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Extraterritorial obligations in the European human rights system

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Introduction

The conduct of state authorities may affect the human rights of individuals located outside their territory. In Europe the scope of extraterritorial obligations is closely tied to the jurisdiction clause in the European Convention on Human Rights (ECHR). States will be internationally responsible not only for human rights violations attributed to them within their own territory, but also for actions and omissions perpetrated outside their own territory but within their jurisdiction. This chapter explores the criteria developed by the European Court of Human Rights (ECtHR) and the former European Commission on Human Rights (ECmHR) to establish the international responsibility of states in the framework of extraterritorial obligations in specific cases and identifies the types of situations in which extraterritorial responsibility has been established. It will first deal with the provision related to extraterritorial jurisdiction and obligations. Subsequently, it will elaborate on the specific extraterritorial instances under which a state can be held responsible under the ECHR for acts of its agents outside its territory, as well as the extraterritorial obligations this entails. It will do so under two jurisdictional models used by the Court and ECommHR, namely the personal model and the spatial model. We will end with the concurrent jurisdiction in case of the spatial model and with some conclusions.

Extraterritorial obligations within the ECHR in a nutshell

The general international obligation of the ECHR states is enshrined in Article 1 ECHR. This clause defines the scope of application of the ECHR and the obligations of the Member States. The European Court links the extraterritorial application of human rights (explicitly or implicitly) with this so-called jurisdiction clause.

(Extra)territorial jurisdiction

The ECHR contains a so-called jurisdiction clause (on its history: Gondek 2009, pp. 84–92; Mallory 2020, pp. 15–23), which holds that every ECHR state is obliged to guarantee the rights

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and freedoms in the ECHR to everyone within its own 'jurisdiction'. Article 1 ECHR reads as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

This implies that the exercise of 'jurisdiction' of a Member State over an act or omission is a prerequisite – a threshold criterion – before a state can be held responsible under the ECHR (ECtHR 2004c, para. 311; Milanovic 2011, p. 19). State responsibility or attribution to a state only arises after it has been asserted that the matter complained of is within the jurisdiction of the Member State concerned (O'Boyle 2004, p. 131). So, the term 'jurisdiction' is an autonomous concept, distinct from the issue of attribution of responsibility for an internationally wrongful act, that is a violation of the Convention (ECtHR 2012a, para. 115; Karakaş and Bakırcı 2018, p. 132).

In Strasbourg case-law, jurisdiction under Article 1 ECHR is primarily a territorial matter, confined within state borders (ECtHR 2004a, para. 139).

In case of acts which have taken place outside the territory of a Member State but have led to civil proceedings in the state concerned, a jurisdictional link has been established (ECtHR 2003a, para. 54). This also counts as to the instigation of a criminal investigation or proceedings within that Member State concerning the death of a person outside that state (ECtHR 2019a, para. 188) or the ill-treatment or deprivation of liberty (ECtHR 2019b, para. 157). The existence of a 'jurisdictional link' was also established between the applicants and Belgium, i.e. the respondent state, failing to fulfil its positive, procedural obligation to cooperate following a European Arrest Warrant issued by Spain regarding a suspected ETA member living in Belgium allegedly implicated in the murder of the father of the applicants (*Romeo Castaño* 2019, paras. 38–42).

In exceptional circumstances, however, Member States may also be held responsible for extraterritorial acts (ECtHR 2001b, para. 67; ECtHR 2011b, para. 131), in light of the particular facts of the case. Over the years the Court has indeed found in a number of instances that states exercised jurisdiction extraterritoriality concerning acts of their authorities producing effects beyond their own territory (ECtHR 2011b, para. 133).

The Court, in *Al-Skeini*, i.e. the leading judgment on extraterritoriality, established a state's extraterritorial jurisdiction and therefore possible responsibility through the use of two models, i.e. (1) when an individual is located within a territory or area over which the state has effective control (*spatial jurisdiction*); (2) when an individual is subject to the authority or control of a state agent (*personal jurisdiction*) (Milanovic 2011, p. 127 and 173).

Overall, the case-law on extraterritorial jurisdiction has received a good deal of criticism. The most outspoken is judge Bonello, who held that it was 'a patch-work case-law at best', with 'case-by-case improvisations, more or less inspired, more or less insipid, cluttering the case-law with doctrines which are, at best, barely compatible and at worst blatantly contradictory'. He pleads for a 'functional test' to jurisdiction, whereby '[j]urisdiction arises from the mere fact of having assumed those obligations [under the ECHR] *and from having the capability to fulfil them* (or not to fulfil them)' and states that a state is effectively exercising 'jurisdiction' 'whenever it falls within its power to perform') (Bonello, Concurring Opinion in ECtHR 2011b, paras. 3–20). Judge Motoc speaks of the case-law as 'one of the most problematic in terms of its application' and with 'several contradictions in the manner in which the Court has interpreted it' (Motoc, Concurring Opinion in *Jaloud* 2015, para. 2; further criticism Hampson 2008, pp. 570–571; Mallory 2020, pp. 8–10). The ECHR states, however, prefer the Court to take a more cautious approach and give a more restrictive interpretation to Article 1 ECHR than it is proposing today (Karakaş and Bakırcı 2018, p. 113).

