

International Law and the Quest
for its Implementation

*Le droit international et la quête de sa mise
en oeuvre*

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Liber Amicorum Vera Gowlland-Debbas

Edited by

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Chapter 16

Compliance with human rights norms extraterritorially: ‘human rights imperialism’?

*Ralph Wilde**

1. *Introduction*

It is a great honour and pleasure to contribute this chapter paying tribute to Professor Gowlland-Debbas. Vera is one of those exceptional people who combine excellence with integrity and collegiality. As an international lawyer, she is striking for being entirely comfortable with, and an authority in, both theoretical and doctrinal aspects of the field. She is also a member of an increasingly rare breed in international law: the true generalist, able to range across all of the discipline, and be universally regarded as a leading expert, in some instances *the* leading expert, in whatever areas of international law she writes on – and she has focused on some of the most important, contested and difficult areas of law. Her work is seminal, often foundational, always excellent. Vera has also combined superlative intellectual work with important engagements in both legal practice and institutionally at the United Nations in Geneva. She has, further, made an immense contribution to the international academy through leadership and service on national, regional and international research institutes, associations and journals. Perhaps above all this, Professor Gowlland-Debbas is valued for her warmth, kindness and collegiality. Not only does she illustrate powerfully what to aspire to on an intellectual level in the nature of one’s work. She has also inspired many of us on a personal level in the example she has set and the support she has given.

* Many thanks to Sara Corris for research assistance. Parts of this chapter include revised and expanded versions of ideas discussed in Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 *Isr. L. Rev.*, 2007, 503; and Ralph Wilde, *Complementing Occupation Law? Selective judicial treatment of the suitability of human rights norms*, 42 *Isr. L. Rev.*, 80, 2009).

This chapter is about the extraterritorial application of human rights law treaties.¹ It offers a critical evaluation of the treatment of two issues of principle by the English courts that were invoked in a decision about whether and to

¹ For the relevant provisions of treaty law in the field of civil and political rights concerning extraterritorial application, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts 1 and 56, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR]; International Covenant on Civil and Political Rights, Art. 2, Dec. 19, 1966, 999 UNTS 171 [hereinafter ICCPR]; American Convention on Human Rights, Art. 1, Nov. 22, 1969, OAS Treaty Series No. 36, 1144 UNTS 123 [hereinafter ACHR]; Convention on the Rights of the Child, Nov. 20, 1989, 1577 UNTS 3 [hereinafter CROC]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2, 10 December 1984, 1465 UNTS 85 [hereinafter CAT]. For judicial/expert body comment, see, e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, ICJ Reports 2004, 163, at para. 112 [hereinafter *Wall Advisory Opinion*]; *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Reports 2005, 116, at paras. 216–17 [hereinafter *DRC v. Uganda*]; Human Rights Committee, General Comment No. 31: Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 10, UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004) [hereinafter *General Comment No. 31*]; *Lilian Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, Human Rights Committee, UN Doc. CCPR/C/13/D/56/1979 (July 29, 1981); *Lopez Burgos v. Uruguay*, Comm. No. R.12/52, Human Rights Committee, Supp. No. 40, at 176, UN doc. A/36/40 (1981); *Hess v. United Kingdom*, Appl. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72 (1975); *M. v. Denmark*, Appl. No. 17392/90, Eur. Comm'n H.R. Dec. & Rep. 193 (1982); *Drozd and Janousek v. France and Spain*, 14 Eur. Ct. H.R. 745 (1992); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A), at para. 62 (1995)(GC)(Preliminary Objections); *Loizidou v. Turkey*, 1996–VI, Eur. Ct. H.R. (ser. A) 2216, 2234–35, at paras. 52–56 (GC)(Merits); *Illich Sanchez Ramirez v. France*, Appl. No. 28780/95, 86 Eur. Comm'n H.R. Dec. & Rep. 155 (1996); *Cyprus v. Turkey*, 2001–IV Eur. Ct. H.R. 1, at para. 77 (GC); *Banković v. Belgium*, 2001–XII Eur. Ct. H.R. 333, at paras. 70–71 (GC) (hereinafter *Banković*); *Issa v. Turkey*, 41 Eur. Ct. H.R. 27 (2004), at para. 71 (hereinafter *Issa*); *Ilaşcu v. Moldova and Russia*, 2004–VII Eur. Ct. H.R. (GC); *Solomou v. Turkey*, Appl. No. 36832/97, European Court of Human Rights, Judgment of 24 June 2008, paras. 43–52; *Coard et al. v. United States*, Case No. 10.951, Inter-American Commission on Human Rights, Report No. 109/99, 29 September 1999, at paras. 37, 39, 41; Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations: United States of America, para. 15, UN Doc. CAT/C/USA/CO/2 (25 July 2006) [hereinafter *CAT: USA Report*]; Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, 23 Nov. 2007, UN Doc. CAT/C/GC/2, 24 Jan. 2008, para. 16; *R (on the application of Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2007] 3 WLR 33 [hereinafter *Al-Skeini* (HL)]; *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2005] EWCA (Civ) 1609 (Dec. 21, 2005) [hereinafter *Al-Skeini* (CA)]; *R (on the application of Gentle and another) v. The Prime Minister and others* [2008] UKHL 20 (Apr. 9, 2008); *R (on the application of Al-Saadoon) v. Secretary of State for Defence* [2009] EWCA (Civ) 7 (Jan. 21, 2009); *R (on the application of Hassan) v. Secretary of State for Defence* [2009] EWHC 309 (Admin) (Feb. 25, 2009). For academic commentary see, e.g. Christopher Lush, 'The Territorial Application of the European Convention on Human Rights:

what extent human rights obligations should apply to the UK in Iraq. Both issues can be understood to relate to ideas of imperialism and self-determination. The subject and nature of this enquiry is fitting for a tribute to Professor

Recent Case Law', 42 *ICLQ*, 1993, 897; Theodor Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL*, 1995, 78; Joachim Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation', *Israel Yearbook on Human Rights*, 1998, 1; Pasquale de Sena, *La Nozione di Giurisdizione Statale nei Trattati sui Diritti dell'Uomo* (2002); Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', 37 *Israel Law Review*, 2003, 17; Matthew Happold, '*Banković v. Belgium* and the Territorial Scope of the European Convention of Human Rights', 3 *European Human Rights Law Review*, 2003, 77; Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *EJIL*, 2003, 529; Kerem Altıparmak, 'Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq?', 9 *Journal of Conflict & Security Law*, 2004, 213; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 *AJIL*, 2004, 1; Fons Coomans and Menno Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004); Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"', 87 *International Review of the Red Cross*, 2005, 39; Gregory H. Fox, 'The Occupation of Iraq', 30 *Georgia Journal of International and Comparative Law*, 2005, 195, 270–78; Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL*, 2005, 119; Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', NYU School of Law, Center for Human Rights and Global Justice Working Paper No. 9 (2005), available at <<http://www.chrgj.org/publications/docs/wp/DeSchutter%20Globalization%20and%20Jurisdiction.pdf>>; Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review*, 2005, 349; Ralph Wilde, 'Legal "Black Hole": Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Michigan Journal of International Law*, 2005, 739; Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', 10 *European Human Rights Law Review*, 2005, 115; Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 *AJIL*, 2006, 580; Ralph Wilde, 'Casting Light on the "Legal Black Hole": Some Political Issues at Stake', 5 *European Human Rights Law Review*, 2006, 552; Michael J. Dennis, 'Non-Application of Civil and Political Rights Treaties Extraterritorially During Times of International Armed Conflict', 40 *Israel Law Review*, 2007, 453; Dominic McGoldrick, 'Human Rights and Humanitarian Law in the UK Courts', 40 *Israel Law Review*, 2007, 527; Gerry Simpson, 'The Death of Baha Mousa', 8 *Melbourne Journal of International Law*, 2007, 340; Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', 40 *Israel Law Review*, 2007, 503; Tobias Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in *R (Al-Skeini) v. Secretary of State for Defence*', 6 *Journal of International Criminal Justice*, 2008, 115; Ralph Wilde, 'Case Note, *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)*', 102 *AJIL*, No. 3, 2008, 628; Marko Milanovic, 'From Compromise to Principle: Clarifying the Notion of State Jurisdiction in International Human Rights Treaties', 8 *Human Rights Law Review*, 2008, 411; Ralph Wilde, 'Complementing Occupation Law? Selective judicial treatment of the suitability of human rights norms', 42 *Israel Law Review*, 80, 2009.

Gowlland-Debbas. In offering a detailed evaluation of the decision of a particular case, focusing on the issues of principle that underpinned this decision, it reflects her dual interests in doctrine and theory. As will be explained, one key matter of general international law relevant to the legal determination in the case concerns the inter-relationship between different areas of international law, a topic that has been an abiding interest of Vera's. In a broader sense, both the subject-matter of the decision – the UK occupation of Iraq – and the issues of principle in play – concerning imperialism self-determination – reflect matters that have been long-standing concerns of Vera's, in both her writing and her legal practice. Finally, the nature of the enquiry in this chapter, considering the adequacy of a judicial attempt to grapple with important issues of principle, the determination of which resolving an entry-level question as to whether a state would be bound by international law at all, is Gowlland-esque: it concerns a foundational issue relating to compliance with international law, and seeks to test the adequacy of the judicial reasoning offered. Whether or not this chapter provides as compelling an analysis as would be forthcoming from Professor Gowlland-Debbas, it is certainly inspired by her approach to scholarship.

