

A second coming of extraterritorial jurisdiction at the European Court of Human Rights?

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1. *Introduction*

*Turning and turning in the widening gyre
The falcon cannot hear the falconer*
(Extract from 'The Second Coming' by W.B. Yeats)

Article 1 of the European Convention on Human Rights indicates that a state's obligations will apply to everyone '*within their jurisdiction*'.¹ The exercise of jurisdiction is therefore a 'threshold criterion...a necessary condition' for a State to be held liable for violations of the Convention.² Remarking on the wording of this provision over 60 years after the Convention was drafted, British Supreme Court Justice Lord Dyson would reflect on how such a 'small number of apparently simple words have proved to be remarkably troublesome' for the European Court of Human Rights (ECtHR).³ Indeed, few issues have proved more contentious in recent years than the judicial interpretation of these words. Writing almost a decade ago Barbara Miltner commented that their interpretation had reached a level that '*any* judgment on the issue would be

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 1.

² *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019) para 178.

³ Lord Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?' <www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> 1.



closely watched'.⁴ Lea Raible has appropriately noted that the reason for this is because every new judgment from the Court 'seems to either add another layer of confusion or line of case-law different from the rest'.⁵ And yet, it is perhaps surprising to note that this was not always the case. With a handful of exceptions, until the turn of the century the Strasbourg jurisprudence was largely settled and coherent. The turning point came in December 2001 when, after incrementally developing the reach of the Convention's application over the course of the previous four decades, the ECtHR called an abrupt halt to its stable line of jurisprudence in *Banković v Belgium et al.*⁶ Almost totally disregarding its previous decisions which had steadily expanded the reach of the Convention's obligations, the Grand Chamber declared jurisdiction to be 'primarily territorial' and only to arise extraterritorially in exceptional circumstances.⁷

Since the moment the *Banković* decision was read-down the jurisprudence on jurisdiction under Article 1 of the ECHR has been in a state of flux. At points it has appeared settled, stable and almost intelligible. At others it has been hugely confusing, infuriatingly contradictory and lacking in any sense of direction. The result has been a broad array of academic, political and judicial critical commentaries on the understanding of the Convention's extraterritorial application.⁸ One of the most potent criticisms of the Court's approach came from within. In a seminal separate opinion, the Maltese Judge Bonello excoriated the Court for 'an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'.⁹ His censure is but a

⁴ B Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons' (2012) 33 Michigan J Intl L 692, 694.

⁵ L Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game-Changers' (2016) 2 Eur Human Rights L Rev 161, 161.

⁶ *Banković and Others v Belgium and Others* (dec) App no 52207/99 (ECtHR, 12 December 2001).

⁷ *ibid* para 59.

⁸ See for instance M Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 5 Eur Human Rights L Rev 566, 576; S Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019); M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

⁹ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras 110-114.



mere drop in the well of criticism directed towards the ECtHR for its approach to interpreting the Convention's reach in application. There is now burgeoning scholarship both on the failings in the Court's approach and the paths that it could seek to follow to establish a more coherent, settled and principled attitude to extraterritorial jurisdiction.

The focus of this piece side-steps from both of these vibrant debates and asks instead the question of whether, given recent developments in the Court's cultural approach to interpreting Article 1 jurisdiction, we could be moving towards a moment of clarity? Is there hope for a 'second-coming' for Article 1 jurisdiction, where the Court leaves behind incrementalism and inconsistency, and embraces something more principled? If so, what can lawyers and applicants do to help the Court to reach that point? If not, why not? What could prevent the Court from re-addressing an area which has proved so troublesome? To answer these questions, we need to begin with the cultural approach of the ECtHR.

2. *The ECtHR's cultural approach to jurisdiction*

The cultural approach to the question of the Convention's extraterritorial application has almost exclusively been one of steady incrementalism. Briefly summarising over half a century of case-law risks inaccuracies and selectivity, and yet despite glaring inconsistencies in some of the jurisprudence, the direction of travel has tended to have been remarkably stable. In the earliest cases on Article 1 in the mid-1960s and early 1970s, the European Commission on Human Rights had first indicated the Convention could apply extraterritorially, thus doing-away with any battles over whether the word 'jurisdiction' as it was understood in Article 1, was to be interpreted as strictly territorial.¹⁰ Throughout the 1970s and 1980s, the understanding continued to be constructed with a series of interstate cases between *Cyprus v Turkey* before the Commission to an expansive understanding whereby Article 1 jurisdiction could be triggered where an individual's rights were 'affected' by a Contracting Party

¹⁰ *X v Federal Republic of Germany* App no 1065/61 (ECommHR, 25 September 1965); *Ilse Hess v United Kingdom* (ECommHR, 28 May 1975).



to the Convention and where they were within a state's 'authority'.¹¹ Alongside this broad approach, specific circumstances began to develop clear lines of jurisprudence, most notably in a string of cases in which individuals were arrested and detained by a Contracting Party's agents on territory located outside of Europe.¹² Although varying in their accounts, the Commission would consistently find that the individuals had been brought within the relevant Contracting Party's jurisdiction. This incremental development reached a high-point in the mid-1990s when the Court established that a Contracting Party could not merely exercise jurisdiction over a person (personal jurisdiction), but over an entire territory that was under its 'effective control' (spatial jurisdiction).¹³

