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# ***AL-SKEINI v. UNITED KINGDOM* AND EXTRATERRITORIAL JURISDICTION UNDER THE EUROPEAN CONVENTION FOR HUMAN RIGHTS**

SAMANTHA MIKO\*

**Abstract:** In July 2011, the European Court of Human Rights (ECtHR) issued its judgment in *Al-Skeini v. United Kingdom*. This case prompted the court to reconsider its conflicting lines of case law on the extraterritorial application of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In its decision, the court validated both the “effective control of an area” and “State agent authority” models of analysis, which had until *Al-Skeini* both been employed by the court at different times to analyze the ECHR’s extraterritorial application. Ultimately, however, the court ruled under an augmented version of the “State agent authority” model—adding a requirement that the state using force exercise some amorphous “public powers” over the extraterritorial area for ECHR Article 1 jurisdiction to attach. As a result, this decision, while greatly anticipated, has posed more questions for international lawyers as to the ECHR’s extraterritorial application than it has answered.

## INTRODUCTION

On July 7, 2011, the European Court of Human Rights (ECtHR) issued a landmark judgment on the extraterritorial application of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention for Human Rights,” “Convention,” or “ECHR”) in the case of *Al-Skeini v. United Kingdom*.<sup>1</sup> In doing so, the court not only attempted to reconcile conflicting lines of case law in this area by reevaluating its conceptions of jurisdiction under the Convention, but also tried to define more precisely how “exceptional” circumstances must be to justify extending a Contracting State’s jurisdiction (and therefore responsibility to those allegedly injured) outside its

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<sup>1</sup> *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011).

borders and outside the Council of Europe.<sup>2</sup> This decision, while on one hand a welcome clarification for international legal scholars on this point of ECtHR case law, maintains some of the ambiguities it sought to rectify and raises questions about its practical application for Contracting States' actions abroad.<sup>3</sup>

Part I of this Comment provides a background on the facts of *Al-Skeini* and the circumstances of British troops in Iraq from 2003 to 2004, as well as a summary of the case's procedural history in the U.K. domestic courts. Part II focuses on the two strains of ECtHR case law regarding ECHR jurisdiction, and summarizes the parties' arguments about them before the ECtHR. Part III analyzes the reasoning of the *Al-Skeini* opinion, examines the holding's implications, and points out several questions left unanswered by the case.

## I. BACKGROUND

On March 20, 2003, the United States led a unified coalition of armed forces, including the United Kingdom, Poland, Australia, and Denmark, in the invasion of Iraq.<sup>4</sup> By April 5, 2003, British forces had overtaken the city of Basrah, and by May 1, 2003, the coalition had declared major combat operations in Iraq complete, turning their subsequent efforts toward reconstruction.<sup>5</sup> In early May 2003, the occupying States created the Coalition Provisional Authority (CPA) to serve as an interim quasi-governmental administrative body with legislative authority until the area became secure enough to establish an Iraqi government.<sup>6</sup> Coalition States appointed representatives to the CPA and divided Iraq into regional areas, with CPA South—including Basrah—to be controlled by the United Kingdom, with responsibility for the area to be vested in a U.K. Regional Coordinator.<sup>7</sup> When the Governing Council of Iraq was established in July 2003, the Occupying Forces required the CPA to cooperate with the Governing Council on all matters relating to the temporary governance of Iraq.<sup>8</sup> By June 28, 2004, the Interim Government, created by the Governing Council, assumed all

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<sup>2</sup> Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121, 129–31 (2012).

<sup>3</sup> *See id.* at 131–33.

<sup>4</sup> *See Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589, 597 (2011).

<sup>5</sup> *See id.*

<sup>6</sup> *Id.* at 599.

<sup>7</sup> *Id.* at 600, 624.

<sup>8</sup> *See id.* at 602.

control of Iraq; this led to the CPA's disbanding.<sup>9</sup> Thereafter, the Multinational Force, including a large contingent from the United Kingdom, remained in Iraq pursuant to United Nations Security Council authorization and the request of the Iraqi government.<sup>10</sup>

By a Security Council Resolution, the international community recognized that, during this tumultuous period from May 1, 2003 to June 28, 2004, the United Kingdom was an occupying power over those areas of southern Iraq "where British troops exercised sufficient authority for this purpose."<sup>11</sup> At the time, the United Kingdom was in command of the Multinational Division (South East), an area of 96,000 square kilometers with a population of 4.6 million, containing the provinces of Al-Basrah, Masyan, Thi Qar, and Al-Muthanna.<sup>12</sup> In occupying this area, British forces were first responsible for maintaining its security and reestablishing the Iraqi police and other Iraqi security forces.<sup>13</sup> Additionally, British forces were responsible for supporting the civil administration in Iraq.<sup>14</sup> This multifaceted mission proved challenging for British military leadership, which described the post-major conflict situation in Iraq to the ECtHR as a "state of virtual anarchy."<sup>15</sup>

All six *Al-Skeini* plaintiffs' claims arose from the deaths of their civilian relatives, which occurred in Basrah during the period of U.K. oc-

<sup>9</sup> *Id.* at 604, 605.

