

Al-Skeini v United Kingdom (2011) 53 EHRR 18

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I Introduction

*Al-Skeini v United Kingdom*¹ concerned the treatment of Iraqi civilians and detainees by UK soldiers during the occupation phase of the Iraq conflict. The case highlights the impact of human rights law, in particular the *Convention for the Protection of Human Rights and Fundamental Freedoms*² ('ECHR') and *Human Rights Act 1998* (UK)³ ('*Human Rights Act*'), on the military. The shooting of Iraqi civilians in five of the six matters before the Court was held by three tiers of the UK civil courts to be outside the ECHR's jurisdiction and therefore did not fall under the obligations of the UK in Iraq in relation to actions by its soldiers. The UK courts adopted this approach after interpreting and following the Grand Chamber of the European Court of Human Rights decision in *Banković v Belgium*.⁴

On this basis the House of Lords denied the remedy sought by the families of the Iraqi civilians shot by UK soldiers in the occupation zone. It suggested that the appropriate law was the military discipline law and international humanitarian law. Yet, of the five matters considered in *R (Al-Skeini) v Secretary of State for Defence*,⁵ only the sixth matter led to a court-martial hearing. The other five matters had been considered by the commanding officer, who held the ultimate power to decide to take action. In each of these matters the commanding officer decided not to court-martial any of the soldiers involved.⁶

Only in regard to the sixth matter, the death of Baha Mousa while detained by UK soldiers on a UK army base in Iraq, was a court-martial hearing held.⁷ No convictions were made, although a guilty plea was entered. A very limited application of the ECHR was accepted in relation to this one matter as it occurred on a UK military base and was

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¹ (2011) 53 EHRR 18 ('*Al-Skeini*').

² *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 December 1953) ('ECHR').

³ The *Human Rights Act* implemented the ECHR under the banner 'bringing rights home'.

⁴ (2002) 41 ILM 517.

⁵ [2008] 1 AC 153.

⁶ *R (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), [27] per Brooke LJ: 'All five of these incidents resulted in the death of an Iraqi civilian. In none of them was there any ballistics testing following the death, any autopsy report, any post mortem, or any investigation by anyone outside the battalion and its chain of command up to brigade level (other than the aborted police investigation in the fourth case). The families of the deceased were never involved in such inquiries as took place, and in each case the battalion's commanders (and in due course the brigadiers) were willing to accept their soldiers' accounts of the incident at their face value.'

⁷ See *R v Payne*, Court Martial (2006). The UK court martial was held three years after the death of Mousa and injury of seven other detainees in the same incident due to the use of tactics banned by the UK government in 1971. It took six months and was conducted by a civilian judge, McKinnon J. His Honour ruled that the detainees Mendonca, Crowcroft and Fallon had no case to answer. Stacey's charge was dismissed, as were two charges against Payne: manslaughter and perverting the course of justice. Peebles and Davies were found not guilty at court martial.

accordingly found to fall within UK jurisdiction for the purposes of the *Human Rights Act*. As such, an independent public investigation was required pursuant to art 2 of the *ECHR*. This decision meant that the government was required to hold an inquiry regarding the incident.⁸ Six Iraqi nationals (the ‘applicants’)⁹ lodged an application on 11 December 2007 under art 34 of the *ECHR* against the UK in the Grand Chamber of the European Court of Human Rights.¹⁰ It was accepted that Iraq was under occupation from 1 May 2003 to 28 June 2004 by the UK and the US as a result of major combat operations that had taken place between 20 March and 1 May 2003. The deaths of all of the applicants’ relatives had occurred during the occupation phase at various locations within Iraq.

