

# **AL SKEINI: A FLAWED INTERPRETATION OF BANKOVIĆ**

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## **I. INTRODUCTION**

The U.K. Divisional Court handed down the decision in the case of *R (on the application of Al-Skeini et al.) v. Secretary of State for Defense* on December 14, 2004.<sup>1</sup> Here, the Court considered the claims of the relatives of six Iraqi civilians against the British government for death and injuries caused by British troops during the 2003 occupation of Iraq. The court had to determine (1) whether the deaths took place within the jurisdiction of the U.K. so as to fall within the scope of the European Convention for Human Rights (ECHR) and the Human Rights Act 1998 (HRA), and (2) if so, whether there should be an independent inquiry to investigate the violations of Articles 2 and 3 of the convention.<sup>2</sup>

The court decided these issues in relation to six test cases, five of which resulted from military operations in the field. These included the shooting of Iraqi civilians while they attended a funeral,<sup>3</sup> were at home,<sup>4</sup> drove home from work,<sup>5</sup> and delivered a box of “suggestions and complaints” to a judge’s home while on duty as a policeman.<sup>6</sup> The sixth was the case of Baha Mousa,

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<sup>1</sup> *Regina (on the application of Mazin Jumaa Gatteh Al Skeini) v. Sec’y of State for Def.*, [2004] EWHC (QB) 2911, [2005] 2 W.L.R. 1401 (Eng.) [hereinafter *Al Skeini*].

<sup>2</sup> *Id.* ¶ 6.

<sup>3</sup> *Id.* ¶¶ 56-59 (Hazim Jum’aa Gatteh Al-Skeini).

<sup>4</sup> *Id.* ¶¶ 60-67 (Muhammad Abdul Ridha Salim and Hannan Mahaibas Sadde Shmailawi).

<sup>5</sup> *Id.* ¶¶ 68-77 (Waleed Sayay Muzban); see also Amnesty Int’l, *Iraq: Killings of Civilians in Basra and al-Amara*, AI Index MDE 14/007/3004, May 11, 2004.

<sup>6</sup> *Al Skeini*, *supra* note 1, ¶¶ 77-81 (Raid Hadi Sabir Al Musawi).

who died in the custody of the British Army after suffering severe beatings.<sup>7</sup>

Though the Divisional Court ultimately found the first five cases to be outside the jurisdiction of the U.K. under the ECHR, it determined that the sixth case fell within that jurisdiction. The court based this distinction primarily on its interpretation of the 2001 judgment of *Banković et al. v. N.A.T.O*<sup>8</sup> by the European Court of Human Rights. The central premise of the *Al Skeini* decision was that “*Banković* is a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated.”<sup>9</sup> It is the contention of this Article that this interpretation is inherently flawed.

*Al Skeini* interprets *Banković* as the authority for two chief precepts: (1) the amalgamation of the four exceptions of extra-territorial jurisdiction into just two (those of effective control of a foreign territory and acts abroad with the consent, invitation, and acquiescence of the host country), and (2) the restriction of the scope of the first amalgamated exception (i.e., effective control) to the territory of the Council of Europe. Both of these assertions are challenged in this paper. It is conceded that the court’s definition of jurisdiction in *Banković* may appear to be phrased in more restrictive terms than had previously been expressed. This Article nevertheless contends that the only restriction imposed by *Banković* was the refinement of the criteria for the exercise of “effective control” to exclude aerial bombardment. Despite assertions to the contrary in *Al Skeini*, *Banković* has little other impact on the scope of contracting states’ responsibilities under the ECHR convention.

Thus, while one must concede that *Banković* is authoritative on the fact that Britain would not be responsible for its participation in the aerial bombardment of Iraq, *Banković* cannot be interpreted so as to relieve a contracting state from its obligation to

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<sup>7</sup> *Id.* ¶¶ 81-89; see also INT’L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION 10 (2004), available at <http://www.ndu.edu/library/docs/Red-CrossRptFeb04.pdf>.

<sup>8</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335.

<sup>9</sup> *Al Skeini*, *supra* note 1, ¶ 267.

secure convention rights in an area where it exercises effective control, even if this area is outside of the Council of Europe. This contention is vital, given that the U.K. has granted its forces immunity from any liability under Iraqi law, providing that British forces will instead operate under the exclusive jurisdiction of the U.K.<sup>10</sup>

Part II of this paper examines the circumstances of the *Banković* judgment and outlines its essential findings. In sum, this section charts the court's conclusions on the meaning of "jurisdiction" under Article 1 of the convention. Part III analyzes the acknowledged exceptions in which the extraterritorial jurisdiction of contracting states of the Council of Europe is involved. It then illustrates flaws in the divisional court's interpretation of these exceptions. Part IV proposes an adaptive, evolving interpretation of *Banković*. Essentially, this section argues against the Divisional Court's view that *Banković* confines extraterritorial jurisdiction under the "effective control" exception to the territory of the Council of Europe. Part V applies these arguments to the three distinct phases of the U.K.'s operations in Iraq. The Article concludes with the assertion that the U.K. was responsible for securing convention rights in all six test cases in *Al Skeini*.

## II. *BANKOVIĆ*: THE DECISION AND THE QUESTION OF JURISDICTION

A decade of human rights violations against ethnic Albanians in Kosovo escalated in 1998. Armed conflict erupted between members of the Kosovo Liberation Army, forces of the Federal Republic of Yugoslavia (FRY), Serbian police, and paramilitary groups.<sup>11</sup> In February and March of 1999, the international community exerted intense diplomatic pressure on the

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<sup>10</sup> Intervention Submission by The Redress Trust, § 4.14, *R v. Sec'y of State for Def.*, CO/2242/02 (Q.B.D. July 12, 2004), available at [http://redress.org/case\\_submissions.html](http://redress.org/case_submissions.html) (follow "Intervention Submission" hyperlink) (citing Coal. Provisional Auth., Status of the CPA, MNFI, Certain Missions and Personnel in Iraq, § 2.2, CPA/ORD/27 June 2004/17).

<sup>11</sup> See Amnesty Int'l, *Kosovo: A Decade of Unheeded Warnings*, AI Index EUR 70/39/99 (Vol. 1 Apr. 1999) & AI Index EUR 70/40/99 (Vol. 2 Apr. 2002).

FRY authorities, accompanying this pressure with threats of military action. The breakdown of negotiations in Rambouillet, France led to the outbreak of international armed conflict.<sup>12</sup>

On March 24, 1999, NATO announced the beginning of air strikes on territory of the FRY, with the aim of preventing a human rights catastrophe.<sup>13</sup> In one such strike, NATO aircraft intentionally bombed the central Belgrade headquarters and studios of *Radio Televisija Srbije* (RTS), the Serbian state television and radio station, killing at least sixteen civilians and wounding a further sixteen.<sup>14</sup>

One person injured in the RTS attack and the relatives of five of the people killed brought a case before the European Court of Human Rights (ECtHR), alleging breaches of Articles 2, 10, and 13 of the ECHR by NATO governments.<sup>15</sup> The Grand Chamber handed down the admissibility decision in *Banković et al. v. NATO*<sup>16</sup> in December 2001. The court ultimately concluded that the impugned acts did not engage the responsibility of the respondent states under the convention.<sup>17</sup>

The critical question in *Banković* addressed the scope of the extraterritorial jurisdiction of the contracting parties under the ECHR. Article 1 of the ECHR, entitled “Obligation to respect human rights,” reads as follows: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”<sup>18</sup> Essentially, the court had to decide if the NATO states, signatories to the convention, could be held responsible for securing (and, consequently, failing to secure) convention rights in the FRY.

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<sup>12</sup> See LORD ROBERTSON OF PORT ELLEN, KOSOVO ONE YEAR ON – ACHIEVEMENTS AND CHALLENGES 9 (2000), available at <http://www.nato.int/kosovo/repo2000/report-en.pdf>.

<sup>13</sup> Press Release, Dr. Javier Solana, Sec’y Gen., NATO, Press Statement by Dr. Javier Solana, NATO Secretary General following the Commencement of Air Operations (Mar. 24, 1999), <http://www.nato.int/docu/pr/1999/p99-041e.htm>.

<sup>14</sup> Amnesty Int’l, *NATO/Federal Republic of Yugoslavia “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, § 5.3, AI Index EUR 70/018/2000, June 2000.

<sup>15</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 345.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 360.

<sup>18</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, 224.

At the outset of the analysis of jurisdiction's significance in *Banković*, it is necessary to clarify the concepts of "jurisdiction" and "sovereignty," which are often used interchangeably and therefore cause confusion. Jurisdiction is not coextensive with sovereignty, but the two concepts are closely related. Sovereignty is "a form of legal personality,"<sup>19</sup> characterizing power and privileges.<sup>20</sup> Jurisdiction is an aspect of sovereignty and refers to specific judicial, legislative, and administrative competence.<sup>21</sup> It might be said that a state's "title to exercise jurisdiction rests in its sovereignty."<sup>22</sup>

Just as jurisdiction is not coextensive with sovereignty, neither are the terms "jurisdiction" and "territory" interchangeable. "Jurisdiction" refers to a particular sphere of legal competence, while "territory" refers to a geographical area. All acts and omissions occurring on the state's sovereign territory will fall under its jurisdiction. It does not follow, however, that a state then avoids responsibility for its extraterritorial actions. There is no neat division between territorial and extraterritorial jurisdiction. In short, simple territorial jurisdiction grants jurisdiction only over acts in which all elements of the act were committed within the territory of the state.<sup>23</sup> Article 1 does not contain any such explicit territorial limitation.<sup>24</sup> Following previous decisions,<sup>25</sup> the court has adopted the public international law definition of "jurisdiction." This approach may be called "qualified territorial jurisdiction."

Per *Banković*, the jurisdiction of the court is essentially territorial, "other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each

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<sup>19</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 106 (6th ed. 2003).

<sup>20</sup> *Id.* at 289.

<sup>21</sup> *Id.* at 297.

<sup>22</sup> 1 OPPENHEIM'S *INTERNATIONAL LAW* 457 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>23</sup> Geoff Gilbert, *Who has Jurisdiction for Cross-Frontier Financial Crimes?*, 2 *WEB J. CURRENT LEGAL ISSUES* (1995), <http://webjcli.ncl.ac.uk/articles2/gilb2.html> (last visited Jan. 24, 2006).

<sup>24</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1.

