Human Rights Imperialists

The Extraterritorial Application of the European Convention on Human Rights

Conall Mallory

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OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

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First published in Great Britain 2020

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Mallory, Conall, author.

Title: Human rights imperialists : the extraterritorial application of the European Convention on Human Rights / Conall Mallory.

Description: Oxford ; New York : Hart, 2020. | Based on author thesis (doctoral – Northumbria University, 2014) issued under title: Exporting rights : extraterritorial obligations in the European Convention on Human Rights after the Iraq conflict (2003). | Includes bibliographical references and index.

Identifiers: LCCN 2019052585 (print) | LCCN 2019052586 (ebook) | ISBN 9781509914739 (hardback) | ISBN 9781509914753 (Epub)

Subjects: LCSH: European Court of Human Rights. | Convention for the Protection of Human Rights and Fundamental Freedoms (1950 November 5) | Exterritoriality. | International criminal law—Europe. | International and municipal law—Europe.

Classification: LCC KJC5138 .M35 2020 (print) | LCC KJC5138 (ebook) | DDC 341.4/8094—dc23

LC record available at https://lccn.loc.gov/2019052585

LC ebook record available at https://lccn.loc.gov/2019052586

ISBN: HB: 978-1-50991-473-9
ePDF: 978-1-50991-474-6
ePub: 978-1-50991-475-3

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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Introduction

On the evening of 20 November 2003, a mother and father were preparing dinner in their apartment at the Institute of Education in Basra. The father, Hameed, was an unpaid night porter at the facility and he lived there with his wife Hannan and their young children. The parents prepared the meal in the kitchen before sitting down at the dinner table at around 8 pm. Within seconds, the room was lit up as bullets entered through a window, striking one of the children in the arm and Hannan in both her head and ankles. She was rushed to hospital, but was pronounced dead on arrival. She was an unintended victim of a gunfight that had broken out on the campus between members of the British 1st Battalion The King's Regiment and a number of gunmen. It was unclear who had fired the lethal shots that killed her. When the colonel with responsibility for the regiment reviewed the statements of the soldiers involved and the brief report into the incident, he duly concluded that it had fallen within the rules of engagement and required no further investigation. This was confirmed by the Brigadier in charge of the unit and the case was closed.[1]

What then for Hameed and his children? Was this brief response all that they would receive to explain why they had lost a wife and mother? The invasion had long since ended and this was now an Iraq under occupation; surely some effort should have been taken to safeguard civilians before engaging in such a gun battle.[2] If not, then why not, and who could give them these answers? Could an investigation that remained entirely within the military chain of command, overseen solely by the commanding officers of the soldiers alleged to be responsible, really be sufficient? The answers to these questions lay a continent away in the courtrooms of Europe and through the application of the European Convention on Human Rights (hereinafter ECHR or 'the Convention').[3] The Article 2 right to life includes a procedural obligation that requires an effective and independent official investigation when individuals are killed in the course of the use of force by state agents.[4] This would not only give Hameed and his children

[1] Hameed Shmailawi was the third applicant in the case of *Al-Skeini v UK* (2011) 53 EHRR 18 [43]–[46].

[2] ibid [170]. The Iraq invasion commenced on 20 March 2003. Major combat operations concluded on 1 May 2003. Thereafter the occupation of Iraq lasted until 28 June 2004.

[3] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR).

[4] See generally: *McCann v UK* (1996) 21 EHRR 97 [161]; *Isayeva v Russia* (2005) 41 EHRR 38 [209]. See also Hannah Russell, *The Use of Force and Article 2 of the ECHR in Light of European Conflicts* (Hart Publishing, 2017) 121–55; Noëlle Quénivet, 'The Obligation to Investigate after a Potential Breach of Article 2 ECHR in an Extra-territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) *Netherlands Quarterly of Human Rights* 119.

the answers they desired, but potentially compensation for the distress they had suffered in waiting for them. Yet there was a problem. Had Hannan been shot on the streets of Belfast, Glasgow, London or anywhere else within the UK, this obligation would have arisen automatically, but because her death had occurred in Iraq, Hameed's representatives would first have to demonstrate that the Convention's obligations had applied to British forces operating there.