II The Decision

On 7 July 2011, the European Court of Human Rights handed down a unanimous decision of 18 judges¹¹ in *Al-Skeini*,¹² which has been described as ‘the case of the century’.¹³ Deciding on the contentious issue of the meaning of the term ‘jurisdiction’ within art 1 of the *ECHR* when it comes to extraterritorial application of the *ECHR*, the Court deliberated in private for longer than most cases on 9 and 16 June 2010 and 15 June 2011. The Court decided that the applicants, all relatives of the deceased Iraqi citizens, fell within the jurisdiction of the respondent state, the UK. The Court further held that the procedural obligation in *ECHR* art 2 requiring an ‘adequate and effective investigation’ into an individual’s death had not occurred. In relation to the sixth applicant’s (Baha Mousa’s) death, it was accepted that a public inquiry¹⁴ had been held in the UK that had satisfied the art 2 obligation. Compensation was awarded to each of the first five applicants to the full amount claimed in order, to acknowledge the distress caused by the failure to fully and independently investigate the deaths of their relatives.¹⁵

In reaching its decision on the facts, the Grand Chamber noted that the Coalitional Provisional Authority (‘CPA’) was created by the US and the UK and was temporarily to exercise powers of government, in particular by providing security and maintaining civil law and order.¹⁶ Regulation No 1 of 16 May 2003, the first legislative act of the CPA, stated that the CPA held responsibility to ‘exercise powers of government temporarily in

⁸ See further *The Baha Mousa Public Inquiry* under the *Inquiries Act 2005* (UK), August 2008–September 2011 <<http://www.bahamousainquiry.org/index.htm>>. The inquiry took three years and cost £13 million. Its report was released in September 2011, two months after the European Court of Human Rights’ decision, and made 73 recommendations for changes within the military.

⁹ The applicants were Mr Mazin Jum’Aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadi Fayay Muzban, Mr Jabbar Kareem Ali and Colonel Daoud Mousa.

¹⁰ *Al-Skeini* (2011) 53 EHRR 18.

¹¹ President Jean-Paul Costa’s judgment was adopted unanimously by all presiding members, with two separate, concurring opinions by Rozakis J and Bonello J.

¹² (2011) 53 EHRR 18.

¹³ Public Interest Lawyers, *European Court’s Grand Chamber to Issue Historic Rulings in UK Cases* (2011) [7] <http://www.publicinterestlawyers.co.uk/news_details.php?id=101>.

¹⁴ Above n 8.

¹⁵ *Al-Skeini* (2011) 53 EHRR 18. The compensation took the form of damages for the sum of €17 000 each and a further €50 000 each in respect of costs and expenses.

¹⁶ *Ibid* [144]: ‘One of the powers of government specifically referred to in the letter of 8 May 2003 to be exercised by the US and the UK through the CPA was the provision of security in Iraq, including the maintenance of civil law and order.’

order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability'.¹⁷

Specific duties given to the UK within the Basra region of southern Iraq were to conduct patrols, arrests and antiterrorist operations, protect the community and infrastructure, and ensure civil demonstrations did not get out of hand.¹⁸ Based on these considerations, the Court determined that the UK exercised in Iraq 'some of the public powers normally to be exercised by a sovereign government'.¹⁹ As such:

the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.²⁰

III The Parties' Arguments

A The UK Government's Arguments

The UK Government put forward a number of arguments, none of which were accepted by the European Court of Human Rights Grand Chamber. The UK Government raised for the first time an argument not put in the domestic jurisdiction, namely that the UK troops were acting as part of the Multi-National Force on the international authority of the binding decision of the United Nations Security Council.²¹ The Grand Chamber dismissed this argument, holding that the UK Government was estopped from arguing before the Grand Chamber a position that had not first been put to the national courts. Grounding such an opinion in principles of procedural fairness, the Grand Chamber held that it was important to give these courts an opportunity to respond as they are 'in direct and continuous contact with the forces of their countries'.²²

The Grand Chamber was of the view that the hurdle 'jurisdiction' question was so closely entwined with the merits that it joined consideration of both aspects.²³ A minor point based on attribution and non-exhaustion of domestic remedies was raised by the Government in relation to the fifth applicant's matter, but that was rejected by the Court.

¹⁷ Ibid [145].

¹⁸ Ibid [147].

¹⁹ Ibid [149].

²⁰ Ibid.

²¹ Ibid [98]: 'The applicants stressed that the Government had not raised this argument at any stage during the domestic proceedings. Moreover, an identical argument had been advanced by the Government and rejected by the House of Lords in *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58.'

²² Ibid [99]: 'It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (*A. and Others v the United Kingdom* [GC], no. 3455/05, [154], ECHR 2009-...).'

