MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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TOWARDS THE TRUE UNIVERSALITY OF HUMAN RIGHTS?

AN ANALYSIS OF THE STRASBOURG COURT'S DEVELOPMENT OF A FUNCTIONAL APPROACH TO EXTRATERRITORIAL JURISDICTION AND THE IMPLICATIONS FOR THE PROTECTION OF THE HUMAN RIGHTS OF CIVILIANS ABROAD DURING CONFLICTS

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Abstract:

Current conflicts increasingly affect civilians, involve multiple parties, and are of ambiguous nature. Therefore, international law and international human rights bodies, must develop new methods to approach alleged human rights violations taking place in such contexts. This thesis analyses one of these methods, i.e., the extraterritorial application of international and regional human rights treaties. Especially the European Court of Human Rights (ECtHR), has adopted a restrictive approach concerning the extraterritorial application of the European Convention on Human Rights (ECHR), and is therefore the main focus of this thesis. The core issue concerning extraterritorial application of human rights treaties is the notion of jurisdiction. Thus, the understanding of jurisdiction in this capacity is analysed, and how the development of a new understanding of jurisdiction, that is functional jurisdiction, can be seen in the Court's judgments within the area. However, the issue is controversial as the exercise of jurisdiction is closely tied to the autonomy of a State and a State's territory. Nevertheless, the expansion of State jurisdiction and the development of a functional approach to jurisdiction would make it possible to take all facts into consideration during all stages of military operations abroad to sufficiently safeguard individual's human rights.

The finding and establishment of the exercise of jurisdiction is of utmost importance, as the exercise of jurisdiction is a necessary condition for a State to be able to be held responsible for acts or omissions imputable to it. Additionally, international human rights law only binds States vis-á-vis their relations with individuals within their jurisdiction. In its findings, the Court has mostly relied on the principle of territoriality and the traditional bases for extraterritorial jurisdiction, which is State agent authority and control (personal jurisdiction) as well as, effective control over an area (territorial jurisdiction). This thesis, through an analysis of decisions and judgments by the Court, seeks to identify the progression of these traditional principles to also include elements of functionality. This thesis, thus, sets out to explore in what instances the Court has found there to be a jurisdictional link between individuals and a Convention State acting abroad. However, when analysing the judgments, it becomes evident that there is no clear approach by the Court, and instead of developing a comprehensive framework on extraterritorial State jurisdiction, most of its conclusions are based on a case-by-case basis, resulting in judicial ambiguity. It is clear that the Court still needs to develop its approach to such matters. Nevertheless, recent judgments indicate a shift in the reasoning by the Court in favour of the protection of civilians' human rights, and a functional approach to jurisdiction, which takes into account the broader framework military operations abroad are conducted in.

Keywords:

The European Court of Human Rights, the European Convention on Human Rights, jurisdiction, functional jurisdiction, extraterritorial State jurisdiction, protection of civilian's human rights

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List of Abbreviations

Abbreviation	Definition
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CIL	Customary International Law
CPA	Coalition Provisional Authority
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights/the Strasbourg Court
FRY	Federal Republic of Yugoslavia
HRCee	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICDC	Iraqi Civil Defence Corps
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
KFOR	International Kosovo Security Force
MND (SE)	Multinational Division, South-East
NATO	The North Atlantic Treaty Organization
OAS	Organization of American States
RTS	Radio Televizija Srbije
SFIR	Stabilization Force in Iraq
UN	United Nations Organization
UNHRC	United Nations Human Rights Council
UDHR	Universal Declaration of Human Rights
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSCR	United Nations Security Council Resolution

1. Introduction

1.1. Background

During the last decades, fighting, conflicts and the parties to conflicts have tremendously changed. More than ever, military operations, fighting and violence are conducted in populated areas, affecting civilians, their lives and their human rights.[1] Most conflicts are internal, nevertheless, outside involvement in such conflicts is common. Other States and organisations contribute and assist with weapons, troops, and knowledge, without sufficiently considering the effect their actions have on the human rights of the civilians living in the affected areas. As conflicts have changed, so should, and has, the protection afforded to civilians living in such situations. One of the methods of protecting civilians, trying to realise their human rights and hold States accountable for their human rights violations abroad, which has gained attention in recent years is the extraterritorial application of human rights treaties. In the thesis, the term 'extraterritorial' indicates 'beyond national territory'. Thus, 'extraterritorial' highlights that a State exercises jurisdiction without any territorial link.[2]

The extraterritorial application of international and regional human rights treaties refers to situations where a State has human rights obligations vis-à-vis a person who is not within that State's territory. Furthermore, by recognising and accepting the extraterritorial application of international human rights, the Contracting Parties to international and regional human rights treaties acknowledges their duties towards individuals abroad affected by their actions.[3] The application of human rights treaties extraterritorially has been especially encouraged by different human rights organisations seeking to protect human rights in all situations.[4]

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[1] Action on Armed Violence, Explosive Violence Monitor 2020, p. 9; Global Humanitarian Overview, 2022.

[2] See for example, Milanovic, 2011; Gondek, 2009 and Coomans and Kamminga, 2004. The expression 'extraterritorial' is also commonly used in other fields, such as economic and criminal law and is often used to qualify jurisdiction exercised by States without any territorial link (extra-territorial). See for example Higgins, 1994, p. 73, who states that: 'Logically, all exercises of jurisdiction that are not based on the territoriality principle are exercises of extraterritorial jurisdiction.' See also Ryngaert, 2008, pp. 6– 7.

[3] See Janig, 2021, p. 1; Besson, 2012, p. 857. Extraterritorial application of human rights especially gained attention due to the 'war on terror' led by the US administration under President W. Bush, during which various allegations concerning serious human rights violations were linked to military operations abroad. For example, public awareness was raised on the issue as pictures were broadcasted worldwide picturing the abuse of detainees by US troops operating overseas e.g., in Iraq, Cuba, and other locations. See, for example, Sands, 2008 and Greenberg, 2009.

[4] One prominent advocate was Amnesty International which authored several articles, documents and publicly addressed the situation in Guantánamo Bay. See, for example, Amnesty International, USA: *Guantánamo: Lives Torn Apart – the Impact of Indefinite Detention on Detainees and Their Families* (AI Index: AMR 51/007/2006);

However, such a development and application have been obstructed and rejected by countries involved in conflicts abroad, which, naturally, support a more limited and spatial reach of international human rights treaties.[5]

The historical development of international law has been primarily based on the sovereignty of States, and simply as a matter of principle, human rights are normally considered to be a notion related to a State's territory.[6] However, there are some generally agreed-upon principles where States are regarded as exercising State jurisdiction abroad. Firstly, where States exercise jurisdiction through authority and control of their agents abroad, and secondly, where States exercise effective control over an area.[7] Treaty bodies, especially the European Court of Human Rights (ECtHR), has been cautious in expanding the concept of jurisdiction away from these traditional principles of territory and stated that the extraterritorial application of the European Convention on Human Rights (ECHR) remains 'exceptional'.[8] For this reason, the ECtHR, as well as the ECHR, is the focus of this thesis. More recently the Court has expressed that:

> The Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court

Amnesty International, USA: *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay* (AI Index: AMR 51/053/2002) and Amnesty International, USA: *Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay* (AI Index: AMR 51/051/2007).