<sup>10</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 605.

<sup>11</sup> Dominic McGoldrick, *Human Rights and Humanitarian Law in the UK Courts*, 40 *ISR. L. REV.* 527, 537 (2007) ("Iraq was a party to Geneva IV but not to its Additional Protocol I or to the Hague Convention; however, the Secretary of State accepted that the Hague Regulations and the material provisions of Additional Protocol I to Geneva IV were recognized as declaratory of customary international law and were therefore applicable as such to the United Kingdom's occupation of Iraq."); *cf.* S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004) ("[b]y 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and . . . Iraq will reassert its full sovereignty.").

<sup>12</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 605.

<sup>13</sup> *Id.* at 605–06.

<sup>14</sup> *Id.* at 606.

<sup>15</sup> *Id.* at 606–07. The *Al-Skeini* decision quotes the British military's Aitken Report, which concerned "the post-conflict situation in Iraq":

There was no Iraqi administration or governance. Fuel and potable water were in short supply, electricity was intermittent, and the hospitals were full of wounded from the combat operations phase. . . . Law and order had completely collapsed. The Iraqi Police Service had melted away; the few security guards who remained were old and incapable; and the Iraqi Armed Forces had been captured, disbanded or deserted. Criminals had been turned out onto the streets and the prisons had been stripped. The judiciary were in hiding. . . . Crime was endemic and in parts of Basra[h] a state of virtual anarchy prevailed.

*Id.*

cupation.<sup>16</sup> Five of these six victims were allegedly killed by British troops on patrol.<sup>17</sup> Following these deaths, internal investigations by the British military found that (1) the shooting deaths resulting from the first four incidents were within the applicable Rules of Engagement, (2) further investigation was unnecessary, and (3) three of the four families should receive charitable donations from the British Army Goodwill Payment Committee.<sup>18</sup>

The father of the fifth applicant, a drowning victim, filed suit in U.K. civil court against the U.K. Ministry of Defence, resulting in a settlement from the Ministry and a formal apology from the British Army.<sup>19</sup> The military did not produce the results of any ballistic tests, autopsy reports, or post mortems following the deaths in any of the first five cases, and no one outside the military conducted any investigations of any kind.<sup>20</sup> The families of the deceased were never involved in the investigations that took place, and though the facts of each death were disputed, in each case military command accepted their soldiers' descriptions of the events.<sup>21</sup>

The sixth victim, Baha Mousa, was allegedly arrested by British troops, seriously mistreated, and killed while in detention at a British military base.<sup>22</sup> Mousa's father requested a civil remedy from the Ministry of Defence, after which the commanding officer ordered the Royal Military Police's Special Investigation Branch to investigate.<sup>23</sup> Subsequent court-martial proceedings against seven soldiers were followed by a civil complaint which resulted in a settlement and a formal public acknowledgement of responsibility.<sup>24</sup>

Prior to and separate from the fifth and sixth applicants' civil complaints, the U.K. Secretary of State for Defence decided on March 26, 2004, "in connection with the deaths of . . . the relatives of the six applicants, (1) not to conduct independent inquiries into the deaths; (2) not to accept liability for the deaths; [and] (3) not to pay just satisfaction."<sup>25</sup> The victims' families sought judicial review of the Secretary's

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<sup>16</sup> See *id.* at 612–15, 617, 619.

<sup>17</sup> See *id.* at 612–15, 617–18.

<sup>18</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 613–14, 616; McGoldrick, *supra* note 11, at 538.

<sup>19</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 617–19.

<sup>20</sup> See McGoldrick, *supra* note 11, at 538.

<sup>21</sup> *Id.*

<sup>22</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 619 ("Baha Mousa was found to have 93 identifiable injuries on his body and to have died of asphyxiation.").

<sup>23</sup> McGoldrick, *supra* note 11, at 539.

