Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon

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I. INTRODUCTION

In Al-Saadoon and Others v. Secretary of State for Defence, it the High Court of Justice of England and Wales has found that the United Kingdom’s obliga:

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1. Al-Saadoon and Others v. Secretary of State for Defence, [2015] EWHC (Admin) 715. It is notable that the (single) presiding judge was Mr. Justice Leggatt, the same judge who delivered the controversial judgment in Serdar Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369, in which he gave a similarly controversial judgment. See, e.g., Sean Aughey & Aurel Sari, Targeting and Detention in Non-International Armed Conflict: Serdar Mo-
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The significance of this development for the armed forces is plain to see—adoption of the approach would subject an even broader range of their activities to the substantive and procedural duties entailed in application of the ECHR. The perceived restraint it will impose on the military’s freedom to conduct hostilities overseas has led one former commander to describe it as “absurd.”4 However, the impact of Al-Saadoon should not be overstated. Most importantly, it may not survive appeal at the UK Court of Appeal or if it is considered by the UK Supreme Court. Furthermore, it is questionable whether the European Court of Human Rights (ECtHR) would reach the same conclusion, either in this case or in any case presenting similar facts. In any event, for reasons I will explain, the UK Ministry of Defence position is that the ruling will not affect the actual conduct of operations.5

Nevertheless, the judgment does reflect a general trend according to which the scope of applicability of the ECHR has expanded. As such, while it may be that neither higher UK courts nor the ECtHR reach exactly the same result, further expansion of applicability is likely. This would exacerbate the problem of the already confusing application of the ECHR to the use of force in armed conflict and may, as the Court in Al-Saadoon con-


cedes, lead to a “flood of claims” whenever the UK enters into any major foreign intervention.\footnote{6}{\textit{Al-Saadoon}, supra note 1, ¶ 106.}

The \textit{Al-Saadoon} judgment deals with a number of preliminary issues affecting over two thousand cases arising from UK military activities in Iraq following the 2003 invasion.\footnote{7}{Id. ¶¶ 1–4.} These issues relate to broad questions of both fact and law that affect the viability of large categories of these claims. They address, for example, the scope of the duty to investigate alleged violations of human rights. However, of broadest significance is the Court’s approach to the extraterritorial applicability of the ECHR and it is, therefore, that topic on which this article will focus.

Before discussing the findings in \textit{Al-Saadoon}, I will situate the judgment in a legal sense by explaining the status of the ECHR—and, by extension, the jurisprudence of the ECtHR—within the UK domestic legal order. Then, turning to the case itself, I will set out the reasoning of the Court with respect to jurisdiction before assessing the potential impact of the judgment, particularly in light of the ambiguous relationship between international human rights law (IHRL) and international humanitarian law (IHL).

II. THE ECHR AND ITS IMPLEMENTATION IN UK DOMESTIC LAW

The United Kingdom is one of forty-seven State parties to the ECHR, which contains a broad catalogue of human rights that includes, \textit{inter alia}, the right to life,\footnote{8}{ECHR, supra note 2, art. 2.} the prohibition of torture and inhuman or degrading treatment or punishment,\footnote{9}{Id., art. 5.} and the right to liberty and security.\footnote{10}{Id., art. 5.} These rights carry with them a range of duties, some of which are negative, in particular the prohibition of conduct that would directly violate the right in question. Some, however, are positive, including the obligation to investigate certain alleged violations to a particular standard.\footnote{11}{See, e.g., \textsc{Walter Kälin \& Jörg Künzli}, \textsc{The Law of International Human Rights Protection} 96–112 (2009).}

Application of the ECHR is supervised by the ECtHR, an international court empowered to rule on applications from individuals or State parties alleging violations of the rights contained in the treaty. Its judgments are
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binding strictly only on States that are parties to the particular case in question. While no formal doctrine of precedent binds the Court to previous decisions, it has generally sought consistency in its jurisprudence (even if it has not always achieved it) and, as a matter of procedure, cases that may require an inconsistent approach must be referred to its highest judicial body, the Grand Chamber.

As a State party, the UK is bound to apply the ECHR as a matter of international law. Under its provisions, alleged violations may be referred to the ECtHR either by other State parties or, once all domestic remedies have been exhausted, by individual victims. However, the UK has also incorporated the substantive rights contained in the ECHR into its domestic law by means of the Human Rights Act 1998 (HRA).

Under the HRA, courts must interpret the UK’s domestic legislation, as far as possible, in a manner compatible with ECHR rights; if they cannot do so then they must make a “declaration of incompatibility.” It is also unlawful for public authorities, including courts, to act in a way which is incompatible with an ECHR right unless, by virtue of an Act of Parliament, they are unable to do otherwise. As a consequence, UK courts are generally obliged to give effect to the rights contained in the ECHR in their decisions. In determining any question that arises in connection with an ECHR right, courts must also take into account any relevant decision of the ECtHR. While not a strict implementation of stare decisis, this means that UK

12. ECHR, supra note 2, art. 46(1).
13. On the approach, generally, of the ECtHR to its own case law, see, e.g., Alastair Mowbray, An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case-law, 9 HUMAN RIGHTS LAW REVIEW 179 (2009).
14. European Court of Human Rights, Rules of Court r. 72(2) (July 1, 2014), available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. The Grand Chamber is the senior judicial formation of the ECtHR. It will hear cases that have either (a) been relinquished in its favor by a lower Chamber before judgment; or (b) been referred to it, on the request of one of the parties to a case, following the judgment of one of the lower Chambers. Id., rr. 72–73.
15. ECHR, supra note 2, art. 33.
16. Id., art. 34, 35(1).
18. Id. § 3.
19. Id. § 4.
20. Id. §6.
21. Id. § 2(1).
courts are generally obliged to follow the jurisprudence of the ECtHR. In practical terms, this means that domestic courts must keep pace with the ECtHR in its development of the law: neither lagging behind nor advancing beyond it. However, inconsistency in the case law of the ECtHR—as has been the case with respect to the question of its extraterritorial applicability—may mean that it is difficult to identify a clear authority on any given point. Furthermore, domestic courts may apply decisions of the ECtHR in good faith, only for the matter to be referred to the ECtHR and for that Court to adopt a different or novel approach.