[5] For example, the US government's position during the W. Bush Administration was restrictive, whilst the Human Rights Committee urged the State (in regards to the applicability of the International Covenant on Civil and Political Rights extraterritorially) to: 'review its approach and interpret the Covenant in good faith' as well as stated that the State Party should 'in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant'. Concluding observations of the Human Rights Committee to the second and third US reports, 15 September 2006, CCPR/C/USA/CO/3, para. 10. See also concluding observations of the Committee against Torture, Conclusions, and recommendations on the second periodic report of the United States of America, 25 July 2006, CAT/C/USA/CO/2, para 15.

[6] Rodley, 2009, p. 47. This has also been demonstrated in the case law on the subject. See, for instance, the European Court of Human Right (ECtHR) has stated in multiple cases that a State's jurisdictional competence under Article 1 is primarily territorial. See e.g., *Soering v. the United Kingdom* (Series A no. 161) 1989, para. 86; *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, paras. 61 and 67; *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, para. 312 and *Assanidze v. Georgia* [GC] (Application No. 71503/01), 2004, para. 139. States are also prohibited from exercising jurisdiction on the territory of other States according to international law, although, exceptions can be made if there is an international treaty or customary international law permitting a State to exercise its jurisdiction outside its national borders, such are e.g., crimes with universal jurisdiction.

[7] The general principles relating to State jurisdiction have been laid down in among other cases, *Al-Skeini and Others v UK* (Application No. 55721/07), 2011. See also *Georgia v. Russia* [GC], (Application No. 38263/08), 2021, para. 81 for a summary of the general principles in case law of the ECtHR.

[8] See e.g., ACHPR, *Mohammed Abdullah Saleh Al-Asad v. Djibouti,* (Communication No. 383/10), 2014, para. 134 and the above cited cases.

> that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts.[9]

The above passage provides no clear and comprehensive guidance on the extraterritorial application of the European Convention on Human Rights. Furthermore, the Court has not set out what constitutes 'exceptional circumstances', only determining that the exercise of extraterritorial jurisdiction 'must be determined with reference to the particular facts'.[10] The paragraph, thus, to a certain degree, disregards the previous demands for personal or territorial jurisdiction for establishing State jurisdiction. Instead, the paragraph seems to set out a new basis for jurisdiction, that is a functional interpretation of jurisdiction, an approach which would take all relevant facts into consideration.[11] This model does not see jurisdiction as control over a certain territory or specific persons, instead, the *functional model* sees jurisdiction as authority or control over activities that affect the enjoyment of human rights. States, therefore, would have extraterritorial jurisdiction, and consequently also obligations, whenever their conduct, or the conduct of private actors over which they exercise authority, leads to a direct and reasonably foreseeable impact on human rights.[12] The ultimate purpose of the debate on extraterritorial application versus non-extraterritorial application is to either find or avoid State accountability for human rights violations.[13] As such, *functional jurisdiction* becomes a threshold criterion to determine extraterritorial applicability,[14] and the finding of a jurisdictional link becomes a precondition for States to be held accountable for their human rights violations abroad.[15]

The central issue of the debate on extraterritoriality is focused on the concept of *jurisdiction*. How the ECtHR has interpreted jurisdiction and whether jurisdiction for human rights purposes should be understood as coinciding with the territory of a State, as has long been the principle, or whether the human rights obligations of a State, arising from human rights treaties, also bind States Parties outside their national territory.[16] The finding and exercise of jurisdiction is of utmost importance, as the exercise of jurisdiction is a necessary condition for a State to be able

[9] ECtHR, *Georgia v Russia* (II), 2021, (Application No. 38263/08), para. 81(132).
[10] Ibid.
[11] Janig, 2021, p. 6; Shany, 2013.
[12] Ibid.
[13] Costa, 2013, p. 3.
[14] Janig, 2021, pp. 3–4.
[15] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, para. 311.
[16] See Costa, 2013, pp. 7-8; Higgins, 1994, p. 56 as well as Shaw, 2004, pp. 572– 620.

to be held responsible for acts or omissions imputable to it.[17] Additionally, international human rights law only binds States vis-á-vis their relations with individuals within their jurisdiction.[18] Thus, it is of key importance to analyse when individuals are seen to be under the jurisdiction of a State.[19] The majority of human rights treaties present particular models for linking the jurisdiction of the State Party to the obligations arising from the treaty in question. However, the models and formulas vary from one treaty to another.[20] An individual's enjoyment of the rights set out in the ECHR, therefore, rests on the finding of a jurisdictional link between the individual and the Contracting State. Consequently, the central issue becomes to identify when individuals have been seen as being within a State's jurisdiction, as determined by the ECtHR, and how the interpretation of the phrase 'within their jurisdiction' in Article 1 of the Convention, affects the extraterritorial obligations of the States Parties to this particular human rights treaty.

This thesis attempts to clarify, in which instances the Court has expanded a Contracting State's jurisdiction to include individuals abroad, whose human rights have been affected by the Convention States' actions during or in connection with military operations, or other actions in connection to conflicts abroad. Although, the concept and application of human rights treaties extraterritorially and State obligations regarding individuals abroad, have incessantly developed, the definite extent and reach of these obligations have been, and still are, subject to significant debate and controversy. Especially intriguing is the recent development of the extraterritorial jurisdiction in the Court's case law to a more functional approach to jurisdiction in the protection of individuals' human rights abroad. Therefore, the discussion centres around the functional model of jurisdiction, and why this approach is a necessary addition to the two

[17] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, para. 311.

[18] IHRL governs actions of States, individuals are thus, as such, not bound specifically by IHRL. However, IHRL treaties often provide a duty on States to hold individuals criminally responsible for crimes they commit which are contrary to IHRL. Such crimes are e.g., murder, torture, or sexual violence. See for example, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 2(3); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 13 and UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: resolution adopted by the General Assembly, 10 December 1984, A/RES/39/46. Article 2.

[19] Responsibility of States for Internationally Wrongful Acts, 2001, Article 8 asserts that: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' Consequently, States' have jurisdiction over acts performed by individuals under their control.

[20] Costa, 2012, pp. 16-17.

traditional models of personal and territorial jurisdiction, in the protection of individuals' human rights.