(Extra)territorial obligations

Once control and authority of ECHR state agents over an individual is established, and therefore jurisdiction, the state has the obligation to secure to that individual the rights and freedoms under the ECHR that are relevant to the situation of the individual concerned. In this sense, therefore, the rights can be 'divided and tailored' (ECtHR 2011b, para. 137; a position which is plainly in contradiction with ECtHR 2001b, para. 75). In *Al-Skeini*, for example, the UK had the obligation to guarantee the victims only those rights and freedoms which were relevant to their situation, i.e. the right to life (ECHR, art. 2).

When an individual is within a territory or area over which the state has effective overall control and is thus within the state's jurisdiction, the state has the obligation to refrain from actions in contravention of the ECHR or its positive obligations to guarantee the rights and freedoms under the ECHR (ECtHR 2004c, para. 322). This concerns the entire range of substantive rights set out in the ECHR and the additional protocols ratified by the respondent state (ECtHR 2001a, para. 77).

The existence of positive obligations in an extraterritorial setting was established for the first time in *Isaak*, where the Court held that Turkey had an obligation to protect the life of the victim (ECtHR 2008a, para. 119).

In what follows, we examine the personal and spatial model of jurisdiction in more detail.

State agent authority and control – personal model

There is extraterritorial jurisdiction in case a state exercises effective control over a person outside its national territory. Such an exercise of effective control over a person may occur in different ways.

Acts of diplomatic personnel abroad or acts of state agents on aircraft or ship

In specific situations, customary international law and international treaties have recognized the extraterritorial exercise of jurisdiction by states (ECtHR 2001b, para. 73). This includes cases involving the activities of diplomatic/consular agents abroad and on board of aircraft and vessels registered in, or flying the flag of a Member State.

Activities of diplomatic or consular agents abroad as exercise of extraterritorial jurisdiction

Activities of diplomatic/consular agents abroad, when they perform certain duties with regard to nationals who are domiciled or resident abroad (ECmHR 1965), amount to the exercise of extraterritorial jurisdiction, when they exercise authority over such nationals (ECtHR 2011b, para. 134) or their property and their acts or omissions thus affect such nationals or property (ECmHR 1977b)

The applicants were within the jurisdiction of a state when German consular staff in Casablanca and Tanger allegedly acted against a German couple, asking the Moroccan authorities to expel the applicant from the country (ECmHR 1965), where the British consul in Amman allegedly failed to provide assistance to a British woman, whose husband had abducted their daughter to Jordan, to restore her custody over her child (ECmHR 1977b), or where the Danish Ambassador in the then DDR requested the police to take a group of 18 East-Germans who had entered the Danish embassy in an attempt to leave their home country (ECmHR 1992).

However, persons simply entering an embassy of a Member State are, by the fact alone that the state exercises administrative control over the premises of its embassies, not brought within that state's jurisdiction. The applicants having submitted a visa application at the embassy of a Member State, are not within the jurisdiction of a state, as – unlike aforementioned case-law – it concerns non-nationals and the diplomatic agents did not exercise a *de facto* control over the applicants, which indeed had freely chosen one embassy above another one and were subsequently free to leave the premises without any hindrance. The Court deemed it irrelevant that the diplomatic agents had, as in the present case, merely a 'letter-box' role, or to ascertain who was responsible for taking the decisions, the Belgian authorities in the national territory or the diplomatic agents abroad (ECtHR 2020b, paras. 114 and 118–119).

Activities on board an aircraft and vessels of a Member State as exercise of jurisdiction

Activities of state agents on board an (air)craft and vessels registered in, or flying the flag of a Member State, are expressions of extraterritorial exercise of jurisdiction, in conformity with customary international law and treaty provisions (ECtHR 2001b, para. 73). The death of a sailor on a Lithuanian merchant vessel off the Brazilian coast did not absolve Lithuania from an obligation to carry out an effective investigation into this death, as the ship belonged to a Lithuanian company, was registered in Lithuania and sailed under a Lithuanian flag, and the relations between the crew and the captain, including those related to safety at work, were determined by Lithuanian law (ECtHR 2016b, para. 63).

Use of force by state agents operating outside state territory

When state agents operating outside the territory of a Member State use force against a person, such person(s) may be subject to the authority or control of the state and may therefore be brought under the jurisdiction of the state (ECtHR 2011b, para. 136).

