



JUDICIARY OF  
ENGLAND AND WALES

**LORD DYSON, MASTER OF THE ROLLS**

**THE EXTRATERRITORIAL APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS:**

**NOW ON A FIRMER FOOTING, BUT IS IT A SOUND ONE?**

**FOR ESSEX UNIVERSITY**

**30 JANUARY 2014**

This annual lecture series is one of the most prestigious in what is becoming a fairly crowded field of lecture series. I am acutely conscious of the high quality of the lectures that have preceded mine and the high standard that they have set. This has presented me with a daunting task. I am, however, delighted to have been asked to give the lecture, particularly because Essex University generously bestowed an honorary LLD on me last year in a splendid ceremony on its beautiful campus at Wivenhoe.

Article 1 of the European Convention on Human Rights (“Convention”) provides:

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

This small number of apparently simple words has proved to be remarkably troublesome for the European Court of Human Rights (“ECtHR”) and other courts faced with the threshold jurisdictional question which arises from time to time in cases involving the Convention. This is a fundamental and important question. It is true that it is less controversial than the question of the relationship between the Contracting States and the ECtHR which is currently exciting such febrile political

interest in our polity. But the scope of the Convention is not free from controversy. There are those who believe that the ECtHR is exercising exorbitant jurisdiction and is guilty of human rights imperialism.

We should perhaps be grateful to Turkey and the United Kingdom for pushing the jurisprudence forward. These two states were the respondents in many of the most important Strasbourg cases where applicants argued that their human rights were violated in foreign territories.

The decision of the ECtHR in *Al-Skeini v United Kingdom*<sup>1</sup> in 2011 resolved one of the most contentious and difficult issues, namely whether and in what circumstances the Convention applies to acts done in a foreign State, outside the Council of Europe, during armed conflict. The Court held the Convention applies to areas subject to the authority and control of an occupying Contracting State, but for reasons that Judge Bonello forcefully argued lacked coherence.

Dutifully lagging behind Strasbourg, as it has bound itself to do by the dual maxims 'no more but certainly no less' and 'no less but certainly no more', the UK courts caught up in the recent decision of *Smith and Others v The Ministry of Defence*.<sup>2</sup> In that case, the Supreme Court held that the Convention applies to British soldiers serving in Iraq since they are under the effective authority and control of the United Kingdom.

The history of the case law in this area gives us a fascinating insight into the workings of the Strasbourg court and the relationship between it and our own courts. We shall see how Strasbourg has struggled to find a clear and coherent interpretation of article 1 of the Convention and how these shortcomings have perplexed and made life difficult, at least for the UK courts.

#### THE LAW

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<sup>1</sup> (2011) EHR 18

<sup>2</sup> [2013] UKSC 41

The initial text of article 1, prepared by the Committee of the Consultative Assembly of the Council of Europe on legal and administrative questions, provided that member States shall undertake to secure the rights and freedoms for all persons “residing within their territories”. The words “residing within their territories” were subsequently changed to “within their jurisdiction”. The reasons were noted in the *travaux préparatoires*:

“It seemed to the Committee that the term ‘residing’ might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word.”<sup>3</sup>

It was therefore recognised from the start that the phrase “everyone within their jurisdiction” is broader than “everyone who enjoys a legal right to reside in a Contracting State”. As can be seen by the comments in the *travaux préparatoires*, however, the focus of the amendment was not on the shift from “their territories” to “their jurisdiction”. Indeed, as we shall see the Court has always analysed the term “jurisdiction” primarily from a territorial perspective. In *Banković*, the Court held that:

“Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification.”<sup>4</sup>

This analysis is consistent with the approach taken in accordance with the general principles of public international law. Under international law, “jurisdiction is an aspect of sovereignty and refers to judicial, legislative and administrative competence.”<sup>5</sup> In his 1964 Hague lectures, Frederick A. Mann described the foundation of modern jurisdictional law in the following terms:

“Jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the State’s sovereignty. As Lord Macmillan said, “it is an essential attribute of the sovereignty of

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<sup>3</sup> Collected Edition of the *Travaux Préparatoires* of the European Convention on Human Rights (Vol. III, p. 260)