<sup>25</sup> *See, e.g.*, *Gentilhomme v. France*, ¶ 20 (Eur. Ct. H.R. May 14, 2002), <http://www.echr.coe.int/eng>; *Assanidzé v. Georgia*, ¶ 137 (Eur. Ct. H.R. Apr. 8, 2004), <http://www.echr.coe.int/eng>.

case.”<sup>26</sup> *Banković* is the first case in which extraterritorial jurisdiction (hereinafter “ETJ”) was held to be “exceptional.”<sup>27</sup> Previously, the court had simply concluded that “jurisdiction” was “not limited to the national territory of the High Contracting Parties.” This approach was adopted in *X v FRG*,<sup>28</sup> *Cyprus v Turkey*,<sup>29</sup> and several other cases.<sup>30</sup>

To support its decision, the *Banković* court cited several prominent jurists on the question of jurisdiction. Oppenheim, for example, notes that “[t]erritoriality is the primary basis for jurisdiction.”<sup>31</sup> Brownlie confirms the presumption that “jurisdiction is territorial.”<sup>32</sup> Byers reiterates that “jurisdiction appears always to be linked to territory in some way.”<sup>33</sup> These pronouncements relate to the civil and criminal jurisdiction of states under international law. Certain commentators have criticized the ECtHR for this analysis, arguing that it should have focused instead on the definition of jurisdiction under the specialized branch of the law on state responsibility, from which the Convention rights are derived.<sup>34</sup> It is true that the International Law

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<sup>26</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 352.

<sup>27</sup> But see, for example, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 33 (1989), where the Court noted “Article 1 . . . sets a limit, notably territorial, on the reach of the Convention.”

<sup>28</sup> *X v. Federal Republic of Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 158, 168 (Eur. Comm’n on H.R.).

<sup>29</sup> *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125, 136 (1975).

<sup>30</sup> See *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72, 73 (1975); *X & Y v. Switzerland*, App. Nos. 7289/75 & 7348/76, 9 Eur. Comm’n H.R. Dec. & Rep. 57, 71 (1977); *Stocké v. Germany*, 199 Eur. Ct. H.R. (ser. A) at 24 (1991); *Drozdz v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23 (1995).

<sup>31</sup> OPPENHEIM’S INTERNATIONAL LAW, *supra* note 22, at 458.

<sup>32</sup> BROWNLIE, *supra* note 19, at 297.

<sup>33</sup> MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 53 (1999).

<sup>34</sup> Kerem Altıparmak, *Banković: An Obstacle to the Application of the European Convention for Human Rights in Iraq?*, 9 J. CONFLICT & SECURITY L. 213, 223-24 (2004); see also Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 128 (2003) (noting that the interpretation is “a very narrow view of jurisdiction that does not appear consistent with most international law doctrine”).

Commission (ILC) Articles on State Responsibility<sup>35</sup> “set no territorial limitation on the attribution to the states of the acts of its organs.”<sup>36</sup> In the context of the ECHR, however, state responsibility arises “if conduct (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State.”<sup>37</sup> This is, arguably, encompassed in the court’s assertion that ETJ is exceptional and requires special justification.<sup>38</sup>

In sum, *Banković* defined “jurisdiction” under Article 1 of the convention as a primarily territorial concept. The ECtHR nevertheless recognized that, in certain exceptional circumstances, contracting states may be held responsible for their extraterritorial acts. The exceptions recognized in the decision fully incorporate the established jurisprudence of the court. In this context, *Banković* is most certainly not a “watershed” decision, as claimed in *Al Skeini*.<sup>39</sup> The exceptions for which ETJ is allowed will now be examined.

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<sup>35</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/56/49 (Dec. 12, 2001). These Articles were developed by successive well qualified and experienced Special Rapporteurs, including Professor Roberto Ago and Professor Crawford. Their importance to “the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations” is outlined in G.A. Res. 56/83, pmb., U.N. Doc. A/RES/56/83 (Jan. 28, 2002); see also *Report of the International Law Commission*, U.N. GAOR Supp. (No. 10) ch. IV, U.N. Doc. A/56/10; James Crawford et al., *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT’L L. 963 (2002).

<sup>36</sup> *Report of the International Law Commission to the General Assembly*, 30 U.N. GAOR Supp. (No. 10) at 34, U.N. Doc. A/10010/Rev.1 (1975), reprinted in [1975] 2 Y.B. Int’l L. Comm’n 83, U.N. Doc. A/CN.4/SER.A/1975/Add.1.

<sup>37</sup> Eur. Parl. Ass., *Areas Where the European Convention on Human Rights Cannot be Implemented*, ¶ 17, Doc. No. 9730 (2003).

<sup>38</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 354.

<sup>39</sup> *Al Skeini*, *supra* note 1, ¶ 268.

### III. BANKOVIĆ: THE EXCEPTIONS

In *Banković*, the Court detailed the instances in which extra-territorial jurisdiction had previously been recognized, as enumerated in *Loizidou*.<sup>40</sup> Thus, ETJ will be involved in each of the following exceptional circumstances:

[W]here the extradition or expulsion of a person by a contracting state may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and or 6),<sup>41</sup> where acts of state authorities produced effects or were performed outside their own territory,<sup>42</sup> where as a consequence of military action (lawful or unlawful) the state exercised effective control of an area outside its national territory, whether it was exercised directly, through the respondent state's armed forces, or through a subordinate local administration,<sup>43</sup> and in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state.<sup>44</sup>

These exceptions distinguish jurisdiction as entitlement, a concept based on sovereignty and title, from jurisdiction as actual control, which depends on authority.<sup>45</sup> Thus, the ECtHR recognizes the general concept of jurisdiction, founded on sovereignty and a state's territorial limits, as the primary rationale underlying Article 1, but accepts that there may be exceptions based on

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<sup>40</sup> *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23-24 (1995).

<sup>41</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 354; *e.g.*, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35-36 (1989); *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at 28 (1991); *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) at 34 (1991); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 96.

<sup>42</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 354-55; *see also Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992).

<sup>43</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 355; *see also Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 24.

<sup>44</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 356.

<sup>45</sup> Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529 *passim* (2003).



physical control of a territory, rather than on sovereignty or legitimacy of title.<sup>46</sup> In sum, it appears that jurisdiction may be established both territorially and personally.

The court subsequently summarized the instances in which ETJ may be engaged as follows:

[W]hen the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.<sup>47</sup>

This summary, cited in *Al Skeini* as the authoritative *Banković* principle,<sup>48</sup> will be referred to as the “*Al Skeini ETJ*” test.

Close examination demonstrates that the analysis fails to fully include all four recognized exceptions as detailed in the decision. In fact, the summary ignores both the first and second exceptions. In this context, particular attention should be paid to the court’s enumeration of the included exceptions. The *Banković* court simply paraphrased the *Loizidou v. Turkey*<sup>49</sup> decision’s treatment of the recognized exceptions. *Loizidou* had established that, “in addition” to other established bases for ETJ, expressly the first and second exceptions, the responsibility of

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<sup>46</sup> See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 3, 54 (Jan. 26) [hereinafter I.C.J. Advisory Opinion on Namibia] (“Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.”).

<sup>47</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 355.

<sup>48</sup> *Al Skeini*, *supra* note 1, ¶ 123.

<sup>49</sup> *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216; *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

contracting parties “may also arise” in the case of the third, “effective control,” exception.<sup>50</sup> The *Banković* court found the fourth exception to have “additionally” been recognized.<sup>51</sup>

These words expressly affirm that each exception is distinct and operates independently of the others. The *Al Skeini ETJ* test is not, therefore, determinative of the extent of extraterritorial jurisdiction under the ECHR. The Divisional Court in *Al Skeini* appears, nevertheless, to have accepted this test as authoritative of the scope of the recognized exceptions.<sup>52</sup> Therefore, the Divisional Court’s conclusions are based on a flawed understanding of the ETJ exceptions.

In sum, the *Al Skeini ETJ* test is inconclusive as it ignores the first and second exceptions articulated in *Banković*, and considers only the third and fourth exceptions. The second, third, and fourth exceptions have in no way been fused. They exist independently of one another. The *Al Skeini* decision must not be interpreted as a merger of the second and third exceptions, or, indeed, of the second and fourth exceptions.

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<sup>50</sup> In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory (see the *Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 29, para. 91).

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

*Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 23-24 (1995).

<sup>51</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 356 (“Additionally, the Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.”).

<sup>52</sup> *Al Skeini*, *supra* note 1, ¶ 123.

## A. PERSONAL JURISDICTION: THE SECOND EXCEPTION

Analysis of the jurisprudence of the European Court with regard to the exceptions is instructive. The first exception, regarding extradition, is of no consequence in this particular context. Under the second exception, “jurisdiction” may cover the acts of all persons who act on behalf of the state, and whose acts produce effects or are performed outside of the territory of that state. This principle reflects the contemporary international law theory that jurisdiction arises in any situation in which there exists “a substantial and genuine connection between the subject-matter of the jurisdiction . . . and the territorial base.”<sup>53</sup>

*Drozd & Janousek v. France & Spain* serves as a clear illustration of this exception’s components.<sup>54</sup> In *Drozd*, the applicant alleged that the acts of French and Spanish judges working in Andorran Courts were imputable to France and Spain.<sup>55</sup> As Andorra is an autonomous entity, it is clear that not all acts perpetrated in Andorra could be imputed to France and Spain. In *Banković* terms, France and Spain did not exercise “effective control” over the territory of Andorra and its inhabitants.

The ECtHR was, nevertheless, willing to involve ETJ not on the basis of the overall control of the territory and its inhabitants but rather the limited authority exercised by the individual judges. Ultimately, the court found that the judges’ actions were not imputable to France or Spain, because they were working in a private capacity in Andorra and not in their capacity as French or Spanish judges.<sup>56</sup> Crucially, however, it suggested that if the judges had been under French or Spanish supervision, or if the

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<sup>53</sup> BROWNLEE, *supra* note 19, at 297; *see also* OPPENHEIM’S INTERNATIONAL LAW, *supra* note 22, at 457-58 (noting the “principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify . . . regulating the matter.”); Françoise J. Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 119, 122 (1992) (noting that “[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place.”).

<sup>54</sup> *Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992).

<sup>55</sup> *Id.* at 25-26.

<sup>56</sup> *Id.* at 31.

French or Spanish authorities attempted to interfere with the applicants' trial, the judges' actions could be imputed to those states, and jurisdiction engaged.<sup>57</sup>

The Divisional Court in *Al Skeini* acknowledged the "personal jurisdiction" exception.<sup>58</sup> Nevertheless, the Divisional Court found that "the [European] Commission's earlier broad personal jurisdiction approach in *Cyprus v. Turkey* in 1975 and *Chrysostomos v. Turkey* in 1991 has been overtaken and replaced by the special exception of the doctrine of 'effective control of an area,' which now becomes [. . .] the dominant reasoning."<sup>59</sup> The court felt that personal jurisdiction relates to "an earlier period of the jurisprudence [of the court,] which has subsequently made way for a more limited interpretation of [A]rticle 1 jurisdiction."<sup>60</sup> It also seemed to find, somewhat inconsistently, that personal jurisdiction now exists as a subset of the fourth exception.<sup>61</sup>

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<sup>57</sup> Those courts, in particular the Tribunal de Corts, exercise their functions in an autonomous manner; their judgments are not subject to supervision by the authorities of France or Spain.

Moreover, there is nothing in the case-file which suggests that the French or Spanish authorities attempted to interfere with the applicants' trial.