UK domestic courts operate within a hierarchy subject to a formal doctrine of precedent; for example, the High Court is bound to apply the law as decided by both the Supreme Court and the Court of Appeal. While the High Court is not strictly bound by its own previous decisions, they are strongly persuasive and will normally be followed. When domestic courts follow decisions of the ECtHR, the legal principles in question may become embedded in domestic law and become subject to the strict domestic application of stare decisis. As a result, courts determining issues touching on ECHR rights may be required to consider both domestic and ECtHR authorities on any particular point. This further complicates the task of identifying the definitive law on any particular issue and increases the scope for finding conflicting authority. It also means that the volume of material to be considered can be vast. The judgment in Al-Saadoon required, for example, consideration of “over three hundred cases and other legal materials.”

The right of individual access to the ECtHR also means that litigation involving controversial issues concerning the application of the ECHR can be exceptionally protracted. Taking the High Court’s decision in Al-Saadoon as an example, the government may first seek to appeal the judgment at the Court of Appeal, after which either party may ask for the case to be considered by the Supreme Court. If the claimants (but not the government) are still unsatisfied once the domestic process has run its course, they may

22. For an analysis of the different approaches taken by UK courts to decisions of the ECtHR, see Francesca Klug & Helen Wildbore, *Follow or Lead? The Human Rights Act and the European Court of Human Rights*, 2010 *EUROPEAN HUMAN RIGHTS LAW REVIEW* 621.


24. This was the case with respect to Al-Skeini. See infra pp. 410–13.


then apply for the case to be heard by the ECtHR, a process that can take years.\textsuperscript{27}

\section*{III. Extraterritorial Application of the ECHR in \textit{Al-Saadoon}}

Turning to the substance of \textit{Al-Saadoon} and its conclusions as to the extraterritorial application of the ECHR, I will first set out the main case law on which the High Court based its decision. Second, I will explain its reasoning in interpreting the law as it did. Finally, I will examine the likelihood that the judgment will survive appeal or be followed in this or subsequent cases by the ECtHR.

\subsection*{A. Relevant Case Law}

The point of departure in understanding the extraterritorial effect of the ECHR is Article 1: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [contained in] this Convention.”\textsuperscript{28} From this, the key question is what it means to be within the jurisdiction of a State party to the ECHR. The term “jurisdiction” is not expressly defined in the ECHR itself and cannot simply be equated with its familiar meaning under the branch of international law dealing with the

\begin{footnotesize}
\textsuperscript{27} The ECtHR is currently dealing with a significant backlog of cases. At the end of 2014 it had 69,900 applications pending before the Court, although this represented an overall decrease of 30 percent over the course of the year. European Court of Human Rights, \textit{Analysis of Statistics 2014} (2015), available at http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf. On the delays that have dogged the Court and led to reform of its processes, see, e.g., Ken Clarke Hails Deal to Overhaul European Court of Human Rights, BBC (Apr. 19, 2012), http://www.bbc.com/news/uk-politics-17762341.

\textsuperscript{28} It is notable that this formulation differs from that contained in the International Covenant on Civil and Political Rights, under Article 2 of which a State party is required to afford the protection of the Covenant to “individuals within its territory and subject to its jurisdiction.” International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. This jurisdiction clause has been widely, though not universally, construed to be disjunctive, i.e., such that the Covenant applies \textit{both} to those within a State party’s territory \textit{and} to those subject to its jurisdiction. On this basis (which is yet to receive support from the United States), arguments for the extraterritorial application of the ECHR could be extended to that of the ICCPR. See, e.g., Marko Milanovic, \textit{Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy} 222–27 (2011). For an analysis of the U.S. position, see Beth Van Schaack, \textit{The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change}, 90 \textit{International Law Studies} 20 (2014).
\end{footnotesize}
legal authority of States to make and enforce domestic law, despite attempts of courts sometimes to do so.29 In understanding what jurisdiction means in the context of the ECHR, courts have made use of two different conceptions: a “spatial” model, linking jurisdiction to control over a geographical area, and a “personal” model, referring to the exercise of authority and control over individuals. The central thread in the development of the law as it regards jurisdiction is the interplay between these different approaches.