The decision under evaluation is the *Al-Skeini* case concerning the application of the European Convention of Human Rights (ECHR) to the UK presence in Iraq following the fall of Saddam Hussein in 2003. At the Court of Appeal stage of the case in 2005, a concern was expressed that the application of the ECHR to the UK would necessitate a more intrusive administrative presence in Iraq, thereby overriding the policy of transferring authority to the local population.² At the House of Lords stage in 2007, a concern was expressed that extraterritorial application would necessitate the imposition of culturally inappropriate norms.³ In order, in part, to address these concerns, it was held that the ECHR should not apply extraterritorially. In effect, then, ideas of self-determination and anti-imperialism were invoked to justify the inapplicability of human rights standards to a state acting outside its territory.

Although *Al-Skeini* is a decision only about the ECHR, and only from the courts of a national legal system, it offers a sustained treatment of key issues of principle relevant to the question of the suitability of applying human rights norms generally in extraterritorial situations. As such, it may influence how these issues of principle are understood by other courts and expert bodies, and in relation to other human rights treaties.

This chapter offers a critical evaluation of the way these issues of principle were addressed in *Al-Skeini*. It begins by summarizing the general legal position on the extraterritorial application of human rights, and the facts and relevant

² *Al-Skeini* (CA), *supra* (note 1).

³ *Al-Skeini* (HL), *supra* (note 1).

overall finding in *Al-Skeini*. It then outlines two general findings on the substantive effect of the application of the ECHR which served as the foundation for the positions taken on the issues of principle. The first finding was the suggestion that human rights obligations mean exactly the same thing, in terms of their substantive effect, when they apply extraterritorially when compared to their application to a state acting within its sovereign territory. The second finding was that the extraterritorial application of human rights law based on the exercise of territorial control presupposes the exercise of civil administration. The chapter then sets out the two positions on the issues of principle adopted: that applying the ECHR to the UK in Iraq would involve both undermining the policy of returning power to the local population, and overriding local cultural traditions.

The chapter then returns to the two general findings on the substantive effect of the extraterritorial application of human rights obligations, and argues that they misunderstand how human rights obligations are conceived, and fail to give due account to the effect on the meaning of human rights law of the application of other areas of international law. Bearing this in mind, the merits of the two related positions on the issue of principle are then considered. It is suggested that the extraterritorial application of human rights law would not necessarily prevent the state subject to such obligations from handing power over to the local population, and that the fear of imposing culturally inappropriate norms is, in the way articulated here, misconceived.

2. The Extraterritorial Application of Human Rights Treaties on Civil and Political Rights

The main human rights treaties on civil and political rights do not conceive obligations simply in terms of the acts of states parties, as is the case, for example, under Common Article 1 of the Geneva Conventions of 1949, in which contracting parties undertake “to respect and to ensure respect for the present Convention in all circumstances.”⁴ Instead, responsibility is conceived in a particular context: the state is obliged to secure the rights contained in the treaty

⁴ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 75 U.N.T.S. 31, Art. 1; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 Aug. 1949, 75 U.N.T.S. 85, Art. 1; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 Aug. 1949, 75 U.N.T.S. 135, Art. 1; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 Aug. 1949, 75 U.N.T.S. 287, Art. 1 [hereinafter Geneva Conventions Common Article 1].

only within its “jurisdiction.”⁵ Thus a nexus to the state – termed jurisdiction – has to be established before the state act or omission is covered by the regulatory framework.

The consistent jurisprudence and authoritative statements of the relevant international human rights review bodies and the International Court of Justice has been to interpret “jurisdiction” as operating extraterritorially in certain circumstances.⁶ The term has been understood in the extraterritorial context as a connection between the state, on the one hand, and either the territory in which the relevant acts took place – referred to as a *spatial* or *territorial* connection – or the individual affected by them – referred to as a *personal*, *individual* or, because of the type of State action involved, *State-agent-authority* connection.⁷

3. *The Al-Skeini Case*

This case concerned the applicability of the Human Rights Act, a UK Act of Parliament, to the UK in Iraq.⁸ Since in the Court decisions (by a majority of four to one at the House of Lords stage) the extraterritorial meaning of the Human Rights Act was tied to that of the ECHR, the case involved a detailed

⁵ See the sources cited *supra* (note 1).

⁶ See the sources cited *supra* (note 1). Some obligations are limited to the State’s territory: see, for example, Protocol No. 4 to the ECHR, 16 Sept. 1963, Council of Europe Treaty Series No. 46, Art. 3. Note also that the ECHR and its Protocols have separate provisions on applicability to overseas territories; see, e.g., ECHR, *supra* (note 1), Art. 56. The ICCPR provision on applicability, by including the word ‘territory’ in addition to ‘jurisdiction’, might be read to suggest that jurisdiction is limited to territory, thereby ruling out extraterritorial applicability. See ICCPR, *supra* (note 1), Art. 2. This position is difficult to sustain given the affirmation of extraterritorial applicability by the International Court of Justice and the United Nations Human Rights Committee in the cases, *Wall Advisory Opinion* and *General Comment No. 31*, cited *supra* (note 1).

⁷ On the ‘spatial’ connection, see, e.g., *Wall Advisory Opinion*, *supra* (note 1), paras. 107–13; *General Comment No. 31*, *supra* (note 1), para. 10; *Loizidou (Preliminary Objections)*, *supra* (note 1), para. 62; *Loizidou (Merits)*, *supra* (note 1), para. 52; *Cyprus v. Turkey*, *supra* (note 1), paras. 75–77; *Banković*, *supra* (note 1), generally, and in particular paras. 70 and 75; *Issa v. Turkey*, *supra* (note 1), paras. 69–70; *Ilascu v. Moldova and Russia*, *supra* (note 1), paras. 314–16; *CAT: USA Report*, *supra* (note 1), para. 15. On the ‘personal’ connection, see, e.g., *General Comment No. 31*, *supra* (note 1), para. 10; *Lopez Burgos v. Uruguay*, *supra* (note 1), para. 12.3; *Celiberti de Casariego v. Uruguay* *supra* (note 1), para. 10.3; *Banković*, above note 1, generally, and in particular para. 75; *Issa v. Turkey*, *supra* (note 1), para. 71; *Solomou v. Turkey*, *supra* (note 1), paras. 45, 50–51; *CAT: USA Report* *supra* (note 1), para. 15. For commentary, see the academic sources listed *supra* (note 1).

⁸ Human Rights Act, 1998, c. 42 (UK).

consideration of the extraterritorial meaning of the term ‘jurisdiction’ in the Convention.⁹ In the words of Lord Bingham in the House of Lords decision, the case concerned

...the deaths of six Iraqi civilians, and the brutal maltreatment of one of them causing his death, in Basra. Each of the deceased was killed (or, in one case, is said to have been killed) and the maltreatment was inflicted by a member or members of the British armed forces.¹⁰

Relatives of the deceased challenged the UK Defence Secretary’s refusal to order an independent enquiry into the deaths, and rejection of liability to afford redress for causing them, on the basis of a right to such an enquiry and such redress when the right to life in Article 2 of the ECHR has been violated. The challenge therefore required the courts to determine whether there had been a violation of Article 2, which in turn required them to determine whether the obligation to secure that right applied to the UK’s actions in Iraq. This necessitated a detailed evaluation of the extraterritorial scope of the “jurisdiction” trigger in Article 1 of the ECHR.

Five of the six deaths involved shooting in the streets or in buildings where UK soldiers were temporarily present. Applicability in relation to these incidents was considered as a matter of the spatial/territorial trigger: the issue of the UK exercising control over the area where the incidents took place. The sixth death, the result of maltreatment by UK soldiers, occurred while the victim was being held in a UK detention facility. Applicability in relation to this incident was considered as a matter of the personal/individual/state-agent-authority trigger: the issue of the UK exercising control over the individual involved.

The relevant finding for present purposes concerned the spatial/territorial trigger for jurisdiction. Here, Lord Brown for the majority at the House of Lords stage asserted that it operated only with respect to actions within the territory of other states also parties to the ECHR.¹¹ As Iraq was not a party to the treaty, the UK action there was not covered. What will be discussed below is the treatment of two related underlying issues of principle – that applicability would impede the handover of local administration and necessitate the imposition of culturally-inappropriate norms – that in part led to this finding.¹² The

⁹ This brief summary is based on Wilde, Case Note, *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)*, *supra* (note 1), with the permission of the Editors-in-Chief of the *American Journal of International Law*.

¹⁰ *Al-Skeini* (HL), *supra* (note 1), para. 1.

¹¹ *Ibid.*, paras. 109 and 127.

¹² For more commentary on this finding, and the finding on the alternative trigger for jurisdiction concerned with the exercise of control over individuals, see e.g. Wilde, Case Note, *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)*, *supra* (note 1).

issues were raised at the Court of Appeal and the House of Lords stages respectively. Although only the House of Lords judgment was actually determinative of the case, the discussion at both stages of the case is worth consideration because of its potential to influence future developments in this area of the law more generally.