²³ Ibid [102]. See also *Al-Jedda v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 27021/08, 7 July 2011) [61], where the Court unanimously joined the merits questions regarding whether the applicant's detention was attributable to the respondent state and whether he fell within the respondent state's jurisdiction.

The fifth applicant's matter was not considered in the UK court hearings of *Al-Skeini*.²⁴ Ahmed Jabbar Kareem Ali was a 15-year-old whose body had been found floating in the river Shatt Al-Arab after being taken there by UK soldiers. The judicial review of his matter had been stayed pending the outcome of the other matters.²⁵

On the merits the Government argued that *Banković v Belgium*²⁶ definitively established the law on the extent of jurisdiction under art 1 of the *ECHR* and that this 'was "primarily" or "essentially" territorial and any extension of jurisdiction outside the territory of the Contracting State was "exceptional" and required "special justification in the particular circumstances of each case"'.²⁷ Of considerable significance also was that the *Banković* Court had held the *ECHR* rights could not be 'divided and tailored'.²⁸

The exceptions the Government argued as accepted in *Banković* included the Effective Control of an Area ('ECA') exception outlined in the northern Cyprus case law,²⁹ where the ECA applied extraterritorially as a consequence of military action. In *Cyprus v Turkey*,³⁰ the Court had said 'contracting states are bound to secure the rights and freedoms under the Convention to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad'.³¹ The Government believed two considerations limited the ECA exception. First, where such jurisdiction arose, then the state exercising ECA was required to secure the entire range of substantive *ECHR* rights in the territory under control, notwithstanding contrary statements in the subsequent Chamber judgment of *Issa v Turkey*.³² Second, ECA only applied within the *ECHR* legal space.

The Government argued that ECA jurisdictional exceptions had only been applied by the Court in the areas of Cyprus and Transdniestria, both of which fell within the territory of another contracting state. It was argued that '[a]ny other approach would risk requiring the State to impose culturally alien standards, in breach of the principle of sovereign self-determination'.³³ Based on the above understanding of the case law, it was considered that Iraq was outside the *ECHR* legal space, and therefore the ECA exceptional basis of jurisdiction did not apply. As a second limb to this argument, it was contended that, in any event, the UK did not factually have effective control in Iraq due to the difficult circumstances prevailing, a position supported by the domestic courts' conclusions.³⁴

The Government also argued it did not have occupying power status as it 'did not have sovereignty over Iraq and was not entitled to treat the area under its occupation as its own territory or as a colony subject to its complete power and authority'.³⁵ It was suggested the CPA, with US Ambassador Paul Bremer at its head, and the central Iraqi Governing Council and a number of local Iraqi councils formed in July 2003, was an administration

²⁴ *Al-Skeini* (2011) 53 EHRR 18, [55]–[62], [103]–[104].

²⁵ *Ibid* [55]–[62].

²⁶ (2001) 11 BHRC 435 ('*Banković*').

²⁷ *Al-Skeini* (2011) 53 EHRR 18, [109].

²⁸ *Banković* (2001) 11 BHRC 435, 452 [75].

²⁹ *Cyprus v Turkey* [2001] IV Eur Court HR 172.

³⁰ (1976) 4 EHRR 482.

³¹ *Ibid* 586 [8].

³² (European Court of Human Rights, Application No 31821/96, 16 November 2004).

³³ *Al-Skeini* (2011) 53 EHRR 18, [110].

³⁴ *Ibid* [112].

³⁵ *Ibid* [114].

recognised by the international community, through the United Nations Security Council. The Court contrasted this with the 'TRNC' in Cyprus or the 'MRT' in Transdniestria, which were not recognised by the international community, but were 'self-proclaimed authorities'.³⁶ Judge Bonello was particularly scathing of the Government's arguments in this regard, stating:

the United Kingdom went a long and eloquent way in its attempt to establish that it did not exercise jurisdiction over the area assigned to it. It just stopped short of sharing with the Court who did. Who was the mysterious, faceless rival which, instead of it, exercised executive, legislative and judicial authority for three years and more over the area delegated to the United Kingdom?³⁷

The Government submitted a number of subsidiary points, including relying on art 56 of the *ECHR* as operating against the position that ECA could apply beyond contracting party territory.³⁸ Article 56 of the *ECHR* provided a mechanism for contracting state parties to extend certain rights under the *ECHR* to their territorial possessions, having regard to the circumstances therein by means of a declaration.³⁹