*Id.*

<sup>58</sup> Mr Rabinder Singh QC submits that one or other or both of two principal exceptions are relevant. The first is that there is jurisdiction where a state exercises control over persons or property outside its own territory. He calls that "personal jurisdiction." . . . The second exception is that there is jurisdiction where a state has "effective control of an area" outside its own territory. . . . He submits that the overlapping principle is that of control, whether of persons or of land, and that these two exceptions are dual strands within what is ultimately a single principle.

*Al Skeini*, *supra* note 1, ¶ 110.

<sup>59</sup> *Id.* ¶ 258.

<sup>60</sup> *Id.* ¶ 265.

<sup>61</sup> It also followed from the essentially territorial aspect of article 1 jurisdiction, that the broadest statements in the earlier cases could not survive as a driving force for the extension of article 1 jurisdiction to anywhere in the world where organs of state parties might exercise authority. In the circumstances the earlier cases were rationalised in *Bankovic's* case more narrowly as exceptional examples supported by international law and treaty provisions, such as "the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of the state."

*Id.* ¶ 260 (quoting *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 356).

These assertions are clearly at odds with the ECtHR's acknowledgement of the independence of the four distinct exceptions as stated in *Banković*.<sup>62</sup> The subsequent case law of the court confirms that each of the exceptions exists independently. It is therefore erroneous to suggest, as did the *Al Skeini* court, that personal jurisdiction has been condensed into the "effective control" exception. Nor is it possible to suggest that the second exception exists merely as a subset of the fourth exception.

The "personal jurisdiction" exception has been employed in various forms in *X v. FRG*,<sup>63</sup> *Cyprus v. Turkey*,<sup>64</sup> and other cases.<sup>65</sup> This exception centers neither on effective overall control of a territory, nor on "consent, invitation and acquiescence,"<sup>66</sup> but on the effect of the exercise of state authority abroad.

The Divisional Court in *Al Skeini* felt that the personal jurisdiction exception, which was created and has predominantly been applied at the admissibility stage, merely reflects the fact that neither the European Commission on Human Rights (EComHR) nor the ECtHR was concerned at that point with defining the scope of ETJ. The Divisional Court found that the broad formulation of the test in these cases (using the words "may" and "can") suggested that the convention organs were simply inclined to indicate that, at the admissibility stage, ETJ *could* be established, but that its limits were unclear.<sup>67</sup> This reflected the fact that Article 1 jurisdiction is not exclusively confined to territorial jurisdiction, but that personal jurisdiction depends on the facts.<sup>68</sup>

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<sup>62</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 354-56.

<sup>63</sup> *X v. Federal Republic of Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 158 (Eur. Comm'n on H.R.).

<sup>64</sup> *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm'n H.R. Dec. & Rep. 125 (1975).

<sup>65</sup> *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975); *X & Y v. Switz.*, App. Nos. 7289/75 & 7348/76, 9 Eur. Comm'n H.R. Dec. & Rep. 57, 71 (1977); *Mrs. W. v. Ir.*, App. No. 9360/81, 32 Eur. Comm'n H.R. Dec. & Rep. 211, 215 (1983); *Stocké v. Germany*, 199 Eur. Ct. H.R. (ser. A) at 24 (1991); *Drozdz v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23-24 (1995).

<sup>66</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 355.

<sup>67</sup> *Al Skeini*, *supra* note 1, ¶ 165.

<sup>68</sup> *Id.* ¶ 179.

This assertion may be countered by closer analysis of the cases in which “personal jurisdiction” has been acknowledged. For example, the first of the *Cyprus v. Turkey* cases held that “authorized agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property ‘within the jurisdiction’ of that State, to the extent that they exercise authority over such persons.”<sup>69</sup>

This principle, which was reiterated verbatim in *X v. U.K.*,<sup>70</sup> illustrates the accepted concept of “personal jurisdiction.” Unlike *Al Skeini*, it is not framed in hypothetical terms but is clear and specific. It does not rest on the consent, acquiescence, or invitation of the state. Furthermore, while it expressly includes “diplomatic and consular agents and armed forces,” the list is by no means exhaustive. Thus, the second “personal jurisdiction” exception is distinct from the fourth “diplomatic and consular agents” exception.

It was, once again, definitively expressed in *Drozdz* that “the term ‘jurisdiction’ is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.”<sup>71</sup> Such a clear elucidation of the personal jurisdiction exception was also expressed in *Chrysostomos & Ors v Turkey*, which stated that “the application of the Convention extends beyond the national frontiers of the High Contracting Parties and includes acts of its organs abroad.”<sup>72</sup> These formulations are far from speculative, and they can only be seen as expressing a

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<sup>69</sup> *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125, 136 (1975), (cited verbatim in *Chrysostomos v. Turkey*, App. Nos. 15299/89, 15300/89 and 15318/89, 68 Eur. Comm’n H.R. Dec. & Rep. 216, 245 (1991)).

<sup>70</sup> *X v. United Kingdom*, 12 Eur. Comm’n H.R. Dec. & Rep. 73, 74 (1977).

<sup>71</sup> *Drozdz v. France*, 240 Eur. Ct. H.R. (ser. A) at 29 (1992). See further the Commission’s decisions on the admissibility of *X v. Federal Republic of Germany*, App. No. 1611/62, 1965 Y.B. Eur. Conv. on H.R. 158 (Eur. Comm’n on H.R.); *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72 (1975); *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125 (1975); *X & Y v. Switz.*, App. Nos. 7289/75 & 7348/76, 9 Eur. Comm’n H.R. Dec. & Rep. 57 (1977); *Mrs. W. v. U. K.*, App. No. 9348/81, 32 Eur. Comm’n H.R. Dec. & Rep. 190 (1983).

<sup>72</sup> *Chrysostomos*, 68 Eur. Comm’n H.R. Dec. & Rep. at 244.

concrete principle. Accordingly, it cannot conclusively be said that the cases involving the (albeit broad) “personal jurisdiction” exception were merely indicative of the possibility of ETJ. On the contrary, this exception is concrete and tangible.

The post-*Banković* case of *Issa v. Turkey*<sup>73</sup> applies the personal jurisdiction test as a distinct exception. In that case, the applicants alleged that their husbands had been arrested and killed by Turkish military forces operating in Iraq. Although it had already established that Turkish troops were not in effective control of the territory of Northern Iraq,<sup>74</sup> the court was willing to hold Turkey responsible for the killings if it were proved that “at the relevant time, Turkish troops conducted operations in the area where the killings took place.”<sup>75</sup> Effective control of the territory and its inhabitants was not established, and consent, invitation, and acquiescence were not discussed. In sum, the *Banković* ETJ test was not fulfilled. The court was nevertheless willing to recognize Turkish jurisdiction. This decision clearly illustrates that personal jurisdiction, though not included in the *Banković* ETJ test, is a valid and autonomous exception to the primarily territorial jurisdiction of the contracting states of the Council of Europe.

Although the issue of jurisdiction was not raised in the admissibility decision of *Issa*, the court allowed the respondent government to raise a jurisdiction objection at the merits stage.<sup>76</sup> This may suggest that the ECtHR was conscious that claims arising out of the 2003 invasion of Iraq might, in due course, need consideration. The fact that the ECtHR examined the question of jurisdiction when it could have avoided the issue lends authority to the argument that personal jurisdiction constitutes a valid exception.

The court in the *Al Skeini* judgment found *Issa* inconsistent with their interpretation of *Banković*, and dismissed it on the basis that it did not “follow any ‘clear and constant jurisprudence of

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<sup>73</sup> *Issa v. Turkey* (Eur. Ct. H.R. Mar. 30, 2005), <http://echr.coe.int/eng> [hereinafter *Issa*].

<sup>74</sup> *Id.* ¶ 75.

<sup>75</sup> *Id.* ¶ 76.

<sup>76</sup> *Id.* ¶ 52.

the Strasbourg Court’<sup>77</sup> and, therefore, represented “an improbable interpretation of *Banković*.”<sup>78</sup> The above section demonstrates that the basis for this conclusion is a flawed interpretation of *Banković* and, as a result, is not convincing on the significance of *Issa*. The ICJ has confirmed that the interpretation of instruments “cannot remain unaffected by the subsequent developments of law.”<sup>79</sup> Consequently, the Court of Appeal must reconsider *Issa* in its assessment of the U.K.’s responsibilities under the ECHR in Iraq when *Al Skeini* comes before it.

## B. EFFECTIVE CONTROL: THE THIRD EXCEPTION

Part IV will demonstrate that the rationale used by the Divisional Court, upon which it deemed the “effective control” exception to be inapplicable to the facts in *Al Skeini*, is fallacious. Given that this issue will now come before the Court of Appeal, it is essential to first examine the circumstances in which “effective control” may be secured.

The “effective control” rationale was first stated in *Loizidou v. Turkey*.<sup>80</sup> This case concerned Turkey’s jurisdiction over Northern Cyprus. The ECtHR rejected Turkey’s argument that the “Turkish Republic of Northern Cyprus” (TRNC) was an autonomous entity,<sup>81</sup> and it found Turkey responsible for securing Convention rights in Northern Cyprus by virtue of the control that the Turkish government exercised over the territory. The Court thereby created the third exception, namely that the responsibility of a contracting party may “arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory.”<sup>82</sup>

Effective control is determined “from the fact of such control whether it be exercised directly, through its armed forces, or

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<sup>77</sup> *Al Skeini*, *supra* note 1, ¶ 265.

<sup>78</sup> *Id.* ¶ 262.

<sup>79</sup> I.C.J. Advisory Opinion on Namibia, *supra* note 46, at 31.

<sup>80</sup> *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2234 (1997); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) 24 (1995).

<sup>81</sup> *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 21-22.

<sup>82</sup> *Id.* at 24.



through a subordinate local administration.”<sup>83</sup> Hence, the existence of effective control is factually established on a case-by-case basis. The court in *Loizidou* found it unnecessary to examine whether Turkey exercised “detailed control” over the policies and actions of the authorities, as the fact of this control was “obvious” from the large number of Turkish troops (30,000) engaged in active territory in Northern Cyprus.<sup>84</sup>

The court in *Cyprus v. Turkey*<sup>85</sup> developed the doctrine a bit further. There, the court found that the responsibility of the occupying power “must also be engaged by virtue of the acts of the local administration which survives by virtue of [the controlling state’s] military and other support.”<sup>86</sup> In sum, contracting states can be responsible both for the acts of their own authorities and for the acts of any administration that subsists through their support.

The facts in the *Banković* case differed considerably. In contrast to the situation in Northern Cyprus, NATO did not deploy ground forces in Kosovo. In *Banković*, the British government submitted that several rights, such as restrictions on freedom of assembly and association, could not be breached by air strikes.<sup>87</sup> The ECtHR accepted this argument, holding that aerial bombardment did not secure effective control of the territory, which remained under full Serbian control on the ground.<sup>88</sup> Thus, aerial bombardment of an area will not come within the third exception.