1.2. Research Question and Limitations

This thesis especially focuses on one particular treaty and key instrument in the protection of human rights, that is, the European Convention on Human Rights, and one specific human rights body, the European Court of Human Rights (also referred to as the Strasbourg Court). The focus is specifically on this Court and Convention, as the Court's practice regarding issues taking place in an extraterritorial context has been inconsistent, and due to its history of having a restrictive extraterritorial reach.[21] However, other relevant legal instruments and human rights mechanisms are referred to when pertinent to the discussion.[22] The ECHR in its Article 1 states that: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[23] Therefore, an essential part of the discussion is centred around how the ECtHR has interpreted the notion of jurisdiction in Article 1, within the context of extraterritoriality in its case law, and especially, how the Strasbourg Court has developed a more functional approach to jurisdiction. A functional approach to jurisdiction would require that States comply with the Convention in all situations in which they exercise public powers (abroad). If they participate in patrol or rescue operations, in Security Council operations, in the battlefield during active hostilities, at checkpoints or in the context of targeted security operations.[24]

As the thesis examines the application of the ECHR, it also seeks to understand, on a more general level, in what way international human rights law (IHRL) can be used in the protection of civilians during conflicts outside a Contracting State's borders. More specifically, this thesis discusses in what situations Contracting Parties, involved in operations abroad, have been and could be found, to exercise jurisdiction over civilians injured or killed during such situations, and how violations of individuals' human rights can be attributed to those parties. Thus, important to the thesis is also the concept of attribution and responsibility. In short, State

[21] See e.g., ACHPR, *Mohammed Abdullah Saleh Al-Asad v. Djibouti,* (Communication No. 383/10), 2014, para. 134.
[22] Such are e.g., the ICCPR, the UDHR and decisions by the HRCee, ICJ, IACHR, etc.
[23] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 1.
[24] ECtHR, *Medvedyev and Others v. France*, (Application No. 3394/03), 2010, para. 81.

responsibility in international law is defined in terms of internationally wrongful acts. According to the ILC Articles on State Responsibility, there is an internationally wrongful act of a State when conduct, constituting an act or omission, is 'attributable to the State under international law', and it 'constitutes a breach of an international obligation of the State.'[25] Hence, an internationally wrongful act is the result of a breach of a primary rule of international law that is attributable to the State, which in turn engages the international responsibility of the State.[26] Under international law, conduct (acts or omissions) is attributed to a State in different ways, which are set out in Articles 4 through 11 of the ILC Draft Articles. The function of attribution is 'to establish that there is an act of the State for the purpose of responsibility.'[27] Underlying the concept of attribution is a truism that any act of a State, 'must involve some action or omission by a human being or group.'[28] The second 'element' of attribution can be seen as a set of tests and principles, seeking to identify whether or not conduct may be attributed to the State.[29] First, to attribute an act to a State, it is necessary to identify with reasonable certainty the actors and their association with the State. Attribution can, thus, not be presumed, instead, it requires an assessment and application of a set of rules and defined factual circumstances, in which conduct is appropriately attributed to the State to engage its responsibility under international law.[30] The ILC has summarised the circumstances in which conduct is generally attributable to the State for purposes of responsibility in the following terms: 'the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.'[31]

The ILC Articles on State Responsibility identifies the secondary rules governing the attribution of conduct to the State by its organs and *de facto* organs, the attribution of *ultra vires* conduct of such actors, as well as other exceptional circumstances in which conduct may be attributable to the State. Such exceptional circumstances may be, for example, excess of authority or contravention of instructions (Article 7), conduct directed or controlled by a State

[25] ILC, Articles on State Responsibility, Article 2.
[26] Weatherall, 2022, p. 178.
[27] ILC, Articles on State Responsibility, Part One, Chapter ii, Commentary, para. 4.
[28] Ibid.
[29] See, Weatherall, 2022, p. 178, and Carlo de Stefano, Attribution in International Law and Arbitration 1, Oxford: oup, 2020.
[30] Weatherall, 2022, p. 178.
[31] ILC, Articles on State Responsibility, Part One, Chapter ii, Commentary, para. 2.

(Article 8), or conduct carried out in the absence or default of the official authorities (Article 9).[32] The above Articles are of particular importance in the future discussion and analysis of this thesis, as it sets out to identify in what circumstances alleged human rights violations abroad can be attributable to another State than the territorial and in examining States' jurisdiction abroad.

The research questions are as follows; how has the European Court of Human Rights interpreted jurisdiction within the context of extraterritoriality, and in what circumstances have States been found to have had jurisdiction over situations occurring abroad during military operations? In what way can the development of a functional approach to jurisdiction be detected in the Court's case law, and what implication does such a development have in the protection of the human rights of civilians, who are subjected to human rights abuses by Contracting States acting extraterritorially?

This thesis, thus, sets out to clarify and analyse judgments of the Court regarding extraterritorial jurisdiction. The analysis examines cases by the ECtHR and illustrates how the Court during the last twenty years has continuously developed its reasoning regarding States Parties' obligations abroad in respect of individuals' human rights being violated. However, when speaking of the interpretation of 'the Court', it is worth noting that the Court is not a homogenous unit, but rather it is a sufficient number of judges within the Court that has subscribed to a certain position, which in turn has shaped a particular approach to extraterritorial jurisdiction.[33] This thesis also examines, how the Court's interpretation of the concept of jurisdiction has shifted to a more functional understanding of the concept, instead of the traditional spatial model and personal model of jurisdiction. Seeing that the main goal of the extraterritorial application of human rights treaties is to hold States responsible for human rights violations and safeguard the human rights of individuals abroad, the concepts of effective control and attribution are also crucial elements.[34] Thus, the question of jurisdiction is also linked with these two concepts. In short, effective control refers to the degree of authority and influence a State exercise over a territory or a group of people. Attribution, on the other hand, refers to the process of assigning responsibility for a particular act or omission

[32] Ibid, Articles 7-9.
[33] Mallory, 2021, p. 35.
[34] Higgins, 1994, p. 149. Nevertheless, in some instances, the ECtHR in its case law has disregarded the establishment of effective control in favour of other types of jurisdictional tests. Discussed further in chapter 4.

to a State or an individual, as was seen above. Both these concepts are crucial for determining the legal consequences of State conduct under international law.[35] This thesis, especially examines if, and when, the conduct of States extraterritorially breaching rights set out in the ECHR, have been seen to be under that State's jurisdiction. Noteworthy is that the question of attribution may influence the determination of jurisdiction. Hence, the thesis also explores the relationship between attribution and functional jurisdiction in the Court's judgments.[36]

In discussing the protection of civilians and their human rights during conflicts abroad, two branches of law are of key importance, i.e., international human rights law (IHRL) and international humanitarian law (IHL). Both branches set out certain rules which seek to limit the effects of armed conflict and they share the common goal of preserving the dignity and humanity of all, as well as creating legally binding obligations concerning the rights of persons affected by conflict. Although different in scope, both branches offer a series of protections for persons in conflict and provide complementary and mutually reinforcing protection.[37] The perhaps traditional, but now obsolete, perception of the difference between IHRL and IHL is that the former is applied in times of peace, whilst the latter is applied in situations of armed conflict. Nonetheless, modern international law recognises that this simple division and distinction is inaccurate. Instead, it is now widely acknowledged by the international community that since human rights obligations derive from the recognition of the inherent rights of all human beings, and as these rights can be affected both in times of war and peace, human rights law continues to be applicable also in situations of armed conflict.[38] IHRL is, thus, applicable in all circumstances, except to the extent permissible by derogations.[39]

[35] Milanovic, 2013(a).

[36] Janig, 2021, p. 1.

[37] UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 1. For further discussion on their interrelationship see UN Office of the High Commissioner, 2011, HR/PUB/11/01. The document addresses the main elements of the legal framework, for example the identification of the main sources of the two bodies of law, as well as presents and compares their key principles and the duty bearers in both IHL and IHRL.

