ARTICLE 1 OF THE ECHR: ITS EXTRATERRITORIAL CERTAINTIES, AMBIGUITIES AND IMPLICATIONS

Abstract

This essay will explore how the European Court has interpreted the meaning of Article 1 of the Convention and it will examine the origins of the two major exceptions to the ‘territorial’ notion of jurisdiction. Secondly, it will also discuss the case of Banković v Belgium¹ and its discredited finding in respect of Article 1 jurisdiction and will give an analysis of the recent case of Al-Skeini and Others v United Kingdom² explaining how it has reduced, to some extent, the inconsistencies arising in this area of law. Finally the essay will highlight the implications arising from Al-Skeini and its impact on future Convention cases.

¹ [2001] ECHR 890.
² (2011) 53 EHRR 18.
Introduction

The doorway to all rights and duties under the European Convention on Human Rights is Article 1 which states that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention’. It has been interpreted not as a standing alone substantive right but as a ‘framework provision’ that authorises and gives effect to the Convention’s system of rights.\(^5\) Like all legal instruments, Article 1 of the Convention is subject to interpretation. So, what does ‘within their jurisdiction’ mean? No definition of the term ‘jurisdiction’ is provided in Article 1 or in any of the other articles of the Convention and, as a result, Article 1 case law is enormously controversial. As a reaction to the jurisprudential developments in this region of law, there is no scarcity of legal commentary, mostly very critical of the recent judgments.

The European Court of Human Rights and the Meaning of Article 1

Over the past six decades, the Commission and subsequently the European Court of Human Rights have been asked to consider the limits of the term ‘within their jurisdiction’ under Article 1. It is clear that ‘jurisdiction’ covers the State’s own territory but the precise circumstances in which it applies extraterritorially are less clear.\(^4\) Consequently, Article 1 has developed a considerable amount of case law and its extraterritorial scope has become one of the most confusing topics and, at the same time, one of the most interesting topics in recent case law.\(^5\)

The case of Banković v Belgium\(^6\) was the European Court’s first attempt at making sense of the inconsistent case law on the issue of extraterritorial jurisdiction. In this case, the Court recognised Article 1 of the Convention as a primarily territorial concept with other bases of jurisdiction being ‘exceptional’.\(^7\) It also recognised that the Convention’s jurisprudence had followed two major exceptions to the principle of territorial jurisdiction under Article 1.\(^8\) One of the exceptions is known as the ‘State agent authority’ exception (also known as the


\(^6\) [2001] ECHR 890.

\(^7\) [2001] ECHR 890, para 61.

personal notion of jurisdiction)\(^9\) which is when a State has jurisdiction whenever it exercises authority or control over an individual. The other exception is the ‘effective control over an area’ exception. This arises where a State exercises effective control over an area outside its national territory as a consequence of military action.\(^{10}\)

**Origins of the Two Major Exceptions**

The State agent authority exception developed in *Cyprus v Turkey*.\(^{11}\) This case arose in response to the military occupation of Turkish troops in Northern Cyprus followed by human rights violations against Greek Cypriots, the first of many. The Commission held that Article 1 was not limited to national territory. A State’s nationals were always partly within its jurisdiction, and ‘authorised 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 or property’.\(^{12}\) With this case, Article 1 jurisdiction extended ‘to all persons under a Contracting State’s actual authority and responsibility,\(^{13}\) whether or not that authority is exercised within their own territory or abroad’. It extends to all natural persons (nationals and non-nationals) as well as objects namely property.\(^{14}\) It is the extent of the State agent’s control over the individual person or property that is relevant.\(^{15}\)

The second exception to the territorial concept of jurisdiction is the ‘effective control of an area’. This exception was established as a way of ascertaining exercises of jurisdiction where the alleged violations were not committed *directly* by State agents, but indirectly, through local agents operating with the support of the Contracting State.\(^{16}\) Therefore, this test is understood to operate more broadly than the State agent authority test.\(^{17}\) It was first established in 1995 in the case of *Loizidou v Turkey*.\(^{18}\) The applicant claimed that her property rights had been breached as a result of the continued occupation and control of Turkish troops


\(^{10}\) Banković *v Belgium* [2001] ECHR 890, para 70.