<sup>24</sup> *Id.*

<sup>25</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 620.

decision, including a ruling that both the deaths and the refusal to investigate them constituted a violation of the ECHR.<sup>26</sup> Of these thirteen cases, six—including applicants one, two, three, four, and six—went forward.<sup>27</sup> The first five applicants were dismissed for lack of U.K. jurisdiction at each appellate level up through the House of Lords, which found only the sixth applicant’s claim to fall under U.K. jurisdiction.<sup>28</sup> Following these civil proceedings against the Ministry of Defence, the Secretary of State for Defence commenced a public inquiry into the death of the sixth applicant.<sup>29</sup> Subsequently, all six applicants appealed on procedural grounds to the ECtHR, alleging that their relatives were within U.K. jurisdiction when killed, and that the United Kingdom violated ECHR Article 2 by not investigating the deaths.<sup>30</sup> The ECtHR then had to answer: “(1) whether the deaths took place within the jurisdiction of the U.K. so as to fall within the scope of the European Convention for Human Rights (ECHR) and the Human Rights Act 1998 (HRA), and (2) if so, whether there should be an independent inquiry to investigate the violations.”<sup>31</sup>

## II. DISCUSSION

### A. *The Complex Relationship Between International Humanitarian Law and Human Rights Law*

International humanitarian law and human rights law occasionally operate concurrently, but often result in a grey area of overlap wherein countries engaging in activities abroad may be unsure to which body of law they may be held accountable.<sup>32</sup> This question is of utmost importance because international humanitarian law is structured to serve as a floor, delineating a standard of conduct beneath which occupiers may

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 620–21.

<sup>28</sup> *See id.* at 621, 623–24, 626–27, 630 (emphasizing that, although each court found jurisdiction for the sixth applicant, they did so for different reasons). The House of Lords “recognise[d] the UK’s jurisdiction over Mr. Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies.” *Id.* at 630.

<sup>29</sup> *See id.* at 620.

<sup>30</sup> *Id.* at 636.

<sup>31</sup> Joanne Williams, Al Skeini: *A Flawed Interpretation of Banković*, 23 *WIS. INT’L L.J.* 687, 687 (2005).

<sup>32</sup> McGoldrick, *supra* note 11, at 527–28.

not sink.<sup>33</sup> It does not, however, impose many of the *positive* human rights obligations guaranteed by the ECHR, specifically those regarding the investigation of use of lethal force.<sup>34</sup>

To begin its analysis in *Al-Skeini*, the Grand Chamber of the ECtHR referred to the case law of the International Court of Justice (ICJ), which first dealt with the difficult relationship between international human rights and humanitarian laws in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>35</sup> There, Israel argued that the human rights instruments to which it was a party did not apply to the Occupied Palestinian Territory, claiming that “humanitarian law is the protection granted in a conflict situation . . . whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.”<sup>36</sup> The ICJ disagreed, holding that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation.”<sup>37</sup> The ICJ further held that while States’ jurisdiction is primarily territorial, it may at times extend beyond national boundaries, making the human rights instruments to which the State is a party applicable over foreign territory.<sup>38</sup> Finally, in its later judgment *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ reaffirmed its finding that both international humanitarian law and human rights law must be considered in extraterritorial exercises of jurisdiction, and that international human rights instruments could have extraterritorial application, “particularly in occupied territories.”<sup>39</sup>

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<sup>33</sup> *Id.* at 544. McGoldrick observes the “unexceptional” nature of the obligations placed on occupying forces, such as not committing murder, and not engaging in torture. *Id.*

<sup>34</sup> *Id.* (“[I]t is clear that the positive obligations under the ECHR (particularly on the planning and control of lethal force and the effective investigation of killings) could go much further than obligations under the law of occupation.”).

<sup>35</sup> See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589, 630–33 (2011); see also *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 102 (July 9) [hereinafter *Wall in Palestinian Territory*].

<sup>36</sup> *Wall in Palestinian Territory*, 2004 I.C.J. 136, ¶ 102.

<sup>37</sup> *Id.* ¶ 106.

<sup>38</sup> *Id.*

<sup>39</sup> *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19).

B. *Articles 1 and 2 of the ECHR and Banković v. Belgium*

Article 1 of the ECHR reads: “The . . . Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.”<sup>40</sup> Article 2 of the ECHR outlines the circumstances under which deprivation of life may be justified.<sup>41</sup> It “requires by implication [of its reading alongside Article 1] that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by [State agents].”<sup>42</sup> In light of Article 1’s limited jurisdictional scope, the ECtHR has provided clarification concerning extraterritorial application through its case law, the most influential of which is *Banković v. Belgium*, decided in late 2001.<sup>43</sup>

In *Banković*, the ECtHR “established that the fact that an individual had been affected by an act committed by a Contracting State or its agents was not sufficient to establish that [the individual] was within that State’s jurisdiction.”<sup>44</sup> According to *Banković*, jurisdiction within Article 1 was “essentially” territorial, and any extension of jurisdiction beyond the Contracting State’s territory was “exceptional,” requiring “special justification.”<sup>45</sup> The court further noted that a Contracting State was obliged to secure all Convention rights and freedoms, which could not be “divided [or] tailored.”<sup>46</sup>

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<sup>40</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).

