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" An Examination of whether the Jurisprudence of the European Court of Human Rights on the Extraterritorial Application of the European Convention on Human Rights is Well-Settled"

by

Omer YILMAZ

Student ID Number: 4286584

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
App.	Application
Com.	Communication
Dec.	Decision
ECHR	European Convention on Human Rights
ECrtHR	European Court of Human Rights
edn.	Edition
ed.	Editor
eds.	Editors
et al.	et alia (and others)
HRC	Human Rights Committee
ibid.	ibidem (in the same place)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
No.	Number
OAS	Organization of American States
p.	page
para	paragraph
UK	United Kingdom
UN	United Nations
US	the United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of the Treaties
Vol.	Volume

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I. INTRODUCTION

Historically, human rights treaties were drawn up as legal instruments aimed at inhibiting violations by governments of the rights of individuals falling within their own populations.[1] Nevertheless, the conduct of states also has an effect on the rights of individuals located outside the national territories of those states. In a highly globalised world, it is possible to observe numerous examples of this situation because of certain factors, such as the increase in military operations abroad. Similarly, with the advent of the global "war on terror", some states have further engaged in activities in the territories of other states, which constitutes an infringement of their commitment to human rights treaties.[2] For instance, certain states have used lethal force against individuals through their agents or through the employment of armed drones, or have illegally arrested them and held them in custody in detention facilities, where they have been subjected to torture or inhuman treatment. All of these violations have brought the extraterritorial application of human rights treaties into question.

The extraterritorial application of a human rights treaty refers to the recognition by states who are party to it of the rights of individuals located outside their territories, and to the determination of their obligations to those individuals.[3] The violating conduct does not need to be executed within the territory of the relevant state. The decisive element for determining whether or not an application is extraterritorial is the fact that the affected individual, at the time of the alleged violation, is located outside the sovereign borders of that state.[4] Illegal arrests or abductions and targeted killings on foreign soil, or violations committed during military occupations by States who are party to the European Convention on Human Rights (hereafter the ECHR, or Convention), have triggered the extraterritorial application of this Convention.[5] Also, due to the global war on terror, the number of cases

[1] Michal Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' [2005] 52 Netherlands International Law Review 349 at 351
[2] Erik Roxstrom, Mark Gibney and Terje Einarsen, 'The NATO Bombing Case and the Limits of Western Human Rights Protection' (2005) 23 B. U. Int'l L. J. 55 at 57; Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 Mich. J. Int'l Law
[3] Samantha Besson, 'The Extraterritoriality of European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857 at 858
[4] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy,* (OUP 2011)
[5] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Rome

brought before the European Court of Human Rights (hereafter the ECrtHR, or Court) continues to grow. Therefore, this study is an examination of whether the jurisprudence of the Court on the extraterritorial application of the Convention is sufficiently well-settled to provide enough protection for individuals, regardless of their location.

In order to be able to assess whether the Court has followed a consistent route with regard to the extraterritorial application of the Convention, relevant cases will, as far as possible, be chronologically examined in four stages. Firstly, early jurisprudence will be analysed under the headings of the basic models of jurisdiction, namely the personal and spatial models, as developed by the Convention's organs. This will be followed by a deep analysis of the case of *Bankovic and Others v Belgium and Others*, which is the primary reason for the controversies on the subject.[6] Thereafter, the cases which were decided after *Bankovic* will be scrutinised in order to highlight how they overruled certain unacceptable holdings of that decision. Finally, the case of *Al-Skeini and Others v United Kingdom* will be reviewed, in order to determine whether it could eliminate the prior controversies and bring some coherence to the issue.[7] The study will close with an analysis of some complex scenarios in which individuals still appear to be unable to claim protection under the Convention. However, before all of this is addressed, Article 1 of the ECHR, which is referred to as the jurisdiction clause and defines the extraterritorial scope of the Convention, will be explored. The focus in this section will mainly be on the distinction of the notion of jurisdiction in human rights law from similar concepts in public international law. Then, a brief analysis will be made on the question of how other human rights supervisory bodies approach the extraterritorial application of their relevant treaties.

II. THE NOTION OF JURISDICTION IN ARTICLE 1 OF THE ECHR

The majority of core human rights treaties include the so-called jurisdiction clauses, which serve to determine the range of individuals to whom Contracting Parties are obligated to secure the rights provided in those treaties. In principle, it is accepted that these treaties in general, and the ECHR in particular, apply to extraterritorial acts of States.

[6] *Bankovic and Others v Belgium and Others* (2001) 11 BHRC 435 (hereafter *Bankovic)*
[7] *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18 (hereafter *Al-Skeini)*

However, the meaning of the word jurisdiction under human rights law is unsettled, which complicates the determination of when and to what extent States are responsible for extraterritorial conduct.[8] The issue of extraterritoriality is one of the contentious areas in human rights law, to which public international law concepts such as jurisdiction are applied in a rather specific context. The resulting tensions caused by the interplay between these two branches of international law lead to questions over when the extraterritorial acts of a Contracting Party to the ECHR may be subject to legal challenges before the Court.[9]

Whether the territorial scope of the Convention extends beyond the national borders of the Contracting Parties must be ascertained pursuant to Article 1 ECHR, which lies at the heart of the debate on the matter. It prescribes that:

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

The expression 'within their jurisdiction', serving as the trigger mechanism for the applicability of the Convention, means that, without state jurisdiction, individuals cannot invoke the substantive rights enshrined in the Convention against violating states. Therefore, jurisdiction in Article 1 is a threshold criterion which must be satisfied before examining whether alleged conduct is attributable to a state in order for its responsibility to arise.[10] In other words, when any states undertake activities beyond their domestic boundaries, the question of jurisdiction becomes the main issue that must be initially dealt with.[11] Therefore, the interpretation of the term jurisdiction gains importance when looking to satisfy the problem which arises when individuals are deemed to be found within the jurisdiction of a state, despite remaining outside of that state's territory.

In cases related to extraterritorial application of the ECHR, the Court held that 'the concept of "jurisdiction" in Article 1 must be considered to reflect the term's meaning in public international law'.[12] Considering this approach, the Court must be guided by the

[8] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9:4 HRLR 521 at 521
[9] Gondek (n 1) 351
[10] Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004); Besson (n 3) 862
[11] Gondek (n 1) 352
[12] *Issa and Others v Turkey* (2005) 41 EHRR 27 para 67

general principles of international law in interpreting the phrase 'within their jurisdiction'.[13] Accordingly, it has done so in these cases, particularly in *Bankovic*, stating that:

> "As to the ''ordinary meaning'' of the relevant term in Article 1 of the Convention, the Court is satisfied that, *from the standpoint of public international law*, the jurisdictional competence of a State is primarily territorial (…) The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction…"[14]

The Court here suggests that the term jurisdiction in Article 1 refers to the meaning of that term in public international law;[15] to put in a different way, the concept of jurisdiction in the Convention is the same as the concept of jurisdiction which exists in public international law.[16] However, this main assumption of the Court is untenable and unconvincing.[17] It confuses two totally different understandings of jurisdiction subsisting in public international law and international human rights law.

The notion of jurisdiction within the meaning of public international law refers to the power of a state to prescribe rules to regulate the conduct of persons, and to enforce them in particular situations where it is legally permitted.[18] There are two types of jurisdiction in public international law, namely prescriptive (or legislative) and enforcement jurisdiction. While the former refers to the right of a state to prescribe the rules establishing its domestic law, the latter implies the possibility of that state enforcing those rules. Finally, the legally permissible bases of extraterritorial jurisdiction in public international law can be enumerated as the nationality, passive personality, protective and universality principles.[19] These categories indicate that some connecting factors such as nationality or vital state interest are required in order for a state to establish its jurisdiction.[20]

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[13] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20:4 EJIL 1223 at 1230
[14] *Bankovic and Others v Belgium and Others* (n 6) para 59-61
[15] Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013)
[16] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8:3 HRLR 411 at 417
[17] ibid 419; Wilde, *Civil and Political Rights* (n 15) 640
[18] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Isr. L. Rev. 503 at 513; See generally Malcolm N. Shaw, *International Law* (7th edn CUP 2014) 469
[19] Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law*, (4th edn OUP 2014)
[20] Milanovic, *From Compromise to Principle* (n 16) 421

On the other hand, the function of the concept of jurisdiction in the Convention is quite different, as it concerns the relationship between states and the individuals to whom those states owe obligations, as envisaged in the Convention.[21] The purpose of the concept of jurisdiction in public international law is to determine whether a state, exercising extraterritorial authority, is lawfully entitled to do so with respect to another state. In contrast, jurisdiction within the human rights context concerns, regardless of the legality of the action, the existence of the effective authority of that state over the area where the violation has occurred, or over the persons whose rights have been infringed.[22] Since the jurisdiction of a state in public international law may only arise when it exercises its competence on a lawful basis, the Court's assumption implies that only the lawful exercise of jurisdiction can trigger the extraterritorial application of the ECHR. However, this is a perverse implication: a state may be exercising extraterritorial jurisdiction within the meaning of human rights law without a lawful basis, since it implies a factual relationship between the violating state and the victim.[23] Thus, states' human rights obligations cannot be deemed inapplicable just because of the illegality of the conduct in question.[24]

Conflating these two entirely different concepts of jurisdiction, and to hold that the jurisdiction of a state can only arise where it exercises that jurisdiction within the meaning of public international law on a lawful basis, leads to unacceptable results in both legal and political terms.[25] For example, if a state abducts a person, with whom there is no connecting factor such as nationality or state interest, from the territory of another state without its consent, the abducting state cannot be deemed as exercising its jurisdiction legally within the meaning of public international law. However, the unlawful nature of such conduct cannot prevent the rise of jurisdiction in human rights law. To hold otherwise enables states acting beyond their legal competences to circumvent their Convention

[21] Miller (n 13) 1232
[22] Michael Duttwiler, 'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights' (2012) 30:2 Netherlands Quarterly of Human Rights 137 at 141
[23] Wilde, *Civil and Political Rights* (n 15) 640; Milanovic, *From Compromise to Principle* (n 16) 423; Leonard Hammer, 'Re-examining the Extraterritorial Application of the ECHR to Northern Cyprus: The Need for a Measured Approach' (2011) 15:6 The International Journal of Human Rights 858 at 861
[24] Gondek (n 1) 364
[25] Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 185 at 196

obligations.[26] Thus, neither the concept of jurisdiction nor the factors necessary for extraterritorial jurisdiction under Article 1 are equivalent to the concept of jurisdiction and the recognised bases of extraterritorial jurisdiction in public international law.

Another issue that must be delineated from the notion of jurisdiction under Article 1 is the concept of attribution. This is particularly important in order to determine at which stage of the proceedings the jurisdiction of the relevant state will be assessed by the Court. The international responsibility of a state arises when an internationally wrongful act resulting from an action or omission is attributable to that state and amounts to a breach of its international obligations, as envisaged in the international treaties to which it is a party; thus, the concept of attribution is a constituent element of state responsibility.[27]

State jurisdiction under Article 1 is a distinct concept from the issue of whether conduct violating the Convention is attributable to the relevant state. Attribution is based on the relationship between the state and the actor of the breach, yet jurisdiction concerns the relationship between the state and the individuals whose rights are violated.[28] In other words, the conduct can be found to be attributable to the state when it has control over the perpetrators, while jurisdiction can be established when that state exercises control over the victims or over the area in which those victims are situated.[29]

The question of imputability comes later, once the jurisdiction of the Contracting Party has been established under Article 1.[30] Jurisdiction is a preliminary stage to the issue of attribution and responsibility. If the alleged victim does not fall within the jurisdiction of the Contracting Party, there are no obligations that must be secured to that person, and thus there is no need to examine whether the conduct is attributable to that party.[31]

However, in certain circumstances, before examining the existence of jurisdiction, the determination of whether or not conduct is imputable to the state may be required.[32]

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[26] King (n 8) 536
[27] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 2, in Report of the International Law Commission: U.N. Doc. A/56/10 (Sept. 6, 2001);
[28] John Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law' (2006) 5 Center for Human Rights and Global Justice Working Paper 1 at 27
[29] Milanovic, *From Compromise to Principle* (n 16) 446
[30] O'Boyle (n 10) 130; De Schutter (n 25) 190
[31] Besson (n 3) 867
[32] Milanovic, *Law, Principles, and Policy* (n 4) 51

This is because it may be necessary to clarify whether the actors of the conduct have acted on behalf of the violating state. For example, if the perpetrators are state agents who are placed at the disposal of international organisations such as the North Atlantic Treaty Organization (NATO) or the United Nations (UN), the question of the imputability of their conduct may become a prerequisite for the establishment of jurisdiction.[33] However, this should not obscure the fact that they are two distinctive concepts.

