

## Extra-Territorial Application of the European Convention on Human Rights after *Al-Skeini* and *Al-Jedda*

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### Abstract

Both annotated judgments are concerned with some prerequisites for the responsibility of a Convention State (i.e., the United Kingdom) for the breach of Convention human rights through behaviours of that State carried out outside its national territory, i.e. through the extra-territorial acts or omissions. However, each of those judgments puts its emphasis on a different prerequisite for the aforementioned responsibility: while *Al-Jedda* is centred on the issue of imputability of extra-territorial acts to the Convention State, *Al-Skeini* focuses rather on the issue of jurisdiction of the Convention State over individuals whose human rights are claimed to be in breach.

### Keywords

European Convention on Human Rights (ECtHR); extra-territorial application of human rights treaties; imputability of conduct; extra-territorial jurisdiction

### 1. The Main Facts of the *Al-Skeini* and *Al-Jedda* Cases and the Judgments of the Court

The much-awaited judgments of the European Court of Human Rights (hereinafter: the Court or ECtHR) in the *Al-Jedda* and *Al-Skeini* cases, both delivered on 7 July 2011,<sup>1</sup> concern the issue of responsibility of the United Kingdom for the breach of Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the “Convention” or “ECHR”) in the course of actions taken by the British military forces in Iraq. The first case originated in an application against the United Kingdom lodged with the Court in June 2008 by a joint Iraqi/British national, Mr Hilal Abdul-Razzaq Ali Al-Jedda. The applicant was arrested on 10 October 2004 by the United States soldiers in Baghdad, acting on information provided by the British intelligence services. He was taken to Basrah in a British military aircraft and then to the Sha’aibah Divisional Temporary Detention Facility in Basrah City, a detention centre run by the British forces.

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<sup>1)</sup> Case of *Al-Jedda v. The United Kingdom*, no. 27021/08; case of *Al-Skeini and Others v. The United Kingdom*, no. 55721/07.

He was held there on the basis that his internment was necessary for imperative reasons of security in Iraq, because he was believed by the British authorities to have been personally responsible for recruiting terrorists outside Iraq, and for conspiring and planning the acts of terror. The applicant was released from internment on 30 December 2007.

As early as on 8 June 2005 the applicant brought a judicial review claim in the United Kingdom, challenging the lawfulness of his continued detention under Article 5 of the Convention which guarantees the right to liberty and security. Both the Divisional Court in its judgment of 12 August 2005 and the Court of Appeal in its judgment of 29 March 2006 unanimously held that United Nations Security Council Resolution 1546 explicitly authorized the Multi-National Force to take all necessary measures to contribute to the maintenance of security in Iraq, in accordance with the annexed letter from the United States Secretary of State. The United Kingdom's obligation under the Resolution, therefore, took precedence over its obligations under the Convention.

The applicant appealed then to the House of Lords.<sup>2</sup> Before the House of Lords the Secretary of State raised a new argument, claiming that by virtue of United Nations Security Council Resolutions 1511 and 1546 the detention of the applicant was attributable to the United Nations, and not to the United Kingdom, and was thus outside the scope of the Convention. While the House of Lords did not agree with this latter argument, it none the less upheld the Court of Appeal's ruling on the non-applicability of Convention in that case.

Before the EctHR, Mr Al-Jedda complained that he was held in internment by the United Kingdom armed forces in Iraq between 10 October 2004 and 30 December 2007, in breach of Article 5(1) of the Convention. The British government contended, in turn, that the internment was attributable to the United Nations and not to the United Kingdom, and that the applicant was not, therefore, within the United Kingdom jurisdiction under Article 1 of the Convention. Further and in the alternative, they submitted that the internment was carried out pursuant to United Nations Security Council Resolution 1546 which created an obligation on the United Kingdom to detain the applicant that, pursuant to Article 103 of the United Nations Charter, overrode obligations under the Convention.

In its judgment, the Court observed that when examining whether the applicant's detention was attributable to the United Kingdom or, as the British government submits, to the United Nations, it is necessary to examine the terms of the United Nations Security Council Resolutions which formed the framework for the security regime in Iraq during the period in question.<sup>3</sup> Therefore, the

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<sup>2</sup> See *R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, 12 December 2007.

<sup>3</sup> *Al-Jedda*, *supra* note 1, § 76.

Court went on to present the Resolutions of the UN Security Council concerning Iraq and adopted after its invasion. The first Security Council resolution after the invasion was Resolution 1483, adopted on 22 May 2003. In this Resolution, acting under Chapter VII of the United Nations Charter, the Security Council called upon the Occupying Powers, i.e. the United States of America and the United Kingdom, through the Coalition Provisional Authority (formed by the U.S. and the UK), “to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability ...”. The United Kingdom and the United States were encouraged “to inform the Council at regular intervals of their efforts under this resolution”. However, as the Court stated, Resolution 1483 did not assign any security role to the United Nations.<sup>4</sup>

In Resolution 1511, adopted on 16 October 2003, the United Nations Security Council, again acting under Chapter VII, underscored the temporary nature of the exercise by the Coalition Provisional Authority of the authorities and responsibilities set out in Resolution 1483 which would cease as soon as an internationally recognized, representative Iraqi government could be sworn in. In paragraphs 13 and 14, the Security Council authorized “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq” and urged Member States “to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13”. The United States, on behalf of the multinational force, was requested periodically to report on the efforts and progress of the force. The Security Council also resolved that the United Nations, acting through the Secretary General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.<sup>5</sup>

As in the case of Resolution 1483, the Court stated that it does not consider that, as a result of the authorization contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations. Although the United States was requested to report periodically to the Security Council about the activities of the Multi-National Force, the United Nations did not, thereby, assume any degree of control over either the force or any other of the executive functions of the Coalition Provisional Authority.<sup>6</sup>

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<sup>4</sup>) *Ibid.*, § 78.

<sup>5</sup>) *Ibid.*, § 79.