<sup>41</sup> *Id.* art. 2.

<sup>42</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 656.

<sup>43</sup> See Milanovic, *supra* note 2, 121–22.

<sup>44</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 639 (“[T]he Grand Chamber in *Banković* . . . conducted a comprehensive review of the case-law, [and] identified a limited number of exceptions to the territorial principle.”); see also Williams, *supra* note 31, at 692. The facts of *Banković* are as follows:

On March 24, 1999, NATO announced the beginning of air strikes on territory of the [Federal Republic of Yugoslavia], with the aim of preventing a human rights catastrophe. In one such strike, NATO aircraft intentionally bombed the central Belgrade headquarters and studios of *Radio Televizija Srbije* (RTS), the Serbian state television and radio station, killing at least sixteen civilians and wounding a further sixteen.

One person injured in the RTS attack and the relatives of five of the people killed brought a case before the [ECtHR], alleging breaches of Articles 2, 10, and 13 of the ECHR by NATO governments. . . . The court ultimately concluded that the impugned acts did not engage the responsibility of the respondent states under the convention.

Williams, *supra* note 31, at 690 (citations omitted).

<sup>45</sup> *Banković v. Belgium*, App. No. 52207/99, 44 Eur. H.R. Rep. SE5, ¶ 59 (2007).

<sup>46</sup> *Id.* ¶ 73.

*Banković* was the ECtHR's first attempt at making sense of its conflicting case law on the issue of extraterritorial jurisdiction of the ECHR, which until that point had followed two distinct strands.<sup>47</sup> First, cases were decided based on the "effective control of an area" model, which holds that "a state possesses jurisdiction whenever it has effective overall control of an area."<sup>48</sup> Second, other decisions employed the "State agent authority" model, which held that "a state has jurisdiction whenever it exercises authority or control over an individual."<sup>49</sup> Though these two models are distinct legal tests, the ECtHR and its predecessor, the European Commission of Human Rights, have frequently discussed both models in the same cases.<sup>50</sup>

Yet, the relationship between these two strands of the case law has eluded international legal scholars, who have yearned for clarification from the ECtHR because "the question of extraterritoriality was never approached in a methodical way, and a number of deviations from the two models stood in between them."<sup>51</sup> Although many had hoped *Banković* would clarify which of these models was preferred, it did not.<sup>52</sup> "[T]he Court basically ignored the [State agent authority] model and control over individuals line of cases, which it did not even discuss."<sup>53</sup> The case law following *Banković* further proved the inadequacy of the *Banković* court's reasoning, because "inconsistencies and uncertainties" in the court's subsequent case law revealed the court's growing and "apparent unease with the rigidity of *Banković*."<sup>54</sup> The above legal development provided the background for *Al-Skeini* and laid the foundation for both parties' arguments.<sup>55</sup>

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<sup>47</sup> Milanovic, *supra* note 2, at 122–23.

<sup>48</sup> *Id.* at 122 (emphasis omitted).

<sup>49</sup> *Id.* (emphasis omitted).

<sup>50</sup> *See id.*; *see, e.g.*, Cyprus v. Turkey, App. Nos. 6780/74 & 6950/75, Admissibility Decision, 2 Eur. Comm'n H.R. Dec. & Rep. 125, 136 (1975).

<sup>51</sup> *See, e.g.*, Milanovic, *supra* note 2, at 122.

<sup>52</sup> *See id.* at 123 ("The Court has been much criticized for *Banković*, and rightly so.")

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 124–25 (noting that, in *Issa v. Turkey*, a Chamber of the Court applied both models of jurisdiction, while in *Pad and Others v. Turkey* the holding directly contradicted *Banković*).

<sup>55</sup> *See id.* at 125.

### C. *The Parties' Arguments in Al-Skeini*

#### 1. The Government

Before the Grand Chamber of the ECtHR, the U.K. government advocated for the primacy of the Divisional Court's reasoning, that on the issue of Article 1 jurisdiction, *Banković* "is a watershed authority," and its selection of the "effective control of an area" model should therefore be upheld.<sup>56</sup>

The U.K. government further argued that *Banković* stood for the proposition that the Convention was "a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States."<sup>57</sup> In other words, the Government contended that State Parties had crafted the Convention to acknowledge the practical and legal challenges that Occupying States would face in implementing its provisions in occupied territory.<sup>58</sup> Moreover, because the Government suggested that these challenges would be particularly onerous when Member States occupy areas with value systems different from their own, it advocated for limits on the Convention's application to its legal space.<sup>59</sup> Because Iraq was outside the Convention's legal space, the Government argued, it could not be applied there extraterritorially.<sup>60</sup>

The Government next submitted that *Banković* identified a "limited number of exceptions to the territorial principle" of jurisdiction.<sup>61</sup> It claimed the principal—and only applicable—exception<sup>62</sup> could be invoked when a State, as a result of military action, exercised effective control of an area outside its territory but within the Convention legal space of the Council of Europe.<sup>63</sup> Under these circumstances, the State exercising effective control must secure all Convention rights to the

<sup>56</sup> Williams, *supra* note 31, at 688; see *Al-Skeini*, 53 Eur. H.R. Rep. at 639, 642.