Having clarified the notion of jurisdiction in Article 1, and its distinctness from other relevant concepts, the study will proceed to identify the circumstances under which an individual falls within the jurisdiction of Contracting Parties. Yet, prior to that, it will be useful to examine the extraterritorial application of other core human rights treaties, which is of importance for identifying the extraterritorial scope of the Convention.

III. EXTRATERRITORIAL SCOPE OF OTHER HUMAN RIGHTS INSTRUMENTS

A) International Covenant on Civil and Political Rights

The issue of whether individuals are protected against the extraterritorial conduct of states has also arisen in the context of the International Covenant on Civil and Political Rights (hereafter ICCPR, or Covenant), and the Human Rights Committee (hereafter HRC, or Committee), the treaty body of the ICCPR, and the International Court of Justice (hereafter ICJ) sought to figure out the problem by interpreting the jurisdiction clause stipulated in Article 2(1) of the ICCPR. This article provides that, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant..."[34]

The literal interpretation of this article suggests that state parties have to discharge their obligations only towards individuals within their territory and, at the same time, subject to their jurisdiction. This interpretation of the Covenant was echoed by Dennis and Surena, who invoked preparatory works and state practise to justify their argument.[35]

[33] Cerone, *Out of Bounds?* (n 28) 27
[34] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2(1) (*emphasis added*)
[35] Michael J Dennis and Andre M Surena, 'Application of International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice' (2008) 6 E.H.R.L.R. 714-731

However, their approach was criticised by Rodley, on the grounds that it did not take into account the context and object and purpose of the Covenant as required by Article 31 of the Vienna Convention on the Law of Treaties (hereafter VCLT).[36] Similarly, some distinguished commentators have rightly argued that the expression "within the territory and subject to its jurisdiction" must be considered a disjunctive conjunction, which obligates state parties to secure the Covenant rights to all individuals subject to their jurisdiction, even if they are situated outside the territorial boundaries of those states.[37]

The HRC has already adopted the second interpretation in individual communications. In *Lopez Burgos v. Uruguay*, the applicant, an opposing trade union leader who fled to Argentina, was detained in Argentina by Uruguayan agents with the help of Argentine paramilitary groups, and was returned to Uruguay where he was mistreated. The HRC, holding that the arrest and detention in Argentina were arbitrary, observed that:

> "The reference in article 1 of the Optional protocol (…) is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights, wherever they occurred. Article 2 (1) of the Covenant (…) does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State. (…) it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetuate on its own territory."[38]

It appears that the Committee based the jurisdiction of the state on the personal model by considering it as the relationship between the individual and the state, regardless of where the violation occurred.[39] However, it did not elaborate on the nature of this relationship. It can be argued that the Committee regarded the jurisdiction as a factual relationship, since, stating that the accountability of a state could arise even if an action is

[36] Nigel Rodley, 'The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A rejoinder to Dennis and Surena' (2009) 5 E.H.R.L.R. 628-636
[37] Thomas Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981); Dominic McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)
[38] *Lopez Burgos v. Uruguay*, Com. No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981) para 12.1-3
[39] Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties,* (Martinus Nijhoff Publisher 2013) at 50; Milanovic, *Law, Principles, and Policy* (n 4) 176; See Section IV sub-heading A for Personal Model;

committed within the territory of another state and with the acquiescence of the government of that state, it appears to have recognised that the legality or illegality of the conduct does not play a key role in the establishment of jurisdiction.[40] Similarly, Da Costa and McGoldrick argued that the jurisdiction of Uruguay was established through a relationship arising from the arrest and abduction of the applicant, but not by virtue of a legal link such as nationality.[41] However, the Committee did not clarify what kind of conduct is necessary to establish such a relationship between the victim and the state. It may be the physical apprehension of the applicant which brought him within the jurisdiction of Uruguay. However, to qualify the relationship to physical custody may imply the exclusion of the possibility of states detrimentally affecting the rights of the person from afar, for example through targeted killings.[42]

The justification of the HRC in this decision was that to allow the commission of some activities by state parties on foreign soil that are legally prohibited within their respective territories would lead to unconscionable results and double standards, which cannot be reconciled with the universality of human rights.[43] However, despite this positive approach, the Committee left the aforementioned questions open.

The Committee, in General Comment No. 31, responded to some of these questions.[44] Firstly, it reaffirmed the disjunctive interpretation of the elements of Article 2(1). Following that, it observed that, "A state party must respect and ensure the rights laid down in the Covenant *to anyone within the power or effective control* of that State Party, even if not situated within the territory of the State Party."[45] Accordingly, it adopted "power or effective control" as the test for the establishment of jurisdiction under the personal model. However, it was unclear whether this test refers to authority over the victim or the legal capacity of the state to secure Covenant rights on foreign soil.[46]

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[40] *Lopez Burgos v Uruguay* (n 38) para 12.3;
[41] Da Costa, (n 39) 50; McGoldrick, *Extraterritorial Application of the ICCPR* (n 37) 62
[42] King (n 8) 525
[43] Wilde, *Legal Black Hole* (n 2) 791; Milanovic, *Law, Principles, and Policy* (n 4) 177
[44] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13
[45] ibid, para 10
[46] Alex Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operation' (2013) 18:2 Journal of Conflict and Security Law 233 at 241

Thereafter, the Committee affirmed the extraterritorial applicability of the Covenant to all individuals, regardless of their legal status such as nationality.[47] Thus, it was clarified by the Committee that it was not the nationality link which brought Lopez Burgos under the jurisdiction of Uruguay, but it was the factual authority or control exercised over him by state agents. The Committee finally noted that:

> "This principle also applies to *those* within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[48]

Although Droege infers from this paragraph that the Committee intended to affirm the applicability of the Covenant when states exercise control over territory (the spatial model) rather than over individuals,[49] the phrase "those" clearly refers to individuals. Therefore, the presence of troops on foreign soil should not directly be considered to signify the spatial model. However, this does not necessarily mean that the HRC completely excluded the spatial model from the context of the ICCPR. In contrast, it affirmed the applicability of this model in its Concluding Observations on Israel.[50] The ICJ, similarly, adopted the HRC's opinion on the extraterritorial applicability of the ICCPR in its *Advisory Opinion on Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, in which it endorsed territorial control for the establishment of jurisdiction.[51]

To conclude, despite its restricted wording, the HRC and ICJ recognised the extraterritorial application of the ICCPR when a factual relationship between the victim and the state has been established. In addition, the legality or illegality of conduct under public international law does not play any role in the application of the Covenant. Finally, these bodies have never explained whether states must fulfil both their positive and negative obligations, or whether they are responsible for the full catalogue of the Covenant's rights.

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[47] HRC General Comment 31 (n 44) para. 10
[48] ibid (*emphasis added)*
[49] Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) Vol 90 No 871 International Review of the Red Cross 501 at 511; See section IV sub-heading B for Spatial Model;
[50] UN Human Rights Committee, *Concluding Observations: Israel,* 21 August 2003, CCPR/CO/78/ISR
[51] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* International Court of Justice, 9 July 2004. Nevertheless, citing *Lopez Burgos* case, the ICJ also confirmed the validity of the personal model.

Yet, most commentators uphold that these considerations will depend on the facts of each case, and the level of the control exercised by the perpetrating state.[52]

B) American Convention on Human Rights

The Inter-American Commission on Human Rights is charged with supervising the conduct of the members of Organization of American States (OAS) under two human rights instruments, namely the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights (hereafter ACHR).[53] While the former does not include a jurisdiction clause, the latter stipulates in Article 1(1) that State Parties are obligated to ensure the rights envisaged in the ACHR to all persons "subject to their jurisdiction".[54] Despite the similarity with the jurisdiction clause in Article 1 of the ECHR, the Inter-American Commission has adopted a more expansive approach than the ECrtHR by applying a relatively low threshold for the rise of jurisdiction of member states, namely authority and control over individuals who have asserted a breach of their human rights.[55]

The Inter-American Commission dealt with the term jurisdiction in Article 1(1) for the first time in the case of *Saldano v Argentina*, in which it rightly distinguished territory from jurisdiction. It affirmed the extraterritorial application of the ACHR, stating that:

> "…a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory."[56]

It cited a decision of the European Commission which was decided under the personal model of jurisdiction, and thus it held that the jurisdiction of states would arise when they exercise authority and control over persons regardless of their geographical positions. As a result, the Inter-American Commission, applying the personal model, expanded the scope of the ACHR so as to cover the extraterritorial conduct of member states.

The Inter-American Commission applied the "authority and control over individuals"

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[52] Sarah H. Cleveland, 'Embedded International Law and the Constitution Abroad' (2010) 110 Columbia Law Review 225 at 255; Da Costa (n 39) 91
[53] American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of OAS, Bogota 1948; Organization of American States, *American Convention on Human Rights, "Pact of San Jose"* 1969
[54] ibid (ACHR) Article 1
[55] Angelika Regner, 'Extraterritorial Application of Human Rights Treaties' (2006) Institute for Human Rights Seminar Notes 1 at 13; Cleveland (n 52) 248; Cerone, *Out of Bounds* (n 28) 8
[56] *Victor Saldano v Argentina*, Petition, Inter-American C.H.R. Report No 38/99, 11 March 1999 para 17

test in a later case, *Coard v United States*, in which it noted that:

> "the phrase "subject to its jurisdiction" may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state - usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."[57]

It is clear from this paragraph that control over applicants was sufficient to bring them under the jurisdiction of the respondent state, regardless of whether or not the area in which such control is exercised is under the control of that state.[58] In other words, it was neither the nationality nor their geographical location that enabled the Commission to find state jurisdiction. Yet, it did not clarify the facts that brought the applicants under the authority and control of United States (US) agents. Thus, one can argue that it was the physical detention of the applicants that constituted US authority and control over them.

However, in the case of *Alejandre v Cuba*, the Inter-American Commission explicitly articulated that it was only the action and not the physical control of the state which put the applicants under the authority and control of Cuba. In this case, military aircraft of Cuba deliberately shot down two unarmed civilian airplanes operating in international airspace, resulting in the deaths of the occupants on board. The Commission held that:

> "The Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace… The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots (…) under their authority."[59]

According to this paragraph, it was solely the direct action, namely the intentional destruction of the aeroplanes, of the Cuban agents that brought the deceased under the control and authority of Cuba. There was no other relationship such as detention, nationality or territorial control that could be invoked to justify the authority and control of the Cuban

[57] *Coard and Others v United States*, Inter-American C.H.R. Report No 109/99 29 September 1999 para 37
[58] Wilde, *Legal Black Hole,* (n 2) 802
[59] *Alejandre and Others v Cuba*, Inter-American C.H.R. Report No 86/99 29 September 1999 para 25

authorities.[60] Thus, it can rightly be concluded that the Inter-American Commission adopted the cause and affect notion of jurisdiction.[61] Ironically, whereas the Inter-American Commission based this kind of jurisdiction on the ECHR jurisprudence, the ECrtHR categorically repudiated this approach in the *Bankovic* case, in which the conduct complained about by the applicant was almost identical to the conduct of the Cuban agents.

