted law-enforcement objective. He may have perceived his use of force to be absolutely necessary in his own defence, but his use of force was unlawful for the purposes of the Convention. Laws of armed conflict permit soldiers on opposing armies to attack each other, even without provocation.[224] As such the applicable legal regime did not define any attack on Lieutenant P by enemy troops as unlawful, and his use of force was therefore not justifiable under Article 2.[225] It is unreasonable that the right to life prohibits use of force in armed conflict. But the court cannot come to any other conclusion in this case. No matter how reasonable it may be to

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[222] *Makaratzis* v *Greece* 41 EHRR 49, §55; *Goncharuk* v *Russia*, App No 58643/00 (ECtHR, 4 October 2007) §74; *Makhauri* v *Russia*, App No 58701/00 (ECtHR, 4 October 2007) §§119, 125.

[223] *McCann*, §§149-50.

[224] First Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 17512 (hereafter "AP1"), Article 50(1). There are several limitations to this generally permissive rule relating to the means and methods of warfare, such as the prohibition on weapons 'inflicting unnecessary suffering' (Article 35(2)).

[225] Just as LOAC permits any attack on Lieutenant P, it also permits Lieutenant P to attack enemy troops. His use of force in this scenario was a lawful attack for the purposes of LOAC, which governs the conduct of hostilities. But Article 2 of the Convention defines permissible use of force more restrictively. This judges Lieutenant P and the targets of his force according to different rules, but that is a necessary operation of the drafting of Article 2, which permits use of force against *unlawful violence* but fails to develop a coherent internal theory of what *unlawful violence* actually is. See Chapter 4.4.1.2.

permit attacks such as this, the text of Article 2 does not allow it and there is no room for judicial balancing.

One plausible way for judges to avoid the incongruity of the right to life and LOAC is to adopt an approach influenced by the combat immunity doctrine. The armed conflict context in which this accident occurred could prompt the court to judge this case is not ripe for judicial resolution. The option is to decide that, in view of the circumstances, the case presents no issues under the negative obligation, or that such issues are beyond the scope of judicial scrutiny. This is the judicial approach to soldiers' claims for damages in negligence.[226] This is not so much a restrictive standard of review as a judicial refusal to scrutinise the issues. Such an approach may be appropriate for negligence law, especially considering the existence of veterans' benefits schemes.[227] But it creates a number of difficulties when applied to human rights adjudication.

This approach can lead to a 'semantic cataloguing' of cases.[228] This would create a dangerous precedent that judges could decline to give judgment in cases arising out of armed conflict. Though it does not directly contradict the verdict of international tribunals that human rights law continues to apply during armed conflicts,[229] it does suggest that courts will not enforce the law in cases arising out of conflicts. Legislative and executive bodies must play a role in determining the scope and nature of human rights obligations,

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[226] *Mulcahy*; Section 1.

[227] The original statutory exemption to liability for negligence during enemy contact only applied in cases where the victim was entitled to a war pension (Crown Proceedings Act 1947, s 10(1)(b)).

[228] *Baker* v *Carr* 369 US 187, 217.

[229] See for example *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, §25.

but to exclude judicial oversight of implementation of the right to life during armed conflict risks ineffective protection of soldiers' rights.

The combat immunity approach avoids the court having to set down a standard of "reasonable" behaviour during enemy contact. Negligence law governs individual relationships and judges outline acceptable standards of behaviour towards one another. The state may incur vicarious liability as the soldiers' employer. But human rights law governs the state-individual relationship and limits the state's physical power. LOAC permits use of that physical power with far fewer restraints, but that does not exclude judicial scrutiny of that exercise.

There is an irreconcilable incongruity between LOAC and the right to life, which reflects the differences between them as permissive and restrictive regimes respectively. Courts asked to judge a soldier's right to life claim are between a rock and a hard place. The text of the Convention does not permit a use of force such as that that killed A and C. But LOAC would not prohibit P's use of force.[230] The negative obligation has strictly-defined interference and justification thresholds that do not permit balancing of any other competing interests. Though the court can decline to adjudicate a case like this one, doing so would undermine the Convention and judicial authority.

[230] If A and C had been enemy troops as P believed, it would have been lawful to attack them. LOAC does not regulate the state's conduct towards its own soldiers, so whilst P's action is not *lawful* under LOAC, it is not *unlawful* either.

6.3.2. Positive Obligation

During conflict the positive obligation can be expressed as a duty to take operational measures to prevent an unjustifiable increase in the risk to soldiers' lives. Soldiers are at constant background risk during deployment abroad, from enemy attack as well as hostile weather conditions and consequences of being unable to establish reliable supply lines. But these risks are of a general nature. Guaranteeing soldiers' right to life must not represent an unreasonable or impracticable burden on the state. The positive obligation offers greater scope for balancing competing objectives and interests, and the armed conflict context of soldiers' right to life claims such as this one limit the extent of the state's duty. The interference threshold of an increase in the risk to soldiers' lives is relatively low. Whilst this opens up more cases to judicial scrutiny, the justification threshold is also low.

A high interference threshold means judges will only scrutinise the state's response to the gravest risks. Such a high interference threshold may be appropriate for cases arising out of actual enemy conflict because it is important to maintain commanders' discretion and ability to respond quickly in those circumstances.[231] Judges have limited experience and expertise of actual combat and cannot replicate combat decision-making conditions in court, so should be slow to scrutinise soldiers' conduct during enemy contact too harshly. An Army Board of Inquiry may be more appropriate to determine whether the Army took sufficient measures to protect soldiers from friendly fire in the course of actual enemy combat because of their greater experience of the circumstances.

This higher interference threshold is met when the risk of friendly fire is grave. Imagine a squadron of British soldiers engaged in hand-to-hand combat with the enemy. A second

[231] See Section 6.6.

squadron of British troops launch a grenade at the enemy soldiers. Because friendly and enemy troops are so close to one another it is impossible to distinguish the targets. The risk of friendly fire in such a situation is high. This reaches the high interference threshold and the state is required to take steps to minimise or otherwise justify that risk to its soldiers' lives. But in this case, Lieutenant P deliberately targeted A and C. They were not collateral damage[232] in an attack on enemy troops. During armed conflict, a state's troops are at significant constant risk from the enemy. The state is under an obligation to protect them from this risk. Situations such as this one should carry a lower interference threshold because the mere fact this accident happened signals systemic operational failures.

