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Keeping it in Bounds: Why the U.K. Court of Appeal Was Correct in its Cabining of the Exceptional Nature of Extraterritorial Jurisdiction in *Al-Saadoon*

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I. TERRITORIAL SCOPE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The scope of Article 1 of the European Convention on Human Rights ("ECHR") has been contested almost since the issuance of the article itself, due in large part to its ambiguous use of the word "jurisdiction." Article 1 extends the "rights and freedoms"[1] defined in Section 1 of the ECHR to "everyone within the . . . jurisdiction" of the state parties to the Convention. But what exactly constitutes a Contracting State's jurisdiction vis-à-vis Article 1? One possible response is that the Contracting States' general duty to secure the rights and freedoms defined in Section 1 of the Convention—including, *inter alia,* the right to life, the prohibition of torture, the prohibition of slavery and forced labor, and the right to liberty and security—is cabined by spatial notions of territoriality. Another possible response is that the importance of protecting those fundamental human rights requires a broader conception of "jurisdiction," whereby the European Court of Human Rights ("ECtHR") could hold a state responsible for its link to the use of force resulting in death, no matter if that use of force itself is the only jurisdictional link.

The friction between merely territorial conceptions of jurisdiction and more extensive, extraterritorial conceptions came to the fore in the early twenty-first century, as a result of the Iraq War. During and after the war, several families of victims killed in the war brought suit against various state parties for contravention of the ECHR under the latter conception of "jurisdiction."[2] In the recent decade or so, European case law has

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[1] European Convention on Human Rights, art. 1, Nov. 4, 1950, EUR. TS. Nos. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

[2] *See, e.g., Bankovic and Others v. Belgium and Others*, Appl No 52207/99 (ECtHR, 12 December 2001) [hereinafter *Bankovic*]; *Issa and Others v. Turkey*, Appl No 31821/96 (ECtHR, 16 November 2004) [hereinafter *Issa v. Turkey*]; *Al-Skeini and Others v. United Kingdom*, App No 55721/07 (ECtHR, 7 July 2011) [hereinafter *Al-Skeini*]; *Al-Jedda v. United Kingdom*, Appl No. 27021/08 (ECtHR, 7 July 2011) [hereinafter *Al-Jedda*].

gradually expanded the scope of "jurisdiction" extraterritorially, until the Court of Appeal of England and Wales unanimously reversed that trend in *Al-Saadoon & Ors v. Secretary of State for Defence*.

The *Al-Saadoon* case is the result of a number of civil law claims arising from British military involvement in Iraq between 2003 and 2009. These claims involved allegations of human right violations, including ill-treatment, unlawful detention, and even unlawful killing of Iraqi civilians by British soldiers. In *Al-Saadoon*, Lord Justice Lloyd Jones of the Court of Appeal affirmed much of Justice Leggatt's below opinion,[3] save for one exception: that *Al-Skeini and Others v. United Kingdom* had extended extraterritorial jurisdiction of ECHR Article 1 to uses of force, notwithstanding where that force is exercised.[4] In so stating, Lord Justice Lloyd Jones narrowed Justice Leggatt's interpretation of *Al-Skeini*, limiting the notion of extraterritorial jurisdiction to what *Al-Skeini* initially described it to be: a personal jurisdiction exception to the primarily territorial application of Article 1.[5] Lord Justice Lloyd Jones further stated that if the principle of extraterritorial jurisdiction advanced in *Al-Skeini* were meant to extend to the state's extraterritorial use of lethal force alone, without requiring a greater degree of power and control, the ECtHR itself could so hold.[6]

The Court of Appeal of England and Wales ultimately made the correct choice in cabining the U.K. High Court's broad extraterritorial application of the ECHR. This note will argue that the Court of Appeal was correct in its approach for three reasons, the first two of which are substantive, and the third of which is procedural. First, the Court of Appeal's approach to extraterritorial jurisdiction comports the most with the approach taken by *Bankovic and Others v. Belgium and Others*, previous case law, and the *travaux préparatoires* of the ECHR. Second, the Court of Appeal's approach allows for a more predictable and less politicized application of extraterritorial jurisdiction, as it eliminates the possibility that the U.K. will extend its extraterritorial jurisdiction in ways incommensurate with the ECtHR's extension of such jurisdiction. Third, even if the U.K. High Court's approach is the more egalitarian of the two, it is not the Senior Courts of England and Wales' place to extend the principles of the current ECtHR jurisprudence in such a manner.

