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I. EUROPEAN COURT OF HUMAN RIGHTS AL-SKEINI AND OTHERS V UNITED KINGDOM (APPLICATION NO 55721/07) JUDGMENT OF 7 JULY 2011

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CURRENT DEVELOPMENTS

DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

Edited by J Craig Barker

I. European Court of Human Rights *Al-Skeini and Others v United Kingdom* (Application No 55721/07) Judgment of 7 July 2011

I. EUROPEAN COURT OF HUMAN RIGHTS AL-SKEINI AND OTHERS V UNITED KINGDOM (APPLICATION NO 55721/07) JUDGMENT OF 7 JULY 2011

A. Introduction

The long anticipated judgment of the Grand Chamber of the European Court of Human Rights in the case of *Al-Skeini and Others v United Kingdom*¹ provided a conclusion to years of academic debate regarding the application of the European Convention on Human Rights to United Kingdom military operations in Iraq.² In question was the extent to which, if any, United Kingdom forces owed Convention obligations to Iraqi citizens when conducting security operations. For the Grand Chamber the case provided an opportunity to re-address the jurisdiction of the treaty under article 1.

The gateway to all obligations under the European Convention on Human Rights (the Convention) is article 1 which states that:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.³

This provision defines when a Contracting Party to the Convention is obligated to secure and protect the rights of individuals listed in the treaty. On numerous occasions over the past sixty-years the Commission, and subsequently the Court, have been asked to consider the limits of the term 'within their jurisdiction'. In doing so the Strasbourg bodies have established that although the exercise of jurisdiction can be considered to be

¹ *Al-Skeini and Others v United Kingdom* (Application No 55721/07). Judgment of 7 July 2011 ('*Al-Skeini*'). This application was heard jointly with *Al-Jedda v United Kingdom* (Application No 27021/08) also decided 7 July 2011. The present case note will focus solely on the decision in *Al-Skeini and Others*.

² S Kavaljdjeva, 'Jurisdiction of the European Court of Human Rights: exorbitance in reverse?' (2006) 3 *Georgetown JintL* 507; J Williams, '*Al-Skeini*: A flawed interpretation of *Banković*' (2005) 23 (4) *Wisconsin IntLJ* 687; M Milanovic, 'Applicability of the ECHR to British soldiers in Iraq' (2011) 70 *Cambridge LJ* 4; P Leach, 'The British military in Iraq—the applicability of the espèce juridique doctrine under the European Convention on Human Rights' (2005) *Public Law* 448; H King, 'Unravelling the extraterritorial riddle: an analysis of *R. (on the application of Hassan) v Secretary of State for Defence*' (2009) 7(3) *Journal of International Criminal Justice* 633; K Altıparmak, 'Bankovic: an obstacle to the application of the European Convention on Human Rights in Iraq?' (2004) 9(2) *Journal of Conflict and Security Law* 213.

³ European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, art 1.

primarily territorial,⁴ in exceptional circumstances jurisdiction can arise extra-territorially.⁵ Between the 1970s and early 2000s a number of cases, largely concerning the Turkish occupation of northern Cyprus, established that jurisdiction could arise outside the territory of a Contracting Party, both through the 'effective control of an area' by a Convention member State over the area of another sovereign State and through the actions of a Contracting Party's State agents which produce abroad.⁶ This note will illustrate that, although the Grand Chamber's judgment in *Al-Skeini* is an enhancement and clarification of the previous understanding of jurisdiction, it builds on the previous jurisprudence of the Strasbourg bodies rather than radically re-writing the understanding of jurisdiction under the Convention.

B. The Complaints

The six applicants in the *Al-Skeini* case were relatives of civilians killed by United Kingdom forces in south-eastern Iraq at the time of the UK/US led military occupation of the country. Each applicant alleged that their deceased relative had fallen within United Kingdom jurisdiction for the purposes of article 1 of the Convention at the time of their death. Consequently the applicants collectively argued that there had been a violation of article 2 as the UK authorities had failed to carry out an effective and independent investigation into the deaths of their deceased relatives.