Commanders ought reasonably to have known there was a risk of friendly fire in these circumstances. This is partly because the battlegroups were using outdated maps that did not show the dam where the QRL adopted their defensive position. Commanders failed to properly brief their squadrons on relative locations of friendly troops, command boundaries and arcs of fire. This was a risk which commanders could reasonably have expected to happen without proper communication. Judges should be respectful of operational realities when determining whether authorities had actual or constructive knowledge of a risk, and adopt a *Wednesbury*-like reasonableness standard in this respect. The relevant question is whether a reasonable commander would have known of the risk of friendly fire on the facts of this case.

The court must recognise that in armed conflict situations there are significant operational challenges. Judges' own preference for how to mitigate a risk or to prevent it entirely may

[232] Chapter 3.1.2.3.

not be possible. Commanders have significantly less control over the circumstances than they do during training.[233] The enemy can be unpredictable and hostile conditions can be difficult to guard against. Judges must assess whether increased risks are justifiable. The measure of justifiability is not the judges' personal preferences but an objective proportionality analysis. To recognise the 'very wide measure of discretion' due to commanders' in-theatre decisions,[234] judges must adopt a low justification threshold that recognises there is more than one way to fulfil the positive obligation.

The court must therefore ask whether the Army acted reasonably to protect the soldiers' lives. In this case the risk came not from enemy attack, but from the failure to properly disseminate information. This increased risk must be justified otherwise it will constitute a violation of Article 2. The court must ascertain whether the commanders acted reasonably. This is a low justification threshold to reflect operational challenges. Even in the heat of combat, it is not reasonable for commanders to have failed to communicate friendly troop locations or clarify command boundaries and arcs of fire. The court must not dictate to the Army how to conduct operations, but can identify failures that reasonable commanders would not have made.

6.4. CROSSFIRE

During the 2003 invasion of Iraq soldiers were commanded to control movements in and out of Az-Zubayr. Specific instructions on how to achieve this aim were not given, so the RTR established a number of vehicle check-points ("VCPs") on roads in and out of the town. At one such VCP soldiers used three Challenger II tanks to control passage along the road.

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[233] Section 6.1.1.

[234] *Smith (No 2)*, [81] (Lord Hope DP).

Sergeant R was among them. R was wearing combat body armour, but his enhanced combat body armour ("ECBA") was withdrawn a few days earlier due to kit shortages. Having lately checked a vehicle and sent it on its way, R was dismounted when a local man, Z, approached and began throwing stones at him. R fired his weapon at Z but the gun jammed. He assumed a defensive position whilst attempting to clear the blockage, signalling to his colleagues he was in difficulty. Believing Z was holding a hand grenade R's mounted comrades trained their weapons on him. Gunner G fired several rounds from a tank-mounted machine gun. Due to discrepancies between the gunner's line of sight and the weapon's position on the tank, the gun is inaccurate at close range, for which the gunner must compensate when taking aim. Though not in G's line of sight, R was killed.[235] The Army Board of Inquiry Report into his death found that, had he been wearing ECBA, R would have survived.[236]

There was a deprivation of life in this case, which can be described as intentional under the Court's approach to intention.[237] As such the negative obligation interference threshold is met. G believed Z was an Iraqi soldier holding a hand grenade. The court should defer to G's appreciation of the events, since he had to make rapid decisions to defend R and the rest of his troop. It was not safe for him to verify the veracity of the threat, nor did he have time to do so. This deference to his understanding of the heat of the moment is

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[235] Ministry of Defence, 'Sergeant Steven Roberts' (*Gov.uk*, 24 March 2003, updated 28 May 2009) <www.mod.gov.uk/government/fatalities/sergeant-steven-roberts> accessed 12 February 2014. The facts are given in detail in the Army Board of Inquiry Report into Sergeant R's death, available at <http://webarchive.nationalarchives.gov.uk/20121203141954/http://www.mod.uk/NR/rdonlyres/D5015226-A05C-44B3-AA22-F3C2345A5C26/0/boi_sgt_roberts.pdf> accessed 18 November 2014 (hereafter "Board of Inquiry (2)").

[236] ibid, 88.

[237] Chapter 2.2.5.

reasonable and follows the European Court's practice in law-enforcement cases.[238] The problem is that Z's attack was presumed lawful for the applicable LOAC. As such G's use of force was not in pursuit of the Article 2(2) law-enforcement objectives and the justification threshold is not met.[239]

In the same way as in the previous case, the court can determine that the negative obligation interference threshold has not been met. The inability to justify G's use of force according to the sole exceptions to the prohibition on intentional deprivation of life means that Article 2 has been violated. Even though, on balance, the use of force was perceived to be absolutely necessary and proportionate and satisfies the flexible element of the justification threshold, the strict textual test is not met. The court's best option to avoid having to make this unreasonable judgment is to determine that the interference threshold is not met, either by adopting a very narrow interpretation of intention such that R was not *intentionally* deprived of his life, or to determine that this is not a question suitable for judicial resolution.

6.4.1. Positive Obligation

The court must determine whether the decision to reallocate Sergeant R's ECBA unjustifiably increased the risk to his life. The Board of Inquiry into Sergeant R's death noted that the standard combat body armour offered 95% similar protection to the ECBA.[240] Considering that R was part of an artillery troop and was expected to spend his

[238] *McCann*, §200; *Bubbins*, §§136-40.
[239] G and Z's actions are judged according to different standards because of the Article 2 drafting structure. See Chapter 4.4.1.2.
[240] Board of Inquiry (2), 25.

time in a heavily-armoured vehicle, reallocating his ECBA only marginally increased the risk to his life. This suggests that the interference threshold has not been met.

