

# Avoiding the Legal *Black Hole*: Re-evaluating the Applicability of the European Convention on Human Rights to the United Kingdom's Targeted Killing Policy\*

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## Abstract

In 2015, the United Kingdom (UK) became the first European State to incorporate extraterritorial targeted killing with drones into its counterterrorism framework. This article examines whether the UK's obligations under the European Convention on Human Rights (ECHR) extend to such operations. Scholars have suggested not, based on a comparison of a drone strike to the circumstances of the landmark *Bankovic* case, which was inadmissible on jurisdictional grounds. Consequently, the UK policy is perceived as occurring in a legal *black hole* outside the purview of the Convention. However, this article argues that the comparisons to *Bankovic* overlook the uniqueness of targeted killing operations and the context in which the UK policy is utilized. Considering the distinctiveness of the UK policy, this article re-evaluates the applicability of the ECHR and proposes that the European Court of Human Rights (ECtHR) could find a jurisdictional link between the UK and the victims of targeted killing, thereby avoiding the perceived legal *black hole*.

## A. Introduction

Targeted killing is the intentional, premeditated and deliberate use of lethal force by States against selected individuals not in their custody.<sup>1</sup> Since 2001, the United States (US) has conducted targeted killing operations within the recognized armed conflicts in Afghanistan and Iraq to weaken the terror threat posed by members of Al Qaeda and associated forces.<sup>2</sup> Additionally, the US has deployed armed drones to lethally target alleged terrorists that are located away from any zone of conventional hostilities, in countries such as Pakistan, Yemen and Somalia.<sup>3</sup>

The use of intentional lethal force away from areas of active hostilities is a particularly controversial aspect of the US *war on terror*, justified on the basis that those targeted pose an ongoing terrorist threat to the US whilst located in so-called safe havens, which refers to territory that is ineffectively or substantially ungoverned.<sup>4</sup> Within safe havens, terrorists are able to organize, plan, and operate in relative security due to the territorial State's inadequate governance, lack of political will to combat terrorists, or both.<sup>5</sup> A consequence of ineffective governance is that the suppression of terrorist threats through conventional law enforcement, such as arrest or detention, is either unavailable or deemed unlikely to be effective. In this context, the US regards targeted killing as necessary for frustrating the activities of terrorists.<sup>6</sup>

European States have facilitated US targeted killing operations in numerous ways, such as the gathering and sharing of intelligence on the whereabouts of

<sup>1</sup> N. Melzer, *Targeted Killing in International Law*, (2008), 5; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development* UN Doc A/HRC/14/24/Add.6, 28 May 2010, 3, para. 1.

<sup>2</sup> J. C. Dehn, 'Targeted Killing, Human Rights and Ungoverned Spaces: Considering Territorial State Human Rights Obligations', 54 *Harvard International Law Journal* (2013), 84, 85.

<sup>3</sup> A. Dworkin, *Drones and Targeted Killing: Defining a European Position* [Dworkin, European Position on drones and targeted killing], (2013), available at [http://www.ecfr.eu/publications/summary/drones\\_and\\_targeted\\_killing\\_defining\\_a\\_european\\_position211](http://www.ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211) (last visited 03 March 2019).

<sup>4</sup> Dehn, *supra* note 2, 85.

<sup>5</sup> U.S. Department of State, Bureau of Counterterrorism and Countering Violent Extremism, *Country Reports on Terrorism 2015, Chapter 5: Terrorist Safe Havens (Update to 7120 Report)*, available at <https://www.state.gov/j/ct/rls/crt/2015/257522.htm> (last visited 03 March 2019).

<sup>6</sup> G. Blum & P. B. Heymann, *Laws, Outlaws and Terrorists: Lessons from the War on Terrorism* (2010), 71.

targets and by permitting the US to use their air bases or air spaces.<sup>7</sup> Yet, the lethal targeting of terrorists away from zones of conventional hostilities remained outside the scope of the wide-ranging extraterritorial counter-terrorism actions of European States.<sup>8</sup> This was true until August 2015, when the UK launched a premeditated, intentional and deliberate drone strike against Reyaad Khan, a British jihadist located in Raqqa, Syria.

The targeted killing of Reyaad Khan was the first time in modern times that the UK conducted a strike away from an area it was involved in war.<sup>9</sup> Prime Minister David Cameron described the killing as an act of self-defence, protecting the British public from the direct threat of terrorist attacks being plotted and directed by Khan, who showed no signs of leaving Syria or desisting from plotting terrorist attacks against the UK. Due to the Syrian Government's lack of political authority in the Raqqa province<sup>10</sup> and the absence of British troops on the ground, lethal force was deemed the only way of preventing Khan's planned attacks.<sup>11</sup>

Following the killing of Reyaad Khan, a parliamentary inquiry confirmed that the UK would be prepared to use armed drones to intentionally target pre-identified terrorists. By adopting a form of direct military counterterrorism pioneered by the US<sup>12</sup>, the UK has embraced conduct that was previously

<sup>7</sup> C. Paulussen, J. Dorsey & B. Boutin, *Towards a European Position on the Use of Armed Drones? A Human Rights Approach*, (2016), available at <https://icct.nl/wp-content/uploads/2016/10/ICCT-Paulussen-Dorsey-Boutin-Towards-a-European-Position-on-the-Use-of-Armed-Drones-October2016-2.pdf> (last visited 04 March 2019).

<sup>8</sup> For an overview of the counter-terror activities of main European actors see, A. Dworkin, *Europe's new Counter-Terror Wars* [Dworkin, Counter-Terror wars], (2016), available at [http://www.ecfr.eu/publications/summary/europes\\_new\\_counter\\_terror\\_wars7155#](http://www.ecfr.eu/publications/summary/europes_new_counter_terror_wars7155#) (last visited 04 March 2019).

<sup>9</sup> House of Commons Debates 7th September 2015, Vol. 599, Col. 30. At the time of the strike, the UK parliament had not authorized the use of force in Syria. In fact, parliament specifically refused to endorse the use of force against ISIS/Da'esh there in 2014. Therefore, the use of force occurred in an area that was away from the zone of hostilities that the UK was engaged in Iraq. This finding does not preclude the strike as occurring within an armed conflict situation where the Law of War would apply, however such an analysis is outside the scope of the present article.

<sup>10</sup> In August 2014, the Syrian Government had lost *de facto* control of the Raqqa province. For a timeline of ISIS activities, including the control of territory see, C. Glenn, 'The Rise, Spread and Fall of the Islamic State' (2018), available at <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state> (last visited 04 March 2019).

<sup>11</sup> House of Common Debates 7th September 2015, *supra* note 9, Cols. 25-26.

<sup>12</sup> Dworkin, *Counter-Terror wars*, *supra* note 8.

unprecedented for European nations.<sup>13</sup> Consequently, this new form of European State conduct raises the question as to whether the UK policy comes under the ambit of the ECHR and may be subject to legal challenges before the ECtHR.<sup>14</sup>

The extraterritorial applicability of the ECHR *vis a vis* targeted killing by drones relies on those targeted being within the jurisdiction of the acting State. There is no direct case law to definitively answer the Convention's applicability in such circumstances because the Reyaad Khan strike remains an isolated example of the UK policy,<sup>15</sup> which was not challenged legally at the State or individual level.<sup>16</sup> Nonetheless, it is the purpose of this article to examine the jurisprudence of the ECtHR and contribute to the discussion on whether targeted killing operations would engage the UK's obligations under the Convention.

The article will be structured as follows: first, the framework of the UK targeted killing policy will be outlined. Subsequently, it will be shown in which circumstances the obligations of the Convention extend beyond a signatory State's territory. Thereafter, it will be illustrated why scholars interpret victims of drone operated targeted killings as being outside the jurisdiction of the acting State. Thus, the UK policy can be described as occurring in a legal *black hole*<sup>17</sup> in so far as the ECHR is concerned. The perceived inapplicability of the Convention is influenced by the continued relevance of the *Bankovic*<sup>18</sup> case, when the Court held that missiles fired from an aircraft, absent territorial presence, did not create a jurisdictional link between the State and those killed. Despite

<sup>13</sup> N. Bhuta, 'On Preventive Killing' (2015), available at <https://www.ejiltalk.org/on-preventive-killing/> (last visited 04 March 2019).

<sup>14</sup> S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 20 *European Journal of International Law* (2009) 4, 1223, 1224.