Use of force by military in or immediately next to a military buffer zone

When a Greek-Cypriot man was kicked and beaten to death by private citizens and at least four Turkish soldiers or soldiers from the north during a demonstration in the UN buffer zone between the North and South of Cyprus, the deceased was deemed to be under the authority and/or effective control of the Member State (Turkey) through its agents, even though the acts complained of took place in the neutral buffer zone. Therefore, the matters complained of fell within the jurisdiction of Turkey (ECtHR 2006). When a petitioner near a Greek-Cypriot checkpoint was hit by a bullet fired cross-border by a Turkish soldier, although he was injured in territory over which Turkey did not exercise control, the opening of fire was the direct and immediate cause of those injuries, and consequently the applicant had to be regarded equally as within Turkish jurisdiction (ECtHR 2008b).

Use of force by police or military when arresting or abducting a person abroad

Following Öcalan's being handed over by the Kenyan authorities to the Turkish agents in the international zone of Nairobi airport and his subsequent arrest on the plane, the PKK (Kurdistan Workers Party) leader was under Turkish authority and control and therefore within Turkish

jurisdiction (ECtHR 2003b, para. 91). Turkey was, with the approval of Kenya, exercising effective control over the applicant within Kenyan territory. In the case of a person who had been detained in Ukraine and handed over to or abducted abroad by Russian state agents – even if the latter were only presumed to be such agents; it also did not matter whether the latter were operating lawfully or unlawfully – jurisdiction had been established, as such person was subject to Russian authority or control allegedly exercised through its agents operating abroad (ECtHR 2019b, para. 161).

Use of force by military when arresting a person on/taking persons on board of naval vessels on the high seas

The sailors of a commercial vessel suspected of drugs smuggling, intercepted and boarded by the French navy on the Atlantic, were brought under French jurisdiction as from the subsequent taking of full, exclusive, uninterrupted, at least *de facto* control by the French military over the vessel and its crew, until the latter were taken off board in Brest (ECtHR 2010, paras. 66–67). Similarly, migrants trying to cross the Mediterranean who were taken on board ships of the Italian navy were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities, in the period between boarding the ships and their handing over to the Libyan authorities (ECtHR 2012b, paras. 81–82).

Use of force by military over persons held in detention centres abroad or killings during a military security operation abroad

Al-Skeini concerned the killing of six Iraqis in Basra by British soldiers in 2003, when the UK had the status of occupying power. Four persons died following gunfire during military security operations, one drowned after being shot and obliged to jump into a river and the last victim died while being tortured at a British military base. It was alleged by the victims' relatives that the British authorities had not conducted a decent investigation into the killings.

The Court noted that following the removal from power of the previous regime and until the accession of the interim Iraqi government at the end of June 2004, the UK (together with the US) assumed in Iraq the 'exercise of some of the public powers normally to be exercised by a sovereign government'. More specifically, the UK assumed authority and responsibility for the maintenance of security in south-east Iraq. In these exceptional circumstances, the UK, via its troops in security operations, exercised authority and control over persons killed during such security operations, so that a jurisdictional link was established between the UK and the persons killed (ECtHR 2011b, paras. 149–150).

Although *Al-Skeini* set the stage for further findings of extraterritorial jurisdiction in the Iraqi context, the Court did not fully overrule its decision in *Banković* (on this case, *infra*). While a personal model of jurisdiction was applied to the killing, this was done so exceptionally, because the UK 'exercised public powers' in Iraq. By focusing on the 'exercise of some of the public powers normally to be exercised by a sovereign government', the Court merely framed the case as an exception to *Banković* (Milanovic 2012, pp. 130–131; also Karakaş and Bakırcı 2018, p. 131 (holding this is 'a drawback')). A contrario, if the UK had not exercised such public powers, the personal jurisdiction model would not have been applicable. And Milanovic pursues: '[w]hile the ability to kill is "authority and control" over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft. Under this reasoning, drone operations (…) wherever

would be just as excluded from the purview of human rights treaties as under Bankovic' (Milanovic 2012, p. 130). In our opinion, it remains unclear whether the present-day Court would now rule differently on extraterritorial jurisdiction for bombing without boots on the ground or without these vague 'public powers'. However, it could also be argued that this line of reasoning is justified. According to Besson, the jurisdiction threshold requires effective, overall and normative power and control, normative indicating that there are reasons for the action with a claim to legitimacy, not just mere coercion (Besson 2012, pp. 872–874). This criterion would manifest itself in the public powers the Court referred to in *Al-Skeini* (Besson 2012, p. 873).