This approach is not failsafe. The judicial process must be able to reduce arbitrariness, but the courts are not required to scrutinise decisions that fall short of the interference threshold. Therefore commanders could redistribute Sergeant R's ECBA on the basis of his hair colour and the courts would be unable to censure the Army for that arbitrary decision because the increase in the risk was marginal. The court should be able to say that an arbitrary decision constitutes an interference with the right to life, whether or not it constitutes a significant increase in the risk. At this point the distinction between the interference and justification thresholds collapses, since the existence of an interference is predicated on the state's inability to justify an increased risk.

There is no easy solution to this problem whilst maintaining the two-stage adjudication process. The court could lower the interference threshold so that even minor risks must be justified. The justification threshold is flexible so that whether a risk is justified depends upon the circumstances. But this leaves the military open to potentially endless litigation. Not only does that clog the judicial process with frivolous claims it also prevents commanders from conducting day-to-day operations in accordance with their own experience, expertise and decision-making authority.

The alternative is to abandon the distinction between interference and justification thresholds completely. The two-step adjudication process does not enjoy unanimous

support,[241] but it is a useful way of structuring human rights adjudication. There are many different considerations in determining whether Sergeant R's right to life was violated and the two-step adjudication process organises these issues coherently. Neither approach resolves the problem in Sergeant R's case without creating other problems.

Though it is an inelegant solution, the best approach would be for the court to determine whether the interference threshold is met with one eye on the justification threshold. This echoes the European Court's approach to the intentionality requirement, where in some cases the scope of "intentional deprivation of life" is dictated by the existence of exceptions that justify it.[242] The court would thereby retain discretion to scrutinise decisions that appear to be arbitrary even though they do not cause a significant increase in the risk to soldiers' lives, without subjecting commanders to unreasonable scrutiny.

Once the interference threshold is met, the court must decide whether the justification threshold is satisfied. Determining whether the reallocation of kit was reasonable requires the court to take into account several factors, such as kit availability. Had there been enough ECBA for all the soldiers, it would be unjustifiable not to give any to Sergeant R. But the justification threshold is lowered because of the lack of equipment. So the court must ask whether the distribution of available kit was reasonable.

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[241] Grégoire CN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' 23 *CJLJ* 179; Webber, *The Negotiable* Constitution, chapters 1-2; Bradley W Miller, 'Justification and Rights Limitations' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008).

[242] Chapter 2.2.6., Chapter 4.1.1.2.

The court's scrutiny should be more rigorous than asking whether the kit was allocated on an objective assessment of need. The fact that such a triage exercise was undertaken is not sufficient to satisfy the positive obligation by itself. The commanders must demonstrate they considered reasonable, relevant factors. For instance it is not reasonable to allocate kit on the basis of hair colour. The Army must satisfy the court that it considered relevant factors such as the nature of operations soldiers would be undertaking and the risks involved. In the current case it is reasonable to surmise that Sergeant R was at lower risk because he was an artilleryman rather than infantry and was therefore not expected to come into the kind of contact with the enemy requiring ECBA.

Other pertinent factors in this assessment of need include the fact that Sergeant R spent some time dismounted from his tank in the course of the VCP. He was therefore exposed to similar risks as infantrymen. But orders for conducting the VCP mandated that no soldier was to be dismounted alone. Furthermore the standard combat body armour offered 95% similar protection to the ECBA.[243] These are all questions the court should consider when determining whether, on balance, the commander acted reasonably by redistributing Sergeant R's ECBA.

Kit allocation is somewhat removed from the action in armed conflict, which may justify a higher standard of review because commanders are not having to make on-the-spot life and death decisions. This distance from actual enemy engagement means kit allocation can be a more considered activity. However commanders still have to make do with available resources and prepare for multiple eventualities in difficult operational

[243] Board of Inquiry (2), 25.

conditions. Judges must take care to preserve commanders' discretion to allocate equipment according to their professional assessment of need.

Expert witness testimony may help judges in overcoming their lack of specialist experience and expertise to review the kit allocation more intensively. The problems with such evidence are twofold. Firstly the witness giving evidence in court is not having to make decisions about kit allocation in the same operational conditions. The witness' own combat experience will overcome this limitation to an extent but the evidence will still be detached from what actually happened. This is untenable where the relevant question is whether the commander acted reasonably *in the circumstances*. Secondly there is a chance that commanders will close ranks to protect the military. If courts adopt a more intensive standard of review and use expert testimony to inform their judgment, but the testimony is doctored, the more intensive standard of review may do more damage to soldiers' right to life than a restrictive, reasonableness-based review.

6.4.2. Procurement

This scenario also poses the question of whether procurement of insufficient materiel is capable of constituting a violation of Article 2. Procurement is a complex political decision authorised by Parliament and implemented by the government. Such decision-making is far removed from battle. It requires civil servants to hedge their bets – they cannot know with certainty what equipment will be needed in future operations or in what quantities, so they must prepare for multiple scenarios and buy equipment to cover all bases whilst managing a finite budget. The fact these decisions are taken far removed from the theatre of operations does not inoculate procurement decisions from judicial scrutiny in the

context of soldiers' right to life claims, although political resolution of these matters may be more appropriate given that primary decision-making authority rests with Parliament.[244]

Courts are not well-equipped to make decisions regarding procurement. In the course of deciding legal disputes the court does not get the "big picture" of competing priorities for public funding. The interference threshold should therefore be high. In the narrow context of Sergeant R's right to life claim it is easy to say that the UK failed to take reasonably practicable steps to protect him from risks by procuring insufficient ECBA for troops deployed to Iraq, but that is not a robust legal argument. The remoteness from the battlefield (in time, place and chain of causation), the sheer number of situations civil servants have to prepare for and the fact that procurement is subject to parliamentary control means judges should be very slow to question decisions made in the procurement process. The interference threshold would be met when there was evidence of illegality or corruption in the procurement process, for example.

It is difficult to make the argument that Parliament should provide more funding for procuring equipment and that the failure to do so constitutes a violation of Article 2. This is because of competing responsibilities and priorities for public funding and judges' lack of authority and expertise to make decisions about allocation of those funds. Rather the court has to ask whether the military decision to proceed with a particular mission was reasonable, considering the lack of equipment resulting from underfunding. Once the question is couched in these terms the procurement issue collapses into operational decision-making, and commanders enjoy a broad degree of discretion in this area.