[38] Human rights entail both rights and obligations and these rights are inherent in all human beings, regardless of nationality, sex, origin, colour religion, language, etc. and are expressed and guaranteed by law, in the form of customary international law, treaties, general principles and soft law. The obligations bind States to act in certain ways or refrain from certain acts to promote and protect the human rights and fundamental freedoms of individuals or groups. See, UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 5.

[39] UN Office of the High Commissioner, 2011, HR/PUB/11/01, pp. 5-6. Furthermore, there is no indication in human rights treaties that they exclusively would be only applicable in times of peace and not in times of armed conflict.

Therefore, the two bodies of law are considered to be complementary sources of rights and obligations in situations of armed conflict.[40]

The two bodies of law have some crucial differences, which are of relevance to this thesis. Firstly, IHL applies only in times of armed conflict and its provisions are formulated in such a way as to take into account the special circumstances of warfare and may not be abrogated under any circumstances.[41] Its scope is thus limited *ratione materiae* to situations of armed conflict.[42] IHL protects human rights to the extent that they are particularly endangered by armed conflicts, thus, other human rights, such as the right to free elections, the right to social security, the right to self-determination, or freedom of thought are not covered by IHL, although, the rules of IHL can be tailored to specific problems arising in armed conflicts.[43] Human rights law, on the other hand, applies at all times, covers almost all aspects of life, and must be applied to all persons and respected in all circumstances.[44] IHRL concerns the rights individuals (and groups) can claim against governments. Therefore, although IHL is a specialised body of human rights law, of key importance and especially constructed for times of armed conflict, with certain provisions explicitly designed to protect civilians in armed conflict, of which some have no equivalent in IHRL, this thesis focuses on IHRL.[45] Mainly due

[40] Ibid, p. 6. This standpoint has also been acknowledged by human rights bodies, e.g., the Human Rights Committee in its general comments Nos. 29 and 31 where it was recalled that the ICCPR also applied in situations of armed conflict to which the rules of IHL are applicable. UN Human Rights Committee General Comment No. 29 on States of Emergency, (Art. 4), para. 3, 31 Aug. 2001, UN doc. CCPR/C/21/Rev.1/Add.11 and General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (para. 11), 26 May 2004, UN doc. CCPR/C/21/Rev.1/Add.13. In addition, the Human Rights Council, in its resolution 9/9 (2008) on the protection of the human rights of civilians in armed conflict, further recognised that the two bodies of law were complementary and mutually reinforcing, as well as observed that all human rights require protection equally and that the protection provided by IHRL continued in situations of armed conflict, also taking into account when IHL applied as *lex specialis*, such as in situations of belligerent occupation. *Lex specialis*, in essence, means the 'law governing a specific subject matter' which when applied overrides more general laws. For a summary on the application of the principle of *lex specialis* see UN Office of the High Commissioner, 2011, HR/PUB/11/01, Chapter II, section D. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1996, p. 226 and ICJ, *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para 106.

[41] International Committee of the Red Cross, Gasser, 1998, 'International humanitarian law and the protection of war victims'.

[42] UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 5.

[43] Ibid, p. 16.

[44] International Committee of the Red Cross, Gasser, 1998, 'International humanitarian law and the protection of war victims'. However, there are some exceptions e.g., regarding times of public emergencies, certain rights may be derogated. Article 15(2) of the European Convention on Human Rights provides a list of rights that may not be suspended under any circumstances as does Article 4 para 2 of the International Covenant on Civil and Political Rights.

[45] IHL in particular, governs the rules on the conduct of hostilities or the use of weapons. Provisions unique to IHL is the treatment of the wounded, sick and shipwrecked. IHRL on the other hand exclusively protects rights such as the right to vote, strike and the freedom of press. Other rights are covered by both branches, such are for

to the advantage it has of applying at all times, whether in situations of peace, war, occupation, or something in-between.[46] This makes IHRL more adaptable in situations where the character of the conflict and the parties to it is ambiguous. Even though, the thesis focuses on IHRL, and particularly the ECHR, IHL is referred to when relevant to the analysis, and throughout the thesis, it is important to keep in mind that both bodies of law should be applied in a complementary and mutually reinforcing way in the context of armed conflict.[47]

1.3. Method and Material

As the aim of the thesis is to analyse the approach of the European Court of Human Rights in cases concerning extraterritorial jurisdiction, and the development of a functional approach to jurisdiction, a considerable amount of the conclusions are based on examining the Court's output and case law, concerning the extraterritorial application of the ECHR. Therefore, this thesis discusses situations where States have allegedly breached the human rights of individuals when exercising public powers abroad and the reasoning by the ECtHR in the determination of State jurisdiction. Although, as a source of international law, judicial decisions are of subsidiary nature, their importance, contribution, and relevance to the debate should not be underestimated.[48] Judicial decisions provide further clarification regarding issues such as the

instance, the prohibition of torture. See ICJ, *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para 106.

[46] UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 7.

[47] The High Commissioner has recalled that, over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council expressed the view that, in situations of armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. The Council also recognized the importance and urgency of these problems. In line with recent international jurisprudence and the practice of relevant treaty bodies, the Council acknowledged that human rights law and international humanitarian law are complementary and mutually reinforcing. See the Human Rights Council, 2009, 'Outcome of the expert consultation on the issue of protecting the human rights of civilians in armed conflict - Report of the Office of the United Nations High Commissioner for Human Rights' (A/HRC/11/31), para. 5. Additionally, certain violations under IHRL and IHL also constitute crimes under international criminal law, thus other bodies of law, such as the Rome Statute of the International Criminal Court, could also be applicable. IHL is implemented in international criminal law and criminal justice on war crimes and, therefore, they also clarify and develop the rules of IHL. Similarly, other bodies of law, such as international refugee law as well as domestic law are also applicable to certain situations and may influence the type of human rights protection available. UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 8. See also the discussion by Milanovic 2023(b), on the admissibility decision of *Ukraine and the Netherlands v. Russia*, and how the Court in the case conceptualises the relationship between IHL and the ECHR. For example, how it accommodates IHL in applying Article 2 of the Convention.

[48] Costa, 2013, p. 6. E.g., of importance, is also the jurisprudence of the International Court of Justice (ICJ), which the Court's Statute recognises as a subsidiary means for the determination of rules of law and is increasingly referring to States' human rights obligations in situations of armed conflict. See e.g., ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1996, p. 226 and ICJ, *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, p. 136 and ICJ, Armed

continuous application of IHRL in situations of conflict.[49] As the formulations of the jurisdictional clauses in different human rights treaties vary, so do naturally the decisions by the treaty bodies. Therefore, although the decisions by treaty bodies, and especially the ECtHR, differ and might not provide an absolute answer to the question of the extraterritorial application of human rights treaties, they are of importance and contribute valuable insight into the debate on the extraterritorial application of human rights treaties and the development of the understanding of the concept of extraterritorial State jurisdiction.