\(^{11}\) (1975) 2 ECHR Dec & Rep 125, 127.

\(^{12}\) ibid 136.

\(^{13}\) ibid.


\(^{16}\) ibid.

\(^{17}\) ibid 175.

in Northern Cyprus which had, on many occasions, prevented her from gaining access to her home and other properties in that area.

This case did not come within the scope of the restrictive State agent authority exception. Nonetheless, when Turkey argued that this was an inadmissible extraterritorial claim, the Court responded that the obligation of a Contracting State may also arise as a consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside of its national territory. Turkey’s attempt to push the blame onto the local authority, the Turkish Republic of Northern Cyprus failed due to the political and military support that Turkey extended to the TRNC.

**The Banković Case**

In *Banković*, a claim was brought by six citizens of the Federal Republic of Yugoslavia (FRY) against seventeen European countries that were members of the North Atlantic Treaty Organisation (NATO). The claim revolved around a NATO bombing mission during the Kosovo War, conducted on the morning of the 23rd April 1999 that struck the radio and television station, Radio Televizijie Srbije, in Belgrade. The close relatives of the five applicants were killed in the bombing and the sixth applicant was injured. They claimed that the respondent countries were in violation of a number of rights under the Convention. It was found that the NATO air strikes did not constitute an exercise of jurisdiction within the meaning of Article 1.

The Court distinguished this case from the earlier cases such as *Cyprus v Turkey*. It held that Turkey had jurisdiction under the Convention in Northern Cyprus on the basis that ‘the Convention is a multi-lateral treaty operating……in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The Former Republic of Yugoslavia clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of the Contracting States’. It should be noted that the Former Republic of Yugoslavia was a non-Contracting State at the time the judgment was delivered for this case.

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20 Belgium, Denmark, the United Kingdom, France, Germany, the Netherlands, Greece, Italy, Iceland, Hungary, the Czech Republic, Luxembourg, Norway, Turkey, Poland, Spain and Portugal.
In Banković, the Court observed that ‘only in exceptional cases’ that acts of the Parties performed or producing effects outside their territory could constitute an exercise of jurisdiction which would require special justification. The Court expressly outlined the two major exceptions namely the State agent authority model and the effective control model even though neither of these exceptions applied on the facts of this particular case. It suggested that the effective control of an area exception was limited to situations arising within the Convention’s legal space and therefore it was globally inapplicable. The Court further noted that a Contracting Party was required to secure all rights and freedoms under the Convention which could not be ‘divided or tailored’ in accordance with the particular circumstances of the extraterritorial act in question.

**The Court’s Restrictive Approach in Banković**

The Court seemed to have merged the two exceptions into a single doctrine narrowing the previous formulations and adding a new limiting factor. This is evident when the Court stated that the exercise of extraterritorial jurisdiction arises ‘when 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’. This single test requires that an exercise of jurisdiction must constitute control over both, the territory and inhabitants, rather than one or the other. It combined both the State agent authority exception and the effective control of an area exception.

This rather mishmash test further indicates that mere effective control of a territory as a consequence of military action is not sufficient to constitute an exercise of jurisdiction. The control must additionally involve an exercise of ‘public powers normally to be exercised by that Government’. Additionally, the judgment has created a restrictive approach to the geographic space and therefore jurisdiction could not be extended to the rest of the world.