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[3] *See*, *e.g. Al-Saadoon & Ors v. Secretary of State for Defence*, [2016] EWCA Civ 811 [hereinafter *Al-Saadoon*] at para. 26–28 (reaffirming that a state's jurisdictional competency under Article 1 is primarily territorial).
[4] *Id.* at par. 69.
[5] *See Al-Skeini, supra* note 2 at para. 74.
[6] *See Al-Saadoon, supra* note 3 at para. 69.

II. BACKGROUND FOR *AL-SAADOON & ORS V. SECRETARY OF STATE FOR DEFENCE*

The first highly important case to the determination of Article 1 jurisdiction is *Bankovic and Others v. Belgium and Others*, decided in December of 2001. Here, the ECtHR determined that the ECHR did not apply to a NATO bombing of a Federal Republic of Yugoslavia radio-television building during the Kosovo crisis of April 1999,[7] as there was no jurisdictional link between the bombing victims and the Contracting States.[8] In so holding, the ECtHR determined that jurisdiction for the purposes of the ECHR is largely territorial,[9] and that the Convention operates in an "essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States."[10] This determination stemmed not only from the ordinary meaning of "jurisdiction,"[11] but also from the *travaux préparatoires* and State practice in applying the Convention.[12] The Court further concluded that, as applied to the facts of the case, with no "jurisdictional link" between the victims of extraterritorial acts and the respondent States, there is no jurisdiction vis-à-vis Article 1 of the ECHR.[13] In order for the ECHR to have any exceptional extraterritorial application, the bases of jurisdiction must be determined on a case-by-case basis[14] "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."[15] *Bankovic* thus set forth a two-pronged exception to the primarily territorial jurisdiction of the ECHR: a Contracting State has extraterritorial jurisdiction where it has both (a) effective control of a territory and (b) exercises all or some of the public powers normally exercised by that territory's government.

Several ECtHR cases after *Bankovic* slowly expanded the Court's construction of the ECHR's jurisdictional reach, extending the regional scope of the ECHR and the primarily spatial *Bankovic* model to cover instances where State agents exercised authority over third parties extraterritorially.[16] This broadening of the extraterritorial exception meant that "a State may . . . 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

[7] The ECtHR did not actually adjudicate *Bankovic, supra note* 2, on the merits; rather, it dismissed *Bankovic* for lack of jurisdiction under the ECHR.
[8] *See Bankovic, supra* note 2 at para. 82.
[9] *See id.* at para. 61.
[10] *Id.* at para. 80.
[11] *Id.* at para. 61.
[12] *Id.* at para. 63.
[13] *See id.* at para. 82.
[14] *See id.* at para. 61.
[15] *Id.* at para. 71.
[16] *See Issa v. Turkey, supra* note 2 at para 71.

under the former State's control through its agents operating—whether lawfully or unlawfully—in the latter State."[17] However, in no case did the Court explicitly abandon *Bankovic*'s territorial model.[18]

The latest influential ECtHR decision regarding extraterritorial jurisdiction came in 2011, in the case of *Al-Skeini and Others v. United Kingdom*. In contrast to the decision of the U.K. House of Lords in *Al-Skeini*, the ECtHR found that all six applicants—Iraqis who were killed by U.K. troops—fell within the U.K.'s ECHR jurisdiction.[19] In so doing, the ECtHR affirmed *Bankovic*'s primarily spatial model, with the exception of "effective control," but also further expanded the "State agent authority" variation on a model of personal jurisdiction. This model dictates that a Contracting State has jurisdiction "when someone was within the control and authority of agents of the Contracting State, even outside the *espace juridique* of the Council of Europe, and whether or not the host State consented to the exercise of control and authority on his soil."[20] This "State agent authority" model is a factual test, "to be determined with regard to the circumstances of the particular act or omission of the State agents."[21] In the sense that *Al-Skeini* applies a limited version of the "State agent authority" model of jurisdiction that *Bankovic* never endorsed, the ECtHR rejects in *Al-Skeini* the idea that Convention rights and freedoms constitute an indivisible package that cannot be "divided and tailored."[22] Through enabling Article 1 of the ECHR to apply—in other words, imposing ECHR jurisdiction—whenever a Contracting State exercises control and authority over an individual through an agent, but not extending the application of other Convention rights through this same agent-based inquiry, *Al-Skeini* allows Convention Rights to be "divided and tailored" on a fact-specific basis.

