APPLICATION OF EXTRATERRITORIAL JURISDICTION IN EUROPEAN CONVENTION ON HUMAN RIGHTS (CASE STUDY: AL-SKEINI AND OTHERS V. UK)

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Abstract

This research explains the definition of jurisdiction, development of the extraterritorial jurisdiction and its regulation in international law which includes its principle and also boundaries. This research then analyses cases before Al- Skeini and others v. UK case regarding the application of jurisdiction mentioned in Article 1 of the European Convention on Human Rights (ECHR) by European Court of Human Rights (ECtHR). Furthermore, this research analyses the applications of Article 1 ECHR in United Kingdom's House of Lords decision and ECtHR decision in Al-Skeini. In its decision ECtHR stated that the existence of Public Power in Al-Skeini causes an extraterritorial jurisdiction in that case. The judgement caters to the human rights protection but on the other hand it still leaves confusion in determining the requirement of extraterritorial jurisdiction in the ECHR.

***Keywords**: Extraterritorial Jurisdiction, European Convention on Human Rights, European Court of Human Rights*

I. INTRODUCTION

This research explains the application of extraterritorial jurisdiction of the European Convention on Human Rights (ECHR) in the case of Al-Skeini and others v. UK. This *Al-Skeini case* was brought by six applicants, relatives of five Iraqis who were killed by British troops in Basrah (southern Iraq), and of one Iraqi who was mistreated by British troops in a British detention facility, as a result which he died. [1]After British courts failed to grant relief to the applicants, they appealed tot he EctHR, claiming that UK had violated the deceased's right to life as laid down in Article 2 ECHR.[2]

In this case the UK's House of Lords stated that the Iraqi citizens

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[1] Cedric Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights (Al-Skeini and others v United Kingdom)",Utrecht Journal of International and European Law 28, Issue 74 (2012),p. 59

[2] *Ibid*.

who were killed by british troops isn't inside the scope of jurisdiction that was governed in ECHR, except for Baha Mousa that was killed after a mistreatment inside british detention in Iraq.

> *"In the view of House of Lords, which applied the 'Banković'[3] principle, under the spatial model of jurisdiction the ECHR does not apply outside the ECHR 'espace juridique', and even if it did on an exceptional basis, the UK did not exercise effective control over the Basrah area. Baha Mousa, by contrast, would fall within the UK's juridiction as a military detention facility arguably has a special status, comparable to an embassy."*[4]

Unlike the UK House of Lords, in *Al-Skeini* the European Court of Human Rights (ECtHR) held that all six applicants, not just Baha Mousa, fell within the UK's jurisdiction.[5] This different interpretations leads us to a problem about what is actually the definiton of jurisdiction itself and how far and in which sircumstances it can be applied.

Jurisdiction is basically derived from a state's sovereignty and applies territorialy.Balksley stated that jurisdiction can be explained as follows:

> *"The term jurisdiction may be defined as the authority to affect legal interest—to prescribe rules of law (legislative jurisdiction), to adjudicate legal questions (judicial jurisdiction) and to enforce judgements the*

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[3] "On 19 December 2001, the European Court of Human Rights announced its decision on admissibility in the case of Bankovićand Others v. Belgium and 16 Other Contracting States. The application was broght by six citizens of the Federal Republic of Yugoslavia (FRY) and concerned the bombing by the North Atlantic Treaty Organization (NATO) of the building of Radio Televizje Srbije (Radio-Television Serbia, RTS) during the Kosovo crisis in April 1999. The building was destroyed; 16 people were kiled and 16 others were seriously injured. The applicants, all family members of the deceased or themselves injured in the bombing, complained that the bombardment of the RTS building violated not only Article 2 (right to life), but also Article 10 of the European Convention on Human Rights (freedom of expression). The Court, however, unanimously declared the application inadmissible as the impugned act is to be considered as falling outside the jurisdiction of the respondent States. The Court came to the conclusion that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States", Dirk Voorhoof, "Case Banković and Others v. Belgium and others",http://merlin.obs.coe.int/iris/2002/1/article2.en.html

[4] Cedric Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights (Al-Skeini and others v United Kingdom)", Op. Cit., p. 59

[5] *Ibid*.

judiciary made (enforcement jurisdiction)."[6]

However, as international law has been continualy developing through years the term of jurisdiction is not only applied territorialy anymore.There are two types of jurisdiction according to its scope of application, territorial jurisdiction and extraterritorial jurisdiciton. Jurisdiciton is extraterritorial when asserted by a nation state over a conduct occuring outside its borders.[7] In public international law, this extraterritorial jurisdiction principle firstly appeared in *Lotus* case.