Several commentators have argued that the ECtHR should reconsider the *Banković* restriction,<sup>89</sup> instead interpreting the convention as a living, breathing instrument<sup>90</sup> and making its

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

<sup>84</sup> *Loizidou*, 1996-VI Eur. Ct. H.R. at 2235 (1997).

<sup>85</sup> *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1.

<sup>86</sup> *Id.* at 25.

<sup>87</sup> *Cf. Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 346-48.

<sup>88</sup> *Cf. id.* at 356-58.

<sup>89</sup> Shelton, *supra* note 34, at 126.

<sup>90</sup> *See, e.g., Matthews v. United Kingdom*, 1999-I Eur. Ct. H.R. 251, 267; *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 26; *V. v. U.K.*, 1999-IX Eur. Ct. H.R. 111, 143.

safeguards “practical and effective.”<sup>91</sup> In the context of these complementary methods of interpretation, analysis of the concept of “effective control” should encompass consideration of tendencies prevalent in modern international society.<sup>92</sup> Under this premise, the *Banković* applicants’ argument may have merited greater attention. That party argued that the “great accuracy and impact” achieved by modern weapons without the need for ground troops makes reliance on the difference between air attacks and ground troops “unrealistic.”<sup>93</sup> Indeed, from March 24, 1999 to June 10, 1999, NATO aircraft conducted over 38,000 combat sorties, including 10,484 strike sorties.<sup>94</sup> Some five hundred civilians are known to have died in ninety separate incidents over seventy-eight days of bombing.<sup>95</sup> Twenty-four targets were hit in the FRY on the night of the RTS strike, including three in Belgrade.<sup>96</sup> Given the accuracy of these air strikes, a certain degree of control must have been achieved. Nevertheless, it must be accepted for purposes of argument that the ECtHR did not find that NATO secured effective control of the territory. On this basis, it appears that ground forces are necessary to secure effective control of a region, yet the “effective control” exception does not rest on this fact alone.

Recent cases of the ECtHR indicate that the number of ground forces deployed does not verify the “effectiveness” of the

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<sup>91</sup> *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 16 (1980); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34 (1989); *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 27; see also *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 12 (1980).

<sup>92</sup> See, e.g., *Altiparmak*, *supra* note 34, at 227; see also Michael Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT’L L. 481, 508 (2003) (quoting CARL VON CLAUSWITZ, *ON WAR* 101 (Michael Howard & Peter Paret trans. & eds., 1976) to the effect that war is in the realm of uncertainty and as such notwithstanding the technological advances of modern warfare, the uncertainties of war will continue to produce “unintended consequences”).

<sup>93</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 350.

<sup>94</sup> Lord Robertson, Sec’y Gen. of NATO, *Kosovo One Year On: Achievement and Challenge* at 11, 13-14 (Mar. 21, 2000), available at <http://www.nato.int/kosovo/repo2000/report-en.pdf>.

<sup>95</sup> See HUMAN RIGHTS WATCH, *CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN* (Feb. 7, 2000), available at <http://www.hrw.org/reports/pdfs/g/general/natbm002.pdf>; see also Federal Rep. of Yugoslavia, Federal Ministry for Foreign Affairs, *Economic Survey* (Nov. 10, 1999) (noting that “more than 1800 [were] killed and 5,000 wounded”).

<sup>96</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 341.

control secured. That the number of ground troops involved is not determinative of control became apparent in the recent case of *Ilașcu & Ors v. Russia and Moldova*.<sup>97</sup> This case concerned the ECHR obligations of Moldova and Russia in the Moldovan Republic of Transdnistria (“MRT”). Here, Moldova compared Russian influence over the MRT to Turkish influence over the TRNC.<sup>98</sup> The situation in the MRT was, however, distinguishable from the situation in Northern Cyprus as Russia had only two thousand “peacekeeping” soldiers stationed in the MRT.<sup>99</sup> Moldova had consented to the presence of these troops, and Russia had never occupied the territory.<sup>100</sup>

The *Ilașcu* court found, however, that the Russian Federation’s responsibility for the unlawful acts of Transdnistrian separatists was engaged by virtue of the continued economic, military, and political support it gave to the MRT régime.<sup>101</sup> The court noted the persistence of the military importance and dissuasive influence of the Russian army in the MRT, as well as its military and financial support of the Transdnistrian separatist forces in the armed conflict of 1991-92 between Moldova and the MRT.<sup>102</sup>

Under this rationale, the extent of ground forces’ control of an area is not definitive. It is, rather, the degree to which the area is dependent on the contracting state for its subsistence that determines the effectiveness of the control. The case of *Cyprus v. Turkey* also subscribes to this rationale.<sup>103</sup> Here, Turkey was found to be responsible for the acts of the TRNC by virtue of the dependency of the TRNC on Turkey for its continued existence. Thus, it was the military *and* other support, not the number of troops stationed in the area that established the effectiveness of Turkey’s control.<sup>104</sup>

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<sup>97</sup> *Ilașcu v. Moldova* (Eur. Ct. H.R. July 8, 2004), <http://echr.coe.intl/eng> [hereinafter *Ilașcu*].

<sup>98</sup> *Id.* ¶ 302.

<sup>99</sup> *Id.* ¶ 355.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ¶ 382.

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

<sup>103</sup> *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R.

<sup>104</sup> *Id.* at 25.

The *Issa v. Turkey* decision further corroborated the understanding of this doctrine. There, the deployment of more than 35,000 ground troops in Iraq backed up by tanks, helicopters, and F-16 fighter aircraft did not secure effective control of the region.<sup>105</sup> The number of troops deployed was no less than the number stationed in Northern Cyprus, but the requisite dependence or support relationship was lacking. This reinforces the view that the quantity of troops deployed does not determine the effectiveness of the control thereby secured.

The *Issa* court distinguished the Cyprus cases on the basis that Turkish troops were present in Northern Cyprus longer than the six weeks they spent in Iraq, and were stationed throughout the entire territory of Northern Cyprus.<sup>106</sup> Furthermore, the area was constantly patrolled and had checkpoints on all the main lines of communication between the northern and southern parts of the island.<sup>107</sup> The ECtHR appears to have accepted Turkey's submission that "the mere presence of Turkish troops for a limited time and a limited purpose in Iraq was not synonymous with jurisdiction."<sup>108</sup>

It appears that effective control may therefore require a "structured relationship normally existing over a period of time."<sup>109</sup> The extent of ground forces deployed does not determine the "effectiveness" of the control secured. This definition of effective control will be applied to the situation of the U.K. in Iraq in Part V.

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<sup>105</sup> *Turkey: Anti-Kurdish Offensive*, Keesing's Record of World Events, News Digest for March 1995, cited in *Issa*, *supra* note 73, ¶ 63. A similar strategy of cooperation between the sovereign states of France and the Sudan in *Sánchez Ramirez v. France*, App. No. 28780/95, 86-A Eur. Comm'n H.R. Dec. & Rep. 155 (1996) was also found not to violate Article 5 of the Convention, as the extraterritorial acts of the respondent state did not interfere with the sovereignty of the cooperating state. Article 5 aims to protect individuals from arbitrariness. See also *Freda v. Italy*, App. No. 8916/80, 21 Eur. Comm'n H.R. Dec. & Rep. 250 (1981); *Altmann v. France*, App. No. 10689/83, 35 Eur. Comm'n H.R. Dec. & Rep. 225 (1984); *Reinette v. France*, App. No. 14009/88, 63 Eur. Comm'n H.R. Dec. & Rep. 189 (1989).

<sup>106</sup> *Issa*, *supra* note 73, ¶ 75.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 58.

<sup>109</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 346 (discussing submission of the British government).

C. CONSENT, INVITATION, OR ACQUIESCENCE:  
THE FOURTH EXCEPTION

Relying on its incomplete formulation of the ETJ exceptions (i.e., the *Al Skeini ETJ* test), the Divisional Court held in *Al Skeini* that the second “personal jurisdiction” exception no longer exists as a “broad doctrine,”<sup>110</sup> but rather as a “narrowly limited exception exemplified by embassies, consulates, vessels and aircraft.”<sup>111</sup> This curious merger of the second and fourth exceptions could, the court felt, also apply to a prison, by virtue of the *Hess v. U.K.* decision.<sup>112</sup> Under this novel precept, the U.K. was held responsible for the death of Baha Mousa, who died in detention.<sup>113</sup>

It has already been shown that under the second exception, acts of states that produce effects outside their own territory may fall within the scope of Article 1.<sup>114</sup> Under the fourth recognized exception, the activities of a state’s diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state will engage the responsibility of the state.<sup>115</sup> Contrary to the *Al Skeini* assertions, this fourth exception operates autonomously of the second exception, which focuses on the exercise of control and authority rather than on “consent, invitation or acquiescence.”<sup>116</sup>

The second and fourth exceptions cannot be harmoniously combined. They are incompatible primarily because the second exception centres on the establishment of jurisdiction on a personal basis, focusing on control and authority, while the fourth is centered on the territorial basis of jurisdiction, focused on sovereignty and entitlement. These two bases for jurisdiction are not predisposed to form one combined exception.

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<sup>110</sup> *Al Skeini*, *supra* note 1, ¶ 273.

<sup>111</sup> *Id.* ¶ 287.

<sup>112</sup> *Id.* This was based on *Hess v. UK*, App. No. 6231/73, 2 Eur. Comm’n H.R. Dec. & Rep. 72, 73-74 (1975).

<sup>113</sup> *Al Skeini*, *supra* note 1, ¶¶ 286-88.

<sup>114</sup> *See supra* Section A, Part III.

<sup>115</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 356.

<sup>116</sup> *Al Skeini*, *supra* note 1, ¶ 123.

The post-*Banković* decision of *Öcalan*<sup>117</sup> illustrates *Al Skeini*'s problematic variation of the “*consent, invitation or acquiescence*” test. In *Öcalan*, the applicant was handed from Kenyan officials to Turkish security forces at Nairobi Airport.<sup>118</sup> In this situation he was effectively under Turkish authority and jurisdiction, even though Turkey exercised its authority outside its territory. He was subsequently arrested by Turkish authorities inside an aircraft in the international zone of the Airport.<sup>119</sup>

The ECtHR accepted that Kenyan authorities had tacitly consented to the arrest through their (albeit unauthorized) collusion with the Turkish authorities.<sup>120</sup> Crucially, however, the *Öcalan* Court cited *Stocké v. FRG*<sup>121</sup> as authority for the principle that “an arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person’s individual rights to security under Article 5 § 1.”<sup>122</sup> This represents a clear acceptance of the second ETJ exception.

In *Stocké*, the applicant, a German citizen who was suspected of tax offences, fled the country to avoid arrest.<sup>123</sup> He was returned from France to Germany by a police informer (Mr. Köster) under a false pretext without the consent, invitation, or acquiescence of the French authorities.<sup>124</sup> The ECtHR found that it had not been established that the cooperation between the German authorities and Mr. Köster extended to unlawful activities abroad.<sup>125</sup> Here, the absence of consent, invitation, or acquiescence of the territorial state from which the applicant was returned was not material to the admissibility of the case. The case, therefore, fell within the realm of the second “personal jurisdiction” exception rather than within the fourth exception,

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<sup>117</sup> *Öcalan v. Turkey*, (Eur. Ct. H.R., May 5, 2005), <http://www.echr.coe.int/eng> [hereinafter *Öcalan*].