This pursuit therefore turned on a phrase adopted 3,000 miles from Basra and over 50 years earlier by the drafters of the ECHR. That expression, 'within their jurisdiction', indicates the geographical scope of the Convention's application.[5] If an individual is within the jurisdiction of a Contracting Party to the treaty, then no matter where in the world they are, its rights apply to them. If Hameed were unable to demonstrate that his wife had been within British jurisdiction at the time of her death, then there would be no corresponding obligation on the British state to fulfil these rights. Establishing the exercise of jurisdiction was therefore key, for it determined, to quote Lady Hale, not whether Hameed and his family were 'entitled to our sympathy and our respect but whether they are entitled to a remedy before the courts'.[6]

This book is directly concerned with this phrase 'within their jurisdiction' in Article 1 ECHR: how it has developed, how it is defined now and whether that understanding is appropriate. In particular, I am concerned with the instances when a state exercises jurisdiction outside of its territorial borders. A considerable amount has been written on this topic, the extraterritorial application of human rights, in recent years. Much of this literature has focused on the intersection between threshold provisions like Article 1 and the principle of universality as a foundation upon which the international human rights regime is constructed. While I will also address these two issues, the central focus of my study lies elsewhere, with the parties who generate meaning through their interpretations. If, as some have argued, it is imperialistic to apply human rights obligations extraterritorially, my attention lies with the human rights imperialists who have, over the course of the Convention's 70-year history, construed its obligations to apply abroad.[7] To quote Bianchi, my concern lies with: 'Who sets the destination and why and how one gets there.'[8]

My argument is that rather than solely concerning ourselves with how Article 1 can be read through a preoccupation with the text, or how it should be read through a fixation on the principle of universality, the first concern should be how it has been read. If we understand what motivates, constrains

[5] European Convention on Human Rights 1950, art 1.

[6] *R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2007] UKHL 26 [92] (Baroness Hale).

[7] Paul Arnell suggests the extraterritorial application of human rights could be 'perceived as a form of neo-imperialism'; Paul Arnell, 'Human Rights Abroad' (2007) 16(2) *Nottingham Law Journal* 1, 17–18. See also *R (Al-Skeini and Others)* (HL) (n 6) [78] (Lord Rodger), [129] (Lord Brown).

[8] Andrea Bianchi, *International Law Theories* (Oxford University Press, 2016) 6.

and compels those who primarily deal with the interpretation and application of the treaty, we can follow this with considerations of textual applicability and thereafter fill the hollow provision with normative content that may be acceptable to all those with the primary role of engaging with the Convention. In doing so, we may find a more lasting solution to the very real practical and normative concerns that the extraterritorial question poses. In this section I will introduce these concerns, before reflecting on how the Strasbourg judicial organs of the European Court of Human Rights (ECtHR) and previously the European Commission on Human Rights (hereinafter Strasbourg Organs) have responded to them, and then outlining in more detail what my argument is and how it will be advanced.

I. THE EXTRATERRITORIAL QUESTION

Despite enjoying a relatively low-key position in the Convention's early decades, the question of the extraterritorial application of the treaty has grown in significance since the 1990s as the Strasbourg Organs have increasingly been called upon to delineate the boundaries of where a state's obligations under the ECHR will apply. This increase can be attributed to a number of different factors. The accession to the Convention of a host of Eastern states with fractious relationships with their neighbours,[9] an active practitioner base ready to utilise the Convention to remedy grievances[10] and a period of increasing interventionism by Western states, both for humanitarian purposes and under the banner of the 'war on terror', have all contributed to growing litigation in this area.[11] This last factor is of particular importance with focus in recent years drawn to the extraordinary rendition of terrorist suspects[12] and the invasion and occupation of other states.[13]

These examples may suggest that the extraterritorial question is only relevant to the use of military force by Contracting Parties and yet, despite the military prevalence in the ECtHR's recent jurisprudence, it is only one part of

[9] eg, *Chigarov v Armenia* (2016) 63 EHRR 9; *Georgia v Russia (II)* (2012) 54 EHRR SE10; *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46.

[10] A significant number of cases in recent years were brought by the now disbanded Birmingham-based law firm Public Interest Lawyers.

[11] NATO interventions in former Yugoslav territories: *Banković and Others v Belgium and Others* (2007) 44 EHRR SE5; *Behrami v France* (2007) 45 EHRR SE10. Cases emerging from the Iraq conflict are considered in depth in chs 6 and 7. See also Rick Lawson, 'Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia, 2004) 84; Tarek Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights' (2004) 14(2) *Journal of Transnational Law and Policy* 159, 159; Julian Samiloff, 'Violations Abroad' (2007) 157 *NLJ* 1021, 1021.

[12] *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25.