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22 ibid para 71.
23 ibid para 69 and 70.
24 ibid para 80.
25 ibid para 75.
has indicated also that the Convention rights could not be divided or tailored to suit the particular situation in question. This means that the Contracting State should be held responsible for all substantive rights under the Convention.\textsuperscript{29} An ‘all or nothing’ approach has been applied here.\textsuperscript{30}

However, the decision in Banković can be contrasted with the latter and less restrictive finding in Ocalan v Turkey.\textsuperscript{31} Like Banković, this case involved action in the territory of a non-member State outside the legal space of the Convention, a circumstance which had been strongly emphasised in Banković. The applicant was arrested by members of the Turkish security forces inside an aircraft of the international zone of the Nairobi Airport in Kenya. The State agent authority exception was applied and this act was enough to bring the applicant within the jurisdiction of the respondent State namely Turkey. It exercised authority and control over the applicant whose Convention rights had been violated.

The Court noted that ‘it is common ground that, directly after being handed over to Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the ‘jurisdiction’ of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory’.\textsuperscript{32} Not only does this case depart from the legal space limitation laid out in Banković, it also suggests that Banković’s single test which combines the two major exceptions and which limits their scope was excessively narrow.\textsuperscript{33} It has indicated a reluctance to apply such a restrictive approach to the exceptions to the principle of territorial jurisdiction under Article 1.

Another post-Banković case further highlights the Court’s unwillingness to apply Banković’s formulation and that is the case of Issa v Turkey.\textsuperscript{34} Like Ocalan, this case applies the State agent authority model as a distinct exception. The applicants alleged that their husbands had been arrested and killed by Turkish military forces operating in Iraq. Although it had already been established that Turkish troops were not in effective control of the territory of Northern

\textsuperscript{31} ibid para 91.
\textsuperscript{33} (2004) 41 EHRR 567.
Iraq, the court was willing to hold Turkey accountable for the killings if it were proved that ‘at the relevant time, Turkish troops conducted operations in the area where the killings took place’.\textsuperscript{35} Effective control of the territory and its inhabitants was not established and therefore the \textit{Banković} test was not satisfied. Nonetheless, the Court was prepared to recognise Turkish jurisdiction. It was established that the Turkish military forces had exercised authority and control over the applicants’ husbands. This decision clearly illustrates that the State agent authority exception is a valid and autonomous exception.\textsuperscript{36}

The case of \textit{Pad and Others v Turkey}\textsuperscript{37} has also proved the defectiveness of the \textit{Banković} reasoning. Iranian nationals were living close to the Turkish border. They were killed by a Turkish helicopter when Turkey claimed that the Iranian nationals attempted to cross the border illegally. It was undisputed that they were killed by Turkish forces, but it was argued whether the killing took place on the Turkish or Iranian side of the border. The Court, while applying \textit{Issa}, held them to have been within Turkey’s jurisdiction under the State agent authority exception, regardless of on which side of the border the deaths took place.\textsuperscript{38} It indicated that ‘a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States but who are found under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State’.\textsuperscript{39}

\textbf{\textit{Banković} – The Criticisms}

The finding in \textit{Banković} has caused some confusion in the Convention’s case law and has been subject to significant criticism.\textsuperscript{40} The reasoning in the \textit{Pad} case was indeed a direct contradiction of \textit{Banković} despite the fact that both these cases had similar facts. Both the killings took place as a result of a missile fire from an aircraft.\textsuperscript{41} As can be seen from \textit{Ocalan},

\textsuperscript{35} ibid para 76.
\textsuperscript{37} (App No 60167/00) 28\textsuperscript{th} June 2007.
\textsuperscript{38} (App No 60167/00) 28\textsuperscript{th} June 2007, para 53 -55.
\textsuperscript{39} (App No 60167/00) 28\textsuperscript{th} June 2007, para 53.
Issa and Pad, the Court has been uneasy with Banković’s rigid finding. These cases did not even apply the additional ‘public powers’ limitation.