<sup>15</sup> Although, the UK has also facilitated US targeted killing operations against British jihadists. For example, the UK worked "hand in glove" to launch an airstrike against prominent IS extremist Mohammed Emwazi, also known as Jihadi John. See: C.Phipps, P.Wintour and J.McCurry, "High Degree of Certainty" that US Strike Killed Mohammed Emwazi' (2015), available at <https://www.theguardian.com/uk-news/2015/nov/13/us-air-strike-targets-mohammed-emwazi-uk-terrorist-known-as-jihadi-john> (last visited 04 March 2018).

<sup>16</sup> A. Lang, 'UK Drone Attack in Syria: Legal Questions' (2015), available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7332#fullreport> (last visited 24 October 2018).

<sup>17</sup> R. Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', 26 *Michigan Journal of International Law* (2005) 3, 739, 740.

<sup>18</sup> *Bankovic and Others v. Belgium and 16 other States*, ECtHR Application No. 52207/99, Judgment of 12 December 2001 [Bankovic].

the similarities between *Bankovic* and the circumstances of the UK policy, it will be posited that targeted killing, as an exceptional form of counterterrorism, is distinctive and *Bankovic* should not be seen as conclusive for the jurisdictional analysis. Considering the distinctiveness of the force envisaged by the UK policy, a re-evaluation of the applicability of the Convention will occur, leading to an observation that the ECtHR could find a jurisdictional link between the UK and the victims of targeted killing, thereby avoiding the perceived legal black hole.

## B. The UK Parliamentary Inquiry on the Use of Armed Drones for Targeted Killing

Following the targeted killing of Reyaad Khan, the Joint Committee on Human Rights (JCHR) commenced a parliamentary inquiry to scrutinize the UK Government's policy on the use of drones for targeted killing. The inquiry sought to clarify whether the targeted killing of Khan heralded in the adoption of a new policy by the Government on the use of lethal force abroad and, if so, what exactly that new policy is.<sup>19</sup>

The Government set out its position in a memorandum to the inquiry, confirming that it will act to counter an identified threat to the UK or British interests abroad. However, the Government acknowledged that lethal action would always be a last resort, when there is no other option to defend against an attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror.<sup>20</sup> During the oral evidence sessions of the inquiry, Michael Fallon, who was the Secretary of State for Defence at the time, confirmed that the Government's approach would apply anywhere where there is no recognized Government or where there is a vacuum of political authority.<sup>21</sup> Therefore, the Government's approach clearly applies to safe havens, which are characterized by the absence of effective governance. Later in his evidence, the Secretary of State articulated a hypothetical example of when the UK Government would consider lethally targeting terrorists:

<sup>19</sup> Joint Committee on Human Rights, *The Government's Policy on the Use of Armed Drones for Targeted Killing*, Second report of the session 2015-16, HL Paper 141 (2016) 29, para 2.1. [JCHR, *Second report*].

<sup>20</sup> *Ibid.* 35, 2.32; Government of the UK, 'Government memorandum to the JCHR' (2015), available at [http://www.parliament.uk/documents/joint-committees/human-rights/Government\\_Memorandum\\_on\\_Drones.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf) (last visited 04 March 2019).

<sup>21</sup> JCHR, *Second report*, *supra* note 19, 36, para. 2.35.

“If we had known that our 30 citizens were going to be murdered on the beach in Sousse [Tunisia], and we knew that the attack was being directly planned from, say, a training camp in Libya, would we have needed to seek authority if we were trying to forestall that attack by striking in Libya? I suspect that the answer would be fairly similar, that there was no political authority in Libya, there may have been no other way of preventing it and therefore we would have been justified in doing it [...]”.<sup>22</sup>

At the time of the inquiry, Libya was outside the geographical area of the UK's armed conflict with ISIS/Da'esh. Accordingly, the hypothetical example provided by the former Secretary of State establishes that the Government is prepared to use lethal force outside areas of recognized armed conflict.

The JCHR achieved one of its core objectives by establishing that the UK has adopted a policy that contemplates the employment of armed drones to target terrorists operating in safe havens. The inquiry also recognized that the targeting of terrorists might also include pre-identified individuals.<sup>23</sup> The UK Government affirmed that the policy would only be employed as a last resort, in order to protect the UK or British interests abroad, when there is no other option, such as arrest or detention, to prevent those plotting acts of terror. The UK also contend that its policy can be employed unilaterally as a form of self-defence, when the State where the terrorist threat derives, is ‘unable or unwilling’ to prevent the attack.<sup>24</sup>

At the time of the inquiry, the Secretary of State for Defence denied that the UK policy equated to the adoption of a targeted killing policy.<sup>25</sup> However, the killing of Reyaad Khan *was* a targeted killing and the UK Government demonstrated the intention to repeat similar counterterrorism operations.<sup>26</sup> This

<sup>22</sup> *Ibid.*, 36, para. 2.36.

<sup>23</sup> *Ibid.*, 37, para. 2.39.

<sup>24</sup> *Ibid.*, 43, para. 3.23; See also, D. Cameron's Speech Prior to the Authorization of Force in Syria, House of Commons Debates (26 November 2015), Vol. 602, Col. 1491.

<sup>25</sup> JCHR, *Second Report*, *supra* note 19, 36, para. 2.33. “There is no policy of targeted killing.”

<sup>26</sup> Interestingly, the Ministry of Defence's Joint Doctrine on Unmanned Aerial Systems, published in September 2017, referred to the UK's practice of targeting terrorists outside of armed conflict situations. However, the UK Government recently updated its drone doctrine and omitted any reference to targeting outside conflict zones. See: J. Doward, MoD ‘in chaos’ over drone use outside of war zones, *The Guardian* (3 February 2018), available at <https://www.theguardian.com/world/2018/feb/03/drones-gavin-williamson-mod-isis> (last visited 24 October 2018).

intention was subsequently reiterated by former Secretary of State for Defence, Gavin Williamson, who suggested that Government will continue to hunt down British members of ISIS “[...] as they disperse across Syria, Iraq and other areas [...]”.<sup>27</sup>

Despite a reluctance to label its policy as such, Governmental statements throughout the JCHR inquiry and comments made since, imply that the UK has adopted a targeted killing policy.<sup>28</sup> From a European perspective, the UK’s incorporation of targeted killing within its counterterrorism framework is groundbreaking and provides a new context for discussions on the extraterritorial applicability of the ECHR.

### C. The Concept of Extraterritorial Jurisdiction Under the ECHR

Article 1 of the ECHR states that the contracting parties shall secure to everyone within their jurisdiction the rights and freedoms of the Convention.<sup>29</sup> Therefore, the key concept that determines the applicability of the ECHR is jurisdiction. Yet, the text of the treaty does not provide any significant guidance on how jurisdiction is to be understood. Instead, the interpretation of this term has been a task reserved for the ECtHR.

The Court has consistently acknowledged that the jurisdictional competence of a State is primarily territorial<sup>30</sup> but has also recognized that “[...] a Contracting State’s jurisdiction under Article 1 may extend to acts of its authorities that produce effects outside its own territory [...]”.<sup>31</sup> The desire to keep extraterritorial jurisdiction exceptional has influenced the Court’s

<sup>27</sup> BBC news, ‘Terrorists Have Nowhere to Hide, says Defence Secretary’ (2017), available at <http://www.bbc.co.uk/news/uk-42260814> (last visited 24 October 2018).

<sup>28</sup> However, as of yet, the UK Government has failed to publish any policy framework on the use of lethal force in extraterritorial counterterrorism operations. Concluding its inquiry into the UK’s use of armed drones, the All Party Parliamentary Group (APPG) recommended that the UK publish its policy on targeted killings of individuals in line with the precedent set by the US and Israel. See: APPG on Drones Inquiry Report, ‘The UK’s Use of Armed Drones: Working with Partners’ (2018), available at [http://appgdrones.org.uk/wp-content/uploads/2014/08/INH\\_PG\\_Drones\\_AllInOne\\_v25.pdf](http://appgdrones.org.uk/wp-content/uploads/2014/08/INH_PG_Drones_AllInOne_v25.pdf) (last visited 04 March 2019).

<sup>29</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 1, 213 UNTS 224.

<sup>30</sup> *Bankovic*, *supra* note 18, para. 67; *Al Skeini and Others v United Kingdom*, ECtHR Application No. 55721/07, Judgement of 7 July 2011, para 131. [Al Skeini].