4. *The Meaning of Human Rights Law Extraterritorially*

The views expressed on the two issues of principle were based in part on determinations of two prior issues concerning the meaning of human rights law extraterritorially.

A. *Applicability cannot Mean Different Things in Different Circumstances*

The first prior issue concerned whether the same set of human rights obligations can mean different things, in terms of what a state must do or not do, when they are applied to different situations. The determination on this issue came out of a consideration of a dictum from the *Banković* case concerning the NATO bombing of a radio and TV station in Belgrade in 1999.¹³

In *Banković*, the applicants claimed that “jurisdiction” under Article 1 of the ECHR could be said to exist on the basis of effective territorial control to the extent that such control was in fact exercised, and that, accordingly, in the words of the European Court of Human Rights, “the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised”.¹⁴ The Court rejected this submission, holding that there was no evidence that obligations could be “divided and tailored” in this way.¹⁵

At the House of Lords stage of *Al-Skeini*, the majority took this finding and expanded it out into a general doctrine that obligations could not be divided and tailored in the sense that they could not mean different things, in terms of what the state would, in substance, be required to do, or not do, in different circumstances.¹⁶

¹³ *Banković*, *supra* (note 1). For an explanation of the facts of the case, see *id.*, paras 6–13. Many of the academic commentators cited *supra* (note 1) address this case.

¹⁴ *Ibid.*, para. 46.

¹⁵ *Ibid.*, para. 75.

¹⁶ *Al-Skeini* (HL), *supra* (note 1), para. 75 (Lord Brown) and para. 69 (Lord Rodger).

B. *Extraterritorial Jurisdiction Based on Territorial Control Requires the Capacity to Exercise Public Administration*

The second prior issue, the determination of which also leading in part to the views expressed on the issues of principle, concerned the meaning of “spatial” or “territorial” trigger for extraterritorial jurisdiction. Specifically, the question was whether or not a capacity to exercise civil administration was part of this test. Again this determination came out of a consideration of a dictum by the European Court of Human Rights in the *Banković* case. In that case, the Court made the following general statement on the issue of effective territorial 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.¹⁷

The relevant case law here concerned the Turkish presence in northern Cyprus.¹⁸

In *Al-Skeini*, the U.K. government argued that by their nature the obligations in the ECHR presuppose the exercise of civil administration for their fulfilment. As a result, the spatial trigger for applicability must include a capacity for this as part of its test. If such a capacity was not required before the obligations were triggered, the law would apply in circumstances where the state was incapable of fulfilling the obligations in play. The UK argued that it did not exercise public authority in Iraq at the relevant time, and so its presence there did not meet the civil capacity requirement within the spatial trigger test. These arguments found favour with Lord Justice Brooke in the Court of Appeal, as illustrated in the following passage from his opinion:

[u]nlike the Turkish army in northern Cyprus, the British military forces had no control over the civil administration of Iraq...

In my judgment it is quite impossible to hold that the UK...was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Banković* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces...It could not be equated

¹⁷ *Banković*, *supra* (note 1), para. 71.

¹⁸ *Loizidou (Preliminary Objections)*, *supra* (note 1); *Loizidou (Merits)*, *supra* (note 1); *Cyprus v. Turkey*, *supra* (note 1).

with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways.¹⁹

In an apparently similar vein, Lord Brown stated at the House of Lords stage of the same case that: "...except where a state really does have effective control of territory, it cannot hope to secure Convention rights within that territory..."²⁰

According to these approaches, then, the test for territorial control must include a capacity to exercise public authority, because it is only in such circumstances that the state would actually be in a position to fulfill its obligations in the ECHR. In other words, the Convention cannot be applicable in a generalized sense when the state does not enjoy such authority, since the obligations it contains in part presuppose such enjoyment.

5. Human Rights Imperialism

A. *Applicability would Impede the Handover to Local Authorities*

The first issue of principle invoked to curtail applicability is based on the prior determination that the trigger for applicability based on effective territorial control presupposes a capacity to exercise civil administration. At the Court of Appeal stage in *Al-Skeini*, Lord Justice Brooke suggested that to have human rights law apply in circumstances where the state was not entitled to exercise public authority would undermine the policy of transferring authority to the local population. For him,

[i]t would... have been contrary to the [US-UK] Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves. To build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR at the very time when the IGC [Iraqi Governing Council] had been formed, with CPA [US-UK Coalition Provisional Authority] encouragement, as a step towards the formation by the people of Iraq of an internationally recognized representative Government... would have run right against the grain of the Coalition's policies.²¹

Here, then, a fear is expressed that being bound by human rights law in the absence of a public authority prerogative would require the coalition in Iraq to become more involved in Iraqi governmental matters rather than, as is intended, to reduce its presence, transferring power to local bodies as soon as possible. Another way of putting this is to suggest that applying human rights law might

¹⁹ *Al-Skeini* (CA), *supra* (note 1), paras. 123–24 (LJ Brooke).

²⁰ *Al-Skeini* (HL), *supra* (note 1), para. 129.

²¹ *Al-Skeini* (CA), *supra* (note 1), para. 125 (LJ Brooke). See also *ibid.*, at para. 126.

somehow undermine the ability of the Iraqi people to exercise self-determination, by requiring the occupation of Iraq to be more prolonged.

B. *Applicability would Involve Imposing Culturally Inappropriate Norms*

The second issue of principle invoked to curtail applicability concerned whether the application of the obligations of an ECHR contracting state to that state's actions in another state not also party to the Convention would involve imposing normative standards not shared by the people of the other state. At the Court of Appeal stage, Lord Justice Brooke raised a concern that applying the Convention to the UK in Iraq might involve inculcating "the common spiritual heritage of the member states of the country [sic] of Europe"²² (misquoting a phrase from the *Golder* case of the European Court of Human Rights)²³ in a "predominantly Muslim country."²⁴ At the House of Lords stage, Lord Brown remarked that:

...except where a state... is within the area of the Council of Europe [the organization comprising all the parties to the ECHR], it is unlikely... to find certain of the Convention rights it is bound to secure reconcilable with the customs of the resident population.²⁵

Lord Justice Brooke's orientalist positioning of Islam and Europe as normative opposites implicitly renders invisible the Muslim people who live in Council of Europe countries, including Turkey, which one imagines the judge would regard as a "predominantly Muslim country." Lord Brown's relatively nuanced comments avoid this crude chauvinism, but his suggestion that the "customs of the local population" are necessarily going to be incompatible with the obligations in the ECHR needs to account for the fact that most of the rights in the ECHR and its Protocols can be found in other international human rights treaties that are not region-specific. For example Iraq, the state where the events at issue in the *Al-Skeini* case took place, is (and was at the relevant time) a party to the ICCPR.²⁶

²² *Ibid.*, para. 126 (LJ Brooke).

²³ In the *Golder* dictum, the word "States" is in title case, and reference is made to the "Council" not "Country" of Europe, which denotes the regional grouping under whose aegis the ECHR operates. See *Golder v. United Kingdom*, Appl. No. 4451/70, European Court of Human Rights, *Series A*, No. 18 (1975), para. 14.

²⁴ *Al-Skeini* (CA), *supra* (note 1), para. 126 (LJ Brooke).

²⁵ *Al-Skeini* (HL) *supra* (note 1), para. 129 (Lord Brown).

²⁶ Iraq ratified the ICCPR, *supra* (note 1), on 25 January 1971 (source: Office of the UN High Commissioner for Human Rights, at <<http://www.ohchr.org>>). The events at issue in *Al-Skeini* took place between August and November 2003. See *Al-Skeini* (HL), *supra* (note 1), para. 6.

However, the fact that treaties contain similar provisions does not, of course, mean that the substantive meanings of these provisions are necessarily identical, bearing in mind the need, for example, to take into account the relevant applicable law and practice of the contracting parties to the treaties – collections of states which may overlap, but not correspond exactly, across different treaties – when interpreting these meanings.²⁷

The jurisprudence of the Strasbourg Court has frequently referenced the European nature of the treaty, and the practice of its contracting states, in construing the meaning of particular provisions, in some cases seeking to identify

