

The Extraterritorial Application of the Human Rights Act

*Ralph Wilde**

Introduction

A striking feature of some of the commentary on certain post 9/11 extraterritorial activities—notably the US detention of several hundred individuals at its Naval Base in Guantánamo Bay, Cuba—is the suggestion that these activities take place in a ‘legal black hole.’¹

This paper considers the UK position, in particular the applicability of the Human Rights Act 1998 to UK activities abroad. Although much attention has been given to the Bush Administration’s resistance to the application of certain US constitutional safeguards to Guantánamo—an argument rejected by the Supreme Court in the *Rasul* case in 2004²—perhaps less well known are the somewhat similar arguments made by the UK government in relation to the applicability of the Human Rights Act to its actions in Iraq. These arguments prompt us to examine the broader question addressed here: when does the Human Rights Act apply to the UK outside UK territory?

The General Position in Relevant International Treaties on Civil and Political Rights

Relevant International Treaties

The Human Rights Act is concerned with civil and political rights and also a right to property and a right to education, taking these rights from the

* Reader, UCL Faculty of Laws. The author has acted as a consultant in the capacity of legal adviser to the applicants in the *Quark* case (see below, n 14). The views expressed herein are independent of this work and do not necessarily reflect the views of any of the parties to that case. Warm thanks are due to James Crawford, Colin Warbrick and Rosalyn Higgins for feedback, and to Silvia Borelli and Daniel Geron for research assistance.

¹ R Wilde, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights’, 26 (3) *Michigan Journal of International Law* (2005) 739.

² *Rasul v Bush*, 124 S Ct 2686 (2004).

European Convention on Human Rights (ECHR) and certain provisions from its Protocols.³ In international law, the UK is subject to other treaty obligations in addition to the ECHR and its Protocols that *also* protect these rights, apart from the property right.⁴ The International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol (ratified by the UK) cover all the civil and political rights under the Act.⁵ Certain civil and political rights are *also* contained in the Convention on the Rights to the Child (CRC); a prohibition on torture, inhuman and degrading treatment is contained in the Convention against Torture (CAT); the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a right to education; the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention contain a prohibition on slavery and institutions or practices similar to slavery; and the 1951 Refugee Convention and its 1967 Protocol contain a *non refoulement* obligation that has since been replicated, in a somewhat more expansive fashion, through a constructive interpretation of the ECHR and the ICCPR and is *also* explicitly provided for in the case of torture in the CAT.⁶

³ Human Rights Act 1998 (hereinafter 'HRA'); European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS, No. 5, ratified by the UK on 8 March 1951 (hereinafter 'ECHR'); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS, No. 9, ratified by the UK on 3 November 1952 (hereinafter 'ECHR Protocol No. 1'); Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS, No. 187, ratified by the UK on 10 October 2003 (hereinafter 'ECHR Protocol No. 13').

⁴ In addition, the UK may well be subject to many of the same obligations as a matter of customary international law, although the precise scope of such coverage is unclear and beyond the scope of this chapter.

⁵ International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, ratified by the UK on 20 May 1976 (hereinafter 'ICCPR'); Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, New York, 15 December 1989, UN Doc. A/RES/44/128, ratified by the UK on 10 December 1999 (hereinafter 'ICCPR Second Optional Protocol'). As far as the death penalty is concerned, there is a slight difference between the absolute prohibition of the death penalty in all circumstances contained in ECHR Protocol No. 13 and the ICCPR Second Optional Protocol which allows for the possibility of reserving the right to apply the death penalty in times of war 'pursuant to a conviction for a most serious crime of a military nature committed during wartime' (Art 2). However, the UK has not entered any such reservation.

⁶ Convention on the Rights of the Child, New York, 20 November 1989, 1577 UNTS 3, ratified by the UK on 16 December 1991 (hereinafter 'CRC'); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 UNTS 85, ratified by the UK on 8 December 1988 (hereinafter 'CAT'); Art 13, International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3, ratified by the UK on 25 May 1976 (hereinafter

In what circumstances do these relevant international treaty obligations apply to the UK extra-territorially? Due to space limitations, the following examination will not cover the obligations in the 1951 Refugee Convention and its 1967 Protocol.

The Concept of 'jurisdiction' in International Treaties on Civil and Political Rights

All the obligations under the ICCPR and its Second Protocol, the ECHR and its Protocols and the CRC, and the obligation to take measures to prevent acts of torture under the CAT do not operate in a 'free-standing' sense, simply in relation to the acts or omissions of the UK anywhere in the world. Rather, the UK is obliged to respect, protect and fulfil the rights contained in these instruments or, in the case of the CAT, is subject to a particular obligation to take 'effective legislative, administrative, judicial or other measures to prevent acts of torture' within its 'jurisdiction'.⁷

Although the ICESCR does not contain any reference to the *spatial* scope of application (other than Article 14 which conceives the state's obligation in relation to the provision of primary education in terms of 'metropolitan territory or other territories under its jurisdiction')⁸, in the recent *Wall Advisory Opinion* on the Israeli-constructed barrier in the Palestinian territories, the International Court of Justice held that the ICESCR applied to Israel in the occupied territories on the grounds that such territories fell within Israel's 'territorial jurisdiction' since Israel was the 'occupying Power,' for the purposes of a separate area of law — the law of belligerent occupation under international humanitarian law.⁹ Since the Court gave no definition of this term, but discussed the ICESCR after considering the meaning of 'jurisdiction' in the ICCPR, one can perhaps assume that the Court had the same meaning in mind in relation to both instruments.

'ICESCR); International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 26 September 1926, 60 LNTS 253, ratified by the UK on 18 June 1927 (hereinafter '1926 Slavery Convention'); Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956, ratified by the UK on 30 April 1957 (hereinafter '1956 Supplementary Slavery Convention'); Convention Relating to the Status of Refugees, Geneva, 28 July 1951, 189 UNTS 137, ratified by the UK on 11 March 1954 (hereinafter 'Refugee Convention'); Protocol relating to the Status of Refugees, New York, 31 January 1967, 606 UNTS 267, ratified by the UK on 4 September 1968.

⁷ ECHR, Art 1; ICCPR, Art 2; CRC, Art 2; CAT, Art 2. ⁸ ICESCR, Art 14.

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion of 9 July 2004, available at www.icj-cij.org/iccjwww/decisions.htm (hereinafter '*Wall Advisory Opinion*'), para. 112.

It is clear that ‘jurisdiction’ covers the state’s own territory; less clear are the precise circumstances in which it subsists extraterritorially. No definition of the term is given in these instruments, and the extraterritorial meaning of it has been discussed in relatively few cases.¹⁰ Nonetheless, as explained in more detail below, from these cases it is possible to discern the broad contours of a definition. Extraterritorial jurisdiction subsists when the state exercises power, control or authority over either territory—what might be termed the spatial basis for jurisdiction—or individuals—what might be termed the personal basis for jurisdiction.

Colonial Clauses

In addition to this ‘jurisdiction’ regime of extraterritorial applicability, the ECHR and its Protocols and the 1951 Refugee Convention all contain a ‘colonial clause’ allowing the UK to make a declaration that the rights contained in the treaty are to apply in ‘territories for whose international relations it is responsible’, a term referring at the time to colonial and Trust territories, and what are now designated by the UK as ‘Overseas Territories’ (formerly ‘dependent territories’), covering former colonies that remain administered by the UK but do not form part of UK territory.¹¹ Similarly, the 1926 Slavery Convention contains an ‘opt-out’ clause which allows states parties to declare that their acceptance of the Convention does not bind some of the territories placed under their jurisdiction,¹²

¹⁰ Eg, *Cyprus v Turkey*, European Court of Human Rights, Judgment of 10 May 2001, *Reports 2001-IV* (hereinafter ‘*Cyprus v Turkey*’); *Loizidou v Turkey (Preliminary Objections)*, European Court of Human Rights, Judgment of 23 March 1995, *Series A*, No. 310 (hereinafter ‘*Loizidou (Preliminary Objections)*’); *Loizidou v Turkey (Merits)*, European Court of Human Rights, Judgment of 18 December 1996, *Reports 1996-VI* (hereinafter ‘*Loizidou (Merits)*’); *Banković v. Belgium and 16 Other Contracting States*, European Court of Human Rights, Admissibility Decision, 12 December 2001, *Reports 2001-XII* (hereinafter ‘*Banković*’); *Öcalan v Turkey*, European Court of Human Rights, Admissibility Decision, 4 December 1999, obtainable from www.echacoe.int (hereinafter ‘*Öcalan (Admissibility decision)*’); *Öcalan v Turkey (Merits)*, European Court of Human Rights, Judgment of 12 March 2003, obtainable from www.echr.coe.int (hereinafter ‘*Öcalan (Merits)*’); *Öcalan v Turkey*, Application No. 46221/99, European Court of Human Rights [Grand Chamber], Judgment of 12 May 2005, obtainable from www.echr.coe.int (hereinafter ‘*Öcalan (Grand Chamber)*’); *Ilascu and Others v Moldova and Russia*, European Court of Human Rights, Judgment of 4 July 2004, obtainable from www.echr.coe.int; *Issa and Others v Turkey (Merits)*, European Court of Human Rights, Judgment of 16 November 2004, available at www.echr.coe.int (hereinafter ‘*Issa*’); *WM v Denmark*, Application No. 17392/190, European Commission of Human Rights, Admissibility Decision of 14 October 1992, reported in (1992) 15 EHRR CD 28 (hereinafter ‘*WM v Denmark*’).