The starting point for most analyses, including that in Al-Saadoon, is Banković, which was not the first case to adopt a spatial analysis, but has been the most influential. Banković concerned a claim brought against a number of nations involved in NATO’s 1999 bombing campaign against the then-Federal Republic of Yugoslavia. All but one of the applicants was related to individuals killed in a NATO airstrike against the Radio Televizije Srbije media facilities in Belgrade; the remaining applicant was himself injured in the attack.30 In considering the admissibility of the claim, the ECtHR considered whether those killed or injured were within the jurisdiction of the States concerned.31 This meant determining whether individuals can be considered to be within the jurisdiction of a State party when the only link that they have with the State party is the latter’s use of physical force in an area which is (a) outside the territory of the State party, (b) is neither occupied nor under any other form of control of the State party, and (c) which is in the territory of a non-State party. The Court found in the negative, concluding that:

In sum, 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 only 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 acqui-

29. MILANOVIĆ, supra note 28, at 19–34.
30. Banković, supra note 3, ¶¶ 6–11.
31. The claimants in Banković argued that all NATO members who were also State parties to the ECHR were liable for the alleged breach, notwithstanding that they were not involved directly in the bombing. The Court, having found there to be no jurisdictional link in any case, did not proceed to address the further question whether State parties could be liable for the actions of an international organization of which they were a member. Id. ¶ 83.
escence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.\textsuperscript{32}

Ignoring the precise contours of this test, the key point for present purposes is its primarily territorial basis. The only stated exceptions were the very limited category of “cases involving the activities of [a State party’s] diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State.”\textsuperscript{33}

While the Court did not explicitly rule out the possibility of a jurisdictional link being established on a personal basis in other circumstances, its reasons for rejecting such a link on the facts of \textit{Banković} are illustrative of its approach. The Court concluded that the application of the ECHR on the basis of \textit{any} level of control would be “tantamount to arguing that anyone affected by an act imputable to a [State party], wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purposes of [the ECHR].”\textsuperscript{34} It would also mean applying the ECHR in situations where a State party could be expected to protect only some rights. However, the Court found that the text of the ECHR would not permit the rights it sets out to be “divided and tailored.”\textsuperscript{35} Furthermore, in countering the suggestion that its decision could leave a vacuum in the protection of human rights, the Court suggested that obligations could only be owed by State parties in respect of acts that occur within the legal space—or \textit{espace juridique}—of the ECHR.\textsuperscript{36} This meant, essentially, that a State party could only by bound extraterritorially by the ECHR if it exercised effective control over the territory of another State party.

The \textit{Banković} decision has been criticized on several fronts. For example, it has been argued that it relies on a flawed analysis of the Court’s own case law and is based on a misunderstanding as to the sense in which the term “jurisdiction” is used in the ECHR.\textsuperscript{37} As a matter of principle, it may also create “a perverse incentive for [S]tates acting outside their boundaries.”\textsuperscript{38} The E.CtHR appears to have understood this dilemma in deciding

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} ¶ 73.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.} ¶ 75.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.} ¶ 80.
\item \textsuperscript{37} MILANOVIĆ, supra note 28, at 21–30.
\item \textsuperscript{38} \textit{Id.} at 30.
\end{itemize}
subsequent cases, but has consistently declined to expressly overrule Banković, which has led to its continued use by States in support of arguments for a narrow approach to the question of jurisdiction. However, as will be shown, subsequent ECtHR decisions have at least attenuated the authority of Banković to the point where it is arguably of only—at most—narrow importance in defining the current state of the law.

These subsequent decisions are, according to the Court in Al-Saadoon, “difficult, if not impossible, to reconcile with the approach in Banković.” In Issa v. Turkey (2004) and Öcalan v. Turkey (2005) the ECtHR recognized the possibility of the exercise of jurisdiction over individuals detained (and then, in the case of Issa, killed) by Turkish agents acting in Iraq and Kenya, respectively, in the absence of effective control by Turkey of the territory in question. Then in Al-Saadoon v. United Kingdom (2009) it recognized the exercise of jurisdiction by the UK over detainees in British military prisons in Iraq and in Medvedyev v. France (2010) by France over the crew of a Cambodian-flagged ship intercepted in international waters by the French navy. The latter two decisions can both plausibly be explained by reference to the spatial model, i.e., as examples of effective control exercised over areas, rather than individuals. However, both cases demonstrate, at the very least, an application of the concept of effective control to increasingly small spaces, well beyond the plain meaning of a “territory and its inhabitants.” The incompatibility—to a greater or lesser extent—of these decisions with Banković was not addressed until the seminal Al-Skeini case, dealt with first domestically in the UK and later, at the ECtHR.

Al-Skeini concerned a number of claims arguing that the UK had an obligation to conduct investigations into alleged breaches of the right to

39. Al-Saadoon, supra note 1, ¶ 39.
42. In Issa the ECtHR ultimately found that there was insufficient evidence that Turkish forces had been operating in the area in question. However, it would appear that the Court would have held the ECHR to apply if the claim had been supported by sufficient evidence. Issa, supra note 40, ¶¶ 76–81.
43. Al-Saadoon v. United Kingdom, App. No. 61498/08, Eur. Ct. H.R (2010). This is not the same case as the one that forms the main subject of this article.
45. Banković, supra note 3, ¶ 73.
46. In the UK, the case was heard in the House of Lords as Al-Skeini and Others v. Secretary of State for Defence [2007] UKHL 26, [2008] 1 AC 153 [hereinafter Al-Skeini v. Secretary of State for Defence]. At the ECtHR, the case was heard as Al-Skeini and Others v. United Kingdom, App. No. 55721/07 Eur. Ct. H.R. (2011) [hereinafter Al-Skeini v. UK].
life in relation to the alleged killings of Iraqi civilians by UK armed forces during the UK’s occupation of Basra.\textsuperscript{47} So far as is relevant here, the key question ultimately was whether the UK had jurisdiction in relation to Iraqi civilians killed outside military bases. The case was eventually considered by the UK’s then-highest domestic court, the House of Lords,\textsuperscript{48} which concluded that Banković remained good law, notwithstanding the apparent contradictions contained in the line of authority beginning with Issa.\textsuperscript{49} Thus the Court concluded there was no jurisdiction because, first, Iraq was outside the \textit{espace juridique} of the ECHR and, second, the UK did not exercise effective control over Basra, the area in question, at the material time.\textsuperscript{50}