<sup>6</sup>) *Ibid.*, § 80.

The final resolution of relevance to the present issue was Resolution 1546 (adopted on 9 June 2004). In this Resolution the Security Council, acting under Chapter VII, reaffirmed the authorization for the Multi-National Force established under Resolution 1511. However, as the Court observed, there is no indication in Resolution 1546 that the Security Council intended to assume any greater degree of control or command over the Multi-National Force than it had exercised previously.<sup>7</sup>

The Court reminded that the internment of Mr Al-Jedda took place within a detention facility in Basrah City, controlled exclusively by British forces. According to the Court, the applicant was therefore within the authority and control of the United Kingdom throughout.<sup>8</sup> The decision to hold the applicant in internment was made by the British officer in command of the detention facility. Although the decision to continue holding the applicant in internment was, at various points, reviewed by committees including Iraqi officials and non-United Kingdom representatives from the Multi-National Force, the Court did not consider that the existence of these reviews operated to prevent the detention from being attributable to the United Kingdom.<sup>9</sup> In conclusion, the Court agreed with the majority of the House of Lords that the internment of the applicant was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.<sup>10</sup>

Next, the Court dismissed an argument of the British government that the binding obligations of the United Kingdom under the Convention were overridden or displaced by the Resolutions of the UN Security Council.<sup>11</sup> According to the Court, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5(1) of the Convention.<sup>12</sup>

The second case, *Al-Skeini*, originated in an application against the United Kingdom lodged with the Court by six Iraqi nationals. The applicants alleged that their relatives (i.e. sons, wife of one of them) fell within the United Kingdom's jurisdiction when killed and that there had been no effective investigation into the deaths, in breach of Article 2 of the Convention. In turn, the British government denied that the United Kingdom had jurisdiction over any of the deceased, except for one. It contended that the acts in question took place in southern Iraq

<sup>7</sup> *Ibid.*, § 81.

<sup>8</sup> See also *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08 (Sect. 4) (Eng), § 88 (2.3.10); judgment of the United States Supreme Court in *Munaf v. Geren* (2008) 128 S.Ct. 2207.

<sup>9</sup> *Al-Jedda*, *supra* note 1, § 85.

<sup>10</sup> *Ibid.*, § 86.

<sup>11</sup> *Ibid.*, §§ 97–110.

<sup>12</sup> *Ibid.*, § 109.

and outside the United Kingdom's jurisdiction under Article 1 of the Convention. The sole exception was the killing of the sixth applicant's son, which occurred in a British military prison over which the United Kingdom did have jurisdiction.

The Court admitted that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.<sup>13</sup> While a State's jurisdictional competence under Article 1 is primarily territorial, the Court reminded that to date in its case-law it has recognized a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.<sup>14</sup>

Then the Court distinguished two main groups of situations where a Convention State may exercise its jurisdiction within the meaning of Article 1 of ECHR extra-territorially: 1) State agent authority and control,<sup>15</sup> and 2) effective control over an area.<sup>16</sup>

The Court also reminded that the Convention is a constitutional instrument of the European public order.<sup>17</sup> It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.<sup>18</sup> The Court has emphasized that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space".<sup>19</sup> However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. As the Court emphasizes, it has not in its case-law applied any such restriction.<sup>20</sup>

<sup>13</sup> *Al-Skeini*, *supra* note 1, § 130.

<sup>14</sup> *Ibid.*, §§ 131-132.

<sup>15</sup> *Ibid.*, §§ 133-137.

<sup>16</sup> *Ibid.*, §§ 138-140.

<sup>17</sup> See *Loizidou v. Turkey* (preliminary objections), no. 15318/89, 310, § 75 (23.3.95).

<sup>18</sup> *Al-Skeini*, *supra* note 1, § 141; see also *Soering v. the United Kingdom*, no. 14038/88, § 86 (7.7.89).

<sup>19</sup> See *Loizidou v. Turkey* (merits), § 78, Rep. 1996-VI; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 80, ECHR 2001-XII.

<sup>20</sup> *Al-Skeini*, *supra* note 1, § 142.

In determining whether the United Kingdom had jurisdiction over any of the applicants' relatives when they died, the Court observed that following the removal from power of the Ba'ath regime and until the accession of the Interim Iraqi 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 considered 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".<sup>21</sup> Applying that latter principle to the specific facts of the case, the Court stated that it is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. In that regard the Court concluded that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.<sup>22</sup>

Next, the Court found a violation of the procedural duty under Article 2 of the Convention in respect of the first, second, third, fourth and fifth applicants.<sup>23</sup>

## **2. Two Basic Prerequisites of Convention States' Responsibility for Extra-Territorial Violations of ECHR**

Both annotated judgments are concerned with some prerequisites for the responsibility of a Convention State (i.e., the United Kingdom) for the breach of Convention human rights through behaviours of that State carried out outside its national territory, i.e., through extra-territorial acts or omissions. However, each of those judgments puts its emphasis on a different prerequisite for the aforementioned responsibility: while *Al-Jedda* is centred on the issue of *imputability* of

<sup>21</sup>) *Ibid.*, § 149.

<sup>22</sup>) *Ibid.*, § 150.

<sup>23</sup>) *Ibid.*, §§ 161–177.

extra-territorial acts to the Convention State, *Al-Skeini* focuses rather on the issue of *jurisdiction* of the Convention State over individuals whose human rights are claimed to be in breach. These two prerequisites for responsibility are distinguished in both judgments very clearly, although it cannot be disputed that they are, at least to some extent, interrelated as to their content. This rigorous conceptual distinction deserves accentuation insofar as in the past the Court was faced with strong criticism for failing to unequivocally separate these two prerequisites for the Convention States' responsibility.<sup>24</sup> Whether the ECtHR has indeed sometimes failed to provide such a firm distinction may be contentious,<sup>25</sup> but it is not striking at all that some authors may have such an impression. This is due to the fact that both these prerequisites are defined by the Court – as evident also from *Al-Jedda* and *Al-Skeini* – through the recourse to the same criterion, namely to that of effective control and authority.

