



## The extraterritorial application of the Echr after Al-Skeini

Philippa Osim-Inyang

Faculty of Law, University of Calabar, Calabar, Cross River State, Nigeria

### Abstract

The extraterritorial application of the European Convention on Human Rights (ECHR) has been in contention among various academic commentators on the subject. The European Court of Human Rights (ECtHR) has also put forth conflicting judgement, fuelling the debate. In the Case of *Bankovic v Belgium*, the ECtHR declared that the jurisdiction of the ECHR remains exclusively territorial. However, in a subsequent judgement in *Al-Skeini v United Kingdom*, the ECtHR appeared to make a shift in its stance by providing certain instances where the jurisdiction of the ECHR could extend beyond the territorial borders of the parties to the ECHR. However, the *Al-Skeini* decision left some unanswered questions as to the precise scope and application of extraterritorial jurisdiction.

**Keywords:** bankovic and al-skeini, extraterritorial human rights, jurisdiction, territorial scope

### Introduction

Article 1 of the European Convention on Human Rights (ECHR) states that 'High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention' (ECHR, article 1). It is established that the notion of jurisdiction in Article 1 is primarily territorial, although unsettled, there are exceptions to that general rule. Whether article 1 extends to extraterritorial acts of state parties, enabling affected individuals to challenge the actions of these states before the court has been subject to serious debate and has sparked off interest especially in the context of military occupation abroad such as the United Kingdom occupation and military action in Iraq (Cowan, 2012; Milanovic, 2011) <sup>[15, 25]</sup> Dennis, 2005; Wilde, 2005; Gondek, 2009; Shany, 2003; Miller, 2010) <sup>[17, 21, 26, 23, 22]</sup>. It has become increasingly contentious as the Court's decisions on the subject have not helped in clarifying the meaning of Article 1 but have instead compounded the incoherence of its jurisprudence (Millier, 2010).

The competing visions of the extraterritorial application of Article 1 of the Convention came to a head in the case of *Bankovic and others v Belgium and others* (2001) <sup>[5]</sup>, which downplayed the notion of extraterritoriality and adopted a state-centred application of the Convention. The decision in *Bankovic* attracted considerable criticism and subsequent case law deviated from its holding. This development further exposed the inability of the Court to adopt a comprehensive test for the Conventions application outside the borders of the High Contracting Parties. The much anticipated *Al-Skeini*, decision in some ways reduced this uncertainty (*Al-Skeini v United Kingdom*, 2011) <sup>[4]</sup>. However, it left many unanswered questions.

The main thrust of this article is to examine the reasoning of European Court of Human Rights (Strasbourg court) (ECtHR) in its jurisprudence on extraterritoriality of jurisdiction under Article 1, from the case of *Bankovic* to *Al-Skeini*, outlining the development of the tests it employed to establish jurisdiction. An analysis of the feasibility of the tests adopted by the Court will also be made.

### Background to *Bankovic*

Before *Bankovic*, the European court had established standards for the application of extraterritorial jurisdiction. In the earlier case-law, it found the Convention to apply where a State party exercised effective overall control of territory beyond its borders (*Cyprus v Turkey*, 1997), and in subsequent ones, it allowed extraterritorial jurisdiction where agents of a Contracting state exercised authority and control over individuals in the territory of another state (*Drozdz and Janousek v France and Spain*, 1992) <sup>[7]</sup>.

In the case of *W.M v Denmark*, a German citizen alleged his human rights were violated due to the conduct of the Danish ambassador in Berlin, the Court found 'that authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that state to the extent that they exercise authority over such persons or property. As long as their acts or omissions affect such persons or property, the responsibility of the State is engaged' (*W.M v Denmark*, 1992) <sup>[13]</sup>. Although it did not find that there was a violation, the language of the Court suggested an extraterritorial application of jurisdiction based on the authority exercised by a state agent over an individual outside his national territory. In *Drozdz and Janousek v France and Spain*, the Court, relying on *W.M v Denmark* observed that '[t]he term "jurisdiction" is not limited to the territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effect outside their own territory (*Drozdz and Janousek v France and Spain*, 1992, par. 91) <sup>[7]</sup>. The Court in these two cases appeared to adopt a 'state agent authority' notion of jurisdiction, where a state could be liable for the extraterritorial acts of its agents when they exercise authority over individuals abroad.

