

Chapter 8

‘Anachronistic As Colonial Remnants May Be...’ Locating the Rights of the Chagos Islanders As a Case Study of the Operation of Human Rights Law in Colonial Territories



Ralph Wilde

8.1 Introduction

One of the major geopolitical developments of the twentieth century was the delegitimization, as a matter of political ideas, and international legal principles, of the idea of trusteeship over people as a basis for introducing and maintaining colonial rule.¹ This was effected through the post-Second World War self-determination entitlement, which became enshrined in Common Article 1 of the two global Human Rights Covenants, agreed in 1966 and entering into force in 1976.² In a complementary move, the universality of human rights affirmed in the Covenants, which came out of the earlier Universal Declaration of Human Rights of 1948, was a repudiation of the notion of civilizational difference understood in terms of aptitudes for rights that had provided the rationale for trusteeship-over-people.³ According to this vision, all people were equal in their capacities not only for self-rule, but also as rights-bearers more generally.

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¹ See Wilde (2008b), Ch. 8, and sources cited therein.

² International Covenant on Civil and Political Rights (hereinafter ICCPR) (16 December 1966, entry into force, 23 March 1976); International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) (16 December 1966, entry into force 3 January 1976).

³ Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948. See the discussion in Wilde (2008b), Chapter 8.

R. Wilde (✉)

University College London, University of London, London, UK

e-mail: ralph.wilde@ucl.ac.uk; <https://www.ucl.ac.uk/laws/people/dr-ralph-wilde>

Ideas and associated concepts and practices of trusteeship and colonialism survived through different means, from other forms of economic exploitation to the concept of ‘development assistance,’ sometimes referred to as neo-colonialism.⁴ Trusteeship-over-people even continued through the same means, in its internationalized manifestation of international territorial administration.⁵ But as a practice conducted by states, in what is arguably the single most transformative event of the twentieth century—decolonization—such arrangements were largely dismantled, usually through liberation in the form of independent statehood.⁶

However, in a few places in the world, formal state colonial rule has endured. This chapter addresses one such place: the Chagos Islands, an archipelago in the Indian Ocean, which at the time of writing was administered by the UK as the British Indian Ocean Territory (BIOT).⁷ The fate of the Islands and their population, the Chagossians, did not follow the general decolonization path after the Second World War. At this time, the archipelago and its inhabitants were administered by the UK as part of the larger Mauritius grouping. The UK excised the Chagos archipelago from that grouping, allowed Mauritius to become independent, and retained control over the Chagos islands, which were named the BIOT and included, for a time, some islands excised from the Seychelles archipelago which were later returned to that state. In the run-up to the independence of Mauritius and the Seychelles, the UK engineered the transfer of the indigenous population in the Chagos archipelago to the other islands in Mauritius, and to the Seychelles, an action that was initially officially denied. No islanders remained. In a related move, the UK leased (in the sense of ceding plenary administrative control) the largest island in the Chagos archipelago, Diego Garcia, to the US, for that state to establish and operate a military base on the island, an arrangement mirroring the more well-known example of the US base in Guantánamo Bay, Cuba.

The displaced Chagossians and their descendants have sought to use various different legal strategies to challenge their displacement, including claims for compensation and the right of return. A central feature of these challenges has been the disputed question of whether and to what extent international human rights law obligations were and are applicable to the UK in the Chagos Archipelago. Such application would provide the basis for entitlements on the part of the Chagossians, which would in turn pave the way for some of the remedies they seek.⁸

Overlaying this has been a further question about the application of human rights law to the US base in Diego Garcia in particular. It has been alleged that this base has been used to transfer and possibly even hold individuals suspected of being either threats and/or perpetrators of prior terrorist acts in the context of the ‘war on

⁴ See Wilde (2008b), Ch. 8, n. 44 and sources cited therein.

⁵ *ibid.*

⁶ *ibid.*, Ch. 8.

⁷ In general, for full detail on what is set out in this paragraph, see e.g. Allen (2004) and sources cited therein. For a history of the creation of the BIOT see David Snoxell’s contribution to this volume (Chap. 14).

⁸ See Richard Gifford’s contribution to this collection (Chap. 4).

terror' of the President George W. Bush-era and the policy of a similar nature of President Obama. This raises the question of whether, as with Guantánamo Bay, the human rights obligations of the US apply to that state extraterritorially and also what legal obligation, if any, the residual authority, the UK, bears in relation to this situation, for example in being required to seek assurances that the base is not used for the commission or enabling of torture.⁹ The factual picture here has shifted, from initial US assurances of no such flights, to an official admission of one transit rendition flight, which led to a UK government statement in parliament, to subsequent allegations being made of other flights and transfers that have not been officially admitted.¹⁰

As far as the UK legal position on these two related issues, a further human rights treaty is in play in addition to the aforementioned two global human rights Covenants: the European Convention on Human Rights (ECHR) adopted before them, in 1950 (entering into force in 1953), as well as its relevant Protocols.¹¹

The ECHR and its relevant Protocols are distinctive instruments because of the unusual way the Convention conceives the locations where it is to apply, including, as in the case of the Chagos Islands/BIOT, colonial locations, and how its approach in this regard is bound up in the broader normative climate of the time at which it was adopted. One hand, it contains a 'colonial clause', Article 56 (previously Article 63) enabling a colonial state to extend the operation of the rights contained in the treaty from the metropolis to its colonial territories. This brings the colonial location in to the normative frame on the basis of a discretionary decision by the imperial state. On the other hand, the ECHR contains a general 'jurisdiction' clause, Article 1, determining the scope of applicability, which has been understood to cover a state's sovereign territory automatically, and to operate extraterritorially on the basis of the factual exercise of control, irrespective of the view of the state concerned as to applicability. All subsequent human rights treaties, including the aforementioned two global human rights Covenants, only contain this latter regime of applicability, and/or equivalents to it, lacking also a 'colonial clause'.¹²

As will be explained further below, the 'colonial clause' model of applicability reflects the trusteeship concept that was in the process of being repudiated at the time the ECHR was adopted, in that it enables the colonial state to judge whether or not colonial people are 'ready' for human rights, rather than having human rights law automatically applicable. By the time the two Covenants—which, as mentioned,

⁹On the issues in relation to Guantanamo Bay, see e.g. Wilde (2005), p. 739 and sources cited therein.

¹⁰See Allen (2016), p. 771.

¹¹European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), ETS, No. 5, in force 3 September 1953 (hereinafter ECHR); ECHR Protocol No. 1, 20 March 1952, Entry into force: 18 May 1954, ETS 9 (hereinafter ECHR Protocol 1); ECHR Protocol No. 6, 28 April 1983, Entry into force: 1 March 1985, ETS 114 (hereinafter ECHR Protocol 6); ECHR Protocol No. 13, 3 May 2002, Entry into force: 1 July 2003, ETS 187 (hereinafter ECHR Protocol 13).

¹²This is set out below.

enshrine the right of self-determination (as the ECHR does not)—there was no place for this approach. But when the Convention continues to be in force, and the colonial clause has not been amended (other than, for different reasons, the treaty article containing it being renumbered) what is and should be the significance of the regime of applicability enshrined in it in the ‘post-colonial’ era?

As will be explained, the standard view adopted in the jurisprudence relating to the ECHR is that the position as a matter of the colonial clause is exclusively determinative of the question of applicability. Thus if a declaration of applicability has not been made, then the Convention cannot be applicable through the alternative, ‘jurisdiction’ basis. This is an issue for the Chagossians, because the UK has not made a declaration under the colonial clause extending the rights under the Convention or its Protocols to the Chagos Islands/BIOT. The operation of the standard view here, then, means that just as formal state-conducted colonial arrangements have endured in certain places, so too the trusteeship-era concepts of civilizational difference and trusteeship-over-people have endured as the basis for determining whether or not human rights standards will operate.

However, in the 2012 decision of the European Court of Human Rights in the *Chagos Islanders* case, the Court suggested, for the first time in the jurisprudence on this issue, that the position taken as a matter of declarations under the colonial clause may no longer be exclusively determinative of applicability.¹³ This is the most recent and important decision on the general question of the application of European human rights law to colonial territories. However, in the decision, the Court dismissed the application on other grounds, and did not explore whether or not the new position it suggested might be possible would be sustainable and, if so, on what basis. The present piece seeks to do this, by situating the applicability question within the broader normative framework of the ideas of trusteeship-over-people which legitimated colonialism, and ideas of self-determination which repudiated this practice. It argues that when the colonial clause is situated within this broader framework, the standard view of exclusive determinacy must fall away, and European human rights law can and should be applicable also on the basis of the alternative ‘jurisdiction’ basis in circumstances where colonial clause declarations have not been made.

8.2 Legal Provisions on Applicability Generally

Some of the main international human rights treaties, including the ECHR and the ICCPR, do not conceive obligations simply in terms of the acts of states parties. Instead, responsibility is conceived in a particular context: the state’s ‘jurisdiction’. For example, under Article 1 of the ECHR and equivalent provisions in some of its Protocols, the state is obliged to ‘secure’ the rights contained in the treaty within its

¹³ *Chagos Islanders v UK*, Application no. 35622/04 (Admissibility decision of 11 December 2012) (hereinafter *Chagos Islanders* decision).

'jurisdiction.'¹⁴ In the case of the ICCPR in particular, applicability operates in relation to those 'within [the State's] territory and subject to its jurisdiction.'¹⁵

As the Grand Chamber of the European Court of Human Rights stated in the 2011 *Al-Skeini* decision about the applicability of the ECHR to the activities of UK forces in Iraq:

"Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.¹⁶

Certain other international human rights instruments, such as the two main anti-discrimination Conventions, do not contain a general provision, whether using the term 'jurisdiction' or something else equivalent, stipulating the scope of applicability of the obligations they contain.¹⁷ Also, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include a dedicated stipulation concerning the scope of application.¹⁸

¹⁴ECHR (n 11), Art. 1; ECHR Protocol 1 (n 11), Art 4; ECHR Protocol 6, (n 11), Art. 5; ECHR Protocol 13 (n 11), Art. 4. This is echoed in the American Convention on Human Rights, (22 Nov. 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, Doc. 21, Rev. 6, (entry into force 18 July 1978)), Art. 1. Under the Convention Against Torture, the State is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction.' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, Dec. 10, 1984, entry into force 26 June 1987, 1465 U.N.T.S. 85 CAT, Art. 2. Under the Convention on the Rights of the Child, states parties are obliged to 'respect and ensure' the rights in the treaty to 'each child within their jurisdiction'. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49 (20 Nov. 1989) (entered into force 2 Sept 1990), 1577 U.N.T.S. 3, Art. 2.1.

¹⁵ICCPR (n 2) Art. 2.

¹⁶*Al-Skeini v UK*, Application No. 55721/07, Judgment of 7 July 2011 (hereinafter *Al-Skeini* (ECt. HR)), [130].

¹⁷The 1948 (Inter-) American Declaration of the Rights and Duties of Man (not a treaty) (adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948)), the 1981 African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or CERD) (Adopted by General Assembly Resolution 2106 (XX), 21 December 1965, entry into force 4 January 1969); the International Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, UNTS, vol. 1249, 13, entered into force 3 September 1981 (CEDAW); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000); Convention on the Rights of Persons with Disabilities [CRPD] (13 December 2006, entry into force 2008). The International Court of Justice has treated the African Charter and the Optional Protocol to the CRC as if they contained 'jurisdiction' clauses determining the scope of their application. See *Case Concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 I.C.J. 116 (19 December 2005), [216]–[217].

