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Al-Skeini and *Al-Jedda* in Strasbourg

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Abstract

The article analyses the European Court of Human Rights' recent judgments in Al-Skeini v. United Kingdom *and* Al-Jedda v. United Kingdom*. The former is set to become the leading Strasbourg authority on the extraterritorial application of the ECHR; the latter presents significant developments with regard to issues such as the dual attribution of conduct to states and to international organizations, norm conflict, the relationship between the ECHR and general international law, and the ability or inability of UN Security Council decisions to displace human rights treaties by virtue of Article 103 of the UN Charter. The article critically examines the reasoning behind the two judgments, as well as their broad policy implications regarding ECHR member state action abroad and their implementation of various Security Council measures.*

1 Introduction

In July 2011 the European Court of Human Rights (ECtHR) delivered its judgments in *Al-Skeini and others v. United Kingdom*[1] and *Al-Jedda v. United Kingdom*.[2] The judgments were much anticipated, and rightly so. Ten years after *Bankovic*,[3] *Al-Skeini* is set to replace it as the leading Strasbourg authority on the extraterritorial application of the ECHR.[4] *Al-Jedda*, on the other hand, presents significant developments with regard to

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[1] App. No. 55721/07, 7 July 2011 (hereinafter *Al-Skeini GC*).

[2] App. No. 27021/08, 7 July 2011 (hereinafter *Al-Jedda GC*).

[3] App. No. 52207/99, *Bankovic and Others v. Belgium and Others* [GC] (dec.),, 12 Dec. 2001.

[4] Generally on the extraterritorial application of human rights treaties see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009); and the contributions in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004).

issues such as the dual attribution of conduct to states and to international organizations, norm conflict, the relationship between the ECHR and general international law, and the ability or inability of UN Security Council decisions to displace human rights treaties by virtue of Article 103 of the UN Charter.

As we will see, in both cases the UK government lost rather badly. But the two judgments repay deeper study, not because of their human rights-friendly result, but on account of the Court's reasoning, its attempts to place its approach to some of these issues on firmer doctrinal foundations, and the broad policy implications that the two judgments will have with regard to ECHR member state action abroad and the members' implementation of various Security Council measures. The judgments also directly affect a number of other cases pending either in Strasbourg or before national courts. To address these issues I will provide some background to the two cases and deal with each judgment in turn.

2 *Al-Skeini v. United Kingdom*

A *Background*

The territorial scope of application of the ECHR is governed by its Article 1, under which the states parties 'shall secure to everyone within their jurisdiction' the rights and freedoms defined in the Convention. Other human rights treaties contain similar, but at times significantly different, jurisdiction clauses; the meaning of this single word, 'jurisdiction', is thus of paramount importance. There are two main strands of jurisprudence on the interpretation of this word, and accordingly on the territorial scope of the ECHR and other human rights treaties. First, there is what I will call the *spatial model* of jurisdiction[5] – a state possesses jurisdiction whenever it has *effective overall control of an area*, a model developed by the ECtHR in *Loizidou*.[6] Secondly, there is the *personal model* of jurisdiction (or 'state agent authority')[7] – a state has jurisdiction whenever it exercises *authority or control over an individual*. This model has been applied in numerous cases before the ECtHR and the now defunct Commission,[8] as well as by the Human Rights Committee.[9]

The relationship between these two strands of the case law has never been clear, as the question of extraterritoriality was never approached in a methodical way, and a number of deviations from the two models stood in between them. Even what little clarity existed was blown away by the Grand Chamber's decision in *Bankovic*, holding

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5 See further Milanovic, *supra* note 4, at 127 ff.

6 App. No. 15318/89, *Loizidou v. Turkey*, Judgment (preliminary objections), 23 Feb. 1995; App. No. 15318/89, *Loizidou v. Turkey*, Judgment (merits), 28 Nov. 1996.

7 See further Milanovic, *supra* note 4, at 173 ff.

8 See, e.g., App. Nos 6780/74 and 6950/75, *Cyprus v. Turkey* (dec.), 26 May 1975; App. No. 11755/85, *Stocké v. Germany*, Commission Report, 12 Oct. 1989, at para. 166. See also *infra* notes 16–23 and accompanying text.

9 See, e.g., *Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. Supp. No. 40 (A/36/40) at 176 (1981); General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 10.

that individuals killed outside an area under the effective overall control of a state by missiles or bombs fired from an aircraft were not within the state's jurisdiction, and that such control generally requires troops on the ground; control over airspace and a 'mere' power to kill were insufficient to create a jurisdictional link. The Court held that Convention rights could not be 'divided and tailored' with respect to the circumstances; either all of them applied or none of them applied. In doing so, the Court basically ignored the personal model/authority and control over individuals line of cases, which it did not even discuss,[10] probably on the basis that it was unable to come up with a non-arbitrary limitation on the personal model – ultimately, *any* state act capable of violating a person's human rights would seem to amount to an exercise of 'authority and control' over that individual.[11] However, the necessary implication of its ruling was that the power to kill alone could not constitute 'authority and control'.