In conclusion, unlike the ECrtHR, the Inter-American Commission does not consider the extraterritorial applications of the relevant instruments as an exception. In addition, while the ECrtHR requires, in certain circumstances, effective overall control over the area for the existence of jurisdiction, the Inter-American Commission merely focuses on the control and authority over the victims, regardless of their location. In addition, the existence of a violating action by state agents suffices to constitute authority and control over the victim, without any further elements such as physical apprehension or nationality.

IV. EARLY JURISPRUDENCE ON EXTRATERRITORIAL APPLICATION

In contrast to the extensive approach adopted by the aforementioned bodies, the ECrtHR has taken a more cautious stance in order to exclude an interpretation that would trigger the application of the Convention to all extraterritorial conduct of Contracting Parties.[62] The landmark decision reflecting this restrictive approach was *Bankovic*, which was heavily criticised on the grounds that its reasoning and findings were consistent with neither previous nor subsequent jurisprudence under Article 1 ECHR.[63] Therefore, in order to ascertain this inconsistency in the following sections, this section is an investigation into the early jurisprudence of the Convention's organs before *Bankovic*. These cases will be examined under the headings of the basic models of jurisdiction, namely the personal and spatial models, developed in the early stages of the Convention. While the personal model refers to the exercise of authority and control over persons, the spatial model is defined as effective overall control over the area where the alleged violation took place.[64]

[60] Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violation' (2007) 13 Buffalo Human Rights Law Review 87 at 139; Cerone, *Out of Bounds* (n 28) 10
[61] Christina M Cerna, 'Extraterritorial Applications of the Human Rights Instruments of the Inter-American System' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)
[62] John Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operation' (2006) 39 Vand. J. Transnat'l Law 1447 at 1481
[63] Gondek (n 1) 356-357; Miller (n 13) 1226-1230
[64] Wilde, *Triggering State Obligations Extraterritorially,* (n 18) 508; Besson (n 3) 874

A) Personal Model of Jurisdiction

In the early stages of the Convention, the European Commission of Human Rights (hereafter the Commission) regarded extraterritorial jurisdiction as some kind of factual relationship arising from the exercise of actual authority and control by Contracting Parties over individuals. The Commission clearly expressed this approach for the first time in the case of *Cyprus v Turkey* (hereafter Cyprus case (1975)), in which the Cypriot government complained about human rights violations arising from Turkey's military intervention in Northern Cyprus. It observed that the High Contracting Parties:

> "… are bound to secure the said rights and freedoms to *all persons under their actual authority* and responsibility, whether the authority is exercised within their own territory or abroad. (…) nationals of a State, including registered ships and aircrafts, are partly within its jurisdiction wherever they may be, and that authorised agents of a State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, *to the extent* that they exercise authority *over such persons or property*. Insofar as, by the *acts or omissions*, they affect such persons or property, the responsibility of the State is engaged."[65]

The adjective 'actual' in the first sentence demonstrates that, rather than a legal basis such as nationality, it was a factual relationship engendering state jurisdiction.[66] Although alleged violations arose from military operations in a certain area, the Commission employed 'authority over persons' as the test for establishing this relationship.

The statement of the Commission that the jurisdiction of states will be triggered to the extent that persons are affected by alleged actions indicates that the Convention's rights can be divided in proportion to the level of control.[67] Additionally, although it did not clearly mention when those persons would be regarded as being under the authority of Turkish agents, the Commission seemed to adopt a cause and affect notion of jurisdiction, which was refused by the ECrtHR in *Bankovic*.[68] Finally, the suggestion of the Commission that acts and omissions would incur the responsibility of Contracting Parties indicates that

[65] *Cyprus v Turkey,* Application No: 6780/74 & 6950/74, (Commission Decision 26 May 1975) (*emphasis added*)
[66] Duttwiler (n 22) 142
[67] Da Costa (n 39) 104
[68] King (n 8) 530

states must fulfil their negative and positive obligations when they are acting abroad.[69]

The personal model of jurisdiction was also reiterated by the Commission in a series of cases related to violations committed by diplomatic and consular authorities of Contracting Parties in the territory of host states. The first case in this context was *X v Federal Republic of Germany*, in which the Commission stated that:

> "…in certain respects, the *nationals* of a Contracting State are within its jurisdiction even when domiciled or resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform *certain duties* with regard to them which may, *in certain circumstances*, make that country liable in respect of the Convention…"[70]

Unfortunately, the Commission did not clarify the relevant criteria that brought those nationals within the jurisdiction of the Contracting State. King argued that it was the lawful competence of the consular authorities arising from public international law.[71] At first glance, it does not seem possible to object to this argument, considering the emphasis by the Commission on the 'nationality' and 'certain duties' of the consular agents.

However, in the subsequent case of *X v UK*, the Commission affirmed the application of the personal model to the acts or omissions of consular agents.[72] It particularly observed that, insofar as state agents, including diplomatic and consular agents, affect individuals or property through their acts or omissions, the responsibility of the state is engaged. The responsibility for not only acts but also for omissions demonstrates that they are factual circumstances triggering state jurisdiction for the conduct of all state agents.

One can conclude that nationality was relevant in the aforementioned cases. However, the Commission found the jurisdiction of Denmark in the case of *W.M. v Denmark*, in which alleged victim was not a Danish national.[73] In this case, the applicant, who illegally entered the Danish embassy in the German Democratic Republic (GDR), alleged, *inter alia*, that the Danish authorities had deprived him of his liberty by handing him over to the GDR authorities. The Commission, adopting similar language to *X v UK*,

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[69] Da Costa (n 39) 104
[70] *X v Federal Republic of Germany,* Application No: 1611/62 (Commission Decision 26 September 1965) 8 Yearbook of the ECHR 158 (*emphasis added*)
[71] King (n 8) 549
[72] *X v United Kingdom,* Application No: 7547/76 (Commission Decision 15 December 1977) 12 DR 73
[73] *W.M. v Denmark,* Application No: 17392/90 (Commission Decision 14 October 1992) 73 DR 193

concluded that he was within the jurisdiction of Denmark for the purpose of Article 5. Although Miller argued that the jurisdiction of Denmark was triggered on the basis of the functional control of Denmark over its embassy, this conclusion was misleading,[74] since the Commission never mentioned the authority of Denmark over the embassy as the criteria for jurisdiction. Rather, it was the action of the Danish ambassador, namely handing the applicant over to the GDR, which brought him within the jurisdiction of Denmark. Thus, it can be concluded that the Commission applied the 'factual control over persons' test without granting a special legal status to the embassy or the nationality of the applicant.

The third line of cases to which the personal model applies are cases involving the arrest or detention of persons abroad. In the case of *Hess v UK,* the wife of the convicted Nazi leader Rudolf Hess, who had been serving life imprisonment in solitary confinement in a military prison jointly administered by four states (the US, France, the UK and the USSR), complained that Article 3 and 8 had been violated by this detention.[75] The question was whether this detention brought Hess under the jurisdiction of the UK, which was just one of the states administering the detention facility under the Four Power Agreement.

After noting that there was no reason why the prison in Berlin should not fall within UK jurisdiction, the Commission found the application inadmissible on the ground that joint authority cannot be divided between four separate jurisdictions. In reality, the UK did not exercise exclusive authority on the administration of the prison, and it was the objection of the USSR that precluded the release of the victim. Yet, the Commission did not clarify whether its conclusion would have been different if the UK had been the sole opposing power.[76]

The jurisprudence of the Commission was constant in the application of the personal model in cases in which individuals were arrested abroad and transported to the territory of the states concerned. In the cases of *Freda v Italy* and *Sánchez Ramirez v France*, the respondent states had acted with the consent of non-European States, on whose territory

[74] Miller (n 13) 1239-1240
[75] *Hess v United Kingdom,* Application No: 6231/73 (Commission Decision 28 May 1975) 2 DR 72
[76] Rick Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 83 at 91-92

the applicants were arrested and handed over to the respondent States.[77] In each case, the Commission held that from the moment the applicants were handed over to Contracting Parties' agents by local state officials, they were effectively under the authority, and therefore within the jurisdiction, of those respondent states. It was, therefore, again the exercise of actual authority over individuals that triggered state jurisdiction, even if the basic element of de jure jurisdiction, the consent of the territorial state, existed as well.[78] In the case of *Stocke v Germany*, the Commission, concluding that the applicant who was under the jurisdiction of Germany acting abroad without legal competence, confirmed that the victims would be considered to be within the jurisdiction of the violating states, even if those states acted in a manner beyond what international law allows.[79]

In short, it was the Commission who developed the personal model of jurisdiction during the early stages of the Convention. Yet, in the following cases related to the military intervention of Turkey in Northern Cyprus, the ECrtHR adopted a somewhat different approach by giving more weight to control over territory rather than individuals.

B) Spatial Model of Jurisdiction

The second category of cases where a state may have extraterritorial jurisdiction involves situations in which a state exercises a level of control over the territory of another state. In other words, the extraterritorial obligations of Contracting Parties under the spatial model emanate from the mere fact of territorial control, regardless of the existence of title or the legality of their actions.[80] The general components of this model were set out in cases arising from military operations conducted by Turkey in Northern Cyprus.[81]

The landmark case decided under the spatial model is *Loizidou v Turkey (Preliminary Objections)*.[82] In this case, the applicant alleged that she was not allowed to access her property in Northern Cyprus as a result of the Turkish military operation, generating claims under Article 8, 10 and Article 1 of Protocol 1 ECHR. Having emphasised that the concept

[77] *Freda v Italy,* Application No: 8916/80, (Commission Decision 7 October 1980) 21 DR 250; *Illich Sanchez Ramirez v France* Application No: 28780/95, (Commission Decision 24 June 1996) 86 DR 155
[78] Duttwiler (n 22) 144
[79] *Stocke v Germany,* Application No: 11755/85 (Commission Decision 12 October 1989)
[80] Wilde, *Triggering State Obligations Extraterritorially,* (n 18) 508
[81] See Hammer (n 23) 862-867 for the historical and political background of Cyprus dispute
[82] *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99 (hereafter *Loizidou*)

of jurisdiction is not restricted to the national territory of the High Contracting Parties, the Grand Chamber identified the situations in which alleged violations committed outside a state's territory could fall within the jurisdiction of that state.

It first mentioned the extradition or expulsion of a person by a Contracting State as an exemplar of situations that can trigger the application of the Convention. Cases under this category, however, are not direct examples of the extraterritorial applicability of the Convention, as the action complained about, namely the decision to extradite the alleged victim, is taken within the territory of relevant state, and more importantly the victim is within the territory of that state, rather than being located somewhere abroad.[83]

It then made reference to extraterritorial effect cases, citing *Drozd and Janousek v France and Spain*, in which it held that "responsibility of Contracting Parties can be involved because of acts of their authorities which produce effects outside their own territory".[84] This case is particularly important, since the action complained about took place in a state, namely Andorra, which was not a party to the ECHR at that time. Nevertheless, this fact did not prevent the Court from examining whether that action could be attributed to France and Spain for the purpose of finding their jurisdiction. Continuing its analysis, the Grand Chamber prescribed a third situation in which the Convention may be applicable abroad:

> "The responsibility of a Contracting Party may also arise when as a consequence of military action - *whether lawful or unlawful* – it exercises *effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the *fact of such control* whether it be exercised directly, through its armed forces, or through a subordinate local administration."[85]

The test constituting extraterritorial jurisdiction was the effective control of an area outside the national territory of the relevant state; therefore, Contracting Parties are under an obligation to provide protection under the Convention against violations which occur in those areas. Despite the shift from the Commission test based on authority and control over individuals to effective control over an area, it does not necessarily purport to a

[83] Lawson (n 76) 97; Cerone, *Out of Bounds* (n 28) 12
[84] *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745
[85] *Loizidou (Preliminary Objections)* (n 82) para 62 (*emphasis added*)

repudiation of that test. Rather, this new test implies that it is not necessary to examine whether every particular situation (or individual) is under the authority of a relevant state, considering the effective control of that state over that area.[86] In addition, the second sentence made clear that it is merely factual circumstances that determine the existence of extraterritorial jurisdiction. It is therefore irrelevant whether the conduct of states undertaken abroad is legitimate under the principles of general international law.