<sup>57</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 639 (quoting *Banković*, 44 Eur. H.R. Rep. SE5, ¶ 56).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 639–40.

<sup>61</sup> *Id.* at 639.

<sup>62</sup> See *id.* at 641 ("The Government accepted that it was possible to identify from the case-law a number of other exceptional categories where jurisdiction could be exercised by a State outside its territory and outside the Convention region. In *Banković* . . . the Grand Chamber referred to other cases involving the activities of diplomatic or consular agents abroad and on board craft and vessel registered in or flying the flag of the State.").

<sup>63</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 639 ("[D]espite dicta to the contrary in the subsequent Chamber judgment in *Issa and Others v. Turkey* . . . the Grand Chamber in *Banković* made it clear that the 'effective control of an area' basis of jurisdiction could apply only within the Convention legal space.").

territory at issue.<sup>64</sup> As noted above, the limitation of this exception to the Convention legal space was advocated by the British as a means to prevent the imposition of conflicting cultural values.<sup>65</sup>

Because “Iraq fell outside the Convention legal space,” the Government argued that “the ‘effective control of an area’ exceptional basis of jurisdiction could not apply.”<sup>66</sup> The British domestic courts endorsed this reasoning.<sup>67</sup> Were the court to find Iraq fell within the Convention legal space, the United Kingdom further contended that it did not have “effective control” to any reasonable degree over the portion of Iraq in question during the relevant time.<sup>68</sup> Government noted that U.K. forces in Iraq faced systemic challenges in attempting to restore the order and security necessary for establishing the Iraqi self-government.<sup>69</sup> It argued that no reliable local law enforcement existed to stave off extensive crime, terrorism, and sectarian fighting.<sup>70</sup> Furthermore, it alleged the U.S.-controlled CPA, rather than the United Kingdom, exercised governing authority in Iraq during the relevant time.<sup>71</sup> Beginning July 2003, a central Iraqi Governing Council and several local Iraqi councils exercised that authority.<sup>72</sup>

## 2. The Applicants

The applicants conceded that jurisdiction under Article 1 was primarily territorial.<sup>73</sup> However, they contended that previous ECtHR case law recognized that it was not exclusively so, naming both the “State agent authority” and “effective control of an area” models as recognizing the exceptional, extraterritorial State exercise of jurisdiction.<sup>74</sup> The

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 640.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The Government argued that it lacked effective control because:

The number of Coalition Forces, including United Kingdom forces, was small: in South East Iraq, an area of 96,000 square kilometres and a population of 4.6 million, there were 14,500 Coalition troops, including 8,150 United Kingdom troops. [U.K.] troops operated in Al-Basrah and Maysan provinces, which had a population of 2.76 million for 8,119 troops.

*See id.*

<sup>69</sup> *See Al-Skeini*, 53 Eur. H.R. Rep. at 606–07.

<sup>70</sup> *Id.* at 640.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 643.

<sup>74</sup> *Id.*

applicants noted that the “State agent authority model” had been endorsed previously in the case law, when the Commission held that “authorised agents of the State . . . not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons or property.”<sup>75</sup> Though in subsequent cases the court relied on the “effective control of an area” model, the court had never expressly overruled the “State agent authority” model.<sup>76</sup> To the contrary, in *Loizidou v. Turkey*, the court utilized both models equally.<sup>77</sup> According to the applicants, no ECtHR case law precluded the use of the “State agent authority” model to connect direct actions by military state agents to the exercise of state authority.<sup>78</sup> The applicants thus argued that the court could properly accept their claims as falling within U.K. jurisdiction under the “State agent authority” model by virtue of the authority and control exercised over their persons by U.K. agents at the time of their relatives’ deaths.<sup>79</sup>

Alternatively, the applicants argued that their relatives fell under U.K. jurisdiction because, under the “effective control of an area” model, the United Kingdom effectively controlled Southeast Iraq at the time.<sup>80</sup> They argued against the Government’s proffered standard that applicants ought to show the State exerted “complete control” over the region, such as would be expected within its own territory.<sup>81</sup> The applicants claimed that this line of reasoning “would lead to the perverse position whereby facts disclosing a violation of the Convention would . . . form the evidential basis for a finding that the State did not exercise jurisdiction.”<sup>82</sup> Furthermore, the applicants argued that the contention that the “effective control of an area” model could apply only within the Convention legal space was inconsistent with the court’s case law.<sup>83</sup>

#### D. *The Court’s Assessment*

The Grand Chamber began by reaffirming the territorial nature of jurisdiction under the Convention, but noted that acts of Contracting

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<sup>75</sup> *Cyprus v. Turkey*, 2 Eur. Comm’n H.R. Dec. & Rep. at 136.