The Court has been much criticized for *Bankovic*, and rightly so.[12] The most fundamental problem with the decision was not the end result, but the Court's reasoning, in particular its holding that extraterritorial application of the ECHR supposedly has to be justified by reference to general international law, and its conflation of the concept of state 'jurisdiction' in Article 1 ECHR with that of state jurisdiction to prescribe and enforce its domestic law.[13] But it was not *really* the Court's failure to distinguish between the different meanings and concepts of 'jurisdiction' that produced *Bankovic*. Rather, *Bankovic* was the result of the Court's less than transparent weighing of competing policy considerations, and its ultimate desire to come up with a superficial, legalistic rationale that would justify making the extraterritorial application of the ECHR *exceptional*. Deciding the case in late 2001, in the immediate wake of 9/11, the Court was understandably torn between considerations of universality and effectiveness.[14] On one hand, it wanted to be as protective as it could of human rights, based in universalist notions of human dignity. On the other, it thought that deciding in favour of the applicants would open the floodgates and involve it in assessing all uses of force by European states – a task it was institutionally unsuited for, lacked the necessary evidence, and lacked the competence in other relevant bodies of law, such as IHL, properly to do.[15] It could not, it would not find itself the ultimate arbiter of all European overseas adventures. It would not fetter these states with unrealistically stringent ECHR standards developed mainly in and for peacetime (as, e.g., with Article 2

[10] See in that regard Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights', in Coomans and Kamminga, *supra* note 4, at 83.

[11] See further Milanovic, *supra* note 4, at 187–209.

[12] See especially Lawson, *supra* note 10; De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', 6 *Baltic Yrbk Int'l L* (2006) 183; Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights,' 14 *EJIL* (2003) 529; Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 40 *Israel L Rev* (2007) 503.

[13] See Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rts L Rev* (2008) 411.

[14] See further Milanovic, *supra* note 4, at 54–55, 106–116.

[15] See, e.g., O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life After Bankovic" ', in Coomans and Kamminga, *supra* note 4, at 125, 135.

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ECHR). It would not dilute these standards developed in and for Europe on a gamble that few, if any, non-Europeans would benefit from them. And so, thought the Court, why not simply say that the Convention does not apply at all?

But, as the years went by, the stringency of *Bankovic* started to look less and less appealing. In *Issa v. Turkey,*[16] a Chamber of the Court allowed for the application of both the spatial and the personal models of jurisdiction to a Turkish incursion in northern Iraq,[17] relying on a decision of the Human Rights Committee that the *Bankovic* Grand Chamber had discounted.[18] In *Pad and others v. Turkey*,[19] the applicants were Iranian nationals living close to the Turkish border. They were killed by a Turkish helicopter, when Turkey claimed they attempted to cross the border illegally. Though it was undisputed that they were killed by Turkish forces, it was disputed whether the killing took place on the Turkish or on the Iranian side of the border. Applying *Issa*, the Chamber held them to have been within Turkey's jurisdiction under the personal model, regardless of on which side of the border the deaths took place – the Court clearly thought that it would have been entirely arbitrary for the application of the ECHR to hinge on the applicants' location within a few hundred metres.[20] This was, of course, in direct contradiction of *Bankovic* – even the killing itself took place by missile fire from an aircraft! In *Isaak and others v. Turkey*[21] the same Chamber declared admissible the complaint by a family of an individual beaten to death by Turkish Cypriot police in northern Cyprus *in a UN buffer zone*, and therefore not in an area over which Turkey had effective overall control under the *Loizidou* spatial model of jurisdiction. In *Isaak* and in two similar cases[22] the Court again felt that it would have been manifestly arbitrary for the applicants to be unprotected by the ECHR, opting instead to rely on the personal model, *Bankovic* notwithstanding. Other cases seemed to apply a version of the spatial model *in extremis*, regarding 'areas' diminishing in size so much as to become mere 'places' or indeed man-made objects.[23]

[16] App. No. 31821/96, *Issa v. Turkey*, Judgment, 16 Nov. 2004.

[17] *Ibid.*, at para. 71: 'a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State'.

[18] *Ibid.*, stating that '[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory', paraphrasing *Lopez Burgos v. Uruguay*, *supra* note 9, at para. 12.3.

[19] App. No. 60167/00, *Pad and others v. Turkey* (dec.), 28 June 2007.

[20] *Ibid.*, at paras 53–54.

[21] App. No. 44587/98, *Isaak and Others v. Turkey* (dec.), 28 Sept. 2006.

[22] App. No. 36832/97, *Solomou and Others v. Turkey*, Judgment, 24 June 2008; App. No. 45653/99, *Andreou v. Turkey* (dec.), 3 June 2008.

[23] See App. No. 3394/03, *Medvedyev and others v. France* [GC], Judgment, 29 Mar. 2010, at paras 66–67 (holding that the crew of a Cambodian ship (the *Winner*) captured by the French navy on the high seas were within France's jurisdiction as France had 'full and exclusive control over the *Winner* and its crew, at least *de facto*'). Note how the Court vacillates between the personal model (control over the crew) and the spatial model (control over the ship). See also App. No. 61498/08, *Al-Saadoon and Mufdhi v. United Kingdom* (dec.), 3 July 2009, at para. 88 ('[t]he Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities *over the premises in question* [a prison], the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction' (emphasis added)).

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And so, with the inconsistencies and uncertainties in the Court's case law and its apparent unease with the rigidity of *Bankovic* growing, the stage was set for *Al-Skeini*.

B Al-Skeini *Before UK Courts*

Al-Skeini was one of several cases arising out of the occupation of Iraq that were brought before UK courts under the Human Rights Act. The case had six applicants. Five of them were killed, or were allegedly killed, by British troops on patrol in UK-occupied Basra (the facts are somewhat more complicated, and one of the applicants before the ECtHR was not the same as before the domestic courts, but this description is accurate enough for our present purposes). The sixth applicant, Mr Baha Mousa, was arrested by British troops and taken to a UK detention facility, where he was mistreated and ultimately killed. The applicants' families asked for a full, independent, and effective investigation, compliant with Article 2 ECHR. They thus limited the merits of the case to the *procedural* component of Article 2, and did not claim a *substantive* violation of that provision, i.e., that the killings were necessarily unlawful.