The common nexus between each of the applicants was that their relatives had died in Al-Basrah at a time when the UK exercised military command over the region. Although the facts in each case are disputed it can generally be summarised that the first applicant's brother was killed by British forces when walking along a public street towards a family funeral; the second applicant's husband was shot and killed when soldiers raided a house they suspected to contain weapons used by insurgents; the third applicant's wife was killed when a series of bullets entered their home during a fire fight between UK forces and unknown gunmen; the fourth applicant's brother was killed after a confrontation with a soldier whilst driving a mini-bus near his home; the fifth applicant's son was killed when British soldiers arrested a group of Iraqi youths they suspected of looting and forced them into the waters of the Shatt Al-Arab and the sixth applicant's son was arrested at the hotel where he worked and taken to a British military base where he was beaten and died of asphyxiation at the hands of British military personnel.

The British government asserted that the relatives of the first five applicants were not within UK jurisdiction at the time of their deaths, while the sixth applicant's son was within UK jurisdiction, but only by way of an analogy between the UK military detention centre and an embassy.⁷

⁴ *Banković and Others v Belgium and Others*, (2007) 44 EHRR SE5, 86 (*Banković*).

⁵ *ibid.*

⁶ Effective control of an area: *Loizidou v Turkey (preliminary objections)* (1995) 20 EHRR 99; *Cyprus v Turkey* (1997) 23 EHRR 244. State agent authority: *Freda v Italy* (1980) 21 European Commission Decisions and Reports 250; *Sánchez Ramirez v France*, Application No 28780/95, Judgment of 24 June 1996; *Öcalan v Turkey* (2003) 37 EHRR 10.

⁷ *Al-Skeini* (n 1) para 118.

C. The Judgment

The Court found that from the removal of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom had assumed some of the powers normally exercised by a sovereign government. In particular the UK had exercised such authority and control over the individuals in question, specifically through its soldiers' engagement in security operations, as to create a jurisdictional link with the deceased relatives of the applicants.

Having passed this threshold test of locating a jurisdictional link between the victims and the UK, the Court went on to find that there had been a breach of the victims' relatives' article 2 right to an independent and effective investigation for the first, second, third, fourth and fifth applicants, while the Court accepted the government's objection that the sixth applicant could no longer be considered a victim as a full, public inquiry into his son's death was nearing completion.⁸

The contribution to the understanding of jurisdiction made by the *Al-Skeini* judgment can be analysed in two sections: the impact of the Court's exposition on general principles of jurisdiction with regard to the much maligned *Banković* decision, and the application of those general principles to the facts of the current case. Both of these issues will be analysed in isolation as they each provide a unique contribution to the discussion of jurisdiction.

D. Realigning General Principles of Jurisdiction

Naturally comparisons will be drawn between the decision in *Al-Skeini* and the Grand Chamber's last major outing on the question of jurisdiction in *Banković*.⁹ The latter case concerned the deaths of sixteen civilians at a Belgrade radio station as a result of a NATO bombing raid during the Kosovo War of the late 1990s. Decided three months after the 9/11 attacks on the United States, the Grand Chamber unanimously interpreted article 1 in a restrictive manner stating that:

The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.¹⁰

Amongst other reasons, as the bombing raid which gave rise to the applications in *Banković* took place before Serbia's accession to the Convention, the victims were said to be outside the Convention's 'legal space' and therefore outside the remit of their State obligations under the treaty.

The *Banković* judgment created uncertainty with regard to three issues. Primarily, ambiguity was derived from the Court's suggestion that the 'effective control of an area' exception to jurisdiction could only be applied to violations occurring within Convention 'legal space'. Previously there had been no discussion of such a restriction to the geographic application of this exception, and it had long been established that the 'State agent authority exception' could be applied outside Europe.¹¹ Secondly the judgment led to confusion concerning the relationship between article 56 (formerly

⁸ The results of this inquiry were published in full on 8 September 2011 and can be found at: <<http://www.bahamousainquiry.org/>>.

⁹ *Banković* (n 4).

¹⁰ *ibid* 91.

¹¹ *Freda v Italy* (1980) 21 European Commission Decisions and Reports 250; *Reinette v France*, Application No 14009/88, Judgment of 2 October 1989; *Sánchez Ramirez v France*, Application No 28780/95, Judgment of 24 June 1996.

article 63) and jurisdiction under article 1. The Commission had previously suggested that Respondent States could not use article 56 to construe jurisdiction under article 1 in a restrictive manner,¹² yet in *Banković* the Grand Chamber instigated such an interpretation. Finally the *Banković* decision advocated for an ‘all or nothing’ approach to rights protection under the Convention, refuting the argument that obligations could be tailored to suit a specific situation.