In *Lotus* case a French merchant ship collided with a Turkish merchant ship on the high seas, and as a result (allegedly) of negligence on the part of Lieutenant Demons, an officer on French ship, several people on the Turkish ship lost their lives.[8] In this sense france had jurisdiction to try Lietuant Demons for manslaughter. However, the Permanent Court of International Justice stated that although there were only a few cases in which states in Turkey's position had instituted prosections, the other states concerned in those cases had not protested against the prosectuions; and secondly, although most states in Turkey's posistion had refrained from instituting prosecutions, there was no evidence that they had done so out of a sense of legal obligation.[9]

In *Lotus* case, the judge stated that :

"Far from laying down a general prohibition to the effect that States may not extend the application of their law and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibtive rules. As regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."[10]

This statement which allows a state's jurisdicion to apply on an

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[6] Christopher L. Blakesley, "United States Jurisdiction Over Extraterritorial Crime", The Journal Of Criminal Law & Criminology 73, No. 3 (1982), p. 1109,

[7] Danielle Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does The Long Arm Of The Law Undermine The Rule Of Law?", Melbourne Journal of International Law 13(2012), p. 2-3

[8] Peter Malanzuk, Akehurst's Modern Introduction to International Law : Seventh Revised Edition, (Taylor & Francis e-Library, 2002), p. 45

[9] *Ibid*.

[10] Karl M. Meessen, Extraterritorial Jurisdiction in Theory and Practice, (London: Kluwer Law International Ltd, 1996), p. 66

event that has an 'effect' to that state is now known as *Lotus principle/ effect principle*. Following the decision in 'Lotus', domestic courts began to grapple with the consequences of assertions of extraterrtiroail jurisdiction.[11] Although some argue that jurisdiction based solely on territoriality well 'served the goals of 'predictability and efificiency', by the mid-1900s the 'heyday' of territorial jurisdiction had begun its demise.[12] As economies became increasingly interconnected there was an increased interest in regulating cross-border activities, such as transnational crime and the activities of multinational corporations.[13] In some cases, the interest in extraterritoriality became associated with attempts to enforce human and indigenous rights.[14]In the case of *US v. Alumunium Co. Of America,* the court stated as follows:

> *"any states may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends…a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable."*[15]

There are still some qualifications that are needed to be fullfiled for this principle to be applied.

II. THE DEVELOPMENT AND APPLICATION OF EXTRATERRITORIAL JURISDICTION IN PUBLIC INTERNATIONAL LAW

In the beginning, geographycal boundary of a country is the standard for the application of the jurisdiction of that country. That country's territory even the basic initiative of the the existence of international law. For example in 1600 Westphalia treaty has given a concept that a nation's power ends within its territorial boundaries.[16]

[11] Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine",Utrecht Law Review 9, Issue 4 (September 2013),p. 70
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] Malcolm N. Shaw, International Law, Ed. 5, (Cambridge: Cambridge University Press, 2003), p. 612
[16] Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine",Op. Cit.,p. 69

However, it is inevitable that there are many problems that are occured outsied a state's border that still has an effect over that country which makes that particular country a sense to be involved and poses the power over that problem. Therefore, the extraterritorial jurisdiction principle was also already known before the 20th century, even its existence was only accepted as an exceptence instead of a rule or even as a law.[17]Not until 20th century the extraterritorial jurisdiction for the first time arrose in public international law in the case of *Lotus,* which was brought before the Permanent Court of International Justice (PCIJ), which in its awards the judges stated as follows:

> *"Far from laying down a general prohibition to the effect that States may not extend the application of their law and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibtive rules. As regards other cases, every state remains free to adopt the principles which it regards as best and most suitable."*[18]

Besides *Lotus* case, the prosecutions of war criminals after second world war also has been an important aspect in the development of extraterritorial jurisdiction. The court's decision that was sentenced to the war crimes that were conducted by Nazis in Nuremberg Trials has changed the understanding of jurisdiction itself.[19] Then in its development, which was in the late 90's, Frederick Mann observed that:

> *"Normally no State is allowed to apply its legislation to foreigners in respect of acts dones by them outside the dominions of the sovereign power encating. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all over sovereign powers outside its own territory."*[20]

He also has its argument that "...the nationality of the defendant is now probably an insufficient link to provide the courts of his home State with jurisdiction over him"[21]. Then in late 20's and early 21's

[17] *Ibid*.
[18] Karl M. Meessen, Op. Cit., p. 66
[19] The adjudication of Nazi war crimes by the Nuremberg. . . has transformed our understanding of jurisdiction, Helena Gluzman, "On Universal Jurisdiction", Bocconi School of Law Student-Edited Papers No.2009-08/EN (2009)
[20] F.A. Mann, Further Studies in International Law, (Oxford: Oxford University Press, 1990), p. 5
[21] *Ibid*.

some treaties such as Convention on the Rights of the Child (CRC), Convention for the Suppression of Terrorist Bombing, and Convention against Torture and Other Cruel invites nations to put extraterritorial jurisdiction into their national law..[22]

In this 21th century, many nations already have extraterritorial jurisdiction approach in their national law. For example countries like Singapore[23], Indonesia[24], Zimbabwe[25], Iraq[26], Rusia[27], France[28],

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[22] For example, the 1989 Convention on Rights of the Child (CRC) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography together require parties to criminalise child prostitution whether or not the acts occur domestically or extraterritorially. All but two countries of the world are now party to the CRC, making it one of the most universally ratified of all United Nations conventions. Other examples include the international anti-corruption frameworks. The major international treaties on anti-corruption all either require or permit a degree of extraterritorial jurisdiction. Similarly, international treaties relating to terrorism and torture also permit some assertions of extraterritorial jurisdiction. For example, the International Convention for the Supression of Terrorrist Bombing calls upon parties to assert jurisdiction on the basis of both passive and active nationalitym and the International Convention for the Suppression of the Financing of Terrorism calls upon parties to assert active nationality jurisdiction. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also permits states to exercise active nationality jurisdiction, and passive nationality, where a state deems it to be 'appropriate'." Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine, Op. Cit.