The case first went to the High Court,[24] then to the Court of Appeal,[25] and finally to the House of Lords (now rebranded as the UK Supreme Court).[26] All of the UK courts opted to dismiss the cases of the five applicants killed on patrol on the preliminary grounds of lack of UK jurisdiction, and consequent lack of extraterritorial application of the ECHR, yet found the sixth applicant, Baha Mousa, to have been within the UK's jurisdiction. They did so on different grounds. While the Court of Appeal thought that the personal model of jurisdiction best suited the case and covered the sixth applicant, the High Court and the House of Lords considered that *Bankovic* precluded the application of the personal model and opted for a variant of the spatial model. For reasons of space I will not examine the reasoning of the lower courts in detail, but will confine myself to the judgment of the Law Lords, which could be summarized as follows:

(1) The spatial model of jurisdiction does not apply outside the *espace juridique* of the ECHR – a concept introduced but not explained by the European Court in *Bankovic*, designating the combined territories of ECHR member states.[27] In other words, though, say, in *Loizidou* Turkey had ECHR obligations to the people of Northern Cyprus because it exercised effective overall control over that area, this was so only because Cyprus was an ECHR state party. According to their Lordships, that reasoning did not extend to the UK in Iraq, because the ECHR is a regional instrument, the imposition of which in Iraq would amount to 'human rights imperialism'.[28]

[24] *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).

[25] *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).

[26] *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [2008] AC 153 (hereinafter *Al-Skeini HL*).

[27] *Bankovic, supra* note 3, at para. 80.

[28] *Al-Skeini HL, supra* note 26, at paras 78–79 (per Lord Rodger).

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(2) Even if the spatial model did apply in principle, as a matter of fact the UK did not have effective overall control over Basra, despite being the occupying power in Southern Iraq, since the strength of the insurgency and the low level of its forces there rendered it factually unable to guarantee ECHR rights, and these rights were per *Bankovic* an all-or-nothing package that could not be divided and tailored.[29]
(3) Whatever the validity of the personal model of jurisdiction in Strasbourg's conflicting case law, *Bankovic* was clear on the point that a mere killing would not suffice for it to engage. Therefore, the first five applicants were not within the UK's jurisdiction.
(4) However, the sixth applicant, who was detained in a UK facility and killed there, was in fact within the UK's jurisdiction, because a military prison has a special status in international law akin to that of an embassy.[30] The government conceded that jurisdiction attached on this basis.

On point (1), their Lordships' reasoning on the spatial model and the *espace juridique* point has been heavily and rightly criticized.[31] Technically, the House of Lords put the *espace juridique* concept to a much more radical use that the European Court did in *Bankovic.* Moreover *Issa* at least was directly contrary to the proposition that the spatial model can apply only within 'Europe'. More fundamentally, if universality truly is the foundation of human rights, why should it matter for the purpose of its extraterritorial application that the ECHR is a *regional* treaty? Jurisdiction either means control of a territory or it does not, and people either are within the state's jurisdiction or they are not.

On point (2), the issue of whether the belligerent occupation threshold of effective control and the human rights jurisdiction threshold of effective overall control is a complex one, on which reasonable people can disagree.[32] The threshold should in either case be met only when the obligations imposed could be realistically complied with. In that regard, the English courts have in my view underestimated the flexibility inherent in the positive obligation to secure human rights under Article 1 ECHR, which requires states to do only what they reasonably can, and have thus exaggerated the adverse implications that considering the two thresholds to be the same could potentially have.[33]

On point (3), it is fair to say that *Bankovic* did preclude the application of the personal model to the first five applicants – but that does not make it any less wrongly decided.

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29 *Ibid.*, at para. 83 (per Lord Rodger).
30 *Ibid.* at para. 97 (per Lord Carswell), para. 132 (per Lord Brown).
31 See especially Thienel, 'The ECHR in Iraq', 6 *J Int'l Criminal Justice* (2008) 115; Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', 10 *European Human Rts L Rev* (2005) 115.
32 See further Milanovic, *supra* note 4, at 141–147.
33 *Ibid.*, at 94–96, 106–117.

But how are we then to explain the fact that the sixth applicant *was* within the UK's jurisdiction? The justification given by the House of Lords – that a military prison is analogous to an embassy – to my mind simply defies common sense. A prison is in *no meaningful way* like an embassy, as I imagine any prisoner would be able to attest to, if we, say, invited him to a cocktail party at an appropriate location in Belgravia. It most certainly does not have any 'special status' in international law.[34] The *only* thing common to a prison and an embassy is that they both operate on the basis of the territorial state's *consent*. But if this were the reason why the extraterritorial state's jurisdiction were to exist, not only is there no justification given for why this would be so – one would imagine that non-consensual interventions would generally be more likely to affect the human rights of the population – but consent can be given to many things, like the presence of foreign forces in general.[35]

What in my view explains the result of *Al-Skeini* is not the intricacies of the concept of jurisdiction in Article 1 ECHR, real or imagined, but again the tensions in the *policy* considerations underpinning the law. On the one hand, like the ECtHR in *Bankovic*, the House of Lords in *Al-Skeini* did not want to open the floodgates of litigation by considering every individual against whom force was used as falling under the protection of the Convention. They did not want to micromanage the use of force in the field, especially when some of the killings in question may even have been justified. On the other hand, however, *nothing* could have justified the mistreatment and killing of a defenceless prisoner. Baha Mousa simply *had* to be protected – and this is where the prison somehow became analogous to an embassy.

This is, in a nutshell, what the House of Lords had to say on *Al-Skeini*. The applicants then understandably decided to pursue the case in Strasbourg. With the ruling of the Lords as it was, the ECtHR had before it a veritable menu of options with a number of issues that it could either explore or completely avoid. Let us now finally see what it actually did.