¹⁸See ICESCR (n 2) Art. 2 para. 1. The International Court of Justice has treated the ICESCR as if it contained a 'jurisdiction' clause determining the scope of its obligation. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 163 (9 July 2004), [112].

8.3 Scope of Application

It is assumed that human rights treaties apply to a state within its territory. Thus when ‘jurisdiction’ alone is the relevant treaty provision, as in the ECHR, this term is understood to cover the state’s territory. Even when a state may not have full or even any control over part of its territory, for example due to the presence of a foreign state there, it has been held in relation that this does not alter the applicability of the host state’s human rights obligations.¹⁹ Rather, it leads to different substantive requirements insofar as that state is practically incapable of securing rights due to the actions of the foreign state.²⁰ Similarly, the aforementioned formulation of the ICCPR, determining applicability to those within the state’s territory *and* jurisdiction (emphasis added), has also been held not to suggest that even within a state’s territory, if the state lacks practical jurisdictional capacities, its obligations are inapplicable. Rather, this is understood only to have implications for the substantive requirements that the state will have.

For those treaties that use the ‘jurisdiction’ conception of applicability, notably the ECHR, there is now an established jurisprudence affirming that this can have an extraterritorial dimension.²¹ Despite the position of refusenik states such as Israel, Russia, the UK and the US, this position on extraterritorial applicability has included the ICCPR, thereby rejecting the view (advanced by some of these states) that the aforementioned provision on applicability referencing the position ‘within [the State’s] territory and subject to its jurisdiction’ limited things to the state’s territory.²² The word ‘and’ in the provision has, in effect, been understood to be an ‘or’, combined with a definition, as with the other treaties, of ‘jurisdiction’ having an extraterritorial as well as a territorial meaning.

In general, the term ‘jurisdiction’ has been defined in the extraterritorial context as a connection between the state, on the one hand, and either the territory in which the relevant acts took place—commonly referred to as a *spatial* or *territorial* connection—or the individual affected by them—commonly referred to as a *personal*, *individual* or, because of the type of State action involved, *state-agent-authority* connection.²³ More recent jurisprudence under the European Convention on Human Rights has also suggested looser, potentially broader tests of ‘effective authority,’ ‘decisive influence,’ and support that affects survival, as also constituting extraterritorial jurisdiction.²⁴

Thus, certain foreign locations have been brought within the scope of application of human rights obligations for the states involved. A wide range of activities have

¹⁹ For example, *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, European Court of Human Rights [Grand Chamber], Reports 2004-VII (8 Jul. 2004).

²⁰ *ibid.*

²¹ See e.g. the following, and citations therein: Wilde (2005, 2013).

²² *ibid.* On the refusenik position of the US, see e.g. Wilde (2005).

²³ *Ibid.*

²⁴ *ibid.* See e.g. *Ilascu* (n 19).

been implicated in this, from the use of military force to the conduct of occupation, extraordinary rendition, the operation of military bases and the interception and detention of migrants, including at sea.

Given what was said earlier about territorial application, this requirement of some sort of determinative role over the situation before the jurisdiction test is met extraterritorially would not seem to be necessary in the territorial context where, as mentioned, the absence of such a role has not been understood to render obligations inapplicable. The level of control or influence exercised by the state has a different legal significance territorially and extraterritorially, then. In the former situation, it mediates the nature of the substantive requirements of the applicable law. In the latter situation, it determines whether the law is even applicable in the first place.

For present purposes, an essential feature of this 'jurisdiction' test for extraterritorial applicability is that it is concerned with the existence of a certain arrangement, called 'jurisdiction' and defined factually as the exercise of control/influence. If this arrangement exists, the obligations are triggered. The state in question has no role in deciding this question once it has become a party to the treaty. Existing extraterritorial activities might be in operation; future such activities might arise. All will be automatically covered by the state's obligations in the treaty, assuming they fall within the contours of the 'jurisdiction' test. It is from the moment the state accedes to the treaty, then—when it takes on the substantive obligations—that it is subject to a dynamic model of applicability operating automatically based on the factual occurrence of any extraterritorial activity.

8.4 Colonial Territories: Territorial or Extraterritorial? Applicability in the Two Situations

The present piece is focused on colonial territories understood to denote arrangements, mostly based on post-Renaissance European colonialism, classified under the League of Nations Covenant as Mandates and the UN Charter as Trust Territories (in both cases covering the colonies of the defeated powers in the two World Wars) and under the UN Charter as 'Non-Self-Governing Territories.'²⁵ There is no overall common characteristic as far as the nature of the sovereign link between the territories concerned and the colonial states was and is concerned. Just as there were and are varying degrees of practical, administrative, political and legal integration/separation between the two, so also in some cases the colony was/is assimilated into the sovereign territory of the colonial state, whereas in other cases the colony was/is treated as somehow distinct, in terms of territorial sovereignty. Moreover, arrangements were often unclear on this point, and varied over time, due to a broad range

²⁵The contents of this paragraph are based on Wilde (2008b), Ch. 5, section 5.3 and Ch. 8, sections 8.2.2 and 8.2.3, and sources cited therein.

of factors ranging from deliberate ambiguity to unresolved disagreements, competing claims, changes in the nature of control exercised and authority claimed by the colonial state, etc.

Thus deploying the terminology of a state's 'metropolitan' territory/ies and its 'non-metropolitan' or 'overseas' territory/ies does not itself indicate whether the situation at issue is one of a distinction between the territorial and the extraterritorial, or two different zones of the territorial, when the territorial/extraterritorial distinction is being used to denote the enjoyment or lack of title by the state concerned.

Depending on the particular situation at issue, then, a state's relationship to its colonies can, therefore, be either territorial or extraterritorial, and sometimes difficult to establish. Given this, for the present objective of addressing such relationships generically, it is necessary to address situations that might fall into either category. They will be referred to herein as 'territorial' and 'extraterritorial' colonial arrangements.

Revisiting the rules on the applicability of human rights law, it might be thought that 'territorial' arrangements would fall within the regulatory regime as a given. Similarly, 'extraterritorial' arrangements would seem to involve the kind of activity that might qualify as falling within the contours of a test concerned with the extraterritorial exercise of control/decisive influence over territory and/or individuals.

For the UK in relation to the Chagos Islands, if the view is taken that they form part of UK sovereign territory, then the assumption of territorial applicability would render the obligations in operation. In the case of Diego Garcia in particular, this would not be altered by the lease of administrative control to the US; it would, rather, vary the substantive obligations the UK would be subject to as far as the situation on the base was concerned.

If the view is taken that the UK-Chagos Islands connection was extraterritorial, then an enquiry would need to be made into the level of substantive control and influence exercised by the UK there. Clearly this has altered significantly, for example as between the period of the excision from Mauritius and forced depopulation, actions obviously involving direct effective control, to the period now, where the UK exercises a looser form of authority over an area that is either entirely depopulated or, in the case of Diego Garcia, where exclusive administrative authority has been ceded to another state. In general, it would not seem difficult to bring things into the contours of the extraterritorial 'jurisdiction' test so as to trigger obligations, whether on the basis of effective control or the looser test of decisive influence, in a variegated fashion depending on the particular time period and also accounting for the distinctive situation in Diego Garcia in particular.

However, this is all further complicated because of the colonial nature of the arrangement, which brings into the frame the *sui generis* regime of human rights applicability.

8.5 Colonial Clauses

In one of the many ways in which the practice and policy of colonialism was enabled by international law, states would sometimes include in treaties provisions determining the operation of the rights and obligations contained in the treaty to their colonial territories.²⁶ This approach was followed in some of the early human rights treaties.

8.5.1 1926 *Anti-Slavery Convention*

The 1926 Convention on the Abolition of Slavery and the Slave Trade stipulates that:

At the time of signature or of ratification or of accession, any High Contracting Party may declare that its acceptance of the present Convention does not bind some or all of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage in respect of all or any provisions of the Convention; it may subsequently accede separately on behalf of any one of them or in respect of any provision to which any one of them is not a Party.²⁷

The phrase 'territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage' reflects the broad range of terminology deployed to classify different types of colonial territories at the time the Convention was adopted.

This approach seems to assume the automatic applicability of the obligations in the Convention to colonial territories. In the case of territorial arrangements (colonies forming part of the sovereign territory of the colonial state), this follows the general model outlined above, with automatic applicability. What is different is that the state is given the opportunity to depart from this default and vary the arrangement to remove applicability (with a subsequent right to restore this if the state so chooses).

In the case of extraterritorial arrangements (colonies not forming part of the sovereign territory of the colonial state), here, unlike the 'jurisdiction' test, it is not a matter of whether the nature of the state's presence meets a certain factual threshold of control/influence; rather, the mere existence of a formal legal tie of a certain character is sufficient. At the same time, unlike the 'jurisdiction' model, which gives no role to the state's own view as to applicability, here the state can decide that the default approach of applicability will be departed from, and the obligations will not apply.

²⁶ See Grant and Barker (2009). See 'colonial clause' and 'territorial application clause' entries, at 107 and 596–597 respectively.

²⁷ International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 25 September 1926, LNTS, vol. 60, 253, as amended by the Protocol Amending the Slavery Convention, approved by GA Res. 794 (VIII) of 23 October 1953, entered into force on 7 December 1953, Art. 9.

8.5.2 *1950 European Convention on Human Rights*

In the 1950 European Convention on Human Rights, a provision entitled ‘Territorial Application’ in what was originally Article 63, later renumbered Article 56 in 1998, and followed in the relevant provisions of Protocols to the Convention, states that:

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.²⁸

The phrase ‘territories for whose international relations it is responsible’ reflects another euphemistic turn in the international legal terminology used to refer to colonial territories. The approach to applicability is the reverse of the 1926 Convention; here the default is inapplicability, unless the state decides otherwise. Comparing this with the general regime above, there is no automatic applicability for territorial arrangements, or applicability if a test of control or influence is met for extraterritorial arrangements. Instead, obligations are triggered on a different basis: a declaration to this effect by the state concerned.

This essentially renders the operation of human rights obligations a two-stage process. For all areas of territorial and extraterritorial application other than in the context of colonial arrangements, this occurs in consequence of accession to the treaty. For colonial arrangements, this occurs if a separate declaration is made (whether on accession or at some other point).

8.5.3 *1956 Supplementary Anti-Slavery Convention*

The Supplementary Convention to the 1926 Anti-Slavery Convention, adopted in 1956, states that:

²⁸ECHR (n 11) Art. 56 (formerly 63). See also ECHR Protocol No. 1, (n 11), Art. 4; ECHR Protocol No. 6 (n 11), Art. 5; ECHR Protocol No. 13 (n 11) Art. 4. Article 63 was renumbered article 56 by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 11 May 1994, entry into force 1 November 1998, ETS 155.

This Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible.²⁹

As mentioned above, the term 'non-self-governing' references, in again a shift in the euphemistic international legal nomenclature deployed for colonies, the Non-Self-Governing Territories arrangements in the United Nations, which covered colonial territories in 1945 other than the colonial territories of the defeated powers in the Second World War, and the remaining Mandated territories, both of which were to be transferred to the Trusteeship arrangements, referred to by the term 'trust' in the extracted provision, to be administered by the victorious powers in the Second World War as internationally-supervised colonies.³⁰

This arrangement follows the model of automatic applicability from the 1926 Convention, with the equivalent similarities and differences in this regard to the general regime as in that earlier treaty. However, unlike the 1926 Convention where a state can depart from the default of applicability through a declaration, the 1956 Convention actually requires any given party to declare which of its colonies are to be covered by the application of the Convention, in a provision which states:

[T]he Party concerned shall [...] at the time of signature, ratification or accession declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.³¹

The effect of this provision is that it is down to the metropolitan state to decide whether and to what extent the provisions will operate in its colonies as a matter of the provision. If a state makes no declaration of applicability, then the obligations will not apply on the basis of the provision. The approach in 1956 is the reverse of that taken in the 1926 Convention, where applicability was the default; 30 years earlier, the role of declarations by states parties was to terminate, not accept applicability (or to accept applicability subsequent to earlier terminations).