<sup>4</sup> Para 61

<sup>5</sup> Ian Brownlie, *Principles of Public International Law*, (7th edn, Oxford University Press 2008) 299

this realm, as of all sovereign independent States, that it should possess jurisdiction over all persons and things within its territorial limits and in all cases, civil and criminal, arising within these limits". If a State assumed jurisdiction outside the limits of its sovereignty, it would come into conflict with other States which need not suffer any encroachment upon their own sovereignty .... Such a system seems to establish a satisfactory regime for the whole world. It divides the world into compartments within each of which a sovereign State has jurisdiction. Moreover, the connection between jurisdiction and sovereignty is, up to a point, obvious, inevitable, and almost platitudinous, for to the extent of its sovereignty a State necessarily has jurisdiction."<sup>6</sup>

A State's sovereignty is understood by reference to a geographical territory and jurisdiction is understood by reference to a State's authority over persons within that territory. The primarily territorial perspective of jurisdiction must also be understood against the background of the historical period in which many international treaties, including the Convention, were written. In the post-WWII era, jurisdiction was a tool to allocate competency among fiercely independent and volatile nation States. In the minds of the drafters of such conventions, if one State assumed extraterritorial jurisdiction then it would, necessarily, encroach upon another State's jurisdiction.

#### THE CASES

Despite the primarily territorial nature of jurisdiction, from its early jurisprudence to date, the Court recognised what it refers to as "exceptional" circumstances justifying and, indeed, compelling a finding of extraterritorial jurisdiction. It established various 'categories' of exceptional circumstances, but until recently it has not clearly articulated any overarching principle which bound the categories together of which they could be said to be manifestations. Seemingly, they were an ad hoc group of categories to which additions were made from time to time.

For example, the Court has held that detaining an individual in a foreign State and coercing that individual to return to a Contracting State so as to face legal proceedings

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<sup>6</sup> Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 30 (1964-I).

there engages Article 1.<sup>7</sup> Likewise, negotiating on behalf of an individual who is on the premises of a foreign embassy or who has sought assistance from a consular official (and where that official has assumed responsibility in relation to the individual), engages Article 1.<sup>8</sup> By contrast, the mere presence of an individual on an embassy premises (without any assumption of responsibility)<sup>9</sup> does not.

But recently, an underlying thread between all of the cases on extraterritoriality has clearly emerged: it is the degree to which a Contracting State is able to exert effective and purportedly legitimate authority over an individual. The reason jurisdiction has been established is because there is a relationship between the State and an individual that can and should entail a responsibility on the part of the State to observe that individual's human rights.<sup>10</sup> The categories of exceptional circumstances are *manifestations* of jurisdiction but they are not the *reason for* finding jurisdiction. Likewise, territory provides a convenient shorthand for determining whether there is a relationship between the State and the individual when the relevant act occurs within a State's borders, but even in those cases, the justification for engaging the Convention remains the same, namely the exercise of effective and legitimate control.

The cases that have proved to be the most difficult and contentious for the Strasbourg Court have been those relating to military intervention in a foreign territory outside the Council of Europe. To analyse this case law, one must start with the cases arising from the Turkish occupation of northern Cyprus and then go on to deal with *Banković*, which, until *Al-Skeini*, was regarded as a "watershed" and now is regarded as an "aberration".

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<sup>7</sup> *Freda v Italy* (1980) 21 DR 250; *Ilich Sanchez Ramirez v France* (1996) 86-A DR 155; *Öcalan v Turkey* (2003) 37 EHRR 10; *Al-Saadoon and Mufdi v United Kingdom* (2009) 49 EHRR SE11; *Medvedyev v France* (2010) 51 EHRR 899; *Jamaa v Italy* (2012) 55 EHRR 627.

<sup>8</sup> *WM v Denmark* (1992) 73 DR 193.

<sup>9</sup> *R (on the application of B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344.

<sup>10</sup> Samantha Besson, "The extraterritoriality of the European Convention on Human Rights: why human rights depend on jurisdiction and what jurisdiction amounts to", *Leiden Journal of International Law* (2012), Volume 25, Issue 4, 857-884.

### *The northern Cyprus cases*

The invasion and occupation by Turkey of northern Cyprus from 1974 to 1983 gave rise to a number of important judgments by the Court on the issue of extraterritoriality. In some ways, this case law is uncontroversial since it concerns the allocation of jurisdictional competence between different Contracting States. Moreover, the incentive to find a justification for extraterritorial jurisdiction in these cases was particularly pressing, since if none were identified, the citizens of northern Cyprus would have been deprived of the human rights they once were guaranteed.<sup>11</sup> The importance of the case law has, however, arisen as a result of its application by analogy to more controversial areas: territories outside the Council of Europe.