C Al-Skeini *Before the ECtHR*

In its judgment, the Grand Chamber tried to bring some coherence to its conflicting case law on the extraterritorial application of the ECHR. As is regrettably often the case in Strasbourg, particularly on this issue, in doing so the Court basically pretended that all of its prior jurisprudence somehow fitted neatly into a bigger picture even though it manifestly did not, as Judge Bonello rightly pointed out in his separate opinion.[36] Crucially, the Court decided still to retain the basic *Bankovic* posture that recognition of extraterritorial jurisdiction must remain exceptional, and somehow requires justification on the basis of general international law – a position dubious both legally and as a matter of policy.

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[34] *Ibid.*, at 153–160.

[35] See also N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), at 214–215.

[36] *Al-Skeini GC*, *supra* note 1, Concurring Opinion of Judge Bonello, at paras 4–8.

The Court first outlined the two main strands of the case law, one based on a personal and the other on a spatial notion of jurisdiction. It dealt with the former under the heading 'state agent authority and control', and said that:

> the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). Thus 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.[37]

Note the *Bankovic* reference to 'public powers', which prove to be key later in the judgment, but which the Court actually (purposefully) misplaces. That paragraph of *Bankovic* was *not* about jurisdiction as authority and control over individuals (personal model), but about jurisdiction as effective control over territory (spatial model), and even in that context it was unclear what the Court had meant by this reference to 'public powers'.[38] Again, we will see in a moment why this shift from the spatial to the personal model matters. The Court then continued by saying that:

> In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad [citing *Öcalan*, *Issa*, *Al-Saadoon* and *Medvedyev*]. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.
>
> 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" (compare *Banković*, cited above, § 75).[39]

Note, first, how the Court rightly says that the cases it cites were not (solely!) about control over ships, aircraft, or places – the spatial model of jurisdiction *in extremis*, applied to ever decreasing 'areas'. The word 'solely' of course leaves open the possibility of applying the spatial model in such circumstances.[40] Rather, the cases were about jurisdiction in personal terms, as the 'exercise of physical power and control

[37] *Ibid.*, at para. 135 (some citations omitted).

[38] 'In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so 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*': *Bankovic*, *supra* note 3, at para. 71, emphasis added. For a critique of the reference to public powers see Lawson, *supra* note 10.

[39] *Al-Skeini GC*, *supra* note 1, at paras 136–137.

[40] See Milanovic, *supra* note 4, at 151 ff.

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over the person in question'. So far so good. But the question that immediately arises is whether there should be any reason, or indeed whether there is any non-arbitrary way, to limit this personal conception of jurisdiction, for example to physical custody.[41] Is it not 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? Does that not flatly contradict the *Bankovic* holding that a 'mere' power to kill cannot equal jurisdiction? The UK courts in *Al-Skeini* certainly (and rightly) thought so. Note also how the Court's express allowance for dividing and tailoring Convention rights is in fact *completely contradictory* to paragraph 75 of *Bankovic* which the Court somewhat cheekily asks as to 'compare' its holding to (viz. 'the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question').

To put this in the strongest possible terms: this is as close as the ECtHR has come to overruling *Bankovic*, and good riddance. Except, as we will see, the Court's disavowal of *Bankovic* is half-hearted at best. Its conceptual foundation – that the extraterritorial application of the ECHR can only be exceptional and needs to be justified by reference to general international law – remains.

The Court then moved on to examining jurisdiction conceived of spatially, as control of an area.[42] Most importantly, the Court killed off the concept of the *espace juridique*, which formed the main basis of the House of Lords' ruling in the case:

> The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space" (see *Loizidou* (merits), cited above, §78; *Banković,* cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction (see amongst other examples *Öcalan, Issa, Al-Saadoon and Mufdhi, Medvedyev,* all cited above).[43]

After this '*espace juridique*' is now rightly nothing more than a fishy French phrase, which is all that it was in *Bankovic* anyway.[44] Having thus overruled the House of Lords, one would have expected the Court then to apply the spatial concept of jurisdiction to Basra, but that is not what the Court in fact did. It completely *avoided*

[41] *Ibid.*, at 187–208.

[42] Among other matters, in para. 140 the Court attempted to end the difficult problem of the colonial clause in Art. 56 by saying that it is really no longer relevant to the application of Art. 1. For more on that issue, see Moor and Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights', 76 *British Yrbk Int'l L* (2006) 121.

[43] *Al-Skeini GC, supra* note 1, at para. 142.

[44] See *supra* note 31 and accompanying text.

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the question whether the UK had effective overall control over Basra/Southern Iraq as a basis for Article 1 jurisdiction, and more particularly whether that threshold was identical to, or indeed *higher* than, that for belligerent occupation, as was held by the House of Lords in *Al-Skeini*. Rather, it noted that, as the occupying powers in Iraq, the US and the UK obviously exercised elements of governmental authority, which it established in very formal terms, by reference to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq,[45] and concluded as follows:

> It can be seen, therefore, that following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the *public powers normally to be exercised by a sovereign government*. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. *In these exceptional circumstances, the Court considers that 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.*
>
> Against this background, the Court recalls that the deaths at issue in the present case occurred during the relevant period: the fifth applicant's son died on 8 May 2003; the first and fourth applicants' brothers died in August 2003; the sixth applicant's son died in September 2003; and the spouses of the second and third applicants died in November 2003. It is not disputed that the deaths of the first, second, fourth, fifth and sixth applicants' relatives were caused by the acts of British soldiers during the course of or contiguous to security operations carried out by British forces in various parts of Basrah City. It follows that in all these cases there was a jurisdictional link for the purposes of Article 1 of the Convention between the United Kingdom and the deceased. The third applicant's wife was killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it is not known which side fired the fatal bullet. The Court considers that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also.[46]

As we can see, the Court applied a *personal* model of jurisdiction to the *killing* of all six applicants, but it did so only *exceptionally*, because the UK exercised *public powers* in Iraq. But, *a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not have applied. In other words, *Bankovic* is, according to the Court, still perfectly correct in its result. While the ability 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 missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic*.