The nature and the effect of this provision is essentially the same as the 1950 European Convention on Human Rights and its associated Protocols: a separate declaration by the state is required in order for obligations to be applicable. That said, here applicability is being asserted from the start, albeit to be filled in entirely through the requirement that states designate which if any territories will be covered.

²⁹Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956, Art. 12(1).

³⁰On Non-Self-Governing Territories, see United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter 'UN Charter'), Chapter XI, and the text, extracted provisions and citations in Wilde (2008b), Chapter 5, section 5.3; Chapter 8, section 8.2.2; Sources List, section 5.3. On the Trusteeship System, see UN Charter, Chapter XII and the text, extracted provisions and citations in Wilde (2008b), Chapter 5, section 5.3; Chapter 8, section 8.2.3; Sources List, section 5.3, and Wilde (2018, forthcoming).

³¹Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956, Art. 12(1).

In the European Convention, by contrast, the starting point is an absence of any reference to applicability.

What these three arrangements have in common is that they allow for a separate process of state determination when it comes to applicability in colonial territories, in contrast to the general regime of applicability, which lacks this. That said, the 1926 arrangements come close to the general regime, in that the separate process only involves the state modifying a default of applicability; absent any state action in this regard, applicability operates automatically as in the general regime. The 1950 and 1956 arrangements, by contrast, vest the triggering of applicability in the separate process; if the state does not make declarations of applicability (1950) or stipulations of territories covered (1956) under the process, then as a matter of the process the obligations will not apply (and so the automatic applicability under the 1956 arrangement is a dead letter).

8.6 The Disappearance of the Colonial Clause and the Emergence of Extraterritorial ‘Jurisdiction’

Apart from the relevant Protocols to the ECHR, all the human rights treaties adopted after the 1956 anti-slavery Convention—constituting all the main human rights instruments apart from the ECHR and its relevant Protocols—lack ‘colonial clauses’ determining the scope of application in colonial territories.

The aforementioned extraterritorial ‘jurisdiction’ test for extraterritorial applicability emerged on the basis not of an express stipulation as in the case of ‘colonial clauses’, but as a matter of interpretation by expert interpretation bodies, notably the European Commission (as it was) and Court of Human Rights.³²

As most human rights treaties lack a colonial clause, and many extraterritorial activities take place outside contexts classified as ‘colonial’ as a matter of international law (even if, as will be discussed further in due course, they attract this designation in broader discourse), this different approach to applicability, based on the existence of factual conditions of control, influence etc., and without any determinative role given to the state, has become the most significant in practice. So in the so-called ‘post-colonial’ era, where the projection of power by states outside their metropolitan territories has continued (challenging, of course, the meaningful nature of understanding colonialism as having ended), a ‘post-colonial’ conception of what should trigger legal regulation through international human rights law has taken over from the colonial clause model of before.³³

³² See the sources cited above, especially Sect. 8.2.

³³ On post-colonialism generally, see the sources cited above in Sects. 8.4 and 8.5.

8.7 Colonial Clause As Appendix?

In the case of people living in and/or originating from colonies of contracting parties to the ECHR and its relevant Protocols, just as the colonial arrangements themselves and/or their legacies continue, so too the colonial clause model for determining when such arrangements will be regulated by international human rights law still prevails in the sense that the clauses still remain in the treaties. But does the model prevail absolutely, in being entirely determinative of the question of human rights law applicability to colonial territories, in the so-called 'post-colonial' era?

For human rights treaties without colonial clauses—most of them—the standard general regime of applicability, as reviewed above, operates for colonial territories. Thus for territorial and extraterritorial colonial arrangements, applicability is arrived at according to the general basis for applicability in each case. In consequence, colonial arrangements are covered on the basis of either territorial application, or being brought within the 'post-colonial' jurisdictional trigger for extraterritorial applicability.

But the ECHR and its relevant Protocols have a special significance in situations such as that involving the Chagos Islanders and the UK, where the only means individuals have to bring legal claims directly against the state without its consent are in jurisdictions—in this case, the domestic UK courts, and the European Court of Human Rights—that are tied to these particular international legal instruments.³⁴ More broadly, as one of the earliest human rights instruments, the ECHR was in force when formal European colonialism was still in existence in many places, and the treaty was in operation during periods of colonial abuse. The entry into force of the global UN Covenants in 1978, for example, was too late for many colonial abuses that took place during the ECHR's operation, including the Mau Mau rebellion Kenya from 1952 to 1960 and, of course, the transfer of the Chagossians from their islands, from 1968 to 1973.³⁵

Within the range of international human rights treaties, then, the European Convention and its Protocols has a special place when it comes to the human rights situation relating to the colonies of its contracting states, a grouping, of course, which includes most of the world's former colonial powers.

But what if the contracting state has not made a declaration under Article 56, and/or the relevant provisions of the Protocols, extending the rights to the colony? The position of the Chagos Islands raises this question, since as mentioned the UK

³⁴In the case of the UK, see the Human Rights Act 1998 c. 42, as amended by The Human Rights Act 1998 (Amendment) Order 2004 (S. I. 2004/1574), art. 2(1), introductory text, section 1 (on the Convention rights), section 2 (on taking into account Strasbourg jurisprudence in particular when interpreting the rights), and Schedule 1 (containing the list of Convention rights). I have previously argued that the received wisdom on the proper international law basis for interpreting the Act, linking the meaning of the Act to Strasbourg jurisprudence exclusively, rather than the UK's international human rights obligations generally, is mistaken. See Wilde (2006), pp. 47–81.

³⁵On the Mau Mau abuses, see e.g. Elkins (2005).

has not made an Article 63/56 declaration with respect to BIOT.³⁶ Is the operation of the colonial clause exclusively determinative, in the negative, of applicability for colonial territories?

8.8 Colonial Clause As Exclusively Determinative: Hong Kong, Macao and South Georgia

The Chagossians are not the first people in European colonies who have sought to bring their grievance before the European Convention of Human Rights system on the basis that the colonial locations of contracting parties are within the scope of the Convention's application.

This issue came before the European Commission and Court of Human Rights in two cases related to Hong Kong and Macao before the handovers to the People's Republic of China, when these territories were subject to UK and Portuguese sovereignty respectively.

The *Bui van Thanh* decision of 1990 concerned Vietnamese asylum seekers in Hong Kong.³⁷ The applicants sought to invoke the *non-refoulement*-type obligation which had been read into the ECHR in the *Soering* decision of 1989.³⁸ They argued that for the UK to send them back to Vietnam would breach the prohibition on inhuman and degrading treatment in the Convention, because they would be persecuted by the Vietnamese government.³⁹ They also made other complaints relating to their detention in Hong Kong.⁴⁰ However, as with BIOT, the UK had not made a declaration under the colonial clause, then numbered Article 63, extending the Convention to Hong Kong.⁴¹ The European Commission of Human Rights held that a declaration under Article 63 was the only way that the situation in Hong Kong could be brought within the UK's obligations in the Convention.⁴²

The *Yonghong* decision of 1999 concerned a Taiwanese national held in prison in Macao in 1999, pursuant to a request by the PRC authorities to the Governor of Macao for Mr Yonghong to be extradited to the PRC to stand trial for fraud. Portugal had not extended the Convention and its Protocols to Macao under what at the time of that case had been renumbered Article 56. Macao was not handed over to China until December of that year. The PRC authorities had given an assurance to the Governor that the death penalty would not be applied in the trial, but the applicant

³⁶ See *Chagos Islanders case* (n 13) [61].

³⁷ *Bui Van Thanh and Others v United Kingdom*, Application No. 16137/90, European Commission of Human Rights, decision of 12 March 1990, DR 65-A, p. 330 (hereinafter *Bui Van Thanh*).

³⁸ *ibid.*, 3. See *Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Judgment, 7 July 1989, Series A Vol. 161.

³⁹ *Bui Van Thanh*, 3.

⁴⁰ *ibid.*, p. 3.

⁴¹ *ibid.*, pp. 2–3.

⁴² *ibid.*, pp. 4–5.

argued that the assurance could not be relied upon, and that the death penalty could be sought for the arrest in question. For the same reason as the earlier decision concerning Hong Kong, the European Court of Human Rights held that Portugal's obligations in the Convention did not apply to it with respect to Macau.⁴³

This position was later affirmed in a case in the English courts, *Quark*, concerning the application of the UK Human Rights Act to South Georgia, a UK overseas territory next to the Falkland Islands.⁴⁴ The case concerned the operation of the property right under Article 1 of Protocol 1 to the ECHR in South Georgia.⁴⁵ Protocol 1, which supplements the Convention with three rights—education in Article 2 and free elections in Article 3 in addition to property in Article 1—is a separate treaty from the ECHR, and its applicability fell to be determined separately from the Convention itself. The Protocol does not contain an equivalent to the 'jurisdiction' clause in Article 1 of the Convention, determining the scope of application. However, its Article 4 contains a colonial clause equivalent to Article 56/63 of the Convention, and Article 5 more broadly seeks to incorporate the three rights and the colonial clause within the overall Convention framework, thereby potentially implicating the general jurisdiction regime of applicability in Article 1 of the Convention:

Article 4 – Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5 – Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.⁴⁶

The UK had made a declaration under Article 56/63 of the ECHR, extending the Convention to South Georgia, but had not also made a declaration under Article 4

⁴³ *Yonghong v Portugal*, case number 50887/99, European Court of Human Rights, Judgment of 25 November 1999, 3.

⁴⁴ *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (hereinafter *Quark*); *Quark Fishing Ltd v United Kingdom* (dec.) (Application No. 15305/06), ECtHR, 19 September 2006, Reports of Judgments and Decisions 2006-XIV, 22 BHRC 568; (2007) 44 EHRR SE4. I was involved in this case as a consultant to the legal team of the applicant, Quark Fishing.

⁴⁵ ECHR Protocol 1 (n 11).

⁴⁶ *ibid.*

of Protocol 1, extending the rights it contains to the island (by contrast, extensions under both instruments had been made with respect to the nearby Falkland Islands, which had earlier been administered with South Georgia by the UK as a single juridical unit). In *Quark* it was assumed that as far as applicability triggered by colonial clause declarations was concerned, for the rights in Protocol 1, a separate declaration had to be made on the basis of Article 4 of that Protocol. It was not possible simply for a state ratifying the Protocol to have the rights contained in it then rendered automatically applicable to its colonial territories on the basis a declaration it had made under Article 56/63 of the general Convention, despite what is said in Article 5 of the Protocol incorporating its provisions into those of the Convention.

The applicants in *Quark* thus had to argue, initially in the English courts and then at the European Court of Human Rights, that the Protocol could apply in South Georgia even if a colonial clause declaration had not been made. As in *Bui Van Thanh* and *Yonghong*, this was rejected on the basis that for colonial territories applicability could only be arrived at through a colonial clause declaration.⁴⁷

8.9 Existence of Colonial Clause Places Alternative ‘Jurisdiction’ Basis for Extraterritorial Applicability into Question

As mentioned, the ‘post-colonial’ regime of extraterritorial applicability of human rights law to activities in non-colonial territories has been widely affirmed in the jurisprudence on the topic, although some of the states whose activities would be covered continue to challenge this position.