<sup>31</sup> *Al Skeini*, *supra* note 30, para. 133.



consistent rejection of a *cause and effect* concept of jurisdiction, which would result in any State act capable of violating a person's human rights as being sufficient to bring that individual within the jurisdiction of the State.<sup>32</sup> Instead, the Court has opted for the extraterritorial applicability of the Convention to occur in exceptional circumstances.<sup>33</sup>

The pertinent issue for the present analysis is whether the type of force envisioned by the UK policy coincides with the exceptional circumstances when a State exercises its jurisdiction extraterritorially under the ECHR. Before making this assessment, it is necessary to recognize the circumstances when a person affected by the extraterritorial act of a State is brought within that State's jurisdiction under the Convention. The Court's jurisprudence on this issue is vast but for the purposes of this article, it is sufficient to focus on the case of *Al Skeini v. UK*, which is the leading authority in this area.

### *Al Skeini v. UK*

The case of *Al Skeini v. UK* concerned the deaths of six Iraqi civilians during incidents involving British soldiers in South-east Iraq. The deaths occurred between May and November 2003, the period that the UK was an *occupying power* in Iraq.<sup>34</sup> The relatives of those killed brought a claim against the UK, alleging that the UK did not conduct effective investigations into the deaths, violating the procedural element of Article 2.<sup>35</sup> Before considering whether the applicants were within the jurisdiction of the UK, the Court referred to its previous jurisprudence to outline the circumstances when a State exercises extraterritorial jurisdiction. In respect to military operations abroad, the Court identified three situations, when an individual is brought within the State's jurisdiction.<sup>36</sup> One such situation is "[...] when, as a consequence of lawful or

<sup>32</sup> F. Haijer & C. Ryngaert, 'Reflections on *Jaloud v the Netherlands*: Jurisdictional Consequences and Resonance in Dutch Society', 19 *Journal of International Peacekeeping* (2015) 1-2, 174, 180.

<sup>33</sup> *Bankovic*, *supra* note 18, para. 71.; *Al Skeini*, *supra* note 30, para. 132; *Jaloud v. the Netherlands*, ECtHR Application No. 47708/08, Judgement of the 20 November 2014, para. 132. [*Jaloud v. The Netherlands*].

<sup>34</sup> The UK and the US became 'occupying powers' on the 1st May 2003 and the period of occupation ended on the 28th June 2004. See *Al Skeini*, *supra* note 30, paras. 143-148.

<sup>35</sup> *Al Skeini*, *supra* note 30, para. 3.

<sup>36</sup> Additionally, the Court acknowledges other recognized instances of extraterritorial exercise of jurisdiction by a State include the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. See *Bankovic*, *supra* note 18, para. 73; *Al Skeini*, *supra* note 30, para. 134. However, these instances of extraterritorial jurisdiction are not relevant for the current analysis.

unlawful military action, a Contracting State exercises effective control of an area outside [its] national territory”.<sup>37</sup> This exception to the primarily territorial concept of jurisdiction is referred to as *spatial jurisdiction* because individuals are brought within the State’s jurisdiction, as a result of their location within an area under the State’s *effective control*.

Whether a State exercises effective control over an area outside its territory is a question of fact and “[i]n determining whether effective control exists, the Court will primarily have reference to the strength of the State’s military presence in the area [...]”.<sup>38</sup> In *Loizidou*<sup>39</sup>, when the Court first articulated the spatial model of jurisdiction, the Court concluded that 30,000 ground troops equated to Turkey exercising *effective control* of Northern Cyprus.<sup>40</sup> When a State exercises *effective control* of an area, it is required to secure the entire range of rights contained in the Convention.<sup>41</sup> Practically speaking, a State is only able to fulfil this requirement with significant territorial presence, such as when it is occupying or administering a territory.<sup>42</sup> *Effective control* is considered comparable to territorial jurisdiction, in regards to the power of the State to regulate conduct.<sup>43</sup> As Lubell identifies, when a State has effective control of an area, it “[...]takes on responsibilities on a governmental scale and the circumstances are in many ways analogous to the State’s own territory”.<sup>44</sup>

Despite recognizing that the occupation of territory may be indicative of a State exercising *effective control* of an area, the Court in *Al Skeini* did not consider whether the UK exercised *effective control* in South-east Iraq.<sup>45</sup> Rather,

<sup>37</sup> *Al Skeini*, *supra* note 30, para. 138.

<sup>38</sup> *Al Skeini*, *supra* note 30, para. 139.

<sup>39</sup> *Loizidou v. Turkey (preliminary objections)*, ECtHR Application No. 15318/89, Judgment of 23 March 1995, para. 62.

<sup>40</sup> *Loizidou v Turkey*, ECtHR Application No. 15318/89, Judgment of 18 December 1996, para. 16.

<sup>41</sup> *Al Skeini*, *supra* note 30, para. 138.

<sup>42</sup> N. Quéniwet & A. Sari, ‘Submission to the Joint Committee on human rights on UK governments policy on use of drones for targeted killings (2015), available at: <http://eprints.uwe.ac.uk/28332> (last visited 10 March 2019); N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), 211.

<sup>43</sup> B. Oxman, ‘Jurisdiction of States’, in R. Bernhardt & P. Macalister-Smith (eds), *Encyclopedia of Public International Law*, (1997), 55, 57.

<sup>44</sup> Lubell, *supra* note 42, 211.

<sup>45</sup> However, the judgment did recognize the chaotic circumstances of the period in question, when crime and violence were endemic. Within a 13 month period, there were over a thousand violent attacks against coalition forces, which included British soldiers and military police. *Al Skeini*, *supra* note 30, para 161. It can be inferred from the Court’s

the Court articulated two additional situations of extraterritorial jurisdiction, which came under the heading of *State agent authority and control*. These exceptions to territorial jurisdiction are also known as *personal jurisdiction* because jurisdiction arises due to the acts of State agents and their impact upon individuals. Moreover, the Court clarified that when a State has jurisdiction over an individual on a personal basis, the State has an obligation to secure the rights and freedoms that are relevant to the individual's particular situation.<sup>46</sup> Therefore, the rights and obligations contained within the Convention can be *divided and tailored* to individual circumstances.<sup>47</sup>

In respect to personal jurisdiction, the Court acknowledged that “[...] whenever the State through its agents exercises control and authority over an individual, [...]”, the State is exercising jurisdiction.<sup>48</sup> The Court referred to the cases of *Öcalan*<sup>49</sup>, *Issa*<sup>50</sup>, *Medvedyev*<sup>51</sup> and *Al-Saadoon and Mufidha*<sup>52</sup> to demonstrate when State agents exercise *authority and control* over individuals. All of the aforementioned cases involved the detention of individuals, confirming that individuals detained by State agents are brought within the jurisdiction of the State.

Furthermore, the Court accepted the exercise of extraterritorial jurisdiction by a Contracting State when, “[...] through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government”.<sup>53</sup> It was on this basis that the Court found a jurisdictional link between the UK and the deceased in *Al Skeini*. The Court held that the UK, as an *occupying power*, assumed in Iraq the exercise of some of the *public powers* normally to be exercised by a Sovereign Government. In particular, the UK assumed the authority and responsibility for the maintenance of security in South-east Iraq.

assessment of the situation in South-east Iraq, that the UK did not exercise effective control of the area.

<sup>46</sup> A. Cowan, ‘A New Watershed? Re-evaluating Bankovic in Light of Al-Skeini’, 1 *Cambridge Journal of International and Comparative Law* (2012), 1, 213, 219.

<sup>47</sup> *Al Skeini*, *supra* note 30, para 137.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Öcalan v. Turkey*, ECtHR Application No. 46221/99, Judgment of 12 May 2005.

<sup>50</sup> *Issa and Others v. Turkey*, ECtHR Application No. 31821/96, Judgment of 16 November 2004.

<sup>51</sup> *Medvedyev and Others v. France*, ECtHR Application No. 3394/03, Judgment of 29 March 2010.

<sup>52</sup> *Al-Saadoon and Mufidhi v. The United Kingdom*, ECtHR Application No. 61498/08, Judgment of 2 March 2010.

<sup>53</sup> *Al Skeini*, *supra* note 30, para 135.