In its judgment on the merits, invoking the spatial model of jurisdiction, the Court deemed it unnecessary to examine whether Turkey actually exercised detailed control over the administrative actions and policies carried out by Turkish Republic of Northern Cyprus (TRNC).[87] It was sufficiently evident from the large number of Turkish troops engaged in active duties in Northern Cyprus that Turkey's army exercised effective overall control over the relevant part of the island. In other words, the strong military presence of Turkey enabled it to acquire overall control over the relevant area.[88] Therefore, if a state is in overall control of an area abroad, any violations committed in that area fall within its jurisdiction, including breaches of the local authorities, irrespective of the status ascribed to them by that state, since the exercise of effective overall control over an area implies that that state also has effective control over the local authorities operating in that area.

However, what was not clear in this finding is whether the Court found that all of the conduct of the TRNC was attributable to Turkey. Some commentators argued that because of the effective overall control over the area, and thus over the local authority, that local authority was considered to have acted on behalf of Turkey; therefore, all actions of that local authority were attributable to Turkey.[89] However, Milanovic argues that it was not the real intention of the Court to consider all of the conduct of the TRNC as the conduct of Turkey. Rather, the responsibility of Turkey emanated from its positive obligation to

[86] Lawson (n 76) 98; See also Duttwiler (n 22) at 160-161, arguing that territory-based control test was misleading, since the applicability of ECHR is governed by control over persons. It was not the presence of the property in the occupied area, but control over it that brought the applicant under the authority and thus jurisdiction of Turkey.
[87] *Loizidou v Turkey* (*Merits*) (1996) 23 EHRR 513, para 56
[88] Anja Klug and Tim Howe, 'The Concept of State Jurisdiction and the Applicability of Non-Refoulement Principle to Extraterritorial Interception Measures' in Bernard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges,* (Koninklijke Brill NV 2010) 69 at 78
[89] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 84; Cerone, *Out of Bounds* (n 28) 12

prevent any kind of violations in the area under its effective control, regardless of by whom they were committed.[90] This argument is more persuasive, since to hold otherwise purports to deem effective control test as a component of the test of attribution, which fails to distinguish the concept of jurisdiction from that of attribution.

In the subsequent case of *Cyprus v. Turkey*, the Grand Chamber not only confirmed but also expanded some of the principles adopted in *Loizidou*.[91] It restated that, because of its effective overall control over Northern Cyprus, Turkey was responsible for both the acts of its own agents and those of the local administration, which survives by virtue of the Turkish military and other support. This high threshold enabled the Court to conclude that, "Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights provided in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey."[92] The general purpose of the Court here was to make clear that the responsibility of Turkey was not confined to its negative obligations, but also included positive obligations identical to those it had to secure to persons situated in its recognised territory.[93] In addition, the obligation of Turkey to secure the entire range of rights derives from the high level of effective control it exercised over the area; therefore, its responsibility would have been more limited in the case of a lower level of control.[94] Thus, despite the absence of clarity, the rights in the Convention can be said to be divided commensurate with the extent of control.

Another key aspect of this decision was the statement of the Court that to hold Turkey not responsible for the alleged violations would lead to a regrettable vacuum in the system of human rights protection.[95] This is because Cyprus was already a party to the ECHR, and all of its citizens had previously enjoyed the Convention's rights prior to the military intervention of Turkey. Therefore, they should not be deprived of that protection due to a military operation. However, this finding should not be read as the Convention not applying

[90] Milanovic, *Law, Principles, and Policy* (n 4) 47
[91] *Cyprus v Turkey* (*Merits)* (2002) 35 EHRR 30
[92] ibid para 77; Klug and Howe (n 88) 79
[93] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 84-85
[94] Lawson (n 76) 99
[95] *Cyprus v Turkey (2001)* (n 91) para 78

to violations which occur in the territories of states which are not party to the Convention. Such a criterion has never been invoked by the Convention's organs in previous cases as a prerequisite for the existence of extraterritorial jurisdiction.[96]

In conclusion, prior to *Bankovic*, under both models, it was the factual authority and control exercised by states that brought individuals within the jurisdiction of the relevant states, regardless of the legality of their actions in the sense of public international law. In addition, it can be deduced from the wordings of those cases that the extent of the rights and obligations involved will depend on the level of the control exercised by states. Finally, the Convention was found applicable in any territory, regardless of whether that territory is covered by the legal space of the Council of Europe. However, this relative clarity was blown away by the *Bankovic* decision, which has given rise to huge uncertainty and dispute with regard to the interpretation of Article 1 and its practical application.

V. BANKOVIC CASE: THE ORIGIN OF THE CONTROVERSIES

The case of *Bankovic and Others v Belgium and Others* dealt with the question of whether bombing from a military aircraft by Contracting Parties of a territory belonging to a state which was not a party to the Convention triggered that state's jurisdictions under Article 1.[97] After all efforts to settle the Kosovo conflict had failed, member states of NATO decided to conduct air strikes against the Federal Republic of Yugoslavia (FRY). During these air strikes, a missile launched from a NATO aircraft destroyed the Serbian Radio and Television Station in Belgrade; sixteen civilians in this building died, while another sixteen were seriously injured. Despite the fact that the deaths and injuries were the result of that airstrike, the Grand Chamber found the application inadmissible on the ground that those alleged victims did not fall within the jurisdiction of the respondent state.

Most of the findings of the Court shaping its jurisprudence on extraterritoriality were controversial. These controversial issues will be separately examined in the following sub-sections, indicating their clashes with previous cases.

[96] Ralph Wilde, 'The Legal Space or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?' (2005) 2 E.H.R.L.R. 115 at 120-121

[97] *Bankovic and Others v Belgium and Others* (n 6); See for the deep analysis of the decision Alexandra Ruth and Mirja Trilsch, 'International Decisions' (2003) 97 Am. J. Int'l. L. 168 at 170; Matthew Happold, 'Bankovic v Belgium and the Territorial Scope of European Convention on Human Rights' (2003) 3(1) H.R.L.R. 77-90

A) Interpretation of the Jurisdiction: Primarily Territorial?

Before *Bankovic*, the Convention organs consistently stated that the phrase "jurisdiction" in Article 1 did not entail a territorial limitation, and, therefore, states can be held liable for their actions, regardless of the place where they were conducted, which produce an effect outside their territory.[98] However, in *Bankovic*, the Court, relying on the rules of interpretation of the VCLT, radically departed from this reading, holding that the jurisdictional competence of a state is primarily territorial. It did not completely rule out extraterritorial jurisdiction, yet it regarded such situations as "exceptions" requiring special justification according to their particular circumstances. The methodology used by the Court for reaching this ordinary meaning was not convincing, as it did not take into account two further elements in Article 31 of the VCLT, namely the context and the object and purpose of the Convention.[99] The Convention was a reaction to the widespread human rights violations committed during World War Two all around Europe, and thus it did not intend to confine the obligations of Contracting States merely within their respective territories.[100] Rather, its object and purpose is to secure for all human beings the rights therein, which are universal and inherent in their dignity.

The Court's reference to subsequent state practice to reinforce its interpretation was also disputable. It considered the lack of derogation under Article 15 by Contracting States with regard to their previous military operations abroad as an indicator that they did not assume those actions to fall within their jurisdiction in terms of Article 1. However, this reasoning is untenable, since a state may refrain from derogating from the Convention for various reasons, such as political concerns.[101] In addition, those states may have no *right* to derogate from the Convention due to the requirements in Article 15, or because of the illegality of their use of force under Article 51 of the UN Charter.[102] More importantly, considering the reaction of other Contracting Parties and criticism of the Convention's

[98] *Drozd and Janousek v France and Spain* (n 84) para 91; Cyprus v Turkey (1975) (n 65)
[99] Joanne Williams, 'Al-Skeini: A Flawed Interpretation of Bankovic' (2005) 23 Wis. Int'l. L. J. 687 at 713
[100] Loukis G. Loucaides, 'Determining the Extraterritorial Effect of the European Convention: Facts, Jurisprudence and the Bankovic Case' (2006) 4 E.H.R.L.R. 391 at 394
[101] Kamchibekova (n 60) 122
[102] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 118

organs in Cyprus cases against the declaration of Turkey, which aimed to reduce the jurisdiction to a primarily territorial notion, it is not possible to speak of a clear and constant practice as required by Article 31(3)(b) of VCLT.[103]

A more fatal problem emanating from this interpretation is, as has already been analysed in detail in Section Two above, the assumption of the Court that the term "jurisdiction" in Article 1 is identical to its ordinary meaning in public international law. The decision itself is an indicator that these two concepts of jurisdiction are quite different: on the one hand, the Court cited the nationality, passive personality, protective and universality principles as recognised exceptions to extraterritorial jurisdiction in public international law; on the other hand, after stating that extraterritorial bases of jurisdiction for the purpose of the application of the Convention are exceptional, it did not define these exceptions with reference to those exceptions which exist under public international law. Rather, it relied on exceptions adopted in previous case law, namely effective control cases, extraterritorial effect cases, extradition cases, and diplomatic, consular and flag jurisdiction cases.[104]

In addition, this assumption contradicts the early jurisprudence of the Convention's organs, since, while jurisdiction within the meaning of public international law may only arise where a state is acting on a lawful basis, the Court in *Loizidou* held that state jurisdiction may arise through effective control over an area during a military action, *whether lawful or unlawful*. Similarly, it is not possible to reconcile this interpretation with the Commission's decision in *Stocke v Germany*, in which the illegality of the extraterritorial arrest of the victim did not preclude the liability of the respondent state, but rather constituted a presumption of a material breach of the Convention.[105]

B) A Failed Analysis of Early Case Law

The second shortcoming of *Bankovic* is that the analysis of early case law was selective, and the findings of the Court were inconsistent with those previous cases. These

[103] Loucaides (n 100) 395; Da Costa (n 39) 133-134; See for criticism on the Court's invoking Travaux Preparatoires: Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 105; Da Costa (n 39) 136-138
[104] Miller (n 13) 1231-1232
[105] *Stocke v Germany* (n 79) para 167

problems resulted from the dilemma that the Court faced: while the Court aimed to limit the scope of the Convention to the territory of states, its early decisions compelled it to legitimise the extraterritorial applicability of the Convention.[106] The Court found a solution by stating that, according to its early case law, extraterritorial jurisdiction may only be established in exceptional cases. Yet, this assertion was completely misleading, since it implies that the Court in pre-*Bankovic* cases frequently dealt with extraterritorial conduct, but found only very few of them admissible for their exceptional nature. Yet, in reality, there was no case before *Bankovic* found inadmissible on these grounds.[107]

The Court then made its conclusion, holding that jurisdiction under Article 1 can be established when the respondent state:

> "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the *public powers normally to be exercised by that Government."*[108]

Firstly, the Court seemed to reduce exceptional circumstances to the "effective control over an area" criterion developed in *Loizidou*. However, it failed to recognise that this was not the only situation, but it was just one example of situations that may trigger state jurisdiction.[109]

Secondly, the Court modified the substance of the territorial control test by introducing an additional requirement which was absent in early cases. According to the Court, in order for a state to have extraterritorial jurisdiction, it must not only exercise effective control over the territory of other state, but must also exercise *all or some of the public powers* normally exercised by the local government. This new criterion clearly contradicts the Cyprus cases; although Turkey may be held to have exercised such powers, the Court did not regard their exercise as a prerequisite for the rise of jurisdiction. In addition, the phrase "all or some public powers" was too broad and ambiguous, yet the

[106] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 87
[107] Erik Roxstrom and Mark Gibney, 'Human Rights and State Jurisdiction' (2017) 18 Hum. Rights Rev 129 at 142
[108] *Bankovic and Others v Belgium and Others* (n 6) para 71 (*emphasis added*)
[109] Antoine Buyse, 'A Legal Minefield-The Territorial Scope of European Convention' (2008) 1 Inter-American & European Human Rights Journal 269 at 286

Court did not clarify what they actually involve. It did not even explain whether the NATO bombing or control over airspace can be considered as an exercise of public powers.[110]

The third failure of the Court was the lack of reference to the cases decided under the personal model.[111] Although this model had been clearly adopted by the defunct Commission in the Cyprus case and other cases arising from the abduction or illegal detention of individuals abroad, it did not enumerate this line of cases among recognised instances.[112] Although it acknowledged cases related to the actions of diplomatic and consular authorities, this model is not limited to such acts, but encompasses the actions of any kind of agents exercising authority or control over individuals.