<sup>118</sup> *Id.* ¶ 12.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 96 (concluding that Kenyan officials played “an effective role” in “separating the applicant from the Greek Ambassador” and in transporting him to the airport immediately preceding his arrest on board the aircraft).

<sup>121</sup> *Stocké v. Germany*, 199 Eur. Ct. H.R. (ser. A) at 24 (1991).

<sup>122</sup> *Öcalan*, *supra* note 117, ¶ 88 (citing *Stocké*, 199 Eur. Ct. H.R. (ser. A) at 24).

<sup>123</sup> *Stocké*, 199 Eur. Ct. H.R. (ser. A) at 7.

<sup>124</sup> *Id.* at 7-9.

<sup>125</sup> *Id.* at 19.

which focuses on sovereign relations based on consent, invitation, or acquiescence.

*Stocké* was further cited in *Öcalan* as authority for the principle that Article 5 of the ECHR, which aims to protect individuals from arbitrariness, is breached where the state's authorities "have acted extraterritorially in a manner that is inconsistent with the sovereignty of the host State and therefore contrary to international law."<sup>126</sup> Thus, a state's interference with the sovereignty of the host territory does not preclude the examination of the impugned acts. This, once again, refers to the second "personal jurisdiction" exception, rather than to the fourth exception.

If the *Al Skeini* interpretation of the amalgamation of the second and fourth exceptions had been applied, the *Öcalan* Court would not have had jurisdiction to examine a situation where Turkey arrested Öcalan without Kenyan consent. Indeed, the *Stocké* Court was found to have jurisdiction in this very situation. The *Stocké* exception reflects the fact that the second exception is based on factual authority rather than sovereignty. This is innately distinct from the fourth exception, which adheres to the sovereignty rationale.

To summarize, it may conclusively be stated that each of the exceptions enumerated in *Banković* operates independently of the other three. On this basis, the *Banković ETJ* test does not delineate the scope of the extraterritorial exceptions under Article 1 of the convention. *Al Skeini*'s adoption of the *Banković* test as authoritative therefore led to an erroneous decision. However, *Al Skeini* incorporated yet another flawed interpretation in its decision; this second critical defect is examined below.

Although the Divisional Court's decision with regard to the five test cases incorporates a serious flaw, its treatment of the death of Baha Mousa is important for two reasons. First, the decision represents a significant victory for human rights. The U.K. must now investigate all alleged instances of killings, torture, and inhuman and degrading treatment by U.K. soldiers in Iraq. Indeed, a further ten individuals, victims of torture by U.K. soldiers

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<sup>126</sup> *Öcalan*, *supra* note 117, ¶ 92 (citing *Stocké*, 199 Eur. Ct. H.R. (ser. A) at 19).

during the occupation of Iraq, are ready to pursue their cases.<sup>127</sup> The ECHR has developed a detailed body of guidelines as to the efficiency and independence of these investigations, which aim to bring the perpetrators to justice.<sup>128</sup> Second, the decision dispels the possibility of the U.K. evading responsibility by virtue of its status as neither the sole nor the leading occupying power in Iraq.

*Al Skeini's* decision regarding Baha Mousa appears to have been based on the case of *Hess v. UK*.<sup>129</sup> *Hess* involved the detention of a German citizen in the Allied Military Prison in Germany, which was jointly governed by the U.K., France, the U.S.S.R., and the United States. The EComHR found the application inadmissible, as the administrative powers exercised by the U.K. jointly with the other three states were not sufficient to bring the case within its jurisdiction.<sup>130</sup> The Divisional Court in *Al Skeini* found this principle to be inapplicable to the U.K. position in Iraq.<sup>131</sup> In *Hess*, all decisions required a unanimous vote of the occupying powers.<sup>132</sup> The level of control exercised by the U.K. in Iraq greatly exceeded that exercised by any of the four governors in *Hess*. Thus, the Divisional Court felt that the U.K.'s shared control over Iraq under the Coalition Provisional Authority (CPA) did not prevent the establishment of jurisdiction.<sup>133</sup>

While this decision may have brought vindication for victims of torture, the rationale behind the judgment is not as broad as might have been hoped. The court's peculiar interpretation of the exception, under which the U.K. was found to be responsible, is somewhat inconsistent with the court's earlier pronouncement

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<sup>127</sup> Press Release, Public Interest Lawyers, Birmingham, Iraqi Civilian Torture Cases Succeed (Dec. 14, 2004), [http://www.publicinterestlawyers.co.uk/iraq\\_press\\_statement.htm](http://www.publicinterestlawyers.co.uk/iraq_press_statement.htm) [hereinafter PIL Press Release].

<sup>128</sup> See *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) at 49 (1996); *Jordan v. United Kingdom* ¶ 105 (Eur. Ct. H.R. May 4, 2001), <http://www.echr.coe.int/eng>.

<sup>129</sup> *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72.

<sup>130</sup> *Id.* at 74.

<sup>131</sup> *Al Skeini*, *supra* note 1, ¶ 140.

<sup>132</sup> 2 Eur. Comm'n H.R. Dec. & Rep. at 73.

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



that the second, “personal jurisdiction,” exception had been subsumed by the third, “effective control,” exception. The court thus appears to suggest that not only have the second and third exceptions amalgamated, but the second, “personal jurisdiction,” continues to exist as a branch of the fourth exception. These assertions are patently incongruous and detract from the victory.

#### IV: A NARROW TERRITORIAL INTERPRETATION

In *Al Skeini*, the Divisional Court interpreted *Banković* as introducing an additional criterion to the consideration of “effective control.”<sup>134</sup> The court asserted that *Banković* established the test of whether the inadmissibility of a case would deprive civilians of rights they would otherwise possess under the ECHR.<sup>135</sup> This approach emphasizes the European centrality of the convention. Under this test, no contracting state would be responsible for securing convention rights outside the territory of the Council of Europe, since they would be responsible only for securing Convention rights in those territories which were party to the convention.

Essentially, this interpretation restricts the scope of the third, “effective control,” ETJ exception to the “regional sphere”<sup>136</sup> of the Council of Europe. Under this interpretation, the extension of jurisdiction to the events complained of in the first five *Al Skeini* test cases was precluded since the impugned acts occurred in Iraq, which is neither a European state nor a member of the Council of Europe. This Article argues for an alternative interpretation of *Banković*.<sup>137</sup>

In *Banković*, the ECtHR distinguished NATO actions in Kosovo from Turkish operations in Northern Cyprus on the basis

<sup>134</sup> See also Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT’L L. REV. 765, 799 (2002).

<sup>135</sup> *Al Skeini*, *supra* note 1, ¶ 190.

<sup>136</sup> *Id.* ¶ 249.

<sup>137</sup> This is particularly relevant at present given that the Inter-American Commission on Human Rights is due to consider whether to admit a case of alleged violations of human rights and humanitarian law committed by US forces in Iraq. See John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, ASIL INSIGHT, Oct. 25, 2005, <http://www.asil.org/insights/2005/10/insights051025.html>.

that Cyprus was a party to the convention and the FRY was not. The court noted that the Cypriot government was unable to exercise its convention obligations in Northern Cyprus due to the Turkish occupation. For that reason, if Turkey was not held accountable, there would be “a regrettable vacuum in the system of human rights protection” in Cyprus.<sup>138</sup>

The ECtHR noted that previous cases had extended ETJ “only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.”<sup>139</sup> Proponents of the *Al Skeini* interpretation rely on the court’s description of the convention as “a multi-lateral treaty operating. . . in an essentially regional context and notably in the legal space (*espace juridique*) of the Council of Europe.”<sup>140</sup> The ECtHR held that the convention was “not designed to be applied throughout the world, even in respect of the conduct of Contracting States.”<sup>141</sup> These pronouncements appear to corroborate the *Al Skeini* interpretation.

Restrictive interpretation of the ECHR is not, however, “among the interpretative methods accepted in international law and is not supported by the Vienna Convention on the Law of Treaties of 1969.”<sup>142</sup> Furthermore, a narrow territorial interpretation of the concept of jurisdiction may conflict with the object and purpose of the ECHR, with the celebrated court approach of interpreting the convention as a “living breathing instrument,” and with the well established principle that instruments must be “interpreted and applied within the overall framework of the international juridical system in force at the time of the interpretation.”<sup>143</sup> It is also contradicted by recent case law of the ECtHR.<sup>144</sup> Each of these factors will now be analyzed.

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<sup>138</sup> Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 25.

<sup>139</sup> Banković v. Belgium, 2001-XII Eur. Ct. H.R. 335, 359.

<sup>140</sup> *Id.* at 358-59.

<sup>141</sup> *Id.* at 359.

<sup>142</sup> Orakhelashvili, *supra* note 45, at 530; BROWNLIE, *supra* note 19, at 636.

<sup>143</sup> I.C.J. Advisory Opinion on Namibia, *supra* note 46, at 31, quoted in Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, at 10 (July 14, 1989), reprinted in 29 I.L.M. 378, 387 (1990).

<sup>144</sup> See, e.g., *Issa*, *supra* note 73; *Ilaşcu*, *supra* note 97.

## A. OBJECT AND PURPOSE

It may be argued that a restrictive interpretation of the *Banković* principle is inconsistent with the object and purpose of the ECHR. Under Article 31(1) of the Vienna Convention, “[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>145</sup> The Vienna Convention is firmly established in the jurisprudence of the ECtHR as elucidating “generally accepted principles of international law.”<sup>146</sup>

These factors form just one of four elements to be taken into account under Article 31 of the Vienna Convention. The International Law Commission (ILC) has held that the “process of interpretation is a unity, and that the provisions of the article form a single, closely integrated rule.”<sup>147</sup> The four Article 31 elements form one “General Rule of Interpretation,” as opposed to individual “rules.” Consequently, there is no hierarchy among the four elements, and each must therefore be given equal consideration. Textual interpretation of a provision, that is, according to its natural and ordinary meaning, cannot, therefore, be absolute.<sup>148</sup>

On this basis, a narrow territorial interpretation of the *Banković* decision may accord insufficient consideration to the context, object and purpose of the ECHR.<sup>149</sup> The ECHR preamble alludes to the object and purpose of the convention, and boasts the objective of “the maintenance and further realization of human rights and fundamental freedoms.”<sup>150</sup> The preamble

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<sup>145</sup> Vienna Convention on the Law of Treaties, art. 31, par. 1, *opened for signature* May 23, 1969, 1155 U.N.T.S. 332, 340 (*entered into force* Jan. 27, 1980).

<sup>146</sup> *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 14 (1975).