²⁷ On this principle of treaty interpretation generally, see e.g. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Arts 31–33, and the relevant commentary and sources cited in Lord Arnold Duncan McNair, *The Law of Treaties*, (Oxford: Oxford University Press, 1986); Antony Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2000), ch. 13; and Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008). On the relevance of these general principles to the interpretation of the ECHR, see *Golder*, *supra* (note 23), paras. 29–30, 34–36; *Luedicke, Belkacem and Koc v. Germany*, 29 Eur. Ct. H.R. (ser. A) at para. 39 (1978); *The Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A), at para. 48 (1979); *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A), at paras 42, 61, 64 (1986); *Lithgow v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A), at paras 114, 117 (1986); *Johnston v. Ireland*, 112 Eur. Ct. H.R. 24 (ser. A), at para. 51 (1986); *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A), at para. 59 (1988); *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at para. 100 (1991); *Loizidou (Preliminary Objections)*, *supra* (note 1), para. 73; *Loizidou (Merits)*, *supra* (note 1), para. 43; *Witold Litwa v. Poland*, 2000–III Eur. Ct. H.R. at paras. 57–59; *Al-Adsani v. United Kingdom* [GC], 2001–XI Eur. Ct. H.R., at para. 55; *Fogarty v. United Kingdom* [GC], 2001–XI Eur. Ct. H.R. at para. 35; *McElhinney v. Ireland* [GC], 2001–XI Eur. Ct. H.R., at para. 36; *Vo v. France* [GC], 2004–VIII Eur. Ct. H.R., at paras. 4–5 (dissenting opinion of J. Ress); *Ocalan v. Turkey* [GC], 2005–IV Eur. Ct. H.R., at para. 4 (partly dissenting opinion of J. Garlicki); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* [GC], 2005–VI Eur. Ct. H.R., at paras. 100, 150; *Mamatkulov and Askarov v. Turkey* [GC], 2005–I Eur. Ct. H.R. at paras 39, 111, 117, 123, and at paras. 5, 13, 18, 21–24 (joint partly dissenting opinion of J. Caflisch *et al.*); *Jorgic v. Germany*, 2007–IX Eur. Ct. H.R. at para. 68; *Stoll v. Switzerland* [GC], 2007–XIV Eur. Ct. H.R. at paras. 59–61; *Behrami and Behrami v. France & Saramati v. France, Germany and Norway* [GC], Appl. Nos 71412/01 and 78166/01, European Court of Human Rights, Admissibility Decision, 31 May 2007, obtainable from <http://www.echr.coe.int>, at para. 122; *Saadi v. United Kingdom* [GC], Appl. No. 13229/03, European Court of Human Rights, Judgment of 29 Jan. 2008, obtainable from <http://www.echr.coe.int>, at paras. 26, 61–62; *Kononov v. Latvia*, Appl. No. 36376/04, European Court of Human Rights. Judgment of 24 July 2008, obtainable from <http://www.echr.coe.int>, at para. 6 (joint dissenting opinion of J. Fura-Sandstrom *et al.*); *Demir and Baykara v. Turkey* [GC], Appl. No. 34503/97, European Court of Human Rights, Judgment of 12 Nov. 2008, obtainable from <http://www.echr.coe.int>, at paras. 65, 67; *Andrejeva v. Latvia* [GC], Appl. No. 55707/00, European Court of Human Rights, Judgment of 18 Feb. 2009, obtainable from <http://www.echr.coe.int>, at para. 19 (partly dissenting opinion of J. Ziemele).

common standards in national practice across the contracting parties.²⁸ Perhaps with this in mind, in paragraph 80 of the *Banković* judgment the Court stated that

the Convention is a multi-lateral treaty operating... 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.²⁹

In *Al-Skeini*, Lord Rodger discussed this dictum and observed that:

The essentially regional nature of the Convention is relevant to the way that the court operates. It has judges elected from all the contracting states, not from anywhere else. The judges purport to interpret and apply the various rights in the Convention in accordance with what they conceive to be developments in prevailing attitudes in the contracting states. This is obvious from the court's jurisprudence on such matters as the death penalty, sex discrimination, homosexuality and transsexuals. The result is a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world. So the idea that the United Kingdom was obliged to secure observance of all the rights and freedoms as interpreted by the European Court in the utterly different society of southern Iraq is manifestly absurd. Hence, as noted in *Bankovic*... para. 80, the court had 'so far' recognised jurisdiction based on effective control only in the case of territory which would normally be covered by the Convention. If it went further, the court would run the risk not only of colliding with the jurisdiction of other human rights bodies but of being accused of human rights imperialism.³⁰

²⁸ The Preamble to the ECHR, above note 1 states that “[t]he governments signatory hereto, being members of the Council of Europe, ... [b]eing resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration...” ECHR jurisprudence frequently references this “common heritage” when construing the meaning of treaty provisions. See, e.g., *Golder*, *supra* (note 23), para. 34; *United Communist Party of Turkey and Others v. Turkey*, Appl. No. 19392/92, European Court of Human Rights, *Reports 1998-I*, para. 45; for academic commentary, see, e.g., Steven Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’, 23 *Oxford Journal of Legal Studies*, 2003, 405. The principle of treaty interpretation concerned with taking into account the relevant practice of the contracting parties is contained in Article 31.3.b. For an affirmation of the applicability of this principle to the interpretation of the ECHR, see *Cruz Varas*, *supra* (note 27), para. 100; *Loizidou (Preliminary Objections)*, *supra* (note 1), para. 73; *Bosphorus*, *supra* (note 27), para. 100; *Mamatkulov*, *supra* (note 27), paras. 5, 13, 18 (joint partly dissenting opinion of J. Caflisch *et al.*); The following cases also take into account the subsequent practice of state parties, but do not reference the Vienna rule as the basis for doing so: *James*, *supra* (note 27), para. 65; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A), at paras. 102–104 (1989); *Ocalan*, *supra* (note 27), paras 162–65.

²⁹ *Banković*, *supra* (note 1), para. 80.

³⁰ *Al-Skeini* (HL), *supra* (note 1), para. 78 (Lord Rodger).

It might be thought that, if anything, subjecting a foreign occupier to the regulation of human rights law would have the effect of mitigating, not exacerbating, the imperial nature of the situation. However, in Lord Rodger's view, it would aggravate it, because the human rights norms serving as the basis for regulation would not have resonance with, and might even contradict, the culture and traditions of the local population.

The purchase of this view depends in part on the prior assumption that the obligations in the Convention always apply in an identical fashion – there can be no differential application as between situations abroad and those 'at home' which might be able to accommodate cultural differences.

This view, although articulated in the context of the applicability of the ECHR, is potentially relevant more broadly to situations where states act in territory that is not their own, and which does not form part of another state that is also bound by the same human rights obligations as they are. This would cover territory of a state that is not a party to the same human rights treaty, such as the case of Iraq and the ECHR, and non-state territory that is not bound by any human rights treaties at all. It would also cover territory of a State that is party to the same treaty but subject to different obligations under it, whether through reservations, declarations or a divergent position as far as additional instruments (e.g. optional protocols) to the treaty are concerned.

According to this view, in any of these situations, having the human rights obligations applicable to the foreign state in the territory concerned would potentially introduce a normative regime that had not been in operation previously. This would amount to 'human rights imperialism' in the sense that it would potentially mandate the imposition of human rights standards which are not applicable on a universal level and, crucially, not applicable to the territory concerned, but, rather, 'specific' to a sub-universal grouping of States.

This is not, then, a rejection of human rights law *in toto*; it is a rejection of human rights norms that have not yet been universally accepted, even if they have been accepted by the foreign state. Thus it would not rule out the extraterritorial application of human rights treaty obligations if these obligations were already binding on the occupied State. In the case of the UK in Iraq, then, in this view although the ECHR would be a problem, the ICCPR would not.

6. *The Meaning of Human Rights Obligations Revisited*

What, then, are the merits of these findings on the two issues of principle concerning the suitability of applying human rights law extraterritorially? In order to appraise the findings, one must start with the two views on the meaning of human rights obligations on which the findings are partially based: that human

rights obligations cannot mean different things in different situations, and that the spatial test for extraterritorial jurisdiction includes a requirement that there is a capacity to exercise public administration.

A. *Identical Obligations but Varied Meanings*

Beginning with the first view on the meaning of human rights obligations, here it will be recalled that the majority at the House of Lords stage in *Al-Skeini* adopted a position that human rights obligations cannot mean different things, in terms of the substantive policies which states are bound to adhere to, when applied to different territorial situations. As previously mentioned, the majority adopted this view after considering the dictum from *Banković*, that there is no support for the contention that the rights in the ECHR can be “divided and tailored”.

However, the *Banković* dictum was expressed in the particular context of what level of territorial control was needed to trigger obligations extraterritorially. The Court was rejecting a ‘cause and effect’ notion of applicability – that it could apply only to the extent of territorial control exercised – holding that there was no evidence that the Convention could be divided and tailored in this way.³¹ It did not say that the Convention could not be divided and tailored *at all*, in any respect. In the first place, then, the doctrine posited in *Al-Skeini* is not directly supported in what was said by the Strasbourg Court in *Banković*.

More broadly, this doctrine contradicts the way in which human rights treaty obligations are understood. Actually, taking account of particular contextual situations is an integral part of understanding what the obligations amount to when they are applied. Beyond non-derogable rights, human rights norms are conceived to mean different things in different contexts – flexibility and contextualization are integral components of the very meaning of the obligations themselves, via the operation of limitation clauses, derogation provisions and, in the case of the ECHR, the ‘margin of appreciation’ doctrine applied by the Strasbourg Court.³² To have the same obligations apply, then, does not

³¹ *Banković*, *supra* (note 1), para. 75.

³² Under human rights treaties states are permitted to impose limitations on certain individual rights in order to protect the rights of others and the broader interests of the community or the state. Under the ECHR, for instance, states parties may impose limitations on the right to respect for private and family life, home and correspondence (Art. 8(2)), on the freedom to manifest one’s religion or beliefs (Art. 9(2)), on the right to freedom of expression (Art. 10(2)) and on the freedom of peaceful assembly and association (Art. 11(2)). Rights which are not qualified by limitation clauses under the ECHR are the right to life, the right to be free from torture and ill-treatment, the prohibition of slavery and forced labour, the right to liberty and security, the right to fair trial, the prohibition of retroactive criminal legislation, the right to

necessarily result in identical requirements in terms of particular policies promoted in all cases, even if identical minimum standards operate.