The undeniable logic underlying *Al-Jedda* and *Al-Skeini* is the assumption that in order to hold a given Convention State responsible for the infringement of Convention, the acts or omissions leading to the alleged infringement of rights and freedoms of individuals must, first of all, be imputable (attributable) to that very State. Moreover, the Convention State to whom the aforementioned acts or omissions are imputed must exercise its jurisdiction over the alleged victims of those acts or omissions.<sup>26</sup>

### **3. The Imputability of Actions of Multi-National Force in Iraq to United Nations under the Convention**

As far as the issue of imputability is concerned it should be observed that in *Al-Jedda* the Court devoted much space to substantiate the thesis that the acts of soldiers within the Multi-National Force in Iraq (as well as actions of the Coalition Provisional Authority) were not attributable to the United Nations because the United Nations Security Council had neither “effective control” nor “ultimate authority and control” over the acts and omissions of troops within the Multi-National Force (and over the actions of the Coalition Provisional Authority) within the meaning of Article 5 of the International Law Commission (ILC) draft Articles on the Responsibility of International Organizations.<sup>27</sup> The Court thus accepted that the aforementioned draft Articles, including the ILC's

<sup>24</sup>) See e.g. J. Cerone, “Out of Bounds? Considering the Reach of International Human Rights Law”, Center for Human Rights and Global Justice Working Paper, No. 5, 2006, pp. 26 *et seq.*

<sup>25</sup>) This author does not agree with such an opinion.

<sup>26</sup>) *Al-Jedda*, *supra* note 1, § 74; *Al-Skeini*, *supra* note 1, § 130; see also *Ilașcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII.

<sup>27</sup>) See *Al-Jedda*, *supra* note 1, §§ 75–86.

commentary thereon, provided the proper criteria of attribution of some conduct to the United Nations, and came to the conclusion that the Resolutions adopted by the United Nations Security Council after the invasion of Iraq did not give that latter body any effective control over the conduct of troops within the Multi-National Force, as Article 5 of the said Articles provides. However, the ECtHR clearly overlooked the fact that according to Article 7 of the ILC draft Articles, conduct which is not attributable to an international organization under the preceding draft articles (including Article 5 providing for the criterion of effective control) shall nevertheless be considered an act of that international organization under international law if and to the extent that the organization “acknowledges” and “adopts” the conduct in question as its own. The Court should have thus considered (what it has failed to do) whether the Resolutions of the United Nations Security Council did “acknowledge” and “adopt” the behaviours of British (and US) troops, because the positive answer thereto could presumptively question the Courts’ conclusion that the acts of soldiers within the Multi-National Force did not become attributable to the United Nations. In that regard it is worth reminding that in Resolution 1546 (2004) the Security Council “reaffirmed” the authorization for the multinational force under unified command established under Resolution 1511 (2003), “having regard” to the letters annexed to that former Resolution.<sup>28</sup> In one of those letters, expressly referred to in Resolution 1546 and next provided to all members of the Security Council, Mr. Colin Powell, the then US Secretary of State, wrote to the President of the Security Council that Multi-National Force stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection in Iraq, including combat operations against members of groups applying violence and causing security threats, and including internment where this is necessary for imperative reasons of security. In its Resolution 1546, the Security Council reaffirmed then that it authorizes once again (i.e. as it did in Resolution 1511<sup>29</sup>) the Multi-National Force to conduct the operations that were referred to in the letters annexed to the Resolutions, including the letter of Mr. Colin Powell. The Security Council also decided therein that the Multi-National Force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to the Resolution, including by preventing and deterring terrorism, so that, inter alia, the United Nations can fulfil its role in assisting the Iraqi people and the Iraqi people can implement freely and without intimidation the timetable for the political process and benefit from reconstruction and rehabilitation activities.<sup>30</sup> It thus follows that the UN Security Council not only authorized

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<sup>28</sup>) Point 9 of Resolution 1546 (2004).

<sup>29</sup>) See point 13 of Resolution 1511 (2003).

<sup>30</sup>) Point 10 of Resolution 1546 (2004).



and accepted in general all past and future operations of the Multi-National Force carried out within the mandate delegated to the latter, while being fully aware of the military nature of those tasks and the consequences they trigger, but also expressly recognized that the operations in question were to play an essential role from the perspective of the United Nations' tasks, and should enable the United Nations to fulfil its role in Iraq. In other words, the UN Security Council conferred upon the Multi-National Force a mandate of a military nature, while recognizing this mission as being instrumental with regard to the UN's own tasks. Against such a background one may reasonably wonder whether such a Resolution of the UN Security Council should not be qualified as "acknowledgment" and "adoption" of the behaviours of British (and US) troops in Iraq? Obviously, the answer to that question must not necessarily be in the affirmative. According to the ILC itself, the term "acknowledges and adopts" in Article 7 of the ILC draft Articles makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the international organization identifies the conduct in question and makes it its own.<sup>31</sup> Whether this is indeed the case may be determined only after a thorough examination, considering the whole complex context of a given factual situation. However, in *Al-Jedda* the Court is completely silent about this prerequisite for a possible attribution of military activities of the Multi-National Force to the United Nations, and does not examine the Resolutions of the Security Council from such a point of view at all. Undoubtedly, this oversight in the ECtHR's reasoning does not make its final thesis more convincing.