[244] *Smith (No 2)*, [65] (Lord Hope DP).

6.5. IMPROVISED EXPLOSIVE DEVICES

The 2003 invasion of Iraq toppled the Ba'athist regime. Thereafter the country was occupied by a coalition of forces from states including the United Kingdom, United States and others. During the occupation, insurgents attacked the occupying forces using improvised explosive devices ("IEDs"). In one such attack, a patrol was sent to investigate a bomb blast in Al-Amarah. The patrol was travelling in a convoy of Snatch Land Rovers. Designed to withstand small arms fire, these lightly armoured vehicles do not offer passengers any protection from explosives, including IEDs. The vehicles used by the patrol that day had not been fitted with any electronic counter-measures ("ECMs") that would have prevented IED detonation. As the convoy headed towards the site of the bomb blast, an IED was detonated level with the lead vehicle. Private H and Second Lieutenant S were killed.[245]

Seven months later, a similar incident occurred. Two Snatch Land Rovers were travelling in convoy, with an escort of three heavily armoured Warrior tanks. Both Snatch Land Rovers had been fitted with ECMs, but were waiting to be fitted with a new component. Private E was the driver of one of the Snatch Land Rovers. Between the Iraqi Police headquarters in Al-Amarah and the British Army base at Camp Abu Naji, an IED was detonated level with Private E's vehicle. Private E and Captain O were killed in the explosion and another soldier was seriously injured.[246] In both instances the order to go out on patrol can be considered an intentional deprivation of life, since it was an action that resulted in death,[247] which was

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[245] The facts of this case form the basis of one of the claims in *Smith* v *Ministry of Defence;* the facts are given in the judgment of Lord Hope DP, [4]-[6].
[246] *Smith*, [7]-[8] (Lord Hope DP).
[247] See Chapter 2.1.

intentional under some descriptions of intention.[248] In order to avoid an unreasonable result, the court would be best to raise the interference threshold such that it does not have to consider this case within the negative obligation framework. This leaves the question of how to approach the facts within the positive obligation framework.

Commanders should be granted a wide degree of discretion to pursue military objectives they consider, in their professional opinion, to be expedient in the best way possible. But pursuit of a military objective that puts soldiers at increased risk will satisfy the interference threshold if the risk is significant. The interference threshold should not be so low that every single risk is open to judicial scrutiny. Courts need to preserve commanders' discretion and not hamper their authority. But judges should not raise the interference threshold so high that it never scrutinises commanders' decisions.

Judges should consider a number of different factors regarding the increased risk. In this case, the risk came from sending the patrol out in lightly-armoured Snatch Land Rovers, which lacked the ECMs that would have prevented IED detonation. In case of IED detonation the danger to soldiers travelling in the Snatch Land Rovers was severe because of the lack of protection the vehicle offered. Bearing in mind the security situation at the time and insurgents' increased use of IEDs there was a significant risk that a patrol would be targeted. These are the sorts of factors that judges should consider when deciding whether the interference threshold has been met. In this case there was a significant risk of an attack that posed a severe danger to soldiers' lives. The interference threshold has been met in this case.

[248] Chapter 2.2.

The Army must accordingly justify the risk to the soldiers. Several factors determine the height of the justification threshold. In the first case, there were no ECMs to fit to the Snatch Land Rover. The patrol was sent out on an important military objective. The court has little expertise to judge the merits of military objectives, so should adopt a reasonableness review like the British *Wednesbury* principle. The question is whether the military objective itself was reasonable, and whether a reasonable commander would have chosen to pursue that objective in this way. Any more intensive review than that would restrict commanders' discretion and military efficacy.

In the second case the same standards of review should be adopted. The nature and significance of the risk is the same. The only difference is that in the second case, the justification threshold is not met. In the circumstances, no reasonable commander would have sent the patrol out in Snatch Land Rovers without ECMs fitted if those ECMs were available. Even on this restrictive reasonableness standard of review, the Army fails to satisfy the requirements and the right to life has been violated. In cases arising out of training accidents, such as Marine B or Recruit W, the court can ask whether more appropriate measures could have been taken to protect the individual soldier from the risk. In the armed conflict paradigm that enhanced scrutiny is unreasonable because the risks themselves are entirely outside the commanders' control. When risks cannot be accurately predicted or prepared for, there are limited measures that can be taken to defend against those risks. Those limitations become even stricter when there are other operational challenges, such as insufficient equipment or difficulties establishing reliable supply lines.

6.6. COMBAT

Lance Corporal Y was deployed to Iraq at the beginning of the 2003 invasion. His regiment was tasked with securing the coast and port towns to enable disembarkation of reinforcements and supplies from the Persian Gulf. Y and his mortar troops were assaulting Iraqi military positions in Az-Zubayr. Iraqi soldiers fought back, attacking Y's troop with rocket-propelled grenades.[249] Y broke through the escape hatch of his armoured vehicle to man a machine gun.[250] He was killed when a grenade detonated near him, and later received a posthumous Mention in Despatches for his gallantry.[251]

The orders to go into battle in Az-Zubayr may constitute an intentional deprivation of life. However it is more appropriate to consider this case within the positive obligation framework. The order was not a 'use of force that is no more than absolutely necessary' for the pursuit of one of the Article 2(2) law-enforcement objectives. As such it would be a per se violation of Article 2 if the order was considered an intentional deprivation of life. It would impose an unrealistic and unreasonable burden on states if every military order given in war were capable of constituting an intentional deprivation of life. In adjudicating this case, the court should adopt a high interference threshold by interpreting intention restrictively.

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[249] BBC, 'Scots Battalion Loses Soldier' (*BBC News*, 25 March 2003) <news.bbc.co.uk/1/hi/Scotland/2883615.stm> accessed 3 September 2017.