[13] *Al-Skeini* (ECtHR) (n 1); and *Al-Jedda v UK* (2011) 53 EHRR 23.

a much wider issue. In effect, the extraterritorial question has the potential to concern any state action beyond its territorial borders. It is equally important in respect of a state's conduct during maritime operations,[14] detentions at international tribunals[15] and the treatment of employees.[16] Similarly, it gives rise to ambiguities around the relationship between the citizen and the state in a world of weakening borders and increasing migration.[17] Thus, it can have implications for the decision-making of both diplomatic and consular officials.[18] Future concerns will no doubt emerge relating to a changing climate, an increase in data sharing, and joint police operations.

In the military sector, the questions are indeed multiplying and becoming ever more complex. While the decades-long wrangling over whether human rights laws apply during armed conflict appears to be drawing to a close, some issues remain unanswered.[19] There are disputes around the application of human rights obligations to soldiers and other military operatives,[20] and the isolated use of force by the agent of one state on the territory of another.[21] Increased convergence between human rights and humanitarian law often takes place extraterritorially, giving rise to issues relating to prisoner handling and during periods of occupation.[22] More significant is how the subject will develop in line with technological advances, with the evolution of autonomous weaponry and increases in artificial intelligence posing new challenges.

Both within and outside of military affairs, the rise in recognition of the extraterritorial application of human rights laws has also opened new pathways for litigation. Actions brought under the ECHR and the Human Rights

[14] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21; *Medvedyev and Others v France* (2010) 51 EHRR 39.

[15] *Djokaba Lambi Longa v The Netherlands* (2013) 56 EHRR SE1.

[16] *R (K and Others) v Secretary of State for Defence and Another v Secretary of State for Defence* [2016] EWCA Civ 1149 (CA).

[17] *R (El-Gizouli) v Secretary of State for the Home Department* [2019] EWHC 60 (Admin).

[18] *R (on the Application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 (SC).

[19] See generally Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (Cambridge University Press, 2019); Iain Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2009) 14 *Journal of Conflict and Security Law* 449; Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011); Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *War, Conflict and Human Rights: Theory and Practice* (Routledge, 2014).

[20] *Smith v Ministry of Defence* [2013] UKSC 41. This was the second of two cases titled Smith that specifically concerned the application of Convention obligations to soldiers. For this reason, it is referred to as *Smith* (2), with the earlier litigation culminating in *R (on the Application of Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 referred to as *Smith* (1); *R (on the Application of Long) v Secretary of State for Defence* [2015] EWCA Civ 770.

[21] Take, for instance, the poisoning of former Spy Yuri Skirpal by Russian agents; BBC, 'Russian Spy: What Happened to Sergei and Yulia Skripal?' (27 September 2018), https://www.bbc.co.uk/news/uk-43643025.

[22] *Al-Skeini* (ECtHR) (n 1).

Act 1998 (HRA) cut through justiciability barriers that could otherwise block their litigation under other aspects of domestic law.[23] This has meant that events taking place both on the battlefield and in other areas of foreign policy are now potentially subject to review in a way that could not previously have been countenanced.[24]

The extraterritorial question's practical importance is also directly connected to its relevance in relation to a state's responsibility for an internationally wrongful act, although the two should not be confused as the same thing. In order for a state to be responsible, there must both be an obligation and conduct that is attributable to it.[25] The extraterritorial question squarely addresses whether an obligation exists. For the ECHR, if a states exercises jurisdiction in accordance with Article 1, then an obligation arises.[26] The question of attribution is separate and relates instead to whether a state can be held responsible for a particular individual's action; so, for instance, it could distinguish between the actions of state agents from those of private individuals or where such measures are undertaken on behalf of an international organisation. While the ECtHR has a developing body of jurisprudence on both attribution and state responsibility that connects to the application of the Convention, I do not seek to engage with these issues directly.[27]

In sum, the issue of Article 1 jurisdiction stands out as having considerable practical importance for the 47 Contracting Parties to the ECHR and yet the issue, its interpretation and application, tells us an enormous amount more about the Convention system than merely where its rights apply. Litigation concerning jurisdiction under Article 1 has uncovered significant challenges in the normative foundations of the entire enterprise. The topic is what Waldron refers to as an 'archetype'. He explains:

> The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but that also operates in a way that expresses or epitomizes

[23] Baroness Hale famously noted in *Gentle*: 'As I understand it, it is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate it must.' See *R (on the Application of Gentle and Another) v Prime Minister and Others* [2008] 1 AC 1356 [60]. See also Virginia Mantouvalou, 'Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality' (2005) 9(2) *International Journal of Human Rights* 147.