But what is more, the Court does not mention at all such a legally admissible option as the dual attribution of Multi-National Force's conduct to both the United Kingdom and the United Nations. This dual attribution of the same conduct can never be excluded from the outset. Thus, attribution of conduct to a State does not rule out attribution of the same conduct to an international organization.<sup>32</sup> This dual attribution of the same conduct can, in particular, be the

<sup>31</sup>) See ILC draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), p. 53. True, this document, while explaining the phrases "acknowledgment" and "adoption", is concerned with the issue of responsibility of the States and not of the international organizations. However, in its commentary on draft Articles on the Responsibility of International Organizations (Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10, A/59/10), the ILC itself admits that the terms "acknowledgment" and "adoption" within the meaning of Article 7 of the ILC draft Articles on the Responsibility of International Organizations should be understood in a similar way as these terms are understood under the Draft articles on the Responsibility of States for Internationally Wrongful Acts. Explaining its position, the ILC refers, among others, to some judgments of international tribunals (see commentary on ILC draft Articles on the Responsibility of International Organizations, pp. 121-122).

<sup>32</sup>) See commentary on ILC draft Articles on the Responsibility of International Organizations, *supra* note 31, recital 4 of the preliminary section: "Attribution of conduct to an international organization" (p. 101).

result of the two following circumstances. First, the conduct in question that was under the effective and exclusive authority and control of a State was subsequently acknowledged and adopted by an international organization. Second, the conduct was a joint operation of a State and an international organization. Especially in the case of military or peacekeeping operations, it happens that some actions are jointly controlled by two partners.<sup>33</sup>

This all is not to say that the military actions of the Multi-National Force in Iraq, obviously in the case of British troops, were not attributable to the United Kingdom under the Convention. The imputability of actions of the British troops to the United Kingdom could not be disputed at all, since the UK had an effective authority and control over its troops. However, the complete silence about the possibility of a dual attribution of actions of those troops, as well as the lack of examination of the Security Council's Resolutions from the point of view of such potential dual attribution, do not contribute to the legal clarity in the Court's reasoning. The ECtHR omitted the consideration of criteria included in the international document which it itself has referred to as being relevant for the issue of attribution under the Convention,<sup>34</sup> and in that way it clearly underestimated the role of the United Nations in Iraq. Interestingly, this underestimation was not the first instance where the Court understated the involvement of an international organization in the actions of Convention States. In particular, in the famous *Banković* judgment<sup>35</sup> the Court did not even consider the circumstance that the air strikes on the territory of the Former Republic of Yugoslavia were ordered and effectively controlled not so much by the Convention States themselves, but rather by the North Atlantic Treaty Organization (NATO), whose members the above-mentioned States were. Therefore, according to Article 5 of the ILC draft Articles on the Responsibility of International Organizations, the aforementioned air strikes should have been attributed to the NATO, and not to the Convention States (with reservation that the NATO itself is not a Party of the Convention). It seems that it could have been a much better resolution of the *Banković* case than the Court's controversial conclusion that the States bombing a city in another State do not have the jurisdiction (within the meaning of Article 1 of the ECHR) over the victims of such air strikes.<sup>36</sup>

<sup>33</sup>) It is true, however, that for the sake of efficiency of military operations, the United Nations insists on claiming exclusive command and control over peacekeeping forces (see commentary on ILC draft Articles on the Responsibility of International Organizations, *supra* note 31, recital 8 of the commentary to Article 5).

<sup>34</sup>) I.e. ILC draft Articles on the Responsibility of International Organizations; see *Al-Jedda*, *supra* note 1, § 84.

<sup>35</sup>) *Banković and Others*, *supra* note 19.

<sup>36</sup>) Thus, contrary to what the Court has stated in *Banković*, it could be argued that the air forces bombing Belgrad had jurisdiction over the victims (within the meaning of Article 1 of ECHR), but in that particular situation the military actions of those forces should be attributed to the NATO, and not to the NATO members.

#### 4. The Imputability of Actions of Military Forces of Interim Iraqi Government under the Convention

In the *Al-Jedda* case, the internment of the applicant that was scrutinized by the Court started on 10 October 2004, i.e. at the time when the full authority for governing Iraq was in the hands of the Interim Iraqi Government. In that particular case the Court did not have to examine whether the acts or actions of the Interim Iraqi Government (including peacekeeping or security operations carried out by its soldiers or officials) should have been attributed either to the United Kingdom or to that Iraqi Government alone, because these were clearly the British forces (and not the military forces of the Interim Iraqi Government) that held the applicant in internment in Basrah City. However, it could be interesting to consider to whom the internment would have to be attributed under the Convention (i.e. to the United Kingdom or to the Interim Iraqi Government), had it been ordered and exercised by the military or special forces acting on behalf of the Interim Iraqi Government. From the Court's settled case-law it follows that when a Convention State controls and decisively influences the authorities (civil administration) in another country, i.e. when such a domestic civil administration survives by virtue of the military, economic, financial and political support given to it by a Convention State, then the actions of those subordinated authorities and/or civil administration should be attributed to the Convention State.<sup>37</sup> This attribution exists irrespective of whether such a control over the civil administration in another country gives the Convention State "effective and overall control of an area"<sup>38</sup> situated outside its national territory, and, accordingly, "jurisdiction" within the meaning of Article 1 of the ECHR.

However, there are no serious or convincing reasons to assume that the United Kingdom exercised effective authority and control (possibly also with the USA) over the Interim Iraqi Government. The Court's considerations in *Al-Skeini* justify rather the opposite conclusion: the Court emphasizes that the formation of a sovereign Interim Government of Iraq led to a situation in which that Government assumed full responsibility and authority for governing Iraq. In the event, the occupation came to an end on 28 June 2004, when full authority for governing Iraq passed to the Interim Iraqi Government.<sup>39</sup> In the light of the above, the actions of the Interim Iraqi Government, including military operations ordered by that Government, could not be attributed to the United Kingdom under the Convention. Only the military actions carried out directly by British troops, as was the case in Basrah City, could be imputed to the UK.

<sup>37</sup> See *Cyprus v. Turkey* [GC], no. 25781/94, §§ 75-77, ECHR 2001-IV; *Loizidou*, *supra* note 19, §§ 54-56; *Ilaşcu and Others*, *supra* note 26, § 392.

