

# Law Across Borders

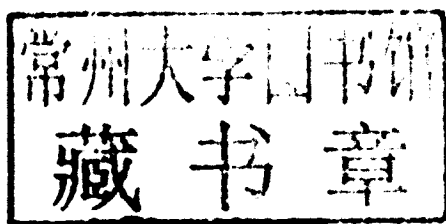
The Extraterritorial Application  
of United Kingdom Law

Paul Arnell

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# Law Across Borders

*Law Across Borders* examines the application of UK criminal and human rights law to people and circumstances outside its territory. Building upon previous analyses which have focused on a single aspect of extraterritoriality, the book examines the fields of criminal and human rights law – the two areas of non-private law applied across borders – in a single volume. Both fields are placed in context before being thoroughly described, criticised and analysed. The book surveys historical practice, describes current law and explores the issue of enforcement. The author's analysis includes coverage of topics such as the criminalisation of sex tourism, the extradition of white-collar criminals and the application of human rights law to Iraq following American and British intervention in the region. The book goes on to point the way forward in the development of the extraterritorial application of law, and suggests ways in which greater coherence can be achieved.

*Law Across Borders* will be of particular interest to academics, practitioners and scholars of international law, human rights law and criminal law. It is unique in its ambition to offer a comprehensive description and analysis of the extra-territorial application of UK human rights law and criminal law in a single text.

**Paul Arnell** is a Reader in Law and Postgraduate Director at Robert Gordon University, Aberdeen, Scotland. His area of expertise is the extraterritorial application of law. He has published widely in various journals, including the *International and Comparative Law Quarterly*, the *Juridical Review* and *Nottingham Law Journal*.

**For: Sarah, James and Alice**

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**Al-Skeini and others v the United Kingdom**  
**Application No. 55721/07, 7 July 2011**

Subsequent to the submission of the manuscript of *Law Across Borders* the Grand Chamber of the European Court of Human Rights, on 7 July 2011, published its decision in *Al-Skeini and others v the United Kingdom*. This significant judgement must be noted as it directly and importantly relates to the subject matter of the book.

The facts and jurisprudence leading up to the decision are discussed in Chapter 4. Here it is sufficient to discuss the judgement. The crux of the issue was whether the relatives of the applicants, who were killed in the area of southern Iraq over which the UK exercised authority for the maintenance of security following the invasion in 2003, were within the jurisdiction of the UK under Article 1 of the Convention. The House of Lords had held that they were not, with Lords Rodger and Carswell explicitly stating that the UK was not in effective control of Basrah City at the relevant time.<sup>1</sup> Further, the House of Lords considered and rejected 'state agent authority' as an independent basis upon which jurisdiction could be founded.

Following the decision of the House of Lords the six applicants lodged an application against the UK on 11 December 2007 alleging that their relatives fell within UK jurisdiction when killed and that there had been no effective investigation into the deaths, in breach of Article 2 of the Convention.

The Grand Chamber unanimously held, in contrast to the decision of the House of Lords, that all the applicants were within the jurisdiction of the UK for the purposes of Article 1 of the Convention.<sup>2</sup> It stated that whilst jurisdiction is primarily territorial it can exceptionally extend to outside a State Party's territorial boundaries. The Grand Chamber held it can do so under two heads 'state agent authority and control' and 'effective control of an area'. The former was held to create a 'jurisdictional link' between

1 *R (on the application of Al-Skeini) v Secretary of State for Defence*, [2007] UKHL 26 at paras 83 and 97.

2 The UK was ordered to pay 17,000 euros in damages to each of the five applicants in regard to whom the UK contested jurisdiction.

the relatives of the applicants and the UK. The Court stated '... the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention'.<sup>3</sup>

*Al-Skeini and others v the United Kingdom* is a significant judgement for several reasons. Most obviously it sheds considerable light on the nature of the application of the Convention across borders. Whilst emphasising the territorial nature of jurisdiction the Court clearly provides that it can exceptionally extend under two heads. Within UK jurisprudence and indeed the case law of the European Court of Human Rights itself the existence and nature of 'state agent authority' had been unclear. Secondly, the Court accepted that it is possible that the rights protected under the Convention may be 'divided and tailored'.<sup>4</sup> Hitherto, and supported by the previously leading case of *Bankovic v Belgium et al*,<sup>5</sup> the law provided that the Convention had to apply *in toto*, or not at all. This is a notable development, and only time will tell how exactly the protections under the Convention may be divided and tailored. The Court merely provides that where state agents exercise control and authority over an individual, the particular state is obliged to secure rights and freedoms that are 'relevant to the situation of the individual'.<sup>6</sup>

The usage of the term 'jurisdictional link' in the *Al-Skeini v the United Kingdom* judgement is in itself a notable aspect of it. As will be explained in Chapters 1 and 5, a theme emerging from the application of law across borders is a proper law approach. In essence this provides that the law will only be extended and applied in the presence of a sufficient connection or link between the state and the subject of the application of the law. The term jurisdiction link provides some support to this theme. Up to this point the term was rarely used. Finally, a point in the separate concurring opinion of Judge Bonello should be mentioned. This relates to the arguments made by the United Kingdom that to extend the application of the Convention as argued by the applicants would amount to 'human rights imperialism'. This is a point the present author puts forward in Chapter 5 as militating against the application of human rights law across borders. Judge Bonello dismisses it summarily. He states: 'For my part, I believe that those who export war ought to see to the parallel export of guarantees against the atrocities of war. And then, if necessary, bear with some fortitude the opprobrium of being labelled human rights imperialists'.<sup>7</sup>

3 At para 149.

4 At para 137.

5 (2001) 11 BHRC 435 at para 75.