[24] See Lord Mance, 'Justiciability' (2018) 67(4) *ICLQ* 739.

[25] International Law Commission, *Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries* (2001) Official Records of the General Assembly, Fifty-sixth Session, Supp No 10, UN Doc A/56/10, art 2.

[26] *Ilaşcu and Others v Moldova and Russia* (n 9).

[27] See elsewhere Jane Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v Netherlands*' (2015) 62(3) *Netherlands International Law Review* 407; Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v Netherlands*: Old Problem, New Solutions' (2014) 53 *Military Law & the Law of War Review* 287.

> the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise.[28]

The extraterritorial question is an archetype in the ECHR system as it has 'a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law'.[29] It peels back layers of lofty rhetoric and commitments towards universal human rights protection, forcing those engaged in the system to identify the limits of where the legal obligations of human rights apply and, in turn, who they apply to. This then gives a distinct platform to the debate on universality and the justifiable qualifications that can be made to this founding principle of human rights law. If human rights are 'understood to be the rights that one has simply because one is human', then all humans should benefit from them without distinction.[30] Conversely, the extraterritorial question forces us to recognise that there are limits to which a state can be obligated to ensure an individual's rights. As Sedley LJ put it in a pivotal case concerning the extraterritorial question at the UK Court of Appeal, this is where universalist arguments meet 'an increasingly steep terrain of practical reality'.[31]

The position of universality in the human rights movement has experienced challenges before, but of a different nature. The relationship between a truly universal recognition of human rights, and a respect for cultural sympathies, practices and beliefs, continues to be heavily debated.[32] This is particularly the case in societies where discriminatory practices towards homosexuality, gender equality and recognition, and religious tolerance, are commonplace. The extraterritorial question introduces another angle to this debate. Whereas the cultural relativist argument would largely accept in the absence of a valid reservation that human rights obligations prima facie apply, with the scope of those obligations being qualified by cultural concerns, the extraterritorial question challenges the notion of universality based on location, proximity and a relationship with the state, in order to query whether any obligation ever existed in the first place.[33]

[28] Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford University Press, 2012) 228. On the absolute prohibition against torture as an archetype, see Natasa Mavronicala, 'Torture and Othering' in Benjamin Goold and Liora Lazarus (eds), *Security and Human Rights*, 2nd edn (Hart Publishing, 2019) 28–29.

[29] Waldron (n 28) 228.

[30] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, 282–83.

[31] *R (on the Application of Al-Skeini and Others) v Secretary of State for Defence* [2006] 3 WLR 508 (CA) [189] (Sedley LJ).

[32] See generally Marie-Benedicte Dembour, 'Critiques' in Daniel Moecklie, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2014) 62–64; Michael Rosenfield, 'Universal Rights and Cultural Pluralism: Comment: Human Rights, Nationalism, and Multiculturalism in Rhetoric, Ethics and Politics: A Pluralist Critique' (2000) 21 *Cardozo Law Review* 1225.

[33] Regner considers that because of conceptual universality, a distinct approach should be taken to the interpretation of the scope in application of human rights treaties: 'Human rights are inherent, that means they are not deprivable and cannot be renounced, even not by states. The concept

In a seminal piece of work, Milanovic reflected on the issue as being one of a tension between universality and effectiveness in the application of human rights obligations.[34] De Londras and Dzehtsiarou take a similar approach, identifying that the area has given rise to a difficulty in refining the 'general *normative* principle into a workable set of *legal rules* about the applicability of a certain set of human rights standards'.[35] Taking a slightly different angle, Shany has framed this as a debate between universality and particularism.[36] Elsewhere Besson has referred to the issue of jurisdiction as both a normative threshold and a practical condition.[37] While not precisely the same, the questions that emerge across these conceptions revolve around the extent to which it is reasonable for a state to fulfil extraterritorial obligations and the extent to which an international system of monitoring and implementing these obligations is possible. In essence, they are asking at what point the principle of universality is deactivated and superseded by practical realities.