<sup>38</sup> On this notion, see for more *infra*.

<sup>39</sup> *Al-Skeini*, *supra* note 1, § 148.

## 5. The Imputability of Conduct of Private Individuals under the Convention

In the context of attribution of conduct under the Convention it must be observed that the acts of private individuals violating human rights of other individuals cannot be imputed to a Convention State,<sup>40</sup> even if the State exercises the overall and effective control over a given area outside its territory (and has therefore the jurisdiction over the persons situated within that area). Assuming that a Convention State has jurisdiction within the meaning of Article 1 of ECHR over the persons whose Convention human rights have been infringed by other private individuals, the reason why the Convention State is then responsible for the breach of Convention is that it did not prevent the above-mentioned infringement by taking up some positive actions, and did not stop a private person (intruder) from violating the human rights of the victim. Thus, in such a situation the Convention State is responsible because it has breached its own positive obligations stemming from the Convention (i.e. for failing to take some protective actions in favour of the victim), and not because the behaviour of a private individual (intruder) is then attributable to that State. The issue of attribution of the conduct of a private individual under the Convention deserves attention here insofar as these were exactly such private individuals who might have contributed to the violation of human rights in *Al-Skeini*.

## 6. Territorial Character of Jurisdiction under the Convention

As mentioned earlier, the issue of attribution of conduct violating human rights to a Convention State must be conceptually distinguished from the issue of jurisdiction of a Convention State over the persons whose Convention human rights are infringed. As Article 1 of ECHR reads: “The High Contracting Parties shall secure to everyone *within their jurisdiction* [emphasis added] the rights and freedoms defined in Section I of this Convention”. From the vast body of the relevant judgments of ECtHR it may be inferred that “jurisdiction” within the meaning of Article 1 of ECHR means indeed the physical power, and actual authority and control that a Convention State has over certain persons, including the authority and control over a given territory where the persons are located.<sup>41</sup> It is quite natural that such a physical power and actual control are basically exercised by the

<sup>40)</sup> Also in other fields of public international law it is generally accepted that the conduct of private persons is not as such attributable to the State; see e.g. I. Brownlie, *System of the Law of Nations: State Responsibility*. Part I (Oxford University Press, 2001), pp. 159 et seq.; ILC draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 31, 38, and the literature and judgments indicated therein.

<sup>41)</sup> See L. Loucaides, “Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case”, 4 EHRLR (2006), pp. 391 et seq.; M. Milanovic,

State over its national territory and over the persons present in that territory (according to the Court, there is a presumption that a State normally exercises its jurisdiction throughout its whole territory<sup>42</sup>). Therefore, it may be said that jurisdiction within the meaning of Article 1 of the Convention is primarily territorial,<sup>43</sup> i.e. this is the “essentially territorial notion of jurisdiction”,<sup>44</sup> confined mainly to the own territory of a State, and the persons located therein. The settled jurisprudence of the Court admits, however, that there are some exceptional circumstances when a Contracting State’s jurisdiction under Article 1 of ECHR may be exercised outside its own territory (extra-territorially), and be thus qualified as extra-territorial.<sup>45</sup>

## 7. Two Main Groups of Extra-Territorial Jurisdiction Specified in *Al-Skeini*

In *Al-Skeini*, the Court confirms once again that jurisdiction under Article 1 of ECHR is primarily territorial (i.e., is concerned with the national territory of a Convention State), and that in some exceptional circumstances it may be exercised outside a State’s territory, i.e. extra-territorially.<sup>46</sup> However, while the former case-law of the Court was rather casuistic in determining those exceptional circumstances and identified plenty of such specific instances, in *Al-Skeini* the Court took an attempt to generalize its previous case-law regarding this issue, and it distinguished two main groups of situations in which a Convention State exercises its jurisdiction within the meaning of Article 1 of ECHR outside its national territory. The first group is the State agent authority and control over persons. The second one is an effective control over an area.

The first group of instances of extra-territorial jurisdiction is characterized by the activity of State’s agents who exercise the physical power and control over the persons concerned outside the State’s national territory. In this context it does not

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*Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011), p. 41.

<sup>42</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 136, ECHR 2005-VI; *İlaşcu and Others*, *supra* note 26, § 312; *Issa and Others v. Turkey*, no. 31821/96 (Sect. 2) (Eng), § 67 (16.11.04).

<sup>43</sup> *Soering*, *supra* note 18, § 86; *Banković*, *supra* note 19, § 59; *İlaşcu and Others*, *supra* note 26, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; *Markovic and Others v. Italy* [GC], no. 1398/03, § 49, ECHR 2006-XIV; *Issa and Others*, *supra* note 42, § 67; *Bosphorus*, *supra* note 42, § 136; *Rantsev v. Cyprus and Russia*, no. 25965/04 (Sect. 1) (Eng), § 206 (7.1.10).

<sup>44</sup> *Banković*, *supra* note 19, § 61; *Medvedyev and Others v. France* [GC], no. 3394/03, § 64 (29.3.10); *Rantsev*, *supra* note 43, § 206; *Al-Saadoon and Mufdhi*, *supra* note 8, § 85.

<sup>45</sup> *Markovic and Others*, *supra* note 43, § 49; *Assanidze*, *supra* note 43, § 137; *Medvedyev and Others*, *supra* note 44, §§ 64–65; *İlaşcu and Others*, *supra* note 26, §§ 314–318; *Drozdz and Janousek v. France and Spain*, 240, §91 (26.6.92); *Issa and Others*, *supra* note 42, §§ 68–71; *Banković*, *supra* note 19, §§ 67–73; *Al-Saadoon and Mufdhi*, *supra* note 8, § 85.