The Government argued that international humanitarian law and the law of occupation 'could not in themselves have consequences for the very different issue of jurisdiction under the *ECHR*'.⁴⁰ The Government claimed the legal authority provided by the *Hague Regulations*⁴¹ to ensure 'public order and safety' in the occupied territory was an entirely different provision of international humanitarian law that could not be intermingled with international human rights law and *ECHR* jurisdiction requirements.⁴² It was further argued that the UK military could not be said to be exercising 'public functions' pursuant to treaty arrangements such as those in the *Hague Regulations*. It was said that:

[n]o sensible distinction could be drawn between the different types of military operation undertaken by them. There was no basis for concluding that the applicability of the Convention should turn upon the particular activity that a soldier was engaged in at the time of the alleged violation, whether street patrol, ground offensive or aerial bombardment.⁴³

Therefore '[n]o distinction could be drawn in this respect between a death resulting from a bombing and one resulting from a shooting in the course of a ground operation'.⁴⁴ The Government cited the three UK Court decisions in *Al-Skeini* as indistinguishable from the facts in *Banković*,⁴⁵ in which the NATO Forces' bombing of Radio Televizje Srbije in

³⁶ Ibid [113].

³⁷ Ibid [34] (Bonello J).

³⁸ Ibid [111]. The Government in *Al-Skeini* (2011) 53 EHRR 18, [116] also relied on *Banković* (2001) 11 BHRC 435, 452 raising arguments based on state practice, and art 15 of the Convention.

³⁹ See further regarding art 56 *Quark Fishing Ltd v the United Kingdom* (European Court of Human Rights, Application No 15305/06, 30 March 2005).

⁴⁰ *Al-Skeini* (2011) 53 EHRR 18, [114].

⁴¹ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 187 CTS 227; 1 Bevans 631 (entered into force 26 January 1910).

⁴² *Al-Skeini* (2011) 53 EHRR 18, [117].

⁴³ Ibid.

⁴⁴ Ibid [116].

⁴⁵ (2001) 11 BHRC 435.

Belgrade on 23 April 1999 killed 16 people and injured another 16 civilians.⁴⁶ However, a significant difference with the situation in Iraq was that it was one of occupation, whereas in *Banković* the deaths occurred during the period of hostilities.

The Government pointed out that its forces were prevented from acting with impunity as they were still subject to international humanitarian law, UK military disciplinary and criminal law, and civil tort claims within the UK.⁴⁷ However, this argument against impunity of actions did not gain traction given the lack of successful prosecutions in the UK in relation to the deaths of the applicants' relatives.⁴⁸

B The Applicants' Arguments

The applicants, while accepting that jurisdiction was 'essentially territorial',⁴⁹ argued it was not exclusively so. They claimed that there are principally two types of exceptions to the extraterritorial operation of the *ECHR*. One is based on 'state agent authority' ('SAA') and the other on ECA. In relation to SAA, they cited *Cyprus v Turkey*⁵⁰ and the Commission's statement that:

authorised agents of the State ... not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property.⁵¹

The applicants contended that SAA and ECA each exist as separate principles that operate side-by-side and not to the exclusion of the other. On this basis, SAA stands in its own right as a ground for analysing whether a contracting party has jurisdiction. Their reasoning was based on the fact that, in the Cyprus and Turkey situation, Turkey had accepted that art 1 of the *ECHR* would be engaged by the direct acts of Turkish military personnel. However, Turkey had based its denial of responsibility in that case on the fact that the actions were not those of the Turkish military, but rather the actions of the autonomous local administration, the TRNC.⁵² This proposition had been rejected in both *Loizidou v Turkey (Preliminary Objections)*⁵³ and *Cyprus v Turkey*⁵⁴ by the Court developing the principle of ECA. In *Loizidou v Turkey (Preliminary Objections)* the Court stated:

when as a consequence of military action — whether lawful or unlawful — [a contracting state] 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

⁴⁶ *Al-Skeini* (2011) 53 EHRR 18, [118].

⁴⁷ *Ibid* [119].

