Revisiting the Bankovic v. Belgium precedent: A reassessment as to the scope of extraterritorial applicability of the ECHR in light of R (Al-Skeini) v. United Kingdom

Ray Barquero, Mr., University of Edinburgh
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International Law of Human Rights

By

Ray Barquero
BA, LLB, LLM
This essay revisits the question as to the extent that States are required to comply with their ECHR\(^1\) obligations in an extraterritorial context, as addressed in the *Bankovic* case\(^2\) before the European Court of Human Rights (ECtHR). Although *Bankovic* dates from 2001, this analysis has been developed against the backdrop of the more recent ECtHR judgment of *R (Al-Skeini) v. United Kingdom*\(^3\) from 2011. The *Al-Skeini* judgment sheds new light on the *Bankovic* decision and merits a reassessment as to the decision rendered by the ECtHR in *Bankovic*. This essay constitutes a comparative analysis between the two decisions, with a particular focus on the reasoning applied in the two cases, the methodology used by the Court and the applicability of the *Bankovic* criteria to the Court’s decision in *Al-Skeini*.

The question of extraterritorial application of a State’s human rights obligations is not unique to the ECHR or to the *Bankovic* or *Al-Skeini* case. There exists a host of different juridical institutions --both domestic and international-- which have confronted this same issue. They are all important in that they shed new light and provide the academic with new perspectives on when and how human rights obligations will transcend beyond national borders. For example, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,\(^4\) the International Court of Justice examined the scope of territorial jurisdiction of the ICCPR,\(^5\) concluding that the Covenant’s applicability could extend beyond a State’s territorial boundaries.\(^6\) In *Burgos/Lopez v Uruguay*,\(^7\) a case given rise to by allegations of Uruguayan authorities committing human rights abuses on an Uruguayan national residing in Argentina, the Human Rights Committee dealt with the same issue. There it was held that it would be “unconscionable to so interpret the [ICCPR] responsibility as to permit a State party to perpetrate violations

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\(^1\) Throughout this essay ECHR will be made reference to, which stands for the European Convention of Human Rights. Please not that unless otherwise stated, all article references are to this Convention

\(^2\) *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, App. No. 52207/99, Eur. Ct. H.R. (2001), available at 41 I.L.M. 517 (will be referred to as ‘Bankovic’)

\(^3\) *Al-Skeini et. Al. v. The United Kingdom*, App. No. 55721/07 Eur. Ct. H.R. 2011 (will be referred to as ‘Al-Skeini’)

\(^4\) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Rep. 136


\(^6\) Supra note 4, para. 108-109

\(^7\) Human Rights Committee, *Lopez Burgos v. Uruguay* (Communication No. 52/1979, final views 29 July 1981, UN Doc. CCPR/C/OP/1)
of the Covenant on the territory of another State, which violations it could not
perpetrate on its own territory”.

In *Montero v. Uruguay*, the Human Rights Committee found that the ICCPR imposed obligations both on the State of residence and on the State of nationality of an individual and that, therefore, the Covenant could not be interpreted as limiting the obligations of Uruguay to citizens within its own territory. In the Committee for Human Rights the issue has also been addressed, for example in General Comment No. 15 where the High Commissioner reasserted the ICCPR commitment to afford human rights to “*all individuals within its territory and subject to its jurisdiction*”. The reader can conclude from the foregoing that international authority and especially human rights jurisprudence tends to lean towards the recognition of the extraterritorial applicability of a State’s human rights obligations. The question as to the extent that this can be done and the criteria used for determining when it can be done, however, is a facet of human rights law in which there is still much uncertainty and in which many gaps continue to exist. These uncertainties are brought to surface in the *Bandkovic* case. Although the Court ultimately refused the admissibility of the case, the methodology used in the Court’s reasoning is worthy of an assessment. It sheds light on the legal complexities of allowing the trans-border extension of human rights duties and the difficulties of ascertaining under what circumstances that extension is permissible within the framework of the ECHR. As such, the *Bankovic* case will be turned to respectively.

The *Bankovic* decision derives from six citizens of the Federal Republic of Yugoslavia (FRY) who raised a claim before the ECtHR against seventeen ECHR State-parties for the latter’s role in a NATO bombing that occurred on April 23, 1999. The bombing took place in the FRY (i.e. outside of the territory of all seventeen State respondents) and resulted in the death of over fifteen people and over a dozen more that were injured. The claimants were either the victims of the bombing itself or the immediate relatives of other victims. Specifically, the claim was raised for alleged violations of Article 2 (Right to Life), Article 10 (Freedom of Expression) and Article 13 (Right to an Effective Remedy) of the ECHR. The Grand Chamber of the ECtHR,

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8 Ibid. para. 88
however, held the claim as inadmissible, claiming that the scope of Article 1 jurisdiction did not extend to acts that were committed by Convention State-parties for their actions in a foreign territory.