<sup>46</sup> *Al-Skeini*, *supra* note 1, § 131.

matter whether the aforementioned power and authority is exerted within the embassies or consulates,<sup>47</sup> on board of ships<sup>48</sup> or aircrafts,<sup>49</sup> or over the buildings of military prisons.<sup>50</sup> In *Al-Skeini*, the Court very strongly accentuates that what is decisive in such cases is the exercise by the Convention State of physical power and control over the person in question, and not simply the exercise of authority or control over the buildings, aircrafts or ships in which the individuals are held.<sup>51</sup>

The second group of instances of extra-territorial jurisdiction consists in exercising an effective control over an area. According to the Court, while it is a question of fact whether a Convention State exercises effective control over an area outside its own territory, in determining whether such an effective control exists, the Court will primarily have reference to the following two circumstances: 1) the strength of the State's military presence in the area, or 2) the extent to which the State's military, economic and political support for the local subordinate administration provides it with influence and control over the region concerned (§ 139 of *Al-Skeini*).

The Court's statement about the "strength of the State's military presence in the area" clearly indicates that not every military presence of a Convention State in a given area abroad amounts to effective (and overall) control over that area. In *Al-Skeini*, the ECtHR does not specify how strong that military presence of a State within an area must be so that it could be qualified as being equivalent to effective control over that area. However, some very instructive indicators in that regard may be found in the *Issa* judgment where the Court scrutinized the military presence of Turkish armed forces carrying out military operations in northern Iraq (over a period between 19 March and 16 April 1995). The Court emphasized there that notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control over the entire area of northern Iraq. According to the Court, this situation was therefore in contrast to the one which occurred in northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases, and which gave rise to the conclusion that such an effective (and overall) control over the area of northern Cyprus existed.<sup>52</sup> In the latter cases the Court found that the Turkish armed forces totalled more than 30,000 personnel, and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of

<sup>47</sup> See *W.M. v. Denmark*, no. 17392/90, Commission decision of 14 October 1993.

<sup>48</sup> See *Medvedyev and Others*, *supra* note 44.

<sup>49</sup> See *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Franco Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980.

<sup>50</sup> See *Al-Saadoon and Mufdhi*, *supra* note 8.

<sup>51</sup> *Al-Skeini*, *supra* note 1, § 136.

<sup>52</sup> See *Loizidou* *supra* note 19, §§ 54-56; *Cyprus v. Turkey*, *supra* note 37, §§ 75-77.

communication between the northern and southern parts of the island. It is also important in that regard that the troops in northern Cyprus had been present over a much longer period of time than they were later present in northern Iraq.<sup>53</sup>

From §139 of *Al-Skeini* it follows that for a Convention State's military presence in an area to be qualified as amounting to effective control over that area it is not necessary to control a local (civil) administration in the aforementioned area. True, the control over such local and subordinate administration is an alternative means of effective control over an area (which may occur either separately or jointly with the military presence of a Convention State within the area). However, contrary to what some authors claim,<sup>54</sup> for the State's military presence to be qualified as effective control over an area the exercise of control over the local administration is not strictly necessary. This is understandable insofar as within an area that is strongly or even totally controlled by the military forces of a Convention State the local civil administration may not exist at all, or can be disorganized completely (and the public powers normally to be exercised by a sovereign government are then realized directly by soldiers or official of a Convention State). In that latter situation it could be against factual circumstances to assume that effective control exercised by a Convention State over such area does not exist.

In turn, when a Convention State's military presence within an area is not strong enough to be qualified as an effective control over that area, such an effective control may none the less still exist, and be the corollary of the Convention State's control of the local subordinate (civil) administration. However, the very fact of the Convention State's exercise of control over the local subordinate administration does not by itself imply that the Convention State exercises then an effective control over the area (and has thus jurisdiction within the meaning of Article 1 of ECHR). The Court's statement in §139 of *Al-Skeini* by no means justifies such a conclusion. From that paragraph it follows that what is decisive in this context is the extent to which a Convention State's military, economic and political support for (and the control of) the local subordinate administration provides the Convention State with influence and control over the region concerned. In particular, when the local subordinate administration controlled by a Convention State does not have sufficiently strong power and authority over the region concerned, and is not able to enforce the obedience for its own orders or regulations (also with the support of the Convention State), then it is unfounded to claim that the Convention State controlling such local administration exercises an effective (and overall) control over the area concerned.

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<sup>53)</sup> *Issa and Others*, *supra* note 42, § 75.

<sup>54)</sup> R. Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties", 40 *Israel Law Review* (2007), pp. 515 *et seq.*

It has to be added that an effective control over an area exercised by a Convention State, which is equivalent to vesting that State with a “jurisdiction” within the meaning of Article 1 of ECHR, entails not only the control over some spatial territory, i.e. over the cities, roads or another infrastructure there, but it also necessarily implies the control over all persons located within that territory. Therefore, an effective control over an area (within the meaning presented above) amounts to a control over all persons present within that area. Moreover, such an effective control of an area justifies a presumption that a Convention State has then the jurisdiction over all persons located therein.

### **8. Extra-Territorial Jurisdiction in *Al-Skeini* as the Corollary of the United Kingdom’s Control over the Deceased Persons**

As already mentioned, in *Al-Skeini* the Court finally concluded that the United Kingdom had jurisdiction over the deceased persons in Iraq who were the relatives of applicants in that case.<sup>55</sup> However, the Court did not state expressly among which of the two groups of instances of extra-territorial jurisdiction – which it distinguished itself – the factual situation in *Al-Skeini* should be classified, i.e. whether the jurisdiction of the UK resulted from the concept of State agent authority and control over persons (first group), or was rather the corollary of an effective control over the area of the province of Basrah (or at least over Basrah City) exercised by the British troops (second group). A thorough analysis of the Court’s reasoning leads to the conclusion that the jurisdiction of the United Kingdom over the persons concerned (i.e. over the relatives of applicants) resulted from the fact that the British troops exercised actual control and authority over those persons, and not from the United Kingdom’s effective control over the area of Basrah. In this context it must be noted that the Court by no means came to the express conclusion that the UK had an effective control over Basrah (province or City). Neither the strength of the UK’s military presence there, nor the extent to which the UK’s support for the local subordinate administration provided it with influence and control over the region concerned gave the Court reason to conclude that the UK indeed had such an effective control over the area in question. In contrast to that, the Court emphasized that a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention existed insofar as 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”.<sup>56</sup>

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<sup>55</sup>) *Al-Skeini*, *supra* note 1, §§ 149–150.