[250] BBC, 'Soldier's Name Carved on Memorial' (*BBC News*, 5 September 2004) <news.bbc.co.uk/1/hi/Scotland/3629228.stm> accessed 3 September 2017.

[251] Ministry of Defence, 'Lance Corporal Barry Stephen' (*Gov.uk*, 24 March 2003, updated 28 May 2009) <www.gov.uk/government/fatalities/lance-corporal-barry-stephen> accessed 3 September 2017.

Given that Lance Corporal Y was killed during enemy engagement, it may be appropriate to adopt a limited standard of review to reflect the challenging circumstances in which troops were operating. The court must determine whether the state took such reasonably practicable measures to avoid an unjustifiable increase in the risk to Y, or to protect him from increased risks. In English negligence law the combat immunity doctrine posits that during enemy engagement soldiers are under no common law duty to act with reasonable care for the health and safety of their comrades or for such civilians or civilian objects as may appear in the theatre of operations.[252] In the context of human rights adjudication the court may lower the justification threshold so as to preclude their scrutiny of military decision-making in the heat of battle.

Instead of asking whether commanders acted reasonably, or weighing positive and negative values associated with the risk, the justification threshold becomes a simple factual criterion, namely whether soldiers were engaging the enemy at the material time. Commanders lack control over the enemy, and in the heat of battle it would be unreasonable of the court to push commanders to justify decisions taken in such a stressful and fast-changing environment. In respect of whether Y's commanders should have done more to protect him in the split-seconds in which he was attacked, the court should adopt this very limited standard of review. The effect is not that the duty to protect Y does not exist, or that the state is absolved of it by virtue of the circumstances. Rather the judge is unable to reasonably quantify what could have satisfied that duty in the circumstances.

[252] *Mulcahy*, 749-50 (Neill LJ). Section 1.

This approach has some merit for decisions made in the heat of close quarters enemy engagement. It avoids imposing unrealistic burdens on commanders. It would be implausible to expect the state to have done more to protect Y against attack in the moments in which he was killed. But the judge must have account of all the relevant circumstances and in the broader context of the military operation, this combat immunity approach is unacceptably limited. The European Court has stressed the importance of the broader context in which an operation takes place. In *McCann* the fatal shooting of three terrorist suspects was quite acceptable in the split-seconds it occurred.[253] But in the broader context of the whole circumstances the state had failed to plan the operation with sufficient regard to the suspects' right to life. The whole operation had been conducted in such a way as to make recourse to lethal force unavoidable. This constituted a violation of Article 2.[254] Similarly in *Finogenov* the Russian authorities' use of narcotic gas was not a problem. Their failure to adequately plan the operation and organise an effective medical response meant the risk to life had not been minimised as far as possible.[255]

The court must determine whether, not just in the split-seconds leading to his death but in the broader context of the military operation, reasonably practicable measures were taken to protect Y against the risk to his life from enemy attack. The further from the heat of battle a decision is taken, the less compelling the combat immunity argument.[256] The standard of review must be capable of protecting soldiers against genuinely poor decision-making. The combat immunity doctrine prevents any such scrutiny, but the broader context can be analysed more rigorously. Yet by the same token, judges lack expertise of military strategy and decision-making authority over conduct of hostilities. The standard of

[253] *McCann*, §200.
[254] ibid, §213. See Chapter 3.1.2.2.
[255] *Finogenov*, §266. See Chapter 3.1.2.3.
[256] See Section 1.

review must preserve commanders' discretion, but guard against manifestly unreasonable operational decisions.

Going into battle carries an obvious danger. The court must calibrate the interference threshold carefully. Too low and the military may be subjected to excessive litigation, the fear of which may impair military efficacy. If the interference threshold is too high, the court becomes an apologist for bad soldiering and fails to fulfil its role of ensuring states uphold their Convention obligations. There is no bright line rule about the interference threshold. Rather it must be determined on a case-by-case basis by reference to all the relevant facts. In the circumstances of this case the interference threshold is met. At this early stage of the invasion, soldiers were already at significant risk. The Iraqi regime was still in power and its military at full force. The British Army still had limited troops and resources on the ground. Sending the troops into battle in an urban area against entrenched and concealed enemy positions enhanced the risk to such an extent as to invite judicial scrutiny.

The justification threshold is low. The court must recognise its own limitations in respect of adjudicating strategic political and military choices. The court must not ask what measures it would have taken, but whether the commanders acted reasonably in the circumstances. Would a reasonable commander have ordered his troops into battle in this scenario? This clearly echoes the *Wednesbury* principle.[257] The doctrine permits decision-makers to choose from a range of reasonable decisions. The justification threshold is met if the court is satisfied that the decision is not so outrageous that no reasonable commander would

[257] See Section 2.

have ordered his troops into battle in these circumstances. The court must have regard of all the relevant facts, including competing demands for limited resources, unpredictability of enemy tactics and the importance of the military objective. In respect of operational tactics rather than equipment allocation, the court must be slow to question the commanders' decisions. Judicial interference should be restricted to exceptional cases of manifestly unreasonable decisions.

This is a restrictive standard of review but the doctrine can be appropriate in certain circumstances.[258] No reasonable commander would act unreasonably and put his troops in unnecessary danger. Enhanced scrutiny would be unreasonable in this case and has the potential to impose an impractical burden on the military. In addition to judges' lack of military expertise, in combat situations commanders only have so many options available to them. As such judges must ask no more than whether the commander acted reasonably in the circumstances.

