CHAPTER 23

The Iraqi Cases: Further Elements and Thoughts concerning ‘Jurisdiction’ under Article 1 of the European Convention on Human Rights

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I Introduction

Article 1 of the European Convention on Human Rights (echr) of 4 November 1950¹ provides as follows:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 [Articles 2 to 17] of this Convention.

According to the decision in Banković and Others v. Belgium and Others, to be discussed later,² Article 1 was intended to protect “all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word.” An observation was made by the representative of Belgium on 25 August 1950, in a plenary meeting of the Assembly of the Council of Europe, to the effect that

the right of protection by our States, by virtue of a formal clause of the Convention, may be exercised with full force, and without any differentiation or distinction, in favour of individuals of whatever nationality, who on the territory of any one of our States, may have had reason to complain that [their] rights have been violated.³

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1 European Treaty Series, No. 5.
2 Banković and Others v. Belgium and Others, No. 52207/99, GC, decision of 12 December 2001, paras. 19 and 20; see below, ii.2.c.
Article 1 does not, as has been pointed out, define the jurisdiction of the European Court of Human Rights (ECtHR) but the scope of States Parties’ obligation to secure the Convention rights to individuals:

> [h]owever badly State agents may have treated the applicant, if he or she was not within the State’s jurisdiction, then there was no obligation on the State to apply the Convention, and there is no case for the Court to examine.⁴

‘Jurisdiction’ is an element used to determine whether States, on account of the conduct of their agents, can be held responsible for violations of the ECHR and its Protocols. For present purposes, jurisdiction designates the powers to legislate, to judge and to enforce, which, under international law, are generally limited to the State’s territory, although there are exceptions. The present contribution deals in particular with three relatively recent cases – *Al-Saadoon and Mufdhi*, *Al-Skeini* and *Al-Jeddah v. United Kingdom⁵* – where those exceptions were discussed.

II  
**Jurisdiction in the Case-Law of the Court**

1  
**Jurisdiction over State Territory**

This subdivision of the paper will succinctly recall two cases where the jurisdiction of a State Party to the Convention *over its own territory* was debated before the Strasbourg Court. In *Ilaşcu and Others v. Moldova and Russia⁶*, the Court stated that, despite the fact that Moldova lacked control over Transnistria, where the applicants were being detained, it did have jurisdiction under Article 1 of the Convention, but the duty to secure the rights protected by the latter was limited by a factual obstacle, *i.e.* the difficulty to obtain the release of the individuals detained. A similar situation prevailed in *Assanidze v. Georgia⁷*.

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⁵ See below, iii.


⁷ No. 71503/01, GC, judgment of 8 April 2004.