With regard to the merits, namely that the UK allegedly failed to comply with its procedural obligation to investigate the killings, while logically finding a procedural violation of the right to life (ECHR, art. 2) (except for the last victim), the Court was pragmatic and sensible where holding that in circumstances such as in (post-conflict) Iraq at the time 'the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators' (ECtHR 2011b, para. 168), herewith implying that the provision could not be applied in an identical manner as in a country in peacetime, given the difficult conditions *in situ*. So, the Court interpreted Article 2 flexibly, and did not impose unrealistic burdens on the UK, while eventually still finding a violation (ECtHR 2011b, paras. 169–177).

Two Iraqis suspected of involvement in the murders of British soldiers and detained by the British army in a UK-managed military detention centre in south-east Iraq in 2003 were deemed to be under UK jurisdiction until being handed over to the Iraqi authorities in 2008. The Court based itself on the total and exclusive *de facto* and later also *de jure* control of the UK over the detention centre and the detained Iraqi's there (ECtHR 2009b, paras. 86–89), although the *de facto* control was decisive (Karakaş and Bakırcı 2018, p. 128).

In the case of the internment of an Iraqi citizen in a British-run detention centre from October 2004 until December 2007, the UK exercised exclusive control over the facility and the detention was decided upon by a British soldier. Therefore, the Court concluded that the applicant was placed within the authority and control of the UK and the detention was ultimately attributable to the UK (*Al-Jedda* 2011, para. 85). Strasbourg was not persuaded by the argument that the detention should have been attributed to the UN, since the organization did not have effective control or ultimate authority over the acts of the troops in the Multinational Force (ECtHR 2011c, paras. 78–84).

In *Hassan*, an Iraqi citizen, between being captured somewhere in 2003 by British troops in the morning and his admission to a detention camp later that afternoon, was within the physical power and control of the UK soldiers and therefore fell within UK jurisdiction. In the ensuing period in a US-run detention camp, Hassan continued to fall under the authority and control of UK forces as he was admitted as a UK prisoner. Moreover, shortly after his admission, he was taken to a compound entirely controlled by UK forces. While under UK jurisdiction in accordance with the US-UK MOA concerning the detainees, the UK was responsible for the classification of its detainees and for the decision to release them. While certain operational aspects relating to Hassan's detention were transferred to US forces, in particular as to the escorting and guarding Hassan, the UK retained authority and control over all aspects of the detention relevant to the case. Hassan remained in the custody of armed military personnel and under the authority and control of the UK until his release from the bus that took him from the detention camp to the drop-off point, so that Hassan fell within the UK's jurisdiction from the moment of his capture by UK troops until his release (ECtHR 2014b, paras. 76–78).

Use of force by military over persons at a checkpoint abroad

In *Jaloud*, an Iraqi citizen died in 2003 when soldiers at a Dutch/Iraqi-manned checkpoint in south-east Iraq under the command and direct supervision of a Dutch officer had opened fire at the vehicle in which he was occupying the front-seat. The fact that the Dutch soldiers at the checkpoint functioned under the operational control of the UK did not absolve the Netherlands of its responsibilities under the Convention (ECtHR 2014a, para. 143). The Court emphasized especially that the Netherlands retained 'full control' over the Dutch soldiers, who had not been placed 'at the disposal' or 'under the exclusive direction or control' of any other state (ECtHR 2014a, paras. 143–151). The alleged victim was deemed to be under the jurisdiction of the Netherlands, since the Netherlands exercised its jurisdiction within the limits of the Stability Force in Iraq Mission and for the purpose of asserting authority and control over persons passing through the checkpoint (ECtHR 2014a, paras. 152–153). The control over the checkpoint was clearly enough for jurisdiction to materialize (Mallory 2020, p. 181), and effective control over the related territory was therefore not necessary to have jurisdiction (Karakaş and Bakırcı 2018, p. 132). This seems to be corroborated in a separate opinion, which speaks of authority and control over persons passing through the checkpoint (concurring opinion Spielmann and Raimondi in ECtHR 2014a).

Foreign individuals exercising state authority with its agreement

The Court has recognized the exercise of extraterritorial jurisdiction by a Member State when the Member State, through the consent, invitation or acquiescence of the local government of that territory, exercises all or some of the public powers normally to be exercised by that government (ECtHR 2001b, para. 71; ECtHR 2011b, para. 135). Therefore, where, in conformity with custom, an international treaty or another agreement, the authorities of the Member State carry out executive or judicial functions on the territory of another state, the Member State may be responsible for violations thereby incurred, as long as the acts in question are attributable to it rather than to the territorial state (ECtHR 2011b, para. 135; ECtHR 2014b, para. 74). In *Drozd and Janousek*, two convicted criminals alleging that an Andorran court, composed of judges appointed by Spain and France, was incompatible with the right to a fair trial, did not fall under French or Spanish jurisdiction. The judges did not act as French or Spanish judges, the court was independent from both countries, which did not interfere with the proceedings (ECtHR 1992, para. 96). When an arrest warrant containing an irregularity is issued by an ECHR state, the requesting state is responsible under the ECHR for the detention in the other state, even if it was executed by the other state in compliance with its international obligations, as long as the requested state could not have detected this irregularity (ECtHR 2009a, para. 52).