C) Can the Rights and Obligations Be Divided and Tailored?

Another question arising in the context of extraterritorial jurisdiction is the range of rights applicable and the level of obligations that must be secured by Contracting Parties. While states are normally obligated to secure all substantive rights within their territory, the list of applicable rights is argued to be limited by the scope of their capacity to exert control over the area or individuals abroad.[113] Similarly, Article 1 of the ECHR imposes on Contracting Parties both negative obligations (obligation to respect), requiring them to refrain from conduct capable of violating the rights of beneficiaries, and positive obligations (obligation to secure), to take all necessary measures to protect those rights, even against the conduct of third parties.[114] The level of these obligations, in the extraterritorial context, is also argued to be tied to the level of actual authority or control of those states.[115]

These questions arose again in *Bankovic* because of the novel approach of the applicants, who asserted that the positive obligation under Article 1 extends to securing the Convention's rights in a manner proportionate to the level of control exercised by the

[110] Eleni Kannis, 'Pulling (Apart) the Triggers of Extraterritorial Jurisdiction' (2016) 40 U.W. Australian Law Review 221 at 229; See Stewart who argued that public powers criteria referred to state agent authority test, not to the spatial model of jurisdiction: Alastair Stewart, 'Back to the Drawing Board: Al-Skeini v UK and the Extraterritorial Application of the European Convention on Human Rights' (2011) 4 UCL Hum. Rts. Rev. 110 at 115
[111] Tarik Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights' (2005) 14 Journal of Transnational Law and Policy 159 at 193
[112] See Section Four sub-heading A for the cases decided under personal model of jurisdiction
[113] Cerone, *Out of Bounds?* (n 28) 20
[114] Alastair Mowbray, *The Development of Positive Obligations under European Convention on Human Rights by the European Court of Human Rights,* (Oxford Hart Publishing 2004)
[115] Milanovic, *Law, Principles, and Policy* (n 4) 18

respondent states. This argument implies that states cannot be expected to do the impossible, but rather they must be held liable for rights and obligations relative to the amount of control in fact exercised.[116] Agreeing with the respondent states' counter claim that this amounted to a "cause-and-effect" notion of jurisdiction, the Court noted that such logic was tantamount to arguing that any act committed anywhere in the world and attributable to a Contracting Party was capable of bringing anyone adversely affected by those acts within the jurisdiction of that party. Therefore, it rejected this on the grounds that Article 1 did not support the suggestion that the positive obligations of states can be divided and tailored according to the particular circumstances of the extraterritorial act in question.

The Court's reasoning implies that, in order for its jurisdiction to be established, a Contracting Party must be in a strong position to provide protection for all substantive rights and obligations in the Convention. To put it another way, if that state is not able to guarantee all of its obligations due to a lack of overall control over a territory, it is obligated to guarantee nothing to individuals in that territory.[117] However, this all or nothing approach contradicts the early jurisprudence. For instance, in *Loizidou*, the applicant was arguably found to be within Turkey's jurisdiction, to the extent that her property was affected. Similarly, in *W.M. v Denmark*, the Commission had held that individuals would be brought within a state's jurisdiction *to the extent* that it exercised authority over them.

The Court also held that the applicants' argument rendered the phrase "within their jurisdiction" superfluous, and failed to distinguish the notion of jurisdiction from the question of whether a person can be considered a victim of a violation. All of these findings are essentially rooted in the Court's equation of the applicants' approach to the cause-and-effect notion of jurisdiction. The Court may prefer not to adopt such a broad approach, as endorsed by the Inter-American Commission in *Alejandre v Cuba*, which included almost similar factual situations.[118] However, the main question is, "Did the applicants really invoke a cause-and-effect notion of jurisdiction?" The answer should be negative, since in

[116] Abdel-Monem (n 111) 186
[117] Kannis (n 110) 228; see also Stewart (n 110) 113 for comparison with Al-Skeini v UK
[118] See Section Three sub-heading B for the approach of Inter-American Commission in Alejandre Case

fact they argued that jurisdiction must refer to state authority, power or control exercised abroad, regardless of control over a territory through ground troops.[119] They were aware that the respondent states did not exercise a *Loizidou* or Cyprus-type control over the territory. Thus, they rightfully argued that respondent states must observe their positive obligations, at least in accordance with the level of control exercised through modern precision weapons, which are more dangerous than ground troops. Yet the Court rejected their argument, merely invoking the textual interpretation of Article 1.

D) Legal Space Argument

Another controversial aspect of *Bankovic* is the legal space (espace juridique) argument, which implies that the Convention does not apply at all if the territory in which the action is committed does not fall within the overall territory of the ECHR. In other words, states are only responsible for violations which occur in the territory of another Contracting Party; they are not bound by the Convention when the alleged victim is located in the territory of a state which is not party to the Convention.[120]

Before *Bankovic*, the fact that a violation was committed in the territory of a non-Contracting state had never been regarded as an obstacle to the extraterritorial application of the ECHR. For instance, in the cases of *W.M. v Denmark, Freda v Italy and Drozd and Janousek v France and Spain*, the Convention's organs found the ECHR applicable in states which were outside the European legal space at that time. However, in *Bankovic*, the Grand Chamber, in response to the applicants' argument, originating from the Cyprus case (2001), that any failure to find jurisdiction of respondent states would lead to a regrettable vacuum in the Convention's system of human rights protection, held that:

> "In short, the Convention is a multi-lateral treaty operating (…) in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."[121]

What the Court has suggested here, and whether it aimed to preclude the extension of the

[119] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 108
[120] Wilde, *The Legal Space* (n 96) 116; Conall Mallory, 'Current Developments: Decisions of International Courts and Tribunals' (2012) 61 ICLQ 301 at 304
[121] *Bankovic and Others v Belgium and Others* (n 6) para 80

Convention's obligations outside the European legal space, was not clear. Most commentators have argued that the Court did not intend to limit extraterritorial application to the territory of Contracting Parties.[122] It simply wanted to mention that the vacuum argument can only be invoked in cases in which individuals located in the territory of a Contracting Party are deprived of the Convention's protection because of the occupation of that territory by another party.[123] Therefore, the fact that the vacuum argument does not arise when a violation is committed in the territory of a state, such as FRY, which does not fall within the ECHR legal space, does not prevent the application of the Convention. Similarly, Wilde, interpreting the relevant paragraphs, reached the same conclusion, on the grounds that the Court had already found the case inadmissible due to a lack of jurisdiction, before commenting on the legal space argument.[124] In other words, while the lack of effective control over the area was *ratio decidendi* for not finding jurisdiction, the invocation of the legal space doctrine was merely an *obiter dictum*.[125]

Of course, a second reading of the Court's findings arising from the literal interpretation of certain expressions is also possible. For instance, the Court, stating that "the Convention operates notably within the legal space of the Contracting States within which the FRY does not fall", and "the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States", may have sought to restrict the extraterritorial application to conduct performed only in the territories of other Contracting Parties. However, the universal character of human rights and the living instrument doctrine, requiring the interpretation of the Convention in light of its object and purpose rather than the intention of the drafters, exclude this holding, which arbitrarily allows a breach of the Convention's rights in non-Contracting States.[126] To conclude, the statements of the Court do not allow reaching a clear-cut conclusion as to whether Contracting Parties have obligations beyond the borders of the Council of Europe.

[122] Lawson (n 76) 113-115; O'Boyle (n 10) 137; Wilde, *Legal Black Hole* (n 2) 793-796
[123] Gondek (n 1) 376
[124] Wilde, *The Legal Space* (n 96) 117
[125] Regner (n 55) 7
[126] Williams (n 99) 723

E) Conclusions of the Bankovic Decision

Most of the findings of this decision were, as demonstrated above, controversial. Firstly, the interpretation of the term jurisdiction that equated it with the notion of jurisdiction in public international law is not persuasive. Secondly, the analysis of early case law was misleading and incomplete, as it disregarded the personal model of jurisdiction. Thirdly, the rejection of the applicants' argument that the Convention may apply proportionately to the level of control exercised was restrictive and flawed.[127] The final ambiguity was the Court's suggestion that extraterritorial jurisdiction may only arise when a violation occurs within the legal space of the ECHR. Yet subsequent cases, either expressly or implicitly, overruled some of the determinations of the Court in this decision.

VI. FROM BANKOVIC TO AL-SKEINI

Bankovic restricts the extraterritorial application of the ECHR to situations where Contracting States, exercising some public powers, effectively control the territory of another Contracting State through military occupation. In subsequent cases, however, the Court veered off in the opposite direction, and gradually departed from its restrictive approach. Still, it was possible to see some traces of *Bankovic* in these decisions, which hindered the observance of a well-settled jurisprudence on extraterritoriality.

The first case after *Bankovic* which clearly contradicts it was *Ocalan v Turkey.*[128] The applicant, the leader of a terrorist organisation, was arrested inside an aircraft in the international zone of Nairobi Airport by Turkish state agents with the support of the Kenyan authorities, and thus alleged that his arrest and transfer to Turkey from Kenya breached, *inter alia,* Article 5 ECHR. As regards the jurisdiction of Turkey, the Chamber held that, directly after being handed over by Kenyan authorities to Turkish officials, the applicant was under the effective authority, and therefore within the jurisdiction, of Turkey.

In contrast with *Bankovic*, it was the personal model of jurisdiction that the Court applied, which was based on factual and effective authority over the applicant rather than a legal link arising from public international law. Thus, *Ocalan* firstly demonstrated that the

[127] King (n 8) 552
[128] *Ocalan v Turkey* (2003) 37 EHRR 10 (hereafter *Ocalan)*; See for case analysis Abdel-Monem (n 111) 187-192

exceptional circumstances triggering states' extraterritorial jurisdiction were not limited to those identified in *Bankovic*.[129] The second dissent from *Bankovic* was the fact that the applicant's arrest outside the legal space of the ECHR did not prevent the Court from finding the jurisdiction of Turkey. Yet, it was not clear whether the Court would have reached the same conclusion if the applicant had been arrested somewhere in Kenya other than in an aircraft in the international zone of Nairobi airport.[130]

However, the physically forced return of the applicant to Turkey under the control of Turkish officials was not a satisfactory reasoning for distinguishing this case from *Bankovic*,[131] since one can ask the question whether the conclusion would have been different if he had been taken somewhere other than Turkey. This expression also seems to suggest that it was the physical custody of the victim which triggered Turkey's jurisdiction. Yet, this implies that simply killing individuals is out of the scope of the Convention, so long as they are not arrested first. Then, states will definitely prefer to shoot individuals straight away in order to escape responsibility, which is incontestably intolerable. Therefore, the Court failed to clarify that physical custody was not the sole example of situations where the personal model would come into play.

The next case that marked an evolution in the jurisprudence of the Court as it recognised shared jurisdiction between two Contracting Parties is *Ilascu and Others v Moldova and Russia*.[132] In this case, the complaints resulted from the actions of the Moldavian Republic of Transdniestria (hereafter MRT), which proclaimed independence in the territory of Moldova, but was not recognised by the international community. The applicants, alleging the violations of a range of substantial rights, invoked both the responsibility of Moldova and Russia, on the grounds that Moldova failed to make sufficient efforts to put an end to those violations, while Russia, due to its military presence in the area and support for the separatist regime, had effective control over MRT.

