

Clarifying the Extraterritorial Application of the European Convention on Human Rights

Al-Skeini and others v United Kingdom App No 55721/07 (ECtHR, 7 July 2011)

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Keywords

European Court of Human Rights, Iraq War, Jurisdiction, Attribution, Territorial Scope

Abstract

In *Al-Skeini v the United Kingdom*, the European Court on Human Rights clarified the scope *ratione loci* of the European Convention on Human Rights. Without fully abandoning the territorial concept of jurisdiction, which it had affirmed in the 2001 *Bankovic* decision, the Court inched somewhat closer to the personal model of jurisdiction. After *Al-Skeini*, an ECHR Contracting State's exercise of public powers over a given territory, even in the absence of full effective control, may bring persons present in that territory within the State's jurisdiction. The Court did not, however, pronounce itself on the applicability of the ECHR in case (agents of) a Contracting State exercise governmental authority over persons abroad without exercising public powers over the territory where these persons are located.

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I. Territorial Scope of the European Convention on Human Rights

The decision rendered by the European Court of Human Rights ('ECtHR' or 'Court') in the case of *Al-Skeini and others v United Kingdom* ('UK') is a leading decision as regards the territorial scope of the European Convention on Human Rights (ECHR). It adds further clarification to the contentious concept of jurisdiction laid down in Article 1 ECHR, which provides that '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The ECHR founding States' reference to the concept of 'within their jurisdiction' rather than 'within their territory' implied that ECHR Contracting States could be obliged to secure ECHR-based rights also outside their territory, but the exact parameters of the extraterritorial reach of the ECHR remained unclear. Unfortunately, they remain unclear even after the *Al-Skeini* decision.

II. Background of *Al-Skeini and others v UK*

The case of *Al-Skeini and others v UK* was brought by six applicants, relatives of five Iraqis who were killed by British troops in Basrah (southern Iraq), and of one Iraqi who was mistreated by British troops in a British detention facility, as a result of which he died. After British courts failed to grant relief to the applicants, they appealed to the ECtHR, claiming that the UK had violated the deceased's right to life as laid down in Article 2 ECHR.

The analysis in this case note does not deal in detail with the question of whether the UK had indeed violated Article 2 ECHR, but whether the deceased fell within the UK's ECHR jurisdiction in the first place. This was by no means self-evident, as the case concerned acts perpetrated in Iraq, *e.g.*, outside the UK and even outside the ECHR area.

III. *Bankovic*: No Effective Territorial Control over the Former Yugoslavia

In a somewhat comparable case, the 2001 *Bankovic* case concerned the violation of the right to life of victims of NATO aerial bombardments during 1999 in Kosovo. The Court resisted the extraterritorial application of the ECHR in that case in the following terms:

It is [...] difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *ordre public* objective, which itself underlines the essentially regional vocation of the Convention system. [...] In short, 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 [Federal 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 favor of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.¹

The Court made allowance for only one exception to the essentially territorial application of the ECHR: the situation of inhabitants of a territory being under the effective territorial control of an ECHR Contracting State.² Previously indeed, the Court had declared the ECHR applicable to the inhabitants of northern Cyprus, a territory controlled (occupied) by Turkey (an ECHR Contracting State).³ In *Bankovic*, the Court went on to hold that NATO member States did not exercise effective control over Yugoslavia's territory, and that the application was inadmissible.

Before and after *Bankovic*, however, the Court developed case-law that appears to depart from a strict territorial or spatial model of 'jurisdiction',⁴ and emphasizes the intensity of control which ECHR Contracting States' official agents exercise over individuals (the 'State agent authority model').⁵ In no case did the Court, however, explicitly abandon *Bankovic*'s spatial model. It was expected that this would finally happen in *Al-Skeini*. But eventually, while confirming the validity of the

1 *Bankovic and Others v Belgium and Others* Appl No 52207/99 (ECtHR, 12 December 2001), para 80.

2 *ibid.*

3 *Cyprus v Turkey* [GC] Appl No 25781/94, para 76, ECHR 2001-IV; *Loizidou v Turkey* (preliminary objections) (1995) Series A no 310; *Ilaşcu and Others v Moldova and Russia* [GC] Appl No 48787/99, para 311, ECHR 2004-VII; *Isa and Others v Turkey* Appl No 31821/96 (ECtHR, 16 November 2004); *Pad and Others v Turkey* Appl No 60167/00 (ECtHR, 28 June 2007); *Isaak and Others v Turkey* Appl No 44587/98 (ECtHR, 28 September 2006).