In short, while the *Al-Skeini* judgment is good news, it is not *all* good news. Unlike the English courts, the Grand Chamber thought that all of the six applicants were

[45] *Al-Skeini GC*, *supra* note 1, at paras 143–148.
[46] *Ibid.*, at paras 149–150 (emphasis added).

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under the UK's jurisdiction conceived of in *personal* terms. But that reasoning extends only to situations where the state using force exercises some kind of 'public powers', whatever these may be, in a rather bizarre mix of the personal model with the spatial one. *Bankovic*-type killings would still be off the table, and how all this is reconcilable with judgments like *Issa* or *Pad v. Turkey* is anyone's guess. The best news from an Article 1 standpoint is the affirmation in pretty clear terms that both the personal and the spatial conceptions of jurisdiction can apply outside that unfortunate *espace juridique*.

As for the merits of the Article 2 complaint, recall that the merits claim in *Al-Skeini* was not that the killings were substantively unlawful, but that the UK failed to comply with its *procedural* obligation to investigate the killings. Other than with Baha Mousa, even the UK government essentially conceded that its investigative procedures in Iraq were not Article 2-compliant (e.g., because of the lack of institutional independence of the investigators from the military chain of command). The Court thus found it fairly easy to establish a violation of the procedural component of Article 2. But the Court also made a very useful contribution in that it showed awareness that Article 2 could not be applied in Iraq in exactly the same way as it would be applied in the UK in peacetime, because the conditions on the ground were so difficult. It was prepared to interpret Article 2 flexibly, and not impose unrealistic burdens on the UK, but even under that less rigid standard the UK was found to be in violation.[47]

D *Implications*

This judgment needs to be read very carefully by the legal advisors in all European foreign ministries, particularly those which send their troops or agents abroad with some frequency. Bearing in mind that there could be many, many people in a similar situation to those of the applicants, the financial implications for the UK are by no means negligible.[48] But it is also important to note that the picture is not all rosy. While the Court's approach to extraterritorial application is now more expansive than in *Bankovic* and than the English courts allowed in *Al-Skeini*, *Bankovic* has still not been overruled. For example, under *Al-Skeini* the current bombing of Libya by a number of European states could *not* fall under Article 1 ECHR. Note also how the limitation on the application of the personal conception of jurisdiction is entirely arbitrary. Why is one killing under the scope of the ECHR and the other not, merely because the state concerned exercises some vaguely framed 'public powers'? Note also how the fact that *Al-Skeini* was limited to the *procedural* component of Article 2 allowed the Court to say nothing about how Article 2 would *substantively* apply in an occupation context, e.g., how the ECHR would interact with IHL and its targeting rules.

[47] *Al-Skeini GC*, *supra* note 1, at paras 168–177.

[48] The Court awarded substantial damages, at €17,000 per applicant – *ibid.*, at para. 182, as well as costs.

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In short, while the Grand Chamber's *Al-Skeini* judgment clarified some matters, it raised at least as many questions as it answered. At least the following issues remain unresolved or unclear:

(1) While *Al-Skeini* leaves unchanged the outcome of *Bankovic*, I wonder what the Court will do when it has to decide the case brought against Russia by the family of Alexander Litvinenko, assassinated in London in 2006 by radioactive poison, ostensibly at the orders of or with the collusion of the Kremlin.[49] Russia could hardly be said to have exercised 'public powers' on British soil. And what of the Court's judgments in *Issa, Isaak*, or *Pad*?

(2) Similarly, while an Osama Bin Laden-type targeted killing scenario seems to be out of the picture under *Al-Skeini*, would that change if the territorial state gave its *consent* to the killing, say if Pakistan had consented to the US military operation? To my mind consent or the sovereignty of the territorial state more generally should be entirely irrelevant for the issue of extraterritorial application, but the Court in *Al-Skeini* left this matter open.[50]

(3) And what of various extraterritorial complicity scenarios, say if a UK agent were to feed questions to a coercive interrogation of a terrorist suspect in Pakistan? Would that person be within the UK's 'authority and control' and does the UK exercise some kind of 'public powers'?[51]

(4) The scope of *positive* obligations is likewise unclear. Would, for example, the UK have had the positive obligation to protect the right to life of the applicants in *Al-Skeini* even from purely private violence, as it would have on its own territory,[52] and as it arguable would have under the *spatial* conception of jurisdiction, i.e., if it had effective overall control over Basra? Similarly, would it have had the procedural positive obligation to investigate if one of the killings was purely private in nature, i.e., if there was no involvement by UK soldiers? Note how in pararaph 150 quoted above with respect to the third applicant the Court 'consider[ed] that, since the death occurred in the course of a United Kingdom security operation, when British soldiers carried out a patrol in the vicinity of the applicant's home and joined in the fatal exchange of fire, there was a jurisdictional link between the United Kingdom and this deceased also'. *A contrario*, had the death not happened in the course of a UK military operation, the UK would have had no obligation to investigate. It is unclear whether this conclusion flows only from the fact the applicants were within the UK's jurisdiction under the

[49] See, e.g., 'Litvinenko widow launches case in European Court of Human Rights', available at: www.doughtystreet.co.uk/news/news_detail.cfm?iNewsID=229.

[50] *Al-Skeini GC, supra* note 1, at para. 135, quoted in full above.

[51] See, e.g., Akande, 'UK Case on Complicity by UK Intelligence Agencies in Torture Abroad,' *EJIL: Talk!*, 5 July 2011, available at: www.ejiltalk.org/uk-case-on-complicity-by-uk-intelligence-agencies-in-torture-abroad/.