⁴⁸ See *The Baha Mousa Public Inquiry*, above n 8. Corporal Donald Payne was the only one of the seven detainees to plead guilty to a single offence of inhuman treatment under s 51 of the *International Criminal Court Act 2001* (UK) for which he received 12 months' detention in a military facility. Per *Al-Skeini* (2011) 53 EHRR 18, [68] (Bonello J):

On 19 July 2005 seven British soldiers were charged with criminal offences in connection with Baha Mousa's death ... On 14 February 2007 charges were dropped against four of the seven soldiers and on 13 March 2007 the other two soldiers were acquitted. On 30 April 2007 the soldier convicted of inhumane treatment was sentenced to a year's imprisonment and dismissal from the Army.

⁴⁹ *Al-Skeini* (2011) 53 EHRR 18, [120].

⁵⁰ *Cyprus v Turkey* (1975) 2 Eur Comm HR 125.

⁵¹ *Al-Skeini* (2011) 53 EHRR 18, [121], citing *Cyprus v Turkey* (1975) 1 Eur Comm HR 125, 136. The principle was applied in *Cyprus v Turkey* (1982) 4 EHRR 482.

⁵² *Al-Skeini* (2011) 53 EHRR 18, [122].

⁵³ (1995) 310 Eur Court HR (ser A).

⁵⁴ (1982) 4 EHRR 482, 586.

Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.⁵⁵

Based on this reasoning, the applicants maintained that SAA provided the basis for jurisdiction in relation to all matters before the Court.⁵⁶ It also covered the sixth applicant, Mousa, who would have been covered by this reasoning whether or not he was in a prison. This is arguably a more sensible basis for founding jurisdiction as it avoids the odd outcome of stretching quasi-territoriality to include the area of a prison enclave where a state has authority as custodians over prisoners. Given the UK Courts' acceptance of *Banković*,⁵⁷ if Mousa's persecutors had subjected him to the treatment they did before they formally arrested him and brought him to the military compound, or if they never bothered to arrest and detain him, then no issues regarding rights under the *ECHR* would arise. This was the situation for applicant five, Ahmed Jabber Kareem, before the Grand Chamber in *Al-Skeini*,⁵⁸ who was never arrested. The UK Government argued no human rights protection or duties could be demanded of the UK military for him.⁵⁹

The applicants denied that limitations applied to ECA by virtue of an *ECHR* legal space. They also denied the requirement that the state must be in a position to provide a similar level of rights as it would in its home territory before it could be determined to have jurisdiction. In regards to the proposition that the UK Government did not exercise actual factual control in southern Iraq, due to the difficult circumstances and levels of hostility, the applicants contended that 'defining the existence of control over an area by reference to troop numbers alone would be uncertain, allow evasion of responsibility and promote arbitrariness'.⁶⁰ In this regard, they endorsed the comments by Sedley LJ in *Al-Skeini* in the Court of Appeal, contending that the applicability of the *ECHR* cannot be dependent on inadequate planning or resourcing by the occupying power, enabling it to escape its responsibilities.⁶¹

Last, the applicants argued ECA principles applied to unlawful occupation, as well as to situations of consent. This was based on the case law of the International Court of Justice ('ICJ'),⁶² which had found both international humanitarian law and international human rights law were applicable during belligerent occupation in international law, thus providing a basis for the extra-territorial application of human rights.⁶³

⁵⁵ *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (ser A), [62].

⁵⁶ *Al-Skeini* (2011) 53 EHRR 18, [123].

⁵⁷ (2001) 11 BHRC 435.

⁵⁸ (2011) 53 EHRR 18.

⁵⁹ This view was supported by at least one of the diary entries in a soldier from 1QRL's diary: see Audrey Gillan, 'Diary of a Squaddie: Sunburn, Sore Feet and Three More Ali Babas Tossed in the River', *The Guardian* (London), 28 April 2007: entry regarding 'we beat him up so didn't arrest him'.

⁶⁰ *Al-Skeini* (2011) 53 EHRR 18, [126].

⁶¹ Ibid. 'The application of the Convention should influence the actions of the Contracting States, prompting careful consideration of military intervention and ensuring sufficient troop numbers to meet its international obligations'; see R (*Al-Skeini*) v Secretary of State for Defence [2005] EWCA Civ 1609; R (*Al-Skeini*) v Secretary of State for Defence [2006] 3 WLR 508, [80] (Sedley LJ).