<sup>147</sup> *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. (No. 9) at 51, U.N. Doc. A/6309/Rev.1, *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 169, 220, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

<sup>148</sup> *South-West Africa Cases (Eth. v. S. Afr, Liber. v. S. Afr.)*, 1962 I.C.J. 319, at 336 (Dec. 21) (preliminary objections).

<sup>149</sup> *See, e.g., Orakhelashvili, supra* note 45, at 549 (noting that the Court in *Banković* displayed “a total and arbitrary disregard for the Convention’s object and purpose.”).

<sup>150</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms* pmbl., Nov. 4, 1950, 213 U.N.T.S. 221, 222.

further recognizes that the purpose of the convention is to take “the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”<sup>151</sup> The court has consistently held that such an understanding of the object and purpose requires that limitations or qualifications of the rights granted be narrowly construed.<sup>152</sup>

Nothing in the convention supports differential treatment of non-citizens of the contracting states of the Council of Europe. If anything, convention rights are proclaimed on the basis of the principles of equality and non-discrimination. For example, Article 14 of the convention insists that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground.”<sup>153</sup> Article 10(1) suggests that the rights protected therein should be guaranteed “regardless of frontiers.”<sup>154</sup> A narrow territorial interpretation of the concept of jurisdiction would offend these objectives.

Furthermore, the concept of a territorial restriction on human rights affronts the very concept of the universality of human rights. The ECtHR has consistently acknowledged that the convention creates more than reciprocal engagements between contracting states.<sup>155</sup> It is well established that the basic object and purpose of human rights treaties is “the protection of the basic rights of individual human beings irrespective of their nationality.”<sup>156</sup> Accordingly, human rights treaties are premised on the idea that human rights are inherent in the person on the

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<sup>151</sup> *Id.* at 224.

<sup>152</sup> *Klass v. Federal Republic of Germany*, 28 Eur. Ct. H.R. (ser. A) at 21 (1978); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 41 (1979); *Wemhoff v. Federal Republic of Germany* 7 Eur. Ct. H.R. (ser. A) 23 (1968) (noting that it was necessary “to seek the interpretation that is most appropriate in order to [realize] the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”).

<sup>153</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221, 232.

<sup>154</sup> *Id.* art. 10, para. 1.

<sup>155</sup> *See, e.g., Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 90-91 (1978).

<sup>156</sup> The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion, 1982 Inter-Am. Ct. H.R. (ser. A) No. 2 (Sept. 24), *reprinted in* 22 I.L.M. 37, 47 (1983) [hereinafter Effect of Reservations].

basis of their humanity, not on the basis of their nationality or presence within a geographical location: “individual rights inhere simply by virtue of a person’s humanity.”<sup>157</sup>

In light of these objects and purposes, there exists no logical reason to limit a state’s obligation to respect human rights to the territory of the Council of Europe. To be sure, as is argued here, allowing a contracting state to perpetrate violations of human rights on territories outside of the Council of Europe that it could not perpetrate within the Council is in fact incompatible with these stated objectives. As deftly put by Meron, “narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights.”<sup>158</sup>

### B. A LIVING, BREATHING INSTRUMENT

A restrictive interpretation of the *Banković* case may also be inconsistent with the customary ECtHR approach of interpreting the convention as “a living instrument which must be interpreted in the light of present-day conditions” rather than remain static.<sup>159</sup> As in general international law, restrictive interpretation of the convention is almost never admissible.<sup>160</sup> In fact, Harris et al. suggest that restrictive interpretations of the ECHR have “now totally given way to an approach that focuses instead upon the Convention’s law-making character.”<sup>161</sup>

In this context, the ECtHR’s emphasis in *Banković* and the Divisional Court’s focus in *Al Skeini* on the *travaux préparatoires* in their deliberations on the convention’s meaning of “jurisdiction” may be suspect. The *travaux*, according to the ILC, do not

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<sup>157</sup> Coard et al. v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 37 (1999).

<sup>158</sup> Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 82 (1995).

<sup>159</sup> *E.g.*, *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 26 (1995); *see also* U.N. Human Rights Committee [UNHRC], Views of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights: Canada, ¶ 10.4, U.N. Doc. CCPR/C/78/D/829/1998 (Oct. 20, 2003) (affirming that the ICCPR “should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present day conditions.”).

<sup>160</sup> Orakhelashvili, *supra* note 45, at 534.

<sup>161</sup> D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 7 (1995).

have the same authentic character as the four elements comprising Article 31.<sup>162</sup> The ECtHR has accepted that the *travaux* are far less authoritative than the Article 31 elements. In *Loizidou*, for example, the court noted that the intentions of the authors of the convention expressed more than forty years previously “could not be decisive.”<sup>163</sup>

Nevertheless, the court in *Banković* accepted the *travaux* as “clear confirmatory evidence of the ordinary meaning of Article 1 of the Convention.”<sup>164</sup> The authority of this assertion is dubious, particularly in light of the current objectives of the Council of Europe. A recent Recommendation of the Parliamentary Assembly<sup>165</sup> indicated a desire to provide legal means, not just to members of the Council of Europe, but also to those territories in which the member states are engaged, “to ensure that they do not turn into lawless areas in the fields of human rights under member states’ control.”<sup>166</sup> This objective is clearly incompatible with a restrictive interpretation of the *Banković* decision.

### C. RELEVANT RULES OF INTERNATIONAL LAW

It is settled jurisprudence of the ECtHR that the Convention cannot be interpreted and applied in a vacuum,<sup>167</sup> and that it should be interpreted as harmoniously as possible with other

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<sup>162</sup> *Report of the International Law Commission to the General Assembly*, *supra* note 147, at 50-51.

<sup>163</sup> *Loizidou*, 310 Eur. Ct. H.R. (ser. A) at 27; *see also* *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 183 (noting that acts which were previously classified as “inhuman and degrading treatment” could be classified differently in the future); Judge Spencer in *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, 1958 I.C.J. 55, 129-130 (Nov. 28) (separate opinion of Judge Spender) (suggesting that any recourse to preparatory work has to be done with caution); FRANCIS G. JACOBS & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 33 (2d ed. 1996) (noting that “preparatory work is notoriously unreliable as a general guide to treaty interpretation” and suggesting that any recourse to preparatory work has to be done with caution).

<sup>164</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 351, 354.

<sup>165</sup> Eur. Parl. Ass., *Areas Where the European Convention on Human Rights Cannot be Implemented*, Doc. No. 9730 (2003).

<sup>166</sup> *Id.* ¶ 9.

<sup>167</sup> *Banković*, 2001-XII Eur. Ct. H.R. at 351; *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2231.

principles of international law.<sup>168</sup> According to the ICJ, “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.”<sup>169</sup> The ECtHR’s obligation to consider international jurisprudence is codified in Article 31(3) (c) of the Vienna Convention, which reads as follows:

3. There shall be taken into account, together with the context:

. . .

(c) any relevant rules of international law applicable in the relations between the parties.<sup>170</sup>

A common international approach on the subject of ETJ is discernible from the jurisprudence and opinions of various international bodies.<sup>171</sup> Through the “denationalization” of human rights, these institutions have consciously enlarged the circle of persons protected under the various treaties on which they pronounce.<sup>172</sup> Their common approach focuses on the injustice of a narrow territorial restriction of human rights treaties. This consensus points clearly in the direction of an expansive interpretation of the concept of jurisdiction in human rights treaties. Interpretation of the *Banković* decision must integrate this international consensus.<sup>173</sup>

In *Banković*, the ECtHR dismissed the relevance of the jurisprudence of the Inter-American Commission on Human

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<sup>168</sup> *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, 101.

<sup>169</sup> I.C.J. Advisory Opinion on Namibia, *supra* note 46, at 31.

<sup>170</sup> Vienna Convention on the Law of Treaties, art. 31, para. 3, subsec. c, *opened for signature* May 23, 1969, 1155 U.N.T.S. 332, 340 (*entered into force* Jan. 27, 1980).

<sup>171</sup> See the organs of the European Convention on Human Rights, the organs of the American Convention on Human Rights, the U.N. Human Rights Committee, the International Court of Justice.

<sup>172</sup> Antônio Augusto Cançado Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 13 (1998).

<sup>173</sup> See *Banković*, 2001-XII Eur. Ct. H.R. at 357 (“the Court does not find it necessary to pronounce on the specific meaning to be attributed in various contexts to the allegedly similar jurisdiction provisions in the international instruments.”).

Rights (IACoMHR) on the basis that “there is no explicit limitation of jurisdiction”<sup>174</sup> in Article 2 of the American Declaration on the Rights and Duties of Man.<sup>175</sup> The American Declaration is a multi-lateral treaty operating in an essentially regional context and notably in the legal space of the Organization of American States (OAS).<sup>176</sup> This system parallels that of the ECHR. It is contended, therefore, that the case law of the IACoMHR proves enlightening in the context of an analogous system of human rights protection, and also confirms the international consensus on ETJ.

In *Coard v US*,<sup>177</sup> the IACoMHR acknowledged that jurisdiction “turns not on . . . presence within a particular geographic area, but on whether . . . the State observed the rights of a person subject to its authority and control.”<sup>178</sup> This was based on the aforementioned non-reciprocity of human rights.<sup>179</sup> The IACoMHR reiterated this approach in *Alejandro Jr. et al. v. Cuba*.<sup>180</sup> In that case, a Cuban military aircraft shot down two civilian airplanes in international airspace. Reiterating the *Coard* principle, the IACoMHR held that Cuban agents brought the civilian pilots within the jurisdiction of Cuba by shooting at their planes. The *Coard* principle was again applied, post-*Banković*, in the *Guantanamo* case.<sup>181</sup>

Consequently, jurisdiction under the American Declaration is not confined to the territory of the OAS. This provides clear

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<sup>174</sup> *Id.* at 357-58.

<sup>175</sup> American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the 9th International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6.rev.1 at 17 (1992).

<sup>176</sup> Compare this to *Banković*, 2001-XII Eur. Ct. H.R. at 354 (noting that the ECHR is “a multi-lateral treaty operating . . . in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States.”).

<sup>177</sup> *Coard et al. v. United States*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

<sup>178</sup> *Id.* ¶ 37.

<sup>179</sup> See e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 90-91 (1978).

<sup>180</sup> *Armando Alejandro Jr. et al. v. Cuba*, Case 11.589, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 23 (1999).