Effective control over an area – spatial model

There is extraterritorial jurisdiction in case a state exercises effective control over a territory outside its national territory, either through a military occupation or through a subordinate or separatist local administration (ECtHR 2012a, para. 106; ECtHR 2016a, para. 98). This assessment will primarily depend on military involvement, i.e., the strength of the state's military presence in the area (ECtHR 1996, para. 56), but other indicators, such as military, political and economic-financial support to a separatist or subordinate local administration may also be of relevance (ECtHR 2012a, para. 107). According to Mallory, the duration of time a state will need to have spent exerting such influence or support may appear to be the determining factor

before the jurisdiction it exercises moves from the personal ground to the spatial ground (Mallory 2020, p. 191).

The Court now accepts that there can be extraterritorial jurisdiction within but also beyond the territory ('espace juridique') covered by the CoE states (ECtHR 2011b, paras. 138–142).

Initially, in *Banković*, where the applicants complained about a NATO (North Atlantic Treaty Organization) bombing of Serb radio and television premises in Belgrade in April 1999 and claimed that the 17 respondent NATO states had exercised effective, extraterritorial control through the bombing, which created a jurisdictional link with the applicants, the Court disagreed with this argument, stating that such an approach to jurisdiction would go too far (ECtHR 2001b, para. 75). The dropping of bombs from the air on persons outside an ECHR state's territory did not create a jurisdictional link in the sense of Article 1 ECHR. The Court also stressed that the ECHR operates in an essentially regional context and notably in the *espace juridique* of the contracting states, which Yugoslavia was not a part of (ECtHR 2001b, para. 80). The Court received heavy criticism for its inadmissibility decision (e.g. Altiparmak 2004, pp. 242–243; Leach 2005, p. 57; Loucaides 2006, pp. 398–399 (all criticizing the *espace juridique* criterion)). These statements set a sombre stage for extraterritorial human rights protection in non-Member States.

Subsequently, the Court rejected the notion of *espace juridique* in a number of cases on Turkish military operations in Iraq and Iran (ECtHR 2004b, paras. 73–81; ECtHR 2007, paras. 54–55), but especially in its ensuing *Al-Skeini* Grand Chamber case concerning British military security operations in Iraq. Ruling on the killing or fatally wounding of a number of Iraqi nationals in Southern Iraq in 2003, the Court retraced its steps in *Banković* by denying that jurisdiction can never exist outside of the territory of the CoE states. It first confirmed that where the territory of an ECHR state is occupied by the armed forces of another ECHR state, the occupying state should in principle be held accountable under the ECHR for human rights violations within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights hitherto enjoyed and would result in a 'vacuum' of protection within the 'legal space of the Convention'. However, the Court thereafter said that the importance of establishing the occupying state's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction can never exist outside the territory covered by the CoE states and underscored that it had not in its case-law applied any such restriction (ECtHR 2011b, para. 142; Milanovic 2012, p. 129).

Moreover, in *Issa*, the ECtHR held that it did not exclude that effective control could be exercised in a temporary manner (ECtHR 2004b, para. 74).

The application of the ECHR to military operations abroad has in turn led to certain unease with some ECHR states, and certainly within the UK, which is concerned about its military operations abroad, and in 2016 floated the proposal of entering an 'extraterritorial derogation' (Rooney 2016, pp. 656–663; pro: Milanovic 2016, p. 55 and Wallace 2019, p. 193; nuanced contra: Mallory 2020, pp. 134–136 and 203–204).

Military occupation

A Member State may exercise extraterritorial jurisdiction in case of a 'traditional' military occupation. The Court thereby refers to Article 42 of the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907), which reads as follows: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised'. However, the qualification as an 'occupying power' is not *per se* determinative to conclude whether certain

facts fall within a state's extraterritorial jurisdiction (ECtHR 2014a, para. 142). There is no direct correlation between occupation and effective control of an area (Mallory 2020, p. 188).