Moreover, the possibility of differential requirements is accentuated when human rights treaties are placed in their proper international law context. Their meaning is mediated by the interplay with other applicable law. Such law can include humanitarian law and occupation law where relevant as the *lex specialis*, the law of self-determination, and, when it happens, specific mandates given to

marry, the right to a remedy and the right to enjoy all the rights guaranteed in the Convention on a non-discriminatory basis. In addition to the possibility for limiting rights, human rights treaties also enable states to 'derogate' from their rights obligations in times of war or other public emergencies. Under the ECHR, the right to life under Art. 2, the right to be free from torture and ill-treatment under Art. 3, the prohibition of slavery and compulsory labour under Art. 4 and the prohibition of retroactive criminal legislation under Art. 7 can never be the object of derogation (see Art. 15 ECHR, *supra* (note 1)). Other rights in the ECHR are not covered by this exclusion. On derogations under the other major human rights instruments, see ICCPR, above note 1, Art. 4; ACHR, *supra* (note 1), Art. 27. On this area of the law, see, for example, *Aksoy v. Turkey*, App. No. 21987/93, European Court of Human Rights, *Reports 1996–VI*; *Brannigan and McBride v. United Kingdom*, Appl. Nos 14553/89 and 14554/89, European Court of Human Rights, *Series A*, No. 258 (1993); *Brogan*, above note 27; *Ireland v. United Kingdom*, Appl. No. 5310/71, European Court of Human Rights, *Series A*, No. 1 (1978); *Cyprus v. Turkey*, Appl. Nos 6780/74 and 6950/75, European Commission of Human Rights (1975); *European Human Rights Reports*, vol. 4 (1976), p. 482; *Denmark, Norway, Sweden and Netherlands v. Greece*, Appl. Nos 3321/67; 3322/67; 3323/67; 3344/67, European Commission of Human Rights, *Yearbook of the European Convention on Human Rights*, vol. 12 (1969), p. 1; *Lawless v. Ireland*, European Court of Human Rights, *Series A*, No. 3 (1961); *Judicial Guarantees in States of Emergency (Arts 27(2), 25, and 8 of the American Convention on Human Rights)*, *Advisory Opinion OC-9/87*, Inter-American Court of Human Rights, *Series A*, No. 9 (1987); *Habeas Corpus in Emergency Situations (Arts 27(2) and 7(6) of the American Convention on Human Rights)*, *Advisory Opinion OC-8/87*, Inter-American Court of Human Rights, *Series A*, No. 8 (1987); *Landinelli Silva v. Uruguay*, Communication No. 34/1978, Human Rights Committee, UN Doc. CCPR/C/12/D/34/1978 (1981); Human Rights Committee, *General Comment No. 29, States of Emergency (Article 4)*, UN doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 2; D. J. Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Harris, O'Boyle and Warbrick: Law of European Convention on Human Rights*, ch. 16 (Oxford: Oxford University Press, 2nd edn., 2009); Rosalyn Higgins, 'Derogations under Human Rights Treaties', 48 *BYIL*, 1976–1977, 281; Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights', 15 *Oxford Journal of Legal Studies*, 1995, 69. On derogations in relation to extraterritorial situations, see the comment by the European Court of Human Rights in *Banković*, *supra* (note 1), para. 62. On the "margin of appreciation" approach adopted by the European Court of Human Rights, which can be viewed as having the effect of introducing an additional possibility for rights to be limited, see, e.g., *Handyside v. United Kingdom*, Appl. No. 5493/72, European Court of Human Rights, *Series A*, No. 24 (1976); *Dudgeon v. United Kingdom*, Appl. No. 7525/76, *Series A*, No. 45 (1981); *Christine Goodwin v. United Kingdom*, Appl. No. 28957/95, European Court of Human Rights [GC], *Reports 2002–VI*. For criticism, see e.g. Marks, *ibid*.

foreign states by the UN Security Council in Resolutions passed under Chapter VII of the UN Charter.³³ Earlier, the principles of treaty interpretation were

³³ On the relationship between human rights law and the law of armed conflict, see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, 226, at para. 25; *Wall Advisory Opinion*, *supra* (note 1), paras. 105–106; *DRC v. Uganda*, *supra* (note 1), para. 216; *General Comment No. 31*, *supra* (note 1), para. 11; *Coard v. United States*, *supra* (note 1); *Salas and Others v. United States of America*, Case 10.573, Inter-American Commission of Human Rights, OEA/ser.L/V/II.85, doc.9rev. (1993), reprinted in 123 *ILR* 1. For commentary, see e.g. René Provost, *International Human Rights and Humanitarian Law* (2002); Daniel Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (1997); Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law', 293 *International Review of the Red Cross*, 1994, 94; Jochen Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation', 28 *Israel Yearbook on Human Rights*, 1998, 1; Françoise Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts', 31 *Revue de Droit Pénal Militaire et de Droit de la Guerre*, 1992, 119; '50th Anniversary of the Universal Declaration of Human Rights: Human Rights and International Humanitarian Law', 324 *International Review of the Red Cross*, 1998, 1; Nancie Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?', 40 *Israel Law Review*, 2007, 356; 'Gross "Human Proportions"', 18 *EJIL*, 2007, 1; William Schabas, 'Lex Specialis? Belts and Suspenders? The Parallel Application of Human Rights Law, and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*', 40 *Israel Law Review*, 2007, 592. On self-determination in international law generally, see, e.g., Charter of the United Nations ('UN Charter'), San Francisco, 26 June 1945, (1946–47) *United Nations Yearbook* 831, Arts 1(2) and 55; ICCPR, *supra* (note 1), Art. 1; International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 Dec. 1966, U.N.T.S. 993, p. 3, Art. 1; GA Res. 1541 (XV), 15 Dec. 1960, Annex; GA Res. 1514 (XV), 14 Dec. 1960; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 Oct. 1970; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ Reports 1971, 16; *Western Sahara, Advisory Opinion*, 1975 I.C.J. 12; *Reference re Secession of Quebec*, Supreme Court of Canada, 28 Aug. 1998, [1998] 2 RCS 217, ILM, vol. 37 (1998), p. 1340. The academic commentary is voluminous. See, e.g. the following: Wentworth Ofuately-Kodjoe, *The Principle of Self-Determination in International Law* (New York: Nellen Publishing Co. 1977); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press 1990); James Crawford (ed.), *The Rights of Peoples* (Oxford: Oxford University Press, 1992); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002); James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2nd edn., 2006), pp. 108–28; Antonio Cassese, 'The Self-Determination of Peoples', in: L. Henkin (ed.), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981), p. 92; Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff 1993); Catriona Drew, *Population Transfer: The Untold Story of the International Law of Self-Determination*, unpublished doctoral thesis, LSE 2006 (on file at Senate House Library,

invoked in the context of potential differences in human rights obligations of contracting parties to the same human rights treaties. One such principle relevant for present purposes is that treaty provisions are interpreted taking into account “any relevant rules of international law applicable in the relations between the parties”.³⁴ This has been affirmed and applied by the European Court of Human Rights in the context of interpreting the ECHR.³⁵ In the *Al-Adsani* case, the Court explained its significance thus:

The Convention... cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account... The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part...³⁶

University of London); Anne Bayefsky (ed.), *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer 2000). On the legal significance of Security Council mandates, see, e.g., *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58 and *Behrami*, above note 27. On the relationship between obligations under the UN Charter and human rights obligations more generally, see also Joined Cases C-402/05 P and C-415-05 P *Kadi and Al-Barakaat International Foundation v. Council and Commission*, European Court of Justice, judgment of 3 September 2008 (obtainable from <http://curia.europa.eu/en/content/juris/index.htm>). On the relationship between different areas of international law more generally, see ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission (finalized by Martti Koskenniemi), U.N. Doc. A/CN.4/L.682, Apr. 13, 2006; Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, keynote speech delivered at the Spring Meeting of the International Law Association, British Branch (4 Mar. 2006), reproduced in 55 I.C.L.Q. 791 (2006); David Kennedy, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’, paper delivered at the Spring Meeting of the International Law Association, British Branch (4 Mar. 2006) (available at <http://www.law.harvard.edu/faculty/dkennedy/speeches/LegalOrders.pdf>).

³⁴ Vienna Convention, above note 27, Art. 31 § 3 (c). On this, including further sources, see the relevant parts of the commentary in Aust, *supra* (note 27), and Gardiner, *supra* (note 27).