6 Supra note 3.

7 At para 39. On the same day that the *Al-Skeini* judgment was published was that of *Al-Jedda v the UK*, Application Number 27021/08. Whilst the UK Government had conceded that Article 5 applied to his incarceration in Iraq it, and the House of Lords, were of the view that UN Security Council Resolution 1546 in essence displaced its operation. The Grand Chamber disagreed and held that the Resolution could and should be interpreted in harmony with the Convention.

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# 1 Introduction

## Introduction

Increased international intercourse by persons and states has given rise to an enhanced desire to apply law across borders. The United Kingdom is amongst the states acting on this desire. UK law is increasingly applied to persons and circumstances that in some way exist or occur outside its territory. Not only does it occur more frequently than in the past, but it also relates to a wider range of legal fields. Traditionally, the criminal law was the sole field of non-private law that was applied across borders. Today, human rights law is also not uncommonly considered to relate to persons or circumstances outside the UK. The position is complicated further by distinct institutions and component parts of the UK acting in the area, with the UK and Scottish Parliaments, domestic and European courts and the UK executive all playing a part. The increased frequency of law being applied across borders, human rights law joining the criminal law in being applied in this way and the number of actors involved heightens the necessity for clarity and consistency. This is in part because those possibly subject to UK law whilst outside it, be that a criminal sanction or human rights protection, deserve to be aware of that fact. Indeed, those persons possibly subject to the criminal law whilst outside the UK may have their right to be free from the non-retroactivity of the criminal law violated where the law is unclear.<sup>1</sup> Further, the need for consistency and clarity results from the degree of commonality between the criminal law and human rights law to the extent that they are being related to persons and events outside the UK. It is desirable that where the law operates in a similar way in different fields, it does so, as far as possible, in a kindred manner based upon common principles. Where the law does not apply in a like manner, this should be for clear and defensible reasons. There is undoubtedly a need for principle to run through the application of all UK law applied across borders. The law should as far as possible be predictable. Finally, clarity and consistency are called for because in most cases the locus of

<sup>1</sup> Found in Art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter 'the Convention').



the person or circumstance to which UK law is applied across borders is within a third state. That state will almost certainly be entitled under international law to apply its own law in the circumstances, and so the issue of concurrent jurisdiction arises. A clear, consistent and principled approach within UK law can assist it not only in deciding whether to proceed and apply its law, but can also be used in coming to a decision as to where proceedings should take place in the face of concurrent jurisdiction. The factors supporting clarity and consistency in the law will become further evident throughout this book.

Investigation into the application of UK law across borders serves to meet the demand for clarity and consistency. In addition, it addresses the basic question of why it is felt necessary by the UK Parliament, courts or executive to apply the law across borders in the first instance. Related to this is why a line is drawn at any particular point and why the UK does not take a more expansive approach than it does at present. The answer to these questions is found in the notion of the national interest. The UK largely applies its law across its borders in an effort to protect or secure its interests. As Jennings noted over half a century ago in regard to why states act and the limits of international law:

States claim extraterritorial jurisdiction in cases where they believe their legitimate interests to be concerned; whether that assumption be rationalized and expressed by means of the nationality claim, the objective territorial claim, the security claim, the passive personality claim or the universality claim. It is reasonable to say, therefore, that international law will permit a State to exercise extraterritorial jurisdiction provided that State's legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved . . . [A] State has a right to extraterritorial jurisdiction where its legitimate interests are concerned . . .<sup>2</sup>

A related comment is that the application of law across borders is 'as a matter of law . . . presented as an issue of jurisdiction, the underlying problem is one of State interests'.<sup>3</sup> Whilst this simple fact – that the UK applies its law across borders where it deems that its national interest requires it to do so – may seem axiomatic, there are instances where the law is applied in the absence of readily apparent interests. Indeed, it may at times be thought that the application of law is inimical to such interests. Examples here include the crime of torture abroad by non-UK nationals and residents under section 134 of the Criminal Justice Act 1988, the criminalisation of various child-sex offences committed abroad under the Sex Offenders Act 1997 and the application of Article 2 of the Convention to the death in Iraq of an Iraqi national.<sup>4</sup> In these instances it

2 Jennings, R.Y., 'Extraterritorial Jurisdiction and U.S. Antitrust Laws' (1957) 33 BYIL 146 at pp 152–3.

3 Roth, P.M., 'Reasonable Extraterritoriality: Correcting the "Balance of Interests"' [1992] ICLQ 245 at p 273. The statement is made in the context of competition law.

4 *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26.