In *Cyprus v Turkey*,<sup>12</sup> the Government of Cyprus complained of systematic violations of human rights in northern Cyprus by Turkish State organs and other persons acting with the support and knowledge of Turkey. The Government of Turkey maintained that the Commission had no jurisdiction to examine the application as Cyprus did not fall under Turkish jurisdiction. Turkey had not extended her jurisdiction to the island of Cyprus since she had neither annexed a part of the island nor established a military or civil government there.

The European Commission on Human Rights (the precursor to the Court) held that the words “within their jurisdiction” in article 1 were not equivalent or limited to the national territory of the Contracting States. It stated 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 ... [a]uthorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other person or

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<sup>11</sup> The Court expressly recognised this risk in *Cyprus v Turkey (Inter-State application)*: “any other finding would result in a regrettable vacuum in the system of human rights protection in the territory in question by removing from individuals there the benefit of the Convention’s fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.” (para 78)

<sup>12</sup> (1975) 2 DR 125

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.”<sup>13</sup>

In *Loizidou v Turkey (Preliminary Objections)*,<sup>14</sup> the Court again analysed the issue of whether the applicant’s inability to access her property, located in northern Cyprus, came within Turkish jurisdiction. The Court reiterated that the concept of “jurisdiction” in Article 1 was “not restricted to the national territory” of the Contracting States. In addition, the Court stated:

“...the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.

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.”<sup>15</sup>

So in these Northern Cyprus cases we find reference to the concept of the exercise of extraterritorial control as the foundation for jurisdiction.

#### *Banković*

This broad notion of jurisdiction as encompassing acts of the Contracting States that affect persons or property located outside their geographical territory was abruptly curtailed in the case of *Banković v Belgium and 16 Other Contracting States*.<sup>16</sup> The applicants were the relatives of journalists killed during the NATO bombing of a radio and television station during the Kosovo war. Their application was brought against all the Contracting Parties to the Convention who were also members of NATO. The applicants argued that their relatives had been brought within the jurisdiction of the respondent States by the bombing of the station. They proposed adapting the

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<sup>13</sup> Para 8

<sup>14</sup> (1995) 20 EHRR 99

<sup>15</sup> Para 62

<sup>16</sup> [2001] ECHR 890

“effective control” test outlined by the Court in *Loizidou* such that the extent of the positive obligations imposed by Article 1 would be proportionate to the level of control in fact exercised by the State or States in question.

The Court found that the real connection between the applicants and the respondent States was the bombing, an extraterritorial act. Therefore:

“the essential question was whether the applicants and their deceased relatives were, as a result of that extraterritorial act, capable of falling within the jurisdiction of the respondent States.”<sup>17</sup>

It went on to state that Article 1 must be considered to reflect the ordinary and essentially territorial notion of jurisdiction in public international law; other bases of jurisdiction were exceptions that required special justification.<sup>18</sup> The Court analysed the case law on extraterritoriality and found that the facts did not fall into any of the existing ‘categories’ of exceptions to territorial jurisdiction.

The Court elaborated on what was meant by the term “effective control”, outlined in *Loizidou*. To find jurisdiction on this basis, it was necessary to show that the State, “as a consequence of military occupation or through 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*” (emphasis added).<sup>19</sup> Applying this test, the Court decided that it lacked jurisdiction and declared the application inadmissible.

Further, the Court did not find that the wording in Article 1 provided any support for the applicants’ suggestion that the positive obligation could be “divided and tailored in accordance with the particular circumstances of the extraterritorial act in question”.<sup>20</sup> This Grand Chamber decision was intended to be authoritative and definitive on the article 1 issue. At the time, it was thought that this would be the last word on the subject. It is of some significance that the court said that (exceptionally)

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<sup>17</sup> Para 54

<sup>18</sup> Para 61

<sup>19</sup> Para 71

<sup>20</sup> Para 75



article 1 was not to be interpreted as a “living instrument” in accordance with changing conditions. This was a departure from the court’s usual approach to the interpretation of the Convention. It rejected any expansive reading of its northern Cyprus case law and emphasised the fundamentally regional nature of the Convention:

“the Convention is a multi-lateral treaty operating ... in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY [former Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.”<sup>21</sup>

#### *Issa*

The next significant case on this issue was *Issa v Turkey*,<sup>22</sup> which has experienced the converse fate of *Banković*: going from obscurity to pre-eminence in the jurisprudence on extraterritoriality. Six Iraqi women who lived near the Turkish border complained that Turkey had infringed their relatives’ human rights under the Convention. They alleged that during the Turkish army’s invasion of northern Iraq in 1995, the occupying soldiers had unlawfully arrested, detained, ill-treated and subsequently killed their sons and husbands. Turkey denied that its soldiers had been in the area and argued that, in any case, the presence of its troops would not have meant that the applicants’ relatives were under Turkish jurisdiction.

