University of Nebraska - Lincoln
DigitalCommons@University of Nebraska - Lincoln

Publications of the University of Nebraska Public Policy Center

Public Policy Center, University of Nebraska

2005

R (ON THE APPLICATIONOFAL SKEINI) V. SECRETARY OF DEFENCE: A LOOK AT THE UNITED KINGDOM'S EXTRATERRITORIAL OBLIGATIONS IN IRAQ AND BEYOND

Tarik Abdel-Monem
University of Nebraska - Lincoln, tabdelmonem2@unl.edu

Patrick J.D. Kennedy
University of Arkansas

Ekaterina Apostolova
University of Nebraska-Lincoln

Follow this and additional works at: https://digitalcommons.unl.edu/publicpolicypublications

 Part of the Public Policy Commons

Abdel-Monem, Tarik; Kennedy, Patrick J.D.; and Apostolova, Ekaterina, "R (ON THE APPLICATIONOFAL SKEINI) V. SECRETARY OF DEFENCE: A LOOK AT THE UNITED KINGDOM'S EXTRATERRITORIAL OBLIGATIONS IN IRAQ AND BEYOND" (2005). *Publications of the University of Nebraska Public Policy Center*. 45.
https://digitalcommons.unl.edu/publicpolicypublications/45

This Article is brought to you for free and open access by the Public Policy Center, University of Nebraska at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Publications of the University of Nebraska Public Policy Center by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Abdel-Monem, Kennedy & Apostolova in Florida Journal of International Law (2005) 17.
Copyright 2005, University of Florida. Used by permission.

R (ON THE APPLICATION OF AL SKEINI) V. SECRETARY OF DEFENCE: A LOOK AT THE UNITED KINGDOM'S EXTRATERRITORIAL OBLIGATIONS IN IRAQ AND BEYOND

Tarik Abdel-Monem,[*] *Patrick J.D. Kennedy,*[**] *& Ekaterina Apostolova*[***]

I. OVERVIEW 345

II. BACKGROUND 347
A. Loizidou v. Turkey 349
B. Banković v. Belgium 350
C. Ilaşcu v. Moldova 351
D. Issa v. Turkey 352

III. *R (ON THE APPLICATION OF AL SKEINI) V. SECRETARY OF STATE FOR DEFENCE* 354

IV. IMPLICATIONS 357

V. FUTURE DEVELOPMENTS 359

VI. CONCLUSION 364

I. OVERVIEW

On the evening of September 13, 2003, British soldiers from the Queen's Lancashire Regiment arrested several Iraqi men at a hotel in Basra.[1] The soldiers took the hotel receptionist — Baha Mousa — and several other men to a holding facility previously used by the Iraqi

---

* JD/MPH (University of Iowa), Research Specialist, University of Nebraska Public Policy Center.

** Project Coordinator, University of Arkansas, Clinton School of Public Service.

*** Research Assistant, University of Nebraska-Lincoln.

1. *See* R (on the Application of Al Skeini) v. Sec'y of State for Defence (Skeini v. Sec'y of State for Defence), 2004 Q.B. Div'l Ct. ¶¶ 81-83, *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2004/ (describing a search and arrest of Iraqis at Ibn Al Haitham Hotel by forces of the United Kingdom on the evening of September 13/14, 2003).

Intelligence Service.[2] Coalition personnel reportedly hooded the men, forced them into stress positions and severely beat them in the abdomen and genitals.[3] Mousa was allegedly taken to another room where the soldiers further beat him. He later died.[4] The death certificate issued after the incident indicated that Mousa had died of "cardio-respiratory arrest asphyxia."[5] His family was later offered $3,000 in compensation.[6]

Attorneys took Mousa's case — and five other claims by Iraqi plaintiffs about alleged killings by British forces[7] — before the High Court of England and Wales, asserting that the British government violated human rights protections guaranteed by the European Convention on Human Rights through the U.K. Human Rights Act of 1998.[8] The crucial question before the High Court was whether or not the United Kingdom was obligated to uphold European Convention rights and protections during its military occupation of Iraq.[9] On December 14, 2004, the High Court ruled in *R (on the application of Al Skeini) v Secretary of State for Defence* that U.K. jurisdiction extended to Iraq in the case of Mousa's death, and by virtue of its Convention obligations to prohibit torture and protect human life of persons within its jurisdiction, that the United Kingdom had violated the European Convention even though the death took place in Iraq. The *Al Skeini* case is a major ruling because it provides guidance on when the United Kingdom is obligated to uphold the

---

2. *See* International Committee of the Red Cross, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), ¶ 16 [hereinafter ICRC Report] (describing events at the Al-Hamamiyah facility on the evening of September 13, 2003).

3. *See Skeini*, 2004 Q.B. Div'l Ct. ¶ 85 (describing statement of Kifah Al-Mutari about mistreatment of prisoners by coalition forces at the prison).

4. *Id.* ¶ 86.

5. ICRC Report, *supra* note 2, ¶ 16.

6. *See "They Were Kicking Us, Laughing. It Was a Great Pleasure for Them,"* THE GUARDIAN, Feb. 21, 2004 (noting compensation paid for Mousa's death), *available at* http://www.guardian.co.uk/military/story/0,11816,1153013,00.html (last visited June 22, 2005).

7. *See Skeini*, 2004 Q.B. Div'l Ct. ¶¶ 56-80 (reviewing the alleged factual versions leading up to the deaths of five other Iraqis in Basra during military operations).