6.7. PROCEDURAL OBLIGATION

Article 2 entails a procedural obligation to investigate deaths resulting from state agents' use of force, but also deaths that occur in violent, suspicious or unexplained circumstances. Where state agents kill, an effective investigation determines whether their use of force was disproportionate or otherwise unjustified. In other circumstances the investigation must determine the broad circumstances in which the person died and be capable of identifying the person responsible for death. This duty continues to apply in difficult security conditions and even armed conflict,[259] though conflict may present concrete

[258] *Vilvarajah*, §§123-25.
[259] *Güleç*, §81.

obstacles that impede investigative thoroughness.[260] The UN Special Rapporteur has recommended that realities of armed conflict may 'affect the modality or particulars of the investigation' but the principles of the procedural obligation remain intact.[261]

A military deaths investigative panel should be established to investigate military deaths, though soldiers may conduct initial evidence-gathering.[262] This body should be comprised of members from military, legal, medical or other backgrounds to ensure its reports are well-rounded and independent of the military chain of command. Such a dedicated body would relieve pressure (in terms of case-load and expertise) on coroners' courts, which would otherwise conduct an inquest. If a soldier's next of kin claimed there was ineffective investigation into the soldier's death, the court must examine whether the investigation conformed to Convention principles. The court's role is to review the investigative process, not to remake the investigative panel's decisions. Part of this scrutiny includes whether the process was operationally and hierarchically independent.[263] The required freedom from military authority and discipline[264] is a high threshold and the court should rigorously investigate links between military investigators and those under investigation.

All suspicious, violent or unnatural deaths and all deaths caused by state agents engage the procedural obligation to investigate. The interference threshold is low. The requirements of the procedural obligation are quite strict, with a number of absolute requirements such

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[260] *Bazorkina* v *Russia* 46 EHRR 15, §121.
[261] UNCHR, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2006) UN Doc E/CN.4/2006/53, §36.
[262] Chapter 4.7.
[263] Where state agents kill, investigators must be operationally and hierarchically independent of those under investigation: *Al-Skeini* v *United Kingdom* 53 EHRR 18, §167.
[264] *Jaloud* v *Netherlands* 60 EHRR 29, §196.

as being undertaken on the authorities' own motion[265] and being open to public scrutiny.[266] The justification threshold is thus relatively high. There is little room for judicial deference or balancing competing interests when adjudicating compliance with the procedural obligation. The Court has recognised states' discretion in the form investigations may take.[267] Coronial proceedings, disciplinary hearings or criminal investigations may fulfil the procedural obligation, but whatever form the investigation takes it must have certain outcomes.

States are under a particular duty to investigate deaths resulting from their agents' use of force.[268] Article 2(2) permits use of force that is no more than absolutely necessary in pursuit of the listed law-enforcement objectives.[269] The European Court has interpreted this absolute necessity requirement as including a proportionality test.[270] Any investigation into deaths resulting from state agents' use of force must be capable of determining whether the use of force complied with these standards and substantively answer this crunch question.[271] Corporal A and Trooper C died as a result of Lieutenant P's use of force.[272] Sergeant R died as a result of Gunner G's use of force.[273] Investigations into their deaths must confirm in each case whether or not the use of force was a legitimate exception to the general prohibition on intentional killing.

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[265] *Jordan*, §141; *Özkan* v *Turkey*, App No 21689/93 (ECtHR, 6 April 2004) §310.
[266] *Öğur* v *Turkey* 31 EHRR 40, §92.
[267] *McCann*, §162.
[268] ibid, §161.
[269] Chapter 3.1.
[270] *McCann*, §149. Chapter 3.2.1.
[271] *Jaloud*, §199; *Kaya* v *Turkey* 28 EHRR 1, §87.
[272] Chapter 3.3.
[273] Chapter 3.4.

This is a simple factual test. Either the investigation determined state agents' compliance with Article 2 or it did not. But the investigation must answer this question *correctly* if the right to life is to be effective. The court must review the basis on which the investigation reached its decision. It should restrain itself to asking whether a reasonable investigation would reach this conclusion on the basis of the evidence before it applied to the relevant legal framework. For instance, when Lieutenant P used force against Corporal A and Trooper C, he was not acting in defence of unlawful violence.[274] Since the relevant legal framework prohibits intentional killing except in those narrow circumstances, and according to the facts of the case Lieutenant P used force *outside* those narrow circumstances, a reasonable investigation could only conclude that this was not a legitimate exception to the general prohibition on intentional killing.

Investigations into violent, unnatural or suspicious deaths must take reasonable steps to secure evidence concerning the incident.[275] The state has a broad degree of discretion over the evidence-gathering phase and in armed conflicts the Court has made 'reasonable allowances for the relatively difficult conditions' in which investigations take place.[276] The fact that soldiers perform the initial evidence-gathering does not mean the investigation is ineffective,[277] in the same way that domestic criminal proceedings legitimately depend

[274] Chapter 4.3.2. Attacks on enemy targets are permitted under the applicable laws of armed conflict (AP1, Article 50(1)). If A and C *were* enemy soldiers, as P believed, it would not have been unlawful for them to attack him. It is appropriate to defer to P's appreciation of whether force was necessary (Section 6.3.), but even if one accepts his assessment it was still not a use of force that was justified for the purposes of Article 2.
[275] *Al-Skeini*, §166.
[276] *Jaloud*, §226.
[277] ibid, §192.

upon police evidence to a significant extent.[278] What is more important is that evidence-gathering is as thorough as circumstances permit.

The court can have regard to the length of time between the death and the evidence-gathering. There is room for balancing the need to investigate death with legitimate reasons for delay, such as death occurring in enemy territory where it is impossible to conduct investigations safely. The court should be respectful of the Army's assessment of whether it is safe to investigate to the extent that assessment is reasonable. The time between death and evidence-gathering can prevent important evidence being secured. Whilst legitimate delay will excuse the failure to gather important evidence, where possible all relevant evidence should be secured. The Court has previously found that an investigation was ineffective when it failed to gather forensic evidence it could easily have secured, even though the evidence in question had little probative value.[279] The court should be sensitive to operational constraints, such that a failure to secure evidence does not affect the effectiveness of the investigation to the extent that failure is reasonable.

This somewhat restrictive approach to scrutinising the evidence-gathering phase of the investigation is necessary to avoid imposing unrealistic burdens on states. Nevertheless the Army must act with due diligence when gathering evidence. The judicial phase of the investigation is riper for intensive judicial scrutiny. The investigation must pursue all lines of inquiry and reach its conclusions in a reasonably prompt and expeditious manner.[280] The court is well-placed to determine whether the investigation is robust and capable of

[278] *Ramsahai* v *Netherlands* 46 EHRR 43, §344.
[279] *Jaloud*, §§219-20.
[280] *Yaşa* v *Turkey* 28 EHRR 408, §§102-104.

satisfying the procedural obligation because of its own experience and expertise. The scope of the investigation's mandate and its inquiries' frame of reference are well within the courts' purview. More so than for the negative and positive obligations, the court is able to say how the investigation should have proceeded and how it should have reached its conclusions. The procedural obligation has a high justification threshold, which grants the court greater scrutiny over the state's conduct.