The outcome was very different when the case was considered by the ECtHR, which took the opportunity to restate the law concerning jurisdiction under ECHR Article 1. The Court did not expressly overrule Banković, instead reaffirming that jurisdiction is “primarily territorial”\textsuperscript{51} and that it could be exercised extraterritorially “only in exceptional cases,” which were to be determined “with reference to the particular facts.”\textsuperscript{52} As set out in Banković, such exceptional circumstances included those situations where, “as a consequence of lawful or unlawful military action, a [State party] exercises effective control of an area outside [its own] territory,” and must, as a result, secure the full range of ECHR rights.\textsuperscript{53}

However, the Court also recognized the possibility of personal jurisdiction, in situations where State agents exercise authority and control over individuals. This could happen, first, in the narrow circumstances, already identified in Banković, i.e., where diplomatic or consular agents “exert authority and control over others.”\textsuperscript{54} Second, again drawing on the language of Banković, jurisdiction may be established where a State party, “through the consent, invitation or acquiescence of the Government of [another] territory . . . exercises all or some of the public powers normally to be exercised by the Government,” in which circumstances a State party would be responsible for breaches of the ECHR incurred through the exercise of

\begin{itemize}
  \item \textsuperscript{47} Al-Skeini v. Secretary of State for Defence, supra note 46, ¶ 1, 6.
  \item \textsuperscript{48} The judicial function of the House of Lords is now fulfilled by the Supreme Court of the United Kingdom, which began to hear cases in 2009.
  \item \textsuperscript{49} Al-Skeini v. Secretary of State for Defence, supra note 46, ¶¶ 68–81 (per Lord Bingham), ¶ 108–32 (per Lord Carswell).
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Al-Skeini v. UK, supra note 46, ¶ 131.
  \item \textsuperscript{52} Id. ¶ 132.
  \item \textsuperscript{53} Id. ¶ 138.
  \item \textsuperscript{54} Id. ¶ 134.
\end{itemize}
“executive or judicial functions.” Finally, considering the Issa line of authority, the Court concluded that “jurisdiction in [these] cases [does not arise] solely from the control exercised by the [State party] over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.” Consequently, “whenever the State [party], through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation . . . to secure to that individual the rights and freedoms under [the ECHR] that are relevant to the situation of that individual.”

Key to the identification of personal jurisdiction was the finding that ECHR rights could be “divided and tailored,” such that a State is obliged to secure only those rights “that are relevant to the situation of that individual.” Such a departure from Banković was essential in establishing personal jurisdiction. A State clearly could not be expected to guarantee to a detainee held overseas the full range of rights including, for instance, the right to marry, whereas it would certainly be in the position to refrain, for example, from the use of torture.

The Court’s final clarification related to the concept of the espace juridique, which it interpreted in Al-Skeini so narrowly as to effectively remove any real significance. It explained the idea of a legal space to be relevant only to the narrow argument that jurisdiction should be interpreted to avoid leaving a vacuum in the protection of human rights where one State party’s territory is occupied by the armed forces of another. Whatever limited relevance the concept of espace juridique might still have, it would certainly not, therefore, act as a bar to the exercise of jurisdiction in the territory of a non-State party.

Despite these apparent adjustments in its position, the ECtHR declined to acknowledge its departure from Banković, leaving the status of the earlier decision unclear. However, as the Court recognized in Al-Saadoon, it would seem that the ECtHR regards the restatement of the law in Al-Skeini to be definitive. In two subsequent cases the ECtHR has quoted the relevant

55. Id. ¶ 135.
56. Id. ¶ 136.
57. Id. ¶ 137.
58. Id.
59. ECHR, supra note 2, art. 12.
60. Al-Skeini v. UK, supra note 46, ¶ 142.
61. Id. ¶ 62.
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passages from *Al-Skeini* verbatim and made it clear that the principles set out therein are those to be applied in determining the existence of jurisdiction.62

UK domestic law now recognizes that the correct approach to the question of jurisdiction is that set out in *Al-Skeini*. In *Smith v. Ministry of Defence*, the Supreme Court described *Al-Skeini* as providing a “comprehensive statement of general principles”63 and recognized as one of these the principle that jurisdiction could arise through the exercise of authority and control over an individual.64 As a result, it was common ground between all parties in *Al-Saadon* that the principles that were to be applied in determining the issue of jurisdiction were those set out in *Al-Skeini*,65 albeit that there were significant differences in how they ought to be applied.

**B. Application of the Al-Skeini Principles**

In addressing the application of the *Al-Skeini* principles, the High Court in *Al-Saadon* first asked whether jurisdiction could be found in any of the cases on the basis of effective control over an area. The Court addressed this as a question of fact: “whether the [S]tate is . . . in a position to secure to people within the territory the rights guaranteed by the Convention.”66 It noted that previous factual determinations by domestic courts—acknowledged without criticism by the ECtHR—support the conclusion that this test was not met at *any* point during the UK’s presence in Iraq, even while the UK was considered to be an occupying power. The claimants in *Al-Saadon* did not attempt to persuade the Court otherwise, relying solely on personal jurisdiction—a position described by the Court as “realistic.”67