¹¹ ECHR, Art 56 (formerly 63); Refugee Convention, Art 40.

¹² Slavery Convention 1926, Art 9: ‘At the time of signature or of ratification or of accession, any High Contracting Party may declare that its acceptance of the present Convention does not bind some or all of the territories placed under its sovereignty,

whilst the 1956 Supplementary Slavery Convention, although providing that ‘[t]his Convention shall apply to all non self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible’, requires states to specify to which territories the Convention applies.¹³

As explained more fully below, the conventional position is that, regardless of whether the test for the extraterritorial exercise of ‘jurisdiction’ mentioned above is met (eg through the exercise of effective territorial control), the ECHR and its Protocols do not apply to Overseas Territories unless these instruments have been expressly extended to the Territories in question. The effect of this conventional position is that there are two mutually exclusive regimes determining the extraterritorial applicability of the ECHR and its Protocols: for Overseas Territories, an explicit ‘colonial clause’ extension is required; for everywhere else, the existence of a factual situation amounting to the exercise of ‘jurisdiction’ is necessary.

Under the ICCPR and the ICESCR, by contrast, no express extension to Overseas Territories is required; thus if the ‘jurisdiction’ test is met, these instruments apply. As mentioned, they contain all the rights in the ECHR and its Protocols apart from the right to property.

Existing Position in UK Case Law

The few English cases to date on the extraterritorial applicability of the Human Rights Act have all made a central assumption: the position under the Human Rights Act follows exclusively that under the ECHR and its Protocols.¹⁴ The general reason for this is that the Act was

jurisdiction, protection, suzerainty or tutelage in respect of all or any provisions of the Convention; it may subsequently accede separately on behalf of any one of them or in respect of any provision to which any one of them is not a Party’.

¹³ Supplementary Slavery Convention 1956, Art 12(1): ‘This Convention shall apply to all non self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible; the Party concerned shall [...] at the time of signature, ratification or accession declare the non-metropolitan territory or territories to which the Convention shall apply *ipso facto* as a result of such signature, ratification or accession.’ The UK has not utilized the faculty to opt-out contained in the 1926 Slavery Convention (see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part11chapterXVIII/treaty3.asp>), and, when ratifying the 1956 Convention, it specified that the Convention applies to all the UK Overseas Territories (see Foreign and Commonwealth Office, ‘Treaties applying to UK Overseas Territories, Human Rights’, available at <http://www.fco.gov.uk/Files/KFile/UKOTHumanRightsTreaties.pdf>).

¹⁴ *R. (on the application of Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC Admin 2911, 14 December 2004 (hereinafter ‘*Al-Skeini*’); *R. (Quark Fishing Ltd) v*

intended to ‘incorporate’ most of the rights in the Convention and its Protocols into English law. Under this view, then, one has to separate out the position under the ECHR and its Protocols from that under the other relevant international human rights treaties above and consider only the ECHR and its Protocols when interpreting the scope of the Act. This has had three principal consequences in terms of the extraterritorial scope of the Act.

In the first place, as explained more fully below, the Divisional Court in the *Al-Skeini* case concerning Iraq defined the extraterritorial meaning of ‘jurisdiction’ under the ECHR in a narrower fashion than is the position in human rights law generally, disregarding the notion of a broad doctrine of control/power/authority exercised over individuals in favour of a narrower category of actions in embassies, ships, aircraft and detention facilities. Although, as I shall explain below, this is an incorrect reading of the ECHR, it would be even more difficult to sustain if the frame of reference moved beyond that particular treaty.

In the second place, taking the view that the position under the Act follows the position under the ECHR and its Protocols exclusively, rather than the UK’s international human rights obligations generally, means that the Act applies extraterritorially in Overseas Territories only if a ‘colonial clause’ extension has been made; this would not be necessary if the approach taken under the ICCPR and the ICESCR—which do not require express extension—were adopted.

In the third place, following the ECHR and its Protocols in particular, rather than international human rights law generally, brings in the possibility of adopting an idea developed from a *dictum* by the European Court of Human Rights in the *Banković* case concerning the NATO bombing of what was then the Federal Republic of Yugoslavia (FRY, now called Serbia and Montenegro) in 1999: that the Act only applies to the actions of the UK extraterritorially if such actions occur in other contracting states to the Convention—within the Convention’s ‘legal space.’ In the *Al-Skeini* case this notion was affirmed in relation to acts involving the exercise of control over territory but not in a residual category of particular acts conducted on ships, aircraft, embassies and detention facilities. Although as I shall explain below this is an incorrect reading of the *Banković* dictum, it would not even be relevant (other than perhaps in relation to the property right) if the frame of reference went beyond the ECHR and its Protocols and took in the other international human rights treaties.

Secretary of State for Foreign & Commonwealth Affairs [2004] EWCA Civ. 527, 29 April 2004 (hereinafter ‘*Qwrk*’); *R. (on the application of B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, 18 October 2004 (hereinafter ‘*B*.case’).

In this paper I argue that the central assumption of tying the Act to the ECHR and its Protocols exclusively, and the particular conclusions drawn by the Divisional Court in *Al-Skeini* about the extraterritorial applicability of the ECHR and its Protocols, are incorrect.

The correct international law basis for understanding the extraterritorial application of the Act is the UK’s international human rights law obligations generally, including, but not limited to, the ECHR and its Protocols. Because of this, there is a general doctrine of extraterritorial applicability in circumstances where the UK exercises control/power/authority over individuals; the ‘legal space’ limitation, whatever its merits (which are, as will be explained, dubious) is *inapplicable* to the Act (other than possibly in relation to the property right) since no such limitation operates with respect to the ICCPR and the ICESCR; and the extraterritorial applicability of the Act to the UK’s Overseas Territories in most cases *should not* depend on whether the ECHR and its Protocols have been extended to these territories, but rather, as is the case with other foreign territories under the ECHR and its Protocols, simply whether the ‘jurisdiction’ test is met.

The Terms of the Human Rights Act

The Act renders what it calls ‘Convention rights’ part of English law. The content of that class of rights is determined by inclusion in a list drawn from some of the articles from the Convention and its Protocols contained in Schedule 1 of the Act.¹⁵ These articles are concerned exclusively with rights—they say nothing about the nature of the obligation or obligations borne by the UK government in relation to them. As previously discussed, under the Convention an overall obligation is introduced by coupling each of the articles setting out the rights with Article 1, which states that

The High Contracting Parties **shall** secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.¹⁶

In the case of Overseas Territories, as previously mentioned, there is also the provision in Article 56, and equivalent provisions in the ECHR Protocols, providing for rights to be expressly extended in such territories.

The Human Rights Act, however, does not adopt the obligation contained in Article 1, nor does it contain a ‘colonial extension clause’ as in ECHR Article 56. Instead, it contains its own special set of obligations.

¹⁵ HRA, s 1 and Sch 1.

¹⁶ ECHR, Art 1.

In the first place, under Section 3 the courts are obliged, so far as it is possible to do so, to read and give effect to primary and subordinate legislation in a way that is compatible with these rights and if this is not possible, under Sections 4, 5 and 10 provision is made for the courts to make a declaration of incompatibility and for Parliament to take remedial action in such instances.¹⁷ In the second place, Section 6(1) states that, subject to certain exceptions, ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right’¹⁸ and sections 7 to 9 provide for certain remedies to those complaining of a breach of Section 6.19 As far as the Section 6 obligation, then, there is a different conception of responsibility to that under the Convention: the issue is simply who is carrying out the act, *not also*, as in the Convention, where this act takes place. Clearly the plain meaning of an obligation conceived in this manner is that it applies to all acts of a public authority, regardless of whether they take place within or outside UK territory.

But doesn’t the fact that the Act was intended to incorporate the rights in the Convention also mean that Parliament intended to incorporate the type of obligation operating under that Treaty, even if it did not articulate this expressly?

As far as the long title to the Bill containing the Act is concerned, it is stated that one of the Bill’s purposes is ‘...to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.’²⁰ What are being given *effect* to here are simply the rights—had Parliament intended also to refer to the particular regime of obligation under the Convention, the phrase would need to be worded differently, perhaps stating an intention to give further effect to the *guarantee* of rights under the Convention.

The Act does however require the courts to take into account Strasbourg jurisprudence. Since clearly this jurisprudence *is* concerned not only with Convention rights but also the obligation to secure them under Article 1 and/or the relevance of any Article 56 extensions, do we not see here an intention to adopt the regime concerning extraterritorial

¹⁷ HRA, ss 3 and 4.

¹⁸ *Ibid.*, s 6(1). ¹⁹ *Ibid.*, ss 7–9.