<sup>56</sup>) *Ibid.*, § 149.



It thus follows that jurisdiction within the meaning of Article 1 of ECHR was identified by the Court merely “in the course of security operations” carried out by the British soldiers, because during such operations only the British soldiers had a possibility to exercise actual authority and control over certain persons. In other words, the Court did not assume that the UK exercised jurisdiction over all persons located in Basrah, solely due to the UK’s effective control over that territory. Had the Court established that the UK had exercised an effective control over the area of Basrah (in particular due to the strength of the UK’s military presence there), then the jurisdiction over all persons located there would have been assumed automatically, without a need for a closer inspection whether the British soldiers had an actual and physical control over the particular persons that were killed in Basrah during the period of exercise of such an overall and effective control. In contrast to that, the Court did not accept the presumption that the UK had jurisdiction over all persons in Basrah, but it investigated whether the deceased persons (i.e. relatives of the applicants) were killed “in the course of (...) [UK] 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”. Especially significant in that regard are the Court’s considerations concerning the third applicant’s wife who was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen. What induced the Court to conclude that there was a jurisdictional link between the United Kingdom and this deceased was the fact that “the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant’s home and joined in the fatal exchange of fire”.<sup>57</sup> This clearly shows that the Court is referring here to the concept of State agent authority and control over persons (as a correct basis for jurisdiction), and not to the concept of State’s effective control over an area.

From the Court’s reasoning it is evident that for the control to be qualified as jurisdiction within the meaning of Article 1 of ECHR both the actual control over persons and an effective control over an area must exceed a certain degree (i.e. some threshold), and be sufficiently intensive. Thus, the criterion of control can be graduated according to its intensity. The fact that control over persons and/or area (where the persons are located), which determines whether jurisdiction within the meaning of Article 1 of ECHR exists, is a criterion subject to graduation is accurately reflected by the formula stating that “‘Jurisdiction’ under Article 1 is a threshold criterion”.<sup>58</sup> True, by denominating jurisdiction as a “threshold criterion”, the Court in all probability wanted merely to emphasize that jurisdiction is a criterion that must simply be satisfied in order for the

<sup>57</sup>) *Ibid.*, § 150.

<sup>58</sup>) *Al-Jedda*, *supra* note 1, § 74; *Al-Skeini*, *supra* note 1, § 130.

Convention obligations to arise in the first place.<sup>59</sup> However, it seems that the term “threshold” in the context of jurisdiction under Article 1 of the Convention may equally well be understood as meaning that the main factor defining jurisdiction, i.e. control over persons and/or over an area, is itself subject to graduation, and must exceed a certain degree (i.e. some threshold) so that jurisdiction of a Convention State could be identified as existing.

It has to be admitted that it is not easy to determine in abstract terms the level of control exercised by a Convention State that must be exceeded in order to establish jurisdiction under Article 1 of ECHR. In the case of extra-territorial jurisdiction exercised on the basis of an effective control over an area, the Court was only able to give some general criteria and factors that speak in favour of such control and that must be taken into account in a given case.<sup>60</sup> The identification of whether State’s agents exercise actual power and authority over persons is probably even more difficult, save in those instances where the persons in question are physically in the hands of the soldiers or officials of a Convention State (which makes the existence of control evident).<sup>61</sup> From *Al-Skeini* it may be inferred that the British soldiers had such an actual authority and control (and thus jurisdiction) over persons in the course of their security operations in Basrah, even if the contact of those soldiers with the persons they met during their security operations was not always physical in a strict sense. It was sufficient for the identification of control of the British military forces over the deceased victims (and thus jurisdiction of the UK over the latter) that the deaths of the victims were contiguous to security operations carried out by the British forces in various parts of Basrah City, or that the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the deceased’s home and joined in the exchange of fire.<sup>62</sup> It thus follows that the actual authority and control over persons as a basis for jurisdiction within the meaning of Article 1 of the Convention occurs in all those instances where a Convention State’s agents have a real possibility to exert such influence on those persons so as to secure – by using the means being at the disposal of those agents – the rights and freedoms of the aforementioned persons enshrined in the

<sup>59</sup>) Before the *Al-Jedda* and *Al-Skeini* judgments were delivered, the formula stating that “‘Jurisdiction’ under Article 1 is a threshold criterion” had never appeared in the Court’s case-law. But exactly such a formula was used in the literature, with an explanation that “jurisdiction” is a necessary prerequisite for triggering the obligations stemming from the Convention; see M. O’Boyle, “The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on ‘Life after Bankovic,’” in F. Coomans, M.T. Kamminga (Eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004), p. 125; Milanovic, *supra* note 41, 19.

<sup>60</sup>) *Al-Skeini*, *supra* note 1, § 139.

<sup>61</sup>) See e.g. *Medvedyev and Others*, *supra* note 44; *Öcalan*, *supra* note 49; *Al-Saadoon and Mufdhi*, *supra* note 8.

<sup>62</sup>) *Al-Skeini*, *supra* note 1, § 150.

Convention, either against their own (i.e. agents') acts (in particular by refraining from action), or against the acts of private individuals. Such a viable possibility of securing the rights and freedoms of a person constitutes jurisdiction under Article 1, even if there is no physical contact between a State agent and the person concerned.