The unanimously restrictive interpretation of article 1 by the Grand Chamber in *Banković* led to a decade of perplexing case law in Strasbourg. This uncertainty unsurprisingly filtered to domestic courts, especially in the United Kingdom, at a time when they were being asked to consider whether the Human Rights Act 1998 had any application to Iraqi citizens injured or killed during the British military occupation. Frustrated by such confusion, Lord Rodger famously commented how ‘the judgments and decisions of the European court do not speak with one voice’.¹³ In the Grand Chamber *Al-Skeini* judgment it is evident that the Court attempted to find its voice and in doing so sought to clarify some of the principles established in *Banković*.

1. The Convention’s Legal Space

Pursuant to previous arguments made in similar cases involving northern Cyprus the applicants in *Banković* argued that the NATO forces had brought the victims of the aerial attack within their jurisdiction. They argued that they had done so through an adaptation of the effective control exception in that ‘the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised’.¹⁴ Thus they argued that the control exercised through aerial bombardment was enough to establish a jurisdictional link between the Respondent States and their victims. The Grand Chamber refuted this argument, stating that:

[T]he Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States.¹⁵

In doing so the Court suggested that the ‘effective control of an area’ exception to the territorial principle was limited to situations arising within the Convention’s legal space and could not be extended to the rest of the world. This finding implied that, under the Convention, individuals on the territory of Contracting Parties to the Convention had rights while those outside that legal space did not, even when a Contracting Party exercised effective control over the region they were in.

In *Al-Skeini* the confusion created by the *Banković* decision with regard to this exception was somewhat rectified when the Court, focusing on the ‘effective control of an area’ exception, stated that:

[T]he 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.¹⁶

¹² *Cyprus v Turkey* (1982) 4 EHRR 482 (Commission Decision) 586.

¹³ *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26, 67.

¹⁴ *Banković* (n 4) 83. ¹⁵ *ibid* 91. ¹⁶ *Al-Skeini* (n 1) para 142.

This statement suggests that the ‘effective control of an area’ exception is now applicable globally. In making this finding, the Court aligns both the ‘effective control of an area’ and ‘State agent authority’ exceptions in suggesting that both can be applied anywhere. This alignment is somewhat confusingly supported by the Court referring to four ‘State agent authority’ exception cases, perhaps to illustrate that the Convention has been applied outside Europe in previous extra-territorial cases.¹⁷ Nonetheless the finding is evidence that the Court is willing to find jurisdiction anywhere that a Contracting Party operates abroad, be it through the actions of their State agents or through the effective control of an area.

2. The Role of Article 56

Article 56 (previously article 63) of the Convention allows for a Contracting Party to extend the application of the Convention to any ‘territories for whose international relations it is responsible’.¹⁸ In *Banković* the Court had suggested that the Convention could only be applied outside Europe’s geographical borders by virtue of a declaration made in compliance with article 56.¹⁹ This implied that the geographic application of Convention rights was a State driven concept, based on their voluntary accession; rather than a rights driven approach which would, naturally, suppose an extension of rights protection to all relevant situations. This tension between treaty interpretation in public international law and the application of rights in human rights law will be addressed later in this note.

The Court’s interpretation of article 56 in *Banković* also appears restrictive as the Commission had previously prevented Turkey from using the provision (then article 63) as a tool to interpret article 1 in a restrictive manner with regard to northern Cyprus. In the First and Second applications concerning northern Cyprus the Commission stated that:

The Commission does not find that Art. 63 of the Convention, providing for the extension of the Convention to other than metropolitan territories of High Contracting Parties, can be interpreted as limiting the scope of the term “jurisdiction” in Art. 1 to such metropolitan territories.²⁰

On article 56, the Grand Chamber in *Al-Skeini* returned to this anti-restrictive interpretation stating that:

The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term “jurisdiction” in Article 1.²¹

It is worth noting that the Court restricts this exposition to the ‘present conditions’ existing in the *Al-Skeini* judgment, suggesting that it could return to the relationship in future cases. In practical terms however article 56 has not been utilised regularly in recent years to limit the interpretation of jurisdiction in article 1. Apart from its attempted use by Moldova, to restrict jurisdiction to areas of its own territory which it

¹⁷ *Öcalan v Turkey* (2005) 41 EHRR 45; *Issa and Others v Turkey* (2004) 41 EHRR 27; *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9; *Medvedyev and Others v France* (2010) 51 EHRR 39.