However, the Court, in its subsequent jurisprudence, appeared to adopt another approach without expressly overruling the 'state agent authority' model. The court shifted emphasis to territorial control. This was relevant to the Northern Cyprus conflict of 1974 which resulted in the Turkish occupation of Northern Cyprus. In *Loizidou v Turkey*, the Court noted that 'although there are limits to the

application of Article 1 of the Convention, 'jurisdiction' for Article 1 purposes is not limited to the national territory of the Contracting State' (*Loizidou v Turkey* (Preliminary objections, 1995, par. 62) <sup>[10]</sup>. First, citing *Drozdz v Janousek*, the Court stated that a state can attract jurisdiction beyond its boundaries when its agents are involved in acts abroad which produce effects outside their territory (*ibid*). And secondly, extraterritorial jurisdiction may ensue when the Contracting state, as a consequence of military action, be it lawful or unlawful, exercises 'effective control' of an area outside its territorial boundaries. The obligation to secure the rights and freedoms set out in the Convention in the area is derived from the fact of such control, whether it is exercised directly, through armed forces, or through subordinate local administration' (*ibid*). In *Cyprus v Turkey*, the Court noted that Turkey, 'having effective overall control over northern Cyprus...cannot be confined to the acts of its own soldiers or officials in Northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support' (*Cyprus v Turkey*, 1997, para. 77). Following this approach, the Court found that 'Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights in the Convention and those additional protocols which she has ratified, and that violations of those rights are imputable to Turkey (*ibid*).'

Although the Court focused on territorial control in the Northern Cyprus cases, it did not appear to narrow down the standard set in *W.M v Denmark* and *Drozdz and Janousek* (the state agent authority model). However, the subsequent case of *Bankovic* appeared to diminish the scope of the standard that was set in *W.M v Denmark*.

The *Bankovic* decision derives from a claim made by the relatives of victims of a NATO air strike that occurred on 23 April, 1999 on the Radio *Televizija Srbije* building in the Federal Republic of Yugoslavia (FRY) during the Kosovo crisis. The claims were brought against seventeen ECHR state parties for their role in the bombing for violation of Articles 2, 10 and 13 of the ECHR (ECHR, 1953, Articles, 2, 10 and 13). The Court found that the applicants' relatives were not within the jurisdiction of the respondent states at the time of the bombing (*Bankovic v Belgium*, 2001, p. 82) <sup>[5]</sup>. In rejecting the applicants' claims, the Court did not restate the broad 'state agent authority' standard of *W.M v Denmark*, rather it stressed that the concept of jurisdiction under Article 1 had to be interpreted consistently with the ordinary meaning of jurisdiction under international law, which is 'essentially territorial' (*ibid*, p.65), and that the Convention rights could not be 'divided and tailored' to fit the particular circumstance of the extraterritorial act in question. The Court observed that to extend the conduct of a State such that an infringement of rights committed against individuals anywhere in the world would be enough to bring the individual within the 'jurisdiction' of the State for the purpose of Article 1 would render 'superfluous and devoid of any purpose' the Article 1 language, 'within their jurisdiction' (*ibid*, p.75). The Court limited the principle of extraterritoriality to the 'legal space' (*espace juridique*) of ECHR states by emphasising the regional context and design of the ECHR and declaring its inapplicability to states outside the national territory of the contracting parties to the ECHR. The Court precluded the admissibility of the case because Yugoslavia was not within the jurisdiction of the contracting parties. Noting that acts performed or

producing effects outside the national territory of the state parties could constitute an exercise of their jurisdiction for the purposes of Article 1 only in 'exceptional circumstances (*ibid*, p.67)' which require special justification. In stating the exceptional circumstances, the Court significantly narrowed the scope of extraterritorial application of the ECHR. It stated that the exercise of power and authority over persons will not be sufficient. The court required territorial control, through 'military occupation' justified by the exercise of all or some 'public powers' normally exercised by the government of the territory (*ibid*, p.71). In the end, the Court found that the recognised exceptions for extraterritorial application of jurisdiction were not applicable in the case. The NATO States did not have effective control of the relevant territory, and they did not exercise public powers normally exercised by the Federal Republic of Yugoslavia (FRY) (*ibid*).