This is a challenging discussion and, as an archetype, the responses demonstrate 'the spirit that animates the whole area of law'.[38] Increased globalisation, greater awareness of remedies and a stronger institutional commitment to human rights has resulted in the extraterritorial question rupturing through in a series of domestic and international arrangements and so it is by no means unique to the Convention.[39] Yet in no system is this issue brought to life more vividly than the ECHR.[40] This is in part linked to the success of the European human rights project. The Convention has been described as 'the crown jewel of the world's most advanced international system for protecting civil and political liberties',[41] 'perhaps the most successful emanation of international justice so far',[42] 'a model for a truly effective international system of human

of jurisdiction, therefore, must be construed as a human rights concept.' See Angelika Regner, 'Extraterritorial Application of Human Rights Treaties' (2006) Seminar at Institute for Human Rights Åbo Akademie, 17.

[34] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011) 54–118.

[35] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Palgrave Macmillan, 2018) 124.

[36] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Laws' (2013) 7 *Law and Ethics of Human Rights* 47, 49.

[37] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) *Leiden Journal of International Law* 857, 862–63.

[38] Waldron (n 28) 227.

[39] See ch 1, pp 28–30.

[40] Other treaties are considered briefly in ch 1. For a more detailed discussion, see generally Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Brill/Martinus Nijhoff, 2013) 302; Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties* (Intersentia, 2009); Milanovic (n 34).

[41] Laurence Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19(1) *European Journal of International Law* 125, 159.

[42] Luzius Wildhaber, 'European Court of Human Rights' (2002) 40 *Canadian Yearbook of International Law* 309, 321.

rights protection'[43] and 'the most highly developed instrument in the world'.[44] It is also because of the frequency with which the extraterritorial question has received consideration by the Strasbourg Organs. De Schutter has observed that the Strasbourg Court is 'a laboratory for the understanding of the evolving notion of "jurisdiction" in the era of globalization'.[45] Milanovic refers to the ECHR as containing 'the prototype jurisdiction clause'.[46] Miltner sees the ECtHR's interpretation as being so important that it contributes 'to the sense that *any* judgment on the issue would be closely watched'.[47]

II. THE STRASBOURG APPROACH

While the Strasbourg Organs have been the most active international or regional institution to address the extraterritorial question, they have not been lauded for their approach to the issue. Instead, the Strasbourg method for engaging with the extraterritorial question has generated criticism from a range of stakeholders. There has been broad condemnation from academics with the 'contentious issue' referred to as a 'saga' by Ziegler, Wicks and Hodson.[48] De Londras and Dzehtsiarou describe the ECtHR's approach as both 'idiosyncratic and seemingly doctrinally incoherent'.[49] Commentators have particularly criticised the Court for failing to follow a clear line of principle.[50] Arnell contends that 'overall this body of authority is less than clear and consistent'.[51] Bamforth is more forthright, describing the Court's approach as 'inconsistent',[52] while Schaefer labels the parameters of the Convention's application as 'elusive'.[53] Wilde has referred to it as being 'as highly contested as it is underdeveloped'.[54] Raible goes

[43] ibid 321.

[44] Donat Pharand, 'Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint' (1994) 20 *Canada-United States Law Journal* 19, 33. See also Barbara Miltner, 'Revisiting Extraterritoriality after *Al-Skeini*: The ECHR and its Lessons' (2012) 33(4) *Michigan Journal of International Law* 692, 694.

[45] Olivier de Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Journal of International Law* 185, 193.

[46] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8(3) *Human Rights Law Review* 411, 413.

[47] Miltner (n 44) 694.

[48] Katja Ziegler, Elizabeth Wicks and Loveday Hodson, 'The UK and European Human Rights: A Strained Relationship?' in Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing, 2015) 10.

[49] De Londras and Dzehtsiarou (n 35) 129.

[50] Francoise Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 *International Review of the Red Cross* 551, 571.

[51] Arnell (n 7) 4.

[52] Nicholas Bamforth, 'The Methodology and Extra-Territorial Application of the Human Rights Act 1998' (2008) 124 *Law Quarterly Review* 355, 356. Compare Besson (n 37) 859.

[53] Max Schaefer, '*Al-Skeini* and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 5 *European Human Rights Law Review* 566, 576.