In order to establish whether a state has effective control over an area, it seems that the strength of the military presence and extent to which a state supports a regime militarily, economically and politically play a role (ECtHR 2011b, para. 138), while the size of the occupying military forces also seems to play a role (*supra*) (also Mallory 2020, p. 190). Anyway, *Al-Skeini* (ECtHR 2011b, paras. 143–150) and subsequent cases (e.g. ECtHR 2014a; ECtHR 2014b) seem to demonstrate that the Court avoids the question of extraterritorial jurisdiction based on effective control over territory in *Al-Skeini*-like cases, approaching these cases from a perspective of individual personal jurisdiction instead. It has also been pointed out that, as individual personal jurisdiction had already been established in *Al-Skeini*, and that in its subsequent *Hassan* judgment, the Court itself indicated that factual info available (under 'Facts') in *Al-Skeini* simply tended to demonstrate that the UK was far from being in effective control of the area which it occupied, the Court had deemed an analysis of extraterritorial jurisdiction based on effective control over territory unnecessary (Guide 2019d, para. 54).

Unrecognized subordinate or separatist local administration

The acquiescence or connivance of the authorities of an ECHR state in the acts of private individuals which violate the ECHR rights of other individuals within its jurisdiction may engage the state's responsibility (ECtHR 2001a, para. 81), especially in the case of recognition by the state concerned of the acts of self-proclaimed authorities which are not recognized by the international community (ECtHR 2004c, para. 318). The responsibility of states has been examined with regard to such authorities in Northern Cyprus, Transdniestria and Nagorno-Karabakh.

The responsibility of Turkey has been examined as to facts which took place during its military intervention in the north of Cyprus in 1974 and the subsequent establishment of the Turkish Republic of Northern Cyprus (TRNC). On different occasions the Court has said that the alleged acts have taken place under the jurisdiction of Turkey.

In *Loizidou*, the Court held that the fact that the Greek-Cypriot applicant had lost control of her property in Northern Cyprus stemmed from the occupation of that part of Cyprus by Turkish troops and the establishment there of the TRNC, as well as the fact that she was prevented by Turkish troops from gaining access to her property (ECtHR 1995, paras. 63–64). It was not deemed necessary to determine whether Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC, as it was obvious from the large number of troops engaged in active duties that the Turkish army exercised effective overall control over the north of the island. Such control entailed its responsibility for the TRNC policies and actions. Consequently, persons affected by such policies or actions came within Turkish jurisdiction (ECtHR 1996, paras. 56–57). In *Cyprus v. Turkey*, it was confirmed that as Turkey had effective overall control over Northern Cyprus, its responsibility was not restricted to the acts of its own soldiers or officials, but was also engaged by virtue of the acts of the local administration which survived by virtue of Turkish military and other support (ECtHR 2001a, para. 77).

In turn, Russia has been examined as to its jurisdiction and eventually responsibility for various alleged ECHR violations taking place in the Moldavian Republic of Transdniestria (MRT), a breakaway territory within Moldova not recognized by the international community. In *Ilascu* a petition was lodged by a number of persons as to the imposition of the death penalty, ill-treatment following the arrest and detention and some other issues. The Court found that, in view of Russia's military and political support to setting up a separatist

regime in Transdniestria (1991–1992) and the subsequent continued military, political and economic support to the separatist regime, Russia's responsibility was engaged with regard to the unlawful acts in which Russian state agents participated and those committed by the Transdniestrian separatists. The MRT remained under the effective authority, or at the very least under the decisive influence, of Russia, and survived by virtue of the Russian military, economic, financial and political support. Therefore, the applicants were within the jurisdiction of Russia (ECtHR 2004c, paras. 379–394). In the follow-up case of *Ivantoc*, which was lodged by two persons being kept in prison despite their detentions having been found in contravention of the ECHR in the previous judgment, the Court did not see any changes as to the Russian policy and collaboration with the MRT, nor did it see a Russian attempt to end the applicants' situation brought about by its agents. After the July 2004 *Ilascu*-judgment and at least until the applicants' release in June 2007, Russia had continued to enjoy a close relationship with the MRT, amounting to providing political, financial and economic support to the separatist regime. Besides, the Russian army was at the date of the applicants' release still stationed on Moldovan territory in breach of Russia's undertakings to withdraw completely and in breach of Moldovan legislation. Finally, Russia continued to do nothing to prevent the alleged violations after July 2004 nor to terminate the applicants' situation brought about by its agents. Consequently, the applicants continued to be within Russian jurisdiction until their release (ECtHR 2011a, paras. 116, and 118–120). In *Catan*, which concerned a petition concerning the closure of a number of schools by the local administration because the schools had continued using the Latin alphabet notwithstanding a prohibition, as well as harassment, the Court basing itself on the evidence presented and relying on its *Ilascu* and *Ivantoc* findings, held that during the period concerned (2002–2004) the separatist local administration enjoyed continued Russian military, economic and political support. Therefore, although there was no evidence that Russian state agents were involved in the actions against the schools, Russia exercised effective control over Transdniestria, and the alleged facts thus fell within Russian jurisdiction (ECtHR 2012a, paras. 116–123). In turn, Moldova's jurisdiction was limited to certain residual positive obligations (ibid, paras. 109–110 (see infra)). Since then, on multiple occasions, similar conclusions were reached in further cases (e.g. ECtHR 2016a, paras. 109–111; ECtHR 2020a, paras. 44 and 48).