The progression was suddenly halted in the case of *Banković* in 2001 which involved NATO airstrikes on a radio and television station on Belgrade. Hearing an application made on behalf of those injured and the families of those killed in the attack, the Grand Chamber unanimously ruled the case to be inadmissible as the respondent states had not exercised jurisdiction over either the victims at the time of their death, or the territory in question. The Court stated that the Convention's application was primarily territorial and that the exercise of extraterritorial jurisdiction was exceptional. In disrupting the incremental development, the Court went further, suggesting that the doctrine of the living instrument could not be used to expansively interpret the Convention's reach and that jurisdiction should be understood in relation to its meaning in public international law. It also introduced the concept of a European 'legal space' where the Convention's obligations were intended to apply. In sum, the Grand Chamber unanimously issued a judgment which appeared to reframe Article 1 jurisdiction in a restrictive sense. And yet, despite the obstacle of *Banković* the Court almost immediately returned to its previous incrementalist tendencies. In the decade after *Banković* the Court would expand the Convention's understanding outside Europe once again, and then settle down for a host of cases involving Contracting

¹¹ *Cyprus v Turkey* (1982) 35 EHRR 30, 586. On the Commission's approach see M O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Banković'', in F Coomans, MT Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 128.

¹² See eg *Freda v Italy* (1980) 2 DR 250; *Reinette v France* (1989) DR 63; *Klaus Altmann v France* (1984) 37 DR 230.

¹³ *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99 [62].



Party violations in Iraq. This included the landmark 2011 decision of *Al-Skeini v United Kingdom*, where in dealing with a series of deaths of Iraqi nationals at the hands of British troops in Basra, the Court attempted to systematise jurisdiction in a clearer fashion than ever before.¹⁴

Before addressing this structuring of Article 1 jurisdiction in *Al-Skeini* and how it has evolved in the decade since, it is necessary to pause and look behind the Court's cultural approach and address the impulses that are shaping its trajectory. There is an inherent danger in speaking about 'the court' on this issue (or any for that matter). The much-celebrated English jurist Lord Bingham once remarked that 'any proposition beginning "The judges..." is almost bound to be false. For it suggests an identity of thought and a uniformity of reaction which do not in practice exist'.¹⁵ As a member of the House of Lords, Bingham's comment referred to around a dozen judges, sitting largely in benches of 5-7. Bingham's view adds potency when considering that the ECtHR has 47 judges who often rule in Grand Chambers of 17. Thus, when I speak of 'the judges' or 'the court' I am not attempting to badge them as a homogenous unit, but rather suggesting that there is a sufficient number of judges within the Court that subscribe to a certain position which in turn shapes a particular cultural approach. Despite this qualification, it is worth noting that, as with *Banković*, a considerable number of the judgments which have continued to define Article 1 jurisdiction, have been unanimous.¹⁶ The 'Court's' approach, therefore, appears to be pulled simultaneously in two competing directions. On the one hand, it seems compelled, perhaps by the principle of universality, to advance jurisdiction so as to enlarge the scope of the Convention's application and eliminate any gaps in protection whereby a state could commit a violation abroad which they could not at home. On the other, judges appear wary of being overly-expansive. States have important strategic, economic and political interests in their overseas endeavours. If the Court were to threaten a state's

¹⁴ *Al-Skeini* (n 9).

¹⁵ T Bingham, 'The Courts and the Constitution', in T Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 232.

¹⁶ See for example: *Güzelyurtlu* (n 2); *Al-Skeini* (n 9); *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014); *Al-Jedda v United Kingdom* App no 27021/08 (ECtHR, 7 July 2011); *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010); *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012); *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014).



ability to conduct those operations by providing an overly expansive understanding of the state's extraterritorial obligations, it could concurrently threaten the state's compliance with the Convention system, or at the very least the Court's authority as an arbiter. As a strategic actor, therefore, the Court seems mindful of its own legitimacy and authority in respect of both rights' protection and state compliance. The cultural approach of the Court in its decisions is then a manifestation of these competing impulses.¹⁷ While separate, they are informing of one another. If the culture is to change in the judicial decisions, then that change will be brought about by concerns over one or both of these competing influences. The *Banković* case is an example of this. The Court halted decades of progression and reversed the ethos of its previous approach on jurisdiction in an attempt to avoid having to deal with future cases involving western military interventions outside Europe. Reading down the judgment three months after the 9/11 attacks, with European forces already engaged in operations in Afghanistan, the Court was clearly at pains to avoid being inundated with complex and highly charged cases from an overseas battlefield.¹⁸ Not least because addressing them would require navigation of the intricate relationship between the Convention and the Law of Armed Conflict.

Returning therefore to the cultural approach, the *Al-Skeini* decision arrived after a decade of simmering ambiguity where the Court had attempted to reconcile its restrictive tendencies from *Banković*, with its more progressive impulses in the rest of the jurisprudence. For instance, *Banković* had indicated that a Contracting Party could not exercise jurisdiction over a territory outside of Europe, and yet within three years a Chamber decision in *Issa v Turkey* suggested that Turkey could have exercised such spatial control temporarily in northern Iraq.¹⁹ *Banković* suggested that the Convention's obligations could not be 'divided and tailored' based on the extent or type of jurisdiction exercised, and yet the

¹⁷ For literature adopting a similar approach see S Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2010) 20(4) Eur J Intl L 1245.

¹⁸ See further R Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds) (n 11).

¹⁹ *Issa and others v Turkey* App no 31821/96 (16 November 2004) para 74.