This case is of particular prominence in the overarching collection of ECHR case law because it addresses the question as to whether the scope of the Convention’s territorial jurisdiction extends beyond the territories of its member States. As stated above, the extraterritorial applicability of a State’s human rights obligations remains a point of contention in international law generally, and the Bankovic case brings the issue to light within the framework of the ECHR. In reaching its decision, the Grand Chamber failed to stretch their interpretation of Article 1 “jurisdiction” to the territory of a non-Contracting State party. However, the Court left open the possibility of attributing responsibility to ECHR States for acts that take place outside of their territory when certain conditions are met. The Court clarified:

“in keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention” 11

The Court recognized as an “exceptional circumstance” a case in which the State in question maintains a military occupation over the State in which the claim is given rise to. The Court held that an extraterritorial act could fall under article 1 jurisdiction where a State party

“exercises effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation”.12

This declaration is of particular importance for two reasons. Foremost it establishes military occupation as an ‘exceptional circumstance’ by which the Court explicitly recognizes that an ECHR State can be liable for acts abroad. In addition, however, it

11 Supra note 2, Judgment, para. 67
12 Ibid. para. 71
uses “effective control” as a threshold criterion to impute responsibility to States for Conventional violations, whereby any responsibility resulting from an extraterritorial breach of the Convention would need to emanate from a situation in which that State maintain effective control over that foreign territory. This “effective control” test was an important development in human rights law.

It should be noted, however, that the 

Bankovic decision is not the first case to apply the effective control test.\textsuperscript{13} In \textit{Issa et. al. v. Turkey},\textsuperscript{14} for example, the question of \textit{espace juridique} was dealt with. There, the ECt.HR held that State responsibility for violations of human rights obligations imposed upon a State’s “jurisdiction” could derive from that State maintaining “effective control of an area outside its territory”.\textsuperscript{15} In its General Comment No. 31, the UN Human Rights Committee reaffirmed the application of the “effective control” test in construing Article 2 paragraph 1 of the ICCPR as meaning that “a party must respect and ensure the rights laid down in the Covenant to anyone within the power of effective control of that State party, even if not situated within the territory of the State party”.\textsuperscript{16} The Court had also previously addressed this issue in \textit{Cyprus v Turkey},\textsuperscript{17} holding that in such extraterritorial situations, imputing responsibility to a State that was not engaged in such effective control 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 fundamental safeguards”.\textsuperscript{18} Perhaps of most prominence, however, is the case of \textit{Loizidou v Turkey},\textsuperscript{19} where the Court expressly asserted a State could have article 1 jurisdiction for acts that occurred outside of its territory if it exercised “effective control” over that territory. The substantial body of case law available to this effect makes evident that the Courts, despite apparent caution in extending the scope of the Convention’s territorial jurisdiction beyond the boundaries of the contracting parties, will nevertheless deviate from this position-- albeit subject

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\textsuperscript{13} See, in general \textit{Djavit An v Turkey}, ECHR RJD 2003-III, 231, 240-242; \textit{Ilascu and Others v. Moldova and Russia (GC)}, ECHR RJD 2004-VII, 179, 263; etc.
\textsuperscript{14} \textit{Issa et. al. v. Turkey} (2004) 41 EHRR 567. Not reported in the ECHR RJD.
\textsuperscript{15} Ibid. para. 69
\textsuperscript{16} UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 10, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004)
\textsuperscript{17} \textit{Cyprus v Turkey} (GC), ECHR RJD 2001-IV, 1
\textsuperscript{18} Ibid. para. 25
\textsuperscript{19} \textit{Loizidou v Turkey} (Preliminary Objections) (GC), ECHR (1995) Series A, No. 310, 24; \textit{Loizidou v Turkey} (Merits) (GC), ECHR RJD 1996-VI, 2216, 2234-2235
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to the constraints of a recognized exceptional circumstance, and even then only in applying the relevant test. This is particularly demonstrated in the more recent ECHR case of *Al-Skeini*.