Finally, Armenia has also been assessed as to acts which had taken place in the Nagorno-Karabach region in Azerbaijan. In *Chiragov* the petitioners held that they were unable to access their homes as a result of their displacement due to the conflict between Armenia and Azerbaijan during the first half of the 1990s. While Armenia said that it could not be held responsible for acts of the autonomous Nagorno-Karabach Republic (NKR), the Court held that on the basis of the evidence presented that firstly, as to military involvement, the Armenian military support had been/was decisive for the conquest of and continued control over the territories concerned, and the evidence showed that the Armenian armed forces and the NKR forces were highly integrated; secondly, there was clear political and legal integration, given the general political support given by Armenia to the NKR, the interchange of prominent politicians, the need for NKR residents to acquire Armenian passports for travel abroad, the adoption of Armenian legislation in the NKR, the presence of Armenian law-enforcement agents and the exercise of jurisdiction by Armenian courts in the NKR; and thirdly, as to finances, the Armenian financial support was substantial, to the extent that the NKR would not be able to subsist economically without this support (ECtHR 2015, paras. 172–185). The Court concluded that from the beginning of the conflict, Armenia had had a significant and decisive influence over the NKR, that the two entities are highly integrated in virtually all important matters. The NKR and its administration survived by virtue of the military, political, financial and other support given to

it by Armenia which, consequently, exercised effective control over Nagorno-Karabakh and the surrounding territories. The matters at the basis of the application therefore came within the jurisdiction of Armenia (ibid, para. 186).

Concurrent jurisdiction in case of the spatial model of jurisdiction

Acts which have happened in an ECHR state confronted with a military occupation or a subordinate or separatist local administration, are, as a starting point, still presumed to have happened within the jurisdiction or competence of the ECHR state concerned. However, this presumption of jurisdiction or competence is rebuttable (ECtHR 2004a, para. 139).

The territorial jurisdiction may be limited where a state is prevented from exercising its authority in part of its territory as a result of military occupation by the armed forces of another state which effectively controls the territory concerned, acts of war or rebellion, or the acts of a foreign state supporting the installation of a separatist state within the territory of the state concerned. If such a situation is proven, the state's responsibility is limited to the positive obligations to take all the appropriate measures still within its power to take ('residual positive obligations'), i.e. to take the diplomatic, economic, judicial or other measures in accordance with international law to secure to the applicants the ECHR rights (ECtHR 2004c, paras. 312–313 and 331). It must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign states and international organizations, to continue to guarantee the ECHR rights (ibid, para. 333). While it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures taken were in casu appropriate and sufficient. When faced with a partial/total failure to act, the Court must determine to what extent a minimum effort was nevertheless possible and whether it should have been made, especially in Article 2 and 3 cases (ECtHR 2004c, para. 334; for criticism: Milanovic and Papic 2018).

Conclusions

In a globalizing/globalized world, extraterritorial acts by ECHR states may easily lead to extraterritorial human rights violations. In Europe the scope of extraterritorial obligations is closely tied to the ECHR's jurisdiction clause. States will be internationally responsible not only for human rights violations attributed to them within their own territory, but also for actions and omissions perpetrated outside their territory but within their jurisdiction. It is therefore interesting to explore to what extent the obligations incumbent on states under the ECHR extend beyond the national borders or territorial waters of its Members. Over the past decades, the Court has, through its case-law, gradually broadened the application and protection offered by the ECHR, be it not always in a clear and coherent way, but still beyond the confines of Europe.

The Court, in its leading *Al-Skeini* judgment on the issue of extraterritoriality, which was a unanimous decision of the Grand Chamber, has established a state's extraterritorial jurisdiction under Article 1 ECHR – jurisdiction being the threshold issue before issues of state responsibility – and therefore possible responsibility through the use of two models of jurisdiction, namely the 'spatial model' (when an individual is located within a territory or area over which the state has effective control) and the 'personal model' (when an individual is subject to the authority or control of a state agent).

Importantly, the Court has also underscored in the same judgment that jurisdiction can exist outside the territory ('espace juridique') covered by the CoE states, thereby setting aside its earlier *Bankovic* decision on this point (but which has in turn led to certain unease with some

ECHR states, and certainly within the UK, which – concerned about its military operations abroad – in 2016 suggested to enter an 'extraterritorial derogation').