⁶² *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 [178] <<http://www.icj-cij.org>> and its Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

⁶³ *Al-Skeini* (2011) 53 EHRR 18, [127].

C The Interveners' Arguments

Third party interveners⁶⁴ also appeared before the Grand Chamber and argued that it 'was inconceivable that the drafters of the *ECHR* should have considered that the prospective responsibilities of States should be confined to violations perpetrated on their own territories.'⁶⁵ They referred to the *Vienna Convention*⁶⁶ obligation to interpret treaties such as the *ECHR* in terms of its 'object and purpose', which they suggested required the 'need to avoid unconscionable double standards, by allowing a State to perpetrate violations on foreign territory which would not be permitted on its own territory'.⁶⁷

They contended, as have others,⁶⁸ that 'jurisdiction' is a factual question concerning the degree of control, authority or power that a State or its agents exercise over an individual and that, where this is factually determined to be the case, jurisdiction can be said to apply. Based on the case law of the ICJ, in situations of military occupation, such authority and control was presumed to exist.

IV Analysis

The Grand Chamber's decision overturning the UK Court's has significant repercussions for other UK decisions relating to the UK's obligations under the *ECHR* in Iraq, particularly in relation to its own soldiers.⁶⁹

The Grand Chamber sought to bring some order to the earlier jurisprudence of the Court on the jurisdictional reach of art 1 of the *ECHR*. Its starting point was to reiterate that jurisdiction as a threshold criterion is essentially territorial⁷⁰ and that, in exceptional cases only, acts of 'contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1'.⁷¹ The Court went on to indicate that these exceptional situations require a consideration of the facts in each case.⁷² It then considered these exceptions separately under both SAA and ECA.

The Grand Chamber confirmed the recognition of the application of the *ECHR* on the basis of SAA where the contracting state's agent's actions produce effects outside its territory.⁷³ The Court considered this broad statement needed some defining principles,

⁶⁴ The interveners were the Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, Interights and the International Federation for Human Rights.

⁶⁵ *Al-Skeini* (2011) 53 EHRR 18, [128].

⁶⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1960, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

⁶⁷ *Al-Skeini* (2011) 53 EHRR 18, [128].

⁶⁸ See, eg, Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) *Human Rights Law Review* 411; Tobias Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*' (2008) 6(1) *Journal of International Criminal Justice* 115.

⁶⁹ *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission Intervening)* [2011] 1 AC 1; *Smith v Ministry of Defence* [2011] EWHC 1676 (QB).

⁷⁰ *Al-Skeini* (2011) 53 EHRR 18, [131], citing as support *Soering v United Kingdom* (1989) 11 EHRR 439, [86]; *Banković* (2001) 11 BHRC 435, 452 [61], [67]; *Ilascu and Others v. Moldova and Russia* (2005) 40 EHRR 46 ('*Ilascu*') [312]; *Assanidze v Georgia* (2004) 39 EHRR 653.

⁷¹ *Al-Skeini* (2011) 53 EHRR 18, [131], citing *Banković* (2001) 11 BHRC 435, 452 [67].

⁷² *Al-Skeini* (2011) 53 EHRR 18, [132].

⁷³ *Al-Skeini* (2011) 53 EHRR 18, [133], citing as authority for the principle '*Drozđ v France*, [91]; *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (ser A); *Loizidou v Turkey* (merits), 18 December 1996, [52], *Reports of Judgments and Decisions* 1996-VI; and *Banković*, [69]'.

emphasising that what mattered was that jurisdiction does not arise solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held, but '[w]hat is decisive in such cases is the exercise of physical power and control over the person in question'⁷⁴ in each of the following circumstances:

1. It clearly includes 'acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law ... when these agents exert authority and control over others'.⁷⁵
2. Where a contracting state 'through the consent, invitation or acquiescence of the government' of a territory exercises all or some of the public powers usually exercised by that government.⁷⁶ This was qualified with 'where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State'.⁷⁷
3. In certain circumstances, the use of force by a state's agents operating outside its territory may bring the individual under the control of the state's authorities and so within *ECHR* art 1 jurisdiction; for example, where an individual is taken into the custody of state agents abroad.⁷⁸