8. *See* Gavin Cordon & Emily Pennink, *Iraqi Families Launch Legal Battle Over Civilian Deaths*, INDEPENDENT (London), May 5, 2004 (discussing claims by Iraqi families for deaths caused by British military personnel), *available at* http://news.independent.co.uk/uk/legal/story.jsp?story=518260 (last visited June 22, 2005).

9. *See* Richard Norton-Taylor, *Families Win Hearing on Deaths*, GUARDIAN (London), May 12, 2004 (discussing the High Court's ruling to admit the case against the United Kingdom because its European Convention obligations may extend to Iraq), *available at* http://www.guardian.co.uk/international/story/0,3604,1214674,00.html (last visited June 22, 2005).

European Convention on Human Rights in areas both outside its own borders and outside Europe itself.

II. BACKGROUND

The European Convention on Human Rights[10] is arguably the strongest regional human rights treaty in force today. The Convention echoes the Universal Declaration of Human Rights. It protects the fundamental rights to life,[11] liberty,[12] free expression,[13] and prohibits torture and other forms of mistreatment,[14] among other obligations. All members of the Council of Europe — now composed of forty-six nations[15] — must accept the Convention as a condition of membership.[16] The judicial body of the Convention is the European Court of Human Rights,[17] based in Strasbourg, France, and its enforcement body — the Committee of Ministers — is composed of the Foreign Ministers of Council of Europe member-states.[18]

The United Kingdom is bound to uphold the rights and protections of the Convention as one of the founding member-states of the Council of Europe.[19] It was first party to a case before the Court as a defendant in 1975,[20] and has since been a defendant in other high profile cases

---

10. Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, pmbl., Europ. T.S. No. 5 [hereinafter European Convention for Human Rights], *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf (last visited June 22, 2005).

11. *Id.* art. 2.

12. *Id.* art. 5.

13. *Id.* art. 10.

14. *Id.* art. 3.

15. *See* COUNCIL OF EUROPE, THE COUNCIL OF EUROPE'S MEMBER STATES, *at* http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited June 22, 2005) (listing 46 member-nations of the Council of Europe from Albania to the United Kingdom).

16. *See* European Convention for Human Rights, *supra* note 10, art. 1 (stating that all parties of the Council of Europe must uphold the rights and obligations of the Convention).

17. *See id.* art. 32 (1) ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto. . . ."); *see also* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 648-90 (1995) (describing the functions, composition, and procedure of the Court).

18. *See* Statute of the Council of Europe, May 5, 1949, art. 15(a), Europ. T.S. No. 1 ("[T]he Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements.").

19. *See* COUNCIL OF EUROPE, *supra* note 15 (noting that the United Kingdom was one of the ten founding nations of the Council of Europe).

20. *See* DONALD W. JACKSON, THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS 126 (1997) ("The first decision of the European Court of Human

involving operations against Irish Republican Army operatives, such as *Ireland v. United Kingdom*[21] and *McCann v. United Kingdom*.[22] As the United Kingdom is ultimately accountable to the European Court for human rights cases, its own courts commonly cite to case law of the Court in Strasbourg in domestic decisions.[23] In 1998, the United Kingdom adopted virtually all of the Convention into its domestic law through the Human Rights Act of 1998, making the Convention's rights enforceable in the U.K. justice system and placing great authority in the precedent of the European Court in Strasbourg.[24]

In recent years, the Strasbourg Court has issued a small yet important number of cases determining when the Convention's protections apply outside a member-state's national territory. This case law revolves around Article 1 of the Convention, which states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention."[25] Collectively, the Court's decisions in this area indicate that a member-state can extend its jurisdiction abroad if particular factual situations are found to exist, thus obliging it to uphold the Convention's rights in such situations.

Rights that involved the United Kingdom as a state defendant was the *Golder* case, decided in 1975.").

21. Ireland v. United Kingdom, App. No. 5310/71, 2. E.H.H.R. 25 (1978).

22. McCann v. United Kingdom, App. No. 18984/91, 324 Eur. Ct. H.R. (ser. A) (1995).

23. *See* JACKSON, *supra* note 20, at 126-27 (outlining instances in which U.K. courts have cited to the European Court of Human Rights).

24. *See* Human Rights Act 1998, introduction ("An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights"); *see also* DEPARTMENT OF CONSTITUTIONAL AFFAIRS, PEOPLE'S RIGHTS > HUMAN RIGHTS > FREQUENTLY ASKED QUESTIONS, *available at* http://www.dca.gov.uk/hract/hrafaqs.htm (last visited June 22, 2005).

> The Convention enshrines fundamental civil and political rights, but for many years it was not part of our own law. Using the Convention usually meant taking a case to the European Court of Human Rights in Strasbourg. This was often time-consuming and expensive.
>
> Since coming into force on 2 October 2000, the Human Rights Act has made rights from the ECHR (the Convention rights) enforceable in our own courts.

DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *supra*.

25. European Convention for Human Rights, *supra* note 10, art. 1.

A. Loizidou v. Turkey

The first major European Court decision addressing extraterritorial jurisdiction was its 1995 ruling in *Loizidou v. Turkey*.[26] Loizidou was a Greek Cypriot who sued Turkey for Convention deprivations arising out of Turkish military occupation over parts of Cyprus.[27] Both Turkey and Cyprus were member-states to the Convention, but Turkey argued that it had no jurisdiction — and hence no Convention obligations — in occupied Cyprus because that territory was part of the self-declared, breakaway "Turkish Republic of Northern Cyprus" that was not party to the Convention.[28]

In its ruling, the Court held that Turkey did have jurisdiction in Northern Cyprus by virtue of its military occupation:

> [T]he concept of "jurisdiction" under Article 1 of the Convention (art. 1) is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory . . . the responsibility of a Contacting Party could also arise when as a consequence of military action – whether lawful or unlawful — it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[29]

Because Turkey had approximately 30,000 soldiers stationed in Northern Cyprus in support of the Turkish separatist area,[30] it was obvious to the Court that Turkey had effective overall control of that portion of Cyprus.[31] Because of its effective control, Turkey had expanded its jurisdiction to

---

26. Loizidou v. Turkey, App. No. 15318/89.

27. *See id.* ¶¶ 10-14 (describing the plaintiff's claims for deprivation of property rights and events leading up to her arrest and detention by Turkish forces).