One interesting challenge here, made by the UK in the aforementioned *Al-Skeini* case, involved invoking the existence of the colonial clause as a basis for challenging extraterritorial applicability in other, non-formally-colonial contexts.

Al-Skeini concerned the ‘post-colonial’ regime of extraterritorial human rights applicability based on the fact of territorial control to ‘post-colonial’ extraterritorial imperial activity, the occupation of Iraq from 2003. The UK was advancing an argument, itself with significant colonial era-resonances as will be discussed further in due course, that although it accepted the ECHR could apply extraterritorially on the basis of territorial control, this was only the case if the location in question was within the territory of another contracting party to the Convention, and thereby within the ‘legal space’ or ‘*espace juridique*’ of the Convention. As Iraq was not such a party, it was outside this legal space, and the UK’s obligations were therefore inapplicable. Over the course of the *Al-Skeini* litigation, various arguments were made to support this contention.⁴⁸

⁴⁷ See the sources cited above, see Sect. 8.5.

⁴⁸ *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2004] EWHC

One such argument formed the basis for the Strasbourg Court's treatment of the colonial clause in its judgment in the case. The UK suggested that, in the light of the earlier case law, notably *Quark*, that if:

[T]he "effective control of territory" exception [to an exclusively territorial application of the Convention] were held to apply outside the territories of the Contracting States, this would lead to the conclusion that a State was free to choose whether or not to extend the Convention and its Protocols to a non metropolitan territory outside the Convention "espace juridique" over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.⁴⁹

This observation underscores the fundamental difference between the colonial clause declaration model, and the model for triggering human rights obligations otherwise. The former involves a special determination by the state; the latter does not. Given the broader context in which the statement is made, as part of an effort to challenge the applicability of the ECHR to it in Iraq, the UK is suggesting that its lack of freedom in the latter arrangement is problematic, given the freedom it is given in the former arrangement, and the ironic contrasting consequences of having relatively short-lived activities regulated by human rights law, but arrangements that are more long-standing (and often conceived to continue indefinitely) left outside legal regulation.

Setting aside the important matter that if the 'effective control' model for extra-territorial applicability were not to apply to non-colonial extraterritorial arrangements outside the territory of Council of Europe member states (e.g. in Iraq), then there would be no possibility of applicability at all to such arrangements (so not the same—including as a matter of the UK's freedom of choice—as the colonial clause model, where applicability can happen, if the UK so wishes),⁵⁰ as a matter of principle the contradiction identified by the UK can be resolved in two different

2911 (Admin), 14 December 2004, (hereinafter *Al-Skeini* (DC)); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2005] EWCA (Civ) 1609 (21 Dec. 2005) (hereinafter *Al-Skeini* (CA)); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2007] 3 WLR 33 (hereinafter *Al-Skeini* (HL)) and the review in Wilde (2010), and sources cited therein.

⁴⁹ *Al-Skeini* ECtHR (n 16) [111].

⁵⁰ The argument is misleading in using the terminology of freedom of choice in the context of the 'effective control' model of human rights applicability outside colonial contexts in territory outside that of the member states of the Council of Europe, and positing this as a direct comparison to the colonial clause model. The UK argued that it is not 'free to choose' whether or not its obligations would apply in such contexts under the 'effective control' model, when compared to what it can do under the colonial clause model. But if the effective control model did not operate in such contexts, it is not as if the colonial clause model would operate in the alternative. Rather, no model of applicability would operate. Actually, then, the UK's freedom of choice would not be as wide as it is under the colonial clause model, where it can choose to extend (as it has done in practice), because it would not have the choice to have its obligations applicable. The only way this assertion makes sense is if the UK does not wish its obligations to be applicable at all, and therefore sees no value in the option of being able to render them operative.

directions. An argument can be made the other way around from what is suggested: the fact that states do not determine whether their obligations are applicable to their extraterritorial activities outside the colonial context, and yet these activities might be shorter in duration than continuing colonial arrangements, might call into question the continuing validity of the older, discretionary model operating for colonial territories.

However, this alternative argument has to reckon with the continued existence of colonial clause provisions and the received wisdom up to *Quark* that for overseas territories the question of a colonial clause extension is exclusively determinative. The UK could make its submission, in favour of one of the two possible means of resolving the contradiction, because this legal settlement necessarily rules out a challenge to the continued validity of the colonial clause model.

The Strasbourg Court effectively rejected the UK's argument, stating in its judgment of 2011 that the existence of the colonial clause:

[W]hich was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1.⁵¹

The court prefaced its remarks above with the observation that:

The "effective control" principle of jurisdiction...does not replace the system of declarations under Article 56 of the Convention [...]⁵²

Since this 'principle', as the Court puts it, relates to *extraterritorial* jurisdiction in particular (as discussed above, jurisdiction is presumed to operate territorially, even if the state does not exercise effective control), this statement could be interpreted as suggesting that in colonial territories where the nature of the state's presence would meet the effective control test for extraterritorial jurisdiction, but an declaration has not been made, applicability cannot be effected through the jurisdictional model. In addition, or in the alternative, the statement could be interpreted as underlining the mismatch between, on the one hand, a regime of extraterritorial applicability and, on the other hand, the issue of declarations with respect to territorial colonial arrangements: the former cannot address the situations covered by the latter because they each address zones that are by definition opposites (respectively, extraterritorial and territorial).

The Court continued in this vein after the earlier remarks, stating that:

The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.⁵³

Describing the two situations as 'separate and distinct' is somewhat ambiguous: on the one hand, the words are not tight enough to rule out any overlap (a qualifier such as 'entirely' would be needed), on the other hand, using two words that are in

⁵¹ *Al-Skeini* ECtHR (n 16) [140].

⁵² *ibid.*

⁵³ *ibid.*

this context effectively synonymous is a tautology, which might be taken as an effort to indicate a somewhat more rigid separation than is suggested by either word alone. It is unclear, then, what exactly the import of this statement is on the crucial question of whether or not the two situations are mutually exclusive.

Bearing in mind the context of the statement, though, which is to address the UK submission about the extraterritorial application of the Convention to non-colonial territories outside the 'legal space' of the Council of Europe, we might see the Court here speaking not so much about direct interplay between the two situations (and so addressing the question of whether extraterritorial 'jurisdiction' could somehow trigger obligations in colonial territories as an alternative to the operation of a colonial declaration) but, rather, what the relevance the existence of colonial clause model has for the meaning of the other model *outside the colonial context* (e.g. in Iraq). On this, the contradiction highlighted by the UK is to stand: it cannot be resolved, as the UK had suggested, by reducing and even eliminating the 'effective control' basis for applicability in non-colonial territories outside of the 'legal space' of the territory of Council of Europe States so as to bring things closer to the colonial-clause approach whereby applicability in any given situation is not applied without the state's specific consent.

That said, a year later in the decision about the Chagos Islands, the Court revisited this statement, and while acknowledging that it was made in the context of the relevance, if any, of the colonial clause arrangements for the scope of the extraterritorial meaning of jurisdiction to non-colonial territories, it insisted that:

[T]he Court's judgment on the point was cast in general terms: the Grand Chamber not only cited the *Quark* decision as an authority but in fact adopted the reasoning in that decision that the situations covered by the "effective control" principle were clearly separate and distinct from circumstances falling within the ambit of Article 56.⁵⁴

Cast in general terms, it may have been (how could it have been otherwise?); however, its determinative significance in the reasoning was still specific to the consequence for the scope of the extraterritorial jurisdiction test for non-colonial territories outside the Council of Europe. And the issue remains that, as mentioned, the way it was significant in this reasoning is itself less than clear when it comes to the significance of 'separate and distinct' for the question of whether the two regimes are mutually exclusive as a matter of generality. In other words, the statement may have been general enough, but it was not specific enough, for present purposes.

8.10 Contradictory Situations Created by the Exclusive Determinism Model for Colonial Clause Declarations

Not only, of course, does the exclusive determinacy of 'colonial clause' extension or non-extension as far as applicability is concerned lead to contradictory results when two similar situations, one formally colonial, the other not, are compared, and

⁵⁴ *Chagos Islands* decision (n 13) [73].

a formal declaration has not been made in relation to the former situation (e.g., the UK was not bound by its obligations under the ECHR in Hong Kong pre-handover, but was in Iraq during the occupation, because of the difference in the legal status of the two territories and the absence of a colonial clause declaration in relation to Hong Kong). Also, it is contradictory, creating a divergent situation, when the *same* situation is considered under a treaty with a colonial clause, like the ECHR and its Protocols, and other human rights treaties where such clauses do not exist, like the ICCPR.

Given the overlap in the rights covered as between the ECHR and its Protocols, on the one hand, and some of these other treaties, on the other, a situation may arise impacting on the enjoyment of a particular right common to both sets of treaties, but only the obligation in the latter applies (either because of territorial application, or because of meeting the test for extraterritorial jurisdiction), because the state has not made an express extension of the relevant part of the ECHR or its Protocols. As mentioned already, this is potentially the situation in BIOT. It was also the position for the UK in Hong Kong, and Portugal in Macau, pre-handover. It did not prevail in the *Quark* case, since the right at issue in the case—the right to property—is contained only in ECHR Protocol No. 1, not also in other human rights treaties. More broadly, as indicated earlier, although there might be overlaps in rights between the instruments, other key differences, such as in the historical periods covered by the treaty obligations, and the availability of remedies, might diminish the significance of the contradiction in the sense that the other treaties, although covering the same rights, are for other reasons less important.

8.11 ‘Colonial Relic’ Challenged: *Chagos Islanders v United Kingdom*

In their case before the European Court of Human Rights that led to an admissibility decision in 2012, mentioned above, the Chagossians sought to challenge, as had been attempted in the *Bui Van Than*, *Yonghong* and *Quark* cases, the exclusive determinacy of the colonial clause provision as far as the operation of the UK’s obligation in the Chagos Islands were concerned. Significantly, this decision came one year after the Court’s decision in *Al-Skeini*, where the Court made its aforementioned remarks on the colonial clause in response to the UK’s submissions as to the supposed significance of this clause for the regime of ‘effective control’ applicability, and more broadly purported to articulate the general contours of the jurisdiction test both territorially and extraterritorially, before applying this test in its latter manifestation to the facts of the UK presence in Iraq.⁵⁵

The Chagossians attempted to persuade the Court to depart from an approach that would render a declaration under the colonial clause exclusively determinative

⁵⁵ For its articulation of the jurisdiction test and applying it to the UK in Iraq, see *Al-Skeini* (ECtHR) (n 16) [130]–[150].

of applicability. They made their case for such a departure on a two-pronged principled basis: in the first place, that it would remedy a legal black hole that would operate otherwise; in the second place, that the colonial clause can be bypassed as far as it is exclusively determinative because it is an objectionable 'relic'.

The Court rejected these arguments, stating that it could not agree that 'any possible basis' of jurisdiction such as that set out in its earlier decision in *Al-Skeini*:

[M]ust take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention. Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result.⁵⁶

Where arguments of principle, including those of an anti-colonial nature, would not work, however, the Court's own prior statement about the contours of territorial and extraterritorial jurisdiction, made in the *Al-Skeini* judgment issued after all the previous colonial clause decisions (including *Quark*), was possibly to have a different effect on its reasoning.⁵⁷ The Court remarked that the 'question remained' as to whether this prior statement:

[I]ndicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised "State agent authority and control" or "effective control" in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.