Not only does the post-Banković case law indicate criticism towards it, commentators have also attacked Banković for promoting a narrow view of international human rights law and for abandoning the Convention’s previous jurisprudence. Loucaides has characterised Banković as ‘a break in a substantial line of decisions’ and that it is ‘a set-back in the effort to achieve the effective promotion of and respect for human rights by the High Contracting Parties to the Convention in relation to the exercise of any State activity within or outside their country’. Though the two major exceptions are separate legal tests, the Court has regularly discussed both tests in the same cases. Banković did not clarify which test was to be the preferred. This was a disappointment for many. It could be said that Banković enhanced the inconsistency of the Court’s Article 1 jurisprudence as it has created a new and very restrictive test to determine extraterritoriality.

**Al-Skeini and Others v United Kingdom**

The case of Al-Skeini and Others v United Kingdom was one of several cases arising out of the occupation of Iraq by British troops that were brought before the UK courts under the Human Rights Act 1998. The applicants were relatives of six Iraqi citizens who were killed by British troops on patrol in UK occupied Basra, Iraq. Three were shot by British soldiers, one was allegedly drowned in a river after being arrested and another died during a cross-fire between British soldiers and ‘insurgents’. The sixth, Baha Mousa, was arrested and taken to the UK detention facility by British troops where he was purportedly tortured and subsequently killed. This case first went to the UK High Court, then to the Court of Appeal, and finally to the House of Lords. In the House of Lords, the relatives of the six

42 ibid 125.
45 ibid 407.
49 *R (on the application of Al-Skeini and Others) v Secretary of State for Defence* [2004] EWHC 2911 (ADMIN), [2004] All ER (D) 197 (Dec).
50 *R (on the application of Al-Skeini and Others) v Secretary of State for Defence* [2005] EWCA Civ 1609, [2005] All ER (D) 337 (Dec).
Iraqi civilians asked for an independent investigation into the deaths. Their request was denied and the applicants brought various applications for judicial review.

The House of Lords held that only one of the victims, Mousa, was within the jurisdiction of the United Kingdom. The judges considered Mousa to be within the State’s jurisdiction ‘essentially by analogy with the extraterritorial exception made for embassies’. In regard to the other five civilians, the judges heavily relied on Banković and consequently denied their extraterritorial claim. Their case was dismissed. It was stated that ‘the Issa judgment should not be read as detracting in any way from the clear – and clearly restrictive – approach to Article 1 jurisdiction adopted in Banković’. It was found that the State agent authority exception could not apply because the mere fact of killing individuals would not be sufficient to involve jurisdiction. Also, the effective control of an area exception could not apply either because Iraq was outside the Convention’s legal space.

In Strasbourg, the relatives claimed that the United Kingdom had breached its obligation to carry out an independent investigation on the deaths of the Iraqi citizens under Article 2 of the European Convention. The European Court retained the basic Banković position that extraterritorial jurisdiction must remain exceptional and somehow requires special justification on the basis of general international law. The Court then outlined the two major exceptions to the principle of territorial jurisdiction, the State agent authority exception and the effective control of an area exception.

**State Agent Authority** - It was noted by the Court, while citing previous case law, the State agent authority exception is broad and that it is necessary to examine the Court’s case law to identify the defining principles. Referring to Banković, the Court outlined that jurisdiction may arise if a State is exercising all or some of the public powers normally to be exercised by the government of the territory through the consent, invitation or acquiescence of that government. After citing several examples from the Convention’s jurisprudence, the Court held that in certain circumstances, the use of force by State agents operating outside its

52 [2007] UKHL 26, para 132.
54 [2007] UKHL 26, para 131.
56 (2011) 53 EHRR 18, para 133-140.
57 ibid para 133.
58 ibid para 135.
territory may bring the individual within the control of the State’s authorities and into the State’s Article 1 jurisdiction.\textsuperscript{59}

In applying the State agent authority exception, the Court concluded that at the time the Iraqi victims died, the United Kingdom had exercised some of the public powers that would normally be exercised by the sovereign government.\textsuperscript{60} In these exceptional circumstances, the Court considered that the United Kingdom, through its soldiers engaged in security operations, exercised authority and control over the individuals killed in the course of such security operations so as to establish a jurisdictional link between the Iraqi civilians and the United Kingdom for the purposes of Article 1.\textsuperscript{61} However, if the United Kingdom had not exercised public powers the State agent authority test would not have been applied.\textsuperscript{62} After finding that the jurisdictional link had been established, the Court then found that the UK had violated their obligations under Article 2 with respect of all the Iraqi civilians except that of Mousa. The Court noted in Mousa’s case that a full public inquiry had been carried out.