28. *See id.* ¶¶ 35, 51 (describing Turkey's argument that the claims could not be imputable to Turkey as it had no jurisdiction in the Turkish Republic of Northern Cyprus).

29. *Id.* ¶ 52.

30. *See id.* ¶ 16 (describing the presence of Turkish military personnel in Northern Cyprus).

31. *See Loizidou*, App. No. 15318/89, ¶ 56 (concluding that Turkey had overall control of Northern Cyprus through its occupation).

that area of Cyprus it occupied, along with its Article 1 obligation to uphold Convention rights in that area.[32]

B. Banković v. Belgium

The Court's 2001 decision in *Banković v. Belgium*[33] revisited the issue of Article 1 jurisdiction abroad. The *Banković* plaintiffs were family members of civilians killed by North Atlantic Treaty Organization (NATO) air strikes on Belgrade during the 1999 Kosovo crisis. The plaintiffs sued NATO nations that were also party to the European Convention on Human Rights for violations of Article 2 – the right to life.[34] At the time of the military operation, Yugoslavia was not a member of the Council of Europe and the Convention therefore did not cover that nation.

Citing to *Loizidou*, the plaintiffs conceded that NATO did not have overall effective control of Belgrade or the obligation to uphold the entire Convention there. However, they argued that the amount of control actually exercised should impose an obligation by member-states to uphold the specific Convention rights implicated by such control.[35] Through its intentional, precision air strikes on civilian targets, the plaintiffs asserted that NATO had exercised a form of control, and was therefore obligated to protect the particular Convention right implicated by such activity — i.e. the Article 2 right to life.[36] In their defense, the NATO governments argued that "jurisdiction" should be construed according to its customary definition in international law as a nation's capacity to exercise legal authority over a person — such as an arrest or detention.[37] If the plaintiffs' proposal was upheld, NATO asserted that such an understanding of extraterritorial jurisdiction would substantially undermine the international structure and policy by granting the European

---

32. *See id.* ¶ 56 ("Her [Turkey's] obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.").

33. Banković v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. (2001).

34. *See id.* ¶¶ 1, 11, 28 (describing the plaintiffs and their claims against NATO nations for a missile strike against a television station resulting in sixteen deaths).

35. *See id.* ¶ 46 (describing the plaintiffs' argument that the Loizidou effective control principle could be applied on a basis relative to amount of control actually exercised).

36. *See id.* ¶ 47 (describing the plaintiffs' argument that NATO was not obligated to uphold all of the Convention, but those specifically applicable to the factual context).

37. *See id.* ¶ 36 (describing the respondents' argument that jurisdiction be defined "in accordance with the ordinary and well-established meaning of that term" as an exercise of legal authority).

Court the ability to review military operations conducted by member-states anywhere in the world.[38]

Examining the meaning of Article 1, the Court concluded that jurisdiction meant territorial jurisdiction, and only in exceptional cases — such as in *Loizidou* — could jurisdiction extend abroad.[39] In *Loizidou*, Turkey's jurisdiction in Northern Cyprus existed vis-à-vis the obvious fact of its military occupation and the overall control of that area.[40] On the other hand, if it accepted the plaintiffs' theory of extraterritorial jurisdiction in *Banković*, the Court believed that the commission of any act by a member-state anywhere in the world that resulted in a detrimental effect would undermine the Convention's regional purpose.[41] It specifically observed that the Convention was a treaty operating "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world."[42] The Court therefore sided with the NATO parties and removed the case for lack of jurisdiction.

C. Ilaşcu v. Moldova

In July of 2004, the Court addressed whether or not Russia had Convention obligations in the self-proclaimed Moldovan Republic of Transdniestria (MRT) in *Ilaşcu v. Moldova*.[43] Following the dissolution of the Soviet Union, the former Moldavian Socialist Soviet Republic devolved into an independent Moldova composed of ethnic Romanians, and the rival MRT in the eastern portion of the state with allegiance to Russia.[44] A division of the Soviet Red Army remained in Moldova as the

---

38. *See Banković*, App. No. 52207/99, ¶ 43 (describing respondents' arguments about the "serious international consequences" that would exist if the plaintiffs' proposal was upheld).

39. *See id.* ¶¶ 59-71 (outlining the Court's analysis of Article 1 jurisdiction).

40. *See id.* ¶ 70 (reviewing and upholding the *Loizidou* judgment).

41. *See id.* ¶ 75 (responding to the plaintiffs' proposed theory). The Court also noted that in *Loizidou*, Northern Cyprus had previously been covered by the Convention prior to Turkish intervention.

42. *Id.* ¶ 80.

43. Ilaşcu v. Moldova, App. No. 48787/99 (judgment) (July 2004).

44. *See id.* ¶¶ 28-41 (outlining events following the dissolution of the USSR).