¹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, art 56: see discussion in *Al-Skeini* (n 1) para 140.

¹⁹ *Banković* (n 4) 91.

²⁰ *Cyprus v Turkey* (n 12) 586.

²¹ *Al-Skeini* (n 1) para 140.

was in actual control of,²² the major article 1 cases of recent years have not elicited such an argument from any of the Respondent States.²³ Moreover, in a separate application also against the United Kingdom, the Court has suggested that as a provision article 56 may be outdated:

The Court can only agree that the situation has changed considerably since the time that the Contracting Parties drafted the Convention, including former Article 63.²⁴

It is the spirit in which the Court approaches this relationship which is most noteworthy. In a diametrically opposite manner to *Banković* the Grand Chamber in *Al-Skeini* indicated that it is willing to hear representations on a progressive interpretation of jurisdiction, even on a topic where there are compelling arguments to restrictively interpret article 1. One such argument is Miltner's assertion that both article 56 and article 1 have policy connotations and that it is illogical for a Contracting Party to have the choice whether to voluntarily extend its obligations to a territory with which it has close political or constitutional ties through article 56, but quite involuntarily to be found to have obligations in territories with which it has much looser connections through article 1.²⁵ Assertions such as this partially explain why the Court was not willing to definitively state that article 56 could not be used to restrict the interpretation of article 1.

3. Tailored rights

A fundamental stumbling block for all applicants in an extra-territorial context who are asserting a jurisdictional link between violation and Contracting Party has been the question of which rights are applicable. Should the Party in question be held responsible for all substantive rights and obligations, including their optional protocols, or should there be a way of defining which rights apply in a given situation? In *Banković* the applicants had the task of defining what rights, if any, had applied at the time of the aerial bombardment. They took a novel approach to this question, arguing that:

[W]hen the respondent States strike a target outside their territory, they are not obliged to do the impossible (secure the full range of Convention rights) but rather are held accountable for those Convention rights within their control in the situation in question.²⁶

This assertion was made in relation to the 'effective control of an area' exception to the presumption of territoriality. At the time it was rebuffed by the Grand Chamber which stated that:

[T]he 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

²² *Ilaşcu and Others v Moldova and Russia*, Application No 48787/99 Admissibility (Unreported), (ECtHR Grand Chamber 4 July 2001) as noted in BL Miltner 2011. "Revisiting Extraterritoriality: the ECHR and its Lessons" ExpressO. Available at: <http://works.bepress.com/barbara_miltner/1> 38.

²³ *Issa and Others v Turkey* (n 17); *Öcalan v Turkey* (n 17); *Medvedyev and Others v France* (n 17); *Mansur Pad and Others v Turkey*, Application No 60167/00, Judgment of 28 June 2007.

²⁴ *Quark Fishing Ltd v the United Kingdom* (2007) 44 EHRR SE4, 73.

²⁵ Miltner (n 22).

²⁶ *Banković* (n 4) 83. Also see R Lawson, 'Life after Banković: on the extraterritorial application of the European Convention on Human Rights' in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

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.²⁷

In *Al-Skeini* the Court gave a more composed elucidation of the separation of rights. Returning to the ‘effective control of an area’ exception, the Court remained consistent with the *Banković* judgment in stating that in cases involving extra-territorial effective control of an area the controlling State is bound to secure ‘the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified’.²⁸ However, the Court also found that where a State exercised jurisdiction through the ‘State agent authority’ exception ‘the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are *relevant to the situation* of that individual. In this sense, therefore, the Convention rights can be “divided and tailored”’.²⁹

This was not the first example of the Grand Chamber dividing obligations. In *Ilaşcu* the Court found that although Moldova did not exercise full control or authority over one of its regions with separatist ambitions, it was still responsible for securing its positive obligations in the area.³⁰ This was decided even though Russia had concurrently been found to exercise jurisdiction over the region through the influence of its military forces. *Al-Skeini* enhances this division of rights in an altogether separate dimension, as it is not positive and negative obligations which are divided but the substantial provisions themselves. One would expect a plethora of academic discussion as to which rights are applicable in a given situation to follow this aspect of the judgment.