The Court distinguished the case from *Loizidou* by finding that, notwithstanding the large number of troops involved in the military operation, it did not appear that Turkey exercised effective overall control of the entire area of northern Iraq. Further, Turkey denied that there had been any military operations in the area where the

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<sup>21</sup> Para 80

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

applicants claimed their relatives had been killed. After analysing the available evidence, the Court concluded that:

“it has not been established to the required standard of proof that the Turkish armed forces conducted operations in the area in question, and, more precisely, in the hills above the village of Azadi where, according to the applicants’ statements, the victims were at that time.”<sup>23</sup>

However, the Court did not exclude the possibility that, as a consequence of extraterritorial military action, a State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq:

“a state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state’s authority and control through its agents operating – whether lawfully or unlawfully in the latter state.”<sup>24</sup>

Were that established on the facts, which was not done to the satisfaction of the Court in that case, those within that area would be within the jurisdiction of the State, even if that area were normally outside the legal space of the Contracting States. The Court concluded that a State’s accountability in such situations:

“stems from the fact that art 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.”<sup>25</sup>

This represented a fundamentally different perspective of jurisdiction from that expressed in *Bankovic*. In *Bankovic*, the Court saw jurisdiction simply as the allocation of competence among the Contracting States, where a failure to find extraterritorial jurisdiction, would lead to a vacuum in human rights protection. By contrast, in *Issa*, the Court saw jurisdiction as a means of ensuring State responsibility

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<sup>23</sup> Para 81

<sup>24</sup> Para 71

<sup>25</sup> Para 71

for human rights protection whenever that State exerts authority and control over an individual, regardless of whether they are located in a foreign territory.

*Al-Skeini – the House of Lords’ decision*

Given the apparent conflict between *Banković* and *Issa*, the House of Lords had to make a choice in *R (on the application of Al-Skeini) v Secretary of State for Defence*.<sup>26</sup> This was one of a series of UK cases arising out of the Iraq war. The case concerned the deaths of six Iraqi civilians as a result of actions by a member or members of the British armed forces in the British controlled area of Basrah. It was argued for the civilians that, because of the special circumstances in which British troops were operating in Basrah, the conduct complained of fell within the exception to the territoriality principle recognised by Strasbourg.

Lord Brown, with whom the majority agreed, gave the fullest examination of the Article 1 issue. He took as his starting point the decision in *Banković*, which he described as “a watershed authority”. That was hardly a surprising description. As I have said, *Bankovic* was a decision of the Grand Chamber which was clearly intended to be authoritative and definitive. He considered that the following propositions could be derived from *Banković*:

- “(1) Article 1 reflects an “essentially territorial notion of jurisdiction ... other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case...”
- (2) The Court recognises article 1 jurisdiction to avoid a ‘vacuum in human rights’ protection’ when the territory ‘would normally be covered by the Convention’....
- (3) The rights and freedoms defined in the Convention cannot be ‘divided and tailored’
- (4) The circumstances in which the court has exceptionally recognised the extra-territorial exercise of a state include [he then set out a number of the examples to be found in the case law of the court]”.

He then examined some of the post-*Bankovic* case law and concluded that it reinforced the principles established in *Bankovic*. In so far as *Issa* was said to support

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<sup>26</sup> [2007] UKHL 26

any wider notions of article 1, Lord Brown could not accept it. Any such wider view of jurisdiction would be inconsistent with the reasoning in *Banković*. In characteristically blunt language, he said that either it would extend the effective control principle beyond the Council of Europe area (where alone it had previously been applied) or “it would stretch to breaking point the concept of jurisdiction extending extraterritorially to those subject to a state’s ‘authority and control’”. Lord Brown did not consider that the cases of five of the applicants fell into any of the exceptions to the territorial principle so far recognised by the Court. Moreover, he expressly supported the conclusions reached by the Court in *Banković*:

“It is one thing to recognise as exceptional the specific narrow categories of cases I have sought to summarise above; it would be quite another to accept that whenever a contracting state acts (militarily or otherwise) through its agents abroad, those affected by such activities fall within its article 1 jurisdiction. Such a contention would prove altogether too much. It would make a nonsense of much that was said in *Banković*.”