Russian Operational Group (ROG) and fought along with and provided arms and material aid to the separatist pro-Russian forces.[45]

Ilaşcu and three other Moldovan plaintiffs claimed that a number of Convention violations by the Transdniestrian separatists had been committed in the MRT that were imputable to Russia vis-à-vis its Article 1 obligations. They argued that Russia had jurisdiction in the MRT by virtue of its political, military and economic support of the breakaway enclave, amounting to a *Loizidou*-like effective control.[46] Russia argued that the ROG presence of 2,000 soldiers was not comparable to that of the Turkish occupation in Cyprus involving 30,000 personnel, and that the ROG was not an occupying force but on a "peacekeeping mission."[47] However, the Court sided with the plaintiffs, indicating that the support given by Russia to the MRT was enough to engage its Article 1 responsibility for Convention violations committed by the separatists.[48]

D. Issa v. Turkey

In its other 2004 decision involving extraterritorial jurisdiction — *Issa v. Turkey*[49] — the Court examined Turkey's jurisdiction for alleged killings of Kurds in Northern Iraq. The plaintiffs were family members of Kurds living close to the Turkish border, who claimed that seven male relatives had been physically detained by Turkish forces in Iraq in April 1995.[50] The men were later found dead after they had been allegedly

---

45. *See id.* ¶¶ 70-79 (discussing how members of the Soviet Fourteenth Army remained in Moldova to fight with separatist forces of the MRT); *see also id.* ¶ 380 (noting the Court's observation that Russian troops fought with and armed the MRT against Moldova).

46. *See id.* ¶¶ 365-70 (describing the plaintiff's arguments and reliance on the *Loizidou* holding).

47. *See id.* ¶ 355 (describing Russia's arguments).

48. *See Ilaşcu*, App. No. 48787/99, ¶ 382 (judgment) (holding that Russia had Article 1 responsibility in the MRT). The circumstances in the *Ilaşcu* case are factually analogous to ongoing Russian support of the self-declared Republic of South Ossetia in Northern Georgia. South Ossetia declared itself independent from Georgia in 1992, with the intention of joining North Ossetia as part of the Republic of Russia. Since the outbreak of civil war between Georgian soldiers and South Ossetian separatists, the Russian military has allegedly been providing military support to South Ossetian separatists, and been involved in random detentions, mistreatment, and killings of Georgian civilians. *See* International Helsinki Federation for Human Rights, Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia, and North America Report 2002 (Events of 2001), *available at* http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1782 (last visited June 22, 2005).

49. Issa v. Turkey, App. No. 31821/96 (judgment) (Nov. 2004).

50. *See id.* ¶¶ 12-17 (describing the plaintiffs and their version of the facts).

detained, with their ears, tongues and genitals mutilated.[51] Turkey denied the charges, but did admit that it had conducted a large-scale military operation in Iraq at the time of the alleged killings, although that operation was ten kilometers north of where the alleged events occurred.[52]

At the outset, the Court recognized that a nation may have extraterritorial jurisdiction vis-à-vis either effective control of an area, such as in *Loizidou*, or through the specific actions of its agents acting abroad.[53] To support this latter proposal, the Court cited several non-European Court cases for the general proposition 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."[54]

In its decision, the Court recognized that Turkey had conducted a large military operation in Iraq at the time of the alleged killings in an area close to where they occurred.[55] Due to this presence, Turkey had temporary *Loizidou*-like effective control of that portion of Iraq, and therefore if there was "a sufficient factual basis for holding that, at the relative time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey."[56] However, this factual basis could not be proven beyond a reasonable doubt because of a lack of detailed testimony and independent eyewitness confirmation placing the Kurds within the Turkish area of operations.[57] The Court thus ruled in favor of Turkey because it could not be proven that they had any Convention obligations to uphold in regards to the Iraqi Kurds' claims.

---

51. *See id.* ¶¶ 18-24 (describing the search for and discovery of the missing men's bodies after they had been allegedly arrested by Turkish forces).

52. *See id.* ¶ 25 (outlining Turkey's argument).

53. *See id.* ¶¶ 69-71 (noting that a state may be held accountable for its actions abroad if it exercises effective control of an area, or through its agents' exercise of control).

54. *See Issa*, App. No. 31821/96 (citing *Lopez Burgos v. Uruguay*, Communication No. 52/1979 (July 29, 1981), U.N. Doc. CCPR/C/OP/1 at 99 (1984); *Celiberti de Casariego v. Uruguay*, Communication No. 56/1979 (July 29, 1981), U.N. Doc. CCPR/C/OP/1 at 92 (1985); Coard v. United States, Case 10.951, Report No. 109/99, Inter-Am. C.H.R. (Sept. 29, 1999)).

55. *See id.* ¶¶ 63, 73 (stating that it is "undisputed" that Turkey had conducted a large military operation in Iraq from March 19 to April 16, 1995).

56. *Id.* ¶ 74.

57. *See id.* ¶¶ 76-81 (holding that it could not be proven beyond a reasonable doubt that the Kurds had been killed in an area controlled by Turkish forces).

III. *R (ON THE APPLICATION OF AL SKEINI) V. SECRETARY OF STATE FOR DEFENCE*

The critical question before the High Court of England and Wales was whether or not the United Kingdom had Article 1 jurisdiction in Iraq at the time that Mousa and the five other Iraqis were allegedly killed by British military personnel. To resolve this question, the High Court reviewed all the Strasbourg precedent on extraterritorial jurisdiction and outlined a number of conclusions that led to its final holding.