Court did just that in reducing Moldova's responsibility to positive obligations in a case concerning the separatist region of Transnistria.²⁰ *Banković* had further suggested that 'instantaneous' acts could not give rise to jurisdiction, and yet a series of Chamber decisions then appeared to find jurisdiction through instantaneous acts of force in respect of shots being fired across the UN buffer-zone in Cyprus,²¹ and potentially fire-power from helicopters in Iran.²² And yet the Court was not always expansive as, after these decisions, in the case of *Medvedyev v France*, an application concerning the detention of suspected drug-dealers on the high-seas, the Court would rely on *Banković* in returning to rule out instantaneous jurisdiction as if the other cases had not happened.²³ The *Banković* judgment was then at points an anomaly, inconsistent with the rest of the Court's jurisprudence and something to be avoided, while at other times it was an authority, still relied upon to enforce a restrictive notion of jurisdiction.

Al-Skeini was then an opportunity for the Court to revive its authority over the issue of Article 1 jurisdiction by providing some clarity. It seized this opportunity by taking the rare approach of outlining a passage on the 'General principles relevant to jurisdiction under Article 1 of the Convention', wherein it broke down the exercise of extraterritorial jurisdiction into two categories. A spatial basis which would arise where a state exercised *de facto* effective control over an area abroad and a personal basis where a Contracting Party exercises state agent authority and control over individuals.²⁴ The Court then listed when such personal jurisdiction may arise including (1) when exercised through diplomatic and consular agents, (2) when state agents exercise public powers on another state's territory and, most contentiously, (3) when an individual is brought into a state's jurisdiction through the use of force.²⁵ In *Al-Skeini*, however, the Court ignored the previous Chamber decisions which had

²⁰ *Ilascu and Others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) paras 72-78. Note that this was a rare divided opinion with 11-6 on the question of Moldovan jurisdiction.

²¹ *Andreou v Turkey* App no 45653/99 (ECtHR, 3 June 2008).

²² *Mansur Pad v Turkey* App no 60167/00 (ECtHR, 28 June 2007).

²³ *Medvedyev* (n 16) para 64.

²⁴ *Al-Skeini* (n 9) paras 138-140.

²⁵ *ibid* paras 133-137.



suggested that the act of shooting could give rise an instantaneous jurisdictional connection and appeared to see that use of force as only exercising jurisdiction where an individual fell within a state's custody. What was more concerning was that despite this surge for general clarity, the Court infused ambiguity in the specifics of the case, declaring that the United Kingdom had not exercised effective control over southern Iraq during the period of occupation, but that it had exercised personal jurisdiction through administering public powers in the region.

Nonetheless *Al-Skeini* swiftly emerged as the framework for future clarity on the Convention's extraterritorial application. The 'General Principles' section of the judgment was clearly intended to be the skeleton upon which all future incantations of jurisdiction grew from and it is now regularly quoted in full in Article 1 decisions.²⁶ Thus, in both *Hassan* and *Al-Jedda*, two further cases involving the detention of Iraqis by British forces, the Court unanimously found personal jurisdiction to have been exercised over individuals within British custody.²⁷ Along similar lines, in the pivotal decision of *Hirsi Jamaa v Italy*, the Grand Chamber found that Italy had exercised jurisdiction over boat migrants in the Mediterranean having exercised exclusive *de jure* and *de facto* control over them.²⁸ Later, *Al-Skeini's* (re)emphasis that jurisdiction was 'primarily territorial' was relied upon *ND and NT v Spain* where the Grand Chamber found that Spain exercised jurisdiction over the individuals who arrived within the Spanish enclave of Melilla in North Africa.²⁹ Most recently, the effective control of an area basis was relied upon as the framework in *Ukraine v Russia (RE: Crimea)*.³⁰

On the face of things then, the ECtHR had appeared to have somewhat managed to slay the extraterritorial beast. Pivotaly, *Al-Skeini* had provided domestic courts and states alike with something of a roadmap which they could follow in applying the principles developed by the Court. The difficulty, however, was that the underlying impulses were

²⁶ See eg *Ukraine v Russia (Re Crimea)* App nos 20958/14 and 383314/18 (ECtHR, 16 December 2020) para 303; *Chagos Islanders v United Kingdom* (dec) App no 35622/04 (ECtHR, 11 December 2012) para 72; *Hassan* (n 16) para 74; *Jaloud* (n 16) para 139.

²⁷ *Hassan* (n 16) para 80; *Al-Jedda* (n 16) para 86.

²⁸ *Hirsi Jamaa* (n 16) para 81.

²⁹ *ND and NT v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020) para 111.