Turning to the question of personal jurisdiction being exercised where there was no effective control over the area, the Court first addressed the issue of the exercise of public powers. A potential hurdle to finding jurisdiction on this basis is the reference in *Al-Skeini* to the exercise of public powers.
powers through the “consent, invitation or acquiescence” of the territorial government.\textsuperscript{68} However, this would clearly not be the case where a State party exercises public powers as an occupying force, in which case—as in Iraq—there may be no government with which to deal. The Court in \textit{Al-Saadoon} therefore drew the inference “that the test of control over individuals, like the test of control over an area, is a factual one which depends on the actual exercise of control and not on its legal basis or legitimacy.”\textsuperscript{69} As the Court observed, this makes sense because “[i]t would be perverse if a state was bound to secure an individual’s right to life when its soldiers are conducting security operations or exercising other public powers lawfully on foreign territory; and yet if the state could show that it was acting unlawfully, the Convention would not apply.”\textsuperscript{70}

Furthermore, the exercise of public powers could not be determined by reference to macro-level events, such as the declared completion of combat operations or the assumption of status as an occupying power. Instead, the Court found it to be a question “that can only be answered by considering what function the soldiers concerned were performing in any given case.”\textsuperscript{71} Therefore, the Court found there to be instances where the UK exercised public powers in Iraq not only during the period of occupation—which the UK government accepted—but during the earlier “invasion” period and also after it had transferred authority to the Interim Iraqi Government (IIG), on whose request the UK was conducting a “broad range of tasks to contribute to the maintenance of security.”\textsuperscript{72}

However, it is in the application of the principle whereby jurisdiction can arise through the exercise of physical power and control over an individual—absent the exercise of public powers—where the Court’s reasoning is most controversial. While it was clear that jurisdiction could be identified on this basis in the case of a detainee,\textsuperscript{73} it was unclear if, as the claimants argued, it could be extended to situations where physical power and control is exercised in relation to a non-detainee. To put it another way, when a State agent uses violence against somebody, could that act \textit{in itself} be sufficient to establish jurisdiction? The Court, despite a range of arguments presented by the government to the contrary, found that it could.

\textsuperscript{68} \textit{Al-Skeini v. UK}, supra note 46, ¶ 135.
\textsuperscript{69} \textit{Al-Saadoon}, supra note 1, ¶ 74.
\textsuperscript{70} Id. ¶ 74.
\textsuperscript{71} Id. ¶ 79.
\textsuperscript{72} Id. ¶¶ 84–86.
\textsuperscript{73} The UK government had already accepted as much. Id. ¶ 93.
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Addressing, first of all, the question as a matter of principle, the Court found “it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person.” 74 This, the Court found, was the “ultimate exercise of physical control over another human being.” 75 Furthermore, no “principled system of human rights law [could] draw a distinction between killing an individual after arresting him and simply shooting him without arresting him first.” 76 In reaching this conclusion, the Court rejected the government’s argument that a “rational distinction” could be drawn between the exercise of authority and control over a detainee—as a consequence of being in custody—and the use of force against an individual not in custody. The government had attempted to apply a gloss to its argument such that, “if the person holding the gun is in such control of the situation that he is literally able to hold the gun to the individual’s head, it may be that the individual is in fact detained.” 77 The Court found this to be unsustainable because it would lead to the result that “the applicability of a system of human rights law [would] depend on the distance between the gun and a person’s head.” 78

The Court also recognized a handful of cases where, prior to Al-Skeini, the ECtHR had identified jurisdiction on the basis of the exercise of authority and control without detention. 79 The government argued, correctly, that none of these cases were mentioned in Al-Skeini—and that all of the relevant cases referred to in Al-Skeini did involve detention. 80 However, the Court reasoned that “the general principle articulated [in Al-Skeini] encompasses and explains the finding of jurisdiction in the non-detainee cases.” 81

Also important was the principle that rights can be divided and tailored. Given that a State, when exercising jurisdiction on a personal basis, must “secure [only] those rights relevant to the situation of [an] individual, then the fact that an individual is taken into custody can only be relevant . . . to the extent of the rights which must be secured.” Consequently, whereas a detainee would enjoy a range of protections under the ECHR, a

74. Id. ¶ 95.
75. Id.
76. Id.
77. Id. ¶ 96.
78. Id.
79. Id. ¶¶ 89–92.
80. Id. ¶ 94.
81. Id. ¶ 97.
non-detainee (absent any other basis for jurisdiction) would be owed only the negative obligation “to refrain from unlawful killing.”

Turning to Al-Skeini itself, the government argued in Al-Saadoon that it had been only in the context of the exercise of public powers—specifically security operations—that the ECtHR had found jurisdiction where individuals had been shot by British soldiers. It is true that the ECtHR arguably muddied the waters in Al-Skeini by apparently referring to more than one aspect of its newly defined personal basis for jurisdiction. It found that “the United Kingdom . . . assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government.” However, it then went on:

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

Thus, on the facts of Al-Skeini, it was arguably only in the context of the exercise of public powers that the ECtHR found there to be personal jurisdiction based on the authority and control exercised by British soldiers.

However, the Court in Al-Saadoon took the position that the ECtHR, once it had identified the jurisdictional link based on the exercise of public powers, “simply did not address the question of which cases involved the exercise of physical power and control . . . and which did not.” Instead it had applied the same reasoning to all of the cases, irrespective whether or not they involved detention.