[23] Lihat Kitab Undang-Undang Hukum Pidana (KUHP) Singapura, Singapore, Chapter 224, 2008 rev. ed., Ps. 3; Undang-Undang Pencegahan Korupsi Singapura, Singapore, Chapter 241, 1993 rev. ed., Ps. 37; dan putusan pada kasus Public Prosecutor v Taw Cheng Kong, [1998] 2 SLR 410, [27]-[43].

[24] Lihat Kitab Undang-Undang Hukum Pidana (KUHP) Indonesia, Indonesia, Kitab Undang-UndangHukum Pidana (KUHP), Ps. 4

[25] Lihat Undang-Undang Kriminal Zimbabwe, Zimbabwe, Criminal Law (Codification and Reform) act, 2004, Ps. 5, http://www.refworld.org/docid/4c45b64c2.html, diakses pada 17 Desember 2014

[26] Lihat Kitab Undang-Undang Kriminal Iraq, Iraq, Criminal Code 1969, Ps. 2-4, http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf, diakses pada 17 Desember 2014

[27] Lihat Kitab Undang-Undang Kriminal Rusia, Rusia, Criminal Code of the Russian Federation, 1996, Ps. 12, http://www.russian-criminal-code.com/PartI/SectionI/Chapter2.
html, diakses pada 17 Desember 2014

[28] Lihat Kitab Undang-Undang Hukum Pidana (KUHP) Perancis, Perancis, Code Pénal [Penal Code] (France), Ps. 113(6)-113(12), http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations, diakses pada 17 Desember 2014

Inggris[29], Mexico[30], Canada[31], United States[32], Japan[33], Israel[34], and Thailand[35] has at least some of its national laws which include extraterritorial jurisdiction. The geography concept of a territory of a nation is becoming a less salient feature of the International legal landscape.[36] States are acting on treaty obligations, reacting to world events, or seeking to achieve political objectives.[37]

However, a state surely can't act unaccordingly to the existing law and states that it has a jurisdiction over events that are occured outside its territory without complying to international law and principles. According to a research tha was conducted by Harvard Law School between 1920's and 1930's[38], there are severals principles that can brings out extraterritorial jurisdiction which are national principle, territorial objective / effect principle, protective principle and universal principle.

The first principle, nationality principle, is a most fundamental principle of extraterritorial jurisdiction. This pirnciple opens a doorway to a state's extraterritorial jurisdiction.[39] This principle governs that

[29] Lihat Undang-Undang Suap Inggris, Inggris, Bribery Act (UK) c. 23, 2010, Ps. 12.
[30] Lihat Kitab Undang-Undang Hukum Pidana Meksiko, Meksiko, Código Penal Federal (Mexico), 1931, Ps. 4, http://www.wipo.int/wipolex/en/text.jsp?file_id=199697#LinkTarget_461, diakses pada 17 Desember 2014
[31] Lihat Kitab Undang-Undang Kriminal Kanada, Kanada, Criminal Code, RSC 1985, c C-46, Ps. 7(4.1), http://laws-lois.justice.gc.ca/eng/acts/C-46/page-3.html, diakses pada 17 Desember 2014
[32] Lihat Undang-Undang Yurisdiksi Ekstrateritorial Militer Amerika, Amerika, Military Extraterritorial Jurisdiction Act of 200, 18 USC § 3261(2000, http://www.pubklaw.com/hi/pl106-523.pdf, diakses pada 17 Desember 2014
[33] Lihat Kitab Undang-Undang Hukum Pidana Jepang, Jepang, Penal Code (Japan), 1907, Ps. 3-5, http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=1&yo=penal+code
&x=0&y=0&ky=&page=1, diakses pada 17 Desember 2014
[34] Lihat Hukum Pidana Israel, Israel, Penal Law of Israel 199, Ps. 13-17, http://www.refworld.org/docid/3ae6b60a4.html, diakses pada 17 Desember 2014
[35] Lihat Kitab Undang-Undang Kriminal Thailand, Thailand, Criminal Code, 1956, Ps. 8, http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=THA&p_classification=01.04&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY, diakses pada 17 Desember 2014
[36] Michael Byers, "Abuse of Rights: An Old Principle, A New Age", McGill Law Journal/ Revue De Droit McGill 47 (2002), p. 424
[37] Danielle Ireland-Piper, "Extraterritorial Criminal Jurisdiction: Does The Long Arm Of The Law Undermine The Rule Of Law?",Op. Cit.
[38] Karl M, Meessen, Op. Cit., p. 67-68
[39] J.G. Starke, Pengantar Hukum Internasional 1, Ed. 10, Terj. Bambang Iriana Djaja-

when someone or a company which is located or running its business in a foreign country, besides being a subject of territorial jurisdiction from that foreign country, is also a subject of extraterritorial jurisdiction from their country origin (their nationality).[40]The second princple is the effect principle/ effect doctrine which has been forementioned firstly appeared in *Lotus* case.