³⁰ *Ukraine v Russia* (n 26) para 303.



still at play and so judicial divergence continued into answering novel questions on extraterritorial jurisdiction and, similar to the pre-*Al-Skeini* confusion, these decisions did not speak with one voice.³¹

3. *Turbulence in the Court's recent cases*

Things fall apart; the centre cannot hold

The lingering question to remain was what direction would the Court take when next faced with a novel exercise of extraterritorial jurisdiction? Where would it go when the framework outlined in *Al-Skeini* did not provide a solution? The answer was to be found in the previous and existing judicial culture, and thus a cautious incrementalism returned. In *Jaloud v the Netherlands*, the Court was faced with a case where an individual had died after being shot at a military checkpoint in Iraq. The facts did not fit comfortably within the existing *Al-Skeini* framework which appeared to recognise only custody, not shootings, as creating a jurisdictional link when force was used. Dutch forces were not an occupying power in Iraq so as to merit consideration of the application of spatial jurisdiction, or jurisdiction exercised through public powers in the same fashion as the United Kingdom had in *Al-Skeini*. For the Court, the solution was to create what appeared to be a new basis for jurisdiction, this time where the respective state exercised a sphere of influence over the precise area. Thus, in *Jaloud* the Court found Dutch forces exercised jurisdiction by 'asserting authority and control over persons passing through the checkpoint'.³² This pushed the understanding of jurisdiction beyond the *Al-Skeini* structure; a point which was noted by seven of the seventeen panel Grand Chamber who stated in a separate opinion that the new basis logically '[built] on the Court's earlier case-law on jurisdiction'.³³ Thus, while this notion of a sphere of influence could be constructed from the existing spatial and personal exercises of jurisdiction,

³¹ *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26 para 67 (Lord Rodger).

³² *Jaloud* (n 16) para 152.

³³ *ibid* Judges Casadevall, Berro-Lefevre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis para 1.

it is evident that it was seen as a new, freestanding, exception to the primacy of territoriality (albeit within the state agent authority and control subsection).

The next novel situation emerged in 2019 with *Güzelyurtlu and Others v Cyprus and Turkey*. In this case the applicants claimed that both Turkey and Cyprus had violated Article 2 in failing to conduct effective investigations into their relatives' killings. The victims, a family of three, had been killed in Cyprus, but there were clear implications of involvement by persons from the Turkish Republic of Northern Cyprus ('TRNC'). At the Grand Chamber, the judges then found a jurisdictional link existed between the victims and Turkey as police officials in the TRNC had initiated a criminal investigation into the deaths and arrested several individuals on suspicion of murder. As the Court's practice has been to find Turkey responsible for the acts or omissions of the TRNC, Turkey therefore exercised jurisdiction over the criminal investigation into the deaths on the Cypriot Republic.³⁴ This finding of jurisdiction, and therefore the Article 2 obligation, was further triggered by the existence of what the Court referred to as 'special features',³⁵ which included the fact that the suspects in the case had fled to the TRNC, thus preventing Cyprus from conducting its own investigation. The Court stressed that even read disjunctively, the instigation of the criminal investigation or the 'special features', could give rise to the jurisdictional link. It subsequently applied this 'special features' doctrine in *Romeo Castano v Belgium*, another Article 2 procedural obligation case, where a murder suspect had fled from Spain to Belgium.³⁶ In the case the features were activated as Belgian authorities had allegedly failed to cooperate with their Spanish counterparts who had sought to institute criminal proceedings against the suspect in Spain.³⁷

The cultural approach was therefore on full display again in the cases of *Jaloud*, *Güzelyurtlu* and *Romeo Castano*. All appeared to pose new, novel, questions for the Court to deal with. All resulted in a finding of jurisdiction, thus continuing the incremental growth in the Convention's reach. In reflecting the Court's cohesion in this approach, it is worth also noting also

³⁴ See eg *Demopoulos and Others v. Turkey* App no 46113/99 (ECtHR, 1 March 2010).

³⁵ *Güzelyurtlu* (n 2) para 192.

³⁶ *Romeo Castano v Belgium* App no 8351/17 (ECtHR, 9 July 2019).

³⁷ *ibid* para 41.



that they were, again, all unanimous decisions and yet, these cases appear to be the outer limits of where some judges were willing to go.

In the 2020 decision of *M.N v Belgium*, which considered asylum applications made to Belgium by a Syrian family in Beirut, a majority of judges at the Grand Chamber held that the applicants had not fallen within Belgian jurisdiction for the purposes of the Article 1 and so declared the application inadmissible.³⁸ The size of the majority is unclear as voting records are not normally released for admissibility decisions.³⁹ In any event, the decision demonstrates that there was a point of expansion beyond which judges would not go. This point was more clearly identified by three partly-dissenting judges in the subsequent decision of *Hanan v Germany*, where the Court ruled on whether Germany had violated the investigative obligation under Article 2 in respect of an air-strike it had been involved in which killed a group in civilians in Afghanistan. While it was American Air Force pilots which had destroyed the oil-tanker in question, killing bystanders, they had done so following a German intelligence gathering exercise, thus giving rise to a possible jurisdictional connection between the victims and Germany. In certain respects, this was therefore a re-run of *Güzelyurtlu*, and yet unlike that case, the Court was unwilling (or rather deterred by the arguments of the respondent and intervening states) to find a jurisdictional connection on the basis that Germany was already investigating the deaths. Nonetheless, a majority of the Court still found room to see a jurisdictional link given that ‘special features’ could once again be determined from the case. For the majority, these were due to Germany’s existing obligations to investigate the deaths under both principles of customary international humanitarian as well as domestic law and as Afghan authorities could not investigate it themselves.⁴⁰

For some members of the Grand Chamber, however, this was too much of a stretch. After all, it was not merely the exceptional exercise of

³⁸ *M.N and Others v Belgium* App no 3599/18 (ECtHR, 5 March 2020).