4 See for a discussion, also beyond the ECHR: R Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 40 *Israel Law Rev.* 503 (2007).

5 Eg, *Stoček v Germany* Appl No 11755/85 (ECtHR, 12 October 1989).

State agent authority model under specific circumstances, the Court maintained *Bankovic* and failed to outright endorse the principle that an individual over whom an ECHR Contracting State exercises control or authority falls, as a matter of course, within that State's jurisdiction for purposes of the application of the ECHR.

IV. UK House of Lords Decision in *Al-Skeini*

In *Al-Skeini*, the UK House of Lords applied *Bankovic* and refused to hold that the Iraqis who were killed by UK troops fell within the UK's ECHR jurisdiction, except for applicant Baha Mousa who was held in a British detention facility.⁶ In the view of the House of Lords, which applied the *Bankovic* principle, under the spatial model of jurisdiction the ECHR does not apply outside the ECHR *espace juridique*, and even if it did on an exceptional basis, the UK did not exercise effective control over the Basrah area.⁷ Baha Mousa, by contrast, would fall within the UK's jurisdiction as a military detention facility arguably has a special status, comparable to an embassy.⁸

V. European Court of Human Rights: UK Violation of Article 2 ECHR

Unlike the UK House of Lords, in *Al-Skeini* the ECtHR held that all six applicants, not just Baha Mousa, fell within the UK's jurisdiction. The Court proceeded to hold the UK in violation of its procedural obligations under Article 2 ECHR. Importantly, the ECtHR abandoned *Bankovic's* ill-conceived *espace juridique* concept,⁹ and showed considerable sympathy for the personal or State agent authority model of jurisdiction, citing its own case-law at length.¹⁰ Nonetheless, the Court hesitated to fully implement the personal model in *Al-Skeini*. Instead, it reintroduced *Bankovic* through the back door, by noting that the UK, in the specific – and exceptional – circumstances of the case, exercised 'elements of governmental authority' and 'public powers' which normally belong to a sovereign government:

It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.¹¹

In so holding, the Court maintained the *Bankovic* principle that the ECHR only applies extraterritorially on an exceptional basis. Moreover, as in *Bankovic*, it decided the case on the basis of some variation of the 'effective control' doctrine: the exercise of public powers over a given territory. The question then arises whether the Court in *Al-Skeini* is not simply paying lip-service to the personal model it has developed over the years, while in fact applying a somewhat looser territorial model of jurisdiction. This model would be broader than occupation or control over diplomatic premises,¹² and include a State's physical custody of an individual (Baha Mousa) and even the exercise of public authority over a given territory short of occupation (the other applicants in *Al-Skeini*). However, it may not run the entire gamut of situations in which a State exercises control over persons. For example, it may be difficult to contest that NATO exercised some level of control or authority over individuals killed in an air raid over Belgrade – and thus that those individuals fell within NATO member States' jurisdiction when applying the personal model of jurisdiction (assuming that the ECtHR would attribute the acts to the member States

6 *R (Al-Skeini) v Secretary of State for Defence* (2007) UKHL 26, paras 65-66 (per Lord Rodger), paras 109, 127 (per Lord Brown), para 90 (per Baroness Hale), para 97 (Lord Carswell).

7 *ibid*, paras 78-79 (per Lord Rodger), para 83 (per Lord Rodger).

8 *ibid*, para 97 (per Lord Carswell), para 132 (per Lord Brown).

9 *Al-Skeini and Others v United Kingdom* App No 55721/07 (ECtHR, 7 July 2011), para 142.

10 *ibid*, paras 136-137. ('In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad [...] The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question. It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".' [citations omitted])

11 *idem*, para 149.