First, in a nod to the *Banković* decision, the High Court recognized that a nation's Article 1 jurisdiction should primarily be considered to extend only to its own borders.[58] However, exceptions did exist where a party to the Convention could have extraterritorial jurisdiction in another nation, such as that recognized in *Loizidou* where Turkey had effective control of Northern Cyprus through its military occupation.[59] Yet the High Court noted that in the Strasbourg case law, with the exception of *Issa*, member-nations to the Convention were only found to have jurisdiction abroad vis-à-vis effective control in nations that were also party to the Convention. For instance, in *Loizidou*, both Turkey and Cyprus were parties to the European Convention. Likewise, in *Ilascu*, Russia had jurisdiction in the Moldovan Republic of Transdniestria, a self-declared region of Moldova — also a member of the Convention.[60] The European Court's finding of jurisdiction in those cases was therefore consistent with its dicta in the *Banković* decision that the Convention was only meant to be applied within the space of its regional treaty members.[61]

---

58. *See* Skeini v. Sec'y of State for Defence, 2004 Q.B. Div'l Ct. ¶ 245 ("[T]he essential and primary nature of article 1 jurisdiction and therefore of the Convention is territorial.").

59. *See id.* ¶ 248 ("[I]t is clear that there is an exception to the principle of territoriality where a state party has effective control of an area, lawful or unlawful.").

60. *See id.* ¶ 249 (noting how the effective control doctrine has only been applied in instances in which one Convention party was in effective control of the territory of another Convention party). The *Loizidou* and *Ilascu* cases were factually analogous, as both the "Turkish Republic of Northern Cyprus" and the "Moldovan Republic of Transdniestria" were separatist areas of nations party to the Convention. In *Ilascu*, the Court of Human Rights found extraterritorial jurisdiction to exist only at a point after both nations had ratified the Convention. The Convention had come into force on September 12, 1997, in Moldova and May 5, 1998, in Russia. Although the civil war and Russian intervention in Moldova preceded that date, the Court found Russia to have official jurisdiction over the MRT after May 5, 1998. *See* Ilaşcu v. Belgium, App. No. 48787/99 (judgment) (July 2004), ¶¶ 379-94.

61. *See* Banković v. Belgium, App. No. 52207/99, ¶ 80 (discussing how the Convention's protections were not meant to be applied "throughout the world" but only within the legal space of the contracting European parties to the Convention).

The High Court of England and Wales was thus faced with reconciling this pattern of cases with the *Issa* decision, a case in which the European Court recognized that effective control extended Turkey's extraterritorial jurisdiction to portions of Iraq – obviously not a European nation party to the Convention. Indeed, the High Court noted that *Issa* was inconsistent with *Banković*, and that "[i]t may well be that there is more than one school of thought at Strasbourg."[62] However, given that the weight of the Strasbourg case law involved extraterritorial jurisdiction of nations within the legal space of Council of Europe members, the High Court found *Banković* to be the controlling precedent, and that a member-nation's extraterritorial jurisdiction under Article 1 should be construed as narrowly as possible.[63]

The High Court specifically came to this conclusion because the *Banković* decision first allowed for extraterritorial jurisdiction vis-à-vis the effective control doctrine by upholding *Loizidou*;[64] second, however this ruling made clear that the Convention was only to be applied within the regional space of the Convention parties — the Council of Europe.[65] Therefore, a member-state to the Convention could only have extraterritorial jurisdiction if it had effective control of the territory of another Council of Europe member — such as in Cyprus and Moldova — and not in Iraq.[66]

The only remaining possibility in which the United Kingdom could have jurisdiction outside its territory — in this case Iraq — would be within the limited exceptions to extraterritorial jurisdiction where nations retain jurisdiction over their embassies, aircrafts, and ships abroad.[67] In all

---

62. *Skeini*, 2004 Q.B. Div'l Ct. ¶ 265.

63. *See id.* ¶¶ 268-69 (stating that *Banković* was the watershed authority in questions of extraterritorial jurisdiction and that there is no broad application of extraterritorial application of the Convention's jurisdiction but only limited exceptions).

64. *See Banković*, App. No. 52207/99, ¶ 70 (reviewing and upholding the *Loizidou* judgment).

65. *Id.* ¶ 80.

66. *See Skeini*, 2004 Q.B. Div'l Ct. ¶ 281.

> It follows in our judgment that, since Iraq is not within the regional sphere of the Convention, the complaints before us do not fall within the article 1 jurisdiction of the United Kingdom under the heading of the extra-territorial doctrine of the "effective control of an area" exception as found in the cases of northern Cyprus and Moldova.

Id.

67. *See id.* ¶ 284 (considering limited exceptions to extraterritorial jurisdiction).

of the six claims brought against the United Kingdom by Iraqis, except Mousa's case, the deaths resulted from military operations conducted by British soldiers in combat areas, and in almost all the cases there were conflicting versions of the facts.[68] For instance, one of the deceased was killed while visiting a house stormed by British soldiers, and the claimants' disputed whether the deceased posed an armed threat or not.[69] In another case, the deceased was killed while driving a van stopped by British soldiers. The United Kingdom argued that the man had acted aggressively and grabbed the soldier's weapon, whereas the plaintiff argued that the deceased had simply been driving down the street when his van came under fire and he was shot and killed.[70] The High Court distinguished those five cases from the sixth claim alleging the extrajudicial killing of Baha Mousa:

> The sixth case of Mr Baha Mousa, however, as it seems to us, is different. He was not just a victim, under however unfortunate circumstances, of military operations. He was not, as we understand the matter, a prisoner of war. He was, prima facie at any rate, a civilian employee . . . He was taken into custody in a British military base. There he met his death, it is alleged by beatings at the hands of his prison guards . . .
>
> In the circumstances the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft.