²⁰ *Ibid.*, long title. *Bennion on Statutory Interpretation* states that: ‘The long title (formerly and more correctly called the title) appears at the beginning of the Act. It is a remnant from the Bill which on royal assent became the Act. Its true function pertains to the Bill rather than the Act. It sets out in general terms the purposes of the Bill, and under the rules of parliamentary procedure (at least in the House of Commons) should cover everything in the Bill. ... Although thus being of a procedural nature, the long title is nevertheless regarded by the courts as a guide to legislative intention’. Francis Bennion, *Statutory Interpretation: A Code* (4th ed., 2004) (hereinafter ‘*Bennion on Statutory Interpretation*’) part XV, Sec. 245, p. 620.

applicability set out in the ECHR and its Protocols exclusively? The problem with drawing such a conclusion is that the obligation in the Act is simply to ‘take account’ of Strasbourg jurisprudence when ‘determining a question which has arisen in connection with a Convention right,’ and only when this is ‘relevant to the proceedings in which that question has arisen’.²¹ This clearly falls short of a position whereby the meaning of rights and the scope of state obligations under the Convention and its Protocols is to be adopted by the Act.

Clearly one can disaggregate Strasbourg determinations on the meaning of ECHR and/or ECHR Protocol provisions into those aspects bound up in the particular way obligations are conceived under Article 1, and other aspects relevant more generally to the right concerned. So, for example, one could look to Strasbourg jurisprudence on the meaning of inhumane and degrading treatment under ECHR Article 3, without also following the formulation taking Article 3 together with Article 1 and, where relevant, Article 56, that the state is obliged not to perpetrate such treatment only within its jurisdiction and/or when an Article 56 ‘extension’ has been made. Equally, nothing in the obligation to take into account Strasbourg jurisprudence when ‘relevant’ prevents the English courts from taking into account any other considerations that would also be relevant to statutory interpretation.

The text of the Act, then, suggests that although the rights it contains are based on provisions in the Convention—and for this reason are called Convention rights—Parliament did not necessarily intend the nature of government obligations under the Act to follow the jurisdictional limitation adopted under Article 1 of the Convention.

Presumption of Territorial Application

Turning from the plain meaning of the Act to principles of statutory interpretation, one such principle is that in the absence of an intention expressed to the contrary, it is assumed that Parliament intends that legislation shall apply only territorially.²²

²¹ HRA, s 2.

²² *Ex p Blain In re Sawers*, 12 Ch D 522 (1879) at 528 per Brett LJ; see also *Cooke v Charles A Vogeler Co* [1901] AC 102. *Bennion on Statutory Interpretation* states: ‘Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom’ (section 106 (Presumption of United Kingdom extent)). ‘Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to

However, it is doubtful whether this applies to statutes concerning the state's human rights obligations. One of the main justifications normally given for the presumption that statutes do not apply extraterritorially is that this ensures consistency with the United Kingdom's international obligations, given the presumption that Parliament has legislated in conformity with these obligations.²³ Entirely separate from, and dealing with a different matter when compared with, human rights obligations, international law contains a set of rules concerning what is also called the exercise of 'jurisdiction.' Here, the term has a related but distinct meaning from its use in international human rights law: the scope of application and enforcement of UK criminal law to individuals. Unlike human rights law, where the term is used to denote a particular activity that, if present as a matter of fact, triggers the operation of substantive obligations, under this area of law the rules are concerned with determining when the UK is permitted to engage in a particular activity.

Under this separate area of law, the UK is only permitted to exercise this 'jurisdiction' extraterritorially—eg the English criminal law applying to acts taking place outside the UK—in a narrow set of circumstances. The principle behind this is that the UK should not normally be entitled to infringe the sovereignty of other states by applying its law to individuals in those states, which in normal circumstances are to be subject to the exclusive criminal jurisdiction of the host state.

which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters.' *Ibid*, section 128 (General principles as to application).

The principle is stated in the following more expansive way in *Halsbury's Laws of England*: 'There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations, and, provided their language admits. Acts are to be applied so as not to be inconsistent with the comity of nations or with the established principles of international law. Thus general words in an Act may be presumed to be limited so as to have effect within the effective jurisdiction of Parliament only.' *Halsbury's Laws of England* (4th ed., reissue, 1995), Vol. 41-1, 'Statutes', para. 1317.

On the limits deriving from 'comity of nations' and 'international law, see *Le Louis* (1817) 2 Dods 210; *The Annapolis* (1861) Lush 295; *R v Wilson* (1877) B QBD 42; *Bloxam v Faure* (1883) 8 PD 101 at 104 (affd (1884) 9 PD 130, CA); *Colquhoun v Brooks* (1889) 14 App Cas 493, HL; *Re AB & Co* [1990] 1 QB 541, CA; *Re Martin, Loustalan v Loustalan* [1990] P 211 at 233, CA; *Philipson-Stow v ZRC* [1961] AC 727 at 745, [1960] 3 All ER 814 at 821, HL; *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corpn* [1981] QB 368, [1980] 3 All ER 359, CA. By virtue of the sovereignty of Parliament, the presumption mentioned must give way before a clearly expressed intention: *Mortensen v Peters* (1906) 8 F 93 at 103.

²³ *Ex p. Bkzin*, n 22 above, at 527, per James LJ: 'in the absence of express legislative provision, compelling me to say that the Legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done anything of the kind.'

However, human rights law does not operate in this way: the law in question is not being applied—in the sense of imposing obligations—to individuals abroad; rather, it applies to the UK. Clearly the UK applying its law to its own acts in a foreign state is not an infringement on the sovereignty of that state (of course, the fact that the UK is acting in the foreign state might be a violation of sovereignty, but that is a separate matter).

In the *Roma Rights* case the House of Lords assumed without explanation that the obligation not to discriminate on racial grounds in the Race Relations Act 1976, applied to UK immigration officials operating in Prague Airport.²⁴ This adds some weight to the argument that the 'territorial' assumption is inapplicable in the case of human rights obligations.

The UK's Other International Human Rights Obligations—Introduction

A more significant principle of statutory interpretation relates to the UK's international human rights law obligations generally, including, but not limited to, the ECHR and its Protocols. Before considering the relevance of this principle, and applying it to the Act, it is necessary to explain in more detail the framework of international human rights law summarized at the start of this paper.

As mentioned above, for each right under the Act apart from the property right there are at least two separate relevant sources of international treaty obligation. In understanding the nature of the UK's international obligations with respect to these rights, one therefore has to take into account not only the Convention, but also these other sources of treaty obligation. Moreover, insofar as there is a divergence in scope between different sources of obligation in relation to the rights protected under various instruments (eg a particular right having a broader meaning in one instrument than another), one ultimately has to look to the broadest formulation in appreciating the full extent of the UK's obligations.

To what extent do these international obligations apply to UK actions outside its territory? I shall address this question below, beginning with the extraterritorial meaning of 'jurisdiction' in the relevant treaties generally, and then turning to the relevance of 'colonial clauses' in certain human

²⁴ *R v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, 9 December 2004 (hereinafter '*Roma Rights* case'); see the opinion of Lady Hale.

rights treaties and the ‘legal space’ idea from the *Banković* case mentioned above.

The Extraterritorial Meaning of ‘jurisdiction’ in Human Rights Treaties

The Relevance of the Public International Law Term ‘jurisdiction’

In the *Banković* case the European Court of Human Rights seemed to suggest that the meaning of ‘jurisdiction’ in the ECHR should reflect the meaning of that term in public international law generally;²⁵ as mentioned above, in public international law the term refers to rules prescribing the particular circumstances where a state is *legally permitted* to exercise its *legal authority* over a particular situation (eg prosecuting its own nationals for crimes committed abroad). Insofar as the Court intended to make this suggestion, it does not fit with how it and other international human rights bodies have approached the issue in other cases, which is to define extraterritorial jurisdiction as a *factual* test, regardless of whether such a situation is lawful. For example, the Court held that Turkey’s presence in Northern Cyprus constituted the exercise of jurisdiction for the purposes of the ECHR because of the degree of control exercised (see below), stressing that such jurisdiction could subsist on this basis regardless of the legality of the exercise of control (Turkey’s presence in Northern Cyprus was *unlawful*).²⁶ The UN Human Rights Committee recently stated in relation to the ICCPR that the principle of making available the enjoyment of Covenant rights to all individuals regardless of nationality

...applies to those within the power or effective control of the forces of a State Party acting outside its territory, *regardless of the circumstances in which such power or effective control was obtained*, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.²⁷

²⁵ *Banković*, n 10 above, paras 59–61.

²⁶ *Loizidou (Preliminary Objections)*, n 10 above, para. 62; *Loizidou (Merits)*, n 10 above, paras. 52–56. See also *Cyprus v Turkey*, n 10 above, para. 77.

²⁷ UN Human Rights Committee, General Comment No. 31, ‘The Nature of the General Legal Obligation on States Parties to the Covenant’, Eightieth session (2004), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7 (2004), at 192 (hereinafter ‘General Comment 31’), para. 10, emphasis added.

So the UK could be exercising extraterritorial jurisdiction without a valid international legal basis for doing so, and its human rights obligations would not be inapplicable simply by virtue of the illegality.