The high threshold set by the *Bankovic* case has attracted considerable criticism. It has been asserted that the Court equated the right to an extraterritorial exercise of governmental power with the scope of application of International Human rights which should rather regulate the actual exercise of state power, whether it be lawful or unlawful in nature (Milanovic, 2011, p.3) <sup>[25]</sup>. The *Bankovic* decision apparently leads to an absurd result, exempting states that operate unlawfully from complying with the relevant rules of Human Rights. Also, the *Bankovic* decision is difficult to reconcile with the more flexible approach the Courts employed in previous case law, allowing the Convention to apply in situations that involve degrees of control that are significantly lower than that exercised by states within their national boundaries. The *Bankovic* decision contradicts some core principles of International Human Rights, particularly, the 'unconscionable' result of letting States perpetrate violations abroad that they would not have been permitted to do within their territorial boundaries (*Al-Skeini, v United Kingdom*, 2011, para. 17) <sup>[11]</sup>.

### After *Bankovic*

The *Bankovic* decision was the ECtHR's first attempt at streamlining the previous case law on extraterritoriality. Some cases were decided based on the 'effective control of an area model' (*Cyprus v Turkey*, 1997), others adopted the 'State agent authority' (*Drozdz and Janousek v France and Spain*, 1997) model, and although these models are different legal tests, the ECtHR has often discussed the two models in the same cases (Milanovic, 2011, p.122) <sup>[25]</sup>. Yet, the relationship between the two models of jurisdiction have been unclear, leaving international legal scholars yearning for a clarification from the Court because 'the question of extraterritoriality was never approached in a methodological way, and a number of deviations from the two models stood in between them' (*ibid*, p.123). Many anticipated that *Bankovic* will provide a clarification on the preferred model of jurisdiction, but it did not. The ECtHR did not even discuss the 'state agent authority model.' The rigidity posed by the decision in *Bankovic* made subsequent case law to shift to a more relaxed standard, showing a re-convergence with pre-*Bankovic* case law.

In *Issa and others v. Turkey*, which concerned the acts of Turkish forces in Northern Iran, the court addressed the circumstances for the extraterritorial application of the ECHR (*Issa v Turkey*, 2005). It restated the 'effective

control' notion of jurisdiction in the Northern Cyprus cases, and also reiterated the 'state agent authority' notion. Citing the decision in *W.M v Denmark*, it stated that, 'a State may also be held accountable for a violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be within the former State's authority and control through its agents operating, whether lawfully, or unlawfully, in the later State.' The Court distanced itself from the *Bankovic* decision when it stated that, 'Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to let a State party perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.' In its controversial judgement in *Ilascu and others v Moldova and Russia*, the Court held that the alleged violations of the Convention by Russia fell under Russian jurisdiction through military presence and political and economic support to the Moldovan Republic of Transnistria, which was a separatist movement (*Ilascu and others v Moldova and Russia*, 2005) [8]. In *Ocalan v. Turkey*, the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that state for the purposes of Article 1 of the Convention, even though Turkey exercised its authority outside its territory' (*Ocalan v Turkey*, 2005, para. 91). In *Al-Saadoon and Mufdhi v United Kingdom*, the Court held that two nationals of Iraq that were detained in British-controlled military prisons in Iraq were within the jurisdiction of the United Kingdom because the United Kingdom exercised exclusive overall control over both the prisons and the individuals detained therein (*Al-Saadoon and Mufdhi v United Kingdom*, 2010). In *Medvedyev and Others v. France*, the court held that the applicants were within French jurisdiction by virtue of the exercise by the French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters (*Medvedyev and others v France*, par. 67).

In the above cases, the Court did not only take into consideration that jurisdiction of the contacting state arose over the authority and control exercised over the aircraft, ship and buildings which the individuals were held, but the exercise of physical power and control over the persons concerned.

Notwithstanding the *Bankovic* judgement in favour of territoriality, the subsequent case law diverged from it and further proved the inconsistencies in the courts reasoning and its unease with the rigidity of the decision. This led Lord Rodger to state that 'the problem which the House has to face, quite squarely, is that judgements and decisions of the European Court do not speak with one voice' (*Al-Skeini v Secretary of State for Defence*, 2007, para. 67) [3]. In the same vein, Judge Bonello stated that: 'Up until now, the Court has, in matters concerning the extraterritorial jurisdiction of Contracting parties, spawned a number of leading judgements based on a need-to-decide basis, patchwork case-law at best (*Al-Skeini and others v United Kingdom*, 2011, p. 5) [4].