The High Court of England and Wales thus held that, of the six cases of deceased Iraqis, Baha Mousa's fell within the United Kingdom's jurisdiction, and therefore, under the European Convention on Human

---

68. *See id.* ¶¶ 56-80 (describing conflicting versions of events in which Iraqis were killed in Basra during military operations).

69. *See id.* ¶¶ 60-63 (describing versions leading to the death of Muhammad Abdul Ridha Salim).

70. *See id.* ¶¶ 68-76 (describing conflicting accounts of the death of Waleed Sayay Muzban).

Rights. Article 2 of the Convention — the right to life — and Article 3 — the prohibition of torture — imposed an obligation upon a member-nation to properly investigate alleged torture and extrajudicial deaths of individuals in government custody.[71] Although the Royal Military Police's Special Investigation Branch had conducted a cursory investigation of Mousa's death, the High Court found it inadequate,[72] and therefore held that the United Kingdom had violated Article 2 and Article 3 of the European Convention on Human Rights.[73]

IV. IMPLICATIONS

By allowing only for the existence of extraterritorial jurisdiction outside of Council of Europe nations in very narrow exceptions, the High Court of England and Wales has strictly limited potential liability for U.K. forces in Iraq. In controlled situations involving Convention violations following traditional police-style arrests and detentions in custody, potential liability does exist. However, the Convention's reach does not appear to cover areas outside of Europe where the United Kingdom is either engaged in military operations, or in effective control of a territory, e.g., military occupation, on the grounds that the Convention was not broadly intended to be enforced throughout the world, as stated in *Banković*.

However, the High Court's holding rests on a questionable analysis of the Strasbourg case law. As noted in its decision, the 2001 *Banković* judgment and the European Court's analysis in its 2004 decision in *Issa* are not compatible and do seem to indicate that there are conflicting approaches towards extraterritorial jurisdiction outside of Europe among Strasbourg judges.[74] By identifying *Banković* as the controlling precedent on extraterritorial jurisdiction, the High Court furthers the United Kingdom's national interests in limiting its potential liability for violations of the Convention in non-European nations to a limited set of exceptions, such as Mousa's death in government custody. By neglecting the more

---

71. *See Skeini*, 2004 Q.B. Div'l Ct. ¶¶ 322-23 (discussing the burden on the government respondent to account for the death of those in its custody).

72. *See id.* ¶¶ 326-31 (outlining the investigation of Mousa's death and finding that it was inadequate).

73. *Id.* ¶ 344.

74. *See id.* ¶ 265 ("It may well be that there is more than one school of thought at Strasbourg.").

recent decision of *Issa*, the High Court has side stepped the possibility that it marks a new, broader expansion of the European Convention's coverage outside the boundaries of Europe. In *Issa*, the Strasbourg Court held that a European nation could indeed have jurisdiction outside of Europe entirely. Its decision was based on the notion that a nation should not be legally permitted to commit a human rights violation abroad that it could not commit within its own territory — a fundamental principle of international human rights. Such a reading is arguably an indication that the European Court is more willing to extend the Convention beyond the borders of Europe than the High Court of England and Wales would like to believe.

Legal implications notwithstanding, the *Al Skeini* ruling has already created a significant amount of controversy in the United Kingdom. Two High Court officials stated that the Ministry of Defence should hold an independent inquiry and criticized the initial investigation as not "timely, open or effective," "dilatory" and "lacking accountability."[75] The Royal Military Police have been scrutinized by Amnesty International repeatedly for its failure to conduct adequate investigations following the deaths of Iraqi civilians.[76] U.K. military law grants the Army Prosecuting Authority within the Armed Forces exclusive rights to block criminal charges against soldiers in a time of war. One possible long-term implication of recent criticisms could be that British Armed Forces lose this right to block charges, allowing for more thorough investigations of all future allegations

75. *See* Severin Carrell, *Revealed: The Handwritten Notes Made by Soldiers After Mousa Died*, INDEPENDENT (London), Dec. 19, 2004 ("We are unable to accept that the investigation has been open or effective. Other than at the early stages and at the autopsy, the family has not been involved. The outcome of the SIB report is not known. There are no conclusions. There has been no public accountability. All this in a case where the burden of explanation lies heavily on the United Kingdom authorities.").

76. *See* Amnesty International, Iraq: Killings of Civilians in Basra and al-'Amara, ¶ 67 ("RMP investigations are shrouded in secrecy and lack the level of public scrutiny required by international standards."), *available at* http://web.amnesty.org/ library/index/engmde140072004 (last visited June 22, 2005).

of prisoner or civilian abuse against British soldiers.[77] This degree of criticism is expected, given that overall public support for the United Kingdom's involvement in Iraq is generally perceived to be low, a possible consequence of the recently made allegations of prisoner abuse by British military personnel.[78]

V. FUTURE DEVELOPMENTS

The relevance of Strasbourg precedent on extraterritorial jurisdiction has become more significant given recent occurrences in the United Kingdom. On July 7, 2005, bombs exploded inside three central London subway stations.[79] An hour later, another bomb detonated on a double-decker bus.[80] Fifty-six people were killed in the explosions, and hundreds were injured.[81] Shortly after the terrorist attacks, a message was placed on an Egyptian web site of "the secret Jihad Group for Al-Qa'idah in Europe" disclosing to have planned the four explosions.[82] The reason given by the

---

77. *See* Joshua Rozenberg, *Army May Lose Right to Stop Charges*, TELEGRAPH (London), Dec. 6, 2004 ("The Armed Forces may lose the right to block criminal charges against troops following the case of a soldier accused of shooting dead an Iraqi civilian during an operation"), *available at* http://www.sport.telegraph.co.uk/news/main.jhtml?xml=/news/2004/06/11/narmy11.xml&sSheet=/portal/2004/06/11/ixportal.html; John Silverman, *Army to Feel Impact of Mousa Judgment*, BBC NEWS (World Edition), Dec. 14, 2004 ("The longer-term consequence could be that the armed forces lose the right to block criminal charges against troops. This is an issue which concerns the Attorney-General and which has been put on hold while the courts consider the cases of Mr Mousa and others."), *available at* http://news.bbc.co.uk/2/hi/uk_news/ 4096181.stm.