³⁹ Referring to the *Ukraine v Russia (Re Crimea)* case, Milanovic has appropriately noted that ‘[a]s a matter of policy, it makes no sense whatsoever to not be explicit about the size of the majority and prohibit separate opinions in Grand Chamber admissibility cases of this kind’: see M Milanovic, ‘ECtHR Grand Chamber Declares Admissible the Case of Ukraine v. Russia re Crimea’ <www.ejiltalk.org/ecthr-grand-chamber-declares-admissible-the-case-of-ukraine-v-russia-re-crimea/>.

⁴⁰ *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021) para 142.



jurisdiction extraterritorially, nor was it a ‘special feature’ derived from earlier cases which gave rise to an obligation outside of the general list of exceptional exercises of jurisdiction. It was now an additional, albeit narrower, basis for the exercise of a special feature. The Court was at pains to stress that despite finding a jurisdictional link for the procedural component of Article 2, it was not making any ruling on the substantive component.⁴¹ Three judges concluded that the ‘special features’ relied on by the majority had been unjustified and given rise to a result which would ‘excessively broaden the scope of application of the Convention’.⁴² Their analysis was that the majority had stretched the notion of ‘special features’ past ‘breaking point’ and in effect detached it from the *sine qua non* characteristic of the exercise of jurisdiction. They noted:

‘With the present judgment the Court has created a procedural duty to investigate a loss of life which has taken place outside the legal space of the Convention, which is expressly not “attributable” to the Contracting State, in relation to which that State has no substantive Article 2 obligation and in respect of which it does not even have jurisdiction’.⁴³

Moreover, they voiced concern that the manner in which the majority had arrived at the decision to apply special features lacked the legal certainty required for parties under the Convention to be able to understand and reasonably foresee the engagement of their obligations.⁴⁴

Similar concerns of overly expansive understandings of jurisdiction then appeared to be at play in the case of *Georgia v Russia (II)* where, on one particularly contentious issue, the Grand Chamber split eleven to six in ruling that Russian forces did not exercise jurisdiction throughout a period of active conflict during the war in Georgia. For the majority, spatial jurisdiction could not be found because of the ‘very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos’.⁴⁵ The active conflict was also given ‘decisive weight’ in the finding that no jurisdiction was

⁴¹ *ibid* paras 143-144.

⁴² *ibid* Judges Grozev, Ranzoni and Eicke para 7.

⁴³ *ibid* Judges Grozev, Ranzoni and Eicke para 14.

⁴⁴ *ibid* Judges Grozev, Ranzoni and Eicke para 19.

⁴⁵ *Georgia v Russia [III]* App no 38203/68 (ECtHR, 21 January 2021) para 126.



exercised on a personal basis either.⁴⁶ It was evident in their reasoning that the majority were influenced by the potential wider ramifications of the judgement, with one member describing the conclusion of those who would have found jurisdiction as being ‘ultimately founded on an overly expansive vision of the Court as an adjudicator of the totality of armed conflict’.⁴⁷

In respect of the impulses informing the judicial culture, therefore, these judges represent the wing of the Court that is conscious of the risks of an overly expansive approach to defining jurisdiction in Article 1. It should not be missed also that during this period state consternation with the Court’s approach to extraterritorial jurisdiction had been growing, with state interventions increasing dramatically. France, Italy and Belgium had all intervened in the case of *ND and NT v Spain*. The Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway and the United Kingdom had done so in *MN v Belgium*. Denmark, France, Norway and Sweden intervened in *Hanan v Germany*. States have therefore become far more active in attempting to shape the meaning of extraterritorial jurisdiction within judicial proceedings. Outside of the Court there has also been an increase in state authorities attempting to solve the perceived problems caused by extraterritorial human rights obligations domestically. For instance, the United Kingdom government introduced a Bill into Parliament which would mandate consideration of an extraterritorial derogation under Article 15 and create a presumption against the prosecution of any soldier for offences committed abroad after a period of 5 years.⁴⁸

The more conservative judicial opinions of the Court have been met with vocal concerns from more progressively minded judges who would continue to expand the notion of Article 1 jurisdiction into new areas. This was particularly the case in respect of the *Georgia v Russia (II)* decision, where the internal division was readily apparent. Referring again to the finding that jurisdiction had not been exercised during an active conflict phase, Judge Lemmens lamented that the majority had taken ‘a step

⁴⁶ *ibid* paras 126, 137.

⁴⁷ *ibid* Judge Keller para 4.

⁴⁸ Overseas Operations (Service Personnel and Veterans) Act 2021. The provision relating to extraterritorial derogations (clause 12) was removed at a late stage of drafting.



back and restricted the scope of the Convention in situations where human rights are at great risk'.⁴⁹ Judge Grozev noted concern that the finding undermined the regional characteristic of the treaty and allowed a black hole of human rights protection to exist within Contracting Party territory, specifically because it had involved two Contracting Parties to the Convention. This would be 'entirely at variance with the fundamental principles of the Convention'.⁵⁰ Judges Yudkivska, Wojtyczek and Chanturia were more forthright in their criticism. They were 'astonished' by the lines of reasoning adopted by the majority and rebutted any suggestion that a wider reading would be overly expansive, instead stating that the onus was on the Court to 'confer more consistency on the general principles established in the case-law and apply those principles in a more coherent way'.⁵¹ They surmised that the effect of this decision was to have 'confusion concerning the meaning of the case-law on extraterritorial jurisdiction and the scope of obligations for States in armed conflicts'.⁵² They further recognised that '[d]omestic courts are already confused by the different standards, lack of clarity and omissions of the Court in dealing with cases of extraterritorial jurisdiction' and that the 'continuing state of confusion defeat[ed] the core purpose of the Convention to establish peace in Europe after the events of the Second World War'.⁵³

The peak of the criticism arrived in a sole authored separate opinion by Judge Pinto De Albuquerque, who dissected the failings in the Court's 'erratic' approach and lamented that the:⁵⁴

'case-law on extraterritorial jurisdiction are not only promoting fragmentation in international law, but also pushing the Court to an extremely isolated position worldwide and thus discrediting its role as a human rights guarantor in Europe'.⁵⁵

⁴⁹ *Georgia v Russia [II]* (n 45) Judge Lemmens para 3.