One of the reasons given for the state of affairs was stated to be the resentment by the ECtHR judges of a state of affairs that will allow states to freely engage in atrocious conduct beyond their boundaries, and again the judges are reluctant to impose stringent international human rights obligations

on Convention states. 'The Court tries to find a not too hot and not too cold "goldilocks" formula to delineate state obligations in a manner that would encompass some but not too many, extraterritorial manifestations of state power. As often the case with compromise formulations, however, they leave all stakeholders unsatisfied' (Shany, 2003, p. 57), p.58) [23].

Another probable reason for the incoherence of the Courts jurisprudence is the confusion between the need to ensure that human rights are protected through the elimination of legal 'black holes' (Steyn, 2004) [16], as seen in *Bankovic*, and the 'international law platform selected for realization of IHRL, which features a continued commitment to territoriality and borders as organising principles of the international legal order (notwithstanding the increasingly tenuous connections between borders and human welfare)' Shany, 2003, p. 58) [23].

The Courts attempt to balance the principles of extraterritoriality to create a coherence will be a highly stringent task because of the competing considerations involved in considering the cases on a case by case basis (Milanovic, 2011, p.208-209) [25]. If the Courts adopt the 'effective control of territory' notion of jurisdiction, the problems involving a state's control over ever decreasing spaces which cannot be properly distinguished from each other ensue. And then if the 'state agent authority notion is adopted, we face problems of delineation'.

The above legal development provided the background for *Al-Skeini*.

### **Al-Skeini**

*Al-Skeini* was the much anticipated judgement of the ECtHR. It was expected that the controversies raised by previous jurisprudence will finally be laid to rest. The case involved claims by the applicants, relatives of the deceased, killed in incidents involving British soldiers in Basra, South-East Iraq. Five of the applicants were allegedly shot and killed by British soldiers on patrol in the United Kingdom occupied Basra. The sixth applicant, Baha Mousa, was arrested by British soldiers and taken into a United Kingdom detention facility, where he was tortured and eventually killed. The main question for determination was whether the applicants were within the United Kingdom's jurisdiction and therefore under the protection of the Convention.

The ECtHR, began by restating the territorial nature of jurisdiction as was the position in *Bankovic*. That Acts outside the national territory of Convention parties will only come under Article 1 in exceptional circumstances. After considering how it had used the 'state agent authority' model in the past, the Court validated the reasoning of the model, concluding that extraterritorial jurisdiction occurs when diplomatic or consular agents 'exert authority and control over others' beyond their national territory (*Al-Skeini v United Kingdom*, pp. 136-137). The court reasoned that when an individual is in the custody of military personnel in a foreign territory, such individual could come under the jurisdiction of Article 1 (*ibid*). The court limited this exception to whenever a state exercises 'physical control' over the individual in question, and not over buildings or vessels. In such situations, the State is obligated to secure the relevant Convention rights to that individual (*ibid*). After addressing the situations in which jurisdiction will attach, the Court developed its first exception, that Article 1

jurisdiction will be extraterritorial to acts of State agents who ‘through the consent, invitation, or acquiescence of the government of that territory, exercise all or some of the ‘public powers’ normally to be exercised by that government’ (*ibid*).

One may wonder why the ‘State agent authority’ model of jurisdiction should be limited to the physical custody of the individual. ‘Isn’t it true that having the power to kill a person, whether through a drone or from a rifle, is very much an exercise of physical power over that individual?’ (Milanovic, 2011b). If this is answered in the affirmative (and it was in *Al-Skeini*), then it directly contradicts the decision in *Bankovic* that ‘a mere power to kill does not equal jurisdiction (*ibid*).’ Also the Courts express allowance of dividing and tailoring Convention rights to suit individual situations directly contradicts the holding in *Bankovic* (*Bankovic v Belgium*, 2011, p. 75) <sup>[25]</sup>. This is the closest the Court has come to overruling *Bankovic*.

The Court then carved its second major exception to territorial jurisdiction under Article 1. It adopted the reasoning of the ‘effective control of an area’ model, concluding that, when an occupying state’s domination is obvious, examining whether it ‘exercises detailed control over the policies and actions of the subordinate local administration’ is unnecessary (Bankovic, 2011).