Significantly, the Grand Chamber clarified that rights can be divided and do not have to be applied in the all-or-nothing manner that had caused many issues within the case law. This appears to be a point of distinction between SAA and ECA exceptions, as it is said to apply to SAA exceptions only:

It is clear that, *whenever the State through its agents exercises control and authority over an individual*, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention *that are relevant to the situation of that individual*. In this sense, therefore, the Convention rights *can be 'divided and tailored'*.⁷⁹

As regards ECA outside a state's national territory, the Grand Chamber accepted where 'as a consequence of *lawful or unlawful* military action, a Contracting State exercises ... such control', there is an obligation under the *ECHR* 'from the fact of such control, whether it

⁷⁴ *Al-Skeini* (2011) 53 EHRR 18, [136].

⁷⁵ Ibid [134], citing as authority for the principle *Banković* (2001) 11 BHRC 435, [73]; *X v Federal Republic of Germany* (1965) 8 *Yearbook of the European Convention on Human Rights* 158; *X v UK* (1977) 12 DR 73; *WM v Denmark* (European Court of Human Rights, Application No 17392/90, 14 October 1993).

⁷⁶ *Al-Skeini* (2011) 53 EHRR 18, [135], citing as authority for the principle *Banković* (2001) 11 BHRC 435, [71]; *Drozd v France* (1992) 14 EHRR 745; *Gentilhomme v France* (European Court of Human Rights, Application Nos 48205/99, 48207/99, 48209/99, 14 May 2002); *X and Y v Switzerland* (European Court of Human Rights, Application Nos 7289/75, 7349/76, 14 July 1977) 57.

⁷⁷ *Al-Skeini* (2011) 53 EHRR 18, [135].

⁷⁸ Ibid [136], citing by way of example *Öcalan v Turkey* [2007] IV Eur Court HR 131, [91]; *Issa v Turkey* (European Court of Human Rights, Application No 31821/96, 16 November 2004), 'authority and control over'; *Al-Saadoon and Mufdhi v the UK* [2010] Eur Court HR 282, a situation where the UK exercised 'total and exclusive control' over a prison in Iraq; *Medvedyev v France* (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010) [67]: 'French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters.'

⁷⁹ *Al-Skeini* (2011) 53 EHRR 18, [137] (emphasis added).

be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration' to secure all Convention rights.⁸⁰

In determining whether a contracting state exercises ECA, the Grand Chamber in *Al-Skeini* emphasised that the following factors are to be determined as questions of fact:

1. 'the strength of the State's military presence in the area';
2. 'the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'; and
3. where domination is determined as fact, it need not be 'detailed control over the policies and actions of the subordinate local administration'.⁸¹

What is significant for the ECA exception is that, where it exists, the controlling state will have responsibility under *ECHR* art 1 to 'secure, within the area under its control, *the entire range of substantive rights* set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights'.⁸²

The UK Law Lords had interpreted *Banković*⁸³ as collapsing the exceptional operation of jurisdiction into just ECA, denying SAA. They saw *Banković* as drawing on art 56 to aid its understanding of the reach of jurisdiction of the *ECHR*.⁸⁴ Article 56 is concerned with a declaration that may be made by contracting parties to the *ECHR* for overseas territories for which it holds international relations responsibility.⁸⁵ To support its decision, the *Banković* Court contended that this article lent support to the reading that the *ECHR* is 'a multi-lateral treaty operating, subject to art 56 of the Convention (as an express exception) in an essentially regional context'⁸⁶ and notably in the legal space (*espace juridique*) of the Contracting States'.⁸⁷ While *Banković* did not refer to the Council of Europe States, it did note:

[t]he Court's obligation, in this respect, is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties.⁸⁸

⁸⁰ Ibid [138], citing as authority *Loizidou v Turkey (Preliminary Objections)* (1995) 310 Eur Court HR (ser A), [62]; *Cyprus v Turkey* (2001) IV EHCR 172, [76], *Banković* (2001) 11 BHRC 435, [70]; *Ilascu* (2005) 40 EHRR 46 [314]–[316]; *Loizidou v Turkey (Merits)* (1996) VI Eur Court HR 2216, [52].