§ However, even accepting the above interpretation, the Court finds it unnecessary to rule on this particular argument since, in any event, the applicants' complaints fail for the reasons set out below.⁵⁸

The Court, then, did not ultimately have to make a determination on applicability, because the case was deemed admissible for a different reason (concerning the requirements of the victim test).⁵⁹ But it is striking that the Court took the trouble to make this statement, given that it left open the possibility that, somehow, the position under the colonial clause may no longer be exclusively determinative of applicability.

Given that the *Al-Skeini* statement mentioned by the Court is about both territorial and extraterritorial jurisdiction, it might be said that the 'alternative bases for jurisdiction' that could apply to trigger the applicability of human rights obligations

⁵⁶ *Chagos Islanders v UK* (n 13) [74].

⁵⁷ *ibid.* The Court describes the statement in paragraph 70 citing paragraphs 130–141 of the *Al-Skeini* judgment (cited above, (n 16)).

⁵⁸ *ibid* [75]–[76].

⁵⁹ See *ibid* [77]–[83].

to colonial territories in the absence of an extension declaration under the colonial clause would potentially cover such applicability to both ‘territorial’ and ‘extraterritorial’ colonial arrangements. That said, when the Court goes on explain how this would play out as far as the UK in the Chagos Islands is concerned, it utilizes, exclusively, the tests for *extraterritorial* jurisdiction in particular (state agent control [over individuals]/effective [territorial] control). Either, then, this implies that the Chagos Islands are extraterritorial as far as the UK is concerned, or a new form of *territorial* jurisdiction is being speculated about, specific to colonial territories, which operates in an equivalent manner to extraterritorial jurisdiction, and so different from other forms of territorial jurisdiction, in that applicability is not an automatic given, but dependent on the existence of effective control.

Why, then, does the Court’s review of applicability according to the jurisdiction regime set out a year earlier in the *Al-Skeini* case create the possibility of something that was not held in earlier decisions on the question? We are not given an explanation for this, and so can only speculate. Obviously the *Al-Skeini* review is not directly about the question at issue (there, is of course, the ambiguous invocation of the ‘separate and distinct’ idea in another paragraph). Moreover, although it covers both territorial and extraterritorial applicability, on the former issue, it does not contain anything new, nor, then, comes at a particularly significant moment in the Court’s jurisprudence in that regard. On extraterritorial applicability, things are very different. The Court rejects, for the first time, the doctrine, which had been held by the English courts to be operable to a certain extent, that the Convention does not apply extraterritorially to the actions of contracting states taking place outside the ‘legal space’ of the territory of other contracting states. Although this doctrine had never actually been clearly adopted previously by the Court, it was ‘in the air’ because of an ambiguous statement it made in the *Banković* decision ten years earlier, which is reviewed below, which the UK then relied upon to advance the doctrine, with some success, in the English courts.⁶⁰ The doctrine would have ruled out the possibility that obligations can be triggered with respect to extraterritorial colonial territories (other than, perhaps, such territories that form part of the sovereign territory of another Council of European state, not something that has been at issue in any of the ‘colonial clause’ cases to date) as a matter of extraterritorial jurisdiction, even assuming such a trigger could operate as an alternative to colonial clause declarations.

More broadly, the significance of the *Al-Skeini* decision has to be appreciated in the context it was made. The Court’s jurisprudence on extraterritorial applicability developed piecemeal, with the contours of the test emerging in stages as particular elements of it came to be defined as needed by the facts of particular cases.⁶¹ In the *Banković* decision of 2001 about the NATO bombing of Belgrade, the Court attempted a general review of the situation, but the review provided created great disagreement and confusion on the topic rather than clarifying matters.⁶² The

⁶⁰ See below, text accompanying (n 75) et seq.

⁶¹ See the review in the sources cited above.

⁶² *Banković v. Belgium and others*, 2001–XII Eur. Ct. H.R. 333, Grand Chamber, European Court

following assertions in that review can be highlighted in this regard, all of which having implications for the extent of applicability, but failing to clarify what these implications were: the supposed link with the general public international law concept of jurisdiction⁶³; a narrow definition of extraterritorial jurisdiction exercised by state agents⁶⁴; the 'control over territory' test including the exercise of public powers⁶⁵; the idea that the Convention was never intended to apply throughout the world, even in respect of contracting states⁶⁶; and the related idea—the ambiguous statement mentioned earlier—that the Convention applied 'notably' in the 'legal space' of the territory of contracting states.⁶⁷

The hostages to fortune contained in the implications of these statements were exploited by the UK in the *Al-Skeini* litigation in the English courts, to make a wide array of arguments that narrowed the scope of applicability, or eliminated applicability entirely, of the Convention to the UK in Iraq (e.g., as mentioned, the 'legal space' statement being used to underpin the aforementioned idea that the Convention does not apply extraterritorially outside the territory of contracting states).⁶⁸ When that litigation ended up in Strasbourg, then, the Court had to deal, in essence, with the consequences of its earlier statement in having created so much uncertainty and potential for dispute on the fundamental question of whether and to what extent the Convention is applicable extraterritorially. Whatever one might think about whether the Court successfully cleared up this mess with its second general effort, in *Al-Skeini*, to define the contours of extraterritorial applicability, this effort, as is the nature of general statements on the legal framework, can certainly be viewed as an attempt to provide clarity, and resolve uncertainty, on the topic. If the Court views itself as having succeeded here, which presumably it did—the *Chagos* decision is only one year later, and references the previous general statement multiple times—then perhaps the significance of this for the present subject is that the Court was taking the view that the timing was now right, as it was not previously, for the regime of jurisdictional applicability to be potentially transferrable to colonial territories, because the contours of the regime that would operate have been clarified after a period of acute uncertainty and dispute. So although the *Al-Skeini* review was not, of course, about the question of whether this transfer could happen, it supposedly cleared up (or at least resolved some issues relating to) the prior issue—what extraterritorial jurisdiction means—necessary in order for the transfer to be possible.

There is also a further general implication of the timing that might explain why the Court concludes that the matter must 'now be considered'. When human rights law and its enforcement modalities follow states into the extraterritorial arena, there

of Human Rights Judgment (hereinafter *Banković*).

⁶³ *ibid*, [59]–[61].

⁶⁴ *ibid*, [73].

⁶⁵ *ibid*, [71].

⁶⁶ *ibid*, [80].

⁶⁷ *ibid*, [80].

⁶⁸ See e.g. *Al-Skeini* (DC), *Al-Skeini* (CA), *Al-Skeini* (HL) (n 48); the reviews in Wilde (2010), Wilde (2008a), p. 628 and sources cited therein.

is a move outside the ‘comfort zone’, as it were, of the usual territorial focus. The subject matter is always controversial, and sometimes even of existential significance for the states involved if it relates to the use of military force. Usually other areas of international law are co-applicable (e.g. the laws of war), and sometimes states act together, raising difficult issues of overlapping responsibility, especially if one or more of the partners is not bound by the same human rights obligations and/or takes a different view on the scope and meaning of obligations held in common.

The *Banković* case epitomized these issues, given that it related to the NATO bombing of Belgrade in 1999, implicating the controversial issue of the legality of so-called ‘humanitarian intervention’, concerning action where IHL was also applicable, and relating to joint action with a coalition of states with notable members—the US and Canada—who were not party to Convention, and with one of which, the US, taking the view that its own human rights obligations in the ICCPR did not apply extraterritorially or in situations of armed conflict where the LOAC applied only.⁶⁹

It can be speculated that the Court’s decision in that case, that the Convention did not apply to situations of aerial bombardment, was in part influenced by a broader reluctance to move into such complicated, contested and politically sensitive terrain.⁷⁰ Moreover, the decision came just after the attacks on the US on 9/11, which precipitated an exceptional international climate of sympathy and support for the US in general, including NATO invoking its collective self-defence provision, and for the actions the US and its allies took in response in Afghanistan in particular. It can be speculated that a view prevailed that this was not the right time to pronounce upon the legality, in the sense of human rights compliance, of a US-led NATO military action.

What happened in the intervening ‘war on terror’ decade between this moment and the Court’s decision in *Al-Skeini*, of course, was a profound shift in the normative climate in response to US-led actions extraterritorially and the general terror-related restrictions on and violations of human rights.⁷¹ Controversy on these issues was at its apex where they intersected: the indefinite detentions and torture in the US base in *Guantánamo* and the initially secret so-called ‘black sites’, and the egregiously incompetent occupation of Iraq in general, with its widespread negative impact on the population of that state, and the abuses of detainees in the *Abu Ghraib* prison in particular. These developments led to a greater critical engagement with the impact of state actions on human rights extraterritoriality, with a greater call, within this, for law to play a role in providing checks and balances. When the concern was raised that such situations actually constituted legal ‘black holes’ in this regard, the pressure was on courts and other human rights bodies to assert the rule

⁶⁹ See *Banković* (n 62). On the US position in the ICCPR, see Wilde (2005).

⁷⁰ On the decision of inapplicability, see *Banković* (n 62) [74]–[76].

⁷¹ See the discussion and sources cited in Wilde (2005).

of law as a protective device, and so to affirm the extraterritorial applicability of human rights law when this was challenged.⁷²

This was the context when the *Al-Skeini* case came before the Court. The case involved all the main controversial elements of *Banković* a decade previously, if anything in more exaggerated form: an especially controversial use of military force and occupation, the respondent state being a junior partner in a coalition led by another state, the US, not even party to the same treaty let alone to the case at issue, and a situation where other areas of law—LOAC and occupation law—were also applicable. But the Court takes the opposite position from *Banković*, not avoiding the substance of the case and restricting extraterritorial applicability, but addressing this substance and affirming this applicability. The shift taken a decade later, then, is not only in attempting to clarify applicability, as mentioned earlier, but also to do so in an affirmative fashion in the sense of extending its scope. It is difficult not to understand this in part as a confident assertion, in the light of the 'war on terror' backdrop, of the rule of human rights law extraterritorially in the face of the practice of human rights abuses in that context. It might have been felt that the lessons of the previous decade were that international human rights bodies had to grasp the nettle of all the difficult and contested issues bound up in extraterritorial situations, because of the clear track record of abuses in such situations. Avoidance, as happened in *Banković*, was no longer tenable. One also wonders whether the lesson of the *Al-Skeini* litigation for the Court was that national legal systems could not be relied upon to provide effective redress for such abuses. Even a national jurisdiction with a redress mechanism tied to the Convention and a legal profession and judiciary supposedly exceptionally well-versed in the general subject could not be relied upon to get things right (as will be elaborated on further below).⁷³

Clearly the logic of all this is transferrable to human rights abuses in colonial territories. Even though, as discussed, in some cases these are not 'extraterritorial' to the colonial state as far as legal title is concerned, in a broader sense they are treated as geographically, legally, politically and socially distinct. Abuses of people in territories other than the 'metropolitan' territories of north American and Council of Europe states, and Israel, perpetrated by these states, share a commonality whether or not the arrangements are formally constituted as 'colonial' or not (hence, of course, the continued use of the 'colonial' tag outside the formal context, e.g. to the occupation of Iraq). The need for the international rule of human rights law in the colonial context derives greater impetus, then, from what has happened extraterritorially outside this context, and the similarity between the two. Indeed, of course, the Chagos situation epitomizes the overlapping nature of the two in a literal sense, with the non-formally-colonial US base at Diego Garcia, and its use to house rendered 'war on terror' detainees, grafted onto one the islands of the colonial BIOT.