<sup>181</sup> Inter-American Commission on Human Rights, *Legal Status of the Detainees at Guantanamo Bay to be Determined by a Tribunal*, 23 HUM. RTS. L.J. 15, 15 (2002).



guidance on the accepted definition of jurisdiction in the context of a regional system of human rights protection. It is important to note, however, that in this context, the objective nature of a specific human rights treaty is attributable to the character of the substantive obligations protected by the treaty and not to whether the treaty is universal or regional in scope.<sup>182</sup> The nature of these obligations means that similar principles of interpretation are applicable to different treaties, whether universal or regional. Indeed, the IACtHR has emphasized the similarity between regional human rights treaties and universal treaties.<sup>183</sup>

In view of this universality, the jurisdiction of the International Covenant on Civil and Political Rights (ICCPR)<sup>184</sup> also addresses questions of jurisprudence under the ECHR. The approach of the U.N. Human Rights Committee (HRC) is akin to that adopted by the Inter-American system. The case of *Burgos v. Uruguay*<sup>185</sup> concerned the kidnap of the applicant's husband by Uruguayan forces in Argentina. Crucially, the HRC indicated that "it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory."<sup>186</sup>

The HRC therefore determines a state's responsibilities, not on a geographical basis, but rather on the basis of the relationship between the individual and the state.<sup>187</sup> This principle was also applied in the case of *Montero v. Uruguay*,<sup>188</sup> concerning the confiscation of a passport by a Uruguayan consulate in Germany,

<sup>182</sup> Orakhelashvili, *supra* note 45, at 532.

<sup>183</sup> Effect of Reservations, *supra* note 156, at 47-48.

<sup>184</sup> Article 2 of the ICCPR limits the jurisdiction of the state parties to the Covenant to those acts committed *within the territory and subject to the jurisdiction of the state party*. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>185</sup> *Burgos v. Uruguay*, Comm. No. 52/1979, U.N. Human Rights Comm., ¶ 2.2, U.N. Doc. CCPR/C/13/D/52/1979 (Jul. 29, 1981).

<sup>186</sup> *Id.* ¶ 12.3.

<sup>187</sup> *Id.* ¶ 12.2; *see also* *Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, U.N. Human Rights Comm., ¶¶ 10.2-.3, U.N. Doc. CCPR/C/13/D/56/1979 (Jul. 29, 1981).

<sup>188</sup> *Montero v. Uruguay*, Comm. No. 106/81, U.N. Human Rights Comm. ¶ 9.4, U.N. Doc. CCPR/18/D/106/1981 (Mar. 31, 1983); *see also* *Lichtensztein v. Uruguay*,

and again applied in the HRC's Report and Concluding Observations on Israel.<sup>189</sup> There, it was found that the ICCPR applies within the Occupied Palestinian Territories, which is not a party to the covenant, by virtue of the exercise of Israeli control over those territories. Israel is, of course, a party to the ICCPR.<sup>190</sup>

The HRC approach was recently endorsed by the International Court of Justice (ICJ) in its *Palestinian Wall* advisory opinion.<sup>191</sup> The ICJ referred to the established case law of the HRC, which, it said, was corroborated by the *travaux préparatoires* of the covenant.<sup>192</sup> The drafters of the ICCPR "did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their national territory."<sup>193</sup> The deference the ECtHR recently showed to the ICJ in the *Mumutkulov*<sup>194</sup> case allows us to assume that it will show a similar deference to *Palestinian Wall*.<sup>195</sup>

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Comm. No. 77/1980, U.N. Human Rights Comm., ¶ 8.3, U.N. Doc. CCPR/C/18/D/77/1980 (Mar. 31, 1983).

<sup>189</sup> U.N. Human Rights Committee [UNHRC], *Concluding Observations of the Human Rights Committee: Israel*, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (Aug. 18, 1998); U.N. Human Rights Committee [UNHRC], *Concluding Observations of the Human Rights Committee: Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

<sup>190</sup> Ratified Jan. 3, 1992; see International Covenant on Civil and Political Rights, Oct. 3, 1991, 1651 U.N.T.S. 566 (ratifying International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, effective Jan. 3, 1992). Israel ratified the ICCPR with a reservation:

With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned. To the extent that such law is inconsistent with its obligations under the Covenant, Israel reserves the right to apply that law.

*See id.* at 567.

<sup>191</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (Jul. 9, 2004), *available at* [http://www.icj-cij.org/icjwww/idocket/imwp/imwp\\_advisory\\_opinion/imwp\\_advisory\\_opinion\\_20040709.pdf](http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf) [hereinafter I.C.J. Advisory Opinion on the Wall].

<sup>192</sup> See the discussion of the preliminary draft in the Commission on Human Rights, U.N. Doc. E/CN.4/SR.194, ¶ 46; U.N. GAOR, 10th Sess., Annexes, pt. II, ch. V, ¶ 4, U.N. Doc. A/2929 (July 1, 1955).

<sup>193</sup> I.C.J. Advisory Opinion on the Wall, *supra* note 191, ¶ 109.

<sup>194</sup> *Mumutkulov v. Turkey*, ¶¶ 51, 106-110 (Eur. Ct. H.R. Feb 6, 2003), <http://www.echr.coe.int/eng>.

<sup>195</sup> Theodor Schilling, *Is the United States Bound by the ICCPR in Relation to Occupied Territories?* 11 (Oct. 5, 2004) (unpublished draft, New York University:

The latest commentary of the HRC on Article 2(1) of the ICCPR also adopts this approach. In *General Comment 31*,<sup>196</sup> the HRC interprets Article 2 as extending protection of the Convention to “those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.”<sup>197</sup> These harmonious views provide clear guidance and should discourage a narrow territorial interpretation of the *Banković* decision.

#### D. POST-BANKOVIC DEVELOPMENTS AT THE ECtHR

Recent case law of the ECtHR does not support a narrow interpretation of *Banković*. The aforementioned case of *Issa v. Turkey*<sup>198</sup> concerned the alleged murder of Iraqi shepherds at the hands of Turkish armed forces in northern Iraq. This case is essential, given its similarity to the facts of the *Al Skeini* case. Turkey argued that *Banković* established that jurisdiction would only be established where impugned acts occurred in a territory that would normally be covered by the ECHR.<sup>199</sup> As seen in *Al Skeini*, under this narrow interpretation Turkey would not be obliged to secure convention rights in Iraq because Iraq is not a signatory to the convention.

The court noted, however, that there were no grounds for declaring the application inadmissible.<sup>200</sup> Significantly, it appears to have adopted the “unconscionability principle” as espoused by the IACoMHR and UNHRC, holding that accountability for extraterritoriality actions, albeit “exceptional,”<sup>201</sup> stems from the fact that Article 1 “cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory

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Emile Noel Fellows Forum), available at <http://www.jeanmonnetprogram.org/fellowsforum/Schilling%20Forum%20Paper%20100504.pdf>.

<sup>196</sup> U.N. Human Rights Committee [UNHCR], *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

<sup>197</sup> *Id.* ¶ 10.

<sup>198</sup> *Issa*, *supra* note 73.

<sup>199</sup> *Id.* ¶ 55.

<sup>200</sup> *Id.* ¶ 71.

<sup>201</sup> *Id.* ¶ 68.

of another state, which it could not perpetrate on its own territory.”<sup>202</sup> This is reminiscent of the IACoMHR *Coard* principle, to which the ECtHR expressly referred in *Issa*.<sup>203</sup>

The ECtHR was, under this rationale, willing to accept that “as a consequence of . . . military action, the respondent State could be considered to have exercised . . . effective overall control of a particular portion of the territory of northern Iraq,” and, if so, “it would follow logically they were within the jurisdiction of Turkey.”<sup>204</sup> Thus, the court rejected the government’s restrictive interpretation of *Banković* and adopted a more expansive approach.

Arguably, the *Issa* reference to the unconscionability principle obliterates the *Banković* pronouncements on the regional nature of convention protection. The only reference in *Issa* to the Council of Europe was that the troops were under Turkish jurisdiction and not that of Iraq, which “clearly does not fall within the legal space (espace juridique) of the Contracting States.”<sup>205</sup> This is a parallel of the assertion in *Banković* that the “FRY clearly does not fall within this legal space.”<sup>206</sup> The *Issa* reference, however, does not concern the regional nature of the convention. It may simply indicate that, as Turkey was ultimately found not to be responsible for the impugned acts, Iraq could not be responsible, as it is not a contracting state to the Convention.

It may further be argued that the Court in *Banković* never expressly precluded the extension to jurisdiction outside the Council of Europe. Technically, the court merely noted that all previous ETJ cases had involved contracting states of the Council of Europe.<sup>207</sup> Its subsequent assertion that the Convention “was not designed to apply throughout the world” is *obiter*, as *Banković* is not authoritative on a situation where effective control is in fact established.<sup>208</sup> *Banković* deals, rather, with a situation in which effective control has not been established.

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<sup>202</sup> *Id.* ¶ 71.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* ¶ 74.

<sup>205</sup> *Id.*

<sup>206</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 335, 359.

<sup>207</sup> *Id.* at 356-59.

<sup>208</sup> Schilling, *supra* note 195, at 7.

*Issa* appears to substantiate the claim of the applicants in *Al Skeini* that references to the regional nature of the Convention in *Banković* and the *Cyprus v. Turkey* (2002) cases were “only an additional and unnecessary piece of reasoning,”<sup>209</sup> and “merely inessential and make-weight arguments.”<sup>210</sup> Yet *Issa* was rejected in the *Al Skeini* decision as an “improbable interpretation of *Banković*.”<sup>211</sup> It has been here shown, however, that it is not *Issa*’s expansive interpretation but the narrow territorial interpretation of *Banković* adopted in *Al Skeini* that is improbable.

The previously mentioned case of *Ilaşcu*<sup>212</sup> further supports a purposive interpretation of *Banković*. Here the Russian Federation was held responsible for securing Convention rights in the Moldovan Republic of Transdniestria (“MRT”) before Moldova ratified the Convention, by virtue of its effective control of the territory.<sup>213</sup> The MRT was not, at the time, part of the Council of Europe. Therefore, those in the MRT were not deprived of rights otherwise held. Nevertheless, Russian control of the area brought it within the jurisdiction of the Council of Europe.

Overall, given the need to interpret the convention in the light of its declared object and purpose, as a living, breathing instrument, in light of an established international consensus, and in the context of the court’s recent decisions, it may be argued that *Banković* does not, in fact, restrict extraterritorial jurisdiction of contracting states to the territory of the Council of Europe.

## V. APPLICATION OF THE THEORY TO THE AL SKEINI CASE

Moving from the theoretical to the particular, this section applies the more expansive interpretation proposed in Parts III and IV to the facts of the *Al Skeini* test cases. For the purpose of this analysis, therefore, it will be assumed that the “effective control” exception extends outside of the Council of Europe. It will

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<sup>209</sup> *Al Skeini*, *supra* note 1, ¶ 275.

<sup>210</sup> *Id.* ¶ 219.

<sup>211</sup> *Id.* ¶ 262.

<sup>212</sup> *Ilaşcu*, *supra* note 97.

<sup>213</sup> *Id.* ¶¶ 393-94.

be recalled that the Divisional Court in *Al Skeini* left the definition of effective control wide open,<sup>214</sup> and that lawyers intend to appeal the dismissal of the first five cases.<sup>215</sup>

The objective of this section is therefore to evaluate the merits of the five test cases dismissed by the Divisional Court in *Al Skeini*. Although these five cases occurred during the period of occupation, this Article will also assess the possibility of the U.K. being held responsible for the acts of its forces during the war. The war may be divided into two phases: the first consisting of aerial bombardment of certain parts of the country and the second involving deployment of ground forces.