⁵⁰ *ibid* Judge Grozev.

⁵¹ *ibid* Judges Yudkivska, Wojtyczek and Chanturia para 9.

⁵² *ibid* Judges Yudkivska, Wojtyczek and Chanturia para 14.

⁵³ *ibid*.

⁵⁴ *ibid* Judge Pinto De Albuquerque para 9.

⁵⁵ *ibid* Judge Pinto De Albuquerque para 2.



In an opinion which echoed Bonello's vigorous rebuke in *Al-Skeini*, Pinto De Albuquerque found the decision as 'deeply regrettable', bemoaned the Court's position as 'morally and legally untenable'⁵⁶ and described it as 'intentionally running away from trouble'.⁵⁷ To quote from Yeats' *The Second Coming* once again, Judge Pinto De Albuquerque is saying that '*The best lack all conviction, while the worst Are full of passionate intensity*'. And to his final point he robustly warned that the Court will now 'face a gargantuan task to restore the damage to its credibility'.⁵⁸ From this point of swelling turbulence, we are now ready to consider the question: could we be moving to a moment of clarity in the Court's approach to Article 1 jurisdiction?

4. *A second coming?*

*Surely some revelation is at hand;
Surely the Second Coming is at Hand*

Could the growing turbulence in the Court's current approach bring about change? In previous years the answer to this question would have been an emphatic 'no, the Court's cultural approach has and continues to serve it well'. Miller had once wonderfully described the Court's attentions to Article 1 jurisdiction as being 'intensely pragmatic',⁵⁹ and yet, there may be cause to wonder whether the grounds are shifting enough to create an urgency for a new approach; a second coming as it were. The reasons for this are threefold.

First, there is evident dissatisfaction amongst judges appealing to both of the impulses that underlie the Court's cultural approach. For those who fear an overly-expansive interpretation, the line of jurisprudence since *Güzelyurtlu* and culminating in *Hanan* posed clear areas of concern. If the analysis of the three dissenting judges in *Hanan* is correct, then the future could result in further fractures to the *Al-Skeini* framework which seems to remain as the preferred basis for clarity within the

⁵⁶ *ibid* Judge Pinto De Albuquerque para 22.

⁵⁷ *ibid* Judge Pinto De Albuquerque.

⁵⁸ *ibid* Judge Pinto De Albuquerque para 30.

⁵⁹ Miller (n 17) 1245.



Court's approach for extraterritorial considerations. It is not unforeseeable that the special circumstances closely-linked to procedural obligations in Article 2 become special also for Article 3. Would they end there? The Court has already recognised that obligations can be divided and tailored in an extraterritorial sense. Could it evolve to a point where certain rights, or even certain obligations within each right, are protected abroad, while others are disregarded? More potently for judges within this school of thought is how states will react to their interpretations. The cautious incrementalism practiced by the Court does not always assist legal certainty and foreseeability. States will become increasingly frustrated at being surprised by new features in the Court's understanding of jurisdiction which appear to arise *ex post facto*. While logically explained, the sphere of influence approach from *Jaloud* and engagement of an extraterritorial 'special features' category in *Güzelyurtlu* may not have been predicted by states in advance.⁶⁰ On the other side of the divide there is evident dissatisfaction amongst those who feel the Court is shying away, both legally and morally, from considering egregious rights violations. The tone of the dissents in *Georgia v Russia (II)* were highly emotive for a Court which tends to operate with a considerable degree of collegiality.⁶¹

That this dissatisfaction is not new is the basis for the second point. For at least the last two decades individual judges have been lamenting the state of the jurisprudence on Article 1 and, more importantly, proposing changes to the Court's approach. In the *Ilaşcu* and *Assanidze* cases in the early 2000s Judge Loucaides made efforts to propose an approach to extraterritorial jurisdiction more closely attuned to a state's authority. His contention was simple: 'jurisdiction' means actual authority, that is to say the possibility of imposing the will of the State on any person, whether exercised within the territory of the High Contracting Party or outside that territory'.⁶² In the aftermath of *Al-Skeini* Judge Rozakis suggested that instead of a twin stream of spatial and personal jurisdiction,

⁶⁰ Note, however, that the special features discussion had emerged much earlier in the case of *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010).

⁶¹ For discussion on the Court's internal workings, see N Arold, *The Legal Culture of the European Court of Human Rights* (Martinus Nijhoff 2007).