³⁵ *Golder*, *supra* (note 23), paras. 29; *James*, *supra* (note 27), paras 58–66; *Loizidou (Merits)*, *supra* (note 1), para 43; *Al-Adsani*, *supra* (note 27), para. 55; *Fogarty*, *supra* (note 27), para. 35; *McElhinney*, *supra* (note 27), para. 36; *Ocalan*, *supra* (note 27), para. 163 and para. 4 (partly dissenting opinion of J. Garlicki); *Bosphorus*, *supra* (note 27), paras. 100, 150; *Mamatkulov*, *supra* (note 27), paras. 39, 111, 123, and paras 13, 21–24 (joint partly dissenting opinion of J. Caffisch *et al.*); *Behrami*, *supra* (note 27), para. 122; *Saadi*, *supra* (note 27), paras 26, 61–62; *Kononov*, *supra* (note 27), paras 5–6 (joint dissenting opinion of J. Fura-Sandstrom *et al.*); *Demir*, *supra* (note 27), para. 67; *Andrejeva*, *supra* (note 27), paras 17–19 (partly dissenting opinion of J. Ziemele).

³⁶ *Al-Adsani*, *supra* (note 27), para. 55. See also *Loizidou (Merits)*, *supra* (note 1), para. 43 (cited in this quotation in *Al-Adsani*, in the gap after the second sentence); *Fogarty*, *supra* (note 27), at para. 35; *McElhinney*, *supra* (note 27), para. 36; *Ocalan*, *supra* (note 35), para. 163; *Bosphorus*, *supra* (note 27), para. 150; *Mamatkulov*, *supra* (note 27), para. 111; *Behrami*, *supra* (note 27), para. 122; *Saadi*, *supra* (note 27), para. 62; *Kononov*, *supra* (note 27), para. 5 n. 2; *Demir*, *supra* (note 27), para. 67.

At the Court of Appeal stage in *Al-Skeini*, Lord Justice Sedley considered the underlying legal question of what the obligations would mean were they to apply in a fashion more consonant with both the meaning of human rights law and potential effect on this meaning of other areas of law. He stated that:

No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art. 14. But I do not think effective control involves this. If effective control in the jurisprudence of the [European Court of Human Rights] marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying state and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights... [it places] an obligation on the occupier to do all it can.

If this is right, it is not an answer to say that the UK, because it is unable to guarantee everything, is required to guarantee nothing.³⁷

Bearing in mind the nature of human rights obligations, and the impact on them of other applicable law, a doctrine that such obligations somehow have an identical substantive effect in different contexts is difficult to sustain. The same obligations may apply, and in their totality, but they may mean something rather different in terms of what the state can and cannot do in any given situation. If, all things considered, on a particular issue human rights obligations require identical behaviour by the state whether it is acting territorially or extraterritorially, and this requirement is not altered by the general international law picture being different as between the two locations, then indeed identical obligations mean identical substantive effect. What is problematic is assuming, as the majority did in *Al-Skeini*, that such a scenario is always in play.

B. *Spatial Test for Extraterritorial Jurisdiction*

Turning to the second view on the meaning of human rights obligations on which the findings on the underlying issues of principle were partially based, here it was suggested that the trigger for extraterritorial applicability based on territorial control included as a requirement the capacity to exercise civil administration. As stated previously, the affirmation of this idea in *Al-Skeini* followed the invocation of a dictum by the European Court of Human Rights in *Banković*, where the Court offered the following description of when it had recognized extraterritorial jurisdiction in its previous case-law:

...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

³⁷ *Al-Skeini* (CA), *supra* (note 1), paras. 196–97.

territory exercises all or some of the public powers normally to be exercised by that Government.³⁸

As far as extraterritorial action as a consequence of occupation is concerned, the situation that was at issue in the northern Cyprus cases that constitute the main jurisprudence on the extraterritorial application of the ECHR based on territorial control, the above statement underlines a feature of the factual backdrop to those cases – the exercise of public powers – that was not actually emphasized in the Court’s earlier 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. But, whereas indeed such powers were exercised by Turkey in Northern Cyprus, their exercise was not seen as a prerequisite to the exercise of jurisdiction by the Court in its decision in the cases: the only issue was the exercise of “effective control”. For example, in the *Loizidou* case, the Court 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.³⁹

Although, then, the statement from *Banković* touches on some of the factual circumstances in relation to which the Court had previously found the exercise of jurisdiction (cf. the phrase ‘it has done so’), it would be wrong to conclude that the capacity to exercise public authority was actually one of the *salient* facts, and thus part of the test for jurisdiction as territorial control, in those previous cases. Indeed, it is notable in this regard that in its application of the law to the facts of the case in *Banković*, 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 Actually, the Court dismissed the contention that the bombing constituted jurisdiction on other grounds, namely that aerial bombardment did not constitute “effective control” of territory.⁴¹

It was a mistake in *Al-Skeini*, then, to conclude that the trigger for extraterritorial jurisdiction based on territorial control includes as a necessary requirement the capacity to exercise civil administration. To be sure, the exercise of

³⁸ *Banković*, *supra* (note 1), para. 71.

³⁹ *Loizidou (Preliminary Objections)*, *supra* (note 1), para. 62, cited in *Loizidou (Merits)*, *supra* (note 1), para. 52. See also *Cyprus v. Turkey*, *supra* (note 1), para. 77.

⁴⁰ See *Banković*, *supra* (note 1), paras. 75–76.

⁴¹ See *Banković*, *supra* (note 1), paras. 75–76.

civil administration would appear to constitute territorial control for the purposes of this test; the point is that it need not be evident for the test to be met. Perhaps the majority were influenced by their other, equally mistaken determination that the application of human rights obligations has an identical effect, in terms of the substantive policies required, extraterritorially as territorially. If human rights law somehow required a state has to govern occupied territory in exactly the same way as it governed its own territory, then indeed one might plausibly see the exercise of civil administration as an essential prerequisite for such governance. But, as has been explained, human rights law does not operate in this way.

7. Human Rights Imperialism Revisited

Having considered the two views about the substantive meanings of human rights law that in part led to the positions taken on the two issues of principle, I will now return to a critical appraisal of these positions, bearing in mind what has been said about the views on the substantive meanings, together with further factors.

A. Self-determination

A crucial additional factor that needs to be accounted for is the international law of self-determination. As mentioned at the beginning of this chapter, both of the views on the underlying issues of principle can be understood in terms of self-determination. The concern about impeding the handover to the local population relates to the right of that population to govern itself. The concern about imposing culturally inappropriate norms relates to the right of the people to respect for their particular value system.

What is striking about the expression of these two concerns in the *Al-Skeini* case is that they are articulated without any reference to legal foundation. The law – here the law of the European Convention on Human Rights – is invoked only as an impediment to them; the concerns themselves are not connected up to any legal framework. The issue of handing over administrative control to the Iraqi population is articulated only in terms of a policy of the coalition in Iraq. The issue of avoiding ‘human rights imperialism’ is articulated as a policy whose legitimacy does not require any authoritative back-up.⁴² Interestingly, a court

⁴² The concern about overriding local norms on human rights is at one stage represented as contradictory to the obligation in the law of occupation to respect, unless absolutely prevented, the law in occupied territory, but this is posited as an additional problem to that of ‘human rights imperialism’ and is itself not presented as relating to self-determination. See *Al-Skeini* (HL),

invokes what are articulated as extra-legal policy concerns in order to override the application of the rule of law itself.

One obvious starting point in appraising this position is to consider whether the policy concerns invoked are actually absent from international law, and thereby warrant an exclusively non-legal characterization. Actually, of course, the policy concerns map onto norms called “self-determination” which exist in customary international law – and so the common law of England and Wales – and the treaty law of most states (including the UK) via common Article 1 of the two global human rights Covenants.⁴³ Self-determination is not, however, included in the ECHR, nor, therefore, is it listed in the schedule of rights in the Human Rights Act, the instrument whose applicability was at issue in *Al-Skeini*.⁴⁴ Unlike with the ECHR, the UK has not legislated to bring the provisions of the global human rights Covenants into statutory law.⁴⁵

supra (note 1), para. 129 (Lord Brown) and, for discussion, Wilde, Case Note, *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)*, *supra* (note 1), and Wilde, *Complementing Occupation Law*, *supra* (note 1).

⁴³ On self-determination, see the relevant sources cited above note 33. On the general principle that customary international law forms part of the common law of England and Wales, see *Barbuit's Case*, 25 Eng. Rep. 777, Cas t. Talbot 281 (Chanc. 1735); *Triquet v. Bath*, 97 Eng. Rep. 936, 3 Burr. 1478 (K.B. 1764); *Heathfield v. Chilton*, 98 Eng. Rep. 51, 4 Burr. 2015 (1767); *Dolder v. Lord Huntingfield*, 32 Eng. Rep. 1097, 11 Ves. Jun. 283 (1805); *Viveash v. Becker*, 105 Eng. Rep. 619, 3 M. & S. 284, 292, 298 (1814); *Wolff v. Oxholm*, 32 Eng. Rep. 1097, 6 M. & S. 92, 100–106 (K.B. 1817); *Novello v. Toogood*, 107 Eng. Rep. 204, 1 B. & C. 554 (1823); *De Wütz v. Hendricks*, 130 Eng. Rep. 326, 2 Bing. 314, 315 (1824); *Emperor of Austria v. Day*, 45 Eng. Rep. 861, 30 LJ Ch. 690, 702 (1861) (reversed on appeal on another point); *Trendtex Trading Company v. Central Bank of Nigeria*, [1977] 2 W.L.R. 336, 1 QB 529 (CA). Cf. *R v. Secretary of State, ex parte Thakrar*, [1974] 2 All E.R. 261 (CA); *International Tin Council Appeals*, [1988] 3 All E.R. 257 (CA); [1989] 3 W.L.R. 969; (HL); *Al-Adsani v. Government of Kuwait*, [1995] 103 ILR 420, 428; [1996] 107 ILR 536, 540–42, and the commentary in Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 7th edn., 2008), pp. 41–44.