78. *See* Alan Travis, *Support for War Plummets*, GUARDIAN, Jan. 25, 2005 ("Support for the war in Iraq has slumped in the aftermath of the photographs of British soldiers abusing prisoners, according to the results of this month's Guardian/ICM poll."), *available at* http://politics.guardian.co.uk/polls/story/0,11030,1397928,00.html (last visited June 22, 2005).

79. *See Four Suicide Bombers Struck in Central London on Thursday 7 July, Killing 52 People and Injuring 700,* BBC NEWS (U.K.), July 7, 2005 (giving an overview of the London terrorist attacks), *available at* http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/what_happened/html/default.stm.

80. *Id.*

81. *See* Emily Pennink & Anna Farley, *War on terror. Seven more July 21 arrests*, BIRMINGHAM POST, Aug. 1, 2005 (discussing the massive investigation undertaken after the July 21 terrorist attacks in London), *available at* LEXIS, World News, Europe, News, European News Sources File.

82. *See Chinese scholars say London attacks to strengthen anti-terror cooperation,* BBC MONITORING/BBC MONITORING INTERNATIONAL REPORTS, July 22, 2005, (quoting Chinese publication on the causes and effects of the London terrorist attacks), *available at* LEXIS, World News, Europe, News, European News Sources File.

group for the bombings was "Britain's massacre in Iraq and Afghanistan."[83]

Intensive counter-terrorist measures followed the terrorist attacks. British secretary Charles Clarke published a list of criteria under which "Britain Islamic radicals" could be deported from the United Kingdom or denied permission to enter it.[84] The list includes behavior that "express views which foment, justify or glorify terrorist violence in furtherance of particular beliefs; seek to provoke others to terrorist acts; foment other serious criminal activity or seek to provoke others to serious criminal acts; or foster hatred which might lead to inter-community violence in the U.K."[85] It covers any non-citizen currently residing in the United Kingdom.[86] This plan has come under scrutiny by U.N. officials and civil rights groups who claim that deportation exposes individuals to the threat of torture in their respective countries.[87]

Critical questions remain about this new announcement. The Strasbourg Court has reviewed a few cases involving deportation of non-citizens by the Convention's member-states to foreign jurisdictions in which the deported might be subject to violations of Article 3's prohibition of torture and inhuman treatment or punishment.[88] The leading precedent is the Court's 1989 judgment in *Soering v. United Kingdom*.[89] *Soering* involved the deportation of a West German national in British custody to the United States to face trial for capital murder in Virginia after allegedly killing his girlfriend's parents.[90] Although a formal extradition agreement existed between the United States and United Kingdom,[91] Soering argued that his extradition to Virginia would amount to a violation of Article 3

---

83. *Id.*

84. *See UK Govt Outlines Plans to Deport, Bar Islamic Radicals*, AFX INT'L FOCUS, Aug. 24, 2005 (discussing the list of criteria that the U.K. government will use to deport or bar from entry to Britain Islamic radicals who promote terrorism, published by Home Secretary Charles Clarke), *available at* LEXIS, Europe, News, European News Sources File.

85. *Id.*

86. *Id.*

87. *See* Gavin Cordon, *Clarke angered by UN terror deportation warning*, PRESS ASS'N, Aug. 24, 2005 (discussing Home Secretary Charles Clarke's reaction to the U.N. warning that Britain's plan to deport Islamic extremists violates its international human rights obligations), *available at* Lexis, World News, Europe, News, European News Sources File.

88. *See* European Convention for Human Rights, *supra* note 10, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

89. Soering v. United Kingdom, App. No. 14038/88.

90. *See id.* ¶¶ 11-16 (outlining the murders of two people by Soering in Bedford County Virginia and the U.S. request for extradition by the United Kingdom).

91. *See id.* ¶¶ 29-30 (describing the 1972 extradition treaty between the two nations).

because, if found guilty, he would be subject to the "death row phenomenon."[92] He specifically argued that Article 3 went further than obliging member-states to prohibit torture or inhuman treatment in their own jurisdictions, but also served to prevent them from placing a person in a position where he might be subject to similar treatment in foreign states.[93] The critical question before the Court was whether or not Soering, if extradited to Virginia, "faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."[94] After a review of the circumstances of the specific case, Virginia's capital murder indictment process and conditions on "death row," the Court concluded that Soering would be at a real risk of such treatment if found guilty by Virginia's courts, and unanimously held that an Article 3 violation would occur if the United Kingdom extradited him to the United States.[95]

It should be noted that the *Soering* Court recognized the absolute nature of the Article 3 prohibition of torture and inhuman treatment as a fundamental human right central to the values of democratic society, regardless of the circumstances of the alleged behavior leading to a possible deportation resulting in ill-treatment.[96] Article 15 of the Convention allows no derogation from Article 3 even in times of war or national emergency.[97] As stated by the Court:

---

92. *Id.* ¶¶ 80-81.