**Effective Control of an Area** – Even though the Court validated both the State agent authority test and the effective control of an area test,\textsuperscript{63} the Court did not state any conclusion on whether the United Kingdom had effective control of the area.\textsuperscript{64}

**Other findings** – Whenever a State through its agents exercises control and authority over an individual, the State has an obligation under Article 1 to divide and tailor the Convention rights to match the circumstances of individual cases.\textsuperscript{65} Whilst citing *Ocalan* and *Issa*, Article 1 jurisdiction may exist outside the territory covered by the Council of Europe Member States and therefore ‘the occupying State should……be held accountable under the Convention for breaches of human rights within the occupied territory.’\textsuperscript{66}

**The remaining Implications after Al-Skeini**

\textsuperscript{59} ibid para 136.  
\textsuperscript{60} ibid para 143-148.  
\textsuperscript{61} ibid para 149.  
\textsuperscript{63} ibid 76.  
\textsuperscript{65} ibid para 137.  
\textsuperscript{66} ibid para 142.
Al-Skeini is a landmark judgment and is set to replace Banković as the leading precedent in respect of Article 1 extraterritorial jurisdiction. In Banković the main focus was on the effective control of an area test whereas Al-Skeini centred on the State agent authority test. The Grand Chamber’s approach to extraterritorial application is now more expansive than in Banković. Al-Skeini has declared that jurisdiction under Article 1 can exist outside the territory of the Council of Europe Member States. Banković limited Article 1 jurisdiction to the Convention’s legal space. The Al-Skeini finding suggests that both exceptions can be applied anywhere. It held that the Convention rights can be divided and tailored in a given situation meaning that a Member State can be held accountable for the Convention rights within their control in the situation at hand. The entire range of Convention rights must be secured to the territory at issue.

Al-Skeini did not combine the two major exceptions into one single test. However Banković has still not been overruled and Al-Skeini identified the public powers requirement showing some element of similarity with the Banković judgment. Therefore, the differences in findings on Article 1 jurisdiction between Al-Skeini and Banković appear not to be incompatible. As Cowan highlights, the difficulty now is ‘working out where the exercise of public powers sits in relation to the two recognised exceptions to territoriality’. Does this limiting factor apply to the both the State agent authority exception and the effective control of an area exception or does it only apply to the State agent authority exception? It could be argued that this is another setback in the progressive development in extraterritorial case law.

It is unclear how the European Court of Human Rights would analyse a ‘reverse Al-Skeini scenario’ in which a British soldier may seek to invoke Convention rights against the British government. It is worth noting the case of R (Smith) v Oxfordshire Deputy Coroner which is an example of a reverse Al-Skeini scenario. This case has been brought before the High Court, the Court of Appeal and finally before the Supreme Court in the United Kingdom. It concerned a British soldier who died in Iraq. His mother contended that his death warranted

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69 (2011) 53 EHRR 18, para 142.
71 ibid.
an Article 2 inquiry which would not be limited only to the immediate cause of death but also to examine any possible systemic failures by the British government such as not providing the appropriate equipment or facilities that could have led to Smith’s death. Therefore, the question arose as to whether Private Smith was protected by the Convention while in Iraq.