In its *Wall Advisory Opinion*, the International Court of Justice stated in relation to the ICCPR that,

... while the exercise of jurisdiction is primarily territorial, it may sometimes be exercised outside the state territory.²⁸

The Court went on to say that:

Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound by its provisions.²⁹

Here, then, the Court is clearly being descriptive about the exercise of jurisdiction, reflecting the fact that states do not normally exercise it *as a matter of fact* outside territory. In the *Banković* case, the European Court of Human Rights made a similar observation, that jurisdiction is ‘essentially’ territorial, with extraterritorial jurisdiction subsisting only in ‘exceptional’ circumstances.³⁰ However, in this observation the European Court, perhaps influenced by the idea (discussed before) of limiting the meaning of extraterritorial jurisdiction to that which is legally permissible, seemed to be suggesting that somehow the ‘exceptional’ character of extraterritorial jurisdiction should be understood not only in a purely factual sense; it should also have purchase in defining the boundaries of the meaning of ‘jurisdiction’ in international human rights law in a limited fashion, and should do so in an autonomous manner from the factual exceptionalism. The autonomous nature of this exceptionalism creates the possibility that even if a state is acting ‘exceptionally’ as a *matter of fact* outside its territory, such a situation might not fall within its ‘jurisdiction’ for the purposes of human rights law.

The *Banković* case was the first case to adopt this approach, which is not found in earlier ECHR cases, or the jurisprudence of other international human rights treaty bodies, including the UN Human Rights Committee, or the International Court of Justice in the *Wall Advisory Opinion*. It was, however, adopted in the recent *Al-Skeini* case before the High Court.³¹ It remains to be seen whether this idea is taken up more generally, but insofar as it is adopted it clearly serves to narrow the range of circumstances in which jurisdiction is understood to subsist extraterritorially as a matter of law.

²⁸ *Wall Advisory Opinion*, n 9 above, para. 109.

²⁹ *Ibid.*

³⁰ *Banković*, n 10 above, para. 67.

³¹ *Al-Skeini*, n 14 above, paras. 245 and 269.

The Spatial and Personal Bases for Jurisdiction

In the case law and other authoritative statements on the ICCPR and the ECHR, the term ‘jurisdiction’ has been understood in the extraterritorial context in terms of the existence of a connection between the state and either the territory in which the relevant acts took place—a *spatial* connection—or the individual affected by them—a *personal* connection.

Although there is less authoritative commentary on the extraterritorial applicability of the CRC and the CAT, the meaning of ‘jurisdiction’ under these instruments is arguably the same as under the ICCPR, ECHR and their Protocols. On the CRC, the ICJ appeared to assume this in affirming the applicability of this treaty to Israel’s presence in the occupied territories in the *Wall Advisory Opinion*.³² On the CAT, the UN Committee Against Torture (the mechanism set up to monitor compliance with the CAT), in its comments on the UK,³³ assumes that ‘jurisdiction’ includes the exercise of control over territory—the *spatial* connection.

We shall now consider in detail the meaning of each type of connection—*spatial* and *personal*—that can amount to the exercise of ‘jurisdiction’.

Jurisdiction as a Spatial Relationship—Control over Territory

Beginning with the approach that conceives the target of the relationship *spatially*, here the exercise of ‘jurisdiction’ amounts to asserting control over a particular territorial space, within which the state is obliged to secure individual rights in a generalized sense. Such a generalized approach can be understood as an analogue to the approach taken to the state’s obligations in its own territory, and reflects the general principle of state responsibility for extraterritorial activity, as articulated in the *Namibia Advisory Opinion* of the International Court of Justice in 1971, where the Court stated that South Africa was

... accountable for any violations ... of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not

³² *Wall Advisory Opinion*, n 9 above, para. i 13. In paras. 118–111 the Court discusses the potential for the term ‘jurisdiction’ under the ICCPR to subsist extraterritorially, concluding in the affirmative. After considering the position under the ICESCR, it turns to the CRC, and concludes extraterritorial applicability simply on the basis that obligations in that instrument are conceived in relation to the state’s ‘jurisdiction.’ One can perhaps conclude that this assumption is made in the light of the Court’s earlier discussion about the meaning of the same term in the ICCPR, and on the basis that the term has the same meaning in both instruments, since otherwise the Court would have to conduct an enquiry into the meaning of ‘jurisdiction’ in the CRC similar to that which it conducted in relation to the ICCPR.

³³ Conclusions and recommendations of the Committee Against Torture: United Kingdom, UN Doc. CAT/C/CR/33/3, 25 November 2004, in particular para. 4 (b).

release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.³⁴

The spatial approach to the target involved in the jurisdiction concept of human rights law was articulated in the *Loizidou*, *Cyprus v Turkey*, and *Banković* cases before the European Convention of Human Rights system, and affirmed by the English High Court in *Al-Skeini*.³⁵

The *Loizidou* and *Cyprus v Turkey* cases concerned the question of Turkey’s responsibility for certain aspects of the situation in northern Cyprus. In its 1995 judgment on preliminary objections in *Loizidou*, the European Court of Human Rights stated that

... the responsibility of a Contracting Party may ... 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 ...³⁶

In its judgment on the merits, the Court affirmed the previous statement, and stated that

[I]t is not necessary to determine whether ... Turkey actually exercises detailed control over the policies and actions of the authorities of the ‘TRNC’. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the ‘TRNC’ ... Those affected by such policies or actions therefore come within the ‘jurisdiction’ of Turkey for the purposes of Article i of the Convention ...³⁷

In general, then, the test is ‘effective control’ over territory; the existence of this factual situation gives rise to a responsibility to secure the rights within the Convention in the territory concerned.

On the facts in Northern Cyprus, the Court emphasized that Turkey exercised effective control operating ‘overall;’ in such circumstances, it

³⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, p. 16, at para. 118.

³⁵ *Loizidou (Preliminary Objections)*; *Loizidou (Merits)*; *Cyprus v Turkey*; *Banković*, n 10 above; *Al-Skeini*, n 14 above, para. 248.

³⁶ *Loizidou (Preliminary Objections)*, n 10 above, para. 62, cited in *Loizidou (Merits)*, n 10 above, para. 52.

³⁷ *Loizidou (Merits)*, n 10 above, para. 56 and *Loizidou (Preliminary Objections)*, n 10 above, paras. 63–64.

was unnecessary to identify whether the exercise of control was detailed. So if the UK is in overall control of a territorial unit, everything within that unit falls within its ‘jurisdiction,’ even if at lesser levels powers are exercised by other actors (eg if particular activities are devolved to other states or local actors). In the *Cyprus v Turkey* judgment, the Court stated that:

...[H]aving effective overall control over northern Cyprus...[Turkey’s] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s ‘jurisdiction’ must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.³⁸

In the *Banković* case, the Court made the following general statement on the issue of effective control:

...the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government.³⁹

Recalling the backdrop to the Northern Cyprus cases, we see the Court in *Banković* emphasising a further feature of those cases which was not actually emphasized in the Court’s consideration of the exercise of jurisdiction in them. For the Court in *Banković*, the issue is control over territory that is not only ‘effective’ but also involves the exercise of ‘some or all of the public powers normally to be exercised’ by the local government. Whereas indeed such powers were exercised by Turkey in northern Cyprus, their exercise was not seen by the Court as a prerequisite to the exercise of jurisdiction in the northern Cyprus cases: the only issue was the exercise of ‘effective control.’ The statement in *Banković* then, should be taken in a somewhat loose sense as a general description of the factual circumstances in which the court had previously found the exercise of jurisdiction (‘it has done so’), rather than as either an accurate statement of the salient facts in those previous cases, or, indeed, a statement of the key factual elements that must subsist in order for extraterritorial jurisdiction to subsist under the ‘effective control’ heading. It is notable in this regard

that in its application of the law to the facts of the case, the Court made no statement, either explicit or implicit, touching on the question of whether or not the relevant acts—the bombing—involved the exercise of powers normally to be exercised by the local government.⁴⁰

The test, then, is ‘effective control’ over territory. What this amounts to in practice is difficult to ascertain, because it has only been considered fully in the case of Northern Cyprus, where there was a clear level of overall control by the Turkish military, and the *Banković* case, where the European Court of Human Rights held that aerial bombardment did not constitute the exercise of control over territory.⁴¹

As far as the applicability of the ECHR to the UK in Iraq is concerned, HMG disputes that its presence since 2003 involves the necessary level of control to bring parts of that country within UK ‘jurisdiction’ for the purposes of the ECHR.⁴² The High Court in *Al-Skeini* avoided having to determine this question by holding that jurisdiction on the basis of effective control could not subsist in territories outside the legal space of the ECHR (see below).

In the November 2004 decision of the European Court of Human Rights in *Issa*, the Court adopted a ‘beyond reasonable doubt’ standard of proof when determining whether Turkish troops exercised effective control in an area of northern Iraq in the context of allegations of unlawful killing by the troops,⁴³ and concluded that this standard was not met, and that the killings did not therefore fall within Turkish jurisdiction for the purposes of the application of its ECHR obligations.⁴⁴ Since the facts are often disputed and difficult to verify in the case of extraterritorial state actions, the question of what standard of proof applies is an important one. It remains to be seen whether this strict standard will be applied in future cases as a general test when facts are in dispute; in *Issa* the Court adopted it because the case concerned unlawful killing and such a test had been used previously in non-extraterritorial cases on that particular issue.⁴⁵

⁴⁰ *Banković*, n 10 above, paras. 75 and 76.