[54] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 *Israel Law Review* 503, 526.

further to note that every new judgment of the ECtHR 'seems to either add another layer of confusion or line of case-law different from the rest',[55] while Miltner suggests the Court practice has been to recognise extraterritorial jurisdiction 'on an ad hoc basis'.[56] Wallace refers to the jurisprudence on Article 1 as being 'in a lamentable state', with 'glaring inconsistencies'[57] and problems that 'are largely of the Court's own making'.[58]

Judicial opinion has been equally scathing. British judges have attempted to piece together the Strasbourg approach in recent decades in domestic decisions involving the HRA. Referring to Article 1, Lord Dyson reflected on how such a 'small number of apparently simple words has proved to be remarkably troublesome' for the ECtHR.[59] Sedley LJ condemned the lack of consistency stating that: 'The decisions of the European Court of Human Rights do not speak with a single voice.'[60] Lord Rodger further lamented that:

> If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality, however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European court.[61]

Lloyd Jones LJ would describe the Court's approach as being one of 'competing interpretations',[62] so much so that Lord Mance would describe the jurisprudence surrounding the issue as 'vexed'.[63] Lord Collins has stated that the entire issue has been 'treated in a very superficial way by Strasbourg'.[64] Lord Philips went as far as to describe the ECtHR as having an 'elastic jurisdiction'.[65] For Lord Wilson, the decisions of the ECtHR involving extraterritorial jurisdiction are 'extreme', 'extravagant' and 'stick in the throat'.[66] Laws LJ pinpoints the difficulty with the jurisprudence as being that it 'has no sharp edge; it has to be ascertained from a combination of key ideas which are strategic rather

[55] Lea Raible, 'The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game Changers' (2016) 2 *European Human Rights Law Review* 161, 161.

[56] Miltner (n 44) 694.

[57] Wallace (n 19) 42.

[58] ibid 72.

[59] Lord Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?' (20 January 2014), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf, 1.

[60] *Al-Skeini* (CA) (n 31) [192].

[61] *Al-Skeini* (HL) (n 6) [67].

[62] *R (Al-Saadoon and Others v Secretary of State for Defence)* [2016] EWCA Civ 811 [28] (CA) (hereinafter *Al-Saadoon* (2)) (Lloyd Jones LJ).

[63] *Smith* (2) (n 20) [164] (SC).

[64] Interview with the Lord Collins, in Hélène Tyrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart Publishing, 2018) 175.

[65] Lord Phillips, 'The Elastic Jurisdiction of the European Convention on Human Rights' (12 February 2014), https://www.oxcis.ac.uk/sites/www.oxcis.ac.uk/files/inline-files/The_Elastic_Jurisdiction_of_the_ECHR_2012.02.14_Oxford.pdf.

[66] Lord Wilson, 'Our Human Rights: A Joint Effort?' (Northwestern University, Chicago, 25 September 2018), https://www.supremecourt.uk/docs/speech-180925.pdf, 8.

than lexical'.[67] Despite extensive litigation in the courts of England and Wales, it is an area that 'remains controversial'.[68]

This dissatisfaction with the Strasbourg approach has also been articulated by some of the ECtHR justices. In a colourful separate opinion that I will return to, the former Maltese Judge Giovanni Bonello stated that the Court's approach had 'been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'.[69] He went on to note that: 'Principles settled in one judgment may appear more or less justifiable in themselves, but they then betray an awkward fit when measured against principles established in another.'[70] The result was that the Court's approach 'enshrined everything and the opposite of everything'.[71] This led to a body of jurisprudence that was 'at best, barely compatible and at worst blatantly contradictory'.[72] Summarising the Court's approach, Bonello said:

> Up until now, the Court has, in matters concerning the extra-territorial jurisdiction of contracting parties, spawned a number of 'leading' judgments based on a need-to-decide basis, patchwork case law at best.[73]

More recently, Romanian Judge Iulia Motuc presented a more diplomatic appraisal, describing the extraterritorial question as 'one of the most problematic' aspects to the Convention's interpretation and acknowledging that 'there are several contradictions in the manner in which the Court has interpreted it'.[74] In sum, while the judges in the ECHR system have repeatedly attempted to provide an answer to the extraterritorial question, they have not yet provided a coherent response free from a considerable amount of stakeholder dissatisfaction.

III. THE CLAIMS OF THE BOOK

With this consternation in mind, I seek to explain the responses given to the extraterritorial question by the Strasbourg Organs and therefore provide a method to their madness. Yet my concern does not cease with the judges in Strasbourg, but extends to the responses given to the extraterritorial question by the other parties with the primary responsibility for interpreting and applying the Convention. I therefore consider the approaches of the Contracting Parties

[67] *R (on the Application of Faisal Attiyah Nassar Al-Saadoon, Khalaf Hussain Mufdhi) v Secretary of State for Defence* [2009] EWCA Civ 7 (hereinafter *Al-Saadoon* (1)) [37].
[68] *R (Al-Saadoon and Others v Secretary of State for Defence)* [2015] EWHC 715 (Admin) [21] (Leggatt J).
[69] *Al-Skeini* (n 1) Concurring Opinion Judge Bonello [O-114].
[70] ibid [O-115] (Bonello).
[71] ibid [O-117] (Bonello).
[72] ibid [O-120] (Bonello).
[73] ibid [O-115] (Bonello).
[74] *Jaloud v The Netherlands* (2015) 60 EHRR 29 [2] (Motuc).

to the Convention and national courts.[75] For these latter groups, I give considerable attention to the actions of the UK and focus solely on the higher echelons of British courts.