<sup>76</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 643–44.

<sup>77</sup> *Id.* at 644.

<sup>78</sup> *Id.* at 643–44.

<sup>79</sup> *Id.* at 644.

<sup>80</sup> *Id.* at 645.

<sup>81</sup> *Id.*

<sup>82</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 645.

<sup>83</sup> *Id.*

States occurring or producing effects outside their territories can, in exceptional cases, constitute exercises of jurisdiction within the meaning of Article 1.<sup>84</sup> It then addressed the parties' arguments systematically, using both the "State agent authority" and "effective control of an area" models to define two exceptional circumstances when a Contracting State's Article 1 jurisdiction would extend extraterritorially.<sup>85</sup>

### 1. Applying the State Agent Authority Model

After considering how it had employed the "State agent authority" model in the past, the ECtHR validated the reasoning of this model, concluding first that a Contracting State's Article 1 jurisdiction would clearly extend extraterritorially to the acts of diplomatic and consular agents in foreign territory when they "exert authority and control over others."<sup>86</sup>

In the same vein, the court reasoned that the extraterritorial use of force by a State's agents against an individual, such as when an individual is taken into custody by military personnel abroad, could bring that individual under the State's Article 1 jurisdiction.<sup>87</sup> The court limited this exception, however, to situations in which State agent control is exercised not over buildings or vessels, but rather physically commands control over the person in question.<sup>88</sup> In such situations, the State is under an obligation to secure the relevant rights of the Convention to the individual over whom it has bodily control.<sup>89</sup>

Having addressed the above discrete situations in which jurisdiction would attach, the court carved its first major exception under which a State's Article 1 jurisdiction would extend extraterritorially: to acts of State agents who "through the consent, invitation or acquiescence of the Government of that territory exercise all or some of the public powers normally to be exercised by that [consenting] Government."<sup>90</sup>

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<sup>84</sup> *Id.* at 647.

<sup>85</sup> *Id.* at 647–52.

<sup>86</sup> *Id.* at 647.

<sup>87</sup> *Id.* at 648.

<sup>88</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 648.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 647.

## 2. Applying the Effective Control of an Area Model

The court then validated the reasoning of the “effective control of an area” model, carving its second major exception to territorial jurisdiction under Article 1.<sup>91</sup> It dispensed with the Government’s contention regarding “complete control” by highlighting that where the Occupying State’s territorial domination is obvious, examining whether it “exercises detailed control over the policies and actions of the subordinate local administration” is unnecessary.<sup>92</sup> The court then concluded that, under such circumstances, the State is obligated under Article 1 to secure within its area of control the rights guaranteed by the Convention.<sup>93</sup>

## 3. *Espace Juridique*

The court forcefully dismissed the Government’s principal defense that its jurisdiction could not, in any event, be extended extraterritorially beyond the Convention legal space.<sup>94</sup> The court explained that it had never restricted the Convention’s applicability to the Convention legal space.<sup>95</sup> Rather, it had in many instances held that occupation of one member state by another would create a legal vacuum in which the citizens of a State that had formerly enjoyed the rights of the Convention would no longer do so.<sup>96</sup> It does not follow, in the court’s opinion, from this assertion that jurisdiction can never exist outside the Convention’s *espace juridique*.<sup>97</sup>

## 4. Factual Findings in *Al-Skeini*

In *Al-Skeini*, the court found that, during the time period between the Ba’athist regime’s fall and the Interim Government’s establishment, the United Kingdom and the United States assumed some of the public powers expected of an Iraqi sovereign government.<sup>98</sup> Specifically, the United Kingdom took on the responsibility of maintaining security in

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<sup>91</sup> *Id.* at 648.

<sup>92</sup> *Id.* at 647–48.

<sup>93</sup> *Id.* at 648.

<sup>94</sup> *See Al-Skeini*, 53 Eur. H.R. Rep. at 649–50.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 649.

<sup>97</sup> *Id.* at 649–50.

<sup>98</sup> *Id.* at 651. Note, however the Government’s contention that U.K. troops were not exercising “public functions” because their presence was meant to stabilize conditions for a representative government that would later carry out public functions. *See id.* at 642.