Addressing the broader point—whether it was only in the exercise of public powers that there could be jurisdiction based on the use of physical force against a non-detainee—the Court argued that this would only make sense if the exercise of public powers required some legal basis or authority. If this were the case, it might be reasonable to argue that only acts pursuant to the “consent, invitation or acquiescence” of the territorial gov-

82. Id. ¶ 98.
83. Id. ¶ 94.
84. Al-Skeini v. UK, supra note 46, ¶ 149.
86. Al-Skeini v. UK, supra note 46, ¶ 99.
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Government could establish jurisdiction. However, the Court had already found that the exercise of public powers was a question of fact and need not have any legal basis. Given that public powers can therefore be exercised unilaterally, it argued that it would be illogical to limit jurisdiction only to a subset of cases where the use of physical force by a State agent is pursuant to some purported exercise of public power. For example, it would make no sense for the ECHR to apply where a State agent kills an individual while claiming to act as a “policeman,” but not if he simply assassinates him. Thus, the purported exercise of public powers may be sufficient—but not necessary—for a State to have jurisdiction over an individual. 87

The government had also argued that recognizing jurisdiction on the basis of the use of force alone would be contrary to the decision on the facts in Banković, which the ECtHR had so far failed to expressly overrule. Indeed, the Court in Al-Saadoon lamented the ECtHR’s “lack of transparency” in Al-Skeini in failing either to “acknowledge that it was departing” from the approach in Banković or to “explain its reasons for doing so.” 88 The lingering doubt as to the status of Banković meant that it remained open to the government to argue that something of the judgment had survived. In particular, the government relied on a passage in Hirsi Jamaa and Others v. Italy, 89 in which the ECtHR had mentioned Banković with approval in cases “where only an instantaneous extra-territorial act is at issue.” 90 Thus the government argued that a distinction could be drawn between situations of detention and those involving only a momentary use of force. However, the Court identified that the principle drawn from Banković was used in Jamaa as an exception only to the exercise of effective control over an area, not in relation to the exercise of jurisdiction over an individual. In Jamaa the ECtHR simply did not consider the scope of the principle by which jurisdiction can be established on the basis of control and authority over an individual. In any case, the Court considered the distinction for which the government argued to be arbitrary: “The essential question is whether . . . a coherent distinction can be drawn based on the length of

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87. Al-Saadoon, supra note 1, ¶ 100.
88. Id. ¶ 56.
89. Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Eur. Ct. H.R ¶ 73 (2012), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231. In Hirsi Jamaa the ECtHR concluded that the applicants, who were Somali and Eritrean nationals who had attempted to reach Italy by sea, were within Italy’s jurisdiction after they had been transferred from their vessel onto Italian military ships.
90. Al-Saadoon, supra note 1, ¶ 101.
time for which physical force is used, though not on the degree of such force . . . .” The Court found that it could not.91

Turning again to the status of Banković, the Court in Al-Saadoon found the decision on the facts in Banković, so far as it related to the extraterritorial use of force by agents of State parties, to be unsustainable in the light of Al-Skeini.92 The Court stressed that this did not mean—as had been argued in Banković would be the consequence of finding jurisdiction on the facts in that case—that jurisdiction would be extended over anyone adversely affected by an act attributable to a State party. The Court reasoned that the principle in Al-Skeini does not go that far; it is only in limited circumstances—the use of coercive force—that the criteria for establishing jurisdiction on the basis of authority and control over an individual would be met.93 This avoids the problem that the requirement for a jurisdictional link would essentially become meaningless and, as the government argued, “collapse[ ] the distinction between jurisdiction and breach.”94 The Court was not suggesting that any adverse effect on an individual would be sufficient to establish jurisdiction, but rather that the use of physical force by a State agent would be sufficient to meet the relevant test set out in Al-Skeini. The “essential principle” derived by the Court is that “whenever and wherever a [State party] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate [ECHR] rights.”95

In identifying this principle, the Court rejected arguments that such a conclusion represented a development that ought to be left to the ECtHR. The government argued, based on sound domestic authority, that UK courts should not expand the scope of ECHR rights beyond the limits set by the ECtHR, particularly in relation to the scope of jurisdiction.96 However, the Court considered its conclusion simply to be a logical consequence of principles clearly articulated in Al-Skeini. Indeed, it found the application of such logic to be a requirement of the doctrine of precedent and that it would therefore be neither permissible nor desirable “to adopt an approach of waiting to see what Strasbourg says.”97

91. Id. ¶ 102.
92. Id. ¶ 103.
93. Id. ¶¶ 104–5.
94. Al-Saadoon, supra note 1, ¶ 108.
95. Id. ¶ 106.
96. Id. ¶¶ 112–15.
97. Id. ¶ 116.
C. Future Acceptance of the Principle Identified in Al-Saadoon

In sum, the Court’s arguments in deriving its “essential principle” as to the application of the ECHR to the use of physical force are cogent and persuasive. Having taken the Al-Skeini principles as a starting point, there is, in the view of this author, nothing in the Court’s reasoning to undermine the conclusion that it reached. Indeed, such a conclusion is arguably the logical—and therefore inevitable—consequence of the approach set out in Al-Skeini.

However, should this case, or another that raises the same issues, be considered by the ECtHR, its response cannot be predicted on the basis of the judgment in Al-Saadoon, whatever the quality of the legal analysis. As has been shown, the ECtHR has not been consistent in the past in tackling the requirement for jurisdiction, and it is unlikely that it will be entirely consistent in the future. In particular, its continued failure expressly to disavow its judgment in Banković leaves open the door to the future application of Banković to exclude admissibility of cases that the ECtHR wishes, for whatever reason, not to tackle on their merits. On past performance, it seems unlikely that it will make a clear declaration—like that made in Al-Saadoon—that Banković would now be decided differently. However, that does not mean that the ECtHR will never find a jurisdictional link to have been established from the use of force alone. The judgment in Al-Saadoon demonstrates that Al-Skeini undoubtedly gives it the scope to reach such a conclusion—and it could do so in a broad range of circumstances that stop short of the type of aerial bombardment considered in Banković, thus allowing it to maintain the continued authority of that judgment.