⁴¹ *Banković*, *ibid.*

⁴² See, eg, the letter from the UK Armed Forces minister, Adam Ingram MP, to Adam Price MP on 7 April 2004 (quoted below, text relating to note 60); a similar position seems to have been taken by the UK Foreign Secretary, Jack Straw, who made the following statement in relation to the applicability of the ECHR to the UK in Iraq, invoking by contrast the situation in Turkish-occupied northern Cyprus: ‘[T]he citizens of Iraq had no rights at all under the ECHR prior to military action by the coalition forces; furthermore, the UK does not exercise the same degree of control over Iraq as existed in relation to the Turkish occupation of northern Cyprus.’ Jack Straw, MP, Written Answer, House of Commons, ‘European Convention on Human Rights,’ 19 May 2004, Hansard Vol. 421, Part No. 89, Column 1083W.

⁴³ *Issa*, n 10 above, para. 76.

⁴⁴ *Ibid.*, para. 81.

⁴⁵ *Ibid.*, para. 76.

³⁸ *Cyprus v Turkey*, n 10 above, para. 77.

³⁹ *Banković*, n 10 above, para. 71.

Jurisdiction as an Individual Relationship—Control over Persons

International human rights treaty monitoring bodies have also understood extraterritorial jurisdiction in terms of some kind of connection operating between the state and an *individual*, rather than whether the area in which the control is exercised is itself under the state's control. This connection has been understood variously as *control* (like the spatial relationship discussed already), power or *authority*.

In the *Coard* case seventeen petitioners complained to the Inter-American Commission of Human Rights about their treatment, including detention, by United States' forces in the first days of its invasion of Grenada in 1983.⁴⁶ Although the 'jurisdiction' test is not contained in the relevant instrument—the American Declaration of the Rights and Duties of Man—under consideration, the Commission decided to use this term as the basis for considering the scope of the obligations contained within the instrument, stating that

...jurisdiction...may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.⁴⁷

This definition of 'jurisdiction' is potentially wide enough to cover the exercise of control over individuals, regardless of whether the area within which such control is exercised is itself under the control of the state. Although of course the UK is not a party to the Charter of the Organization of American States and thus not subject to the obligations contained within the Declaration, this *dictum* is helpful as an authoritative statement on the meaning of a particular obligation of the same kind as that contained within the ECHR and its Protocols and the ICCPR and its Protocols.

The *WM* case before the European Commission of Human Rights concerned the acts and omissions of Danish diplomatic officers committed

⁴⁶ *Coard et al v United States* (Case No. 10.951), Inter-American Commission on Human Rights, Report No. 109/99, 29 September 1999, in Annual Report of the Inter-American Commission on Human Rights 1999, *OAS Doc. OEA/Ser.L/V/II.106*, Doc. 6 rev, Chapter III, obtainable from <http://www.cidh.oas.org/annualrep/99eng/Merits/UnitedStates10.951.htm>, paras. 1–4.

⁴⁷ *Ibid.*, para. 37 (footnotes omitted).

within the Danish Embassy in East Berlin in 1988. In that case the Commission stated that:

...authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.⁴⁸

The *Öcalan* case concerned Abdullah Öcalan, the leader of the Kurdish Workers Party (the PKK), who was arrested in Kenya, flown by Turkish agents to Turkey and detained before being tried and convicted of activities aimed at bringing about the secession of a part of state territory, and sentenced to death.⁴⁹ The Grand Chamber of the Court, confirming the position of the Chamber in this regard, stated that

...the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport. It is common ground that directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.⁵⁰

As in the *WM* case, here the Court fails to state explicitly on what basis 'effective Turkish authority' was being exercised; specifically, we are not told whether it concerned the relationship between Turkey and the applicant, or Turkey and the location where Turkey held the applicant. The Court's choice of pertinent facts, however, does perhaps suggest the former. No reference is made as to whether the aircraft or the 'international zone' in which it was located were controlled by Turkey (the fact that the aircraft was registered in Turkey is insufficient for such control to be assumed), and the only description given of the acts of Turkish officials concerns their behaviour towards the applicant (eg physically forcing him back to Turkey) rather than their behaviour in relation to the space in which the applicant was held.

In the *Roma Rights* case concerning UK immigration officials in Prague Airport, Lady Hale, in her comments on discrimination law with which the majority agreed, seemed to assume that the ICCPR applied to the situation at issue.⁵¹ Similarly, Lord Steyn held that in conducting

⁴⁸ *WM. v Denmark*, n 10 above, 'The Law', para. 1.

⁴⁹ *Öcalan (Admissibility Decision)*, n 10 above, Section I within 'The Facts.'

⁵⁰ *Öcalan (Grand Chamber)*, n 10 above, para. 91. See also the virtually identical statement of the Chamber in *Öcalan (Merits)*, n 10 above, para. 93.

⁵¹ Lady Hale, *Roma Rights case*, n 24 above, paras. 98–99.

immigration decisions in Prague the UK ‘purported to exercise governmental authority’ and that because of its discriminatory nature this operation ‘placed the United Kingdom in breach’ of the ICCPR.⁵² These *dicta* do not discuss the jurisdiction test under the ICCPR, nor does Lord Steyn define ‘governmental authority’ and explain in what way the Prague operations involved the exercise of such authority, but given the nature of the activities—making determinations on immigration status with respect to individuals—one can perhaps construct from these *dicta* a definition of one aspect of the ‘jurisdiction’ test as the exercise of ‘governmental authority’ over individuals.

In its General Comment 31 on Article 2 of the ICCPR, the UN Human Rights Committee stated that the jurisdictional test in Article 2.1

... means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party.⁵³

Here, then, we have a clear statement affirming jurisdiction on the basis of a personal target—‘anyone’—and relationship between the state and this target described in terms of ‘power or effective control.’

Taking these three cases and the General Comment together, we see a suggestion that extraterritorial jurisdiction can subsist when it exercises power (General Comment 31) control/effective control (*Coard*/General Comment 31) or authority (*WM* case, *Öcalan*, and *Roma Rights*) over individuals, quite apart from whether control is being exercised over the territory in which the acts take place.

In the *Al-Skeini* case concerning UK soldiers in Iraq, the High Court rejected the idea of a broad, ‘personal’ basis for extraterritorial jurisdiction as far as the ECHR is concerned, holding instead that there were two types of extraterritorial jurisdiction according to Strasbourg jurisprudence: the ‘effective control of an area’ doctrine (ie jurisdiction conceived *spatially*), and a residual, narrow category of activities conducted by state agents in particular circumstances, ‘exemplified by embassies, consulates, vessels and aircraft,’ and including, on the facts of the particular case, ‘a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects.’⁵⁴

This finding does not fit with the Strasbourg jurisprudence discussed above. More broadly, it is at odds with the jurisprudence and other authoritative commentary under other legal instruments concerning the identical concept of ‘jurisdiction.’ These problems make it likely that the

⁵² Lord Steyn, *Roma Rights* case, n 24 above, para. 45.

⁵³ General Comment 31, n 27 above, para. 10.

⁵⁴ *Al-Skeini*, n 14 above, para. 287.

finding will not survive when the case goes to higher courts. Moreover, on its own terms it only purports to be an interpretation of the position under the ECHR, not the group of international legal instruments considered in this section generally.

‘Colonial Clauses’

As mentioned earlier, the ECHR and its Protocols and the Refugee Convention contain a ‘colonial clause’ allowing the UK to make a declaration that the rights contained in the treaty would apply in what are now called ‘Overseas Territories,’⁵⁵ and somewhat similar provisions exist in the 1926 Slavery Convention and the 1956 Supplementary Slavery Convention.

Similar extension clauses were not included in later human rights treaties, including the ICCPR, the ICESCR, the CRC and the CAT, which therefore apply to the UK in such territories on the same basis as they apply to the UK in other territories (eg if the ‘jurisdiction’ test is met under the ICCPR), without the need for an express extension.

As far as the ECHR and its Protocols are concerned, in many cases the UK exercises a degree of control over Overseas Territories to bring them within the ECHR ‘jurisdictional’ test mentioned earlier, raising the question as to whether the UK’s obligations in that treaty in particular would apply on ‘jurisdictional’ grounds even if a ‘colonial clause’ declaration has *not* been made. The few cases on this issue have held that for overseas territories, the only way ECHR obligations can apply is through a ‘colonial clause’ declaration.⁵⁶ This position is being challenged by the applicants in the *Quark* case concerning South Georgia.⁵⁷

Absent a successful challenge to the established position, the scope of any ‘colonial clause’ declarations will be dispositive of whether the UK’s ECHR obligations apply to its activities in its Overseas Territories. Although the UK has made a series of declarations under several instruments covering various territories, there are some curious anomalies, notably in the decision to extend the ECHR itself to certain territories, but

⁵⁵ ECHR, Art 56 (formerly 63); ECHR Protocol No. 1, Art 4; ECHR Protocol No. 13, Art 4; Refugee Convention, Art 40.

⁵⁶ *Gillow v United Kingdom*, Application No. 9063/80, European Court of Human Rights, Judgment of 24 November 1986, Series A, No. 109, para. 62; *Bui Van Thanh v United Kingdom*, Application No. 16137/90, European Commission of Human Rights, Admissibility Decision, 12 March 1990, 65 DR 330, pp. 4–5; see also *Yonghong v Portugal*, Application No. 50887/99, European Court of Human Rights, Admissibility Decision, 25 November 1999, Reports 1999-IX, p 3.