Private Smith had actually died on a UK military base and that fact alone would have brought Smith within UK’s jurisdiction. While applying the effective control of an area test, the Supreme Court held that Private Smith was within the UK’s jurisdiction under Article 1. However, an issue was raised in the lower courts as to whether Private Smith would have been within the UK’s jurisdiction even had he not died on a UK military base, but in any area under the UK’s effective control, under the same circumstances. In the High Court, Collins J thought that the answer to this question would be yes. He employed the State agent authority test as applying to British soldiers abroad. He said that members of the armed forces remain at all times subject to UK jurisdiction. It would obviously be wholly artificial to regard a soldier sent to fight in the territory of another State as subject to the jurisdiction of that State.74

Milanovic points out that the question raised in the lower courts is of great practical relevance for British military operations abroad. Many soldiers have lost their lives in areas outside the United Kingdom’s effective control. Under Collin J’s ruling, all of them would be entitled to the protections under Article 2 of the Convention. The British government appealed Collin J’s decision arguing that Article 1 jurisdiction is exclusively territorial and would apply only if a UK soldier died on a British military base or a British military hospital (as in the case with Smith). The Court of Appeal upheld Collin J’s ruling. It was pointed out that it would be artificial and would disregard common sense to say that a UK soldier was protected by the Convention while on a UK base, but would lose all protection once he stepped outside it.

However the Supreme Court disagreed. The majority found that mere membership of the armed forces was not sufficient to establish a jurisdictional link for the purposes of Article 1 of the Convention. It should be noted that this judgment was given before the European Court’s decision in Al-Skeini. The judges started from the assumption that the House of Lords decision in Al-Skeini was correctly decided. In contrast to its House of Lords decision, the European Court in Al-Skeini found that an Iraqi civilian is entitled to the protection of Article 2. For that reason, it will be interesting to see how a case like Smith’s would be decided in

74 [2008] EWHC 694, para 12.
the future. Currently, it is unclear as to whether or not a British soldier, who was killed in exactly the same way and in exactly the place as the Iraqi citizens in Al-Skeini, would be entitled to the same Convention protections.

Milanovic has identified another case involving Article 1 jurisdiction and will be decided by the European Court in the near future. This case has been brought against Russia by the family of Russian KBG and then FSB officer, Alexander Litvinenko who was assassinated in London in 2006 by radioactive poison allegedly carried out at the orders or with the collusion of the Moscow Kremlin. Russia could hardly be said to have exercised ‘public powers’ on British soil. Ronchi points out that any killings similar to the ones in Banković which result in aerial bombings with no involvement of public powers would prevent a jurisdictional link. For example the 2011 aerial bombings in Libya and the drone bombings in the Republic of Yemen which also took place in 2011, may not be able to claim Convention protection because of the identified public powers limitation. It will be interesting to see how the European Court might resolve these scenarios.

**Conclusion**

The legal space limitation set out in Banković has been abandoned by Al-Skeini and rightly so. As Sinchak emphasised, ‘human rights treaties should be applied consistent with their object and purpose and not hamstrung with the confines of territorial restriction’. After all, the Preamble of the Convention has provided an aim to ensure the universality of human rights. Fortunately, Al-Skeini has identified this principle. Its decision is seen as a positive result in respect of legal space. Similarly, the case has authorised the division and tailoring of rights in a particular situation which can also be seen as a positive outcome. However, this judgment is not without its shortcomings. The two exceptions have not been clearly defined and the public powers limitation has been left hanging in the air. It was hoped that Al-Skeini would eliminate all of the remaining ambiguities but unfortunately it has failed to do so. Presently, questions remain unanswered and thus the Court’s jurisprudence on extraterritoriality is not black and white. This cluttered area of law eagerly waits for certainty and clarity.

BIBLIOGRAPHY

Cases

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


Cyprus v Turkey (1975) 2 ECHR Dec & Rep 125.


Ocalan v Turkey (2005) 41 EHRR 45.

Pad and Others v Turkey (App No 60167/00) 28th June 2007.

R (on the application of Al-Skeini and Others) v Secretary of State for Defence [2004] EWHC 2911 (ADMIN), [2004] All ER (D) 197 (Dec).

R (on the application of Al-Skeini and Others) v Secretary of State for Defence [2005] EWCA Civ 1609, [2005] All ER (D) 337 (Dec).


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