[129] Cornelia Janik and Thomas Kleinlein, 'Problems of Jurisdiction, Extraterritorial Effects and Norm Conflicts in Light of the European Court of Human Rights' Al-Sadoon Case' (2009) 1 Goettingen J. Int'l L. 459 at 477
[130] Da Costa (n 39) 164
[131] Roxstrom, Gibney and Einarsen, *The NATO Bombing Case* (n 2) 90; Milanovic, *Law, Principles, and Policy* (n 4) 165-167
[132] *Ilascu and Others v Moldova and Russia* (2005) 40 EHRR 46 (hereafter *Ilascu*)

Despite the fact that Moldova did not have effective control over MRT, according to the Court, the applicants were nevertheless within the "limited" jurisdiction of Moldova. The Court held that even in the absence of effective control over a part of its territory, a Contracting State must fulfil its positive obligations, namely to take any diplomatic, economic, judicial or other measures in its power to secure the Convention's rights for individuals in that territory. Thus, since Moldova failed to do so, it was responsible for the infringements of the applicants' rights.[133] Here, the Court rendered jurisdiction a relative concept by tailoring it to the degree of control exercised by Moldova over the contested acts. This may be seen as a positive deviation from the all or nothing approach of the Court in *Bankovic*, with regard to the level of obligations.

The Court also held Russia responsible for the alleged violations, on the grounds that the perpetrator of those violations, MRT, "remains under the effective authority, or at the very least under the decisive influence, of the Russian federation, and in any event that it survives by virtue of the military, economic, financial, and political support given to it by the Russian Federation."[134] The Court here introduced a much lower standard than it adopted in the Cyprus cases, since, while the actions of the local authority (the TRNC) in the Cyprus cases were found to be attributable to Turkey by virtue of its "effective overall control over the area", in this case the imputability of the alleged conduct to Russia arose from its decisive influence over the non-state actors (MRT), rather than the territory. This demonstrates that the jurisdiction inquiry was reduced to the question of whether violations committed by separatist regimes were attributable to foreign states, which clearly contradicts the territorial control test of *Bankovic*.[135]

Another case that overruled the restricted holdings of *Bankovic* is *Issa v Turkey*,[136] which concerned the alleged detention, ill-treatment and killings of the applicants' relatives by Turkish soldiers in Northern Iraq. Although the facts of the case were similar to that of

[133] See also *Assanidze v Georgia* (2004) 39 EHRR 32 in which the Grand Chamber similarly affirmed the responsibility of Georgia for the acts of separatist local authorities even when it did not have effective control over its national territory where those acts had occurred.
[134] *Ilascu and Others v Moldova and Russia* (n 132) para 392
[135] Cerone, *Out of Bounds?* (n 28) 18
[136] *Issa v Turkey* (n 12)

Bankovic, as it involved incidental military operations, the Court rightly departed from the latter, finding the Convention applicable in a territory outside European legal space.

As regards the territorial control exception, the Court restated relevant excerpts developed in *Loizidou* and adopted in *Bankovic*. However, although the number of troops deployed in Northern Iraq was no less than the number stationed in Cyprus, it concluded that Turkey did not exercise effective control over the "entire" area, since the troops in Cyprus were present in the relevant area for a longer period and throughout the entire territory of Northern Cyprus.[137] This clearly illustrates that the quantity of troops is not a determinant for the effectiveness of control required for the establishment of the spatial model.[138] In fact, it was not the lack of any *Loizidou*-type of control that precluded Turkey's jurisdiction. Rather, the Court counted temporary effective control over a particular portion of the area as sufficient for the establishment of jurisdiction.[139] Thus, the relevant question was whether Turkish soldiers had conducted operations in the area where the alleged violations had occurred. Since the answer was not affirmative in light of the evidence, the Court did not find jurisdiction. Another significant point in *Issa* was the renouncement of the Court from the stringent requirement of public powers adopted in *Bankovic*.

Another key aspect of this decision was the explicit endorsement of the personal model by the Court. It confirmed that state agents, acting lawfully or unlawfully in the territory of any other state, may bring individuals over whom they exercise authority and control within the jurisdiction of their states. The reason for this holding was the unconscionability principle adopted in the *Lopez Burgos* case by the HRC, but discounted by the ECrtHR in *Bankovic*: a Contracting Party cannot perpetrate violations of the Convention on the territory of another state which it could not perpetrate on its own territory.[140] This implies that any act violating the rights recognised in the ECHR will lead to its extraterritorial application, regardless of where it was conducted and regardless of whether the state had control over the relevant area or physical custody over the victim.

[137] See Happold (n 97) 83 criticizing this difference as a flimsy distinction.
[138] Williams (n 99) 706
[139] Anna R. Jay, 'The European Convention on Human Rights and the Black Hole of State Responsibility' (2014-2015) 47 N.Y.U. J. Int'l L. & Pol. 207 at 211; *Issa v Turkey* (n 12) para 74
[140] *Issa v Turkey* (n 12) para 71; *Lopez Burgos v Uruguay* (n 38) in Section Three, sub-heading A.

Despite this protective approach to jurisdiction and the recognition of the state agents' authority test, it was not clear under which model the Court reached this conclusion. Although the result would have been the same due to the fact that the killings were not found attributable to Turkey, this distinction may be significant for the determination of the range of rights and level of obligations. Secondly, if the victims were undisputedly found to have been killed by the Turkish army, that would have brought them under Turkey's jurisdiction. This possibility may be considered recognition of the cause-and-effect notion of jurisdiction rejected in *Bankovic*. Although these questions were left open by the Court, subsequent cases provided opportunities to find answers to them.

For instance, the Court explicitly applied the state agents' authority test, or adopted the cause-and-effect notion of jurisdiction, in cases concerning incidents which occurred in the UN neutral buffer zone of Cyprus during the demonstrations held by Greek Cypriots. The first of these cases was *Isaak and Others v Turkey*, in which a demonstrator, Mr Isaak, was beaten to death by Turkish-Cypriot civilians and TRNC police in the UN buffer zone, over which Turkey did not have effective control.[141] Having restated the spatial model and the state agents' authority test, the Court reaffirmed the responsibility of a Contracting State for the actions of private individuals which violate the rights of other individuals within its jurisdiction. However, this was not independent grounds for extraterritorial jurisdiction, like Miltner argued, but was rather a clarification of the scope of the responsibility of states.[142] Although the perpetrators of the action were civilians and the TRNC police, the Court found the victim to be within the jurisdiction of Turkey. Of course, in earlier cases related to Cyprus, the Court had found the acts of the TRNC attributable to Turkey. Yet they were acts committed in Northern Cyprus, over which Turkey had effective control. Therefore, this case proves that the actions of non-state actors bring individuals within the jurisdiction of Contracting States, even if they are committed in an area which is beyond the effective control of both those states and the local authorities.[143]

[141] *Isaak and Others v Turkey,* Application No:44587/98 Chamber (Admissibility decision of 28 September 2006)
[142] Barbara Miltner, 'Broadening the Scope of Extraterritorial Application of the European Convention on Human Rights? (Case Comment)' (2007) 2 E.H.R.L.R. 172 at 179
[143] ibid 181

The second case was *Andreou v Turkey*, in which the Court employed a clear cause-and-effect notion of jurisdiction.[144] It held that, although the applicant, when injured by bullets fired from Northern Cyprus, was in a territory over which Turkey had no effective control, the firing on the crowd from *close range, which was the direct and immediate cause of his injuries,* brought him within the jurisdiction of Turkey.[145] There was no mention of the state agents' authority or physical control. It was merely the action which triggered the state's jurisdiction; yet the Court limited the application of this test to the firings which were discharged from close range, and which were the direct and immediate cause of the killings.[146] Such limited language was absent in the earlier analogous cases.

For instance, in the case of *Pad and Others v Turkey*, seven Iranian nationals attempting to cross the Turkish border illegally were killed by fire discharged from Turkish helicopters, and, unlike *Issa*, there was no reference to the territorial control of Turkey over the area.[147] It was not disputed between the parties that the killings resulted from the actions of Turkish forces, yet it was disputed whether they were killed in the territory of Turkey or of Iran. Although the action complained about is reminiscent of *Bankovic*, the Court found the victims to be within the jurisdiction of Turkey on a very broad reasoning. Dismissing the question of extraterritoriality, it held that the exact location where the killings took place was immaterial, considering the admission of Turkey that the fire discharged from the helicopters had *caused* the killings of the applicants' relatives.

What is apparent in this conclusion is that the Court endorsed the cause-and-effect approach rejected in *Bankovic*, since it was merely the firing from a helicopter which caused the killings which was found sufficient for the establishment of jurisdiction. In addition, it is not possible to distinguish in a non-arbitrary manner the action complained about in *Bankovic*, namely the firing of missiles from an aircraft, from the discharge of fire from helicopters.[148] Therefore, the reasoning in this decision can be interpreted as the Court

[144] *Andreou v Turkey,* App No: 45653/99 Chamber (Admissibility decision 3 June 2008) (hereafter *Andreou)*
[145] ibid 7; See also *Solomou and Others v Turkey* [2008] ECHR 552 (hereafter *Solomou*), in this case, the victim was within the TRNC territory; yet, the complained act was similar to *Andreou*; however, the Court did not apply effects doctrine, but explicitly invoked state agent authority test which was absent in *Andreou*.
[146] Da Costa (n 39) 211
[147] *Pad and Others v Turkey,* App. No: 60167/00 Chamber (Admissibility decision 28 June 2007) (hereafter *Pad*)
[148] Stewart (n 110) 117; Dario Rossi D'Ambrosio, 'The Human Rights of the Other-Law, Philosophy and Complications in the Extraterritorial Application of the ECHR' (2015) 2:1 SOAS Law Journal 1 at 13

intending to overcome the limitations in *Bankovic* in order to find the jurisdiction of states in the context of airstrikes in future cases.[149] Similarly, the irrelevance of whether the alleged action took place within or outside the territory of Turkey corresponds to the unconscionability principle adopted in *Issa*. In addition, the Court explicitly allowed the application of the Convention outside its legal borders. Furthermore, this decision does not provide any support for the public powers requirement created in *Bankovic*.

However, the protective interpretation of jurisdiction in the aforementioned cases was undermined in *Medvedyev and Others v France*, in which a merchant ship called the *Winner* was captured, with its crew, by French forces on the high seas, due to an allegation of carrying illicit drugs. The Grand Chamber held that the applicants, who asserted a violation of the right to liberty, were within the jurisdiction of France on the grounds that France had exercised "full and exclusive control *over the Winner and its crew* at least *de facto* (…) in a *continuous and uninterrupted manner* until they were tried in France".[150]

Recognition of France's jurisdiction in a Cambodian flag flying ship on the high seas (out of legal space) on factual grounds, despite the legality of the conduct within the meaning of public international law, was the positive aspect of this decision. However, further remarks from the Grand Chamber on jurisdiction were open to criticism, and were incompatible with the above cases. Firstly, it distinguished this case from *Bankovic* on the grounds that instantaneous extraterritorial acts (such as the aerial bombing in *Bankovic*) are not sufficient to trigger jurisdiction, as Article 1 does not endorse the cause-and-effect approach. This clearly contradicts *Andreou, Pad and Solomou*; they were merely instantaneous acts, namely firing by soldiers on the ground or from a helicopter, on which the Court grounded the states' jurisdiction under the cause-and-effect approach. Secondly, there was no reference to the state agents' authority test in the Court's assessment on Article 1, though it clearly recognised this test in many cases, such as *Ocalan* and *Issa*. Nevertheless, basing France's jurisdiction on its effective control over both the ship and the crew, it seemed to vacillate between the spatial model and the personal model.[151]

[149] Jay (n 139) 217
[150] *Medvedyev and Others v France* [2010] ECHR 384 para 67 (hereafter *Medvedyev*) (*emphasis added*)
[151] Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23:1 EJIL 121 at 124

To conclude, rather than clarifying the recognised exceptions to *Bankovic*, subsequent cases undermined the main findings of that decision. However, the Court has never explicitly overruled *Bankovic*, but rather referred to it as the authority on the extraterritorial application of the ECHR. As a result of this position, some questions, such as the legal space of the Convention, divisibility of obligations, and validity of the personal model after the exclusion of instantaneous acts, remain unresolved. The Court in *Al Skeini* had an opportunity to bring coherence to these issues by placing them on firmer doctrinal foundations; yet it failed to do so by relying on the main rationale behind *Bankovic*.