This thesis has a regional and international focus. Conclusions are made by using a qualitative approach, particularly by analysing and interpreting judgments by the ECtHR, critically reviewing existing norms of IHRL, that is *de lege lata,* and other relevant sources and literature. The analysis only considers actions, events and cases most relevant to the discussion. The research in the thesis follows the legal doctrinal method and findings are, thus, based on analysing existing international law provided through human rights treaties, especially the European Convention on Human Rights.[50] However, other important sources of IHRL are also utilised to highlight the general approach to extraterritoriality and the interpretation of jurisdiction, such as resolutions adopted by the General Assembly, the Security Council and the Human Rights Council. These are of importance as the Strasbourg Court often refers to other human rights bodies and UN bodies and their decisions in its own judgments. Hence, they also play a significant role in the development of extraterritorial human rights. Furthermore, case law by different treaty bodies and reports of human rights special procedures, guiding principles, declarations and other relevant soft law instruments contribute to the clarification and guidance on human rights norms and standards and are, therefore, used to answer the research questions.[51]

This thesis starts by discussing the relevant interpretations of jurisdiction in Chapter 2 and continues by discussing how jurisdiction is interpreted within the main treaty analysed. Additionally, jurisdiction is further examined in relation to the extraterritorial application of human rights treaties and how different human rights bodies have interpreted the concept in

Activities on the Territory of the Congo (*the Democratic Republic of the Congo v. Uganda*), Judgment, 2005, p. 168.

[49] UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 11.

[50] For a more elaborate discussion on the extraterritorial application of The American Convention on Human Rights and The African Charter on Human and Peoples' Rights see Caflisch, 2017.

[51] UN Office of the High Commissioner, 2011, HR/PUB/11/01, p. 9.

varying ways. Analysing how other human rights bodies have interpreted State jurisdiction may indicate how the ECtHR in the future will interpret the concept, as it gradually moves away from its previous restrictive approach. In Chapter 3, the development within the case law of the ECtHR is discussed. Focusing especially on the earlier requirement of the alleged human rights violation needing to take place within the European legal space, here the analysis relies heavily on the cases of *Banković* and *Behrami.* The thesis then moves on to analyse how the Court has broadened its understanding of State jurisdiction and when individuals are to be regarded as being under the jurisdiction of a Contracting State acting extraterritorially.

Chapter 4 explores how the Court has considered State jurisdiction in specific instances of operations abroad, such are for example, Security Council operations and military operations taking place in the active phase of an international armed conflict. Chapter 5 seeks to identify the development of functional jurisdiction in the Court's jurisprudence and how this approach could be a way of safeguarding individuals' human rights during conflicts abroad. The Chapter also highlights the contrasting approaches by the Court in situations of extraterritorial State jurisdiction. Additionally, the Chapter strives to distinguish potential future developments by the Court concerning extraterritorial State jurisdiction. The discussion is concluded in Chapter 6. The research question is, thus, answered in three main steps. Firstly, by identifying and analysing how jurisdiction has been, and is, interpreted within the context of extraterritoriality. That is, how territorial jurisdiction, personal jurisdiction and functional jurisdiction relate to the actions of States and the protection of human rights abroad. Secondly, by conducting a case law analysis which seeks to identify how the Court has reasoned regarding extraterritorial State jurisdiction in the past in its previous judgments, its development to present day and how the emergence of functional jurisdiction can be seen in the Court's decisions and judgments. Lastly, the thesis discusses what the previous analysis indicates in the protection of civilians and their human rights during conflicts, and how functional jurisdiction is a necessary addition to the traditional principles on extraterritorial jurisdiction to establish a comprehensive framework in the protection of individuals' human rights abroad affected by Contracting State's actions.

2. Jurisdiction

2.1. The Traditional Bases for Extraterritorial Jurisdiction and the Functional Approach

The wording of treaties and how they link jurisdiction with State obligations depend on the specific phrasing of each individual treaty. The articles relevant to the jurisdictional and spatial scope of the treaties are normally found at the beginning of a human rights treaty, after the preamble. In these 'jurisdictional clauses', the Contracting States' obligations are usually linked to their jurisdiction.[52] The formulation of the jurisdictional clause in each respective treaty is decisive when the various bodies and courts argue. However, they to a great extent have the same line of reasoning and have generally emphasised that the extraterritorial application of human rights treaties remains exceptional.[53] Situations where extraterritorial application has been established, traditionally, have involved situations of 'high degrees of State control, roughly equivalent to the level of control exercised by States over individuals residing in their own territory'.[54] Generally, these situations can be divided into two main instances. Firstly, where States exercise effective control over certain territories and spaces, called territorial jurisdiction, the spatial model, or *ratione loci*. Secondly, where States exercise effective control over certain individuals, i.e., personal jurisdiction or *ratione personae*.[55]

In continuing the analysis, the jurisdiction of the ECtHR needs to be clearly separated from the jurisdiction of the Convention States. Jurisdiction under Article 1 is the question of whether the Convention applies in the first place, and has two basic forms, that is State control over territory, or State control over the victim of an alleged human rights violation.[56] The question of a State's jurisdiction under Article 1 of the Convention should, therefore, be clearly distinguished from the question of the Court's own jurisdiction.[57] However, the issue of keeping these two notions of the concept separate becomes more complex as the Court itself

[52] Costa, 2013, p. 17.
[53] See e.g., ACHPR, *Mohammed Abdullah Saleh Al-Asad v Djibouti,* (Communication No. 383/10), 2014, para. 134, ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, and ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001. para. 59.
[54] Shany, 2013, p. 50.
[55] See ACHPR, *Mohammed Abdullah Saleh Al-Asad v Djibouti*, (Communication No. 383/10), 2014, para 134.
[56] Milanovic, 2023(a).
[57] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, paras. 503-507.

seems to muddle the two above understandings of jurisdiction.[58] For instance, the Court recently stated that:

> The Court's case-law demonstrates that the assessment of whether a respondent State had Article 1 jurisdiction in respect of complaints about events outside that State's formal territorial borders may involve consideration of *ratione loci* or *ratione personae* jurisdiction, or both. Where the principal argument is that the respondent State exercised effective control over an area, the question that arises is, essentially, whether that area can be considered to fall within the *ratione loci* jurisdiction of the respondent State, with all the attendant rights and responsibilities that entails, notwithstanding the fact that it falls outside its territorial boundaries. Where the argument is rather that the victims fell under State agent authority and control in territory which the State did not control, the principal question will be whether the respondent State exercised *ratione personae* jurisdiction.[59]

The Latin labels *ratione loci* and *ratione personae* above, are usually used to indicate the jurisdiction of the Court itself, not the jurisdiction of a State.[60] Therefore, in continuing the discussion, the *personal model* and *territorial*/*spatial model* are used when discussing the jurisdiction of a State and the Latin phrases indicate that it is the Court's own jurisdiction which is discussed.

More recently, in addition to the spatial and personal jurisdiction, a third type of model has been promoted, that is the functional model of jurisdiction, which concerns the level of control a State exercises over the enjoyment of an individual's human rights. The functional model of jurisdiction considers the purpose and effect of a State's conduct, rather than only taking into account its territorial or sovereign attributes. As such, a State may be held accountable for its actions outside its borders, if the actions in question have an impact on the rights or interests of other States or individuals, and where the traditional rules of jurisdiction might not be applicable or may not provide an adequate remedy.[61] Nevertheless, when discussing the different types of jurisdiction it becomes obvious that it is difficult to clearly distinguish between these three notions of the concept. They have rather blended into each other and are all relevant in the protection of the human rights of civilians, which is also illustrated later in the analysis of the case law on the subject. Therefore, although the functional model of jurisdiction is the main focus of the thesis, a summary of the other models of jurisdiction is necessary.