But would the imperative to assert the rule of international human rights law not amount to trying to avoid a 'vacuum in protection offered by the Convention'

⁷² *ibid.*

⁷³ On the redress mechanism being tied to the Convention, see (n 34) above.

and a response to the ‘perceived need to right an injustice’, things which the Court rejected as a basis for utilizing the jurisdiction model of applicability in circumstances where a colonial clause extension has not been made?

The avoiding-a-vacuum-in-protection argument has a history in the Strasbourg jurisprudence on extraterritoriality, having been invoked as a beneficial consequence by the Court after it affirmed the applicability of the Convention to Turkey in northern Cyprus in its decision in the *Cyprus v Turkey* case.⁷⁴ The applicants in *Banković* and *Al-Skeini* in the English Courts tried to use it unsuccessfully as a stand-alone basis, i.e. in addition to the ‘effective control’ tests, for applicability in general.⁷⁵ Following what the Court said in its response to this in *Banković*—the aforementioned ‘legal space’ idea⁷⁶—in *Al Skeini* the UK government made its unsuccessful argument about extraterritorial applicability being limited to the territory of Council of Europe states on the basis that only when a vacuum in protection within this ‘legal space’ would otherwise prevail should the Convention apply extraterritorially.⁷⁷

This history is helpful in illuminating how the vacuum-avoidance argument can be deployed in the context of questions of applicability, including as far as the colonial clause is concerned. What has to be appreciated here are two distinct aspects of such questions. On the one hand, applicability is seen as requiring some sort of theory about the existence of a power relationship between the state and the situation in question. As discussed, this existence is assumed as a given in state territory; extraterritorially, the jurisprudence has developed the tests about effective control and influence. The vacuum-avoidance argument, by contrast, is not concerned with defining the contours of the power relationship; it is addressing the consequences of this, which is that there should be a regime of protection wherever it exists, or, put negatively, there should be no absence of protection—no ‘vacuum’—where it is present. Put more simply, it is the idea that where there is power (the jurisdiction test) there should be accountability (the applicability of human rights law).

It might be said, then, that the principle of avoiding a legal vacuum requires a separate theory of power in order to find its context of operation. There needs already to have been established some sort of power relationship between the state and the situation in question, from which flows, as a necessary consequence, the requirement of accountability. Accountability has no meaning outside of this. To say that a particular situation has to be regulated by human rights law in order to avoid a vacuum in protection, then, is to have already concluded that a power relationship exists between the state and the situation so as to require the regulation of human rights law.

But if this power relationship is being defined as that which requires accountability, then the accountability consideration is necessarily bound up in the definition

⁷⁴ *Cyprus v. Turkey*, European Court of Human Rights, Grand Chamber, Case, no. 25781/94, Judgment, 2001 (hereinafter *Cyprus v Turkey*), [78]. See e.g. the review in Wilde (2005) and sources cited therein.

⁷⁵ For *Banković*, see *Banković* (n 62) [79]–[80]. For *Al-Skeini*, see *Al-Skeini* (DC), *Al-Skeini* (CA), *Al-Skeini* (HL) (n 48), and the review in Wilde (2008a) and sources cited therein.

⁷⁶ *Banković* (n 62) [79]–[80].

⁷⁷ See *Al-Skeini* (DC), *Al-Skeini* (CA), *Al-Skeini* (HL) (n 48), and the discussion in Wilde (2008a) and sources cited therein.

of the power relationship. So the trigger for applicability should be defined to ensure that nothing requiring accountability is left outside its scope—there should be no vacuum in protection. However, this is a matter of reading the accountability/vacuum avoidance consideration into the power definition, rather than conceiving the consideration as an autonomous basis for applicability.

This is perhaps the difference between how the idea was invoked by the Court in the *Cyprus v Turkey* decision and how it was raised by the applicants in *Banković*. In the former decision, it is being associated with, as a normative underpinning, the particular definition of the power relationship that triggered obligations: effective control over territory. In the latter situation, by contrast, it is being invoked as a definition of the trigger itself. What is missing is the theory of the power relationship. It is the difference between, in *Banković*, saying that the Convention should apply to the act of bombing, so to avoid a vacuum in protection (what the applicants argued) and saying that the definition of extraterritorial jurisdiction triggering obligations should encompass bombing so as to avoid a vacuum in protection (not what the applicants argued).

These arguments amount to the same thing in substance—an act of bombing involves a causal relationship that plays a determinative role over human rights so as to require the regulation of human rights law. But the difference between them is significant because the Convention has its regime of jurisdiction—its theory of the determinative power relationship—triggering applicability with a test, extraterritorially, of 'effective control' (and also, later, 'decisive influence'). In consequence, arguments about avoiding legal vacuums have to be made within discussions of this test (i.e. what 'effective control' means), not outside of it.

Revisiting what the Court said in *Chagos*, here it discusses the vacuum-avoidance norm in a negative way, as something that could be invoked to remove the exclusively determinative role of colonial clause declarations. Necessarily, this goes only so far, doing away with one regime of applicability. Although the argument presumes that the alternative jurisdiction regime would operate—removal of the role of one is intended to enable the operation of the other—nonetheless the next step, establishing in a positive manner the case for the alternative regime of applicability—via the general jurisdiction provisions—is required. The Court's invocation of the vacuum-avoidance consideration, then, can be viewed as rejection of this being used as a means of bypassing one regime of applicability in the negative, without also making the case in the positive for the operation of the other regime.

The Court then goes on to do this in the following paragraph, as discussed. Although it does not invoke the vacuum-avoidance consideration expressly as the basis for this (no express normative basis is invoked), the Court's invocation of the position taken in *Al-Skeini* on jurisdiction can be seen, as explained above, as relevant to the issue of extending this concept of applicability to colonial territories because of vacuum-avoidance considerations. By rejecting such considerations when considering only in the negative whether or not the colonial clause regime should be abrogated, the Court is not ruling out their significance when turning to the other side of the analysis and considering in a positive way whether the jurisdiction regime can operate with respect to colonial territories.

8.12 ‘Anachronistic As Colonial Remnants May Be...’

8.12.1 *Objectionable Colonial Relic*

As the Court points out, the notion that there are ‘alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue...is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.’⁷⁸

Given, then, that the issue is fiercely contested, and involves the potential redundancy of an article in the Convention, is there anything to bear in mind when considering this issue in addition to the Court’s focus on its jurisprudence on the meaning of jurisdiction as summarized in *Al-Skeini*?

As mentioned, the Court held that ‘it could not agree’ that applicability to colonial territories on a jurisdictional basis:

[M]ust take precedence over Article 56 on the ground that it should be set aside as an *objectionable colonial relic*...*Anachronistic as colonial remnants may be*, the meaning of Article 56 is plain on its face and it cannot be ignored *merely because of a perceived need to right an injustice*. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court *in order to reach a purportedly desirable result*.⁷⁹

The colonial clause model of applicability is characterized as a ‘relic’ and ‘anachronistic’. This foregrounds the way the model is from an earlier point in history, which has passed. The model is also characterized as ‘objectionable’, the indications of which seem to be the effect it has, when a declaration is not made, in preventing an injustice being righted and so enabling a desirable result.

Whereas of course the model is all of these things, characterizing its colonial heritage exclusively in this manner ignores the broader significance of this heritage, and its political and legal implications, which is actually of acute relevance to the question at issue, raising additional ‘objectionable’ features from the ones invoked by the Court. When these broader implications are brought into the frame, the nature of the model, as a ‘relic’, is indeed the reason why it should be set aside.

The Court was able to miss this, and, indeed, reach the opposite conclusion as to the relevance of the colonial clause model as a ‘relic’, because it failed to interrogate the nature of its objectionable status as such (another objectionable feature, concerned with ensuring accountability, is considered, as discussed above). Instead, ‘objectionable colonial relic’ is invoked gratuitously, to be dismissed before its possible meaning and significance have even been considered. How, then, might this gap in the necessary reasoning proceed?

⁷⁸ *Chagos Islanders* decision (n 13) [75].

⁷⁹ *Chagos Islanders* case (n 13) [78] (emphasis added).

8.12.2 *Colonialism Legitimated*

In separate work, I trace the connection between a range of different practices which I term 'foreign territorial administration', covering colonialism, occupation, administration under the League of Nations and UN Trusteeship systems, and the administration of territory by international organizations.⁸⁰ I explore how the international legal concept of 'trusteeship over people' can be identified across these practices as a means of justifying their existence and regulating their concept. In essence, this concept of trusteeship-over-people is based on the idea that there are certain people in the world who are deemed incapable of self-administration, according to the 'standard of civilization', and that this deficient level of development justifies the exercise of authority over them by the other, relatively 'advanced', 'developed', 'civilized' people in the world. This exercise of authority is supposed to be performed by the latter on the basis of 'trust', in the interest of the former, not themselves. In its later manifestations, certain arrangements included improvements in the developmental level, and consequential enhancements in local self-governance, as the objectives of trusteeship administration, in some cases allied to the notion that the realization of such improvements and consequential enhancements could lead eventually to independence. The entitlement to independence, then, is ostensibly bound up in capacities in this regard. It is contingent on developmental improvement as the end point in a progressive enhancement of self-administration.

8.12.3 *Colonialism Delegitimated*

After the Second World War, as mentioned above, the trusteeship-over-people concept was repudiated as a basis for foreign territorial administration, not only politically but also in international law, via the notion of self-determination.⁸¹ Under this new paradigm, there are no advanced and less advanced people in the world when it comes to the question of whether or not foreign territorial administration can be legitimated. All are entitled to freedom and self-determination as equal people.⁸² Existing arrangements of foreign territorial administration were dismantled; no new such arrangements were supposed to be created.⁸³ Moreover, independence is now an automatic right, not something that is earned depending on the level of development. As articulated in the seminal formulation by the United Nations General

⁸⁰Wilde (2008b), Chs. 8 and 9 and sources cited therein.

⁸¹ibid, Ch. 8, section 8.5 and sources cited above.

⁸²ibid. Of course, as mentioned earlier, such ideas continued in other forms.

⁸³ibid. But, as mentioned above, trusteeship continued in its internationalized form. See Id, passim.

Assembly: 'inadequacy of preparedness should never serve as a pretext for delaying independence.'⁸⁴

8.12.4 Human Rights and the End of Empire⁸⁵

Significantly, international human rights law emerged during the period when this broader transformation in the normative character of foreign territorial administration was happening. It is in its heritage both colonial and post-colonial. Although the writing was on the wall for colonialism as the 1950 European Convention was being drafted, the Convention does not, of course, include a right of self-determination in its provisions, and the colonial clause assumes the existence of colonial arrangements. By the time of the adoption of the two global human rights Covenants in 1966, by contrast, self-determination is in both Covenants as a common first article, and there are no colonial clauses, nor indeed are any such clauses contained in any subsequent human rights treaties.

How does the operation of human rights law in colonial territories look according to these two normative models, of trusteeship-over-people, on the one hand, and self-determination, on the other hand?

8.12.5 Trusteeship-Over-People and the Application of Human Rights to Colonial Territories

Under the trusteeship-over-people model, the implications of the standard of civilization are that the people of the metropolis, as advanced and civilized, are immediately 'ready' for human rights law, both as rights-holders, and as those who have to govern in a human-rights-compliant fashion. Territorial applicability as an automatic given reflects this idea.