[52] App. No. 23452/94, *Osman v. United Kingdom* [GC], Judgment, 28 Oct. 1998.

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personal model, or whether the result would have been different under the spatial model.[53]

(5) Similarly, it is unclear what the Court's position would be in a reverse *Al-Skeini* scenario, as in the *Smith* case decided by the UK Supreme Court,[54] where at issue was whether a *UK soldier* had rights *vis-à-vis* the UK.[55] Would the UK's exercise of 'public powers' mean that a UK soldier was continuously under the UK's jurisdiction on the basis of the personal model?

(6) Finally, when it comes to the spatial model of jurisdiction, as we have seen the Court has left completely open the question whether the imposition of belligerent occupation necessarily satisfies the *Loizidou* effective overall control of an area test, i.e., whether the two thresholds for occupation and jurisdiction are one and the same.

3 *Al-Jedda v. United Kingdom*

A *Background*

We turn now to *Al-Jedda*. The applicant was a shady character detained by British forces in Iraq. He was detained not under the law of occupation, nor on a criminal charge in pre-trial detention,[56] but under the authority to detain preventively arguably granted to the US and UK by the UN Security Council in Resolution 1546.[57] He claimed that his detention was unlawful under Article 5 ECHR, which, absent a derogation, does not allow for such preventive security detention, and at that without any judicial review.[58] The UK, on the other hand, argued that under Article 103 of the UN

[53] The better view would be that (i) the negative obligations of states under the ECHR are territorially unlimited, as are procedural obligations which flow from an arguable violation of a negative obligation, but that (ii) positive obligations to prevent and investigate purely private violence require effective overall control over a territory, i.e., spatial jurisdiction: see Milanovic, *supra* note 4, at 209–221.

[54] *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

[55] The Sup Ct found that a UK soldier had rights under the ECHR only when on the premises of a UK military base, but not off it, under a variant of the spatial model applied to places: see further Milanovic, *supra* note 4, at 102, 196–197.

[56] As was the case in *Al-Saadoon*, *supra* note 23.

[57] Acting under Ch VII of the Charter, the Council decided 'that the multinational force shall have the *authority to take all necessary measures* to contribute to the maintenance of security and stability in Iraq *in accordance with the letters annexed to this resolution* expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks, including by preventing and deterring terrorism.' The letters referred to were sent to the Council by the then U.S. Secretary of State, Mr. Colin Powell, and the interim prime minister of Iraq, Dr. Ayad Allawi. Mr. Powell's letter outlined the duties of the MNF forces, stating that these 'will include combat operations against members of [insurgent] groups, *internment where this is necessary for imperative reasons of security*, and the continued search for and securing of weapons that threaten Iraq's security': UN Doc S/RES/1546, at op. para. 10 and annex (emphasis added).

[58] See the authorities cited in *Al-Jedda GC*, *supra* note 2, at para. 100.

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Charter[59] the grant of detention authority in Resolution 1546 prevailed over the contrary prohibition in Article 5 ECHR.

As *Al-Jedda* was finding its way before UK courts under the Human Rights Act and then on to Strasbourg there were a number of significant developments. First, the use of targeted sanctions against suspected terrorists by the Security Council under resolutions 1267 and 1373 and the reliance by states on Article 103 to preclude any human rights-based challenge to these sanctions provoked a wave of litigation. Most famously, in *Kadi* the European Court of Justice held that guarantees of fundamental rights under EU law could not be displaced by Security Council resolutions, as EU law constituted an independent legal order that international law could penetrate only on the EU's own terms.[60] Secondly, the ECtHR decided the *Behrami and Saramati* case,[61] which in many ways mirrored *Al-Jedda*. Specifically, Mr Saramati was detained by international forces in Kosovo (KFOR) on preventive grounds, on the basis of purported detention authority in Security Council resolution 1244, which was argued to prevail over Article 5 ECHR. In its decision, however, the Court did not reach the Article 103 issue, holding instead that the actions of KFOR troops were not attributable to individual troop contributing states, but to the UN, as by authorizing the military mission in Kosovo the UN Security Council supposedly exercised 'ultimate authority and control' over it. The *Behrami* ruling was roundly criticized,[62] again not merely for its end result, but for its numerous methodological flaws and its failure either to apply or at least openly to disagree with the effective control rule codified in then draft Article 5, and now draft Article 7, of the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (DARIO), as finally adopted by the ILC on second reading on 3 June 2011.[63] Indeed, the ILC itself considered and explicitly rejected *Behrami*.[64]

Most importantly from a law of international responsibility standpoint, *Behrami* did not even consider the possibility that attribution of conduct may be *dual* or even *multiple*, i.e., that the same action or inaction can be attributable both to a member state or states and to an international organization. Indeed, when it comes to troop contingents or other military assets that states put at the disposal of international organizations,

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[59] 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[60] Joined Cases C–402/05 P & C–415/05 P, *Kadi & Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351.

[61] App. Nos. 71412/01 & 78166/01, *Behrami and Behrami v. France, Saramati v. France, Germany and Norway* [GC] (dec.), Judgment, 2 May 2007.

[62] See, e.g., Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases', 8 *Human Rts L Rev* (2008) 151; Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *EJIL* (2008) 509; Milanovic and Papic, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law', 58 *ICLQ* (2009) 267.

[63] UN Doc. A/CN.4/L.778.

[64] See G. Gaja, Seventh Report on Responsibility of International Organizations, UN Doc. A/CN.4/610, 27 Mar. 2009, at 10–12.

say in peacekeeping missions, the default rule of attribution continues to apply: being organs of the state the conduct of the troops will be attributable to the state, under Article 4 of the ILC Articles on State Responsibility. The same conduct may also be attributable to an organization, but it requires more than mere attribution to the organization for that conduct to *cease* being attributable to state, and this is the scenario which the DARIO effective control criterion was meant to encapsulate.