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[58] Ibid.
[59] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 548.
[60] Milanovic, 2023(a).
[61] Janig, 2021, pp. 3–4.

Territorial jurisdiction recognises jurisdiction as authority or control over specific spaces and territories, and if States exercise control over a specific space they typically have to ensure the full range of human rights under a given treaty for all individuals present in that space.[62] The key concept is control, as States need to exercise *de facto* control over a certain area for it to have obligations and for human rights treaties to apply extraterritorially. This model, for instance, especially concerns situations where States exercise *de facto* control through their military. Such control can be obtained lawfully, i.e., through authorisation by the UN Security Council, or with the consent of the territorial State. The control can also be acquired unlawfully, that is through, for example, military occupation. The State can exercise this control directly or indirectly through subordinate local bodies. Noteworthy is that in the latter case, it is not necessary to determine whether the State in question has exercised detailed control over the actions of the subordinate local administration or the police. If the local administration survives due to the relevant State's support, either military or other support, it is considered as sufficient grounds for that State to be regarded as responsible for the local administration's policies and actions.[63]

The personal model of jurisdiction concerns authority or control over individuals, regardless of their whereabouts. Similarly to the territorial model, the question of control is also essential, as the exercise or finding of effective (factual) control determines if the treaty obligations are applicable as a whole or if only certain obligations can be applied. Furthermore, international law sets out that States have jurisdiction over persons abroad, if they exercise factual control over the individual in question or *de facto* control over the territory, as was established in the paragraph above. Such are, for example, situations where persons are within the physical control of State agents, typically applying to soldiers, security forces or police forces.[64] The application of the personal model prevents several issues that would arise if the territorial model was the only relied-upon model. One of the issues would be States having no human rights obligations vis-á-vis a person over which the State exercises full physical control, purely

[62] Shany, 2013, p. 59.
[63] Janig, 2021, p. 4. This is established in ECtHR, *Al-Skeini and Others v UK* (GC), 2011, para. 138, in *Loizidou* (Merits), 23 Eur. Ct. H.R. 513 para. 56 and in *Cyprus v. Turkey*, 35 Eur. Ct. H.R. 967 para. 77.
[64] Janig, 2021, pp. 6–7.

due to the violation occurring in a territory which they do not have *de facto* control over, as often is the case when States act abroad.[65]

The functional model, as already briefly mentioned in the introduction, concerns a State's actions and the level of control States exercise over the enjoyment of an individual's human rights. States, thus, would have extraterritorial obligations whenever their conduct, or the conduct of private actors over which they exercise authority, leads to a direct and reasonably foreseeable impact on human rights. Both the spatial and personal models of jurisdiction were developed and based on treaty language, while the functional model was rather presented by scholars and human rights bodies in an attempt to overcome issues relating to the two traditional models which became apparent in case law.[66] In the beginning of the chapter it was highlighted that the wording of treaties differ. Some treaties' wording explicitly requires that individuals are to be within the jurisdiction of the Contracting State to enjoy protection of their human rights, such does e.g. the ECHR.[67] Consequently, the functional model becomes partly constructed as an aspect of the personal model.[68] Therefore, the control States have over activities that might negatively affect the enjoyment of human rights of an individual abroad is considered as jurisdiction over that individual itself.[69]

International human rights law lays down obligations which States are bound to respect. By becoming parties to international human rights treaties, States assume obligations under international law to respect, protect and fulfil certain human rights. The individual concepts of respect, protect, and fulfil all come with their own requirement for States. Firstly, the obligation to respect indicates that States must refrain from interfering with or curtailing the enjoyment of human rights, so-called *negative obligations*. Secondly, the obligation to protect requires States to protect individuals and groups from human rights abuses. Lastly, the obligation to

[65] Ibid, p. 7. For a more elaborate description of the personal model, see Moreno-Lax, 2020, p. 400. The personal model has been adopted in several important cases, for instance, by the Human Rights Committee in *López Burgos v. Uruguay*, concerning the abduction of an individual from an airport in Argentina by Uruguayan security forces, as well as by, the Committee on the Rights of the Child (CRC) in *D.D. v. Spain.* See, HRCee, *Sergio Euben López Burgos v Uruguay*, (Communication No. R.12/52), 1984, UN Doc. Supp. No. 40 (A/36/40) at 176, paras. 12.1-12.3 and CRC, *D.D. v Spain,* (CRC/C/80/D/4/2016), 2019, para. 13.4.

[66] Janig, 2021, p. 6; Shany, 2013.

[67] See, Article 1 of the ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[68] Janig, 2021, pp. 6-7.

[69] HRCee, *Yassin et al v Canada*, (CCPR/C/120/D/2285/2013), Individual Opinion of Olivier de Frouville and Yadh Ben Achour, 2017, para 8; Janig, 2021, p.8

fulfil implies that States must take positive action to facilitate the enjoyment of human rights, i.e., *positive obligations*. These three obligations make it possible to determine whether international human rights obligations have been violated. Consequently, as States have both positive obligations and negative obligations under IHRL they can through action, omission or inadequate action violate these obligations.[70]

Generally, States ensure the observance of human rights in five main ways. Firstly, by not directly, or indirectly, through their agents, violate human rights. Secondly, in creating systems that prevent breaches of human rights, i.e., promoting and safeguarding human rights through establishing appropriate legislation, policies, institutions and mechanisms. Thirdly, by effectively investigating complaints of human rights abuses. Fourthly, by punishing those of their agents who have committed human rights abuses, and lastly, by compensating victims of human rights abuses. These five main ways for States to observe human rights constitute the basic minimum *functions* every Contracting State has assumed by becoming a party to the Convention. The 'functional test' to jurisdiction promoted in the thesis would see that a State effectively exercises jurisdiction, for the purpose of Article 1 of the ECHR, whenever it falls within its power, authority or control to perform, or not perform, any of the above five functions. Jurisdiction, therefore, should mean no less and no more than 'authority over' and 'control of' and, thus, concerning Convention obligations, jurisdiction becomes neither territorial nor extraterritorial, but functional. Thus, whenever a perpetrator or a victim is under the control or authority of a Contracting State they ought to be under that State's jurisdiction.[71] The functional model would hence prevent arbitrary differentiation through a case-by-case analysis that would take all circumstances into account, instead of allowing for sharp dividing lines, partly arising from the application of the traditional models. Furthermore, it would allow for an expansion of the territorial reach of treaties and would truly honour the universality of human rights.[72]

[70] UN Office of the High Commissioner, 2011, HR/PUB/11/01, pp. 14-17.
[71] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, Concurring Opinion of Judge Bonello, paras. 10-12.
[72] Janig, 2021, p. 6; Shany, 2013.