⁶² *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) (Concurring Opinion Judge Loucaides). The Opinion was elaborated upon in *Ilaşcu* (n 20) (Partly Dissenting Opinion Judge Loucaides).



the effective control of an area test be subsumed into the state agent authority component.⁶³ In the same case Judge Bonello proposed a functional test for jurisdiction which was based on a series of different indicative factors. For him, jurisdiction:

‘ought to be functional – in the sense that when it is within a State’s authority and control whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction’.⁶⁴

In *Georgia v Russia* (II) Judge Serghides used a platonic dialectic to suggest a test whereby negative and positive obligations were divided, with a state’s negative obligations extending much further.⁶⁵ Judges Yudkivska, Wojtyczek and Chanturia would propose in their separate opinion a test more firmly based on the exercise of power. They would frame that Article 1 should be understood as meaning that:

‘a High Contracting Party shall secure the rights and freedoms defined in Section I of this Convention to everyone under its State power and the scope the rights and freedoms to be secured should be adequate to the extent of the scope of effective State power’.⁶⁶

The wider point that all of these suggestions demonstrate therefore is that, in addition to the marked criticism of the Court’s approach, there is an appetite among (some) judges for real change.

Beyond this is the third, potentially most potent, indicator. That is that the confusion, contradiction and criticism may finally be starting to eat away at the Court’s legitimacy and authority on the issue. As Judge Pinto De Albuquerque warned, there is the risk that the current cultural approach is causing real ‘damage to its credibility’.⁶⁷ This credibility affects both ends of the judicial impulse. Its credibility amongst states is threatened when the Court appears to introduce a new basis of extraterritorial

⁶³ *Al-Skeini and Others v the United Kingdom* (n 9) Judge Rozakis para 3.

⁶⁴ *ibid* Judge Bonello para 12.

⁶⁵ *Georgia v Russia [II]* (n 45) Judge Serghides para 4.

⁶⁶ *ibid* Judges Yudkivska, Wojtyczek and Chanturia para 3.

⁶⁷ *ibid* Judge Pinto De Albuquerque para 30.

jurisdiction, one constructed by the remnants of different lines of case law, and tries to pass it off as if it had existed all along. Its credibility amongst other interested parties (applicants, lawyers, observers and NGOs) is threatened when its approach varies dramatically in different cases. When the Court issues judgments embedded in different lines of jurisprudence it projects the image that the judges have discretion to pick and choose the law in accordance with their personal preferences, thus eroding the Court's legitimacy and authority in decision-making on this issue.⁶⁸

That risk of a credibility deficit is compounded by the fact that the Court is retreating from a position where it was once a leader in the evolving notion of the extraterritorial application of human rights treaties, to one where it is but one vocal arbiter on the issue. UN treaty monitoring bodies, Special Rapporteurs and other regional courts have not merely caught up with the ECHR's jurisprudence, but in many instances have left it behind in a search for more a principled stance on the application of human rights obligations.⁶⁹ Given the current state of affairs, the Strasbourg Court may seek to follow these bodies in the near future.

And yet, the obstacles facing any possibility for change should also be recognised. While there is certainly appetite for a refreshed approach to extraterritorial jurisdiction amongst some judges, there is no certainty that the bench could agree on what that particular new framing would look like. It is unlikely that in *Georgia v Russia* (II) Judge Serghides did not try to win some of his colleagues round to his approach on negative obligations, or that Judges Yudkivska, Wojtyczek and Chanturia did not try to get further support for their connection with power. Other lines of inquiry could be considered from academic writers and from the workings of other human rights bodies.⁷⁰ Separately, against the backdrop of

⁶⁸ S Dothan, 'Judicial Tactics in the European Court of Human Rights' (2011) 12 *Chicago J Intl L* 115, 123.

⁶⁹ See *inter alia* *A.S. and others v. Malta* UN Doc CCPR/C/128/D/3043/2017; IACtHR, *The Environment and Human Rights* OC-23/17; IACtHR, *The Institution of Asylum and its recognition as a human rights in the inter-American system of protection* OC-25/18; Human Rights Committee, 'General Comment No 36'; A Callamard and FN Aoláin, 'Legal Analysis: Extra-territorial jurisdiction of States over children and their guardians in camps, prisons, or elsewhere in the northern Syrian Arab Republic' <www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf>.

⁷⁰ L Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP, 2020); Y Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Laws' (2013) 7 *L and Ethics of Human Rights* 47.



increasing state participation in attempting to restrictively shape the understanding of jurisdiction, it could be that some judges would be better convinced by a more conservative understanding than exists today.⁷¹ The result is that the Court is currently faced with an array of options to take forward and, given that there is a judicial tendency to find unanimity in Article 1 cases, it may be that the most appealing (or least worst) option will continue to be the existing one of disorganised and unpredictable incremental development. After all, a refreshed definition of Article 1 jurisdiction which is only achieved by a bare majority decision may not inject the credibility that the Court will seek to regain on the issue.

It is necessary also to reflect on the mechanics of how a new understanding of jurisdiction would be brought about. It would first require a novel set of circumstances which forced the Court to give renewed consideration to the meaning of jurisdiction, rather than merely classifying the situation in one of the existing exceptional exercises of jurisdiction articulated in *Al-Skeini*, and built upon in later cases. Given the significance of the issue at stake, the case would then presumably need to be relinquished, or referred, to the Grand Chamber, as it would be a ‘serious question affecting the interpretation of the Convention’.⁷² At the Grand Chamber a conscious decision would then need to be taken at the first deliberation (and there are normally only two), that the judges wanted to take a different direction. Much of the impetus for change could then fall on the specific judge rapporteur who provides the note at the outset of the case containing the relevant information, existing case law and indications where modifications are necessary, and the jurisconsult which provides assistance with this work.⁷³ This mechanism is, necessarily, attuned to ascertaining how a new dispute would fit within the Court’s existing approach to an issue and so again, it may serve the instincts of the generally silent majority who have not yet agitated a change from the existing cultural approach to jurisdiction.