In these exceptional circumstances, the Court considered that the UK, through soldiers engaged in security operations in Basrah, exercised *authority and control* over those killed in the course of such security operations, sufficient to establish a jurisdictional link between those killed and the UK.<sup>54</sup>

Although the Court categorized the *public powers* model of extraterritorial jurisdiction as a personal basis for jurisdiction, this is not how the Court actually applied the concept in *Al Skeini*. The Court held that UK soldiers had exerted *authority and control* by killing the deceased but only exceptionally because the killings occurring during the exercise of *public powers*. Consequently, as Milanovic alludes to, had the killings not occurred during the course of security operations, the personal model of jurisdiction would not have applied.<sup>55</sup>

It would be more accurate to consider the formulation of the *public powers* exception in *Al Skeini* as a “halfway house”<sup>56</sup> between the spatial and personal models of jurisdiction. For this model of jurisdiction to arise, elements of both the spatial and personal models of jurisdiction need to be present.

In *Al Skeini*, neither the assumption of governmental authority nor the killing by State agents were sufficient to bring those killed within the UK’s jurisdiction on either a spatial or personal basis. However, the combination of the assumption of some governmental authority *and* the control exerted by British soldiers over the deceased *did* create a jurisdictional link.<sup>57</sup>

In summary, the Court acknowledged that a State exercises jurisdiction through spatial or personal control. Additionally, a jurisdictional link arises when a State assumes elements of governmental authority by exercising *public powers* and simultaneously exerts control over individuals. Due to the limited case law pertaining to the *public powers* exception, there remain questions surrounding its interaction with the spatial and personal jurisdictional concepts. For instance, as will be shown, the act of killing does not amount to the exercise of *authority and control* over individuals. Yet, *Al Skeini* demonstrated that during the exercise of *public powers*, killing *does* amount to *authority and control* over individuals. This indicates that *authority and control* either has an alternative meaning or a different threshold when connected to the utilization of *public*

<sup>54</sup> *Al Skeini*, *supra* note 30, para 149.

<sup>55</sup> M. Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’, 23 *The European Journal of International Law* (2012) 1, 121, 130.

<sup>56</sup> Cowan, *supra* note 46, 224.

<sup>57</sup> A. Sari, ‘Untangling Extra-Territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?’, 53 *Military Law and the Law of War Review* (2014), 287, 293.

*powers*.<sup>58</sup> Generally, the meaning of *authority and control* in the *public powers* context will determine how narrow or wide this jurisdictional exception applies. Nonetheless, the ECtHR has established that the use of lethal force during the exercise of *public powers* brings those killed within the jurisdiction of the acting State, which is adequate for the scope of this analysis.

By maintaining a jurisdictional concept that is based on exceptional circumstances, rather than a *cause and effect* approach to jurisdiction, there will naturally be acts that impact upon individuals without bringing them within the jurisdiction of the acting State. Wilde has described such State acts as occurring in a legal *black hole*, in so far as the ECHR is concerned.<sup>59</sup> Some extraterritorial killings may occur in the aforementioned legal *black hole* because, controversially, the act of killing does not equate to the exercise of jurisdiction. In the UK, the High Court in *Al-Saadoon* deduced from *Al Skeini* that killing is a jurisdictional threshold because “[u]sing force to kill is indeed the ultimate exercise of physical power and control over another human being”<sup>60</sup>. This interpretation was reaffirmed in academic literature<sup>61</sup> and other UK cases<sup>62</sup> but was subsequently overruled by the Court of Appeal in *Al-Saadoon*. Summarizing whether killing amounted to *authority and control* over an individual, the Court of Appeal submitted that the Grand Chamber in *Al Skeini* required a “[...] greater degree of power and control than that represented by the use of lethal or potentially lethal force alone”.<sup>63</sup>

<sup>58</sup> There are also questions about the relationship between the ‘public powers’ model and the spatial concept of jurisdiction. For example, by having effective control of an area, the controlling State exercises governmental authority similar to the territorial State and is obligated to secure the entire range of rights contained in the Convention. Yet, when exercising ‘public powers’, the acting State also assumes governmental responsibilities but not to the extent when possessing territorial control. Consequently, the acting State is obliged to secure the rights of the Convention relevant to the individual situation. Perhaps, ‘public powers’ can be regarded as a diluted version of the spatial jurisdictional concept, were the scope of the acting States’ obligations are commensurate with the level of governmental authority exercised.

<sup>59</sup> Wilde, *supra* note 17, 804-805.

<sup>60</sup> *Al-Saadoon & Others v Secretary of State for Defence* [2015] EWHC 715, para. 95.

<sup>61</sup> M. Lippold, ‘Between Humanization and Humanitarization? Detention in Armed Conflicts and European Convention on Human Rights’, 76 *Heidelberg Journal of International Law* (2016), 53, 93-94.

<sup>62</sup> *Sedar Mohammed v. Secretary of State for Defence / Yunus Rahmatullah & Iraqi Civilian Claimants v. Ministry of Defence and Foreign and Commonwealth Office* [2015] EWCA Civ 843, para. 95.

<sup>63</sup> *Al-Saadoon and Ors v. Secretary of State for Defence / Rahmatullah & Anr v. Secretary of State of Defence & Anr*, [2016] EWCA Civ 811, para. 69.

Although it may be normatively appealing to equate the use lethal force with the exercise of jurisdiction, the Court of Appeal was correct in its interpretation of *Al Skeini*. If it was the intention of Strasbourg to equate killing with the exercise of jurisdiction, then the Court in *Al Skeini* could have simply found a jurisdictional link on this basis rather than resorting to the *public powers* model.<sup>64</sup> Therefore, for an extraterritorial killing to engage the Convention, the deceased must either be located in an area under the effective control of the State, killed during the exercise of *public powers* or the State has exerted an element of control, such as detention, over the individuals prior to the lethal force.<sup>65</sup> It will now be shown why there is a perception that targeted killing by drones would not amount to the exercise of jurisdiction and occur in a legal *black hole*.

#### D. The Perceived Inapplicability of the ECHR to Extraterritorial Drone Strikes

Contemporary armed drones enable a State to engage in targeted killing without territorial presence or detaining those targeted. This leads to questions about potential victims falling within the jurisdiction of the attacking State under Article 1 of the ECHR.<sup>66</sup> These questions are pertinent to the UK policy, as those targeted will not be in an area under the *effective control* of the UK. Rather, it is the location of terrorists in safe havens, areas that lack effective governmental authority, that necessitates the UK targeted killing policy. Moreover, it goes without saying that the UK would not conduct a drone strike against a detained individual. Thus, the circumstances of the UK targeted killing policy do not offer an obvious basis for extraterritorial jurisdiction and some prominent scholars have posited that killing with armed drones, absent territorial presence where the strike occurs, does not engage the Convention.

<sup>64</sup> For an endorsement of the Court of Appeal's decision in *Al-Saadoon* see: H. Evans, 'Keeping it in Bounds: Why the UK Court of Appeal was correct in its cabining of the exceptional nature of extraterritorial jurisdiction in Al-Saadoon', available at: <http://www.harvardilj.org/2018/01/keeping-it-in-bounds-why-the-u-k-court-of-appeal-was-correct-in-its-cabining-of-the-exceptional-nature-of-extraterritorial-jurisdiction-in-al-saadoon/> (last visited 12 March 2019).

<sup>65</sup> Al-Saadoon & Rahmatullah, *supra* note 63, para. 69.

<sup>66</sup> C. Heyns *et al*, 'The International Law Framework Regulating the Use of Armed Drones', 65 *International and Comparative Law Quarterly* (2016) 4, 791, 824.

Within legal literature, scholars have invoked the case of *Bankovic* to dismiss the relevance of the ECHR to targeted killing by drones.<sup>67</sup>

### *Bankovic*

The case of *Bankovic* concerned a NATO airstrike on the 23rd April 1999, which hit one of the buildings of the *Radio Televizije Srbije* (RTS) in Belgrade. The NATO bombing of RTS caused the death of 16 persons and serious injuries to another 16.<sup>68</sup> Subsequently, claims were brought against the 17 members of NATO that were also parties to the Convention, alleging violations of Articles 2 (the right to life), 10 (freedom of expression) and 13 (right to an effective remedy).<sup>69</sup>

In considering the jurisdictional issue, the Court permitted one exception to the territorial principle of jurisdiction, a State having effective control of an area outside of its territory.<sup>70</sup> The Court found that the respondent States' control over airspace and the power to kill were insufficient to create a jurisdictional link.<sup>71</sup> Through aerial bombardment, the respondent States did not have *effective control* of the area where the airstrikes occurred and consequently, the case was inadmissible on jurisdictional grounds.