> *"The premis (effects principle) is that a state has jurisdiction over extraterritorial conduct when that conduct has an effect within its territory. Effects jurisdiction is sometimes called 'objective jurisdiction,' since it is the object of conduct that is its realm."*[41]

In the scope of international criminal law, by refering to this effect principle, a state has its right to adjudicate and sentence the perpetrator whose conduct was happened outside its state's territory but makes that country suffers a lost inside their territory.

> *"A frequently cited example for the applicability of this principle is that of the offender in state A who fires a gun thereby shooting over the border into state B and injuring someone there. State B would then have jurisdiction to prosecute the offender based on the effect caused by his conduct in state B."*[42]

In the above scenario, the lost that is produced as an effect of that act is the main reason that the country has extraterritorial jurisdiction over it.The third principle which is protective principle governs that a jurisdiction of a state can be applied over a foreign nationals who conduct a violation of national security of that country even if that person

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atmadja, (Jakarta: Sinar Grafika, 2008), p. 270

[40] As early as the first authoritative commentator on jurisdiction, the Italian jurist Bartolus, himself a confirmed territorialist, it has been admitted that as state's laws may be applied extraterritorially to its citizens, individuals or corporations, wherever they may be found, Mark W. Janis, An Introduction to International Law (Canada: Little, Brown and Company, 1993), p. 324. ; "State A may legislate to criminalise sexual activities between its nationals and children, regardless of where those activities take place. It may seek the extradition of the national or, if the activity is discovered on the national's return to State A, simply prosecute in much the same way as for a territorial offence. An example of passive nationality jurisdiction is State A legislating to make it an offence to recklessly or intentionally harm, kill or seriously injure a State A citizen or resident anywhere in the world.,Danielle Ireland-Pieper, Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine, Op. Cit., p. 74

[41] Mark W. Janis, Op. Cit., p. 326

[42] Karl M. Meesen, Op. Cit., p. 107

is outside that country's territory.[43]Starke stated that every nations have its right to have a jurisdiction over a crime that concerns about that country's security and integrity or its vital economy interests.[44]While jurisdiction based on the effects doctrine requires that the effect or result of the offence occurs in the territory of the state claiming jurisdiction, the protective principle applies if the prosecuting state's government even if there is no effect in the state's territory.[45]

The fourth principle is universal principle. The reason of this principle acknowledged as one of the principle of extraterritorial jurisdiction is that because the perpetrator considered a very violent person, an enemy of mankind, that leaves no reason that person can escape from a trial, so the application that is brought by a state over that person is brought in the name of international community.[46] Aside of the application of universal principle in states practices, in short will be explained the main thoughts and reasoning to place an event under this principle which are :

i. So that these events that haven't been included under other types of extraterritorial principles, but can produce a dangerous situation for mankind and against the sense of justice for mankind, still can be brought into trial.
ii. It is the obligation of every states to prevents any events as mentioned above and to eliminate those crimes, wherever and whenever it occured and to anyone who becoming the perpetrator or the victims.

Even though there are principles that make it possible for extraterritorial jurisdiction to be applied, the application itself has a limitation. This limiation also known as a comity doctrine.[47] This doctrine has been widely acknowledged and applied in international world. As

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[43] This principle provide that states exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned.", M.N. Shaw, Op. Cit., p. 410
[44] J.G. Starke, Pengantar Hukum Internasional 1, Ed. 10, Terj. Bambang Iriana Djajaatmadja, Op. Cit., p. 303-304.
[45] Karl M. Meesen, Op. Cit., p. 109
[46] Sefriani, Hukum Internasional Suatu Pengantar, Cet. 2, (Jakarta: Rajawali Pers, 2011), p. 244
[47] J.G. Starke, Pengantar Hukum Internasional 1, Ed. 10, Terj. Bambang Iriana Djajaatmadja, Op. Cit., p. 192

it was stated by Brownlie that the comity doctrine "...is a species of accomodation not unrelated to mortality but to be distinguished from it nevertheless. Neighbourliness, mutual respect, and the friendly waiver of technicalities are involved, and the practice is exemplified by the exemption of diplomatic envoys from custom duties."[48] The same definition also stated by Oppenheim:[49]

> *"the rules of politeness, convenience and goodwill observed by States in their mutal intercourse without being legally bound by them."*

and Henry Campble Black in Black's Law Dictionary:[50]

> *"respect, a willingness to grant a privilege, not as a matter of right but out of deference and good will. Recognition that one soevereignty allows within its territory to legislative, executiv or judicial act of another sovereignty, having due regard to rights of its own citizens. In general, principle of 'comity' is that laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect."*

This comity doctrine also can be defined as a limitation for the application of extraterritorial jurisdiction because by considering the fundamental aspecs of comity doctrine, a court from a country can't apply its jurisdiction without the accordance to international law and principles.