The Court then emphasised that it had never restricted the Convention’s applicability to the Convention legal space (*Al-Skeini v United Kingdom*, 2011, p. 142). Rather, it had in its previous jurisprudence held that the occupation by one member state by another would create a legal vacuum in which the citizens of a State that had formerly enjoyed the rights of the Convention would no longer do so Following the Courts opinion, jurisdiction under Article 1 of the Convention may apply beyond the territory covered by the Convention member States.

The Court then held that, from the removal of power of the Ba’ath regime and until the accession of the interim Government, the United Kingdom assumed some public powers expected of an Iraqi sovereign government (*Al-Skeini v UK*, 2011, p. 149). Particularly, the United Kingdom assumed responsibility of maintaining security in Southeast Iraq. These exceptional circumstances created a ‘jurisdictional link’ between the applicants and the United Kingdom under Article 1 (*Al-Skeini v UK*, 2011). And because the United Kingdom had jurisdiction over all the applicants it was obligated under Article 2, to give an effective official investigation into the deaths of their relatives. For an effective investigations, persons ‘independent from those implicated in the events’ needed to conduct them (*Al-Skeini v UK*, 2011, p.173). Consequently, the Court found that there was a violation of Article 2 in relation to the first five applicants, but not in relation to the sixth applicant, Mr Baha Mousa because his public enquiry was almost complete at the time the decision was given (*Al-Skeini v UK*, 2011, p. 167).

### Analysis

The *Al-Skeini* judgement has done away with many of the contradictions of earlier jurisprudence, particularly rejecting, to a considerably large extent, the *espace juridique* theory in *Bankovic* and its all or nothing approach. Yet it still has not been able to provide a coherent theory on the issue of the extraterritoriality of the Convention. Rather than overruling *Bankovic* it created a mixture of the ‘effective

control of an area’ model and the ‘state agent authority’ model and created a third pseudo-model (Milanovic, 2011, p.129). The pseudo-model includes both models in an attempt to explain how exceptional the ‘exceptional circumstances must be to justify extraterritorial jurisdiction (Milanovic, 2011, p129-131) <sup>[25]</sup>.

The Court in *Al-Skeini* completely avoided answering whether the United Kingdom maintained effective overall control over Basrah thereby attracting jurisdiction under Article 1, but instead went on to apply the personal model of jurisdiction to all the applicants on the ground that all their relatives had been within the United Kingdom’s jurisdiction at the time of their deaths (Milanovic, 2011, p.130-131) <sup>[25]</sup>. The Court then applied the ‘State agent authority’ ‘exceptionally’ because the United Kingdom exercised ‘public powers’ in Iraq. Under this mixed application of both models, if the United Kingdom had not exercised such public powers, the personal model of jurisdiction would not have applied. Following this, it means that while all applicants were within the United Kingdom’s jurisdiction under the ‘State agent authority’ reasoning, it only covers situations where a State using force exercises some amorphous ‘public powers’. This implies that the *Bankovic* decision is still perfectly valid and subsisting. ‘While the power to kill is ‘authority and control’ over the individual if the State has public powers, killing is not authority and control if the state is merely firing away missiles from an aircraft’ (Milanovic, 2011b) <sup>[25]</sup>. Thus, the Court incorporated *Bankovic* into its new line of reasoning as though it had always been consistent (*Al-Skeini v UK*, 2011, pp. 143-150). Though still frustrating, the *Al-Skeini* decision for international lawyers affirms that under Article 1 of the ECHR, both the ‘effective control of an area’ model and ‘state agent authority’ model of jurisdiction can apply, and that the legal space concept is immaterial (Milanovic, 2011a, p.77) <sup>[25]</sup>.

The applicants did not argue for the substantive unlawfulness of the killings under Article 2, they rather argued that the government failed to fulfil its procedural obligations under Article 2 to investigate the victims’ deaths. The government did not oppose this claim (*Al-Skeini v United Kingdom*, 2011, pp.151-153).