“...*Banković* (and later *Assanidze*) stands, as stated, for the indivisible nature of article 1 jurisdiction: it cannot be ‘divided and tailored’. As *Banković* had earlier pointed out (at para 40) ‘the applicant’s interpretation of jurisdiction would invert and divide the positive obligation on contracting states to secure the substantive rights in a manner never contemplated by article 1 of the Convention.’

The position of the sixth applicant, Mr Mousa was, however, different. He had been detained in a military detention facility in Basrah. Lord Brown recognised the UK’s jurisdiction over Mr Mousa only a “narrow basis” “essentially by analogy with the extra-territorial exception made for embassies and foreign prisons”.

Lord Rodger agreed with Lord Brown but added some comments of his own. He recognised that “the problem which the House has to face, quite squarely, is that the judgments and decisions of the European Court do not speak with one voice.”<sup>27</sup> In an obvious sign of frustration with the guidance emanating from Strasbourg, Lord Rodger ultimately concluded that he was “unable to reconcile [the Court’s approach in *Issa*]

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<sup>27</sup> Para 67

with the reasoning in *Banković*.<sup>28</sup> In light of the conflicting elements in the case law, he considered that national courts should give pre-eminence to the Court's unanimous and authoritative ruling in *Banković*.

Both Lord Brown and Lord Rodger recognised both the practical and political difficulties of giving an expansive interpretation to European jurisdiction to territories outside the Council of Europe.<sup>29</sup> In particular, Lord Rodger found the idea that the United Kingdom was obliged to secure the observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq "manifestly absurd" and would amount to a form of "human rights imperialism".<sup>30</sup>

So the basis for jurisdiction was unequivocally stated to be territorial, subject to exceptions in narrowly defined situations.

#### *Gentle*

But the application of article 1 to the Iraq war continued to cast a dark shadow over our courts. Two further cases followed before long. Both involved human rights claims by British soldiers (as opposed to claims by Iraqi civilians). This gave greater strength to the submission that jurisdiction should be engaged, given the degree of authority and control the United Kingdom was able to exert over them.

In *R (Gentle) v Prime Minister*,<sup>31</sup> the appellants appealed against the refusal of their application for judicial review of the Government's decision not to hold an independent inquiry into the circumstances that led to the invasion of Iraq. The appellants were the mothers of two soldiers killed whilst serving in the British army in Iraq.

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<sup>28</sup> Para 75

<sup>29</sup> Paras 127-129

<sup>30</sup> Para 78

<sup>31</sup> [2008] AC 1356

Lord Bingham dismissed the issue of jurisdiction out of hand:

“the deaths of Fusilier Gentle and Trooper Clarke occurred in Iraq and although they were subject to the authority of the defendants they were clearly not within the jurisdiction of the UK as that expression in the Convention has been interpreted: *R (Al-Skeini) v Secretary of State for Defence* [2008] AC 153, paras 79, 129.”<sup>32</sup>

By contrast, Baroness Hale said that if Baha Mousa (the sixth applicant in *Al-Skeini*) detained in a military detention facility in Basrah, was within the jurisdiction of the United Kingdom for the purposes of Article 1, then a soldier serving under the command and control of his superiors must also be within the jurisdiction. Moreover, she felt compelled to reach this conclusion since the United Kingdom was in a better position to secure to its soldiers all their Convention rights, modified as their content is by the exigencies of military service, than it was to secure those rights to its detainees.<sup>33</sup>

The case was ultimately decided against the appellants on the basis that they were unable to establish the duty, which they asserted: the Court held that Article 2 of the Convention does not include any implied obligation on the Government to take reasonable steps to satisfy itself of the legality of an invasion of another country under international law.

#### *Catherine Smith*

The second case was brought by the mother of Private Jason Smith who had been mobilised for service in Iraq and was stationed at Camp Abu Naji.<sup>34</sup> He collapsed while working off base and was rushed by ambulance to the Camp’s medical centre but died there almost immediately of heat stroke. Crucially, Private Smith actually died after he had reached a UK military base. As a result of the House of Lords’ reasoning in *Al-Skeini*, that fact alone was enough to bring Private Smith within the

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<sup>32</sup> Para 8

<sup>33</sup> Para 60

<sup>34</sup> *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29

UK's jurisdiction. However, the question was raised in the lower courts whether he would have been within the jurisdiction even had he died outside the base but essentially under the same circumstances.