It is ironic that NATO's military action in Yugoslavia was predicated on the protection of human rights abroad, but the participant States maintained that they had no legal obligation to observe those rights themselves.<sup>72</sup> Yet, much of the *Bankovic* criticism focused on the Court's restriction of the Convention's extraterritorial applicability to narrow circumstances.<sup>73</sup> However, it was precisely the Court's intention to make the extraterritorial applicability of the Convention exceptional. The Court was concerned that finding the case admissible, on the basis that killing is a jurisdictional trigger, would "[...] open the floodgates and

<sup>67</sup> F. Rosén, 'Extremely Stealthy and Incredible Close: Drones, Control and Legal Responsibility' 19 *Journal of Conflict and Security Law* (2014) 1, 113, 118.

<sup>68</sup> *Bankovic*, *supra* note 18, para. 11.

<sup>69</sup> Cowan, *supra* note 46, 214.

<sup>70</sup> *Bankovic*, *supra* note 18, para. 80.

<sup>71</sup> Milanovic, *supra* note 55, 123.

<sup>72</sup> E. Roxstrom, M. Gibney & T. Einarsen, 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al*) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005) 55, 62-63.

<sup>73</sup> For general criticism of the decision in *Bankovic* see R. Lawson, 'Life After *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 83; Milanovic, *supra* note 55.

involve it in assessing all uses of force by European States [...]”.<sup>74</sup> The Court did not want to assume the competence to review all European overseas military action,<sup>75</sup> as doing so would increase the Court’s heavy case-load and would require it to get involved in politically sensitive conflicts.<sup>76</sup> Influenced by policy considerations, the Court simply excluded *Bankovic* from its remit.

At the time, *Bankovic* was the leading authority on the extraterritorial applicability of the ECHR. This authority now resides with the judgment in *Al Skeini*, which overruled many of the principles articulated in *Bankovic*.<sup>77</sup> In mitigating the judgment of *Bankovic*, the Convention now applies to a broader range of extraterritorial situations. However, the Court still regards the extraterritorial applicability of the Convention as exceptional and that killing does not equate to the exercise of jurisdiction. Thus, the Court has *not* explicitly overruled the decision in *Bankovic*<sup>78</sup> and it appears unlikely that the Court would make a different jurisdictional assessment, if *Bankovic* were decided today.<sup>79</sup>

Scholars have reasoned that *Bankovic* remains good law<sup>80</sup> and according to the Court “[...] still perfectly correct in its result”.<sup>81</sup> Therefore, it remains true that the act of firing missiles from an aircraft does not amount to the exercise of jurisdiction over those killed. Consequently, a *Bankovic*-like situation exists outside the scope of the Convention. On this basis, it is argued that drone strikes would equally be excluded from the purview of the ECHR.<sup>82</sup> With specific

<sup>74</sup> Milanovic, *supra* note 55, 123.

<sup>75</sup> *Ibid.*; Lawson, *supra* note 73, 109.

<sup>76</sup> Lawson, *supra* note 73, 116.

<sup>77</sup> Notably, the Court has backtracked on the suggestion in *Bankovic* that the rights of the Convention are indivisible and that either all of the rights contained within the Convention are applicable to a situation or none. The Court also confirmed that there is no geographical restriction to the potential reach of the Convention. The *Bankovic* judgment implied that the Convention can only apply within the ‘*espace juridique*’ of the Contracting States. Furthermore, extraterritorial jurisdiction was conceived of in *Al Skeini* in spatial and personal terms, rather than solely spatially, as per ‘*Bankovic*’. For a more detailed comparison between the decisions in *Bankovic* and *Al Skeini* see: Cowan, *supra* note 46.

<sup>78</sup> S. Miko, ‘Al Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention on Human Rights’ 35 *Boston College International and Comparative Law Review* (2013) 3, 63, 76.

<sup>79</sup> Milanovic, *supra* note 55, 132 “[A]l Skeini leaves unchanged the outcome of Bankovic”.

<sup>80</sup> Miko, ‘Al Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention on Human Rights’, *supra* note 78, 77.

<sup>81</sup> Milanovic, *supra* note 55, 130.

<sup>82</sup> *Ibid.*; C. Ryngaert, ‘Clarifying the Extraterritorial Application of the European Convention on Human Rights’ 28 *Utrecht Journal of International and European Law*



reference to the targeted killing of Reyaad Khan, McCorquodale speculated that the UK's employment of an armed drone, absent territorial presence in Syria, makes finding the applicability of the Convention to the killing "unlikely".<sup>83</sup>

The continued relevance of *Bankovic* undeniably impedes the applicability of the Convention to killings arising from aerial bombardment. By comparing the circumstances of the UK policy to the situation in *Bankovic*, it is understandable that scholars have evaluated that drone utilized targeted killings would not engage the ECHR. Nonetheless, although there are similarities between the circumstances of *Bankovic* and the UK policy, treating both situations as a carbon copy of one another fails to appreciate the distinctive characteristics of drone operated targeted killing. By distinguishing the circumstances of the UK policy from those in *Bankovic*, it will be argued that the inadmissibility decision of *Bankovic* is not decisive in assessing whether victims of targeted killing would be within jurisdiction of the UK.

### E. Distinguishing Drone Operated Targeted Killings From the Aerial Bombardment in *Bankovic*

It is posited that targeted killing operations are a distinctive form of State conduct with notable contrasts to the aerial bombardment in *Bankovic*. As previously defined, targeted killing is the intentional, premeditated and deliberate use of lethal force by States against selected individuals not in their custody. Therefore, when the UK conducts a targeted killing, the intention is to kill pre-identified targets. However, in *Bankovic*, the 16 deaths that occurred when NATO bombed the *Radio Televizije Srbije* buildings in Belgrade were incidental; those killed were not personally selected nor were their deaths the objective of the aerial bombardment.

An operation that seeks to kill specific individuals is undeniably more challenging than merely firing missiles from a plane. This is demonstrated by the process utilized by the US when conducting targeted killings. The US has followed a multi-staged process beginning with the gathering of intelligence,

(2012) 74, 57 - 60: "[A] *Bankovic*-like situation may still lead to a finding of inadmissibility on jurisdiction grounds. This may imply that victims of extraterritorial targeted killing. E.g., by unmanned drones, perpetrated by western powers in the wastelands of Yemen or Pakistan, do not fall within the acting States' ECHR jurisdiction".

<sup>83</sup> R. McCorquodale, 'Human Rights and the Targeting by Drone' (2015), available at <https://www.ejiltalk.org/human-rights-and-the-targeting-by-drone/> (last visited 12 March 2019).

followed by its analysis, the selection of a target, and the communication of those targets to operators who proceed to launch lethal strikes.<sup>84</sup> For targeted killing by drones, the firing of a missile is the final part of a protracted and multifaceted military mission against a specific individual. With respect to the killing of Reyaad Khan, the UK security agencies had acquired at least 25 intelligence reports on the terrorist threat posed by Khan. The first of the intelligence reports was produced in November 2014, nine months prior to the killing of Khan.<sup>85</sup> The important factor to acknowledge is that for targeted killing operations, there is a nexus between the State and the victim that exists prior to the killing. In contrast, the only link between the respondent States and the deceased in *Bankovic* was the killing itself, there was no connection prior to the killing.

An additional variance between *Bankovic* and the UK policy is the political context, in which force is utilized. In *Bankovic*, NATO conducted airstrikes *against* the Federal Republic of Yugoslavia, following the failed negotiations for a political solution to the ongoing crisis in Kosovo.<sup>86</sup> In contrast, the UK targeted killing policy does not seek to use force against another State but rather anticipates targeting specific terrorists associated with non-State groups.

Rosen postulates that the acts that produced *Bankovic* are simply hard to compare to situations where drones have been utilized for “[...]enduring the close-up monitoring of persons [...]”.<sup>87</sup> Consequently, it seems rather doubtful that the judgment in *Bankovic* provides the “yardstick”<sup>88</sup> for a jurisdictional assessment of drone operated targeted killing. It is submitted that the viewpoint postulated by Rosen is convincing because the force envisaged by the UK policy is distinguishable from *Bankovic* in two significant ways. Firstly, targeted killing operations require comprehensive intelligence and substantial surveillance to identify and track a target prior to killing. The drawn-out nature of such

<sup>84</sup> J. Gibson, ‘The US’s Covert Drone War and the Search for Answers: Turning to European Courts for Accountability’ in European Centre for Constitutional and Human Rights (ed), *Litigating Drone Strikes: Challenging the Global Network of Remote Killing* (2017), 102, 104 - 105; For further information on the US process of drone utilized targeted killing see, J. Levs, ‘CNN Explains: U.S. drones (2013), available at <https://edition.cnn.com/2013/02/07/politics/drones-cnn-explains/> (last visited 13 March 2019); J. Scahill, ‘The Drone Papers: Find, Fix, Finish’ (2015) available at <https://theintercept.com/drone-papers/find-fix-finish/> (last visited 13 March 2019); A. Callam, ‘Drones Wars: Armed Unmanned Aerial Vehicles’ 18 *International Affairs Review* (2010) 3.