2.2. The Interpretation of Jurisdiction within the Context of Extraterritoriality

To be able to answer the research question, the notion of 'jurisdiction' must first be analysed, especially, how the concept has been interpreted within the context of extraterritoriality. The discussion in the present subchapter is first conducted on a more general level, also taking into account how other treaty bodies besides the ECtHR have considered the issue of extraterritorial State jurisdiction. In the next subchapter, the discussion is centred around the ECHR and the threshold criteria for its application. The establishment and exercise of jurisdiction determines if a State can be held accountable for human rights violations in a specific situation, therefore, it is important to define the term and identify the factors through which it can be ascertained.[73]

Besson believes some authors underestimate the meaning and the role of the threshold criterion for the application of human rights, that is, State jurisdiction qua relationship between a certain State Party and certain individuals.[74] Furthermore, when they do consider it they often assimilate it to some kind of trivial factual power or control test for some,[75] or to a mere capability to respect human rights requirements for others.[76] She believes that jurisdiction qua normative relationship between subjects and authorities captures the core of what human rights are about, i.e. the normative relationships between individuals as rights-holders and States as duty-bearers. Thus, analysing jurisdiction is of utmost importance, as it is a threshold criterion for the applicability of most international and regional human rights treaties and consequently, it affects and conditions the applicability of certain rights and duties in political and legal circumstances.[77]

The argument of those supporting the extraterritorial application of human rights treaties is mostly based on the fact that there is no treaty provision explicitly disallowing such an interpretation.[78] In addition, many international human rights bodies have already interpreted

[73] Moreno-Lax, 2020, p. 385.
[74] Besson, 2012, p. 859.
[75] See, e.g., Milanovic, 2011, p. 8 and Cleveland, 2010, p. 231.
[76] See, for instance, ECtHR, *Al-Skeini and Others v. UK* [GC], (Application No. 55721/07), 2011, Concurring Opinion of Judge Bonello, paras. 11–12.
[77] Besson, 2012, p. 860. See also the HRCee, *Sergio Euben López Burgos v Uruguay*, (Communication No. R.12/52), 1984, UN Doc. Supp. No. 40 (A/36/40) at 176, paras. 12.2 and 12.3 on this very notion of the relationship between the individual and the State.
[78] For supporting views, see, Loucaides, 2006, pp. 397– 398. He claims that the drafters of the human rights treaties would have expressly indicated, by including a clear territorial clause, if the treaties were to only be applicable exclusively within a State's territory.

the reading of the jurisdictional clause broadly and indicated that the application of international human rights treaties are not specifically limited to national territory.[79] In the debate on extraterritorial obligations, the key concept, as highlighted previously, is jurisdiction. Particularly, the interpretation of jurisdiction for the purpose of applying a human rights treaty extraterritorially and the interpretation of jurisdiction regarding adjudication and admissibility of communications before the European Court of Human Rights. Therefore, it is not the traditional sense of jurisdiction that refers to legislation or enforcement that is examined in the thesis, although, the distinct types of jurisdictions regularly overlap.[80]

Jurisdiction can be interpreted in a number of ways. For instance, some claim that jurisdiction should be interpreted differently in general public international law compared to other more specific human rights treaties, because the concept of jurisdiction in the former, does not fully correspond to the idea of jurisdiction in the latter. In public international law, jurisdiction presupposes legality, is related to the sovereignty and equality of States, and is seen as the 'authority to affect legal interests',[81] or the 'power of a sovereign to affect the rights of persons'.[82] Jurisdiction in human rights law, on the other hand, rather reflects a factual notion, the exercise of State authority or power, regardless of the legality of the act in terms of public international law.[83] Support for this view of jurisdiction can be found in certain judgments of the ECtHR,[84] which is also demonstrated later on in the thesis.

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[79] See, for example, Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN doc. CCPR/C/21/Rev.1/Add.13, para. 10, affirming that: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means 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.' In addition, see, the Advisory Opinion of the ICJ in, *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 111: 'In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.

[80] For a more elaborate discussion on the various kinds of jurisdiction, see Janig, 2021, Askin, 2019 and Milanovic, 2011.

[81] Blakesley, 1982, p. 1109.

[82] Beale, 1923, p. 241.

[83] Costa, 2013, p. 13. See Wilde, 2008, p. 142 and Scheinin, 2004, pp. 79– 80 who criticise the view and the approach of the ECtHR in *Banković* and considered that: 'what the Court is discussing, is the permissibility of a State exercising jurisdiction beyond its own territory, not at all the legal consequences of the exercise of authority abroad, be it permissible or not'. For him, 'the fact that Yugoslavia perhaps had a sovereign "territorial right" to demolish its own TV station does not mean that action by other States to the same effect would not trigger off the applicability of human rights law in respect of them.' Scheinin, 2004, pp. 79– 80. For a more in-depth discussion on different views of jurisdiction, see Moreno-Lax, 2020, p. 396 and Besson, 2012, p. 864 (forward) who elaborates on jurisdiction qua political and legal authority.

[84] See, *Loizidou v. Turkey* (Application no. 15318/89), 1995 – Preliminary Objections. The Court found that due to the high level of control, Turkey's presence in Northern Cyprus was considered to be an exercise of jurisdiction,

Extraterritorial applicability of human rights treaties is determined partly by whether or not the treaties specify application *ratione loci* themselves.[85] The ECHR states that, 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[86] In comparison, Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), expresses that States Parties need to ensure the rights of the Covenant, 'to all individuals within its territory and subject to its jurisdiction'.[87] At first glance the language used by the ICCPR suggests that an individual would need to be within the territory and simultaneously be under the jurisdiction of a State Party, hence this would exclude the possibility of an extraterritorial application. Nevertheless, such an interpretation has been consistently rejected by the Human Rights Committee, illustrating the importance human rights bodies have in shaping the understanding of the notion of jurisdiction and application of human rights treaties extraterritorially.[88] Most regional human rights treaties contain at least some kind of general clause on the scope of jurisdiction, such as the above Articles of the ECHR and ICCPR. Similarly, Article 1(1) of the American Convention on Human Rights (ACHR), refers to persons 'within' and 'subject to their jurisdiction', jurisdiction in these conventions, therefore, does not seem to be geographically restricted.[89] Nevertheless, numerous core human rights treaties, such as, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD) and the African Charter for Human and Peoples' Rights, contain no

regardless of the legality of the exercise of control. Paragraph 62 states that: 'In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties'. See also, para. 62 where Turkey's presence in Northern Cyprus was considered an exercise of jurisdiction due to the degree of control exercised, regardless of the legality of the exercise of control. Compare also with the reasoning by the HRCee in *López Burgos v. Uruguay*, paras. 12.1– 12.2: 'The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" … 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 set forth in the Covenant, wherever they occurred.' A similar view is found by the Committee in *Celiberti de Casariego v. Uruguay*, (Communication no. 056/1979), 1981, paras. 10.1– 10.2.

[85] Janig, 2021, p. 2.

[86] Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), of 4 November 1950, ETS No. 5 (Protocol 11, ETS No. 155).

[87] Similar language can be found in the Convention on the Rights of the Child (CRC), Article 2(1) and in the International Convention on the Protection of the Rights of All Migrant Workers (ICMW), Article 7. Some other treaties contain no general clause but instead contain obligations related to specific obligations, such as the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), Article 9.