Although the *Al-Skeini* decision is based on the issue of extraterritorial jurisdiction, it is pertinent to point out that when it considered the applicants’ claim, the ECtHR recognised that the turbid conditions in Iraq prevented the United Kingdom from carrying out its obligations that were made to apply during peacetime. This demonstrated the Courts hesitancy to place unrealistic procedural expectations on governments which work to stabilize conditions in hostile territories. However, the Court still adopted a flexible approach by ruling that the United Kingdom violated Article 2. It expunged the role of Article 1 and its attendant jurisdictional issues that prevent State liability under the Convention. By doing so, it provided a higher level of protection for human rights of civilians in occupied territories.

The reluctance shown by the Court in *Al-Skeini* and *Bankovic* holdings gives an insight to the underlying policy considerations that the Court is still unwilling to address. The Court did not want to ‘open the floodgates of litigation under the ‘State agent authority’ argument by considering every individual against whom force is used as falling under the protection of the Convention’ (Milanovic, 2011, p.127)

[25] They did not want to micromanage the use of force in the field, especially when some of the killings in question may have been justified' (Milanovic, 2011 127) [25].

The Court's decision shows the ECtHR's unease with the 'State agent authority' model, which puts its desire for the universal protection of human rights and human dignity at loggerheads with the competing desire to avoid having to decide each individual killing abroad by European States when it is not institutionally suited to do so. As it is not familiar with the necessary rules of humanitarian law.

Also, the arbitrary nature of the 'exceptional' test the Court has given for the application of extraterritorial jurisdiction creates confusion in its jurisprudence, and this will continue to be so following the decision in *Al-Skeini*.

From the policy considerations in prior case law, one can comprehend why the Court was moved to restate its position that jurisdiction is 'exceptional', and validated both models of jurisdiction. This notwithstanding, the definition of 'exceptional' that limits foreseen and troublesome onslaught of individual suits, is arbitrary.

Against this background, Judge Bonello called for a more elaborate theory for the application of the extraterritorial jurisdiction. Advocating a 'functional' test, he stated that 'by virtue of their agreement to become parties to the Convention, every state must observe the following minimum functions to ensure observance of human rights: Firstly, not violating (through their agents) human rights; secondly, having in place systems which prevent breaches of human rights; thirdly, investigating complaints of human rights abuses; fourthly, scourging those of their agents who infringe human rights; and finally, compensating the victims of breaches of human rights' (*Al-Skeini v UK*, 2011, p.10). This functional test in sum prescribes that 'a State has jurisdiction for the purposes of Article 1 whenever the observance of or the breach of any of these functions is within its authority and control...in relation to Convention obligations, jurisdiction is neither territorial nor extraterritorial. It is functional' (*Al-Skeini v United Kingdom*, 2011, p.11) [4], thus, the obligation on states to observe and respect human rights is not made 'casual and approximate to geographic co-ordinates' (*Al-Skeini v UK*, 2011, p.18).

This approach is at par with the arguments of Scheinin (Scheinin, 2004) [18] and Lawson (Lawson, 2004) Scheinin argues that the assessment of jurisdiction should entail simultaneous interpretation of what constitutes a human rights violation. Similarly, Lawson is of the view that 'control entails responsibility,' therefore, if there is a direct and immediate link between the extraterritorial conduct of a State and the alleged human rights violation, the individual must be within that States jurisdiction. This approach is desirable, it provides a bright line rule which measures jurisdiction 'against the essential yardstick of universality of human rights anytime, anywhere' (*Al-Skeini v United Kingdom*, 2011, p.20) [4].

However, this test has been criticised as embracing an overly broad notion of jurisprudence that may produce unsustainable results (Shany, 2004, p.63) [19]. It may include the imposition of obligations which will be politically unacceptable to States and may be contrary to their intentions when becoming parties to the relevant human rights treaties. As Milanovic stated, 'one should not be too hasty in formulating legal standards that deviate too far from legal institutions about what States should do outside their

borders (as distinct from what they can theoretically do)' (Shany, 2004, p.63) [19]. But then, how do we draw the line between functional situations that should entail extraterritoriality and those that do not? Ben-Naftali and Shanny (2003-2004, pp.69-70) [19] suggested that the functional approach should be limited in accordance with two key notions:

- a. The intensity of power relations- Individuals should fall under the jurisdiction of a state when the state, in an extraterritorial display of power, performs an act or omission, the impact of which is direct, significant and foreseeable. This creates a balance between the universal ideal and the states expectations in relation to the legal consequences of their policies. Alternatively;
- b. The concept of special legal relations- Relationships of power that put States in a unique legal position to afford protection to individuals and would also justify the imposition of extraterritorial obligations. Such special relations may be based on either a controlling relationship, (for example, effective control over territory or physical control over the individual), or some other special relationship that makes the State particularly suited to protect certain individuals and generate strong expectations that it will do so by virtue of such special relationship, (for example, flagship states are particularly suited to protect individuals on board of vessels hoisting their flags at least when they sail on the high seas. Hence the flag state should be legally required to provide protection to such individuals).