In light of the above, what seems to be all the more contestable is the Court's earlier stance in *Banković* according to which the Convention States bombing the Radio *Televizije Srbije* buildings in Belgrade did not exercise jurisdiction under Article 1 of the Convention over the victims of such air strikes.<sup>63</sup> Contrary to that, it seems that in the course of air strikes the air forces of a Convention State have a real possibility to exert such influence on civil persons so as to secure their lives, in particular by using the electronic guidance systems. Accordingly, it is submitted that in the course of air strikes the persons being in the range of bombs or missiles launched by the air forces are not less controlled by those forces than are the persons living in a city in the course of security operations carried out by military forces in their vicinity.

## 9. The Scope of Convention States' Obligations in Case of Extra-Territorial Jurisdiction

The principal difference between the situation in which the jurisdiction of a Convention State is a corollary of an effective control over an area (on the one hand), and the situation in which the aforementioned jurisdiction is assumed on the basis of the State agent authority and control (on the other hand) is reflected in the scope of the State's obligations under the Convention in each of those situations. The scope of the State's obligations in the former situation has already been established in the Court's previous case-law, and in *Al-Skeini* the Court merely repeats it. Namely, when a Convention State exercises an effective control over an area then it is under an obligation to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.<sup>64</sup> In contrast to that, the scope of the State's obligations in the latter situation has been identified only in *Al-Skeini*, and that part of the judgment constitutes a real novelty in the Court's jurisprudence. Namely;

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

<sup>63</sup> *Banković*, *supra* note 19, §§ 74–82.

<sup>64</sup> *Al-Skeini*, *supra* note 1, § 138; see also *Cyprus v. Turkey*, *supra* note 37, § 77; *Solomou and Others v. Turkey*, no. 36832/97 (Sect. 4) (Eng), § 47 (24.6.08); *Kallis and Androulla Panayi v. Turkey*, no. 45388/99 (Sect. 4) (Eng), § 26 (27.10.09).

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’.<sup>65</sup>

It thus follows that in that latter situation a Convention State is not obliged to do the impossible, i.e. to secure the full range of Convention rights, but rather that it should be held accountable for those Convention rights that it is able to secure in the situation in question, especially given the scope and strength of its control over a person.

In that way the Court overruled its previous thesis from *Banković* where it stated that

the Court is of the view that the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure ‘the rights and freedoms defined in Section I of this Convention’ can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question, and it considers its view in this respect supported by the text of Article 19 of the Convention.<sup>66</sup>

Interestingly, some practitioners were already predicting a few years ago that the above-mentioned thesis from *Banković* would sooner or later be revisited by the Court.<sup>67</sup> However, while now it is clear that in the case of the State agent authority and control over a person a Convention State must only secure those rights that it is able to protect in a given factual situation, it still remains an open question whether, with regard to those rights that the Convention State is able to protect, the scope of its positive protective obligations to secure those right (i.e. the range of its specific duties in that regard) should also be determined by the factual circumstances of the case, in particular by the scope and strength of its control over a person.<sup>68</sup> Elementary consistency mandates a positive answer to that question.<sup>69</sup>

## 10. Conclusions

In general, it can be said that in *Al-Skeini* the Court maintains and further develops the concept of jurisdiction under Article 1 of the Convention that is

<sup>65</sup> *Al-Skeini*, *supra* note 1, § 137.

<sup>66</sup> *Banković*, *supra* note 19, § 75.

<sup>67</sup> Lord Justice Sedley in *Al-Skeini v. Sec. of State for Defence* [2005] EWCA 1609 (Civ.), §§ 201–202.

<sup>68</sup> In *Banković* the Court answered this latter question in the negative: *Banković*, *supra* note 19, § 76.

<sup>69</sup> As R. Lawson has put it: “the extent to which Contracting parties must secure the rights and freedoms of individuals outside their borders is commensurate with their ability to do so – that is:

apparent from its earlier judgments, namely that “control entails responsibility”.<sup>70</sup> Whenever a Convention State effectively controls an area outside its borders (which entails the control of persons located therein), or exerts actual control over certain persons outside its territory, then under Article 1 of ECHR it has jurisdiction over the persons concerned, and may thus be held accountable for violations of the Convention rights and freedoms of the aforementioned persons. Obviously, such a stance may be (and sometimes really is) criticized as going too far in extending the Convention obligations, but even those criticizing such an approach must admit that it carries a powerful normative justification: it realizes the fundamental object of human rights treaties, which is the universal protection of human rights.<sup>71</sup> The Court is thus right in extending jurisdiction when a Convention State is in a position to control the exercise of individual rights, because the exercise of jurisdiction fills the gaps in international human rights protection and avoids legal black holes.<sup>72</sup> A Convention State cannot be allowed to perpetrate the violations of the Convention in the territory of another State that it could not perpetrate in its own territory.<sup>73</sup> In such a way the Convention becomes a kind of a universalist charter for human rights, obviously in the case of actions of Convention States only. Being aware of the existence of this simple principle: “control entails responsibility”, the Convention States are able to better predict the scope of their international obligations, and to take them into account when considering the pros and cons of their particular extra-territorial actions.

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the scope of their obligations depend on the degree of control and authority that they exercise”: R. Lawson, “Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights,” in Coomans, and Kamminga (eds.), *supra* note 59, 84.

<sup>70</sup> See Lawson, *supra* note 69, 86; see also R. Wilde, “Legal ‘Black Hole’? Extraterritorial State Action and International Treaty Law on Civil and Political Rights,” 26 *Michigan Journal of International Law* (2005) 770–772, 793–797, and 805; D. Kamchibekova, “State Responsibility for Extraterritorial Human Rights Violations,” 13 *Buffalo Human Rights Law Review* (2007), pp. 87 *et seq.*; T. Abdel-Monem, “How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights,” 14 *Journal of Transnational Law & Policy* (2005), pp. 159–162, 196–197, and 213.

<sup>71</sup> S. Miller, “Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention,” 20 *European Journal of International Law* (2010) 1234.

<sup>72</sup> Lawson, *supra* note 69, 86.

<sup>73</sup> Issa and Others, *supra* note 42, § 71.

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