<sup>85</sup> Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria*, (2016-2017, HC 1152), 8 para. 20.

<sup>86</sup> *Bankovic*, *supra* note 18, paras 6 - 8.

<sup>87</sup> F. Rosén, *supra* note 67, 118.

<sup>88</sup> *Ibid.*

operations is distinguishable from *Bankovic*, when the only connection between the States and the applicants was the *instantaneous* act of killing.<sup>89</sup> Secondly, the UK targeted killing policy is an exceptional form of counterterrorism that will be used to kill members of non-State groups. Therefore, the political context of the UK policy differs to that of *Bankovic*, when force was used against another State.

Evaluating the applicability of the Convention to an extraterritorial act requires the consideration of *all* of the relevant aspects of the act in question. The invocation of *Bankovic* to dismiss the applicability of the Convention to the UK targeted killing policy disregards the distinctiveness of targeted killing as a form of counterterrorism. Distinguishing targeted killing operations from *Bankovic* is not itself decisive for determining whether targeted killing falls within one of the exceptions for extraterritorial jurisdiction. Yet, significantly, neither is the judgment in *Bankovic*. For a comprehensive analysis of the Convention's applicability to the UK targeted killing policy, it is necessary to incorporate the policy's distinguishable characteristics into the jurisdictional evaluation. Notably, it will be evaluated whether the UK, by intervening in a State that is either *unable or unwilling* to prevent a threat to the UK, is assuming responsibility for counterterrorism and exercising *public powers* that would normally be reserved for the territorial State. Additionally, it will be assessed whether the Court could construe targeted killing operations, in particular the loitering over a target prior to a missile strike, as amounting to the exertion of personal *control* over the victim.

## F. Re-evaluating the Applicability of the ECHR to the UK Targeted Killing Policy

### I. Targeted Killing as a Form of Counterterrorism: The Exercise of *Public Powers*?

Evaluating whether the UK targeted killing policy equates to the exercise of *public powers* is complicated by the ECtHR's vague framing of what this model of jurisdiction requires.<sup>90</sup> Nonetheless, the Court's analysis in *Al Skeini* and *Jaloud*, when jurisdiction under the *public powers* model arose, provides some direction.

<sup>89</sup> *Medvedyev*, *supra* note 51, para. 64.

<sup>90</sup> *Milanovic*, *supra* note 55, 131.

In *Al Skeini*, the Court held that the UK, as an *occupying power* in Iraq, exercised elements of governmental authority, established in very formal terms, by reference to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq.<sup>91</sup> The assumption of authority and responsibility for the maintenance of security in South-east Iraq resulted in the UK conducting a variety of security operations, such as village patrols,<sup>92</sup> parameter patrols of an air base<sup>93</sup> and house raids.<sup>94</sup> The deaths that occurred during the course of or contiguous to the security operations carried out by British forces, came within the UK's jurisdiction because the operations equated to some or all of the *public powers* normally to be exercised by a Sovereign Government.<sup>95</sup>

Similarly, in *Jaloud* the Court held that the death of Azhar Sabah Jaloud was within the jurisdiction of the Netherlands.<sup>96</sup> Jaloud was killed when a vehicle he was travelling in was fired upon at a checkpoint under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's<sup>97</sup> mission, under United Nations Security Council Resolution 1483, to restore conditions of stability and security conducive to the creation of an effective administration in Iraq.<sup>98</sup> Consequently, the Court considered that the manning of a checkpoint equated to Netherlands assuming the exercise of some elements of governmental authority in Iraq.<sup>99</sup> As a result, the Court was satisfied that the Netherlands exercised its jurisdiction within the limits of its SFIR mission and for the purpose of asserting *authority and control* over persons passing through the checkpoint.<sup>100</sup>

<sup>91</sup> *Al Skeini*, *supra* note 30, paras 143-148.

<sup>92</sup> *Ibid.*, para. 36.

<sup>93</sup> *Ibid.*, para. 49.

<sup>94</sup> *Ibid.*, para. 40.

<sup>95</sup> *Ibid.*, para. 150.

<sup>96</sup> *Jaloud v. Netherlands*, *supra* note 33, para. 152.

<sup>97</sup> Stabilization Force in Iraq (SFIR).

<sup>98</sup> *Jaloud v. Netherlands*, *supra* note 33, para. 152.

<sup>99</sup> Sari, 'Untangling Extra-Territorial Jurisdiction from International Responsibility' in *Jaloud v. Netherlands: Old Problem, New Solutions?* *supra* note 57, 293.

<sup>100</sup> In *Jaloud*, the Court did not explicitly State that the Netherlands exercised 'public powers'. However, the Court responded extensively (paras 140-153) to the Netherlands' argument that they had not assumed 'public powers' as these 'powers' were in the hands of the US and the UK, whose status of 'occupying powers' distinguished them from other States working under the Coalition Provisional Authority (paras 113-114). By addressing this specific argument in detail, the judgment strongly implies that jurisdiction was considered and deemed to exist on the basis of the Netherlands exercising 'public powers'. Moreover, the Court did not address the Netherlands' argument that the lack of detention precluded a jurisdictional link on a purely personal basis (para 118). It can be

The aforementioned cases demonstrate that the *public powers* model of jurisdiction requires the assumption of tasks that would normally be the prerogative of the territorial State. During the utilization of *public powers*, a jurisdictional link arises when the State exerts *authority and control* over individuals. In this context, the Court regards killing as the exertion of *authority and control*. It is submitted that the force envisaged by the UK policy could amount to the exercise of *public powers* because the prevention of terrorism is normally a task reserved for the territorial State and the UK, through its policy and legal justifications for targeted killing, implies the assumption of Governmental authority.

To support the suggestion that targeted killing, could amount to the exercise of *public powers*, it is necessary to acknowledge that, in addition to a States' negative obligation to "[...]refrain from [...] acquiescing in organized activities within its territory directed toward the commission of [terrorist] acts [...]"<sup>101</sup> States also have a positive obligation to act to prevent non-State actors from carrying out terrorism from within their territories.<sup>102</sup> Therefore, when terrorists are operating within a State's territory, the employment of counterterrorism activities are not only *tasks* normally conducted by the territorial State but tasks that the State are legally obliged to undertake. As a result, the UK policy could be interpreted, as equating to conduct that would normally be the prerogative

inferred from this that the Court did not consider the jurisdictional issue on this basis, otherwise it would have been incumbent upon the Court to explain when a State exercises 'authority and control' over individuals outside detention scenarios. Additionally, the UK Courts have also read the judgment in *Jaloud* as applying the 'public powers' model of extraterritorial jurisdiction. See for example *Al-Saadoon*, *supra* note 60, para. 79; *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 65.

<sup>101</sup> Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), A/RES/25/2625, 24 October 1970, Annex; The International Court of Justice has described the provisions of the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations as principles of customary international law, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgement, ICJ Reports 2005, 168, 226-227, para 162.

<sup>102</sup> Following the terrorist attacks of 9/11, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1373 (2001) (binding upon all UN members) which decided that all States shall 'prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens'; For the obligations of States to prevent international terrorism see K. Trapp, 'State Responsibility for International Terrorism: Problems and Prospects' (2011).

of the territorial State. This assessment does not imply that States have an obligation to conduct targeted killings but rather highlights that the UK policy is an exceptional form of counterterrorism, and the prevention of terrorism is a task normally reserved for the State where the threat originates.

Moreover, by highlighting the legal and policy justifications that the UK put forward for targeted killing, it can be inferred that the UK assumes governmental authority when conducting targeted killing operations. Firstly, the UK considers that that killing of specific terrorists is a necessary and justified action to thwart an imminent terrorist attack. However, the UK only seeks to utilize targeted killing as a last resort, when a threat emanates from a State that is either *unwilling or unable* to deter it. Therefore, the UK respects that the prevention of international terrorism is primarily the responsibility of the State where the threat derives. Nonetheless, when a threat to the UK exists and a State shirks their responsibility or lacks the political authority to effectively neutralize the terrorist threat, the UK is prepared to act to prevent the danger. In such circumstances, it is posited that the UK is stepping in and voluntarily assuming the responsibility of the territorial State to combat terrorism.