CONCLUSION

Judges decide each case on its own merits, in view of all the circumstances. The limits of judges' decision-making authority and the nature of adjudication mean judges cannot assume legislative or executive powers to dictate how the Army should protect its soldiers, especially in combat. When measuring the proportionality of the state's measures to protect soldiers' lives from risks, the court can defer to commanders' assessments of military objectives and equipment availability to preserve military discretion. Commanders' appreciation of good soldiering on the battlefield is hard to overcome given their experience and difficult operational realities.

The realities of combat can lower the intensity of judicial scrutiny and the threshold at which the court accepts an interference with the right to life is justified. But in training scenarios the threshold should not be lowered because commanders have significant control over the situation. Though there are legitimate policy objectives in having a well-trained military, this does not excuse the Army from its obligation to protect soldiers' lives. The proportionality analysis favoured by the European Court of Human Rights permits a variable standard of review between intensive and restrictive scrutiny. Since

proportionality is about using the right tools for the job,[281] the appropriate level of scrutiny will depend upon the facts of the case.

In any soldiers' right to life claim, the state might reasonably seek to enjoin judicial scrutiny of its objectives (and indeed of resource availability and other matters) in the name of national security and the safety of soldiers still serving in active combat. Revealing military strategies and resource availability in open court might be prejudicial to ongoing operations. But states should not be able to hide potential human rights violations behind a veil of secrecy. Judges must not use the threat to national security as an excuse to raise the interference threshold. Although commanders must have discretion over everyday operations, there are ways in which courts can appropriately scrutinise their decision-making without prejudicing security.

In surveillance cases the European Court has taken a permissive approach, allowing applications even where victim status under Article 34 cannot be reliably ascertained.[282] The need for security should not render surveillance measures 'effectively unchallengeable'.[283] Judges should take a similar approach to military objectives and declare the increase to the risk to soldiers' lives is unjustifiable if the Army is not prepared to disclose its justifications. The court can respect the imperative of secrecy (with such measures as sealed judgments and injunctions on publication of the details) whilst still taking reasoned judgments about whether soldiers' lives have been properly safeguarded.

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[281] *R* v *Goldstein* [1983] 1 WLR 151, 155 (Lord Diplock).

[282] For a summary of the Court's principles, see *Burden* v *United Kingdom* 47 EHRR 38, §§33-34; *Tănase* v *Moldova*, App No 7/08 (Grand Chamber, 27 April 2010) §§104-106.

[283] *Zakharov* v *Russia*, App No 47143/06 (ECtHR, 4 December 2015) §169. See also *Kennedy* v *United Kingdom* 52 EHRR 4, §124.

Similarly the European Court respected the imperative of secrecy in *Finogenov* when the Russian authorities refused to disclose the chemical composition of the gas used to incapacitate the hostage-takers.[284]

Judicial scrutiny can be far-reaching but the nature of the adjudicative function and the fact that soldiers' right to life claims will take place on a post-hoc basis means the courts' ability to guarantee soldiers' right to life depends heavily on the "right" cases coming to court. The existence of veterans' compensation schemes and the difficulties of litigation mean many families may be discouraged from bringing right to life claims at all. Other proceedings may play a larger role in implementing soldiers' right to life. Coroners' inquests, for instance, determine the circumstances in which an individual was killed and can identify systemic failures in the army's operations that contributed to the soldiers' death. Unlike the High Court, a coroner's inquest does not directly apply the law of the Convention and determine whether the soldier's death constituted a violation of Article 2. Nevertheless the army can still learn from its mistakes as a result of coronial proceedings, and the same can be said for Health and Safety Executive investigations and the army's own Boards of Inquiry. Those proceedings must be robust and rigorous.

[284] *Finogenov* v *Russia* 61 EHRR 4, §§256-57.

CONCLUSION

The aim of this thesis was to understand how to guarantee soldiers' right to life under Article 2 of the European Convention on Human Rights. More specifically, I set out to determine the nature, scope and extent of states' legal obligations to their armed forces. This is an important legal question that has yet to be answered by human rights tribunals. Though a significant body of academic literature considers the application of human rights law during armed conflict, the question of soldiers' human rights against their own states has been neglected. LOAC governs the conduct of hostilities and protects the victims of armed conflict. Nevertheless, that regime does not regulate a state's conduct to its own soldiers and does not create individually-enforceable rights.

International human rights law protects everyone against states' coercive power. The human rights framework can give normative effect to the moral intuition that states have a duty to protect those who lay down their lives in its defence. This thesis has advanced new expressions of states' Article 2 obligations, effectively protecting soldiers' lives whilst recognising the necessities of military operations. The legal tests established are of general application. They may be used to determine whether states have fulfilled their Article 2 obligations to their troops in many different circumstances. They are sufficiently flexible to be applicable for the various military deployments and relative operational capacities of Council of Europe member states. It is a practical guide for effective legal protection of soldiers' right to life.

The thesis established that soldiers continue to enjoy protections of the European Convention wherever they are in the world.[1] Armed forces remain under the state's authority and control when deployed to armed conflicts or peacekeeping missions abroad.[2] States' obligations under the Convention usually apply throughout their national territories,[3] but those obligations are not limited by reference to states' borders. The scope of states' obligations to individuals overseas depends upon the nature and extent of their authority and control exercised over them.[4] No matter where in the world soldiers are, the state exercises significant control over its armed forces through the chain of command, the culture of obedience and military discipline and the continuing application of military law. This level of control entails Convention obligations to respect, protect and guarantee soldiers' Convention rights.