⁵⁷ *Quark*, n 14 above.

not the first Protocol to the Convention (a separate treaty) which contains the right to property.⁵⁸ This is at issue in *Quark*, since the UK has extended the ECHR but not the first Optional Protocol to South Georgia, and the case concerns an alleged breach of the property right in the Protocol.⁵⁹

The conventional position on the ‘colonial clause’ extension of the ECHR and its Protocols creates the potential for a divergent situation under the ECHR and its Protocols when compared with the ICCPR and the ICESCR because of the different basis on which those treaties apply extraterritorially. Given the overlap in the rights covered as between the ECHR and its Protocols, on the one hand, and the ICCPR and the ICESCR, on the other, a situation may arise where the nature of the UK’s actions in an ‘Overseas Territory’ meet the jurisdictional test, and on the facts impact on the enjoyment of a particular right common to both sets of treaties, but only the obligation in the ICCPR or the ICESCR applies because the UK has not made an express extension of the relevant part of the ECHR or its Protocols. This situation does *not* prevail in the *Quark* case, since the right at issue in the case—the right to property—is contained only in ECHR Protocol No. 1, not also in the ICCPR or the ICESCR.

Is the Extraterritorial Applicability of the ECHR Limited to the ‘legal space’ of Contracting Parties?

In a letter written in response to a Parliamentary question submitted by Adam Price MP, UK Armed Forces Minister Adam Ingram stated in 2004 that:

[T]he European Convention on Human Rights is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces.⁶⁰

Assuming that Minister Ingram is using the term ‘signatory’ to refer to a state that has signed *and* ratified the Convention, this passage suggests that a particular action taken by one contracting state in the territory of another state would not be governed by the Convention obligations of the first state, if the second state is not also a party to the Convention.

⁵⁸ ECHR Protocol No. 1. ⁵⁹ *Quark*, n 14 above.

⁶⁰ The Rt Hon Adam Ingram MP, Ministry of Defence, Letter to Adam Price MP, 7 April 2004.

Under this view, although as discussed above the concept of ‘jurisdiction’ under the ECHR is not limited to a state’s own territory, the very applicability of the treaty itself is limited to the overall territory of contracting states. So states acting outside the territorial space of the ECHR are not bound by their obligations in that instrument, even if they are exercising effective control over territory and/or individuals. This is a severe limitation as far as the ECHR is concerned, since most of the world’s states, including some of the key sites of extraterritorial action by the UK (eg Iraq), and all the world’s least developed states fall outside the ‘legal space’ of the ECHR.

The *Banković dictum*

The possibility of making such an argument exists because of a *dictum* by the European Court of Human Rights in the *Banković* case concerning the NATO bombing of what was then called the Federal Republic of Yugoslavia (FRY) in 1999. In that case, the Court stated that the ECHR applies

...in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. ... The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.⁶¹

It is clear that this *dictum* does not support some of the assertions made by the Minister. Although his remark about the ‘design’ of the Convention echoes the phrase used by the Court, his remark that the Convention was not ‘intended’ to cover the activities of a contracting party in the territory of a non-contracting party finds no counterpart. The Court states that the Convention operates ‘essentially in a regional context’—the word ‘context’ hardly a clear reference to a territorial area (it could equally refer to a regional grouping of states, irrespective of where they act)—and ‘notably in the legal space (*espace juridique*) of the Contracting states’—a clear reference to a territorial area, but not one, because of the word ‘notably,’ that necessarily means that the Convention applies *only* in this area. Despite the Minister’s unequivocal assertion, then, neither of these particular remarks in *Banković* necessarily excludes the application of the Convention to the activities of Contracting States outside the territory of the Council of Europe.

⁶¹ *Banković*, n 10 above, para. 80.

But what of the Court's comment that '[T]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States'? Even if the other remarks in that passage are not helpful either way, does this not suggest a general approach in favour of the Minister's assertion? Such a comment could indeed mean that in all circumstances, the Convention does not apply to the actions of contracting parties outside the legal space of the Council of Europe.

In the first place, it is notable that the Court refers to what the Convention 'was not designed' for. This is necessarily a historical comment; certainly, it is concerned with the original wishes of the framers — though, it must be said, without any supporting evidence — but by itself it says nothing about whether this supposed intent is determinative more than fifty years after the Convention was enacted. The Strasbourg organs have been consistently willing to interpret the Convention as a 'living instrument'⁶² creating the possibility that obligations can be understood in a manner not necessarily foreseen by the drafters.

In order to consider whether this supposed original intent is relevant now, it is necessary to clarify how exactly the Court applied it to the facts in *Banković*, the extent to which that application was determinative of the outcome in the case, and more broadly whether the existence of a current limitation along these lines is compatible with other Strasbourg cases.

As for *Banković*, the case concerned the spatial basis for extraterritorial jurisdiction: whether the NATO bombing campaign constituted an exercise of effective control over FRY territory *so* as to bring it within the 'jurisdiction' of the respondent states. One of the applicants' submissions invoked the earlier *Cyprus v Turkey* case concerning the exercise of control over northern Cyprus — part of Cyprus, a contracting state — by Turkey — another contracting state. In that case, the Court held that it

... must have regard to the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'... Having regard to the applicant Government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's

⁶² *Tyrer v United Kingdom*, Application No. 5856/72, European Court of Human Rights, Judgment of 25 April 1978, Series A, No. 26, para 31; *Soering v United Kingdom*, Application No. 14038/88, European Court of Human Rights, Judgment of 7 July 1989, Series A, No. 161, para 101; *Loizidou (Preliminary Objections)*, n 10 above, para. 71. See also DJ Harris, J M O'Boyle & C Warbrick, *Law of the European Convention of Human Rights* (Butterworths: 1995), pp. 7–9.

fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.⁶³

As one part of their argument that the NATO bombing constituted the exercise of effective territorial control, the applicants in *Banković* suggested that if the Court concluded in the negative on this point, this would 'leave a regrettable vacuum in the Convention system of human rights protection,' and would therefore raise the same concern highlighted by the Court in *Cyprus v Turkey*. The Court responded by emphasizing that in *Cyprus v Turkey* it was concerned with the specific type of vacuum created where a population reside in a state that is a party to the Convention — and have therefore already been granted rights under it — but the state is unable to secure those rights because the territory is occupied by another Convention state. The Court asserted that this type of vacuum was 'entirely different' to the vacuum being suggested by the applicants in *Banković*,⁶⁴ presumably because the FRY was not a Convention state. It then made its 'legal space' remark:

In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has *so* far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.⁶⁵

This consideration of the 'vacuum' submission and invocation of the 'legal space' doctrine came *after* the Court had already reached a conclusion rendering the case inadmissible, having earlier concluded that the nature of the air strikes by NATO states in the then FRY did not render this territory under the jurisdiction of the states concerned as far as the exercise of effective control was concerned.⁶⁶ In principle, the nature of the submission was such that it had the potential to affect all other findings, something perhaps reflected in the way the Court designated it as a distinct argument and one that operated 'more generally.'⁶⁷ However, the fact that the Court only addressed such a general consideration after *already* disposing of the earlier submissions without considering it suggests that it did not play a key part of the outcome of the case.

⁶³ *Cyprus v Turkey*, n 10 above, para. 78.

⁶⁴ *Banković*, n 10 above, para. 80.

⁶⁵ *Ibid* (footnote omitted).

⁶⁶ *Ibid*, para. 75.

⁶⁷ *Ibid*, para. 79 ('Fifthly and more generally').

Of course, even if the Court's observations here can be considered in some sense *obiter*, they are an indication of the Court's views on the issue, and we must therefore consider what exactly they amount to even if they do not have strict precedential value.

The first point to make is that the Court's consideration of the original 'design' of the Convention, although reading like a general doctrine, is invoked in the specific context of a submission concerned with an underlying reason for applying the Convention extraterritorially—the avoidance of a vacuum in protection. Moreover, its application in the case is only by way of explaining why, *so far*, this particular underlying reason has been relied upon in the case law in favour of establishing jurisdiction only in relation to actions within the Council of Europe. This is not quite the same thing as saying that the 'legal space' idea prevented this particular vacuum concern from being capable of establishing jurisdiction in relation to actions outside the Council of Europe. Given the use of the word 'accordingly,' the most one can conclude is that the Court is pointing out that the current circumstances in which the vacuum concern has been invoked are on all fours with an idea of the original intent of the Convention.

The comment is limited to a historical analysis of the Court's case law, and does not by itself rule out the possibility of a different finding in future cases. To be sure, the Court decided not to take such a step in *Banković*, but in failing to do so having simply explained that it hasn't done so in the past, in a manner in accordance with some idea of the original design of the Convention, it is hardly giving a clear indication that it is prevented from doing so.

Moreover, the Court is invoking the 'legal space' idea only in relation to the possibility of being able to rely on one particular underlying reason for establishing extraterritorial jurisdiction. This is not the same thing as being able to found extraterritorial jurisdiction itself. It reflects the way in which the 'legal space' concern was treated by the Court in *Cyprus v Turkey*. In that case, the Court affirmed its earlier finding in the *Loizidou* case on the same issue—whether Turkey's presence in Northern Cyprus constituted an exercise of jurisdiction for the purposes of the Convention. In *Loizidou*, the Court held that the

...responsibility of a Contracting 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 ...⁶⁸

⁶⁸ *Loizidou (Merits)*, n 10 above, para. 52.