VII. THE AL-SKEINI CASE: A NONSENSICAL INSISTENCE

The judgement of *Al-Skeini and Others v UK* arising out of the occupation of Iraq is one of the most important decisions of the Grand Chamber, since, replacing *Bankovic*, it became the leading authority on the extraterritorial application of the Convention.[152] It provided an opportunity for the Grand Chamber to re-address the contentious concept of jurisdiction in Article 1 ECHR. Yet, although it explicitly reversed some disputable precepts of *Bankovic*, crucial parameters of extraterritoriality remained unresolved.[153]

The facts of the case read as follows: there were six applicants whose relatives were killed between May and November 2003 when the UK exercised military command over Basrah. The first, second and fourth applicants' relatives were directly shot dead by UK forces during security operations. The third applicant's wife was struck by bullets during a fatal exchange of fire between British soldiers and unidentified gunmen. The fifth had drowned in a river when British agents attempted to arrest him. The sixth, Mr Baha Mousa, a prisoner in a British military detention facility, was brutally beaten and ultimately killed by British officials. The applicants had claimed only a violation of the procedural obligation under Article 2, namely the lack of effective investigation into the deaths of their relatives.

These cases were firstly considered under the Human Rights Act by the UK domestic courts who, adopting *Bankovic* as the leading authority, approached the matter in a very

[152] *Al-Skeini and Others v UK* (n 7); See for the deep analysis of the case: Max Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction' (2011) 5 E.H.R.L.R. 566-581; Richard Reynolds, 'Human Rights in the Line of Fire: Al-Skeini v United Kingdom' (2011) 16:4 Judicial Review 399-410

[153] Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights' (2012) Vol:28:74, Case Notes, Utrecht Journal of International and European Law 57 at 58

cautious and conservative fashion.[154] At the final stage, the House of Lords, relying heavily on *Bankovic*, rejected the validity of the personal model and held that the deceased were not within the jurisdiction of the UK, as the spatial model does not apply outside the ECHR legal space.[155] It further added that, even if it applied in Iraq, the UK did not exercise effective overall control over Basrah because of the strong insurgency and insufficient number of its forces in that area. Only Mousa was found to be within UK jurisdiction, but only due to the arguable nature of a detention facility, namely its special status in international law analogous to an embassy.

The applicants then brought their case before the ECrtHR. The Grand Chamber, applying the state agent authority test, held that they were within the jurisdiction of the UK. Although this was a significant step forward in case-law, the Grand Chamber's reliance on its unsettled jurisprudence, rather than re-writing the concept of jurisdiction in Article 1, left many questions open and also brought new questions to the fore.[156]

The Court spent a large portion of the judgement clarifying the general principles arising from its early jurisprudence. Having reaffirmed that jurisdiction in Article 1 is a threshold criterion, it continued to recognise its problematic posture in *Bankovic*, namely the exceptional nature of extraterritorial jurisdiction. It set out these exceptional circumstances under two models and considered them under separate headings. The first of them is "State agent authority and control", or the personal model, which was absent in *Bankovic*. This model was narrowed down by the Grand Chamber to three sub-tests, the first of which was always undisputed: cases related to acts of diplomatic or consular agents.[157] The second one is the public powers test, under which extraterritorial jurisdiction may arise when state agents, through the consent, invitation or acquiescence of the Government of the relevant territory, exercise all or some of the public powers normally exercised by that Government. However, it is not possible to infer this from previous cases,

[154] *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2004] EWHC 2911 (ADMIN) [2004] All ER (D) 197 (Dec); *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2005] EWCA Civ 1609 [2005] All ER (D) 337 (Dec); See Da Costa (n 39) 222-243 for the deep analysis of the UK Domestic Courts' Decisions
[155] *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26 [2008] AC 153
[156] Samantha Miko, '*Al-Skeini v UK* and Extraterritorial Jurisdiction under the European Convention for Human Rights' (2012) 35:3 Boston College International and Comparative Law Review 63 at 79
[157] Stewart (n 110) 113

even from *Bankovic*, since the public power criterion invoked in that case was a component of the spatial model, not of the state agent authority test.[158] The third sub-test of the personal model is the use of force test, which, according to the Grand Chamber, applies when individuals are under the custody of state agents abroad. Having cited cases such as *Ocalan, Issa*, *Medvedyev* and *Al-Saadoon*, the Grand Chamber concluded that rather than control over buildings, aircraft or ships, it was the exercise of physical power and control over the victims of these cases that triggered the relevant states' jurisdiction.[159] Despite this clarification, the restriction of this test to the physical custody criteria was arbitrary, as it implies that mere killing without prior detention will not suffice for jurisdiction.[160] This clearly contradicts cases such as *Andreou* and *Pad*, which were not mentioned by the Court in order to avoid recognising the cause-and-effect notion of jurisdiction.

Ultimately, the Grand Chamber concluded that when Contracting Parties exercise authority and control over an individual under the abovementioned circumstances, they must secure the Convention's rights, which are relevant to the situation of that individual. In other words, overruling *Bankovic*'s all or nothing approach, the Grand Chamber explicitly allowed for the Convention's rights to be divided and tailored. Although there was no further clarification as to which rights may be deemed relevant for which situations, this was a remarkable moment for the jurisprudence of the Court. The essential problem, however, is the absence of any statement with regard to the scope of positive obligations: it was not clear whether the Grand Chamber would have reached the same result if the victims had been killed by purely private actors, or if they had complained about the lack of any effective investigation by the UK into the killings by those private perpetrators.[161]

As the second exception to the primarily territorial notion of jurisdiction, the Grand Chamber reaffirmed its well-established model, namely the effective control over the area test, which engages Contracting Parties' liability for all of the Convention's rights.

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[158] Milanovic, *Al-Skeini and Al-Jedda,* (n 151) 128
[159] *Al-Saadoon and Mufdhi v UK* (2009) 49 EHRR 11 (hereafter *Al-Saadoon)*, in this case two applicants detained in a detention facility in Iraq operated by the UK were found within the jurisdiction of the UK not solely under the personal test but due to total and exclusive control of the UK over the prisons and individuals detained in them.
[160] Reynolds (n 152) 404
[161] Milanovic, *Al-Skeini and Al-Jedda,* (n 151) 132

Then, the Grand Chamber took a positive step by putting an end to the legal space argument. It held that relying on the legal space test for jurisdiction to arise when a Contracting Party occupies the territory of another party does not imply, a contrario, that extraterritorial jurisdiction can never exist beyond the frontiers of Member States. The examination of the issue under a separate heading, rather than under one of the recognised models, indicates that the ECHR applies to actions which occur anywhere, regardless of the model applied.[162] Thus, the legal space argument must only be seen as an additional tool for the establishment of jurisdiction when the alleged actions occurred in the Convention's zone, but should not be regarded as an obstacle for jurisdiction to arise when the relevant area falls outside the borders of the Council of Europe.

In the second part of its analysis, the Grand Chamber, applying these principles to the facts of the case, analysed the respective roles of the Coalition Provisional Authority (hereafter CPA) and the UK in Iraq. After this, it could have applied the spatial model, yet it preferred the state agent authority test, concluding that:

> "following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (…) assumed in Iraq the exercise of some of the *public powers* normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these *exceptional circumstances*, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over *individuals* killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom..."[163]

In so holding, the Grand Chamber based UK jurisdiction on the state agent authority test, and it was the fact that the deceased were killed in the course of a security operation that established the jurisdictional link between the deceased and the UK. However, this conclusion, according to the Grand Chamber, was exceptional, since the UK exercised public powers of maintenance of security in Southern Iraq through the consent of the CPA, the temporary government of that territory. Therefore, although the killings resulted from

[162] Reynolds (n 152) 407, 410; Mallory (n 120) 304-305
[163] *Al-Skeini and Others* (n 7) para 149 (*emphasis added)*

the use of force by UK agents, the Grand Chamber preferred the public powers sub-test identified above. This implies that if the UK had not exercised public powers, the deceased would not have been within its jurisdiction.[164]

Recognition of the personal model may be seen as a positive development in the jurisprudence of the Court. However, the way in which the Grand Chamber applied it to the case led to more confusion with regard to the basic models of jurisdiction, since the public powers requirement invoked in *Bankovic* was an aspect of the spatial model. The Grand Chamber, transposing it onto the personal model in this case, hybridised two bases for extraterritorial jurisdiction, and thus blurred the distinction between them.[165] Rather than overruling the restricted approach of *Bankovic*, this bizarre mix of the personal and spatial models validates its unacceptable assertion that, without public powers, killings through missiles fired from an aircraft will not suffice for extraterritorial jurisdiction.[166] In addition, while this new two-fold test covers violations which occur in the exercise of public authority over a territory short of occupation on the one hand, it excludes, on the other hand, *Issa* or *Isaak*-type killings decided under the personal model. It follows that, despite the explicit recognition of the personal model, the Grand Chamber in *Al-Skeini* arbitrarily restricted the scope of that model by introducing an arguable public powers principle.

Similarly, this reasoning cannot be reconciled with previous cases such as *Pad* and *Andreou* in which mere killings were found sufficient for the establishment of jurisdiction. In this case, however, that the killings occurred in the course of security operations was not considered enough in the absence of the exercise of public powers. This indicates that, like in *Bankovic*, the Grand Chamber rejected the cause-and-effect concept of jurisdiction.

Another shortcoming of *Al-Skeini* is that the consent of the local government, the CPA, played a constitutive role in the establishment of jurisdiction. This indicates the Court's willingness to retain the public international law approach to jurisdiction adopted in *Bankovic*. As has been underlined throughout this study and reaffirmed by the Court in many cases, the legality of an action from the standpoint of public international law must

[164] Milanovic, *Al-Skeini and Al-Jedda,* (n 151) 130
[165] Miko (n 156) 76-77; Kannis (n 110) 238
[166] Milanovic, *Al-Skeini and Al-Jedda,* (n 151) 131

be irrelevant for jurisdiction to arise. It is also unclear what the Court's position will be when the local government of an area objects to the exercise of public powers by the Contracting Parties, or when there is not any such effective government to object.

In conclusion, despite some positive developments such as the explicit recognition of the personal test, the killing of the espace juridique argument, and confirmation of the divisibility of the Convention's rights, *Al-Skeini* raised many controversies in the field of extraterritoriality. For instance, to limit the application of the personal model to the exercise of physical custody or some public powers was a step backward compared to cases such as *Issa*, *Pad* and *Andreou*. In addition, there was no clarity on the scope of positive obligations. Furthermore, the Court left open the relevance of occupation for extraterritorial jurisdiction. Accordingly, it is not possible to speak of a well-settled jurisprudence on extraterritoriality. Therefore, the following section will examine some unresolved issues, and will represent the insufficiency of case-law in the face of complex scenarios.