Southeast Iraq.<sup>99</sup> This created a “jurisdictional link” between the *Al-Skeini* plaintiffs and the United Kingdom under Article 1.<sup>100</sup>

The court held that because the United Kingdom held jurisdiction over all applicants it was under an obligation, per Article 2, to give an effective official investigation into their relatives’ deaths.<sup>101</sup> For these investigations to be effective, persons “independent from those implicated in the events” needed to conduct them.<sup>102</sup> Consequently, the court found a violation of the procedural duty under Article 2 regarding the first five applicants.<sup>103</sup> Because the public inquiry into the sixth applicant’s son, Baha Mousa, was almost complete at the time of the decision, the court noted that “the sixth applicant accepts that he is no longer a victim of any breach of the procedural obligation under [Article 2].”<sup>104</sup>

### III. ANALYSIS

The Grand Chamber’s opinion in *Al-Skeini v. United Kingdom* is a welcome clarification of the court’s post-*Banković v. Belgium* case law, and is the closest that the ECtHR has come to overruling this confusing precedent.<sup>105</sup> However, rather than overruling *Banković*, the court hybridized the “State agent authority” and “effective control of an area” models, validating both, but in effect creating a third pseudo-model.<sup>106</sup> This pseudo-model incorporates the best of both prior models in an attempt to define more precisely how “exceptional” the “exceptional circumstances” must be to justify extending a Contracting State’s jurisdiction (and therefore responsibility to those whom it allegedly injures) outside its borders.<sup>107</sup>

In *Al-Skeini*, the ECtHR did not rule on whether the United Kingdom maintained effective control of the area of Basrah during the relevant time period; it instead applied the “State agent authority” model to all six applicants, concluding that all of their relatives had been within the United Kingdom’s jurisdiction at the times of their deaths.<sup>108</sup> Nevertheless, the court noted that this outcome was “exceptional” because

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<sup>99</sup> *Id.* at 651.

<sup>100</sup> *Al-Skeini*, 53 Eur. H.R. Rep. at 651.

<sup>101</sup> *Id.* at 655–56.

<sup>102</sup> *Id.* at 657.

<sup>103</sup> *Id.* at 660.

<sup>104</sup> *Id.*

<sup>105</sup> See Milanovic, *supra* note 2, at 129.

<sup>106</sup> See *infra* note 107 and accompanying text.

<sup>107</sup> See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 589, 651 (2011); Milanovic, *supra* note 2, at 129–31.

<sup>108</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 651; Milanovic, *supra* note 2, at 130–31.

the United Kingdom exercised “public powers” in Iraq.<sup>109</sup> Under the court’s apparent hybrid reasoning, had the United Kingdom not exercised such public powers, the modified “State agent authority” model of jurisdiction would have been inapplicable.<sup>110</sup> Therefore, while the ECtHR found that all applicants were under the United Kingdom’s jurisdiction under the “State agent authority” reasoning, that reasoning extends only to situations where the State using force exercises some amorphous “public powers.”<sup>111</sup> The result is a hybrid of the “State agent authority” and “effective control” models.<sup>112</sup>

Even with this new hybrid reasoning, *Banković* remains good law: “[i]n other words, *Banković* is, according to the Court, still perfectly correct in its result. While the ability to kill is ‘authority and control’ over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft.”<sup>113</sup> The court thus incorporated *Banković* into its new line of reasoning as though its case law had always been consistent.<sup>114</sup> Though still frustrating, the impact of *Al-Skeini* for international lawyers will be the affirmation that under ECHR Article 1 both the “State agent authority” and “effective control of an area” models of jurisdiction can apply, and that the concept of *espace juridique* is irrelevant.<sup>115</sup>

The applicants did not argue that the killings were substantively unlawful under Article 2, but rather that the Government did not fulfill its procedural obligation under that provision to investigate the alleged victims’ deaths.<sup>116</sup> The Government did not aggressively contest this claim: “even the UK Government essentially conceded that its investigative procedures in Iraq were not Article 2-compliant (e.g., because of the lack of institutional independence of the investigators from the military chain of command).”<sup>117</sup>

Although the significance of *Al-Skeini* rests in its holding on the extraterritorial jurisdiction issue, it is important to note that in its discussion of the applicants’ Article 2 claim, the court acknowledged that chaotic conditions in Iraq prevented the United Kingdom from fulfilling procedural obligations designed for implementation during peace-

<sup>109</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 651; Milanovic, *supra* note 2, at 130.

<sup>110</sup> See Milanovic, *supra* note 2, at 130.

<sup>111</sup> See Milanovic, *supra* note 2, at 130–31.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.* at 130.

<sup>114</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 648–49; Milanovic, *supra* note 2, at 130.

<sup>115</sup> See Milanovic, *supra* note 2, at 131.

<sup>116</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 636.