Further evidence to support this argument is found in the UK's justification for unilateral targeted killing operations. The reference within the UK policy to a State being *unwilling or unable* to deter terrorism against the UK is not only an attempt to emphasize the necessity of their policy but also a legal justification for extraterritorial forcible action.<sup>103</sup> The *unwilling or unable* doctrine is an expansive interpretation of self-defence under Article 51 of the UN Charter.<sup>104</sup> Proponents of the doctrine argue that when a terrorist organization operates within a State that cannot or will not act to prevent the group from attacking another State, the injured State may act in self-defence against the terrorist organization, with or without the consent of the host State.<sup>105</sup> It is argued that force used in the

<sup>103</sup> JCHR Report, *supra* note 19, 43 3.23.

<sup>104</sup> Although the legality of forced used in such circumstances remains unsettled within international law, it is not the aim of the current analysis to contribute to this discussion. For a detailed analysis of the 'Unable or Unwilling' doctrine, See P. Starski, 'Right to Self-Defense, Attribution and the Non State Actor-Birth of the "Unable or Unwilling" Standard?' 75 *Heidelberg Journal of International Law* (2015) 3, 455; O. Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?' 29 *Leiden Journal of International Law* (2016) 3, 777; A. Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense', 52 *Virginia Journal of International Law* (2012) 3, 483.

<sup>105</sup> M. D. Banks, 'Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defence in International Counter-Terrorism Operations', 200 *Military Law Review* (2009), 54, 57.

aforementioned circumstances equates to extraterritorial law enforcement<sup>106</sup> because the State using force in self-defence is fulfilling the legal obligation of the territorial State to fight terrorism.<sup>107</sup>

The UK Government justified the strike against Reyaad Khan on the basis that the Assad regime was unwilling and/or unable to take necessary action to prevent attacks orchestrated by ISIL from within Syria.<sup>108</sup> Therefore, the targeted killing amounted to the UK assuming responsibility for the prevention of terrorism, which is, according to international law, the prerogative of the territorial State, in this case Syria. Therefore, for targeted killings that replicate the circumstances of the Reyaad Khan strike, it is possible that the use of force would amount to the exercise of *public powers* and would bring those lethally targeted within the jurisdiction of the UK.

Yet, in *Al Skeini*, the Court stated that jurisdiction arises where “[...] through the consent, invitation or acquiescence of the Government of that territory, [a State] exercises all or some of the *public powers* normally to be exercised by that Government”.<sup>109</sup> Therefore, it remains uncertain whether the absence of consent from the territorial State for action inside its borders, such as when the UK killed Reyaad Khan in Syria, could preclude jurisdiction under the *public powers* model. It is submitted that the absence of consent should not prohibit the *public powers* model of jurisdiction from arising. Consent, or the lack thereof, is a relevant consideration in assessing whether a State acting extraterritorially has a legal basis for its incursion onto the territory of another State. The existence or absence of consent is pertinent to the inter-State rules on the violation of sovereignty, but human rights law is concerned with the regulation of State conduct *vis a vis* individuals. It would be illogical if the applicability of human rights law were reliant on the State’s legal basis for the extraterritorial act in question. It would be even more perverse if a Contracting State were obliged to respect its obligations under the Convention when acting lawfully on a foreign territory, but the Convention would be inapplicable if the State was acting unlawfully.

The Court has appeared to follow this line of reasoning in its jurisprudence relating to the *effective control of an area* model of jurisdiction. In assessing

<sup>106</sup> Y. Dinstein, ‘War, Aggression and Self-Defence’ 5th ed. (2011) 268.

<sup>107</sup> Starski, ‘Right to Self-Defense, Attribution and the Non-State Actor-Birth of the “Unable or Unwilling” Standard?’, *supra* note 104, 495.

<sup>108</sup> Joint Committee on Human Rights, *The Government’s Policy on the Use of Drones for Targeted Killing: Government Response to the Committee’s Second Report of Session 2015-2016, Fourth Report of Session 2016-17*, HL Paper 49, HC 747, 14 (Appendix: Government).

<sup>109</sup> *Al Skeini*, *supra* note 30, para 135.

whether a State has exercised spatial control, the legal basis for the State's extraterritorial act has not been determinative. Rather, the Court has evaluated the existence of extraterritorial jurisdiction based on the factual circumstances of the case.<sup>110</sup> It would therefore be inconsistent for the *public powers* model of jurisdiction to be precluded on the basis of the illegality of the extraterritorial action. In fact, such a finding would even be a divergence from the Court's own case law relating specifically the *public powers* model. In *Al Skeini*, the UK did not assume *public powers* in Iraq with the *consent, invitation or acquiescence* of the Iraqi Government because there was no government at the material time.<sup>111</sup> Therefore, it is more likely that jurisdiction *vis a vis public powers* is determined by a factual assessment of whether a State is exercising "all or some of the public powers normally exercised by that Government".<sup>112</sup>

There is another issue that may preclude the applicability of the *public powers* exception to the UK targeted killing policy. So far, the ECtHR has recognized a jurisdictional link when *public powers* have been bestowed upon the acting State, either by the law of belligerent occupation<sup>113</sup> or a UN Security Council Resolution.<sup>114</sup> This raises the possibility that *public powers* are actual legal powers. If this is correct, the type of unilateral force envisaged by the UK policy could not equate to the exercise of *public powers* as there is no legal basis for the powers that the UK is purporting to exercise. Nonetheless, the UK Courts have read *public powers* as not requiring a legal basis. In *Al-Saadoon*, the High Court considered the test of whether *public powers* have been exercised as factual and not determined by their legal basis or legitimacy.<sup>115</sup> The factual test was actually applied in the case to conclude that British soldiers were exercising *public powers* by controlling the supply of rationed fuel to civilians, which would normally be the prerogative of the Iraqi police force,<sup>116</sup> even though the UK was

<sup>110</sup> *Ibid.*, para. 139 "It is a question of fact whether a Contracting State exercises effective control of an area outside its own territory".

<sup>111</sup> I. Park, 'The Right to Life in Armed Conflict' (2018), 79.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Al Skeini*, *supra* note 30, para. 142.

<sup>114</sup> *Jaloud*, *supra* note 33, para. 152.

<sup>115</sup> *Al-Saadoon*, *supra* note 60, para. 74.

<sup>116</sup> *Ibid.*, para. 83.



not an *occupying power* at the time<sup>117</sup> and acted without the consent of the Iraqi Government or authorization from the UN.<sup>118</sup>

This interpretation of *public powers*, according to the Court, stems from the judgment in *Jaloud*, when the Grand Chamber held that the status of 'occupying power' was not determinative in assessing whether the Netherlands exercised *public powers*.<sup>119</sup> Rather, of importance to the Court "[...]was the practical situation on the ground in terms of the powers which the Netherlands was actually purporting to exercise and not the legality or legal basis of its operations".<sup>120</sup> Therefore, the legal basis for a State's assumption of governmental tasks does not appear decisive but could influence the factual assessment of whether *public powers* were utilized.

The precise scope of the *public powers* exception is unknown due to the limited direct case law on the issue<sup>121</sup> However, it appears that when, following the assumption of governmental authority, a State kills during the performance of tasks normally reserved for the territorial State, the *public powers* model of jurisdiction arises. Moreover, the case law of the ECtHR and UK Courts indicates that the absence of a legal basis for the performance of governmental tasks does not preclude this model of jurisdiction. Thus, it is posited that the Court could interpret the UK targeted killing policy as amounting to the exercise of *public powers* because the UK would be assuming the responsibility for counterterrorism, which is normally the prerogative of the State, where the threat is located. Consequently, the victims of targeted killing would be within the jurisdiction of the UK.

<sup>117</sup> Within the litigation, there was one case, the death of Atheer Kareem Khalaf, which occurred during the 'invasion period' of the Iraq war (29 April, 2003), prior to the formal declaration of the completion of major combat operations (May 1, 2003). The UK argued that their soldiers did not exercise 'public powers' during the 'invasion period' as they were fighting against Iraqi forces. Yet, the Court accepted that whether 'public powers' were exercised is not conclusively answered by identifying the date combat operations were formally declared complete. The Court acknowledged that actual war fighting had ceased some time prior to the UK's formal declaration and that the UK was effectively acting as a police force in Basra. See, *Al-Saadoon*, *supra* note 60, paras 77-83.