⁸¹ *Al-Skeini* (2011) 53 EHRR 18, [138]–[139], citing as authority *Ilascu* (2005) 40 EHRR 46 [388]–[394]; *Loizidou v Turkey (Merits)* (1996) VI Eur Court HR 2216, [16], [56]; *Ilascu* (2005) 40 EHRR 46 [387].

⁸² *Al-Skeini* (2011) 53 EHRR 18, [138], citing as authority *Cyprus v Turkey* (2001) IV EHCR 172, [76]–[77] (emphasis added).

⁸³ (2001) 11 BHRC 435.

⁸⁴ See *Al-Skeini* (HL) [2008] 1 AC 153, [109], [111]–[114] (Brown LJ); *Banković v Belgium* (2002) 41 ILM 517, [80].

⁸⁵ See further Matthew Happold, 'Banković v Belgium and the Territorial Scope of the European Convention on Human Rights' (2003) 3 *Human Rights Law Review* 77, 288–91: 'Article 56 has the effect that the Convention only applies to non-metropolitan territories to the extent that a Contracting Party specifically consents for it to do so. However, the origin of the provisions lie in the British Constitutional arrangements.'

⁸⁶ *Banković v Belgium* (2002) 41 ILM 517, [80]. This factor was important in relation to the Cyprus situation as the Court noted that the inhabitants had previously enjoyed the Convention rights from which they were otherwise being excluded.

⁸⁷ Ibid.

⁸⁸ Ibid.

Banković held in these circumstances that the Federal Republic of Yugoslavia did not fall within the jurisdiction or legal space of the *ECHR*.⁸⁹ The Grand Chamber in *Al-Skeini* dealt with the art 56 dilemma shortly: ‘The existence of this mechanism, which was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term “jurisdiction” in Article 1.’⁹⁰

V Conclusion

*Al-Skeini*⁹¹ challenges militaries to determine how human rights can go to war. As a result of the Grand Chamber’s decision, the UK is now under an investigative obligation in relation to the other five matters that related to civilian shootings outside military bases. After nine years it is likely that much of the evidence in these matters has been lost and such an inquiry will add to the already expensive inquiries that the UK has had to undertake as a result of its participation in the invasion of Iraq. Currently the Al-Sweady Public Inquiry⁹² and The Iraq Inquiry⁹³ are ongoing and are yet to report.

One may consider that this has no importance for Australia as it is not a contracting party to the *ECHR*. However, in view of the 2005 *Senate Inquiry into the Effectiveness of Australia’s Military Justice*,⁹⁴ in which the Committee in its deliberations gave due regard to changes to other Western militaries as a result of human rights concerns and the fact that Australia’s participation in Iraq and Afghanistan is part of a multinational force, it is not something that can be ignored. Further, as a result of the Grand Chamber’s decision in *Al-Skeini*,⁹⁵ other UK cases concerning the application of the *ECHR* to the soldiers of a contracting party operating extraterritorially ‘beyond the wire’, which have also considered the *ECHR* rights, are in doubt.⁹⁶

⁸⁹ Ibid.

⁹⁰ *Al-Skeini* (2011) 53 EHRR 18, [140].

⁹¹ Ibid.

⁹² See, eg, the Al-Sweady Public Inquiry, which commenced on 25 November 2009, terms of reference: ‘To investigate and report on the allegations made by the claimants in the Al-Sweady judicial review proceedings against British soldiers of (1) unlawful killing ... on 14 and 15 May 2004, and (2) the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at ... Shaibah Logistics Base between 14 May and 23 September 2004’: Al-Sweady Public Inquiry, *Background* (2009) <<http://www.alsweadyinquiry.org>>.

⁹³ The Iraq Inquiry is also known as the Chilcot Inquiry: see <<http://www.iraqinquiry.org.uk/>>.

⁹⁴ Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia’s Military Justice System* (June 2005) 98.

⁹⁵ (2011) 53 EHRR 18.

⁹⁶ *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission Intervening)* [2011] 1 AC 1; *Smith v Ministry of Defence* [2011] EWHC 1676 (QB).