Domestically, it is also by no means certain that the High Court’s judgment in Al-Saadoon will survive appeal. In the view of the present author, while the Court of Appeal and/or Supreme Court is unlikely to find any fundamental flaws in the High Court’s reasoning as to the application of the principles set out in Al-Skeini, they may be reluctant to reach the same conclusion. The lingering doubt as to the status of Banković, coupled with the principle that the domestic interpretation of the ECHR should advance no further than that of the ECtHR, may lead the higher courts to defer in dealing with this sensitive issue. It may be argued that it should be left to the ECtHR to deal authoritatively with the status of Banković where the implication would be that, even on its own narrow facts, it no longer represents good authority.
IV. THE IMPACT ON THE CONDUCT OF MILITARY OPERATIONS

While noting the doubts as to the long-term authority of the High Court’s judgment in *Al-Saadoon*, it is worthwhile to consider the implications of its decision on the conduct of military operations. What are the consequences of finding that jurisdiction can be established simply through the use of physical force by State agents? The first step is to understand how the relevant substantive provisions of the ECHR apply to such uses of force.

As the Court in *Al-Saadoon* found, the only right that could be relevant where jurisdiction is established from the use of physical force alone would be the right to life. According to the judgment, whenever State agents use physical force against an individual, absent any other basis for establishing a jurisdictional link, they must respect only “the negative [obligation] under Article 2 to refrain from unlawful killing.”98 However, whether or not the right to life is breached by a particular use of force is a question that depends in part on the controversial relationship between IHRL and IHL. A full analysis of the debate concerning the interaction between the two bodies of law is beyond the scope of this article, however, a brief summary will be helpful.

Essentially, it is now uncontroversial that IHRL, as a body of law, continues to apply during armed conflict.99 Indeed, IHRL has authoritatively been held still to apply alongside IHL, with the latter applied as a *lex specialis* to provide the content to less detailed norms of IHRL.100 However, it would be an oversimplification to suggest that acts that are lawful under IHL will always and necessarily be lawful under IHRL. The problem arises, in part, from the multiple meanings of the term *lex specialis*. While it is used with little controversy to mean that a specific rule of one body can provide normative content to a more general rule of the other, it is also used to describe the contention whereby a norm of IHL can *displace* a conflicting, or more restrictive, norm of IHRL. This latter position is far more controversial and arguably unsustainable as a matter of law.101 However, without

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98. Id. ¶ 98.
100. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25, (July 8) [hereinafter Nuclear Weapons].
101. See, e.g., MILANOVIĆ, supra note 28, at 249–52.
such an approach, the consequence may be an irresolvable conflict of norms.

Turning specifically to the right to life, it is illustrative to refer to the equivalent provision under the International Covenant on Civil and Political Rights (ICCPR), according to which it is only “arbitrary” deprivation of life that is prohibited.\footnote{102} Where such a term is used, IHL can be applied as \textit{lex specialis} in its uncontroversial sense so as to define whether deprivation of life is arbitrary or not. Indeed, this was the very example cited in the \textit{Nuclear Weapons} advisory opinion.\footnote{103} If a life is taken lawfully under IHL then, so the argument goes, it will not have been taken arbitrarily.

The situation under the ECHR is not so simple; rather than prohibiting the arbitrary deprivation of life, Article 2 prohibits the deprivation of life except “where it results from the use of force which is no more than absolutely necessary” in the following defined circumstances: “in defence of any person from unlawful violence,” “in order to effect a lawful arrest or to prevent the escape of a person lawfully detained,” and “in action lawfully taken for the purpose of quelling a riot or insurrection.” On the face of it, this is a complete enumeration and there is no “window” through which to apply IHL in the way that it can be applied in the case of the ICCPR.\footnote{104}

The ECHR does make provision for derogation in respect of “lawful acts of war,” but only “[i]n time of war or other public emergency threatening the life of the nation.”\footnote{105} However, it is doubtful whether this formulation would permit derogation in a situation where a State engages in a non-international armed conflict overseas from which it could choose to withdraw.\footnote{106} Without derogating, States must rely on the exceptions contained

\begin{itemize}
\item \footnote{102} ICCPR, supra note 28, art. 6.
\item \footnote{103} \textit{Nuclear Weapons}, supra note 100, ¶ 25.
\item \footnote{104} MILANOVIC, supra note 28, at 254–57.
\item \footnote{105} ECHR, supra note 2, art. 15.
\item \footnote{106} When \textit{Al-Jedda}, another case arising from UK actions in Iraq, was considered by the House of Lords, Lord Bingham said, \textit{obiter}:
\begin{quote}
It is hard to think that [the conditions for the application of Article 15] could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.
\end{quote}
\textit{Al Jedda v. Secretary of State for Defence}, [2007] UKHL 58, [2008] 1 AC 332, ¶ 38. For a contrary view, see infra note 112.
\end{itemize}
in Article 2. In particular, in situations of non-international armed conflict the use of lethal force can be justified on the basis that it is “action lawfully taken for the purpose of quelling a riot or insurrection.” Unfortunately, reconciling this with IHL is not straightforward. In particular, the ECHR requires an individual determination that any use of force is no more than absolutely necessary to achieve the lawful purpose, whereas IHL does not, instead permitting targeting of individuals based on their status alone. The requirement for such an individual assessment could arguably lead, for example, to a situation where States are obliged, in some circumstances, to capture individuals rather than kill them.