In the High Court, Collins J said:

“members of the armed forces remain at all times subject to the jurisdiction of the UK. It would obviously be wholly artificial to regard a soldier sent to fight in the territory of another state as subject to the jurisdiction of that state.”<sup>35</sup>

The Court of Appeal agreed. It adopted a personal conception of jurisdiction, based on the victim's status as a member of the armed forces. It said that it would defy common sense to say that a UK soldier was protected by the Convention while on a UK base, but would lose all protection once he stepped outside it.

A majority of the Supreme Court held that the Contracting States did not intend the Convention to apply to their armed forces when operating outside their territories. Lord Phillips said that the exceptions to the primarily territorial type of jurisdiction, as identified in *Banković*, were confined to circumstances where a State exercised effective control over part of the territory of another State, in contexts analogous to consular jurisdiction or where a State delegated particular government functions to another State authority. *Banković* had not recognised an extraterritorial jurisdiction based solely on a principle of “state agent authority” and it was not for the Supreme Court to rush ahead of Strasbourg.

Lord Collins, with whose reasons Lords Hope, Walker and Rodger agreed, said that the case came within none of the exceptions recognised by the European Court, and that there was no basis in its case law, or in principle, for the proposition that the authority and control which States undoubtedly have over their armed forces abroad should mean that they are “within their jurisdiction” for the purposes of Article 1.

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<sup>35</sup> Para 12

The leading judgment for the minority was delivered by Lord Mance, with whom Lady Hale and Lord Kerr agreed. Lord Mance said that, to the extent that jurisdiction under the Convention exists over an occupied territory, it does so only because of the occupying State's pre-existing authority and control over its own armed forces.<sup>36</sup> An occupying State cannot have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces, in both cases in the sense of Article 1 of the Convention. He said that the United Kingdom's jurisdiction over its armed forces was essentially personal.<sup>37</sup> It could not be expected to take steps to provide in Iraq the full social and protective framework and facilities which it would be expected to provide domestically. But it could be expected to take steps to provide proper facilities and proper protection against risks falling within its responsibility or its ability to control or influence.

*Al-Skeini – the Court's decision*

The issue of extraterritorial jurisdiction beyond the Council of Europe came to a head when, after the House of Lords dismissed the appeal, the applicants in *Al-Skeini* took their case to Strasbourg. The Court unanimously held that there was a sufficient jurisdictional link for the purposes of Article 1 in all six cases. On any view, this was a very important decision. But how did the court explain it? It did not say in terms that it was extending the reach of the Convention further than it had explained, in particular, in *Bankovic*. It started by reasserting the territoriality principle subject to exceptions in particular cases. It mentioned the familiar exceptions such as the acts of diplomatic and consular agents on foreign territory and cases where an individual is taken into custody of state agents abroad.

The Court said: “[w]hat is decisive in such cases is the exercise of physical power and control over the person in question.”<sup>38</sup> And then this at para 137:

“It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under art. 1 to secure to that individual the rights

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<sup>36</sup> Para 188

<sup>37</sup> Para 194

<sup>38</sup> Para 136



and freedoms under s.1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention can be “divided and tailored”.<sup>39</sup>

A further exception to the territoriality principle would occur where, as a consequence of military action, a contracting state exercises effective control over an *area* outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derived from the fact of such control. The Court found that it will be a question of fact whether a Contracting State exercises effective control over an area outside its own territory.

The Court clarified that the *Issa* interpretation of jurisdiction is the right one: extraterritorial jurisdiction is not simply used as a mechanism to fill a vacuum in the protection of rights of individuals who reside in a Contracting State when it is under the occupation of another Contracting State. Whilst extraterritorial jurisdiction has been recognised on that basis in the past, that “does not imply, *a contrario*, that jurisdiction under art. 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States.”<sup>40</sup>

Applying these principles to the present case, the Court concluded that the United Kingdom assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. Accordingly, the Court held that, the British soldiers exercised authority and control over the individuals killed in the course of security operations in Basrah, “so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention”<sup>41</sup>

There can be no doubt that the Strasbourg decision in *Al-Skeini* extended the scope of article 1 well beyond *Bankovic*. The effect of para 137 of the judgment is that the statement in *Bankovic* that the rights and freedoms of the Convention cannot be divided and tailored in accordance with the particular circumstances of the extra-

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<sup>39</sup> Para 137

<sup>40</sup> Para 142

<sup>41</sup> Para 149

territorial act in question was reversed. This is important because that statement had informed much of the thinking of the House of Lords in *Al-Skeini* and of the majority in *Catherine Smith*.