III. CASES OF EXTRATERRITORIAL JURISDICTION WITHIN THE SCOPE OF HUMAN RIGHTS BEFORE AL-SKEINI

Before the case of *Al-Skeini and Others v United Kingdom,* extraterritorial jurisdiction has been acknowledged and accepted in international law including cases that was occured and brought before western countries' courts especially in Europe. The most well-known case is the *Nuremberg Trials* which applied extraterritorial jurisdiction using the universal principle (universal jurisdiction).[51]

[48] Ian Brownlie, Principles of Public International Law, (New York: Oxford University Press, 1998), p. 29

[49] L. Oppenheim, International Law a Treatise Volme I, Edited by H. Lauterpacht, (London: Longmas, 1960), p. 33

[50] Henry Campbell Black, Black's Law Dictionary, 6th ed. (St. Paul, Minnesota: West Publishing, 1990), p. 267

[51] Danielle Ireland-Piper, "Prosecutions of Extraterritorial Criminal Conduct and the

> *"The adjudication of Nazi crimes in the Nuremberg tribunals trasnformed our understanding of jurisdiction. The trials are often described as an exercise of extraterritorial jurisdiction that sought to bring accused war criminals to acount on behalf of the entire world community of civilized nations."*[52]

In *Nuremberg Trials* the officials of Nazi under the leadership of Adolf Hitler was brought to justice over their crimes against humanity during the second world war.After the *Nuremberg Trials* the also well-known case that even though it is very controversial but also has an effect on the development of extraterritorial jurisdiction principle especially in international crime law is the *Eichmann case,* which also brings out universal jurisdiction in its court statement.[53]

These two cases is the very important case in the development of extraterritorial jurisdiction and also in its application over the cases of human rights violation. However the case that has its big influence to the decision that was made in *Al-Skeini* case is the *Bankovic* case (*Bankovic and Others v. Belgium and Other 16 Contracting Parties case*) which in this case for the first time extraterritorial jurisdiction was treated as an exception which only applies over particular acts by a state.[54] This case is was brought before the ECtHR after the death of 16 invidiuals after an air attacks by NATO against the Federal Republic of Yugoslavia in 1999.[55] In its decision, ECtHR stated that extraterritorial jurisdiction of a

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Abuse of Rights Doctrine", Op. Cit.

[52] *Ibid*.

[53] Adolf Eichmann is labeled as the man who masterminded the actual organization of the Holocaust. Adolf Eichmann was a SS officer who planned with meticulous detail the sending of Jews and other groups to death camps such as Auschwitz-Birkneau,Treblinka and Sobibor. Such work was to earn Eichmann the title 'Chief Executioner of the Third Reich,C. N. Trueman, "Adolf Eichmann",http://www.historylearningsite.co.uk/adolf_eichmann.htm

[54] Banković is the first case in which extraterritorial jurisdiction was held to be 'exceptional'. Previously, the court had simply concluded that 'jurisdiction' was 'not limited to the national territory of the High Contracting Parties.",Joanne Williams, "Al Skeini: A Flawed Interpretation of Banković",Wisconsin International Law Journal 23, No. 4, (2006),p. 692, http://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/williams.pdf, diakses pada 29 Desember 2014

[55] ...Banković and Others v. Belgium and Other 16 Contracting Parties, a case concerning the killing of 16 individuals caused by NATO air strike during the air campaign against the Federal Republic of Yugoslavia in 1999, Federico Sperotto, "Beyond Banković : Extraterrtorial Application of the European Convention on Human Rights",Human Rights & Human Welfare Working Paper No. 38 (2006),p.7-8

state only applies in specific circumstances[56]. Therefore, the judgement of the judges in that court delivered a decision that the bombing that was conducted by NATO wasn't included inside the jurisdiction of ECHR especially because there weren't found any effective control and public power by NATO inside Federal Republic of Yugoslavia territory.

As mentioned before, this case is the first time the ECtHR used extraterritorial jurisdiction only as an exception rather as a rule unlike its previous cases that clearly accepted the existence of extraterritorial jurisdiction in ECHR. In Cyprus v. Turkey (1975)[57], the invasion by Turkey in Cyprus was considered by the court still included inside the scope of Turkish jurisdiction because of Turkish 'negative obligation'[58] of contracting parties everywhere they establish their reign or power over someone or something belongs to that person.[59] In this case the court has acknowledged and accepted the existence of extraterritorial jurisdiction which was derived by the effect principle.

In the case of *Drozd and Janousk v. France and Spain (1992)*[60], ECtHR also asserted a similar argument that their obligations can be included over acts that conducted by their state's officials even though it was conducted outside their national territory.[61] Then in the

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[56] [W]here the extradition or expulsion of a person by a contracting state may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and or 6), where acts of state authorites produced effects or were performed outside their own territory, where as a consequence of military action (lawful or unlawful) the state exercised effective control of an area outside its national territory, whether it was exercised directly, through the respodent state's armed forces, or through a subordinate local administration, and in cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, the state, Joanne Williams, Op. Cit.

[57] See European Commission of Human Rights, Cyprus v. Turkey, App. Nos. 6780/74, 6950/75, 2 Eur. Comm'n H.R. Dec. &Rep. 72 (1975)

[58] Negative obligation is an obligation not to violate human rights, in the other hand positive obligation is a state's obligation to do every measure needed to protect those rights,Federico Sperotto, Op. Cit.