B **Al-Jedda** *Before the House of Lords*

When *Al-Jedda* came before the House of Lords[65] it raised three major issues. First, after *Behrami* was decided, the UK government started arguing that the acts of its soldiers in Iraq, which were after resolution 1511 (2003) there under Security Council authorization, were *not* to be attributed to the UK, but to the UN. Accordingly, if the acts of UK soldiers in Iraq were not attributable to the UK, then the UK could not have exercised Article 1 jurisdiction over Mr. Al-Jedda, any more than Turkey could have exercised jurisdiction in Northern Cyprus if it had had no soldiers of its own controlling the territory.[66] Again, practically everyone who has ever read *Behrami* thought it to be wrongly decided, but when *Behrami* was raised before the House of Lords their Lordships were somewhat more diplomatic. They too thought that it would defy reality and common sense to say that the acts of US and UK troops in Iraq were actually attributable to the UN, but they also would not directly go against Strasbourg authority. Therefore, the late Lord Bingham,[67] whom all other law lords but Lord Rodger joined,[68] distinguished *Behrami* on the facts, and found that the acts of UK troops in Iraq were (obviously!) still attributable to the UK. The distinguishing may not have been particularly persuasive – in reality, KFOR in Kosovo was under no more UN control than US and UK forces in Iraq[69] – but it was certainly strategically very smart.

Secondly, the Lords had to deal with Mr Al-Jedda's argument that Article 103 was inapplicable, since resolution 1546 merely *authorized* the UK to detain people considered to be security threats, but did not *oblige* it to do so, while Article 103 accords pre-eminence only to *obligations* under the Charter. Lord Bingham did not find that argument persuasive. He considered that both state practice and academic opinion clearly favoured the applicability of Article 103 to Council authorizations, because the importance of maintaining peace and security in the world could scarcely be exaggerated, and since authorizations have effectively replaced the system of collective security that was envisaged by the drafters.[70]

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65 *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 (hereinafter *Al-Jedda HL*)

66 On attribution of conduct as sometimes being a perquisite for jurisdiction see Milanovic, *supra* note 4, at 51–52.

67 *Al-Jedda HL, supra* note 65, at para. 39 (per Lord Bingham).

68 *Ibid.*, at paras 93–111 (per Lord Rodger).

69 See, in that regard, Messineo, 'The House of Lords in Al-Jedda and Public International Law', 56 *Netherlands Int'l L Rev* (2009) 35.

70 *Al-Jedda HL, supra* note 65, at paras 33–34 (per Lord Bingham). See also *Al-Jedda HL, supra* note 2, at para. 115 (per Lord Rodger, concurring)

Thirdly, finding that there was indeed a norm conflict between resolution 1546 on one hand and Article 5 ECHR on the other, Lord Bingham held that pursuant to Article 103 that conflict had to be resolved in favour of the resolution, and that its prohibition of preventive detention was accordingly displaced or qualified. However, Article 5 could be displaced only to the absolute minimum necessary so that 'the detainee's rights under article 5 *are not infringed to any greater extent than is inherent in such detention*'.[71]

C Al-Jedda *Before the ECtHR*

In Strasbourg, the UK government again raised its attribution argument, claiming (correctly) that on this matter Al-Jedda was indistinguishable from Behrami. The applicant, on the other hand, emphasized the ECtHR's own qualification of the ECHR as the 'constitutional instrument of European public order',[72] and the ECHR as a self-contained regime, which could give way to other norms only through a derogation. Not only was resolution 1546 an *authorization,* rather than an *obligation,* under the Charter, which would render Article 103 inapplicable, but even if it did apply the Security Council could not just extinguish the ECHR on a whim. The applicant urged the Court to rely on the ECJ's decision in *Kadi*, and say that UN SC resolutions could not affect human rights protections under the ECHR as far as the ECHR itself is concerned, or rely on its own decision in *Bosphorus*[73] and say that UN SC resolutions could potentially displace the ECHR only if the UN provided equivalent protection of human rights, which it obviously does not in this particular instance. Both of these avenues in effect asked the Court to declare (hardly or softly) the ECHR to be independent of the UN Charter and general international law, requiring it to fragment the international legal order to the benefit of human rights.

As in *Al-Skeini*, the Court had before it a number of issues and as many options to tackle them. First, on the attribution issue the Court perhaps did the most predictable thing by following the House of Lords in distinguishing *Behrami* on the facts, saying that it 'does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations or – *more importantly, for the purposes of this case – ceased to be attributable to the troop-contributing nations*'.[74] The is a crucial development, as the Court now essentially admits the possibility of dual or multiple attribution of the same conduct to the UN and to a state, a possibility that it did not entertain in *Behrami*. The Court then continued by saying that:

> It would appear from the opinion of Lord Bingham in the first set of proceedings brought by the applicant that it was *common ground between the parties* before the House of Lords that the test to be applied in order to establish attribution was that set out by the International Law

[71] *Al-Jedda HL, supra* note 65, at para. 39 (per Lord Bingham, emphasis added).

[72] E.g., in *Behrami, supra* note 61, at para. 145.

[73] App. No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], Judgment, 30 June 2005.

[74] *Al-Jedda GC, supra* note 65, at para. 80 (emphasis added).