By contrast, the implications of the standard of civilization are that the people of the colonies are necessarily at an inferior developmental level, and so not yet necessarily ready in the same way for human rights law as rights-holders, unless it is decided otherwise. Moreover, because of this civilizational difference, insofar as administrative authority in colonial territories is exercised by local officials, and transfer of authority to them is progressively enabled and, even, there is independence, there is no automatic fit between them and the norms they would have to comply with. To have them subject to these norms in the absence of this fit would be to impose a normative regime where it has no purchase.

⁸⁴United Nations General Assembly Resolution 1514 (XV) of 1960, para. 3.

⁸⁵See Simpson (2004).

As for the colonial administrators, although this model presupposes their fitness to perform the task, the unsuitability of the local population to be rights-bearers in the same fashion as people in the 'metropolis,' unless decided otherwise, means that colonial governance should not itself be subject to the regulatory mechanism of human rights law. Trusteeship as an idea requires accountability, because of the profound power imbalance between the 'trustee' and the 'beneficiary'.⁸⁶ But human rights law in particular cannot necessarily serve as a accountability device, insofar as something crafted to fit automatically with the advanced societies of the 'metropolis' does not work in the differently-conceived societies of the colonies.

Thus according to the logic of the trusteeship-over-people model, there cannot be automatic applicability to colonial territories, whether territorially or extraterritorially, as with the general model adopted within most human rights treaties, for example the ICCPR. A judgment is needed in each case as to the developmental level, and the suitability of the normative regime to both the local population and the local governance structures. The colonial clause declaration requirement enables this. In giving the decision to the colonial state, it reflects the general approach taken in international law and institutions towards the conduct of trusteeship-over-people, crafting very general principles and leaving considerable discretion to 'trustee' states in terms of their interpretation, application and implementation.

The equivalent of this approach can be seen in some of the dicta in the English court decisions in the *Al-Skeini* case about the applicability of the ECHR to the UK occupation of Iraq, based on suggestions made by the UK government in its submissions.⁸⁷ At the Court of Appeal stage, Lord Justice Brooke raised, as a problem, the idea of applying the Convention in a 'predominantly Muslim country'.⁸⁸ In the House of Lords decision, Lord Rodger stated that it would be 'absurd' to apply the law of the European Convention in the 'utterly different' society of Iraq, and Lord Brown disputed that application of the Convention in Iraq would be 'reconcilable with the customs of the resident population'.⁸⁹ These considerations were deployed to undergird the notion that the Convention should not apply extraterritorially outside the 'legal space' of the territories of Convention Contracting states. A relatively more drastic approach is therefore arrived at, compared to the colonial clause model, for the same underlying reason: automatic and unalterable inapplicability.

⁸⁶ See e.g. Wilde (2008c), p. 93 (Nijhoff), and sources cited therein.

⁸⁷ For a more detailed discussion, see Wilde (2010).

⁸⁸ *Al-Skeini* (CA) (n 48) [126] (Brooke LJ).

⁸⁹ *Al-Skeini* (HL) (n 48) [7] (Lord Rodger,); *Al-Skeini* (HL) (n 48) [129] (Lord Brown).

8.12.6 *Self-Determination and the Application of Human Rights to Colonial Territories*

With the repudiation of civilizational differences between people comes the idea of the universality of human rights, and so the idea that people in colonial territories are just as ‘ready’ for human rights, as rights-holders and, when they are involved in self-administration, obligation-bearers, as people in metropolitan territories. Necessarily, then, a regime of applicability based on civilizational differences between metropolitan and colonial people has not only lost its rationale (and so is arbitrary, and unjustified in consequence) but is, indeed, objectionable.

Revisiting the aforementioned later incarnation of the trusteeship-over-people ideas to undergird the supposed unsuitability of European human rights law to the people of Iraq in the *Al-Skeini* litigation, a counter argument here would invoke the fact that Iraq was already a party to the ICCPR, containing the same general spectrum of rights as the ECHR, and that (as the Iraq case illustrated as far as the ICCPR was concerned) both treaties actually already had ‘predominantly Muslim countries’ (for the ECHR, Albania and Turkey; also, Bosnia and Herzegovina is a majority-Muslim country) and countries with significant Muslim minority populations, as parties.⁹⁰

Turning back to the relevance of self-determination to the colonial clause model, as the legitimacy of the trusteeship relationship between the colonial state and people in colonial territories has been repudiated, the former no longer has any entitlement to assess the level of development of the latter, and judge whether and if so to what extent they are ‘ready’ for human rights law.

A trigger of applicability determined by the view of the colonial state is necessarily in contradiction to this new normative position. As such, it is a violation of the right of self-determination of the local population. That said, just because under this vision colonial people are now deemed to be just as ready for human rights law as the people of the metropolis, does it necessarily follow that there should therefore be automatic applicability?

8.12.7 *Human Rights Imperialism?*

The following questions present themselves: Does the right of self-determination not require that colonial peoples consent to human rights law before it is applicable in their territories? If independence is on the horizon, at which point enabling the newly independent state to decide which, if any, international human rights obligations to accept, is a prior extension of human rights law to the territory not prejudging this issue, creating a situation where the newly independent state is set up in a manner that creates formidable practical and political challenges in its ability to

⁹⁰I make this counter argument in Wilde (2010).

freely determine the operative normative regime? Might the continued absence of necessary checks and balances operating during what is supposed to be short-lived final period of colonial rule a price worth paying for the ability of the post-colonial state to be freed from any prior arrangement that prejudices the decisions it will have the right to make as an independent state? Given the typical failure of colonial authorities to build up local capacities for self-administration, and their own establishment of institutions of good governance in colonial territories being poor relative to the situation in the metropolis, would instant applicability be practicably difficult? Finally, would the obligations of human rights law, if applicable, require the colonial state to maintain its authority until it is in a position to hand over a system that is fully compliant (with a concomitant obligation to make reforms to enable this), thereby impeding the precipitous transfer of authority to local people? This would have the effect of perpetuating the trusteeship-over-people model of colonial administration, whereby people only get independence when development has reached a certain level. In doing so, the self-determination entitlement is violated; as discussed above, the realization of independence is supposed to be automatic, not contingent on the state of local preparedness. Paradoxically, then, the application of human rights law would violate self-determination; put differently, an absence of human rights law is needed to ensure colonial liberation.

Similar questions arose in the context of the aforementioned ideas invoked in the *Al-Skeini* litigation making the case for the application of European human rights law to the UK in Iraq as inappropriate. Much of Strasbourg case law has been developed by surveying general trends across the national practices of contracting states in particular. Necessarily, when substantive positions are crafted in part based on such surveys, their normative legitimacy is necessarily tied specifically to such states, and not necessarily transferrable beyond that context without further analysis. Thus in the House of Lords judgment Lord Rodger characterized the law of the European Convention on Human Rights as 'a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world.'⁹¹ In consequence, if the European Court of Human Rights were to hold that the Convention applied outside the territory of Contracting states, it would 'run the risk of...being accused of human rights imperialism.'⁹²

Moreover, outside the interpretation of particular rights, more generally the patchwork of applicable international human rights law of course varies significantly on which rights are covered, and how they are defined when they are covered, even as a matter of treaty provisions. So, for example, there is a general ban on the death penalty as a matter of European human rights law, whereas under the ICCPR the issue is covered by a separate Protocol which many parties to the Covenant have not accepted. Insofar, then, as there are these differences as between the law applicable to the state acting extraterritorially, and the law applicable in the state in whose territory the former state is acting, is the operation of that state's obligations not 'human rights imperialism'?

⁹¹ *Al-Skeini* (HL) (n 48) [78] (Lord Rodger).

⁹² *ibid.*

In *Al-Skeini* it was also asserted by Lord Justice Brooke in the Court of Appeal that having the Convention applicable during the occupation of Iraq would impede the transfer of authority to local people, since the law would require the UK to exercise full civil administration, thereby ‘to build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR’.⁹³ Bearing in mind the aforementioned ideas from the judges in that case about how at odds Convention law was with the ‘utterly different’ society of Iraq, a ‘predominantly Muslim country,’ the process of realizing this would therefore presumably require a profound, time-consuming transformation of the entire legal, political and social system in order to render things fully Convention-compliant beforehand. As with the equivalent issue in the colonial context, the requirements of human rights law are therefore seen as preventing the realization of self-determination.⁹⁴

Questions like these can be raised, whether in the context of the application of human rights law to colonial territories, or to other, non-formally-colonial extraterritorial activities, because the matter of regulating the foreign authority in its conduct of local administration cannot be separated from the general legal regime operative in the territory, with implications for foreign and local authorities alike.

8.12.8 The Different Meaning of Human Rights Law Extraterritorially, in Part Because of Self-Determination

As I have argued in more detail elsewhere in the context of the foregoing arguments about the extraterritorial application of the European Convention to the UK in Iraq, much of what has been said so far makes sense only if the following key features of the legal framework are ignored.⁹⁵ In the first place, beyond the context of the few core non-derogable rights, most human rights obligations are conceived, via limitation clauses and the like, to be context-specific. The same obligations may apply in different situations, then, but their substantive meaning is tailored to accommodate the differences. In the second place, as is well accepted in Strasbourg jurisprudence, the general meaning of a particular human rights instrument has to be determined by placing it into the wider international law context, taking into account the totality of a state’s obligations. The main ‘other’ obligations relevant to the present issue are those relating to self-determination, which exist as a matter of customary international law as well as the aforementioned common articles to the human rights Covenants.

⁹³ *Al-Skeini* (CA) (n 48) [125] (Brooke LJ). See also *ibid* [126].

⁹⁴ Although what was supposedly being prevented was not being characterized in this way.

⁹⁵ See further the discussion in Wilde (2010).

As will be recalled, according to the law of self-determination, the foreign state, whether in a formal colonial context or a 'non-colonial' extraterritorial situation like Iraq, has no entitlement to govern, and has an obligation to enable the self-administration of the local population, including, ultimately, to withdraw from its exercise of authority over them. This state is, necessarily, in a profoundly different normative position compared to the situation in its own territory.

If, then, the meaning of human rights law has to be understood in light of the broader international law framework, and interpreted to be context-specific, then the foregoing normative picture, derived from the law of self-determination, suggests that the substantive meaning of a state's human rights obligations is considerably different in a colony or other extraterritorial territory, compared to the 'home' location. In particular, the requirements of general human rights law must be in step with the foreign state's obligation to respect the will of the local population and local traditions, and to hand over authority to these people in a precipitous manner. Because of this, most of the aforementioned 'problems' are illusory.⁹⁶ Moreover, an obligation to consult the local population on any areas of normative divergence could be seen as a requirement of the self-determination obligation. On non-derogable rights, where limitations, and so context-specific variations, are not possible in the same way, the example of the CPA suspending the operation of the death penalty in Iraq during the occupation period (the UK was subject to an obligation not to exercise this penalty, but Iraq was not) illustrates the possibility of pragmatic get-arounds.

But this can all be missed, and, indeed, the complete opposite conclusions be drawn, if one disregards the law of self-determination. As mentioned, although the European Convention does not, of course, contain an article on this right, unlike the global human rights Covenants, the meaning of the Convention is supposed to be interpreted in the light of the general international law picture. Despite this, judicial discussions of the extraterritorial application of the European Convention on Human Rights before the English Courts and at the European Court of Human Rights have never considered the law of self-determination when it comes to interpreting the meaning of the obligations under evaluation, even when ideas which clearly implicate self-determination are being discussed.