After the *Al-Skeini* decision was issued, the U.K. implemented a version of the "State agent authority" model of extraterritorial jurisdiction,[23] and the ECtHR further solidified the principles set out in *Al-Skeini*.[24]

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[17] *Id.* at para. 71.
[18] Cedric Ryngaert, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, 28 MERKOURIOUS UTRECHT J. OF INT'L & EUR. LAW 57, 58 (2012).
[19] *Al-Skeini, supra* note 2 at para. 149.
[20] *Id.* at para. 79.
[21] *Id.* at para. 129.
[22] *Id.* at para. 137. *Compare Bankovic, supra* note 2 at para. 75.
[23] *See Smith and others v. The Ministry of Defence*, [2013] UKSC 41.
[24] *See, e.g., Hassan v. The United Kingdom*, Appl 29750/09 (ECtHR, 16 September 2014) [hereinafter *Hassan*]; *Jaloud v. The Netherlands*, Appl 47708/08 (ECtHR, 20 November 2014).

III. COMPARISON OF U.K. HIGH COURT OF JUSTICE AND COURT OF APPEAL APPROACHES TO THE EXCEPTIONAL NATURE OF EXTRATERRITORIAL JURISDICTION

Al-Saadoon & Ors v. Secretary of State for Defence, [2016] EWCA Civ 811, is a case with facts analogous to many of those previously discussed: family members of victims allegedly abused by British forces during the Iraq War brought public law claims under the ECHR. Originally heard in the U.K. High Court of Justice in October of 2014 and decided in March of 2015 by Justice Leggatt, the case was later appealed to the U.K. Court of Appeal and decided by Lord Justice Lloyd Jones in September of 2016.

A. RELATIONSHIP TO *AL-SKEINI*

In *Al-Saadoon*, both the U.K. High Court and the Court of Appeal attempted to preserve the *Bankovic* default spatial model of jurisdiction,[25] and to parse out the vague limitation on the principle of "State agent authority" as articulated in *Al-Skeini*.[26] While the U.K. High Court determined that the effect of *Al-Skeini* was to extend Article 1 extraterritorial jurisdiction in such a way that "whenever and wherever a state which is a contracting party to the Convention uses physical force it must do so in a way that does not violate Convention rights,"[27] the Court of Appeal cabined the exception to territorial jurisdiction in interpreting the ECtHR's intent in *Al-Skeini* to "require that there be an element of control of the individual prior to the use of lethal force."[28] In other words, while the U.K. High Court found that jurisdiction could be extended to situations where physical power and control was exercised over a non-detainee through the use of physical force alone,[29] the U.K. Court of Appeal limited jurisdiction for the purposes of Article 1 to instances where there exists "a greater degree of power and control than that represented by the use of lethal force . . . alone."[30]

Acknowledging that his Court of Appeal holding would require U.K. courts to weigh different types and degrees of power and control to determine which conduct falls under Article 1's ambit and which does not, Lord Justice Lloyd Jones considered that balancing exercise an unavoidable consequence of *Al-Skeini*.[31]

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[25] *Cf. Al-Saadoon, supra* note 3 at paras. 19, 54.
[26] *See* Marko Milanovic, *English Court of Appeal Decides Al-Saadoon Case on the ECHR's Application Extraterritorially and in Armed Conflict*, EJIL: TALK (Sept. 14, 2016), https://www.ejiltalk.org/english-court-of-appeal-decides-al-saadoon-case-on-the-echrs-application-extraterritorially-and-in-armed-conflict/.
[27] *See Al-Saadoon, supra* note 2 at para. 69.
[28] *Id.*
[29] *See Al-Saadoon & Ors. v. Secretary of State for Defence*, [2015] EWHC 715 (Admin) at para. 95 ("I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person.").
[30] *See Al-Saadoon, supra* note 3 at para. 69.
[31] *Id.* at para. 71.

B. PRACTICAL EFFECTS ON THE U.K. IN ADOPTING EACH APPROACH

If the Court of Appeal were to have adopted the U.K. High Court's approach in *Al-Saadoon*, three undesirable effects would have occurred. First, the extensive reach of extraterritorial jurisdiction could impinge on military operations in the field,[32] making more activities of armed forces subject to the ECHR. Even Justice Leggatt of the U.K. High Court admits that "there are strong reasons of policy for seeking to interpret the territorial scope of the Convention in a way which limits the extent to which it impinges on military operations in the field, particularly where actual fighting is involved."[33] Second, adopting this approach to extraterritorial jurisdiction would mean that *Bankovic* had been wrongly decided, as the NATO bombing that was determined to be outside the jurisdictional scope of the ECHR would need to be reinterpreted to give rise to ECHR jurisdiction, albeit extraterritorial.[34] Overruling *Bankovic* would even further complicate the inquiry into the extraterritorial application of the ECHR. Finally, adopting the U.K. High Court's approach to extraterritorial jurisdiction would result in the undesirable effect of inducing a floodgate of litigation to the courts, whereby "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purposes of [A]rticle 1 of the Convention."[35]