The reasons for selecting this British angle are manifold. First, alongside Turkey, the UK has been at the centre of more litigation concerning Article 1 than any other Contracting Party to the ECHR. Given the generally high compliance rate of British authorities with both the Convention and ECtHR rulings, the extraterritorial question has emerged as a considerable practical challenge to their operations abroad. A second reason related to this is that focus on British actions provides a detailed account of how a state has engaged with the challenges posed by the extraterritorial question, both in their actions and in their arguments before courts. This has been particularly the case in respect of the British participation in the invasion of Iraq in 2003 and its aftermath. From this, the third reason is because of the sheer weight of jurisprudence to emerge from this conflict and its importance to the present understanding of Article 1 jurisdiction. British courts in particular have been heavily active in adjudicating the 'mountain' of cases involving human rights violations arising out of the Iraq conflict,[76] in a period which Simpson describes as 'juridical hyperactivity'.[77] Litigation, it is said, is 'one of the legacies of the Iraq war'.[78] The nature of their judgments, provided in individual speeches and often including a vigorous engagement with the practical, political and theoretical challenges in the area, have provided a significant contribution to the understanding of Article 1.

My aim is to identify the approaches taken by these three groups – the Strasbourg Organs, Contracting Parties and domestic British courts – towards the extraterritorial question and to use them as a basis from which to propose a more coherent and lasting solution. I advance three arguments in respect of this, the first of which is that the Convention's application clause in Article 1 is substantively indeterminate. As noted above, the text of this crucial provision states that Contracting Parties are obligated to secure the rights and freedoms within the treaty to everyone 'within their jurisdiction'.[79] I contend that this phrasing, and specifically the use of the word 'jurisdiction', fails to identify the scope of the application of the treaty's obligations, leaving the Convention's primary interpreters with the task of not merely applying the law, but also creating it.

From this, my second contention is that we can understand how the meaning of the word 'jurisdiction' has been created through engagement with Stanley Fish's theory on interpretive communities. Fish's model explains how diverse groups of individuals can come together in a form of interpretive agreement in a

[75] On the approach of other national courts, see Lawson (n 11) 116–18.

[76] Gerry Simpson, 'The Death of Baha Mousa' (2007) 8 *Melbourne Journal of International Law* 340, 341–42.

[77] ibid 346.

[78] *(R) Al-Saadoon and Others* (HC) (n 68) [1] (Leggatt J).

[79] European Convention on Human Rights 1950, art 1.

way that constrains radical indeterminacy. To Fish, these communities are constituted not by who is in the group or what text they are interpreting, but an agreed conception of their 'purposive enterprise', their motivation or objective, which, in turn, results in a 'common understanding of what constitutes valid practice' in interpretation.[80] While this does not necessarily mean that interpreters will automatically agree on how a norm or rule is to be understood, the collective goal they are striving towards informs a common practice, which means that there is a consensus towards how interpretation can be pursued. Thus, it draws a clear connection between what interpreters are doing (their 'interpretive practices') and why they are doing it (their 'purposive enterprise'). I argue that the three primary interpreters of Article 1 ECHR can be understood as interpretive communities. Using this theory, I advance an argument for the purposive enterprise of each of these interpretive communities and then demonstrate this motivating objective at play in the various ways in which each community has addressed the extraterritorial question.[81] I therefore retell the story of how the understanding of Article 1 jurisdiction has developed through its interpreters.

The third contention follows on from this. It presupposes that indeterminate words and terms can be made determinate – or at least moderately determinate – through a process of clarification. While accepting Shany's challenge that a conceptual framework is 'needed for the application of IHRL [international human rights law] within a universalist paradigm that is nonetheless informed by pragmatic considerations', the claim I put forward is that any proposed resolution to the extraterritorial question requires cognisance of both how the interpreters behave and why.[82] Recognition of this, and locating any intersections where communities' impulses meet, is the path towards a more lasting solution wherein principle can be deployed.