All courts make mistakes from time to time. Moreover, the Strasbourg court is as entitled to change its mind as our Supreme Court or even our Court of Appeal. Conditions change. New ideas emerge over time. The ECtHR has repeatedly said that the Convention is a “living instrument”. It evolves under the interpretative hand of the court. It is sometimes criticised for this. It is ironic that, having stated in *Bankovic* that article 1 was not to be interpreted as a “living instrument”, in *Al-Skeini* it did just that.

### *Smith*

Following the Court’s decision in *Al-Skeini*, the Supreme Court was asked in a different *Smith* case to determine whether claims brought against the Ministry of Defence by British service personnel injured, and by the families of personnel killed, while serving in Iraq should be struck out.<sup>42</sup> Since the Court had decided that Iraqi civilians were capable of coming within the scope of the Convention by virtue of the acts of British soldiers, the applicability of the Convention to the soldiers themselves was practically a foregone conclusion.

Lord Hope delivered the leading judgment of the Court and the unanimous decision on the issue of extraterritorial jurisdiction. He drew the following two points from the Court’s case law on extraterritoriality. First, the exceptionality of extraterritoriality is not an especially high threshold; it is there to make clear that the normal presumption of jurisdiction that applies throughout a State’s territory does not apply. Secondly, the list of circumstances which may require and justify a finding that the State was exercising jurisdiction extraterritorially is not closed.<sup>43</sup>

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<sup>42</sup> *Smith and others v The Ministry of Defence* [2013] UKSC 41

<sup>43</sup> Para 30

Further, Lord Hope found that the view expressed in *Issa* that jurisdiction can be determined by looking at the authority and control exerted by a Contracting State is not an aberration; the decision in *Al-Skeini* puts *Issa* firmly in the mainstream of the Strasbourg jurisprudence on this topic. It is *Banković* which can no longer be regarded as authoritative on the issue of jurisdiction.<sup>44</sup>

He found the logic behind the statement in *Cyprus v Turkey*, articulated in 1975, that authorised agents of the state not only remain under its jurisdiction when abroad “but bring any other person or property ‘within the jurisdiction of that State, to the extent that they exercise authority over such persons” “compelling” and said:

“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 and control on the state’s behalf. They are all brought within the state’s article 1 jurisdiction by the application of the same general principle.”<sup>45</sup>

#### *Where are we now?*

This review of the key cases on the extraterritorial application of the Convention outside the Council of Europe demonstrates that *Bankovic* put the jurisprudence off course for around ten years; but since *Al-Skeini*, it has now returned to a position that many would regard as more principled and more acceptable. It is likely that, if it were faced with the facts of *Bankovic* today, the Court would reach the same conclusion as it did in 2001, but its analysis would now depend on the degree of authority and control the respondent State exercised over the applicants, not where they were located or whether their cases could be squeezed into one of the exceptional categories to territorial jurisdiction.

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<sup>44</sup> Para 47

<sup>45</sup> Para 52

Even in the judgment in *Al-Skeini* vestiges of the *Bankovic* approach remain visible. Under the heading “the territorial principle” (which is identified as one of the general principles relevant to jurisdiction) the court said at para 131 that a state’s jurisdictional competence under article 1 is “primarily territorial” subject only to “exceptional cases”. But once it is appreciated that the fundamental principle is that of the exercise of control and authority, then the territoriality principle loses its special significance. It goes without saying that a state exercises authority and control over all persons and things within its territorial limits. Surely, it is clearer simply to say that, whenever the state exercises control and authority over an individual, it is under an obligation under article 1 to secure the rights and freedoms of the Convention to that individual wherever he or she happens to be.

It is clear from the case law that the exercise of control and authority must be effective, such as: detaining an individual; assuming responsibility for an individual, exercising public functions in relation to an individual; militarily, financially or politically supporting a regime that exercises authority over an individual; or occupying a territory in which the individual resides. However, in the case of military occupation, it will not matter that the situation on the ground may be close to anarchy. If a Contracting State has taken over control of the civil administration of the foreign territory then its inability to control the situation is not a ticket out of the Convention.