⁴⁴ For the rights covered in the Human Rights Act, and their basis in the ECHR, see HRA, *supra* (note 8), § 1 and sched. 1.

⁴⁵ On the general principle that treaty obligations are not part of the law of England and Wales unless this has been effected through legislation, see *The Parlement Belge Case*, [1880] 5 PD 197; *In re Californian Fig Syrup Co.*, [1888], L.R. 40 Ch. D. 620 (Stirling, J., *obiter*); *Walker v. Baird*, [1892] AC 491; *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326, 347, per Lord Atkin; *Theophile v. Solicitor-General*, [1950] AC 186, 195–96; *Republic of Italy v. Hambro's Bank*, [1950] 1 All E.R. 430; *Cheney v. Conn*, [1968] 1 W.L.R. 242; *International Tin Council Appeals* [1988], above note 43, at 291 per Kerr, LJ; at 335–6 per Nourse, LJ; at 349 per Ralph Gibson, LJ; [1989], above note 43. See also McNair, above note 27, pp. 81–97; 44 *Transactions of the Grotius Society for the Year 1958–59* (London, Grotius Society), pp. 29–62; Jacobs and Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987); Aust, *supra* (note 27); Gardiner, *supra* (note 27).

Although the court in *Al-Skeini* was only considering the ECHR, the UK is, of course, bound by the totality of its international law obligations, not just those obligations in the ECHR, and as with any state its legal position on any given matter is determined when account has been made of the operative international legal framework in its entirety. International law obligations have to be understood in their totality – in this sense there can indeed be no dividing and tailoring. Even as a matter of the artificial (as far as the true legal position is concerned) exercise of considering the ECHR in isolation, as mentioned earlier it is established doctrine in interpreting Convention obligations in relation to any given contracting state that they should be situated within the broader framework of law applicable to that state, and understood wherever possible to be in harmony with that broader framework.

What is the significance of the international law of self-determination to the extraterritorial activity of states? When states act in territory that is not their own, they are bound to respect the right of the local population of that territory, as articulated in common Article 1 of the two global human rights Covenants, to “...freely determine their political status and freely pursue their economic, social and cultural development.”⁴⁶

Understanding that state’s other human rights obligations (e.g. in the ECHR) in the light of this general obligation requires a different interpretation of these other obligations, as they apply to it in its capacity as a foreign presence, compared to their meaning at ‘home’, where it acts as the sovereign.

How, then, should the policy concerns articulated by the court in *Al-Skeini* be understood when the broader normative framework has been brought into the frame? What becomes apparent is that they have a different normative status from the exclusively extra-legal character they are given, and that this has a potentially different significance for the meaning of the human rights obligations under evaluation from that assumed in *Al-Skeini*.

B. *Human Rights Law and Enabling the Local Population to Govern Themselves*

Beginning with the policy concern of ensuring the handover of administrative control from the coalition to the Iraqi people, it will be recalled that this was considered to be at risk by the application of the ECHR because such application included as a component the exercise of civil administration. However, as has been explained, this is an incorrect account of the “territorial control” test for extraterritorial jurisdiction. It is not the case, then, that the extraterritorial application of ECHR on the basis of territorial control would somehow

⁴⁶ ICCPR, *supra* (note 1), Art. 1; ICESCR, *supra* (note 33), Art. 1.

oblige the foreign state to prolong, rather than scale down, its administrative presence.

Not only is this the correct interpretation of the meaning of extraterritorial jurisdiction as a matter of the jurisprudence and other authoritative statements on the matter; the contrary interpretation, offered by the majority in *Al-Skeini*, would contradict the broader international law framework concerning self-determination. It will be recalled that the only authoritative foundation offered by the court for the legitimacy of this concern was that it was the policy of the coalition. In articulating the concern in this fashion, the court ignores, whether deliberately or not, one of the most important developments in international law and public policy in the twentieth century: the profound shift in the legitimacy of introducing and maintaining international trusteeship, including occupation of the kind practiced in Iraq, brought about by the post-Second World War push for self-determination, a movement which led to the establishment of this new idea as a legal norm.⁴⁷

According to this new normative position, administration by outside actors, necessarily preventing self-administration, was considered *ipso facto* objectionable.⁴⁸ Previously, many instances of trusteeship, including certain occupations, operated on the basis that they would remedy perceived incapacities for self-administration, either at all, or in a manner that complied with certain policy objectives (at one time called the ‘standard of civilization’).⁴⁹ Self-administration, either full independence or remaining under the overall imperial umbrella,

⁴⁷ On international trusteeship and how it relates to occupation, see the discussion and sources cited in Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press, 2008), ch. 8.

⁴⁸ On this absolutist rejection of foreign territorial administration, see the discussion in Wilde, *International Territorial Administration*, *supra* (note 47), ch. 8, section 8.5.1 and pp. 385–86. In the words of Robert Jackson “...for several centuries prior to the middle of the twentieth century, an activist doctrine of military intervention and foreign rule was a norm that was imposed by the West on most of the world. By 1960 that old doctrine had been completely repudiated by international society. That was not because trusteeship could not produce peace, order, and good governance in some places. It was because it was generally held to be wrong for people from some countries to appoint themselves and install themselves as rulers for people in other countries... Self-government was seen to be morally superior to foreign government, even if self-government was less effective and less civil and foreign government was more benevolent. Political *laissez-faire* was adopted as the universal norm of international society”, Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), p. 314. In the words of William Bain, “the idea of trusteeship... was relegated to the dustbin of history along with the legitimacy of empire” because of a “normative shift whereby independence became an unqualified right and colonialism an absolute wrong”; William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), pp. 4 and 134 respectively.

⁴⁹ See Wilde, *International Territorial Administration supra* (note 47), ch. 8 generally.

would be granted, and so foreign rule/occupation withdrawn or drastically scaled down, when local capacities reached a certain level.⁵⁰ By contrast, according to the new self-determination paradigm, freedom and independence were no longer to be granted if and when the stage of development had reached a certain level; they were an automatic entitlement. Under Article 3 of General Assembly Resolution 1514 of 1960, “[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”⁵¹

In *Al-Skeini* Lord Justice Brooke articulates the imperative to enable the Iraqis to govern themselves only as a coalition policy that would be undermined by the application of the ECHR. Actually, the policy is also an international legal obligation binding on the coalition which, as such, influences the meaning of the other international legal obligations concerning human rights also binding on coalition members.

Bearing this in mind, to have the exercise of civil administration as a mandated consequence of the extraterritorial application of human rights law on the basis of territorial control not only lacks foundation in the jurisprudence on this issue as discussed earlier; it would also potentially contradict the law of self-determination. The norm of self-determination is regarded as enjoying *jus cogens* status; viz., it trumps the operation of any other rules of international law, including other rules of international human rights law, insofar as there is a contradiction between the two, unless the other rules also have *jus cogens* status.⁵² But the situation is not one of a clash between one human

⁵⁰ See Wilde, *International Territorial Administration*, *supra* (note 47), ch. 8 generally.

⁵¹ GA Res. 1514 (XV), *supra* (note 33), para. 3. As Robert Jackson states, “Independence was a matter of political choice and not empirical condition.” Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge, Cambridge University Press, 1990), p. 95. In the words of William Bain, “...decolonization abolished the distinction upon which the idea of trusteeship depended. There were no more ‘child-like’ peoples that required guidance in becoming ‘adult’ peoples: everyone was entitled by right to the independence that came with adulthood. Thus it no longer made any sense to speak of a hierarchical world order in which a measure of development or a test of fitness determined membership in the society of states”, Bain, *supra* (note 48), p. 135.

⁵² On *jus cogens* and peremptory norms in international generally, see UN Charter, above note 33, Art. 103; Vienna Convention on the Law of Treaties, *supra* (note 27), Arts. 53 & 64; International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, and commentary, adopted 9 August 2001 (hereinafter ILC Articles on State Responsibility, and commentary), contained in *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, and James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2001), Art. 40 and commentary thereto; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), and sources cited therein. Some of the general commentary listed above, note 33, includes discussion of self-determination

rights obligation to displace local actors in the exercise of civil administration and another obligation to enable self-governance. Rather, considering the self-determination norm introduces an additional, compatible element to the normative framework covered by the applicability norm. Whereas the latter norm simply fails to oblige the displacement of local actors in self-administration, the former norm introduces a good reason for this to be absent from the operative legal framework. In other words, international law not only fails to oblige a foreign state to substitute itself for governance by local actors; it also prohibits such substitution.