This is not a new problem and it is not created by the judgment in Al-Saadoon. The same issues already arise where force is used in the exercise of public powers, or where a State has effective control of an area. This, then, is presumably why the UK government has stated that the ruling will have no practical effect on the actual conduct of operations. However, the extension of the personal model of jurisdiction to any use of force against non-detainees would obviously expand the scope of the problem to include the use of force across the full spectrum of military operations.

Notably, the Court in Al-Saadoon dismissed the government’s objection that the scope of the ECHR would be expanded too broadly. In its judgment it referred to the recent case of Hassan v. United Kingdom, in which the

107. The situation is simple with respect to members of the enemy armed forces in the context of an international armed conflict—with few exceptions they “can be attacked at all times and in all circumstances.” Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 34 (2010). In non-international armed conflict the situation is more complicated as insurgents will generally be targeted on the basis that they are civilians directly participating in hostilities. While the scope of this principle is extremely controversial, it is common ground that some such participants can be targeted on the basis of their status as, e.g., members of an organized armed group engaged in particular types of functions. See, e.g., Yoram Dinstein, Non-International Armed Conflicts in International Law 58–63 (2014).

108. This, arguably, was the conclusion of the Israeli Supreme Court in the Targeted Killings case. HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶ 40 [2006] (Isr.), reprinted in 46 International Legal Materials 373. See, e.g., Milanovic, supra note 28, at 256. But see Andrea Giola, The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict, in International Humanitarian Law and International Human Rights Law, supra note 99, at 201, 223–30 (arguing that “the differences between IHL and IHRL, including the ECHR, in respect of the protection of the right to life in combat situations should not be overestimated.”).

109. UK Ministry of Defence, supra note 5.
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ECtHR read into Article 5, which provides for the right to liberty, an additional exception to allow for security detention under IHL in the course of an international armed conflict.110 The Court in Al-Saadoon reasoned that the same approach would apply to Article 2, i.e., that it would be interpreted so as to permit killing that is lawful under IHL. Furthermore, it suggested that courts determining claimed breaches of Article 2 in the context of armed conflict should “recognise their lack of institutional competence” and afford armed forces wide latitude in dealing with such cases.111 However, while the ECtHR could plausibly adopt such an approach, in the light of the textual challenges involved, it is by no means a foregone conclusion that it would feel able or willing to do so.

A better solution may be to extend the situation in which the derogation under Article 15 is available to all situations where a State party legitimately engages in armed conflict, either at home or overseas. This, it is argued, would reflect the expansion in the circumstances where the ECHR has been found to be applicable.112 Such an approach would have the advantage of providing a clear basis for the application of IHL, alone, as the body of law governing the deprivation of life during armed conflict. State parties would, however, have to trust that the basis on which they make their derogations would survive subsequent scrutiny.

111. Al-Saadoon, supra note 1, ¶¶ 108–11.
112. This was the view of Leggatt J. in Serdar Mohammed:

Article 15 accordingly permits a state, within defined limits, to derogate from its obligations under the Convention “in time of war or other public emergency threatening the life of the nation.” This wording, however, (in particular the word “other”) tends to suggest that Article 15 was not intended to apply to a war overseas which does not threaten the life of the nation. That is no doubt because those who drafted the Convention did not envisage that a state’s jurisdiction under Article 1 would extend to acts done outside its territory. Now that the Convention has been interpreted, however, as having such extraterritorial effect, it seems to me that Article 15 must be interpreted in a way which reflects this. It cannot be right to interpret jurisdiction under Article 1 as encompassing the exercise of power and control by a state on the territory of another state, as the European Court did in the Al-Skeini case, unless at the same time Article 15 is interpreted in a way which is consonant with that position and permits derogation to the extent that it is strictly required by the exigencies of the situation.

Article 15, like other provisions of the Convention, can and it seems to me must be “tailored” to such extraterritorial jurisdiction. This can readily be achieved without any undue violence to the language of Article 15 by interpreting the phrase “war or other public emergency threatening the life of the nation” as including, in the context of an international peacekeeping operation, a war or other emergency threatening the life of the nation on whose territory the relevant acts take place.

Serdar Mohammed, supra note 1, ¶¶ 155–56.
In any case, even if the issues concerning the relationship with IHL can be resolved, the expansion of the applicability of the ECHR to all uses of force may result, as the Court in *Al-Saadoon* acknowledged, in “a flood of claims.” All such claims will need to be considered to at least some degree and, where there is a credible allegation of a breach of the right to life, will need to be investigated independently and effectively.

V. CONCLUSION

The High Court’s judgment in *Al-Saadoon* is unlikely to become a leading authority on the extraterritorial application of the ECHR. Its conclusions may be ignored by the ECtHR and domestically its decision may be reversed on appeal. However it is important nonetheless, not least for the precision and clarity of its reasoning. While Mr. Justice Leggatt’s conclusions may not win immediate support, his arguments are likely to be employed to support a future, more authoritative, expansion of the applicability of the ECHR.

This may also inspire and support a similar development in relation to other IHRL instruments, including the ICCPR. In this respect, the judgment in *Al-Saadoon* at the very least reflects a trend according to which the applicability of IHRL instruments has tended to grow rather than to shrink during times of armed conflict. It seems likely that more and more of the activities of armed forces are likely to become subject to IHRL and will, as a result, be judged according to the standards of that body of law.

It is essential therefore to understand how those standards apply in the context of armed conflict. For the ECHR it may be that, as the Court in *Al-Saadoon* suggests, it will be as simple as interpreting the relevant provisions to give effect to the principles of IHL. However, the relationship between the two bodies of law does not seem to be so simple, and it cannot be assumed, therefore, that such a comfortable accommodation can necessarily be reached.