Article 2 of the Convention prohibits intentional deprivation of life.[5] In addition to this strictly textual negative obligation to refrain from intentional killing, the European Court has determined in its jurisprudence that authorities are obliged to take positive operational measures to protect people from risks to their lives in certain well-defined circumstances.[6] States must also ensure effective protection of the right to life by enacting relevant legal frameworks with robust judicial and quasi-judicial mechanisms. The thesis has examined the strict requirements of these three obligations so as to evaluate compatibility of existing frameworks with the realities of military operations and discern general principles of right to life jurisprudence.

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[1] Chapter 1.
[2] *Smith* v *Ministry of Defence* [2013] UKSC 41, [2014] AC 52, [55] (Lord Hope DP).
[3] *Ilaşcu* v *Moldova and Russia* 40 EHRR 46, §31.
[4] *Al-Skeini* v *United Kingdom* 53 EHRR 18, §§136-37.
[5] "No one shall be deprived of his life intentionally".
[6] *Osman* v *United Kingdom* 29 EHRR 245, §116.

The Court has never defined "deprivation of life" and "intention", which are key concepts to defining the scope of the negative obligation.[7] Article 2's lack of conceptual clarity might impose an unrealistic burden on states. On the basis of philosophical analysis of the text of Article 2, the thesis has defined what *could* be an intentional deprivation of life and, importantly, what *should* be. The thesis thus defines the normative and conceptual basis for distinguishing the relationship between the negative and positive obligations and when each obligation applies.

The thesis examined the extent to which existing legal standards are fit for purpose in the context of guaranteeing soldiers' right to life by applying the legal tests established in the Court and Commission's jurisprudence to a number of case studies in which soldiers were killed. The principles of the positive obligation can reasonably apply to domestic training accidents.[8] The duty to regulate and monitor inherently dangerous activities[9] creates an effective framework for ensuring training exercises fulfil the primary policy objective of having a well-trained army whilst minimising risks to soldiers' lives from taking part.

Existing legal tests yield unexpected and unreasonable results when applied to soldiers in an armed conflict context. By applying those standards to real-life case studies this thesis has demonstrated that those tests cannot effectively protect soldiers' right to life. The general principle discernible from the Court's jurisprudence requires states to protect

[7] Chapter 2.
[8] Chapter 4.1. and 4.2.
[9] *Öneryıldız* v *Turkey* 41 EHRR 20, §90.

people from being avoidably killed.[10] Soldiers are exposed to significant risks during armed conflict, which cannot be reliably predicted or prevented. But military commanders may take measures to prevent an unjustifiable increase in that risk.

In the context of protecting soldiers' right to life, Article 2 can be expressed as imposing on states a duty to take measures preventing an unjustifiable increase in the risk to soldiers' lives. This would require a standard of due diligence of all military commanders and officials with the power to make decisions affecting soldiers' right to life. But it also recognises that soldiers deployed to armed conflicts are at constant risk and commanders have to balance limited resources and competing policy objectives. The state's ability to justify increased risk to soldiers' lives depends upon all the facts of each case, including the importance of military objectives, limited resource availability and the unpredictability of enemy attack.

In the context of armed conflict's legalised violence, there are significant challenges for protecting soldiers from being intentionally killed. The harmonious interpretation of Article 2 and LOAC seems impossible. Soldiers on opposing armies may lawfully attack each other in circumstances that Article 2 would not permit. In friendly fire cases, in which soldiers mistakenly target friendly troops, the state would have violated the right to life even though its soldiers were acting lawfully for the purposes of the applicable legal regime. The thesis has discussed the possibility of an implied armed conflict exception to the negative obligation and the challenges of recognising such an exception in light of states' explicit right to derogate from Article 2 in respect of deaths resulting from lawful acts of war. It

[10] Chapter 3.2.

may be more appropriate to examine friendly fire cases within the positive obligation framework but that does not alter the fact that such an intentional deprivation of life would not be permitted under Article 2.

When soldiers' right to life claims come before courts, judges must make a value judgment about whether the state has taken sufficient measures to protect their soldiers. Judges lack decision-making authority to dictate *how* the state should protect soldiers' right to life and lack expertise of military operations to scrutinise some elements of such claims. This thesis has discussed variable standards of judicial review to take account of judges' role in reviewing military compliance with the Convention in response to concrete facts without usurping command. Raising or lowering interference and justification thresholds in different circumstances can prevent imposing unrealistic burdens on states whilst still encouraging commanders to integrate Article 2 considerations into their decision-making.

Guaranteeing soldiers' right to life poses serious challenges. Military service exposes soldiers' lives to significant risks. Such dangers include the possibility of enemy attack during armed conflict, friendly fire, hostile environments, difficult training exercises or other factors. These risks represent an ordinary part of military life. Whenever these risks eventuate and soldiers die, this may be down to systemic failures or "bad soldiering", but the risks themselves are inherent in military operations. The fact that military service poses an inherent risk to soldiers' lives is not a convincing normative argument that states owe no legal duty to protect their soldiers' lives.

This thesis has attempted to give a general introduction to the question of soldiers' right to life. I have attempted to answer the fundamental legal questions, but many more remain to be answered and there is significant potential for future research. This thesis has not considered the interplay of human rights law and LOAC in respect of use of force against enemy soldiers. This is an interesting legal conundrum that future projects may investigate. I have touched on states' right to derogate from their Article 2 obligations in respect of lawful acts of war. No state has yet done so and as such the European Court has not considered the scope and extent of states' obligations in light of valid derogations. The European Court has considered derogation cases in other contexts, and it would be interesting to examine the general principles of that jurisprudence and apply it to the right to life.

It is entirely possible to guarantee soldiers' right to life during training at home, peacekeeping missions and active combat operations overseas. The simultaneous application of LOAC and human rights law during armed conflict creates some inconsistencies. Armed conflict is a 'radical exception to the normal paradigm',[11] and the law governing it consequently has a radically different outlook. It may be impossible to harmoniously interpret the two regimes. But that does not prevent the expression of human rights law obligations, based on general principles of Article 2 jurisprudence, to protect soldiers' right to life even in the heat of battle.

[11] Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 1.

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