Crucially, nothing in *this* finding of extraterritorial jurisdiction based on effective control hinges on the presence or absence of a vacuum in protection within the Council of Europe; obligation derives simply from the 'fact' of 'control.' In *Cyprus v Turkey*, the Court affirmed this determination⁶⁹ and then turned to the particular vacuum issue, holding that 'any other finding' would give rise to this vacuum. Here, then, the Court is giving a reason why a finding *it has already made* serves an important policy objective. This is not the same as suggesting that the necessity of realizing such a policy objective *has* to be present before such a finding can be made. In other words, the Court is remarking that in the particular facts of this case, founding jurisdiction on the basis of effective territorial control serves a particular policy objective; it is *not* asserting that this policy need *has* to be an issue before the exercise of jurisdiction can be found.

The *Al-Skeini* Case

However, in December 2004 the English Divisional Court concluded in the *Al-Skeini* case concerning allegations of abuse by UK soldiers in Iraq that it *was* necessary to establish this particular underlying reason—avoiding a vacuum in protection within the Council of Europe when one contracting state acts in another—in order for extraterritorial jurisdiction to exist on the basis of effective control over territory.⁷⁰ The Divisional Court acknowledged the findings in *Loizidou* and *Cyprus v Turkey*, observing that in the light of these cases

...it might have been possible to say that, because Turkey's same argument had been dealt with in ...*Loizidou* ... without the benefit of the additional reasoning found in ...*Cyprus v Turkey* ..., therefore one could pick and choose between the two analyses.⁷¹

The first thing to say about this is that, as mentioned earlier, there are not two 'analyses' here in the sense of two alternative legal tests—the additional factor was discussed in *Cyprus v Turkey* only in terms of a good reason for a decision the Court had already come to; the cases are identical in terms of the actual test they adopt for jurisdiction on the basis of effective control, viz. simply the fact of such control.

Be that as it may, for the Divisional Court what is 'critical' was how the additional factor considered in *Cyprus v Turkey* was then treated the later case of *Banković*.⁷² This treatment changed everything: although in *Banković* the vacuum consideration was 'raised by the applicants ... in a

⁶⁹ *Cyprus v Turkey*, n 10 above, para. 76.

⁷⁰ *Al-Skeini*, n 14 above, paras. 276–7.

⁷¹ *Ibid.*, para. 276.

⁷² *Ibid.*

form designed to assist themselves'—ie as a good policy reason for finding the exercise of jurisdiction — it was 'turned against them by the [European] Court for its true *import*,⁷³ the true import being that actually it was a *requirement* for jurisdiction to subsist. What explanation does the Divisional Court give for this assertion of a 'true import'? It simply invokes the 'legal space' comment from the *Banković* case mentioned earlier.

However, as we have seen, the passage from *Banković* does not actually support this conclusion. The European Court's comments, which did not seem to be determinative of the outcome of the case, concern an idea—the 'legal space'—conceived only in terms of the original 'design' of the Convention, invoked only by way of explaining how a certain line of cases have come about, without clearly stating that it would prevent other cases that did not fit with the idea, and only discussed in relation to one particular good reason for a finding of extraterritorial jurisdiction, not whether extraterritorial jurisdiction itself exists, either generally or on the basis of effective control.

In sum, a careful consideration of the Court's dictum in *Banković* leads to the conclusion that the Court did not hold that the European Convention does not apply to Contracting States outside the territory of other Contracting States, either generally or, as the Divisional Court held in *Al-Skeini*, in cases involving effective control over territory.

Other Strasbourg Cases, including *Issa*

This conclusion is reinforced by other Strasbourg jurisprudence. The *WM* case decided before *Banković* found the exercise of jurisdiction by Denmark acting in what was then East Berlin, at that stage outside the legal space of the Convention,⁷⁴ and as we have seen in *Loizidou* and *Cyprus v Turkey*, in cases where the exercise of jurisdiction was found by states acting within other contracting states, the fact that the action took place within the territory of a contracting state was never invoked by the Court as a prerequisite for the exercise of jurisdiction.

Moreover, cases *since* *Banković* have also found the exercise of jurisdiction by states acting outside the Council of Europe. A case involving jurisdiction conceived in a personal sense would be *Ocalan*, where a chamber of the Court held that the actions of Turkish agents in relation to the alleged abduction of Abdullah Ocalan in Kenya—not a Convention state—**took** place within Turkish 'jurisdiction.'⁷⁵ This holding was subsequently

⁷³ *Ibid*, emphasis added.

⁷⁴ *WM v Denmark*, n 10 above.

⁷⁵ *Ocalan (Merits)*, n 10 above, para. 93.

affirmed by the Grand Chamber when the case came before it.⁷⁶ A case affirming the possibility of jurisdiction conceived in a spatial sense operating outside the Council of Europe is that of *Issa*, again against Turkey, this time in relation to its actions in northern Iraq—the very state at issue in *Al-Skeini*. At the merits stage, the Court stated that it

... does not exclude the possibility that, as a consequence of this military action, the respondent State [Turkey] could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (*espace juridique*) of the Contracting States.⁷⁷

As the Divisional Court stated in *Al-Skeini*, this suggests that the 'effective control of an area doctrine is essentially a territorial doctrine.'⁷⁸ Given its conclusion as to the meaning of the *Banković* dictum, for the Divisional Court the finding in *Issa* was at odds with that earlier dictum: 'the doctrine that there is any difference between the *espace juridique* of the Convention and any other space anywhere in the world' had been 'entirely sidelined.'⁷⁹ The Divisional Court faced a choice, then, between two supposedly different positions. It opted for its view of the *Banković* position by dismissing the *Issa* dictum in three different ways.

How the Court in *Al-Skeini* Dismissed *Issa*

In the first place, the Divisional Court called into question the European Court's motivation for making its comment in *Issa*. In that case, the European Court considered both spatial and personal bases for jurisdiction, on the latter concluding on the facts that the alleged human rights violations in question were not proved to have been committed by Turkish soldiers.⁸⁰ In the light of this finding on the personal basis for jurisdiction, the Divisional Court viewed the European Court's decision to consider also the spatial basis for jurisdiction as taking it 'out of its way' to an issue 'it could have avoided.'⁸¹ The Divisional Court puzzled that it is 'not plain' why the European Court did this—presumably meaning that there was no obvious purpose for doing so in terms of the reasoning of the

⁷⁶ *Ocalan (Grand Chamber)*, n 10 above, para. 91 (quoted above, text relating to note 50).

⁷⁷ *Issa*, n 10 above, para. 74. See also *Issa and Others v Turkey*, Application No. 31821/96, Admissibility Decision of 30 May 2000, available at www.echr.coe.int.

⁷⁸ *Al-Skeini*, n 14 above, para. 219.

⁷⁹ *Ibid*.

⁸⁰ *Issa*, n 10 above, paras. 7 6 81.

⁸¹ *Al-Skeini*, n 14 above, para. 205.

judgment—and because of its puzzlement offered its own conjectural reason: the European Court

...was conscious that claims arising out of the 2003 invasion of Iraq might in due course need consideration.⁸²

Here, then, we have the suggestion that the European Court is making a statement it did not need to make for the purposes of judging the case before it, and the speculation that this was motivated by a desire to stake out a position on the applicability of the ECHR to Iraq for wider consumption.

The problem with this comment, which of course undermines the significance of the *dictum* as far as the case is concerned, is that it misperceives the relationship between the factual tests under the *spatial* and *personal* headings of jurisdiction as far as state responsibility is concerned. The Divisional Court seems to assume that because the factual test for responsibility under the *personal* heading was not met—the violations could not be imputed to Turkish soldiers—responsibility could not be founded under the *spatial* heading. However, the test under the latter heading, unlike that under the former, does not require the particular acts or omissions giving rise to the alleged violation to be those of agents of the state or actors acting on behalf of it: the key thing here is that they take place within territory that is under the overall control of the state. In the *Cyprus v Turkey* case, which concerned *inter alia* complaints in relation to the actions of the local Turkish Cypriot authorities, as opposed to the Turkish troops occupying Northern Cyprus, in finding Turkey responsible for those actions the Court stated that

[I]t is not necessary to determine whether ... Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious from the large number of troops engaged in active duties in northern Cyprus ... that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' ... Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention ... Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.⁸³

It follows, then, that in *Issa* the Court was *not* able to dispose of the case merely through its finding on the facts in relation to the *personal* heading

⁸² *Ibid.*

⁸³ *Loizidou (Merits)*, n 10 above, para. 56 and *Loizidou (Preliminary Objections)*, n 10 above, paras. 63–64.

of jurisdiction; although the same sets of facts were of course being considered in relation to both headings of jurisdiction, this consideration operated differently as between the two, and a negative finding under one heading would not necessarily rule out a positive finding under the other.