4. Conclusions as to realigning general principles of jurisdiction

The *Banković* decision caused enormous uncertainty and debate as to the interpretation of jurisdiction and the practical application of article 1.³¹ The *Al-Skeini* judgment has done much to clarify this confusion. The seemingly illogical debate surrounding the Convention legal space has been closed and now both the ‘effective control of an area’ and ‘State agent authority’ exceptions are applicable globally. The restrictive interpretation of article 1 in relation to article 56 has been rejected for a second time by the Court, although it appears to have left some leeway for further interpretation. The Court has also introduced the concept of dividing and tailoring substantive rights to specific situations. Such a finding legitimises some of the arguments made by the applicants in *Banković*, and thus can be considered a landmark moment in the Court’s jurisprudence.

²⁷ *Banković* (n 4) 90.

²⁸ *Al-Skeini* (n 1) para 138.

²⁹ *Al-Skeini* (n 1) para 137.

³⁰ *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46.

³¹ A Ruth and M Trilsch, ‘“Banković” v Belgium (Admissibility). App. No. 52207/99’ (2003) 97 AJIL 168; L Loucaides, ‘Determining the extra-territorial effect of the European Convention: facts, jurisprudence and the Bankovic case’ (2006) 4 European Human Rights Law Review 391; M Happold, ‘Bankovic v Belgium and the territorial scope of the European Convention on Human Rights’ (2003) 3 Human Rights Law Review 77; S Williams and S Shah, ‘Bankovic and others v Belgium and 16 other contracting states’ (2002) 6 European Human Rights Law Review 775.

E. The Court's Application of the Principles to the Facts of the Case

Despite spending a large portion of the judgment clarifying once confusing principles applied in the *Banković* case, the Court followed this analysis with its own perplexing attempt at applying the principles of jurisdiction to the facts at hand. In particular, it is unsettling that the Court discusses the currently recognised permissible exceptions to the territorial principle and from this, finds jurisdiction largely on the presence of a characteristic of public international law jurisdiction.

1. The Jurisdictional Link

The Court appeared to find jurisdiction on the basis that the UK had exercised public powers normally to be exercised by a sovereign government in Basrah during the time of the applicants' relatives' deaths, an aspect of the State agent authority exception with roots in public international law jurisdiction. However, the direct link to the deaths was the specific authority and control exercised by UK soldiers over individuals during the course of security operations.

a) State Agent Authority

Throughout its findings the Court makes reference to the existence of State agent authority. For instance, while discussing the general principles of jurisdiction the Court had contributed that 'the exercise of physical power and control over the person in question' was decisive to the finding of a jurisdictional link.³² The Court went on to find that 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.³³

Even the language used, 'authority and control', would suggest that this exception was the most relevant gateway to discussion. In particular, when considering the jurisdictional link between the UK and the third applicant's wife the Court proceeds with the State agent authority exception when stating 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'.³⁴ This is illuminating in that the third applicant's wife is addressed individually in the most detail. As her jurisdictional link is quite clearly found on the basis of the State agent authority exception and, as the circumstances related to her death are associated with the other five applications, it suggests that all of the applicant's relatives were found to be within the jurisdiction of the UK on the basis of this exception.

As the Grand Chamber in *Al-Skeini* had previously discussed, the Strasbourg bodies had regularly found jurisdiction on the basis of the State agent authority exception. For example, in *Freda, Sánchez Ramirez and Öcalan*, the Commission and Court had established a jurisdictional link between State fugitives and the forces of a Contracting Party who took them into custody outside European legal space. In these cases,

³² *Al-Skeini* (n 1) para 136.

³³ *ibid* para 149.

³⁴ *ibid* para 150.

however, the State agents exercised control through custody—a fact dissimilar to a number of the victims in the present case. Therefore the Court appears to extend its reach through the UK's exercise of public powers.

b) Public international law

In order to ascertain a jurisdictional link between the United Kingdom and the deceased relatives of the applicants the Court takes a public international law approach to jurisdiction by focusing on the public powers exercised by the UK. Prior to the finding of jurisdiction the Court's judgment includes evidence that the Coalition Provisional Authority (CPA) had the power to legislate,³⁵ that CPA South was under almost exclusive UK responsibility (see *Hess* where the UK was only one party in a four way agreement³⁶) and that the role of the UK forces in the Al-Basrah region was to support security operations and assist the civil administration.³⁷ The pre-judgment section also refers to the 'Aitken Report' which highlights how the UK army was the sole agent of law and order in the Al-Basrah region.³⁸ In doing so the Court judgment draws out the existence of both legislative and enforcement jurisdiction, two fundamental bases of jurisdiction under public international law.