Conversely, the approach the Court of Appeal adopted in *Al-Saadoon* is more desirable for three reasons. First, the Court of Appeal's approach is consistent with case law and the *travaux préparatoires* of the ECHR itself. Through its approach, the Court of Appeal is acting in accordance with a long line of precedent, ranging from *Bankovic* to *Hassan v. The United Kingdom.*[36] The Court of Appeal is also acting in accordance with the original intent of the ECHR: that the notion of jurisdiction be essentially territorial.[37]

Second, the Court of Appeal's approach eliminates any concerns based on the security dilemmas potentially created by the U.K. extending its own extraterritorial jurisdiction in ways incommensurate with the extension of such principles by the ECtHR. In keeping itself in line with Article 1's ambit as interpreted by the ECtHR itself, the U.K. will remain consistent with the requirements of other Contracting States vis-à-vis extraterritorial jurisdiction. Thus, the U.K. need not be concerned about the possibility that other Contracting States might not decide to extend *Al-Skeini* principles of

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[32] *Id.* at para. 73.
[33] *Al-Saadoon & Ors. v. Secretary of State for Defence, supra* note 29 at para. 106.
[34] *See id.* at para. 94.
[35] *See id.* at para. 104 (citing *Bankovic, supra* note 2 at para. 75).
[36] *See supra* note 24.
[37] *See Al-Saadoon, supra* note 3 at para. 13 (explaining that the expert intragovernmental committee to the European Convention on Human Rights had replaced a reference to "all persons residing within their territories" with a reference to persons "within their jurisdiction."

extraterritorial jurisdiction as far as the U.K. High Court had attempted to extend them—to situations where the only jurisdictional link was the use of lethal force. In addition, U.K. military forces need not limit their activity in the field in ways that other Contracting States are not required. With the U.K. Court of Appeal's approach, Article 1 extraterritorial jurisdiction is more stable and predictable, due to the requirement of a greater jurisdictional link between the U.K. and the relevant territory and its inhabitants abroad than the use of physical force alone.[38]

Third, the Court of Appeal's approach is not irreversible; if the ECtHR would like to extend extraterritorial jurisdiction to the breadth advocated by Justice Leggatt in the U.K. High Court, it is able to do so.[39] In addition, it does not make sense that an ex post analysis of the scope of jurisdiction should err on the side of over-inclusivity, unless that analysis is conducted by the ECtHR itself. Thus, the ECtHR can expand the exceptional nature of extraterritorial jurisdiction for all Contracting States if it so chooses, but the U.K. courts should not construe Article 1 "as reaching any further than the existing Strasbourg jurisprudence clearly shows it to reach."[40]

IV. CONCLUSION

Ultimately, it is still controversial as to whether the ECHR applies to the use of force against Iraqi civilians who were not in the custody of British forces. Although it had been predicted that *Al-Saadoon* might head first to the U.K. Supreme Court and then to the ECtHR itself,[41] the case has still not been appealed. However, the reasons enumerated above suggest that the U.K. Court of Appeal's limited-scope approach to the extraterritorial jurisdiction of ECHR Article 1 is superior to the approach taken by the U.K. High Court.

Although it could be argued that the U.K. should extend the jurisdictional principle first iterated in *Al-Skeini* in a way that first and foremost comports with the idea of the universality of human rights—an approach endorsed by the U.K. High Court—drawing the jurisdictional line that far from ECtHR precedent simply comes at too high a cost. If the U.K. were to adopt the approach endorsed by Justice Leggatt, it would limit its military activities in the field in ways that other Contracting States do not, creating an unnecessary security dilemma. Instead, with the approach endorsed by Lord Justice Lloyd Jones, the jurisdictional line extends just far enough, maintaining the spirit of the "effective control" test initially endorsed by both *Bankovic* and *Al-Skeini*, and still holding accountable a large number of extraterritorial violators of human rights.

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[38] *Cf. Al-Saadoon, supra* note 3 at para. 23.
[39] *See Al-Saadoon, supra* note 3 at para. 70.
[40] *Id.*
[41] *Clarifying the Extraterritorial Application of the European Convention on Human Rights, supra* note 18.