<sup>118</sup> The High Court's interpretation of the 'public powers' model was endorsed by the Court of Appeal, which held that whether 'public powers' were exercised can only be answered by assessing the function actually performed in any given case. See, *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 54.

<sup>119</sup> *Jaloud*, *supra* note 33, para. 142

<sup>120</sup> *Al-Saadoon*, *supra* note 60, para. 75.

<sup>121</sup> Park, Right to Life in Armed Conflict, *supra* note 111, 84.

## II. Personal Control and Targeted Killing

The jurisprudence of the ECtHR demonstrates clearly that a State brings an individual within their jurisdiction through detention.<sup>122</sup> However, detention is not a prerequisite for this subcategory of extraterritorial jurisdiction. For example, in *Isaak and others v. Turkey*,<sup>123</sup> the Court deemed the complaint admissible by the family of an individual beaten to death in a UN buffer zone in Northern Cyprus. Despite the absence of detention, the Court held that the killing at the hands of Turkish Cypriot police amounted to the deceased being under the authority and/or effective control of the respondent State through its agents.<sup>124</sup>

Furthermore, the UK Government itself acknowledged in *Al Saadoon* that an individual did not need to be formally detained in order to be within the State's jurisdiction, and "[...]accepts that there may be more difficult cases which do not strictly involve detention but where, nevertheless, the situation is so closely linked to the exercise of authority and control of the State as to bring it within its jurisdiction for this purpose".<sup>125</sup>

Drone operated targeted killings can certainly be characterized as a so-called more difficult case because those targeted are not detained by or in close proximity to agents of the State. Yet, it can be argued that such situations are closely linked to the exercise of authority and control of the State because targeted killing operations utilize extensive surveillance on individuals, for months if necessary<sup>126</sup> and drones can loiter for up to 14 hours,<sup>127</sup> stalking their target prior to the launch of a missile.

It is submitted, that when a drone pilot verifies the identity of a target and loiters over them prior to firing a missile, control is being exerted over the target.

<sup>122</sup> With reference to personal jurisdiction, the Court stated that "this principle has applied where an individual is taken into the custody of State agents abroad", *Al Skeini*, *supra* note 30, para. 136.

<sup>123</sup> *Isaak and others v. Turkey*, ECtHR App. No. 44587/98, Judgement 24 September 2008, para. 5.

<sup>124</sup> *Isaak and others v. Turkey*, ECtHR App. No. 44587/98, Admissibility Decision 28 September 2006, 21, 2 (b)(ii).

<sup>125</sup> *Al-Saadoon & Rahmatullah*, *supra* note 63, para. 71.

<sup>126</sup> R. Wenzl, 'The Kill Chain: Inside the Unit that Tracks Targets for US Drone Wars', *The Guardian* (23 January 2018), available at <https://www.theguardian.com/world/2018/jan/23/the-kill-chain-inside-the-unit-that-tracks-targets-for-us-drone-wars> (last visited 13 March 2019).

<sup>127</sup> M. Horowitz, S. Kreps & M. Fuhrmann, 'Separating Fact From Fiction in the Debate Over Drone Proliferation' 41 *International Security* (2016) 2, 7, 21.

This is due to the drone pilot, figuratively speaking, having the individual's life within their hands when fixating the aim of a missile upon them. Lubell and Murray propose that within human rights treaties, extraterritorial jurisdiction should be established in relation to the right to life on the basis of targeting. It follows that, whenever a State agent places an individual *within their crosshairs*, they exercise direct control over an individual's right to life.<sup>128</sup>

This submission finds support in the Inter-American Commission case of *Alejandre*,<sup>129</sup> when a Cuban military aircraft shot down two private US registered aircrafts in international airspace. Although the act took place outside Cuban territory, the Commission held that the act amounted to exerting *authority and control* over those killed.<sup>130</sup> Additionally, in the case of *Pad*<sup>131</sup>, the ECtHR held that victims of fire discharged from Turkish helicopters in Northern Iraq would have fallen within Turkey's jurisdiction, if the case would not have otherwise been inadmissible due to the applicants' failure to exhaust domestic remedies.<sup>132</sup>

It is proposed that when a drone operator places a target *within their crosshairs* with the intent to kill, they are exerting *authority and control* and the subsequent killing will be within the jurisdiction of the acting State. Finding a jurisdictional link on this basis would also ensure that intentional State killings that do not involve detention, such as sniper fire, are not excluded from the reach of the Convention. However, such an approach would not cover the entire range of extraterritorial State killing, with collateral deaths such as in *Bankovic* remaining outside the purview of the Court. Therefore, the Court would be able to continue the expansion of the Convention to a broader range of extraterritorial acts without needing to overrule *Bankovic*.

<sup>128</sup> N. Lubell & D. Murray, 'Response to Call for Submissions Regarding Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life' (2017) para. 7, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (last visited 13 March 2019).

<sup>129</sup> *Alejandre Jr and others v Republica de Cuba*, IACHR, Case 11.589, Report No. 86/99, 29 September 1999.

<sup>130</sup> *Ibid.*, paras 23-25.

<sup>131</sup> *Pad and others v. Turkey*, ECtHR, Admissibility Decision, App. No.60167/00, Judgement of 28 June 2007.

<sup>132</sup> *Ibid.*, paras 54-55.

## G. Concluding Remarks

Since 9/11, greater critical attention has centered on the wide range of extraterritorial actions taken by States to combat terrorism.<sup>133</sup> The UK's adoption of a targeted killing policy represents a groundbreaking form of European State conduct that introduces a new context for discussions on the extraterritorial applicability of the ECHR. Scholars have posited, based on the admissibility decision in *Bankovic* that the scope of the Convention does not extend to killings by armed drones due to the absence of a jurisdictional link. Similarities exist between the situation in *Bankovic* and the circumstances of the UK targeted killing policy. However, there are also significant differences that make the invocation of *Bankovic*, as precluding the applicability of the ECHR, unconvincing. Moreover, recognizing the previously overlooked distinctiveness of targeted killing operations and the context of the UK policy necessitates a jurisdictional re-evaluation.

It is posited that as a form of extraterritorial counterterrorism, the UK policy could be perceived as the assumption of *public powers* of the State where the drone strike occurs. Moreover, the capability of armed drones to loiter over a target prior to a strike could be interpreted as State agents having direct control over the targets' right to life, bringing the individual within the jurisdiction of the attacking State. The aforementioned arguments would enable the Court to continue the trend of expanding the reach of the Convention to an ever-growing range of extraterritorial circumstances, without opening the *floodgates* by equating killing as the exercise of jurisdiction.

The Court's willingness to expand the extraterritorial reach of the Convention is a positive development. Furthermore, the potential applicability of the Convention to targeted killing by drones would be favorable, ensuring that European States are held legally accountable for such operations. However, despite some progressive post-*Bankovic* developments in the Court's jurisprudence, the concept of extraterritorial jurisdiction is flawed, which is clearly evident in the context of extraterritorial State killing. For example, it is unjustifiable that an individual is within the jurisdiction of the State, if they are detained prior to being killed but there may not be a jurisdictional link if State agents simply shoot dead an individual from 20 meters away. The author acknowledges that the arguments articulated within this article would add further arbitrariness to the Convention's extraterritorial applicability. It seems unsustainable in the long term, and rightly so, for the Court to preserve an approach that would find a

<sup>133</sup> Wilde, *supra* note 17, 740.

jurisdictional link for targeted killing operations whilst excluding generic aerial bombardments, as per *Bankovic*. Yet, in the meantime, the Court remains loyal to the principle that extraterritorial jurisdiction is exceptional and is reluctant to overrule the decision in *Bankovic*. Therefore, for the applicability of the Convention to State killings, it is necessary to show that a killing is distinctive and, with respect to killings conducted aurally, distinguishable from *Bankovic*.

This article has attempted to convey that the force envisaged by the UK policy is distinguishable from *Bankovic*, the circumstances of targeted killings are distinctive, and that such killings could be interpreted as the exercise of extraterritorial jurisdiction. It is ultimately for the Court to decide whether the Convention is applicable to drone operated targeted killing. However, the arguments contained within this article provide the Court with a means of avoiding the perceived legal *black hole*.