### A. AERIAL BOMBARDMENT

The first phase of the war began on March 20, 2003 with the aerial bombardment of Baghdad. Over 2,270 civilian casualties were reported, of which 678 were fatalities as a result of air strikes and ground battles in March and April 2003.<sup>216</sup> Under the *Banković* principle, the air strikes would not engage jurisdiction. Only the application of the arguments detailed in Part II would demand the U.K. be found responsible for its actions during this initial phase.

### B. GROUND TROOPS

The second phase, during which ground troops were deployed, is distinguishable from *Banković* but comparable to *Issa*.<sup>217</sup> During this phase the people of Basra were unable to leave the city without the consent of the British army and were unable to get basic public services. Those who aroused suspicion were searched and detained for questioning.<sup>218</sup> The *Issa* case concerned a six-week period in 1995 when Turkish troops armed

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<sup>214</sup> *Al Skeini*, *supra* note 1, ¶ 283.

<sup>215</sup> PIL Press Release, *supra* note 127.

<sup>216</sup> Christine Pelisek, *War by Numbers*, L.A. WEEKLY, Mar. 19, 2004, available at <http://www.laweekly.com/ink/04/17/features-pelisek.php>.

<sup>217</sup> *Issa*, *supra* note 73.

<sup>218</sup> See Paul Harris, *Refugees Pour out of Basra*, GUARDIAN (LONDON), Mar. 28, 2003 at 2; Ewen MacAskill, *Crisis in Basra as Troops Fail to Create Corridor for Aid*, GUARDIAN (LONDON), Mar. 25, 2003, at 2; Keith B. Richburg, *People in Basra Contest Official View of Siege*, WASH. POST, Apr. 15, 2003, at A13.

forces carried out military operations in Northern Iraq. Although it was not convinced that the troops were in effective control of the territory, the ECtHR was willing to apply the “personal jurisdiction” exception, and hold Turkey responsible for specific acts of its agents in the area.<sup>219</sup>

In *Banković*, the court and respondent governments suggested that *Issa* constituted “a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil.”<sup>220</sup> Under this premise, the Turkish government could have been held responsible for securing convention rights to those under their control under the “personal jurisdiction” exception. This principle could easily be transposed to the situation of the U.K. in the second phase of the war.

It is important in this context to note that the *Al Skeini* decision only purports to limit the “effective control” exception to the Council of Europe. The Divisional Court, although adopting a flawed interpretation of an amalgamation of the second and fourth exceptions, accepted that both of these exceptions could engage the responsibility of contracting states for acts perpetrated by their agents both inside and outside of the Council of Europe. It is also settled jurisprudence that the first exception applies to territories outside of the Council of Europe.

*Al Skeini* held that the case of Baha Mousa fell within the jurisdiction of the U.K. under the ECHR. As this case was determined under the second and fourth exceptions, and not by reference to the criteria of effective control, the fact that the death occurred during the occupation is irrelevant. It further suggests that the U.K. could also be found responsible for such violations under the second and fourth exceptions, before the occupation was secured, and during the first and second phases of the war.

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<sup>219</sup> [A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully - in the latter State.

*Issa*, *supra* note 73, at ¶ 71.

<sup>220</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 346.

## C. OCCUPATION

International humanitarian law recognizes that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”<sup>221</sup> The British Manual of Military Law defines effectiveness of occupation by requiring that the national forces are not in possession, the inhabitants are disarmed, measures are taken to protect life and property and to secure order, and the presence of occupying troops make their control “felt” by the population.<sup>222</sup> Similar requirements are included in the U.S. Army Manual.<sup>223</sup>

British Prime Minister Tony Blair announced on April 4, 2003 that the south of Iraq was under the “control” of the U.K.<sup>224</sup> British tanks rolled into Basra on April 7, 2003.<sup>225</sup> From this point on, the U.K. was recognized as an occupying power in Iraq. The end of major military operations was declared on May 1, 2003.<sup>226</sup> The occupation was officially recognized on May 22, 2003 under U.N. Security Council Resolution 1483.<sup>227</sup> It continued until the handover of power, over thirteen months later, on June 28, 2004.<sup>228</sup> It is, therefore, indisputable that during this period, the U.K. exercised “effective control” over Southern Iraq and over Basra in particular.

It is in this context that the definition of “effective control” comes into play. It will be recalled from Part III that it is the degree to which the area is dependent on the contracting state

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<sup>221</sup> Convention (IV) Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, 2306, 1 Bevans 631.

<sup>222</sup> THE WAR OFFICE, *BRITISH MANUAL OF MILITARY LAW: THE LAW OF WAR ON LAND* 141 (1958).

<sup>223</sup> DEP’T OF THE ARMY, *FIELD MANUAL NO. 27-10: THE LAW OF LAND WARFARE* 139 (1956).

<sup>224</sup> Tony Blair, Prime Minister, U. K., *A Strategy for Peace in Iraq* (Apr. 4, 2003), available at <http://www.number-10.gov.uk/output/Page3494.asp>.

<sup>225</sup> Peter Beaumont & Rory McCarthy, *British Tanks Force Way into Basra and Destroy Ba’ath Party HQ*, *GUARDIAN* (London), Apr. 7, 2003, at 1.

<sup>226</sup> *Al Skeini*, *supra* note 1, ¶ 10.

<sup>227</sup> S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (“recognizing the specific authorities, responsibilities and obligations under applicable international law of these states as occupying powers under unified command.”).

<sup>228</sup> *Al Skeini*, *supra* note 1, ¶ 11.



for its subsistence that determines the effectiveness of the control. It also appears that a structured relationship must exist over a period of time, and that the contracting state must exercise “all or some of the public powers normally to be exercised by that Government.”<sup>229</sup>

These elements are unquestionably fulfilled in the case of the U.K. in Iraq. The U.K. occupied Iraq for over 13 months. This greatly exceeds the six-week period held insufficient in *Issa*, and should indicate that “effective control” was secured. Beginning on April 16, the CPA exercised powers of government in Iraq. The CPA was “vested with all executive, legislative, and judicial authority necessary to achieve its objectives.”<sup>230</sup> British forces were not subject to a sovereign at any stage of the war or occupation. The tasks of U.K. troops included the maintenance of security, protection of essential utilities and infrastructure, and protecting police stations.<sup>231</sup> The troops were also charged with the support of the local administration in Iraq in a variety of ways.<sup>232</sup>

The U.K. was in command of the Multinational Division (South East) of Iraq.<sup>233</sup> Of around 14,500 Coalition troops deployed in the division, about 8,150 were U.K. forces.<sup>234</sup> 8,119 of these were stationed in the Al Basrah and Maysan regions, the location of the acts impugned in *Al Skeini*.<sup>235</sup> The court in *Al Skeini* pointed out that while the troops to population ratio in Northern Cyprus was one to seven, the same ratio in southern Iraq was about one to 317, and in Al Basrah and Maysan, one to 340.<sup>236</sup> As related above, however, recent ECtHR decisions indicate that the concentration of ground forces present in an area is not definitive. Although these figures may have little relevance

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<sup>229</sup> *Banković v. Belgium*, 2001-XII Eur. Ct. H.R. 333, 355.

<sup>230</sup> Coal. Provisional Auth., CPA/REG/16 May 2003/01, § 1, par. 2, cited in *Al Skeini*, *supra* note 1, ¶ 19.

<sup>231</sup> *Al Skeini*, *supra* note 1, ¶ 43.

<sup>232</sup> *Id.* ¶ 44.

<sup>233</sup> *Id.* ¶¶ 41-42. This area comprised the provinces of Al Basrah, Maysan, Thi Qar and Al Muthanna and is an area approximately twice the size of Wales with a total population of about 4.6 million.

<sup>234</sup> *Id.* ¶ 41.

<sup>235</sup> *Id.* ¶ 42.

<sup>236</sup> *Id.* ¶¶ 41-42.

to the question of whether the U.K. was in effective control of Iraq, they are still persuasive.

As a final element that indicates “effective control,” the Divisional Court in *Al Skeini* stated that, were it to decide on the facts before it, it would “perhaps conclude” that the U.K. was in effective control of Iraq during the occupation.<sup>237</sup> In sum, the U.K. was in effective control of the Al Basrah region of southern Iraq during the time at which the acts impugned in the five *Al Skeini* test cases occurred. Under this rationale, and presuming that the expansive interpretation of *Banković* proposed in Part IV is adopted, the U.K. may be held responsible for failing to secure convention rights for the victims in all six of the *Al Skeini* test cases.

## VI. CONCLUSION

It is clear that, under an expansive interpretation of *Banković* decision, the five test cases dismissed in the *Al Skeini* case would fall within the jurisdiction of the U.K. under the convention. Here, just as in the case of Baha Mousa, the U.K. would be obliged to initiate an investigation into these cases. The British government has not only failed to bring such an investigation, but expressly refused in March 2004 to launch such an inquiry and to grant reparations to the families involved.<sup>238</sup> The families also accuse the government of tampering with evidence that could support compensation claims.<sup>239</sup> It is hoped that the promised appeal will compel the government to fulfill its obligations to the victims and their families.

On a more positive note, the decision with regard to Baha Mousa in *Al Skeini* represents a victory for human rights. It appears that, from this point on, alleged violations of Articles 2 and 3 of the convention at the hands of the agents of state parties to the convention will have to be investigated, and the perpetrators brought to justice, regardless of the location of the impugned act.

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<sup>237</sup> *Id.* ¶ 283.

<sup>238</sup> *Court Challenge over Iraqi Deaths*, BBC NEWS, May 5, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/3684937.stm](http://news.bbc.co.uk/2/hi/uk_news/3684937.stm); *Families Win Hearings on Deaths*, GUARDIAN (London), May 12, 2004, at 13.

<sup>239</sup> Robert Verkaik et al., *Families of Killed Iraqis Accuse MoD of Tampering with Evidence*, INDEPENDENT (London), May 6, 2004, at 6.

Under detailed guidelines developed by the ECtHR as to what a state must do to fulfill its obligations under Articles 2 and 3, there will have to be official investigations which are prompt, thorough, independent, and impartial, in fact and in appearance.<sup>240</sup>

Under the ECtHR guidelines, these investigations must be capable of leading to a determination of whether the force used was justified in the circumstances and, if it was not, to the identification and punishment of those responsible. There must also be a sufficient level of *public scrutiny* of the progress of the investigations and, in all cases, the victim's family must be able to be involved in the procedure to the extent necessary to safeguard its legitimate interests.<sup>241</sup> This increase in public scrutiny will, it is hoped, lead contracting states to reduce, minimize, and eliminate violations of the ECHR perpetrated by agents operating outside of their own territories, both within and outside of the Council of Europe.

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<sup>240</sup> PIL Press Release, *supra* note 127.

<sup>241</sup> See Amnesty Int'l, *Report on Iraq, Killings of Civilians in Basra and al-'Amara*, AI Index MDE 14/007/2004, 21, May 10, 2004.