In *Al-Skeini*, a Strasbourg claim was raised against the United Kingdom by six Iraqi citizens for the alleged failure of the UK to conduct proper investigations into the deaths of the claimant’s relatives. The lead applicant was Al-Skeini, the brother of one of the casualties who claimed that a British serviceman shot and killed multiple civilians while on patrol in Iraq. The claim was centered on the allegation that the UK’s investigation of the killing was not “sufficiently adequate” in terms of the procedural obligations arising out of article 2 of the Convention. The central question before Strasbourg was whether the Convention’s reach could encompass the actions of a UK soldier in Iraq, thus bringing the Claimant’s action within the scope of the Convention’s jurisdiction. Although the House of Lords already issued a decree in the negative on this very same issue, the Strasbourg court held that the Convention was applicable and that the UK was in breach of their ECHR obligation. Specifically, the Court held the UK was in violation “because the narrow focus of the criminal proceedings against the accused soldiers was inadequate to satisfy the requirements of Article 2 in the particular circumstances of this case”.

The European Court’s judgment marked a departure from the previous House of Lords decision on the same case. There, the House of Lords held that the Convention would not extend to the action of British soldiers occurring on the territory of non-contracting parties, therefore effectively failing to bring the applicant’s claim into the jurisdiction of the United Kingdom.

The *Al-Skeini* case is important because the Court revisited the criteria used for assessing when a State is obliged to extend their ECHR duties extraterritorially, as done in *Bankovic*. The first step in the ECtHR’s approach was to reassert that establishing UK jurisdiction over the incident would be a precondition to any liability

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20 Note that in *Bankovic* the Court entertained other “exceptional circumstances” in which the jurisdiction of the Convention could potentially be applied extraterritorially noting, inter alia, *de jure* jurisdiction, special jurisdiction, military occupation, etc. However, for the purpose of this essay we are only concerned with military occupation.


22 Supra note 3, Judgment, para. 174

23 Supra note 21
that might arise. Like in the Bankovic case, the Court reiterated that the term “jurisdiction” is primarily territorial in nature. Furthermore, in keeping in line with Bankovic precedent, the Court maintained that the Al-Skeini case would depend foremost on whether any of the exceptional circumstances laid out in Bankovic could be established. Although admitting that there was no blanket rule for when to accept extraterritorial jurisdiction for the ECHR and that the facts of each individual case would ultimately turn on themselves, the Court in Al-Skeini did adhere to the ‘exceptional circumstances’ precedent in Bankovic. In that case, the relevant condition was held to be a military presence of the potentially respondent State in the occupied territory where the claim would eventually derive from. After having established that military occupation was a pre-requisite (given the circumstances of this particular case) for proceeding upon the claim, the Court turned to the question of effective control. As to whether the UK maintained the requisite effective military control over the territory in question, the Court held: “as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that 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”.24 The Court continued:

“In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention”.25

This is a landmark case in itself in that it overturns a previous House of Lords decision. However, it is also just as important because of the admissibility and the decision to reward an extraterritorial ECHR claim for a violation that took place outside the territory of an ECHR contracting party. The European Court established that there was a jurisdictional link between the acts that took place in Iraq and the ECHR obligations owed by the United Kingdom. In doing so the Court kept in line

24 Supra note 3, para. 122
25 Ibid. para. 149
with previous case law and particularly the *Bankovic* case by foremost establishing that there was a military occupation of a foreign territory and subsequently evaluating the degree of authority and control exercised over that territory resulting from that occupation. In *Bankovic*, the Chamber could not establish that jurisdictional link based on the effective control test. However, as has been mentioned above, despite the outcome of its judgment the Court in *Bankovic* did in fact assert the application of the ‘authority and control’ test. The Court maintained throughout its reasoning that there were in fact circumstances where ECHR state parties were bound by the Convention outside of their own territory. The Chamber construed a proper meaning of the article 1 “jurisdiction” to be that a Contracting State must secure the rights and freedoms to persons within or subject to their actual power.\(^\text{26}\) *Al-Skeini* is a perfect example of the application of that test. The methodology used by the Chamber reflects the reasoning used in *Bankovic* and the Court addresses the ‘exceptional circumstances’ elaborated on in the latter. The *Al-Skeini* decision is an important contribution to European human rights law and has emerged as a product of the “exceptional circumstance” analysis adopted by the Court in the *Bankovic* decision. Alas, it serves to clarify past questions as to the circumstances in which the Court will allow the extraterritorial applicability of ECHR obligations and establishes a precedent for future European human rights cases to follow.

\(^{26}\) Supra note 3, para. 46-53