93. *See id.* ¶ 82.

> The applicant likewise submitted that Article 3 (art. 3) not only prohibits the Contracting States from causing inhuman or degrading treatment or punishment to occur within their jurisdiction but also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States.

Id.

94. *Soering*, App. No. 14038/88, ¶ 91.

95. *See id.* ¶ 99 ("The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the 'death row phenomenon' has been shown to be such as to bring Article 3 (art. 3) into play"); *id.* ¶ 111 ("Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3."). Soering was ultimately extradited to Virginia on the guarantee that the death penalty would not be sought. He is currently serving two life sentences in Virginia. *See* Jay Conley, *Haysom Murders, 20 Years Ago Today: Blood Sweat and Convictions*, ROANOKE TIMES (Va.), Apr. 3, 2005 (discussing the Virginia murders, Soering's imprisonment and aftermath), *available at* http://www.roanoke.com/news/roanoke/21202.html.

96. *See infra* text accompanying note 98.

97. *See* European Convention for Human Rights, *supra* note 10, art. 15.

> [t]his absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe.
>
> . . . It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedoms and rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.[98]

Soering himself was in custody of British authorities at the time of the Court's proceedings, and did not pose a reasonable safety risk to others. Even so, these statements suggest that an Article 3 inquiry into the consequences of possible extradition to another nation focus not on the nature of the alleged crime committed, but the risk that the deportee will face after being extradited.

The Court's subsequent 1996 decision in *Chahal v. United Kingdom* spoke to circumstances in which the purported deportee posed an active risk to the host nation.[99] Chahal was an Indian citizen who originally entered the United Kingdom as an illegal immigrant, but was then residing in England under an immigration amnesty.[100] Following a 1984 massacre of Sikh civilians by Indian authorities, Chahal became increasingly involved in anti-India activities in the United Kingdom, including publicly advocating for violent separatist acts and alleged attempts to assassinate

---

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Id.

98. *Soering*, App. No. 14038/88, ¶ 88.

99. Chahal v. United Kingdom, App. No. 15/11/1996.

100. *See id.* ¶¶ 12-13 (outlining the residency status of the applicant and his family in the United Kingdom).

political rivals and Indian Prime Minister Rajiv Gandhi.[101] In 1990, the United Kingdom moved to deport Chahal to India because he was deemed a threat to national security.[102] Chahal argued for political asylum in the United Kingdom, because if deported to India he would be tortured or otherwise mistreated, an application denied by the British government.[103]

The United Kingdom argued that, unlike the circumstances in *Soering*, the applicant in the instant case posed a credible threat to national security, and that any Article 3 determination as to the possible consequences of deportation should be limited by the deportee's security threat to the host nation.[104] The government further argued that a balancing test should be employed in which the threat to national security should be weighed against the possible risk of torture in the receiving country.[105] The Court, however, followed *Soering* in stating that the Convention's prohibition of torture was so fundamental to democratic values that no inquiry need be made into the deportees' activities or possible consequences thereof — the sole factor to be examined was the degree of real risk of torture of inhuman treatment that the deportee may face in the receiving country:

> Article 3 (art. 3) enshrines one of the most fundamental values of democratic society. . . . The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture

---

101. *See id.* ¶¶ 19-24 (describing Chahal's political and alleged criminal activities).

102. *See id.* ¶ 25 ("On 14 August 1990 the Home Secretary (Mr Hurd) decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was unconducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.").

103. *See id.* ¶¶ 26-27 (outlining Chahal's claim for asylum and subsequent denial by the home secretary).

104. *See Chahal*, App. No. 15/11/1996, ¶ 76 (noting the U.K. argument that in Article 3 deportation cases like the instant one "various factors should be taken into account, including the danger posed by the person in question to the security of the host nation").

105. *See id.*

> The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security. But where there existed a substantial doubt with regard to the risk of ill-treatment, the threat to national security could weigh heavily in the balance to be struck between protecting the rights of the individual and the general interests of the community.

Id.

> or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.
>
> . . . In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[106]

Thus, no examination was needed of the potential deportee's activities or degree of threat to the host nation. After concluding that there was a real risk that Chahal would face torture or persecution upon expulsion to India,[107] the Court ruled that his deportation would amount to a violation of Article 3.[108]

VI. CONCLUSION

The United Kingdom faces a particular conundrum. It has adapted the European Convention on Human Rights almost wholesale vis-à-vis the Human Rights Act. At the same time, it is engaged in an aggressive military policy overseas and seems poised to embark on a domestic policy that will push the Convention to its limits. Plaintiffs outside of Europe such as Al-Skeini may increasingly turn to the Convention for relief so long as an adequate cross-territorial link can be made. Recently, even former Iraq President Saddam Hussein has moved to petition the Court in Strasbourg in regards to his detention and custody in Iraq.[109] The European Convention on Human Rights and its Strasbourg case law will continue to resonate in the analysis of member-states' actions that are conducted abroad or which have extraterritorial implications.

---

106. *Id.* ¶¶ 79-80.

107. *See id.* ¶¶ 87-106 (reviewing contextual evidence regarding practices of torture in India and the likelihood that Chahal would be at risk).

108. *Id.* ¶ 107.

109. *See* European Court of Human Rights Press Release, *European Court of Human Rights Rejects Request for Interim Measures by Saddam Hussein*, June 30, 2004, *available at* http://www.echr.coe.int/Eng/Press/2004/June/RequestforInterimmeasure-SaddamHussein.htm.