Later, when coming to its conclusion as to the finding of jurisdiction, the Court discusses how:

[T]he 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.³⁹

The Court further takes into account how the United States and United Kingdom took temporary 'control of Iraqi institutions responsible for military and security matters'⁴⁰—thereby exercising further de facto enforcement jurisdiction. Furthermore, the judgment also refers to the CPA taking legislative steps to restore conditions of security and stability—thereby exercising further legislative jurisdiction.⁴¹

In making these observations, both prior to the judgment and in the actual finding of a jurisdictional link, the Court clearly relies upon the presence of public international law characteristics of jurisdiction. The difficulty with reliance upon such characteristics is that in the jurisprudence of the Court they exist only on the periphery of international human rights law characteristics of jurisdiction. Generally speaking, public international law is commonly understood to regulate the relationship between two or more sovereign States, whereas international human rights law regulates the relationship between a State and an individual. With the Convention being an international treaty of public international law, predominantly concerned with the relationship between State and individual, it lies on the border between the two disciplines.

The major problem with looking at the characteristics of public international law in finding jurisdiction is that the principles concerned have largely been derived from international criminal law and international economic regulations, which have sought to ascertain which country possesses jurisdiction over an alleged action, so as to arrest or try an individual. In this sense jurisdiction is a right attributable to a sovereign State. In

³⁵ *ibid* para 12.

³⁶ *Ilse Hess v United Kingdom* (1975) 2 European Commission Decisions and Reports 72.

³⁷ *Al-Skeini* (n 1) para 21. ³⁸ *ibid* para 22. ³⁹ *ibid* para 149. ⁴⁰ *ibid* para 144.

⁴¹ *ibid* para 145.

international human rights law terms, however, jurisdiction is less of a State's right and instead is discerned from a factual scenario which arises by virtue of circumstance. Human rights law jurisdiction does not deal with a State's rights, but with its responsibilities and obligations to which it has committed through accession to an international treaty.⁴²

2. Hindered Progression

Al-Skeini is a progressive judgment for the understanding of article 1 jurisdiction in the European Court of Human Rights. However it could be argued that the extent of the progression is strongly hindered by the finding being based on the exercise of public powers as opposed to the specific action of the UK forces. This distinction is best viewed when consideration is given to each of the applicants' relatives' circumstances.

It is remembered that the fifth and sixth applicant's relatives were within the control of the United Kingdom by either being in the physical custody of UK forces or by being arrested and detained at a United Kingdom facility. The relationship link between these individuals and the United Kingdom is not very different from the relationships in *Issa*, where the applicant's relatives were allegedly taken into the physical custody of the Turkish forces and executed;⁴³ *Öcalan*, where the applicant was arrested by Turkish officials at Nairobi airport;⁴⁴ *Medvedyev*, where the applicants were confined to their quarters by French forces on board a ship under French control⁴⁵ and *Al-Saadoon and Mufdi* where the applicants were arrested and (at one point) detained at a UK run facility in Iraq.⁴⁶ In all cases it is apparent that the presence of physical custody, control and power was central to establishing a jurisdictional link.

It is also remembered that the relatives of applicants one, two and four were all killed without arrest and outside the custody of UK forces. Applicant one's brother purportedly on his way to a funeral, applicant two's husband inside a house raided by British military personnel and applicant four's brother while driving a mini-bus. There are few cases in the Strasbourg bodies' jurisprudence where such a jurisdictional link can be assimilated to these applicants, *Pad* being the possible exception. In *Pad* the Court was willing to find a jurisdictional link in relation to the killings of seven Iranian men by Turkish soldiers. Although the facts are disputed the Court was willing to find jurisdiction where the applicants' relatives were killed by fire from Turkish helicopter gunships; however it could be argued the Court's willingness to find such a link arose from the Turkish government's prior acceptance that its forces had killed the men.⁴⁷ Nonetheless the relationships in *Pad* and for the relatives of the first, second and fourth applicants arguably existed on the basis of the State agent authority exception where the victims had not fallen into the full custody of the respondent State, but were directly

⁴² Similar observations are made in M Milanovic, 'From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties' (2008) 8(3) Human Rights Law Review 411–448, 417; M Gondek, 'Extraterritorial application of the European Convention on Human Rights: territorial focus in the age of globalization?' (2005) Netherlands IntlLRev 349–387, 364; V Mantouvalou, 'Extending Juridical Control in International Law: Human Rights Treaties and Extraterritoriality' (2005) 9(2) International Journal of Human Rights 147–163, 160.