[59] Erik Roxstrom, Mark Gibney, dan Terje Einarsen, "The Nato Bombing Case (Banković Et Al, v. Belgium Et Al) and The Limits of Western Human Rights Protection",Boston University International Law Journal 23:55 (2005), p. 56-57

[60] See European Court of Human Rights, Case of Drozd and Janousek v. France and Spain, App. No. 12747/87 (1992), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57774#{"itemid":["001-57774"]}

[61] The term 'jurisdiction' in Article 1 is not limited to the national territory of the High contracting parties; their responsibility can be involved because of acts of their

case of *Loizidiou v. Turkey (Preliminary Objection) (1995)*[62]which the applicant was unable to have access over his belongings in Northern Cyprus while it was under Turkish Invasion(which he also claimed that when he tried to access his belongings in 1989 he was captured without any reasons and got mistreated afterwards)[63], ECtHR gave its decision that Turkey was inside the scope of jurisdiction mentioned in ECHR because of its act was conducted by Turkish official body and there was Turkish effective control at that moment over Northern Cyprus, which indirectly has control over TRNC (The organization that occupied Northern Cyprus at that moment)[64]. In its conclution, *Louzidou* is still with its argument over the ECtHR that when a country effectively occupying another country, that contracting state (which is also an occupying country) is not only responsible for acts conducted by its official organs but also over acts of its local public authority (TRNC) which was operating in that terriotry.[65] The same decision also can be found in the decision of ECtHR in the case of *Cyprus v. Turkey (2001).*[66]

After seeing these caes, it can bee seen that the European Court of Human Rights has been clearly using extraterritorial jurisdiction principle in their decisions before *Bankovic.* Contrary with the case of *Bankovic* which used the extraterritorial jurisdiction only as an excaption and seemingly ignoring those previous decisions and judgements.

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authorities that occured outside of their territories, *Ibid*., Para. 91

[62] See European Court of Human Rights, Case of Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89 (1995), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920#{"itemid":["001-57920"]}

[63] *Ibid*., Para. 54

[64] Bearing in mind the objcet and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it excercise effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordnate local administration., *Ibid*., Para. 62

[65] "Stated differently, a judgment that a Contracting State has effective control over a territory entails the judgment that it has effective control over the local authorities operating in that territory – that the local authorities are subordinate operating in that territory – that the local authorities are subordinate to the Contracting State, Erik Roxstrom, Mark Gibney, dan Terje Einarsen, Op. Cit.

[66] Erik Roxstrom, Mark Gibney, dan Terje Einarsen, Op. Cit.

IV. APPLICATION OF EXTRATERRITORIAL JURISDICTION IN EUROPEAN CONVENTION ON HUMAN RIGHTS ACCORDING TO PREVIOUS DECISIONS BY ECTHR BEFORE AL-SKEINI

In *Al-Skeini v. UK* case, the judges of ECtHR accepts 6 applicants, which was the realtives of five Iraqi citizen that was killed by british troops in Basrah and of an another Iraqi citizen that was mistreated and killed by the british troops insidef british detention fasility in Iraq.[67] Before that, the House of Lords in England has stated that in that case, the Iraqi citizens that were killed by british troops weren't included in the jurisdiction fo ECHR, excepts for Baha Mousa.

"In the view of House of Lords, which applied the 'Banković'[68] principle, under the spatial model of jurisdiction the ECHR does not apply outside the ECHR 'espace juridique', and even if it did on an exceptional basis, the UK did not exercise effective control over the Basrah area. Baha Mousa, by contrast, would fall within the UK's juridiction as a military detention facility arguably has a special status, comparable to an embassy."[69]

However, according to ECHR in 2011, this case is within the juris-

[67] Cedric Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights (Al-Skeini and others v United Kingdom)",Op. Cit., hlm. 59,

[68] "On 19 December 2001, the European Court of Human Rights announced its decision on admissibility in the case of Bankovićand Others v. Belgium and 16 Other Contracting States. The application was broght by six citizens of the Federal Republic of Yugoslavia (FRY) and concerned the bombing by the North Atlantic Treaty Organization (NATO) of the building of Radio Televizje Srbije (Radio-Television Serbia, RTS) during the Kosovo crisis in April 1999. The building was destroyed; 16 people were kiled and 16 others were seriously injured. The applicants, all family members of the deceased or themselves injured in the bombing, complained that the bombardment of the RTS building violated not only Article 2 (right to life), but also Article 10 of the European Convention on Human Rights (freedom of expression). The Court, however, unanimously declared the application inadmissible as the impugned act is to be considered as falling outside the jurisdiction of the respondent States. The Court came to the conclusion that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States", Dirk Voorhoof, "Case Banković and Others v. Belgium and others",http://merlin.obs.coe.int/iris/2002/1/article2.en.html

[69] Cedric Ryngaert, "Clarifying the Extraterritorial Application of the European Convention on Human Rights (Al-Skeini and others v United Kingdom)", Op. Cit., hlm. 59

diction of UK.