Thus, as mentioned, in *Al-Skeini* before the English courts the spectre of imperialism is raised, as objectionable, as merely a political consideration, without reference also to the law of self-determination. Similarly, the imperative to hand over power to the Iraqi people is described only with reference to an 'over-arching policy...to encourage the Iraqis to govern themselves', and the supposed effect of European human rights law in building up 'an alternative power base' being characterized as something that 'would have run right against the grain of the Coalition's policies'.⁹⁷ Thus the imperative is a policy only, not also a legal obligation. These misconceived approaches fail to appreciate that ideas of self-determination are not entirely 'other' than the law they are addressing but, rather, in their legal manifestation need to be

⁹⁶ See further the discussion in Wilde (2010).

⁹⁷ *Al-Skeini* (CA) (n 48) [125] (Brooke LJ). See also *ibid* [126].

read into the substantive norms in order to arrive at the correct import of those norms. Instead, this import—that the substantive law in general requires local traditions to be respected, and that power is handed over to local people precipitously—is missed and, indeed, the complete opposite conclusion is reached.

8.12.9 The Different Picture if Self-Determination Is Not Realized

What has been observed so far presumes that the state will implement its obligation to realize self-determination through its own act of withdrawal. Special considerations for the above issues present themselves when the state does not do this, and retains authority and control. Clearly such action is itself a violation of self-determination. Within this, what are the implications for the regulatory regime applicable to the conduct of administration? It would be to put theoretical future issues ahead of actual day-to-day needs for a state not to be subject to human rights obligations in order not to prejudice a decision to be taken about the normative system to be in operation on liberation, if that liberation is being postponed in a prolonged and even indefinite fashion.

And given the circumstances of a denial of self-determination, clearly the rights of the local population are of particular significance, given that their treatment as a matter of the conduct of administration may be bound up in their treatment as a matter of the denial of independence. Beyond the way that the latter treatment may reflect a broader position that is transferrable to the former treatment, the two can also be linked more directly, whereby the former enables the latter, whether through preventing the development of a sustainable local administration and associated capacities on the part of local people, or, as in the Chagos case, effecting a complete depopulation of the territory so as to sever the link, as a matter of facts on the ground, between the people and their land.

This brings back to the general idea of trusteeship requiring accountability, but in an exaggerated form, given that there is a breach of trust, and in circumstances where, unlike before, the notion that the standards which would apply are not of local purchase, because of civilizational differences, has been repudiated.

8.12.10 ‘Anachronistic as Colonial Remnants May Be...’

Because of the foregoing analysis, the rationale for having the Convention inapplicable to colonial territories, and/or to territories outside the ‘legal space’ of contracting states, no longer operates and, indeed, is objectionable. Just as colonial arrangements themselves are egregious throwbacks that have been legally and politically repudiated, so too the colonial era idea of how human rights law regulation should operate is offensive and has been superseded.

But as the Court points out, the colonial clause remains in the Convention and its Protocols. It may be anachronistic, then, but it is still in force. Should the model for applicability it reflects continue, then, despite being at odds with how applicability generally now looks in the light of self-determination?

The clause itself simply enables states to make declarations of applicability. It does not also stipulate that such declarations are to be exclusively determinative on the matter, i.e., that in their absence, there cannot be some other route to applicability. But, as the Court pointed out, looking at the provision on its own, it might be said that there seems little point giving states a role in determining applicability if actually the Convention will apply anyway on an alternative, factual basis (other than in narrow circumstances where a state does not exercise any control over the territory but wishes to have its obligations applicable). The existence of the clause presupposes exclusive determinacy.

But the foregoing observations about the need, as a matter of interpreting the Convention, to take into account the general international law picture, discussed in the context of the substantive meaning of human rights law, are equally applicable here. The role of the colonial clause provision has to be interpreted by situating the provision within the law of self-determination. It is legally incorrect, then, simply to look at the provision on its own terms, and draw a conclusion about the role of the clause simply on the basis that its existence, in isolation, must have substantive significance, or not, only on those terms. The question of whether or not it should have significance cannot be answered from looking at the provision on its own if the actual legal position is to be appreciated.

Earlier, it was observed how in certain judicial dicta from the English courts it was possible to adopt positions on the substantive meaning of human rights law extraterritorially that amounted to the precise opposite of the actual position, by failing to take into account the law of self-determination. In the *Chagos* decision the European Court of Human Rights, in a similar act of failure, although without the same consequence of a perverse result (the Court ultimately leaves the issue of applicability open) characterizes understanding the colonial clause as not exclusively determinative as a matter of abrogating 'at will' the 'meaning of Article 56' because the article is an 'objectionable colonial relic.' Thus the idea that something is objectionable on anti-colonial grounds is something to be understood outside, not as a part of, interpreting the 'meaning' of the Article. Moreover, as a consideration, it is characterized simply as one of policy or principle, and not also of law. To take it into account, then, would involve the Court doing something 'at will', i.e. as a matter of extra-legal fiat.

Unlike the dicta from the English courts, the Court's failure to appreciate the significance of the law of self-determination does not lead it to a substantive position on applicability; that matter is, as discussed, left open. Rather, it constitutes a missed opportunity to acknowledge and address what, it is submitted, is an essential normative consideration for the issue. Abrogating the determinative role of the clause because of the import of the law of self-determination would be to take a position on the meaning of the clause, and to do so on the basis of legal considerations.

This would not be the first time, of course, that treaty provisions have been rendered, in effect, 'dead letters', because of the impact of broader normative

developments, whether as a matter of the overall operation of the treaty, or external legal changes. For example, the entire international system of collective security in the United Nations Charter has operated, as far as the use of force to promote international peace and security is concerned, on the basis not of the express, detailed Charter provisions concerning the deployment of UN forces under the command of the Security Council Military Staff Committee, but of the Council granting authority to use force to member states.⁹⁸

It is submitted, then, that the link between the colonial clause model of applicability, and an underlying concept, trusteeship-over-people, which international law repudiated after the ECHR was adopted, means that the colonial clause model itself has been constructively repudiated by the law of self-determination. Just as the notion of the Convention not applying extraterritorially outside the ‘legal space’ of contracting states was ultimately rejected by the Strasbourg Court in *Al-Skeini*, despite its earlier statement in *Banković*, so too the Court should take the step of rejecting the notion that, since the advent of the modern self-determination entitlement, states have lost their right to determine at will whether the human rights obligations they have accepted as a matter of generality do or do not apply to them in their colonial territories.

8.13 Conclusion

In its 2012 decision in the *Chagos Islanders* case, the European Court of Human Rights left open the possibility that, despite what had been held in earlier cases on the issue, the position taken on applicability as a matter of declarations made under the colonial clause of the European Convention on Human Rights should not be determinative of the issue. At the same time, the Court failed to acknowledge the significance of the self-determination entitlement in international law, choosing to mischaracterize the ‘colonial relic’ aspects of the issue as exclusively political and not also legal. When the self-determination entitlement is, as it should be, brought into the normative frame, a basis for realizing the possibility raised by the Court is provided.

References

- Al-Skeini v UK*, Application No. 55721/07, Judgment of 7 July 2011
 Allen S (2004) *The Chagos Islanders in international law*. Hart, Oxford
 Allen S (2016) The scope of third-party responsibility for serious human rights abuses under the European Convention on human rights: wrongdoing in the British Indian Ocean Territory. *Human Rights Law Rev* 16(4):771

⁹⁸On the Military Staff Committee, see UN Charter (n 30) Articles 43–47. On the system of Security Council authorization to member states, see e.g. Sarooshi (1999), and sources cited therein.

- Banković v. Belgium and others*, 2001–XII Eur. Ct. H.R. 333, Grand Chamber, European Court of Human Rights Judgment
- Bui Van Thanh and Others v United Kingdom*, Application No. 16137/90, European Commission of Human Rights, decision of 12 March 1990, DR 65-A
- Chagos Islanders v UK*, Application no. 35622/04 (Admissibility decision of 11 December 2012)
- Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956
- Cyprus v. Turkey*, European Court of Human Rights, Grand Chamber, Case, no. 25781/94, Judgment, 2001
- ECHR Protocol No. 1, 20 March 1952, Entry into force: 18 May 1954, ETS 9
- ECHR Protocol No. 6, 28 April 1983, Entry into force: 1 March 1985, ETS 114
- ECHR Protocol No. 13, 3 May 2002, Entry into force: 1 July 2003, ETS 187
- Elkins C (2005) *Imperial reckoning: the untold story of Britain's Gulag in Kenya*. Holt, New York
- European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), ETS, No. 5, in force 3 September 1953
- Grant JP, Barker JC (2009) *Parry & grant encyclopaedic dictionary of international law*. Oxford University Press, Oxford
- Ilaşcu and Others v. Moldova and Russia*, Appl. No. 48787/99
- International Covenant on Civil and Political Rights (16 December 1966, entry into force, 23 March 1976)
- International Covenant on Economic, Social and Cultural Rights (16 December 1966, entry into force 3 January 1976)
- International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 25 September 1926, LNTS, vol. 60, 253, as amended by the Protocol Amending the Slavery Convention, approved by GA Res. 794 (VIII) of 23 October 1953, entered into force on 7 December 1953, Art. 9
- Quark Fishing Ltd v United Kingdom* (dec.) (Application No. 15305/06), ECtHR, 19 September 2006
- R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2004] EWHC 2911 (Admin), 14 December 2004
- R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2005] EWCA (Civ) 1609 (21 Dec. 2005)
- R (on the application of Al-Skeini and others) v. Secretary of State for Defence* (The Redress Trust intervening) [2007] UKHL 26; [2007] 3 WLR 33
- R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529
- Sarooshi D (1999) *The United Nations and the development of collective security: the delegation by the UN Security Council of its Chapter VII Powers*. Oxford University Press, Oxford
- Simpson AWB (2004) *Human rights and the end of empire*. Oxford University Press, Oxford
- Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Judgment, 7 July 1989, Series A Vol. 161
- United Nations General Assembly Resolution 1514 (XV) of 1960
- Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948
- Wilde R (2005) Legal "Black Hole"?: extraterritorial state action and international treaty law on civil and political rights. *Mich J Int Law* 26(3):739
- Wilde R (2006) The extraterritorial application of the human rights act. In: Holder J, O'Connell C (eds) *Current legal problems 2005*. Oxford University Press, Oxford, pp 47–81
- Wilde R (2008a) Case Note, *R (Al-Skeini) v Secretary of State for Defence* (The Redress Trust intervening). *Am J Int Law* 102(3):628
- Wilde R (2008b) *International territorial administration: how trusteeship and the civilizing mission never went away*. Oxford University Press, Oxford
- Wilde R (2008c) *Understanding the international territorial administration accountability deficit: trusteeship and the legitimacy of international organizations*. *Int Peacekeeping* 12:93

- Wilde R (2010) Compliance with human rights norms extraterritorially: 'human rights imperialism'? In: de Chazournes LB, Kohen M (eds) *International law and the quest for its implementation/Le droit international et la quête de sa mise en œuvre*, Liber Amicorum Vera Gowlland-Debbas. Brill/Martinus Nijhoff, Leiden, Chapter 16
- Wilde R (2013) The extraterritorial application of international human rights law on civil and political rights. In: Rodley N, Sheeran S (eds) *Routledge handbook on human rights*. Routledge, Oxford, chapter 35
- Wilde R (2018, forthcoming) The trusteeship council, Chapter 8. In: Weiss TG, Daws S (eds) *The Oxford handbook on the United Nations*, 2nd edn. Oxford University Press, Oxford
- Yonghong v Portugal*, case number 50887/99, European Court of Human Rights, Judgment of 25 November 1999

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