12 See for the former *Cyprus v Turkey* [GC] Appl No 25781/94, ECHR 2001-IV, and for the latter *Hess v United Kingdom* Appl No 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975), and *Al-Saadoon and Mufdhi v the United Kingdom* (dec) Appl No 61498/08 (ECtHR, 30 June 2009).

rather than NATO as an international organization). However, it is open to doubt whether NATO exercised public powers over those individuals to an extent that is comparable to the powers exercised by the UK in southern Iraq. Thus, under the *Al-Skeini* public powers model, a *Bankovic*-like situation may still lead to a finding of inadmissibility on jurisdictional grounds. This may imply that victims of extraterritorial targeted killings, e.g., by unmanned drones, perpetrated by Western powers in the wastelands of Yemen or Pakistan, do not fall within the acting States' ECHR jurisdiction.¹³ This position was received very critically in the literature pre-*Al-Skeini*.¹⁴

VI. International Attribution and Limits on Territorial Application

It is of note that *Al-Skeini*, just like *Bankovic*, did not address the issue of attribution. The Court could have inquired whether the alleged acts should be attributed to an international organization that exercised some level of authority over a military operation (e.g., the UN and NATO) rather than to the States that took part in this operation. However, in *Al-Jedda*, which was decided by the Court on the same day as *Al-Skeini* and also related to UK misbehaviour in southern Iraq, the Court did tackle this question. In *Al-Jedda* the Court ruled that *Al-Jedda* fell within the UK's jurisdiction and that the UK, rather than the UN, exercised effective control over the military operation in southern Iraq.¹⁵ Interestingly, like in *Al-Skeini*, in *Al-Jedda* the Court set out to reconcile two rival theories: in *Al-Skeini*, the Court attempted to square *Bankovic* with the personal model of jurisdiction, while in *Al-Jedda*, the Court tried to reconcile the 'ultimate control and authority' standard, as developed by the Court in the oft-criticized *Behrami* and *Saramati* decisions,¹⁶ with the 'effective operational control' standard endorsed by the UN's International Law Commission.¹⁷ In both cases, the result has been the creation of an awkward hybrid theory.

That being said, the Court may be forgiven for not embracing the personal model lock, stock and barrel. As Scheinin observed: 'Authority and control over individuals as a basis for state jurisdiction simply boils down to the proposition that a state has obligations under human rights treaties towards all individuals whose human rights it is able to violate.'¹⁸ Accordingly, an unrestrained personal model may cast the net too wide and unjustifiably increase the obligations that States owe to individuals beyond their borders. Moreover, the Court suffers from considerable procedural delays; it may have wanted to avoid overburdening itself through the adoption of an unduly low jurisdictional standard. However, it remains no less true that the personal, State agent control model has a strong moral appeal; for those who brandish human rights, it is difficult to accept that States may do abroad what they are not allowed to do inside their borders. In the years to come, it will remain a precarious exercise for the Court to reconcile apology and utopia in this respect.¹⁹ ■

13 See M Milanovic, '*Al-Jedda* and *Al-Skeini* in Strasbourg', forthcoming in 23 *European Journal of International Law* 2012.

14 Leading writers have favoured a personal model in military and security operations. See N Lubell, 'Extraterritorial Use of Force against Non-State Actors', Oxford, Oxford University Press, 2010, 193-235. Under this model, targets of missile attacks fall within the targeting State's human rights jurisdiction, be it that, from a substantive law point of view, international humanitarian law (IHL) may serve as *lex specialis*: IHL accepts such killings if proof of the existence of an armed conflict is adduced. See for a discussion of the limits of the personal model: M Milanovic, 'Extraterritorial Application of Human Rights Treaties', Oxford, Oxford University Press, 2011, 187-208.

15 *Al-Jedda v United Kingdom* Appl No 27021/08 (ECtHR, 7 July 2011). The author has discussed the question of attribution, also in relation to the Court's *Al-Jedda* decision, elsewhere. See C Ryngaert, 'Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: an Inquiry into the Application of the 'Effective Control' Standard after *Behrami*', forthcoming in 45 *Israel Law Rev.* 2012. See case note on *Al-Jedda v UK* Appl No 27021/08 (ECtHR, 7 July 2011) by Laura Henderson in this edition of *Merkourios*.

16 *Behrami and Behrami v France, Saramati v France, Germany and Norway* Appl Nos 71412/01 and 78166/01 (ECtHR, 2 May 2007).

17 Article 7 ILC of the ILC's Draft Articles on the Responsibility of International Organizations, Texts and titles of draft articles 1 to 67 adopted by the Drafting Committee on second reading in 2011, UN Doc A/CN.4/L.778, 30 May 2011 (DARIO 2011).

18 M Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F Coomans & M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 76.

19 The terms are borrowed from M Koskeniemi, 'From Apology to Utopia. The Structure of International Legal Argument', Cambridge University Press, 2006.