The problems associated with the idea that the exercise of civil administration by a foreign state in substitution for governance by local actors is somehow mandated by human rights law are perhaps further underlined if one considers the situation in northern Cyprus, the treatment of which forming the canon of ECHR case-law on the meaning of extraterritorial jurisdiction based on territorial control. The Turkish presence in that territory, and the proclamation of the Turkish Republic of Northern Cyprus (TRNC), were generally regarded internationally to be illegal.⁵³ As reflected in the dicta from the *Loizidou* case extracted earlier, the Court determined that Turkey's obligations operated with respect to its presence there simply because of the 'fact' of its control over the territory, and that such responsibility arose irrespective of whether the military action in consequence of which the control was established was 'lawful or unlawful.' This suggests a model of applicability that grafts the regulatory framework of human rights law onto a pre-existing situation, without prejudice to whether or not the situation – the administrative presence – is itself lawful.

If, by contrast, a model of applicability operated whereby the effect of the human rights norms would be to mandate the continuance of the foreign presence, this would move the applicable law beyond operating merely as a regulatory framework into the terrain of serving as a basis for legitimating the administrative presence itself. If this were correct, then the effect of the Court's decisions in the northern Cyprus cases would have been to somehow introduce a legal basis legitimizing Turkey's presence there, and the chief consequence of it, the proclamation of the TRNC. It is surely beyond doubt that the Court did

and *jus cogens*. See also the relevant parts of Orakhelashvili, this note; ILC Articles on State Responsibility, and commentary, this note, Commentary to Art. 40, para. 5.

⁵³ See S.C. Res. 353, U.N. Doc. S/RES/353 (July 20, 1974); S.C. Res. 365, U.N. Doc. S/RES/365 (Dec. 13, 1974); S.C. Res. 541, U.N. Doc. S/RES/541 (Nov. 18, 1983); S.C. Res. 550, U.N. Doc. S/RES/550 (May 11, 1984); G.A. Res. 3212 (XXIX), 1 Nov. 1974. See also the cites from ECHR case law, *infra* (note 54).

not intend such an effect, bearing in mind the general international position as to the illegality of Turkey's presence and the proclamation of the TRNC.⁵⁴

A model of applicability that mandated the continuance of the administrative presence would lead to an absurd situation where lawful occupations are subject to the regulation of human rights law but illegal occupations – because they should be brought to an end – are not, simply by virtue of the difference in legality.⁵⁵ Yet, of course, a difference in legality does not, in this manner, map onto the necessity for regulation. It would be perverse to suggest that lawful occupations require more legal regulation than illegal ones; if anything, a difference in the relative likelihood of human rights abuses operates in an opposite fashion.

C. Human Rights Law and Cultural Differences

So much, then, for the merits of the assertion in *Al-Skeini* that the application of human rights law based on territorial control would prevent the handover of authority to local actors. What of the other suggestion, that it would involve imposing culturally inappropriate standards, thereby constituting 'human rights imperialism'?

If, actually, human rights law properly understood can mean different things in different contexts, then it is necessary to consider whether these different meanings can accommodate the need to account for differences as between the obligations of the foreign state and the pre-existing applicable law in the territory, and more broadly cultural differences on human rights issues as between the foreign state and the people of the occupied territory. Equally, if the correct

⁵⁴ For references in Strasbourg case-law to the legal invalidity of the proclamation of the TRNC and/or the right of the government of Cyprus to be the sole government of Cyprus and/or the non-recognition of the TRNC by states other than Turkey, see *Cyprus v. Turkey* (1975), *supra* (note 32), pp. 135–36; *Cyprus v. Turkey*, Appl. No. 8007/77, European Commission of Human Rights (1978), pp. 146, 148; *Loizidou (Preliminary Objections)*, *supra* (note 1), paras 47, 56; *Loizidou (Merits)*, *supra* (note 1), paras. 19–23, 42, 56; *Cyprus v. Turkey* (2001), *supra* (note 1), paras 14, 15, 61, 90, 236, 238. The Court has not itself expressly affirmed directly that Turkey's presence in Cyprus is illegal. In the *Loizidou* case it explained that it was not necessary for it to pronounce upon the legality of Turkey's military intervention for its determination of responsibility under the ECHR, because, as previously stated, the test of 'jurisdiction' operated in the context of Turkey's exercise of territorial control irrespective of whether or not the military action in consequence of which such control was exercised was lawful. See *Loizidou (Merits)*, *supra* (note 1), para. 56.

⁵⁵ This model for applicability bears some relation to an idea suggested in the *Banković* decision on extraterritorial applicability, that the meaning of 'jurisdiction' in human rights treaties should reflect the meaning of the term 'jurisdiction' used in general international law. See *Banković*, *supra* (note 1), paras 59–61. For a discussion of this, see Wilde, *Triggering State Obligations Extraterritorially*, *supra* (note 1), 513–14 and sources cited therein.

interpretation of the ECHR requires the general norm of self-determination to be taken into account, then the different significance of this norm in a situation of foreign occupation compared with situation of a government acting in its sovereign territory raises the question of whether the substantive effect of ECHR obligations is consequently also rendered different as between the two situations.

On the particular issue raised by Lord Brown, that having the ECHR apply to the actions of contracting states taking place in other states not also bound by the Convention would risk a clash with the jurisprudence of other human rights bodies, the significance of this as a problem is not explained, and yet is surely doubtful. As for clashes in jurisprudence, as already mentioned the reality is that all ECHR contracting states are also bound by other human rights treaties that cover much of the same ground as the ECHR and its protocols, even if these obligations may mean different things. As in many other fields of international law, the international law of human rights is a law of ‘clashing’ obligations in the sense that multiple regimes, covering the same rights and the same subject-matter, are often in play.

As for clashes in the jurisdiction of courts and other expert bodies monitoring States’ compliance with their human rights treaty obligations, even for extraterritorial action taking place in the territory of other Council of Europe states, such a possibility exists because some ECHR contracting states have accepted the right of individual communications to other bodies such as the UN Human Rights Committee, creating the possibility of overlapping jurisdictions.⁵⁶ This is addressed to a certain extent by the various jurisdictional/admissibility devices that seek to avoid multiple fora being seized of the same situation.⁵⁷ Ultimately, however, where it occurs it is something which the state

⁵⁶ On the right of individual petition to the Human Rights Committee, see the (First) Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [hereinafter ICCPR First Optional Protocol]. For a list of states which have accepted the competence of the Human Rights Committee to hear individual communications under the First Optional Protocol, see <http://www2.ohchr.org/english/bodies/ratification/5.htm>. A number of those States are also parties to the ECHR, namely Albania, Andorra, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine. For the status of ratification of the ECHR, see the website of the Council of Europe Treaty Office at <http://conventions.coe.int/>.

⁵⁷ See ICCPR First Optional Protocol, above note 56, Art. 5(2)(a): “The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement...”; ECHR, *supra* (note 1), Art. 35(2)(b): “The Court shall not deal with any application

concerned has accepted, and it is not the business of a court to seek to revisit and unilaterally alter the consequences of such acceptance, let alone to do so through the drastic measure of rendering inapplicable the substantive obligations which the state has accepted.

For extraterritorial action conducted by the UK in territory not falling within another state also party to the ECHR, there is of course no greater risk of a clash with the jurisdiction of the UN Human Rights Committee when compared to action taking place within the territory of Council of Europe member states; the UK has not accepted the Human Rights Committee's jurisdiction over individual communications at all, and if it did, such jurisdiction would operate in either situation.⁵⁸

8. *Conclusion*

The willingness of a court to face up to the general principles at stake, and to seek to address them in the view it takes as to the substantive rules being determined, is to be welcomed. What is regrettable about the *Al-Skeini* House of Lords decision is the misconceived fashion in which their Lordships appraised the underlying legal questions which had to be determined in order to correctly analyse the general principles. The majority misunderstood the proper meaning of human rights treaty obligations on the questions of whether they can result in different substantive requirements in different situations and whether the 'spatial' trigger for extraterritorial application requires a capacity to exercise civil administration. Moreover, they failed to give proper account to the interface between human rights law and other relevant obligations in international law, notably the international law of self-determination.⁵⁹

These flawed determinations led to conclusions on the two issues of principle which, because of the flawed nature of the prior determinations, are themselves of questionable merit. Human rights obligations may compel, rather than impede, the handover of authority by an occupier to the local population. Equally, having a foreign state's obligations applicable to its presence in the territory of a state not also bound by the same obligations may not amount to 'human rights imperialism'. The obligations themselves and the effect on them of other areas of international law, notably the right of self-determination, may require the state to be deferential to and accommodating of local cultural norms

submitted under Article 34 that... (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

⁵⁸ See *supra* (note 56).

⁵⁹ Not discussed in the present piece, the majority did discuss the interface with one particular area of international law, the law of occupation. See *supra* (note 42).

in a way that, were such norms to be at issue in its own territory, different legal requirements would prevail.

Greater understanding is needed of what, in the words of Lord Justice Sedley in the Court of Appeal stage of *Al-Skeini* quoted above, doing 'all it can' might mean in the light of this view of the applicable law, before one can draw conclusions on the issue of 'human rights imperialism'. The House of Lords decision made a significant contribution to the debate on the issues of principle discussed, but the problematic nature of its reasoning suggests that there is much more to be said on them.