The final question then, is what can lawyers, applicants and interveners do to drive a change in the Court’s approach? In essence, this is answered in their current practice. They must continue to bring novel cases

⁷¹ See L Helfer, E Voeten, ‘Walking Back Human Rights in Europe?’ (2020) 31 Eur J Intl L 797, 798.

⁷² ECHR art 30.

⁷³ H Keller, C Heri, ‘Deliberation and Drafting: European Court of Human Rights (ECtHR)’ (2018) Max Planck Encyclopedia of Intl L 34 para 16.



to the Court in order to keep the judicial approach to Article 1 tilting and turbulent. The present unsettled phase is simply the manifestation of a series of cases being addressed, notably at the Grand Chamber, in consecutive years. This has prevented the Court from any period of respite for the jurisprudence to settle. Such controversial cases are on the horizon with a merged Dutch/Ukrainian case on *inter alia* the conflict in the Donbass and the downing of flight MH17.⁷⁴ This application, as with any arising from the 2020 Nagorno-Karabakh conflict, is likely to test the judicial commitment to the *Georgia v Russia* (II) decision on situations of chaos. Elsewhere, a recent application concerning the repatriation of two French women and their children from Syria is likely to test the outer boundaries of the *Al-Skeini* framework.⁷⁵

Lawyers have also been particularly adept at intervening, often as part of organised units, and frequently through collaboration with one another. There were notable interventions made in *inter alia* *Hanan, M.N* and *ND and NT*.⁷⁶ The nature of the applicants' case strategies and interventions have also varied between attempting to build on the existing framework understanding of jurisdiction and attempting to convince the court of a more principled approach. For instance, in the recent *S.S and others v Italy*, a case involving 'pull-back' operations in the Mediterra-

⁷⁴ H Coynash, 'Important move by ECHR merges Dutch case against Russia over MH17 with Ukraine's case over aggression in Donbas' <<http://khp.org/en/1606780758>>.

⁷⁵ *H.F. and M.F. v France* and *J.D. and A.D. v France* App nos 24384/19 and 44234/20.

⁷⁶ *Hanan v Germany* included observations from the Human Rights Centre of the University of Essex, the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano, the Open Society Justice Initiative and Rights Watch (UK); *ND and NT v Spain* included observations from Commissioner of Human Rights of the Council of Europe and from UNHCR, the CEAR and, acting collectively, the AIRE Centre, Amnesty International, ECRE and the International Commission of Jurists, joined by the Dutch Council for Refugees; *M.N. and Others v Belgium* included observations from the Human Rights League, the International Federation for Human Rights, the Centre for Advice on Individual Rights in Europe, the Dutch Council for Refugees, the European Council on Refugees and Exiles, the International Commission of Jurists, and the Bar Council of French-speaking and German-speaking Lawyers.



nean, interveners launched a more principled understanding of jurisdiction which focused on the influence the state held in a given situation in ascertaining whether jurisdiction was exercised.⁷⁷

Elsewhere, in *Ukraine v Russia (RE: Crimea)* the McGill Centre for Human Rights and Legal Pluralism intervened to invite ‘the Court to clarify its position by adopting a single comprehensive principle under which States would be regarded as exercising jurisdiction over a territory and individuals when it fell within their power or capacity’.⁷⁸ Some of the interventions have attempted to build on existing arguments and suggestions. For instance, in *Hanan* the NGOs Rights Watch (UK) and the Institute of International Studies of the Università Cattolica del Sacro Cuore di Milano endorsed the ‘functional approach’ articulated by Judge Bonello in *Al-Skeini*.⁷⁹ Indeed, in the future it would be perhaps strategically sensible for interveners to target some of the proposals made by judges in their separate opinions in *Georgia v Russia (II)* and to furnish those arguments with supporting authority from the fast-paced developments taking place in other human rights tribunals. Doing so may bring other judges around to that viewpoint.

If a ‘second coming’ – a clarification and new direction – is to come to pass, it will be the applicants, their lawyers and the interveners who tip the Court into a new era of understanding for extraterritorial jurisdiction under the ECHR. For them, failure is a natural part of the process. As the great activist, human rights lawyer and academic Kevin Boyle is said to have remarked to his students while awaiting the *Banković* judgment in early 2001: ‘we see this case as just one modest step on the long road to the rule of international law. Even if we fail, ultimately someone will build on it’.⁸⁰ There may be many more failures along the road towards a more lasting, accessible and perhaps principled approach to the Convention’s extraterritorial obligations, but recent events suggest that, just maybe, that time is coming.

⁷⁷ A De Leo, ‘SS and Others v Italy: Sharing Responsibility for Migrant Abuses in Libya’ (6 January 2020) <www.publicinternationallawandpolicygroup.org/lawyring-justice-blog/2020/4/23/ss-and-others-v-italy-sharing-responsibility-for-migrants-abuses-in-libya>.

⁷⁸ *Ukraine v Russia (Re Crimea)* (n 26) para 301.

⁷⁹ *Hanan* (n 40) para 130.

⁸⁰ M Chinoy, *Are you with me? Kevin Boyle and the Rise of the Human Rights Movement* (Lilliput Press 2020) Afterword.