> *"Unlike the UK House of Lords, in Al-Skeini the ECtHR held that all six applicants, not just Baha Mousa, fell within the UK's jurisdiction."*[70]

The decision of House of Lords or later known as UK Supreme Court over the case of *Al-Skeini* overall includes as follows:[71]

"(1) The spatial model of jurisdiction does not apply outside the espace juridique of the ECHR – a concept introduced but not explained by the European Court in Banković, designating the combined territories of ECHR member states. In other words, though, say, in Loizidou Turkey had ECHR obligations to the people of Northern Cyprus because it exercised effective overall control over that area, this was so only because Cyprus was an ECHR state party. According to their Lordships, that reasoning did not extend to the UK in Iraq, because the ECHR is a regional instrument, the imposition of which in Iraq would amount to 'human rights imperialism'

(2) Even if the spatial model did apply in principle, as a matter of fact the UK did not have effective overall control over Basra, despite being the occupying power in Southern Iraq, since the strength of the insurgency and the low level of its forces there rendered it factually unable to guarantee ECHR rights, and these rights were per Banković an all-or-nothing package that could not be divided and tailored.

(3) Whatever the validity of the personal model of jurisdiction in Strasbourg's conflicting case law, Banković was clear on the point that a mere killing would not suffice for it to engage. Therefore, the first five applicants were not within the UK's jurisdiction.

(4) However, the sixth applicant, who was detained in a UK facility and killed there, was in fact within the UK's jurisdiction, because a military prison has a special status in international law akin to that of an embassy. The government conceded that jurisdiction attached on this basis."

According to the first point, the judge's argument of the spatial model and *espace juridique* has been heavily critized rightly critized.[72] It has been explained before, that according to previous decision by

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[70] *Ibid*.

[71] Marko Milankovic, "Al-Skeini and Al-Jedda in Strasbourg",The European Journal of International Law 23, No. 1. (2012), p. 125-126

[72] *Ibid*., p. 126

ECtHR, for example in X v FRG, Cyprus v. Turkey, Issa v. Turkey and other cases, there were facts that according to the judges consideration and also judgement inside the court's decisions over those cases the jurisdiction mentioned in Article 1 ECHR not only applies regionally or limited only inside contratcing state's territory. In the case of *Issa v. Turkey*[73], the court stated that a nation also obliged in ECHR wherever it acts, and its acts that was done outside its country has no difference when it was inside its own territory. This decision is very contrary to the argument that was brought by the House of Lords that according to spatial model the jurisdiction of ECHR can only be applied solely within the territory of Europe.

Even though the House of Lords in this case has acknowledeged the existence of personal jurisdiction principle they still believe that this principle can't be applied anymore beacuse there is already an effective control principle in the newer cases that replace the personal jurisdiction principle.[74] That statement was against what has been stated by ECtHR in *Bankovic* regarding four exceptions of territorial jurisdiction principle with regards to the application of Article 1 ECHR. In ECtHR's statement it was explained that each of the exceptions stands on its own and completely different from the other exceptions. Which means that the personal jurisdiction still exists even though there are principles that has been applied in the newer decisions such as the effective control principle. With that being said, it's clear that according to personal jurisdiction, UK has jurisdiction over acts that was conducted by its troops in the case of *Al-Skeini.*

For the second point, it also contrary to the decision of ECtHR in the case of *Ilaşcu & Ors v. Russia and Moldova*.[75] In the second point it was stated that the judge in House of Lords stated the absence of such effective control because of the little amount of local military power in that area. When it can be seen that in the case of *Ilaşcu,* the court's of

[73] See European Court of Human Rights, Case of Issa and Others v. Turkey (Application no. 31821/96), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460#{"itemid":["001-67460"]}, diakses pada 30 Mei 2015

[74] Joanne Williams, Op. Cit., hlm. 698

[75] Lihat European Court of Human Rights, Case of Ilaşcu and Others v. Moldova and Russia, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61886#{"itemid":["001-61886"]}, diakses pada 1 Juni 2015

decision stated that the effective control is not depending on the number of troops that were established int he area, but the dependency of that area to that country is what really matters in determining the presence of effective control over that territory. In the case of *Al-Skeini* it is so obvious that the Southern Iraq was ruled by UK.[76] In that matter, every thing that was happened in Southern Iraq is under UK's surveillance until it is safe enough for Iraq to establish its own government to take over the administration over that territory.[77] This clearly shows the relation between Southern Iraq and UK, where UK has effective control over that territory which means UK has jursdiction over that territory. UK's statement about its incapability to ensure the protection of human rights in that area isn't correct either, it's simply because the acts were done by its troops that clearly is under UK's obligation to monitorize their troops taking responsibility over every acts they've done regardless of when and where they were at that moment.

In the third point, as also has been explained in the argumentation over the first point that every acts that were conducted by a state's authority even though it was conducted outside it's territory are still within that state's jurisdiciton, as it was stated also in the case of *Issa.* And for the fourth point it was explained about UK has extraterritorial jurisdiction over Baha Mousa because he was inside UK's detention facility which according to international law there was a special status of UK over that place as the one that applies to an embassy. It might be acceptable, even though it is still not right to compare a detention facillity to an embassy, because both facility opperates by the consent of local state which is included in the fourth exception in *Bankovic* which is the existence of Consent, Invitiation and Acquiescence.