<sup>117</sup> Milanovic, *supra* note 2, 131; see *Al-Skeini*, 53 Eur. H.R. Rep. at 655, 657.

time.<sup>118</sup> In doing so, the ECtHR noted its reluctance to place unrealistic procedural expectations on a government working to stabilize conditions in hostile territory.<sup>119</sup> Because the court ultimately still ruled that the United Kingdom violated Article 2, its ruling is a step toward greater substantive human rights protections for civilians in occupied areas—the court adopted a flexible approach, recognizing factual circumstances and thereby eliminating the role of Article 1 and its attendant jurisdictional issues as a shield from State liability under the ECHR.<sup>120</sup>

In *Al-Skeini*, as in *Banković*, the hesitancy shown in the ECtHR's holding reflects underlying policy considerations that the court is still reluctant to address.<sup>121</sup> These are the same policy considerations which weighed on the minds of the House of Lords when considering the six applicants in this case:

[L]ike the ECtHR in *Banković*, the House of Lords in *Al-Skeini* did not want to open the floodgates of litigation [under the “State agent authority” argument] by considering every individual against whom force was used as falling under the protection of the Convention. They did not want to micromanage the use of force in the field, especially when some of the killings in question may even have been justified.<sup>122</sup>

The court's holding demonstrates the ECtHR's discomfort with the “State agent authority” model, which sets its desire for universal protection of human rights and human dignity against the competing desire to avoid becoming the arbiter of each individual killing abroad by European states.<sup>123</sup> This is a task the ECtHR is “institutionally unsuited for,” as it lacks the necessary evidence and familiarity with international humanitarian law.<sup>124</sup>

Furthermore, the arbitrary nature of the “exceptional” line that the court has drawn in the extraterritorial jurisdiction sand complicates ECtHR jurisprudence, and will continue to frustrate human rights activists in the wake of *Al-Skeini*.<sup>125</sup> It is understandable, given prior case law and the above policy considerations, why the court felt compelled to

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<sup>118</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 655, 657; Milanovic, *supra* note 2, at 131.

<sup>119</sup> See *Al-Skeini*, 53 Eur. H.R. Rep. at 655, 657.

<sup>120</sup> See Milanovic, *supra* note 2, at 131.

<sup>121</sup> See *id.* at 123.

<sup>122</sup> *Id.* at 127.

<sup>123</sup> *Id.* at 123.

<sup>124</sup> *Id.*

<sup>125</sup> See *id.* at 131.

reinforce its position that extraterritorial jurisdiction is “exceptional,” and to validate both the “State agent authority” and “effective control of an area” models, ultimately affirming the former while amending its application.<sup>126</sup> However, the definition of “exceptional,” which limits the anticipated—and troublesome—onslaught of individual suits, is arbitrary.<sup>127</sup>

*Al-Skeini* has left a number of other questions unanswered and also brought new questions to the fore.<sup>128</sup> Among these questions is the scope of positive procedural obligations owed by occupying governments.<sup>129</sup> Also, because the court limited its discussion to the procedural aspects of Article 2, the court left open how the ECHR would substantively apply alongside relevant international humanitarian law in an occupation context.<sup>130</sup> Finally, it is unclear how the court would analyze a “reverse *Al-Skeini* scenario,” wherein a U.K. soldier may have sought to invoke rights under the ECHR against his own government.<sup>131</sup>

#### CONCLUSION

*Al-Skeini and Others v. United Kingdom* is a landmark judgment and is set to replace *Banković v. Belgium* as the leading ECtHR precedent on ECHR Article 1 extraterritorial jurisdiction. By its *Al-Skeini* judgment, the court attempted to reconcile its conflicting lines of case law, ultimately validating both the “effective control of an area” and “State agent authority” models of jurisdiction, and dismissing the *espace juridique* argument as a State defense in the process. In so reasoning, however, the court added another layer of complication to the “State agent authority” model it ultimately applied. As a result, important questions remain unanswered and require further court interpretation of the extraterritorial application of the ECHR. This is much to the dismay of the international legal community and European military commanders, both of whom continue to seek predictability and clarity in this area of the law.

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<sup>126</sup> See Milanovic, *supra* note 2, at 130–31.

<sup>127</sup> See *id.* at 131 (“For example, under *Al-Skeini*, the current bombing of Libya by a number of European states could *not* fall under Article 1 ECHR. . . . Why is one killing under the scope of the ECHR and the other not, merely because the state concerned exercises some vaguely framed ‘public powers’?”).

<sup>128</sup> *Id.* at 132.

<sup>129</sup> *Id.* (“Would, for example, the UK have had the positive obligation to protect the right to life of the applicants in *Al-Skeini* even from purely private violence, as it would have on its own territory . . . ?”).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 133.