It is also clear that the authority must, at least, purport to be legitimate. That is, the State agent must be acting under the ostensible authority of the State (whether lawfully or unlawfully). The Convention is concerned with the responsibility of States, not individuals; as a result, it needs to be shown that the State agent is purporting to act *on behalf* of the State to justify a finding of jurisdiction under Article 1.

Finally, it is clear that, contrary to the statement in *Bankovic*, the Convention can be divided and tailored according to the extent of authority exercised by the Contracting State. So in Iraq, the United Kingdom comes under an obligation to protect the

Article 2 and Article 3 rights of those individuals residing in Basrah, including a positive obligation to conduct investigations of potential breaches of those rights. The United Kingdom is not, however, obliged to secure the whole package of rights contained in the Convention, such as Article 8 (privacy), Article 10 (expression), or Article 11 (association), which would clearly be unsustainable and inappropriate given the situation on the ground in Basrah and its vastly different legal traditions.

Bringing soldiers and those killed and injured by them during armed conflict “within the jurisdiction” of a Contracting State, when military personnel are under the strictest authority and control of their supervisors, appears to me an obviously correct conclusion.

In *Al-Skeini*, Judge Bonello wrote a rousing concurring opinion in which he condemns some of the jurisprudence to which I have earlier referred. It is a wonderful read. He describes the jurisprudence as “patchwork case law at best”. Principles settled in one judgment may appear more or less justifiable in themselves, but they then “betray an awkward fit when measured against principles established in another”. He complains that Strasbourg has “squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application”. The cornerstone of the Convention is the aim of securing the *universal* recognition and observance of fundamental human rights. He says: universal “hardly suggests an observance parcelled off by territory on the checkboard of geography”.

To overcome this lamentable state of affairs, Judge Bonello proposed what he called a “functional jurisdiction test”. He identified what he called the “functions” of the Convention:

“States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and, finally, by compensating the victims of breaches of human rights. These constitute the basic minimum

functions assumed by every State by virtue of its having contracted into the Convention.”<sup>46</sup>

The “functional jurisdiction test” would see a State effectively exercising jurisdiction whenever it falls within its power to perform, or not to perform, any of these five functions:

“Very simply put, a state has jurisdiction for the purposes of art.1 whenever the observance or the breach of any of these functions is within its authority and control.”<sup>47</sup>

Moreover, where a State is acknowledged by international law to be “an occupying power” pursuant to the Geneva and The Hague instruments, a rebuttable presumption ought to arise that the occupying power has “authority and control” over the occupied territory.<sup>48</sup>

Applying this test to the facts in *Al-Skeini*, he concluded in these forthright terms:

“I find it bizarre, not to say offensive, that an occupying power can plead that it had no authority and control over acts committed by its own armed forces well under its own chain of command, claiming with one voice its authority and control over the perpetrators of those atrocities, but with the other, disowning any authority and control over atrocities committed by them and over their victims.

It is my view that jurisdiction is established when authority and control over others are established. For me, in the present cases, it is well beyond surreal to claim that a military colossus which waltzed into Iraq when it chose, settled there for as long as it cared to and only left when it no longer suited its interests to remain, can persuasively claim not to have exercised authority and control over an area specifically assigned to it in the geography of the war games played by the victorious.”<sup>49</sup>

I am not sure that, in their essentials, there is a fundamental difference between the approach of Judge Bonello and that of the majority of the court. The critical point is that, as a result of their commitment to observe and protect the rights and freedoms contained in the Convention, whenever Contracting States exert effective and

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<sup>46</sup> Para O-III10

<sup>47</sup> Para O-III1

<sup>48</sup> Para O-II24

<sup>49</sup> Paras O-II26-27

purportedly legitimate authority over an individual, they must do so in a way that conforms to the requirements of the Convention. The Convention constrains a state's freedom to act, regardless of where that individual is located because the rights and freedoms are those of individuals, not those of territories. The question that the Court should ask is whether it is in a relationship of effective and purportedly legitimate authority over the individual (which is a threshold question). If it is, jurisdiction is engaged *because* the state has constrained its freedom to act in the context of such relationships. The extent to which the state's freedom is constrained by the Convention is *then* determined by the degree to which the state can perform the functions identified by Judge Bonello.

This is an important topic. I suspect that we have not heard the last word from Strasbourg on it. I should conclude by expressing my gratitude to Sophie Matthiesson, a former judicial assistant of mine, for her invaluable assistance in preparing this lecture.