⁴³ *Issa and Others v Turkey* (n 17).

⁴⁵ *Medvedyev and Others v France* (n 17).

⁴⁶ *Al-Saadoon and Mufdi v United Kingdom* (n 17).

⁴⁷ *Mansur Pad and Others v Turkey* (n 23) para 54.

⁴⁴ *Öcalan v Turkey* (n 17).

impacted by their actions all the same. In particular the victims in each of these scenarios were the intended targets of the State agents in question.

The circumstances of the death of the third applicant's wife in the *Al-Skeini* case however is unlike any the Court has considered before. On this occasion the victim was neither within the custody/physical control of the respondent State's forces nor the intended target. Instead she was an honest bystander, entirely unrelated to the conflict. Through finding a jurisdictional link between her death and United Kingdom forces the Court has expanded its jurisprudence to include the 'innocent bystander'.⁴⁸ This could suggest that the Court is willing not only to find a jurisdictional link between forces and intended targets of military action, but also between forces and those who are entirely unconnected to the action but are injured or killed nonetheless.

If this finding was solely on the basis of the control exercised by UK forces then the *Al-Skeini* judgment would be considered to be truly significant and groundbreaking. Instead, the decision appears to be based on a combination of both the military control exercised and the presence of public international law characteristics of jurisdiction; this finding is not entirely without merit but is certainly less progressive than the alternative. In his concurring opinion Judge Bonello stated that:

The undeniable fact is that this Court has never, before today, had to deal with any case in which the factual profiles were in any way similar to those of the present applications. This Court has, so far, had several occasions to determine complaints which raised issues of extra-territorial jurisdiction, but all of a markedly different nature.⁴⁹

As has already been illustrated, apart from the third applicant's wife, each of the other five applicants' factual profiles bear resemblance to at least one other case in the Strasbourg bodies' jurisprudence. The fact that Judge Bonello takes the opinion that all six of the applicants' factual profiles are new, is evidence that the Court's finding was not made solely on the basis of the control exercised by UK forces. This in turn illustrates that the presence of public international law characteristics are not merely auxiliary to the finding of jurisdiction, but decisive.

The impact of such a finding does not radically revolutionise the bases upon which jurisdiction can be found by the Court. Instead it creates what can be described as a 'sub-heading' under the State agent authority exception which extends that exception to cover a greater range of factual profiles. Where in *Freda*, *Sánchez Ramírez* and *Öcalan* the Strasbourg bodies' were willing to find a jurisdictional link on the basis of the actions of State agents abroad, the Court will still be willing to make such a finding. However when there is evidence of the exercise of public powers, the State agent authority exception will include a wider range of circumstances and in particular victims, such as the innocent bystander.

F. Conclusions

Since the 1960s the Strasbourg bodies have been asked to delineate the limits of where the European Convention on Human Rights applies. Occasionally decisions have been straightforward, but increasingly decisions are becoming more and more controversial.

⁴⁸ The term 'innocent bystander' is used only to denote the distant relationship between this particular victim and the fire fight which led to her death. It is not intended to define the other victims in the application.

⁴⁹ *Al-Skeini* (n 1) Judge Bonello para 29.

With the increased global interaction between Contracting Parties and foreign States it would be fair to suggest that the number of cases concerning article 1 of the Convention will continue to grow.⁵⁰

In one sense *Al-Skeini* has provided clarity to the jurisdiction question. Not only is it clearer in that the Convention is not bound to Convention legal space, but also that Contracting Parties cannot use article 56 as a way to restrictively interpret article 1. That being said the decision has added more confusion concerning the tailoring of rights. What rights are now protected and in which situation? Will it always be the Court's discretion or will guidelines be developed? Confusion also stems from the fact that the Court found jurisdiction on the basis of the public powers exercised by the UK rather than on the specific actions of its forces. Will the Court ever find extra-territorial jurisdiction solely on the basis that an individual is killed by a State agent?

As the questions continue to grow and the Court applies, overrules and adapts its previous jurisprudence one has to wonder whether at some point States should intervene and define the extent of their obligations collectively through a voluntary agreement, rather than watching the Court struggle to find its voice on an inherently policy based issue.

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⁵⁰ M Gondek, 'Extraterritorial application of the European Convention on Human Rights: territorial focus in the age of globalization?' (2005) 52 *Netherlands IntlLRev* 349.

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