During the past decade, the Court has been generous as to its understanding of extraterritorial jurisdiction. The Strasbourg case-law provides ample illustrations of extraterritorial situations which are dealt with under the 'personal jurisdiction model'. It concerns extraterritorial cases such as acts of diplomatic personnel abroad or acts of state agents on aircraft or ship as exercise of extraterritorial jurisdiction in accordance with principles international and Article 1 ECHR, the use of force in a regular, classic wartime scenario (e.g. Iraq) by state agents operating outside state territory as exercise of extraterritorial jurisdiction, such as force used by military personnel in or immediately next to a military buffer zone, by police or military when arresting or abducting a person abroad, by the military when arresting a person on/taking persons on board of naval vessels on the high seas, by the military over persons at a checkpoint or over persons held in detention centres abroad, or killings during a military security operations abroad, as well as where foreign individuals exercise state authority with the latter state's agreement. In contrast, bombing abroad does not amount to jurisdiction.

In turn Strasbourg cases handled under the 'spatial jurisdiction model' exclusively relate to situations where a subordinate, breakaway administration receives support from an ECHR Member State (Transdniestria, Nagorno Karabakh, North Cyprus). The sparing application by the Court of the 'spatial model' is due to the fact that the threshold to find that a Member State has effective control and therefore exercises jurisdiction over a region or territory is quite high.

Overall, it is to be expected in the mid and long term that the Strasbourg case law will further expand and broaden the extraterritorial application of the ECHR in the ambit of the 'personal jurisdiction model'. A range of upcoming cases concerning the conflict between Ukraine and Russia in East-Ukraine and the Crimea, extraterritorial assassination attempts or targeted killings through the use of drones beyond the borders of the ECHR states, an extraterritorial environmental case, and extraterritorial pullback migration cases in the Mediterranean, as well as surveillance cases will undoubtedly lead to further refinement of the Strasbourg case-law on extraterritorial jurisdiction and extraterritorial obligations.

Which indeed brings us to the key issue of extraterritorial state obligations under the ECHR. The state's jurisdiction, and its exercise, is closely tied up to its ECHR obligations. Member States are obliged to guarantee the protected rights. More specifically, where control and authority of state agents over an individual and therefore jurisdiction abroad have been established, the state has the extraterritorial obligation to secure to that individual the rights and freedoms under the ECHR which are relevant to the situation of the individual concerned. However, where effective control over an area has been established, therefore bringing that area and the persons there within the state's jurisdiction, the state has the extraterritorial obligation to refrain from actions which go against the full range of ECHR rights and must also comply with its positive obligation to guarantee those rights and freedoms.

While the Court's present-day case-law following *Al-Skeini* has shed light on a number of issues, its case-law remains very contextual and has attracted criticism in that regard, to the extent that next to, or even instead of the two existing jurisdictional models, i.e. the 'spatial model' and the 'personal model', some former ECtHR judges (e.g. Loucaides, already far earlier than Al-Skeini, in a Concurring Opinion in ECtHR 2004a; and Bonello in a Concurring Opinion in ECtHR 2011b), as well as certain legal doctrine (Gondek 2009, p. 375; Lawson 2011, p. 70; Mallory 2020, pp. 205–211), have been arguing in favour of a third, 'functional jurisdiction model' (while often proposing different variations but connected with a state's power). This model would grosso modo imply that a Member State must respect and protect

ECHR rights and freedoms of persons with regard to whom it is in a position to respect and protect, to the extent it is in a position to do so (see also Milanovic 2011 and Mallory 2020, pp. 206–211 (who advocate for a division between 'negative obligations' – which should automatically be falling under the jurisdiction of a Member State – and 'positive obligations' – which Milanovic restricts to areas where a Member State exercises effective control – while Mallory proposes a functional test of whether the action required was one within the power of the Member State).

Meanwhile, across the Atlantic, in its 2017 Advisory Opinion on Environment and Human Rights, the Inter-American Court of Human Rights has broadened what constitutes extraterritorial jurisdiction by recognizing a new extraterritorial 'functional jurisdiction model or link' based on control over domestic activities with extraterritorial effect (even where the Inter-American Court has said that extraterritorial obligations are 'exceptional'), thereby departing from the two existing criteria to establish extraterritorial jurisdiction. While the functional model has thus as such been given certain traction by the Inter-American Court, it remains to be seen whether the European Court will follow suit, especially in times where human rights are experiencing a certain backlash and the Court might be wary of losing chunks of its built-up legitimacy.

Whereas a functional approach would extend the scope of protection offered by the ECHR, implying that certain issues such as extraterritorial assassination attempts or targeted killings through the use of drones beyond the borders of the ECHR states, and extraterritorial pullback migration cases with the distanced assistance of ECHR states on the high seas, would be within the jurisdiction of the implementing state, and maybe even impact extraterritorial or cross-border environmental cases or actions of the Member States (transnational) companies abroad, this might ultimately also push back against the European human rights system, or even lead to withdrawals from the ECHR altogether.

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