VIII. BURNING ISSUES

At first glance, *Al-Skeini* can be construed as a further development on the subject of extraterritoriality, as it disowned some of the unpalatable features of *Bankovic*. However, the artificial limitation of the personal model precludes the establishment of a well-settled jurisprudence comprising the widest spectrum of extraterritorial controversies. In other words, there may still be complex scenarios excluded from the protection provided by the Convention. For instance, in the wake of 9/11, some terrorist suspects are detained and subjected to coercive interrogations involving torture and inhuman or degrading treatment in secret detention facilities located in the territory of non-Contracting Parties.[167] In a scenario in which a Contracting Party is not in control of such a facility, what will happen if the controlling state's officers who torture suspects to obtain intelligence are merely fed questions or information by a Contracting Party's agents? Under the public powers requirement introduced in *Al-Skeini,* it does not seem possible to deduce that those suspects are under the authority and control of that Contracting Party.[168] Similarly,

[167] See Wilde, *Legal Black Hole,* (n 2)
[168] Marko Milanovic, 'UK Secret Overseas Torture Policy Leaked' (5 August 2011) <https://www.ejiltalk.org/uk-secret-overseas-torture-policy-leaked/> (accessed 01 September 2017)

assuming that the US is a party to the ECHR, the assassination of Osama Bin Laden would not have fallen within the extraterritorial jurisdiction of the US due to the lack of exercise of public powers or lack of physical control through a prior arrest or detention.[169] In other words, Bin Laden-type targeted killings appear to be out of the purview of the Convention under the rationale of *Al-Skeini*.

The court retained this approach in the case of *Jaloud v Netherlands*, which was, like *Al-Skeini*, related to the occupation of Iraq.[170] The complaint arose out of the fatal shooting by a Dutch officer of an Iraqi citizen, who tried to pass without stopping a vehicle checkpoint under the command of Dutch authorities. The Court firstly dealt with the Dutch government's argument that it was not an occupying power exercising public authority, but assumed a supporting role in maintaining security in the area, with its troops under the command of a British officer. It rejected this argument, holding that the legal status of a state is irrelevant for the question of jurisdiction, and that the Dutch government retained full command of its contingent stationed in the relevant area.[171] Then, it examined the factual circumstances surrounding the death of the applicant's son. It did not dismiss the argument made by the Netherlands that opening fire against a person is not sufficient to bring that person within a state's extraterritorial jurisdiction. Rather, it held that the deceased was within the jurisdiction of the Netherlands as he passed through the checkpoint, which was set up for the purpose of asserting authority and control over individuals passing through it. In other words, in addition to the exercise of limited public powers by Dutch forces, the passage of Jaloud through the checkpoint was the main factor that brought him under the authority and control of the state agents.[172] This was again a disallowance of the cause-and-effect notion of jurisdiction, as the mere killing of Jaloud was not *per se* sufficient to bring him within the jurisdiction of the Netherlands.

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[169] Dominic McGoldrick and APV Rogers, 'Assassination and Targeted Killing-The Killing of Osama Bin Laden' (July 2011) 60 International and Comparative Law Quarterly 778 at 785; Stewart (n 110) 121

[170] *Jaloud v Netherlands* (2015) 60 EHRR 29 (hereafter *Jaloud*)

[171] In doing so, the Court overruled *Behrami and Behrami v France* in which the alleged actions of French soldiers were found attributable to NATO but not to France, although it retained full command of those soldiers, see *Behrami and Behrami v France* (2007) 45 EHRR SE 85;

[172] Aurel Sari, '*Jaloud v Netherlands:* New Directions in Extra-Territorial Military Operations' (24 November 2014) <https://www.ejiltalk.org/jaloud-v-netherlands-new-directions-in-extra-territorial-military-operations/> accessed 01 September 2017

In light of this approach, it is hard to estimate how the Court will deal with the case of *Litvinenko v Russia*.[173] Alexander Litvinenko, who was a former Russian intelligence service (KGB) agent, fled to the UK in 2000 and became a harsh critic of the Putin regime. He was allegedly poisoned by two former KGB agents with whom he met three times in London. At their last meeting in a London hotel they drank tea together, and forensic evidence revealed that polonium-210, a strong radioactive substance, had been poured into his cup. Russian authorities refused to extradite one of those suspects, and conducted its own investigation. Yet the widow of Litvinenko applied to the Court, alleging that the investigation was not effective. Considering *Al-Skeini* together with *Jaloud*, it will be difficult to find the jurisdiction of Russia, since it cannot be said to have exercised public powers in London, and since the deceased was clearly not under the physical custody of the alleged murderers.[174] In addition, it will definitely be very difficult for the Court to say that drinking in a bar or in a hotel lobby was sufficient to establish a jurisdictional link so as to bring Litvinenko under the authority and control of those Russian agents.[175]

Another controversial issue in the context of extraterritoriality is the practise of targeted killings through armed drones by Convention States, in countries such as Afghanistan, Yemen, Libya and Syria.[176] One of the key difficulties on this matter is that Member States could engage in extraterritorial drone campaigns against individuals without exercising effective control over the relevant territory, or without exercising authority and control by state agents through physical custody.[177] In other words, considering the spatial test in *Bankovic* requiring effective control over a territory through military operations, and the personal test in *Al-Skeini* requiring state agents' authority or

[173] *Litvinenko v Russia,* App. No: 20194/07 (lodged on 21 May 2007, still pending) (hereafter *Litvinenko*)
[174] Anders Henriksen, 'The Poisoning of Alexander Litvinenko and Geographical Scope of Human Rights Law' (9 February 2016) <https://www.justsecurity.org/29238/poisoning-litvinenko-scope-human-rights/> accessed 01 September 2017
[175] In fact, in a similar case of *Gray v Germany*, the Court held that Germany had positive obligation to conduct effective investigation against a doctor who was practising in the UK but returned to Germany following his professional negligence caused the death of a British patient. Apart from the nationality link, the only connection with Germany was his presence therein at the time of the complaint. Yet, there was no jurisdiction argument in this case and highly political nature of *Litvinenko* case may preclude the Court to follow the broad position in this case, See *Gray v Germany* [2014] ECHR 503
[176] See generally Adam Bodnar and Irmina Pacho, 'Targeted Killings (Drone Strikes) and the European Convention on Human Rights' (2012) XXXII Polish Yearbook of International Law 189-209
[177] Christof Heyns and Others, 'The International Law Framework Regulating the Use of Armed Drones' (October 2016) 65 ICLQ 791 at 824

control through exercise of public powers or physical custody, it is difficult to argue that individuals killed by drones would fall within the jurisdiction of Contracting Parties.[178]

Unfortunately, the violation of the right to life through the use of armed drones has not yet been subject to the scrutiny of the Court. Some commentators argue that such a deliberate killing would constitute ultimate control over the victims so as to bring them within the jurisdiction of the operating state.[179] Rosen takes a similar approach, holding that current drone technology provides more effective control over individuals or territory than troops on the ground.[180] Considering that the Court found the authority and control of British soldiers in *Al-Skeini* in a disordered security operation conducted in a difficult and dangerous environment, he rightly argues that technological drones, capable of longstanding surveillance in different places and combined with precise weapons, should, *a fortiori,* be accepted as constituting effective control sufficient to establish a jurisdictional link between the victims and operating states.[181]

Milanovic proposes a nuanced solution applicable not only to right to life cases, but also to all substantive rights provided in the Convention.[182] Reconciling universality and effectiveness, he argues that negative obligations to respect human rights should be applied regardless of territory, while positive obligations must be fulfilled when states have effective control over the area where individuals are located. In addition, he suggests that the positive procedural obligation to investigate killings by state agents must also be territorially unbound in order for the negative obligation to refrain from unjustified killings to be truly effective. Under this approach, both drone operations and Litvinenko-type killings could come within the protection of the Convention.[183]

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[178] Milanovic, *Al-Skeini and Al-Jedda,* (n 151) 130

[179] Nils Melzer, *Targeted Killing in International Law,* (OUP 2008); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors,* (OUP 2010) 227-231

[180] Frederik Rosen, 'Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility' (2014) 19:1 Journal of Conflict & Security Law 113 at 120-121

[181] Kretzmer and Droege, on the other hand, suggest that core human rights in human rights treaties, including the prohibition of arbitrary deprivation of life, have become peremptory norms of customary international law, and therefore, the application of them is not a matter of extraterritorial scope of the relevant treaties. See David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence' (2005) 16:2 E.J.I.L. 171 at 185; Droege (n 49) 520

[182] Milanovic, *Law, Principles, and Policy* (n 4) 209-221

[183] See also Functional Test proposed by Judge Bonello in his concurring opinion in *Al-Skeini* (n 7)

IX. CONCLUSION

After all these analyses, it appears fair to conclude that the jurisprudence of the Court on the extraterritorial application of the Convention is not sufficiently well-settled to provide legal certainty on this matter. Since, as shown throughout the study, most of the decisions contradict each other, not because of positive developments but due to arbitrary limitations and incoherent reasoning invoked by the Court. Of course, the Court could be appreciated for finding the Convention applicable abroad on different occasions, such as interception in high seas, detention in prisons operating on foreign soils, and killings committed by fire discharged from helicopters. However, the problem is that it is not possible to extract consistent and objective principles from these decisions capable of bringing a wide range of differing violations under the protection of the Convention. Regrettably, most of these erroneous precepts were created by leading cases on extraterritoriality, such as *Bankovic* and *Al-Skeini*, which cannot be easily left aside.

Since the initial development of case-law on extraterritoriality, the authority and control exercised by a Contracting Party, either over a territory or an individual, have been the main criteria triggering that state's extraterritorial jurisdiction. In the early stages, naturally, these terms and the relationship between the two main models had not been sufficiently clarified by the Convention's organs. The Court had the opportunity to fill the gaps in the *Bankovic* case, yet the outcome resulting from the misinterpretation of the term "jurisdiction" in Article 1 was disastrous: in addition to rejecting the personal model and the divisibility of rights, the Court added some further criteria, namely the exercise of public powers, to the spatial test, which was restricted to the legal space of the Convention. All of these holdings contradict both the earlier and later cases.

The ten years after *Bankovic* was a significant period, as it was the closest that the Court has come to adopting the same flexible approach to extraterritoriality as other human rights supervisory bodies. While *Ocalan* confirmed the validity of the personal model, *Ilascu* reduced the strong military presence criteria of *Loizidou* to the decisive influence test required for triggering state jurisdiction. More importantly, in cases like *Pad* and *Andreou,* mere killings were found sufficient for jurisdiction to arise, and thus the

cause-and-effect approach rejected in *Bankovic* was, at least implicitly, recognised by the Court. Similarly, *Issa* approved the applicability of the Convention beyond the legal borders of the Council of Europe. However, despite these clear contradictions, the problem was the fact that the Court did not explicitly overrule *Bankovic*, but treated it as the leading authority on extraterritoriality. In addition, the application of a mixed test to detention cases like *Al-Saadoon*, and the arbitrary distinction between instantaneous acts and prolonged control submitted in *Medvedyev*, brought more confusion to the matter.

Al-Skeini was expected to put an end to all of this vagueness by adopting objective doctrines to the extraterritorial application of the ECHR. However, although it explicitly dismissed the legal space restriction and allowed the divisibility of rights, it generated broader complications, particularly with regard to the personal model. Transferring the public powers element of the spatial test to the personal one, it made blurry the distinction between these tests, which was already unclear. In addition, in the absence of the exercise of public powers, it restricted the application of this test to cases which include the physical custody of individuals. This clearly contradicts cases such as *Pad* and *Andreou*, in which killings of individuals without physical control sufficed to trigger state jurisdiction.

The most fatal problem is that, under the current jurisprudence, the Court cannot effectively deal with the complex scenarios which it will face in the future. Considering the aerial bombardment by Convention States against Libya, or the participation of them in the Syrian Civil War through the employment of extremely technological drones, the Court must expeditiously prepare itself for those scenarios. However, as long as it continues to preserve *Bankovic*'s holdings, it does not seem possible to expect a novel approach. Perhaps the Convention States could intervene and define the scope of extraterritorial jurisdiction through a formal amendment to the Convention. What is currently clear is that, in the words of Lord Rodgers, "the judgments and decisions of the European Court do not speak with one voice", even after *Al-Skeini* and its successors.[184]

[184] *R (on the application of Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL (n 155) para 67

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