Turning to the Divisional Court's second basis for dismissing the *Issa dictum*, here the focus was on the European Court's finding on the existence of jurisdiction in the *spatial* category. For the Divisional Court, because the European Court held on the facts that Turkey did not exercise the necessary control over the area to meet the jurisdictional test, it followed that the Court's *dictum* that, if this test was met, the Convention would apply (and that the extraterritorial application of the Convention under the *spatial* heading was not therefore limited to Council of Europe territories) was 'on any view *obiter*.'⁸⁴

This is a bizarre finding: the European Court needed to affirm the relevance of the legal test before applying it—it would make no sense to consider whether Turkey exercised effective control over the area of territory in Iraq if a supposed *espace juridique* limitation would in any case bar the applicability of the Convention—moreover, a court not finding a legal test met on the facts does not necessarily render that court's statement on the meaning of that test *obiter*: what is crucial is whether the finding is determinative of the outcome of the case. If it does, then the Court's articulation of the legal principle being applied forms the heart of the case. As we have seen, because the *spatial* and *personal* bases of jurisdiction are separate, and a finding of one can be made without a finding of the other, it follows that *both* findings in this case determined its outcome. In consequence, the Court's statement of the legal principle it applied in considering the *spatial* basis for jurisdiction forms part of the reasoning of the case, and is not *obiter*.

Indeed, it is remarkable that the Divisional Court made this observation, given the questionable juridical significance of the *Banković dictum* in determining the outcome of that case.

However, the Divisional Court offered a third ground for dismissing the *Issa dictum*:

...in our judgment the dicta in *Issa* ... are inconsistent with *Banković* and the development of the Strasbourg jurisprudence in the years immediately before *Banković*. In a sense *Issa* seems to us to look back to an earlier period of the jurisprudence, which has subsequently made way for a more limited interpretation of article 1 jurisdiction. It may well be that there is more than one school of thought at Strasbourg; and that there is an understandable concern that modern

⁸⁴ *Al-Skeini*, n 14 above, para. 202.

events in Iraq should not be put entirely beyond the scope of the Convention: but at present we would see the dominant school as that reflected in the judgment in *Bankovic* and it is to that school that we think we owe a duty.⁸⁵

Thus the Divisional Court drops the notion of precedent in favour of an idea of what it considers to be the ‘dominant’ approach within Strasbourg jurisprudence as a whole, following this approach even if flatly contradicted by the most recent case on the issue. Setting aside the problematic nature of this line of reasoning, what is certainly worth considering is the fact that *Issa* is only a Chamber decision whereas *Banković* was a judgment of the Grand Chamber.

None of this is ultimately relevant, however, since the issue of resolving a conflict between *Issa* and *Bankovic* only arises if the Divisional Court was correct in its finding on *Bankovic*, which it was not. The correct reading of *Banković* leads to the conclusion that there is no ‘legal space’ restriction; the later finding by the Court in *Issa* is therefore in harmony with this earlier decision, something which the Court itself affirmed in *Issa*.⁸⁶ There is no contradiction, and so no choice to be made, let alone a choice made on the questionable grounds adopted by the Divisional Court in *Al-Skeini*.

Conclusion on the Position Under the ECHR

It will be recalled that in *Banković* the European Court of Human Rights said that

The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States

What is clear from post-*Bankovic* cases like *Öcalan* and *Issa* is that, in tune with the notion that the Convention is a ‘living instrument,’ this idea of the original design of the Convention — whatever its truth in terms of the intentions of the drafters — has given way to the notion that the Convention does apply to the actions of Contracting States outside the territory of other Contracting States and on the basis of control exercised over either individuals or territory.

The English Divisional Court’s mistaken reading of *Banković* in relation to jurisdiction founded on the exercise of control over territory in the *Al-Skeini* case creates the strong possibility that its finding will not survive challenges in higher English courts and/or the European Court of Human

⁸⁵ Ibid, para. 265.

⁸⁶ In its invocation of *Banković* in its comments on the legal nature of the ‘effective control over territory’ test.

Rights. As things currently stand, the ‘legal space’ notion is of doubtful significance in operating as a limitation on the extraterritorial application of the ECHR, but it is clearly something that the present UK government will attempt to invoke in order to achieve this effect.

Beyond the ECHR

The *espace juridique* idea has only been put forward in the context of the ECHR, and has not been taken up by any other human rights treaty bodies such as the UN Human Rights Committee in its comments on the ICCPR. It might be argued, then, that even if the doctrine has some limiting effect, it is specific to the ECHR and is not of general application to human rights treaties, notably the ICCPR. So even if on ‘legal space’ grounds the ECHR does not apply to the UK’s exercise of jurisdiction in the territory of non-ECHR-contracting states (or does apply to such jurisdiction but only in the narrow circumstances outlined in *Al-Skeini*), the ICCPR is not limited in this way. Alternatively, the doctrine could be applied to other human rights treaties, but of course for those ‘universal’ treaties it would not have much of a limiting effect, since most states in the world fall within their ‘legal space.’ Significantly, Iraq is a party to the ICCPR.

International Human Rights Treaties — Overview

Given what has been said about the extraterritorial applicability of the ICCPR, CRC and ICESCR, what we can see, then, is that as a matter of these international human rights treaty law obligations, with the exception of the property right, the UK is obliged to secure all the rights that it has made part of English law through the Human Rights Act in any instance where it exercises control over either individuals or territory abroad, regardless of whether, in the case of UK Overseas Territories, an express extension of the relevant parts of the European Convention and its Protocols have been made, and regardless of whether or not the territory concerned is part of the territory of a state party to the ECHR.

Interpreting the Act

In the light of this picture in international treaty law generally, how should we understand the extraterritorial application of the Human Rights Act? One key principle of statutory interpretation is of course the

presumption mentioned earlier that, absent an express contrary provision, Parliament intended to legislate in conformity with the UK's international human rights obligations. Does this require that the rights under the Act apply extraterritorially in the same manner as they apply in international law?

It might be argued that compliance doesn't necessarily require this. A narrower framework of application — limited to UK territory, say, or limited according to the mistaken interpretation of the European Convention discussed earlier — would not go as far as international human rights law generally, specifically the regime under the ICCPR, but it wouldn't violate this broader framework. The key thing in terms of conformity to that broader framework would be whether the UK actually adhered to it when acting abroad. In other words, the UK is only obliged not to violate rights abroad; it isn't also obliged to enshrine such an obligation as a matter of its own domestic law.

The problem with this approach is that the UK is also obliged, in the words of the ICCPR, 'to take the necessary steps . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized' in the Covenant.⁸⁷ One aspect of this is ensuring a framework for adhering to its obligations in relation to these rights as a matter of internal practice. In other words, being bound to observe these rights as a matter of international law is not enough: the state must also take steps internally to ensure that the international obligation is followed. The most obvious way in which this happens is through the provision of a 'domestic remedy': domestic redress for individuals complaining of rights violations.

But does this have to be an English law remedy when it relates to acts committed abroad? Indeed, it might be more appropriate in terms of accessibility for a remedy process to be operated in the territory itself. However, for many UK extraterritorial actions the UK is granted sweeping privileges and immunities in the legal system of the country in which it operates, thereby preventing such a remedy in that legal system. Equally, the military court martial system that has led to convictions of UK soldiers for abuses in Iraq clearly falls short of a remedy as far as serving the interests of the victims are concerned, even if it does implement the UK's international obligations in terms of sanctioning those committing human rights abuses.

It is in this broader context that the English courts must understand the significance of applying the Human Rights Act extraterritorially — in failing to enable this either partially or fully, they risk further narrowing

the range of domestic remedies available, thereby contributing to a state of affairs constituting a breach of the UK's obligations in this regard. Adopting the presumption that Parliament did not intend to act inconsistently with the UK's international law obligations in the light of this broader context, then, it is necessary to interpret the Human Rights Act so as to apply extraterritorially in the same way as the equivalent areas of human rights law operate on the international level.

Conclusion

One main impetus for enacting the Human Rights Act was to end the situation where the UK government was subject to a broader set of human rights obligations in the civil and political sphere in international law than was the case under English law. Although the Act rectified this in large measure by taking most of the rights of the Convention and its Protocols and rendering them part of English law, the trend so far in the few cases on this issue is to conceive the extraterritorial applicability of these rights in a manner falling short of the position in international law. So although a particular right exists in both areas of law, its applicability is narrower in one than in the other, running counter to Parliament's intention to create greater harmony between the domestic and international position.

This is a key moment in the development of this area of law. As has been suggested, the flaws in the High Court's decision in the *Al-Skeini* case create the possibility that higher courts will rectify what is currently a mistaken view of the 'legal space' *dictum* in *Banković* and the scope of extraterritorial jurisdiction based on the exercise of control/power/authority over individuals. More fundamentally, what also needs to be revisited is the underlying assumption that an exclusively Convention-based approach should be followed.

Given the precise manner in which the HRA adopted most of the rights, but not the general obligation, of the Convention and its Protocols, the qualified manner in which the Act obliges the courts to look to Strasbourg jurisprudence in construing the Act, and Parliament's general intention to legislate in conformity with the UK's international obligations, the courts need to move beyond an exclusive focus on the Convention and its Protocols to the relevant areas of international human rights law generally in understanding the extraterritorial application of the Act.

⁸⁷ ICCPR, Art 2(2).