IV. THE STRUCTURE OF THE BOOK

The structure can be briefly summarised. In Chapter 1 I reflect on the drafting history of the Convention and the particular challenges raised by the use of the word 'jurisdiction' in order to explain the initial lack of textual clarity concerning where the Convention's obligations apply. This ambiguity can only be resolved through interpretation. Chapter 2 therefore introduces the theory of interpretive communities as a way to explain what channels, constrains and

[80] Jean D'Aspermont, 'Professionalisation of International Law' in Jean D'Aspermont, Tarcisio Gazzini, Andre Nollkaemper and Wouter Werner, *International Law as a Profession* (Cambridge University Press, 2017) 29.

[81] Waibel notes how: 'Interpretive communities exist both nationally and internationally, and interact with one another.' See Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 152.

[82] Shany (n 36) 50.

dictates interpretation by those engaged in the application of the Convention. In this chapter, I attempt to explain the purposive enterprise (that motivating factor and central objective) of each of the three principal interpretive communities of the Strasbourg Organs, the Contracting Parties and the national courts (with the focus on the British judiciary).

The remainder of the book is structured to reflect the three distinct periods of evolution in respect of Article 1 jurisdiction. The first ran from the Convention's entry into force in 1953 through to the end of 2001, when the understanding of its extraterritorial application was relatively stable and progressive. The second commenced in late 2001 with the landmark decision in *Banković* and instituted a decade of turmoil in the understanding of jurisdiction. The third began in mid-2011 with the seminal *Al-Skeini* decision and continues to this day. In Chapters 3–6, I seek to prove my hypotheses by demonstrating the purposive enterprise at play in the interpretive practices of the relevant communities during these periods. As I am broadly focusing on the development of meaning, these chapters necessitate a loose chronological approach charting the development of Article 1 jurisdiction, and yet this is not rigidly adhered to. My concern is to demonstrate how the purposive enterprise informed particular methods of interpretation during specific periods and, in turn, how the meaning in Article 1 developed. Thus, where a similar interpretive practice was used in a series of cases, I address these together.

Chapters 3 and 4 both address the development of meaning by the Strasbourg Organs. Chapter 3 charts the period until 2001 where the Convention's extraterritorial application was normalised. Chapter 4 then takes discussion through a period of interpretive disorder between the dawning of the new century and 2010. Chapter 5 largely covers the same 50-year period, but instead focuses on the Contracting Parties to the Convention and the arguments they make both outside courtroom and inside it. For outside the courtroom, specific attention is paid to the UK's engagement with Article 1 ECHR before, during and, to a limited extent, after the Iraq conflict. For inside the courtroom, I identify a taxonomy of types of arguments in the various interpretive and argumentative practice by states at the Strasbourg Organs.

Chapter 6 directs attention to national courts with a focused case study of the domestic judiciary in British courts between 2003 and 2010. During this period, British judges had to deal with a range of circumstances relating to the extraterritorial question, from its relationship with occupation, to the investigative obligations relating to the right to life, and from prisoner transfers to the human rights of soldiers. This analysis, and the judicial compulsion towards providing clarity in their discussions, has played an influential role in the ongoing development at the ECtHR. Chapter 7 therefore draws these threads together and presents the current understanding of the extraterritorial scope of the Convention's application through the lens of the three communities that have provided its meaning. Using the crucial condensed period of Iraq litigation since 2011 at both the ECtHR and in domestic courts as a basis, the chapter identifies the

various current exceptions to the general presumption that the Convention's application is primarily territorial.[83]

Chapter 8 concludes the book with an analysis of whether a better response to the extraterritorial question exists and where it may lie. The purpose of this book is to establish a path towards this destination. The road to this point, and any progress forward, will continue to be defined by the constraints provided by each of the three interpretive communities who primarily construe the Convention. Therefore, rather than seeking a solution underpinned solely by universalist aspirations or theoretical and practical concerns, this chapter explains why the proposed solution may be acceptable for each of these groups. In order to reach this destination, I must first return to our departure point and the drafting of the ECHR in the late 1940s.

[83] Clare Ovey has observed the significance of these cases, particularly in relation to the activities of the military agent abroad: 'The principles relating to the application of the European Convention on Human Rights (ECHR) during extraterritorial armed conflicts have, to a very large extent, been expounded by the European Court of Human Rights (ECtHR) in cases against the United Kingdom – particularly cases involving its military activity in Iraq from 2003.' See Clare Ovey, 'Application of the ECHR during International Armed Conflicts' in Ziegler, Wicks and Hodson (n 48) 225.