Unlike the decision of House of Lords, in the case of *Al-Skeini,* ECtHR didn't govern whether UK has an effective control or not over the area of Basrah for a particular time but the court set a state agent authority model or as known as personal jurisdiction over the six

[76] Samantha miko, "Al-Skeini v. United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights",Boston College International and Comparative Law Review 35, Issue 3, Article 5 (2013),hlm. 64-65, http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1702&context=iclr, diakses pada 6 Januari 2015

[77] *Ibid*., hlm. 64

applicants with the conclution that all of their relatives (the victims) were within UK's jurisdiction at the time of their deaths. [78] Nevertheless, the court noted that this outcome was 'exceptional' because the United Kingdom excercised 'public powers' in Iraq.[79] The court gave notes that as the governing states in Iraq, United States and UK were clearly running an element of goverentment power over that Iraq territory, which was made by a very formal provision that is according to Security Council resolution and was also governed by the Coalitioon Provisional Authority (CPA) in Iraq.[80]

> *"...the Court applied a 'personal' model of jurisdiction to the killing of all six applicants, but it did so only 'exceptionally', because the UK exercised 'public powers' in Iraq. But, 'a contrario', had the UK not excercised such public powers, the personal model of jurisdiction would not have applied."*[81]

This means that the usage of personal jurisdiction in seeing the existance of a court's jurisdiction limited only when there is an element of public power inside the act of killing of all of the six applicants.[82]

It means that according to the court what was delivered in the decision of the case of *Bankovic* was correct. If the act of killing by a state is within that state jurisdiction because there was found an element of public powers in it can be read as if the country has no so called public powers in its act of killing like the one that was conducted in *Bankovic* case there is no jurisdiction of that state of that act.

Therefore, even though the decision of ECtHR in *Al-Skeini* is a happy news for human rights, not every elements of that decision is a happy news. The ECtHR's decision give a consideration that all six applicants were within UK's jurisdiction according to the personal jurisdiction principle. However, that principle can only be applied limitedly when there is an element of public powers in it. This means that killing that

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[78] Samantha Miko, op. cit., p. 77
[79] *Ibid*.
[80] "...it noted that, as the occupaying powers in Iraq, the US and the UK obviously exercised elements of governmental authority, which is established in very formal termas, by referenve to Security Council resolutions and regulations of the Coalition Provisional Authority in Iraq", Marko Milankovic, Op. Cit., p. 130
[81] *Ibid*.
[82] Samantha Miko, Op. Cit., p. 77

was conducted by NATO in *Bankovic* still considered as not within the jurisdiction as mentioned in Article 1 ECHR.

"Even with this new hybrid reasoning, Banković remains good law: '[i]n other words, Banković is, according to the Court, still perfectly correct in its result. While the ability to kill is 'authority and control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft."[83]

This decision is indeed brings frustration with its consistency to the previous decisions, which more likely to bring back that decision in *Bankovic* which was heavily critized. However it also brings a positive impact for the international lawyer that there is some certainty that the Article 1 ECHR regarding the jurisdiction of the convention includes the state agent authority / personal jurisdiction principle and also effective control of an area, also the concept of espace juridique becoming irrelevant.

V. CONCLUSION

The conclusion of this research is firstly, in its development with the first case in public international law was found in *Lotus case* (1927), extraterritorial jurisdiction exists where a country has a jurisdiction over events that were occured outside its territory. According to cases extraterritorial jurisdiction derived from nationality principle, effect principle, protective principle and universal principle. It is then limited by the comity doctrine which governs that extraterritorial jurisdiction can be applied as long as it respects other countries, having a good relation with another country and has a principle of equality of states. A court from one state can't apply its jurisdiction without its accordance to the principle of international law.

Secondly, before *Al-Skeini case,* there has been many application of extraterritorial jurisiction principles in cases which shows the acceptance of extraterritorial jurisdiction in court's decisions. In Nuremberg trial, it was shown that west countries have acknowledged and accepted the existence of extraterritorial jurisdiction, especially universal juris-

[83] *Ibid*.,

diction principle, by bringing the genocide perpetrators to trial together. The same universal jurisdiction also can be seen in the *Eichamnn case*.

The application of extraterritorial jurisiction also can be seen in *Bankovic* which for the first time extraterritorial jurisdiciton was used only as an exception. Unlike its previous caes like *Cyprus v. Turkey, Loizidou v. Turkey,* serta *Drozd and Janousek v. France and Spain,* where the court used the principles that is known as the principle of extraterritorial jurisdiction without using it only as an exceptions.

Thirdly, even though the decision of ECtHR in the case of *Bankovic* was heavily questioned and critized, the court's arguments, which still use jurisdiction basicaly applies territorialy, still accept the fact that jurisdiction also can applies extraterritorialy but only in special circumstances. These exceptions are adalah *extradition and expulsion, personal jurisdiction, effective control,* serta *consent, invitation, or acuiescence.* According the second, third, and fourth exceptions ECtHR shows that UK's jurisdiction can be found in the case of *Al-Skeini* because it has effective control over Basrah, according to personal jurisdiction all acts and conducts by british troops is automatically within UK's jruisdiction, and that statement is strenghten by the fact that the 6th applicant, Baha Mousa, was held inside UK's detention facility in Iraq which clearly within UK's jurisdiction. ECtHR stated that UK has done public powers over the acts that were conducted by its troops that held UK responsible for every applicants that were the relatives of the victims.

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