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> Commission, in Article 5 of its draft Articles on the Responsibility of International Organisations and in its commentary thereon, namely that the conduct of an organ of a State placed at the disposal of an international organisation should be attributable under international law to that organisation if the organisation exercises *effective control* over that conduct (see paragraphs 18 and 56 above). For the reasons set out above, the Court considers that the United Nations Security Council had neither *effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force* and that the applicant's detention was not, therefore, attributable to the United Nations.[75]

Here the Court does not acknowledge in any way the overwhelming criticism that *Behrami* has received, but is content to say that the situation in Iraq does not satisfy either the ILC's or its own test, without telling us which applies and why. While it was fairly predictable that the Court would distinguish *Behrami* rather than apply it or overrule it, the Court's evasiveness is still quite troubling.

This brings us to the merits of the case: the apparent norm conflict between the ECHR and resolution 1546 and the role of Article 103 of the Charter, on which the Court held as follows:

> In its approach to the interpretation of Resolution 1546, the Court has reference to the considerations set out in paragraph 76 above. In addition, the Court must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in . . . promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". *Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.*[76]

This is an incredibly important development – the Court has laid down a clear statement rule for interpreting SC resolutions that can go a long way in providing a meaningful human rights check on the Security Council. Sir Nigel Rodley argued for precisely such an interpretative rule in his separate opinion in the *Sayadi* case before the Human Rights Committee,[77] while I have made a similar argument, relying *inter alia* on domestic public law jurisprudence.[78]

[75] *Ibid.*, at para. 84 (emphasis added).

[76] *Ibid.*, at para. 102 (emphasis added).

[77] *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006, 29 Dec. 2008,

[78] See further Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke J Comp & Int'l L* (2009) 69, at 97–102.

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Note how the interpretative presumption that the Court creates is very, very strong. Despite the fact that the letters annexed to the resolution expressly referred to security internment,[79] the Court still did not find that the presumption was rebutted, because the resolution seemed to leave internment as just one of a number of options that the states concerned could use, because it also expressly referred to the need to comply with international human rights law, and because the UN Secretary-General and his special representative in Iraq frequently objected to the use of internment.[80] Since Article 5 therefore continued to apply in full force, the Court found that Mr. Al-Jedda was unlawfully detained.[81]

D *Implications*

An interpretative presumption, particularly one this strong, can prove to be a key tool for securing human rights compliance with respect to UN SC decisions. Its main purpose is to foster accountability. If the Council now truly wishes to release states from their human rights obligations, it will have to do so through clear and unambiguous language – language that does not get used very often in its chambers – and its members will have to take political responsibility for their actions. But note also what the Court did *not* say. It did not at all examine the fundamental question whether resolution 1546 *could have* prevailed over the ECHR even if it *did* satisfy the presumption. Perhaps that argument can be taken as implicitly accepted, but I think the Court's silence speaks volumes; it is not easy for it to accept that the SC can displace the ECHR, the 'constitutional instrument of European public order', of which it is the ultimate guardian. The Court also did not address the issue of whether authorizations are capable of being covered by Article 103.[82] The Article 103 issue thus remains open for a sequel, whilst bearing in mind the strong presumption that the Court has created. That sequel may come sooner rather than later, say in the *Nada v. Switzerland* case currently pending before the Court.[83]

79 See *supra* note 57.

80 *Al-Jedda GC*, *supra* note 65, at paras 105–106.

81 *Ibid.*, at paras 109–110. The Court awarded the applicant €25,000 in damages *ibid.*, at para. 114.

82 See, in that regard, the dissenting opinion by Judge Poalelungi.

83 App. No. 10593/08; the Grand Chamber held an oral hearing in the case on 23 Mar. 2011. The case concerns an Italian national resident in the Italian enclave of Campione in Switzerland, who at Switzerland's request was placed on a terrorist suspect list by the UN SC Res 1267 Committee, and subjected to targeted sanctions. Among these sanctions was a travel ban which Switzerland implemented through its domestic legal mechanisms. Accordingly, the applicant was denied permission to transit through Switzerland from Campione, thus rendering him unable to move even to other parts of Italy, let alone anywhere else, essentially confining him to the (rather posh and casino-filled) 1.6 square km of Campione. Mr Nada complains that the Swiss travel ban violates his rights under Arts 5 and 8 ECHR. See Milanovic, 'More on Nada v. Switzerland', *EJIL: Talk!*, 23 Dec. 2010, available at: www.ejiltalk.org/more-on-nada-v-switzerland/.

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4 Conclusion

In both cases the Court awarded substantial damages and costs; the financial and policy implications of the two cases are immense – just consider the number of people detained, killed, or otherwise affected in UK or multi-national operations in Iraq or Afghanistan.[84] Despite its flaws *Al-Skeini* will be of particular importance for those European states, such as the UK or France, which engage in overseas military action with relative frequency. On the other hand, *Al-Jedda* is likely to produce ripple effects in all situations involving SC sanctions that may have an adverse impact on human rights, and we will soon see just how far the ECtHR – and other European courts – will be prepared to take the *Al-Jedda* presumption.

Clearly, in both judgments the Court articulated some very important principles; these will be leading cases on the various issues for many years to come. Importantly for their precedential value, the Court was unanimous or near-unanimous in both cases. Whether the Court's reasoning is persuasive on all counts will undoubtedly be a matter of some controversy, but it is fair to say that, at least in terms of legal craftsmanship and quality of analysis, the *Al-Skeini* and *Al-Jedda* Court absorbed some lessons from *Bankovic* and *Behrami*. However, despite some improvements the Court's jurisprudence on the extraterritorial application of the ECHR still rests on shaky ground; the Court's incorporation into the personal model of jurisdiction of the nebulous *Bankovic* reference to 'public powers' is particularly unfortunate, and the resulting uncertainty will be likely to prove to be unsustainable in the long term.

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[84] In that regard, one may well ask whether the forces of various European powers in Afghanistan exercised 'public powers' there, as the UK did in Iraq.