### Conclusion

The ECtHR has struggled to define a standard that determines the extraterritorial applicability of the Convention that will create a balance between the extraterritorial application of Convention rights on one hand and the centrality of borders in delineating State powers and responsibility under international law on the other hand. The jurisprudence of the ECtHR displays a strong moral case favouring extra-territoriality. Yet attempts to delineate the exact scope of extraterritorial application through reference to degrees of control over individuals or areas, or by the nature of obligations have produced unsatisfactory results, demonstrating a concurrent acceptance and rejection of the relevance of borders for delineating Convention obligations.

The way forward seems to involve the adoption of a functionalist view as a basis for applying the Convention extraterritorially, which will require States to protect Convention rights in situations they can do so. This can be done while respecting the need to secure political acceptability, legal certainty and foreseeability by limiting the functional approach to the two notions advocated by Ben-Naftali and Shani- the intensity of power relations and special legal relations.

### References

1. CASE LAW
2. *Al-Saadoon and Mufdhi v United Kingdom*, 2010, ECHR 282.
3. *Al-Skeini and others v Secretary for Defence*, 2007, UKHL 26.
4. *Al-Skeini and others v United Kingdom*, 2011, ECHR 1093.

5. Bankovic and others v Belgium and others, 2001, ECHR 890.
6. Cyprus v Turkey, 1992, 23 EHRR 244.
7. Drozd and Janousek v France and Spain, 1992, 14 EHRR 745.
8. Ilascu and others v Moldova and Russia, 2005, 49 EHRR 1030.
9. Issa v Turkey, 2004, 41 EHRR 562.
10. Loizidou v Turkey (Preliminary objections) [1995] Application No. 15318/89.
11. Medvedyev and others v France [2010] ECtHR 384.
12. Ocalan v Turkey, 2005, 41 EHRR 45.
13. W.M v Denmark, 1992, EHRR 90.
14. ARTICLES
15. Cowan, 'A New Watershed? Re-evaluating Bankovic in the light of Al-Skeini' 1 Cambridge Journal of International Comparative Law 1, 2012.
16. J. Steyn, 'Guantanamo Bay: The Legal Black Hole', 2004, 53 International and Comparative Law Quarterly 1.
17. Dennis M. 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 2005, 9 AJIL 119.
18. M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights Treaties' in T. Coomans and M. Kamminga (eds) Extraterritorial Application of Human Rights Treaties (Intersentia, 2004).
19. Ben-Naftali O, Shany Y. 'The Application of Human Rights in the Occupied Territories, 2003-2004, 37 Israel Law Review 17.
20. R. Lawson, 'Life after Bankovic: On the Extraterritorial Application of Human Rights Treaties' in Coomans and Kamminga (eds) Extraterritorial Application of Human Rights Treaties (Intersentia, 2004).
21. R. Wilde, 'Legal Black Hole? Extraterritorial State Action and International Treaty law on Civil and Political Rights', 2005, 26 Mich JIL 693.
22. S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 2010, 20 The European Journal of International Law 4.
23. Y. Shany, 'Taking Universality Seriously: A Functional Approach to extraterritoriality in international humanitarian law' 3, 2003, 7 Law and Ethics of Human Rights 1.
24. BOOKS
25. M. Milanovic, Extraterritorial Application of Humanitarian Rights Treaties (Oxford: Oxford University Press, 2011).
26. M. Gondek, The Reach of Human Rights Treaties in a Globalising World: Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2009).
27. F. Coomans and M. T. Kamminga (eds) Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2004).
28. ELECTRONIC DATA
29. M. Milanovic 'European Court Decides Al-Skeini and Al-Jedda at <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/> (last visited 1, 2014).
30. CONVENTIONS
31. European Convention on Human Rights (ECHR), 1953.