[88] See, Joseph and Castan, 2013, para. 4.11.

[89] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.

specific provision concerning jurisdiction.[90] Consequently, it can be established that international law provides no definite or strict standard on whether or not human rights treaties should apply extraterritorially, instead the extraterritorial application of the treaties is resolved by analysing and taking account of the text, purpose, and object of each individual treaty.[91] In such instances, what is to be understood by 'jurisdiction' becomes increasingly important, seeing that in cases where treaties have no pertinent provision on territorial reach, the notion of jurisdiction has in some cases been used to conceptualise their territorial reach.[92]

As mentioned in the introduction, the ECtHR has adopted a restrictive approach to the application of the ECHR extraterritorially. In comparison, the African Commission on Human and Peoples' Rights (ACHPR) has adopted a broad approach and considered that States, 'should ensure accountability for any extraterritorial violations of the right to life, including those committed or contributed to by their nationals or by businesses domiciled in their territory or jurisdiction'.[93] More recently, the ACHPR has considered that it would apply a functional model in its judgments, in concert with other notions of jurisdiction, as stated in General Comment No. 3 on the African Charter on Human and Peoples' Rights:

> A State shall respect the right to life of individuals outside its territory. A State also has certain obligations to protect the right to life of such individuals. The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected, or *whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life*.[94] [emphasis added]

Similarly to the ACHPR, the Inter-American Commission on Human Rights (IACHR) has also adopted a broader approach to the issue of extraterritorial jurisdiction. For instance, as early as 1999 the IACHR came to the conclusion in *Alejandro et al v. Cuba,* that the shoot-down of a foreign-registered civilian aircraft by the Cuban air force, situated in international airspace, constituted a violation of the right to life by Cuba, as the State agents acting abroad remained

[90] For example, The African Charter on Human and Peoples' Rights in its Article 2 states that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter'. Compare with the more restrictive phrasing of the ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' (Article 1).
[91] Janig, 2021, p. 2; Milanovic, 2011, pp. 10-11.
[92] Wilde, 2013, paras. 64-65; Janig, 2021, p. 3.
[93] ACHPR, General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), 2015, para. 18.
[94] African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 2015, para. 14.

bound by their obligation to respect human rights if they, 'exercise power and authority over persons'.[95] Whilst the facts are comparable and similar to that of *Banković*,[96] discussed in the following Chapter, it is noteworthy that the IACHR applied the American Declaration of the Rights and Duties of Man, which contains no provision on its territorial reach.[97] However, later the Commission confirmed this approach in several other cases, such as in *Franklin Guillermo Aisalla Molina Ecuador v. Colombia* and in *Danny Honorario Bastidas Meneses and Others v. Ecuador*.[98] Although case law is important, the developing view by human rights bodies regarding States' obligations, as well as States' acceptance to protect the human rights of individuals abroad is an even more impactful development. For example, the Committee on the Rights of the Child recently considered France to have some jurisdiction over children detained in refugee camps, controlled by a non-State actor in Syrian Kurdistan, due to France being the State of the children's nationality. Therefore, France was seen as having some capability and power to protect certain rights of the children, and to a certain degree, the children were, thus, seen to be under the jurisdiction of France.[99]

2.3. Jurisdiction in Relation to Extraterritorial Application of the ECHR

The concept of extraterritoriality in itself implies that a territorial application of human rights is the principle, thus, human rights typically apply to subjects situated within the territorial boundaries of the State. However, there are exceptions and certain circumstances that require the Convention to also be applicable outside a State's borders. Nevertheless, before continuing the discussion on, when and if, a State has extraterritorial obligations to respect human rights,

[95] IACHR, *Alejandre v. Republic of Cuba*, (Case 11.589, Report No. 86/99), 1997, para. 25.

[96] See also Costa, 2013, pp. 145-146.

[97] Janig, 2021, p. 8. Even if the Declaration was not meant to be legally binding when created, the Inter-American Court and the Inter-American Commission on Human Right consider the American Declaration as obligatory for OAS member States. Articles 106 and 145 of the OAS charter provides the IACHR with competence to monitor Member States' conduct regarding human rights, thus, the declaration has binding force over all member states. However, the OAS found that the moral obligation of the American Declaration was not sufficient to protect human rights, therefore, the drafting of a binding convention began in 1959. After many years, the American Convention on Human Rights was adopted and reinforced, expanding the scope of many of the principles described in the American Declaration. The Convention entered into force July 19, 1978. American Declaration on the Rights and Duties of Man, OAS Res. XXX, 2 May 1948.

[98] IACHR, *Franklin Guillermo Aisalla Molina Ecuador v. Colombia*, (Report No. 112/10), 2010 and IACHR, *Danny Honorario Bastidas Meneses and Others v. Ecuador*, (Report No. 153/11), 2011.

[99] See, Committee on the Rights of the Child, *L.H. and others v France*, (CRC/C/85/D/79/2019–CRC/C/85/D/109/2019), 2 November 2020, paras. 9.6-9.7. However, the children were only in some instances seen as to be under the jurisdiction of France, some other parts of the application were seen as inadmissible.

the thesis examines the wording of Article 1 of the ECHR and how it can be interpreted as also applying extraterritorially.

The wording 'within their jurisdiction' used in the ECHR, 'their' referring to the Contracting States, demonstrates wording often used in international human rights treaties. By referring to 'within their jurisdiction' the Convention covers any territory that is under the effective control of a Contracting States authorities.[100] Moving forward with the analysis of the specific treaty language of the ECHR, it is important to take into account and note, not only what the Convention expressly says in relation to jurisdiction, but also what it does not state. The drafters could have included an application scope, restricting the treaty to a certain territory, certain nationals, or a specific period in time, which is common in some domestic constitutions.[101] Instead, the drafters chose to simply refer to the normative relationship linking States Parties to their subjects.[102] In comparison to the human rights bodies discussed in the previous subchapter, the ECtHR has stated that, in establishing a jurisdictional link to individuals abroad, there must be certain 'special features'. These special features could include, whether the alleged perpetrator is its national, part of its service personnel or present in its territory, whether the State has an obligation to investigate the matter under domestic law (or other norms of international law), whether the State subsequently established effective control over the territory in which the violations occurred or, whether the territorial State in question is in fact or legally barred from conducting an effective investigation.[103]

Article 1 of the European Convention on Human Rights determines the Convention's jurisdictional scope and provides the threshold criterion for the application of the Convention. At first glance, the phrasing may indicate that the reach of the Convention is restricted to the territory of the Contracting States, as Article 1 simply sets out that the High Contracting Parties

[100] Nowak, 2010, p. 21. However, it is possible for a Contracting State to withdraw part of its territory from the scope of the Convention in accordance with Article 56. See Chapter 3.1. for a further discussion on Article 56.
[101] See Besson, 2012, p. 863.
[102] Ibid. Jurisdictional clauses and their wording in general have been subject to much controversy, during and since their drafting, and States Parties have raised several disputes in relation to their intended meaning, especially the meaning of "within its territory" found in Article 2(1) of the ICCPR. See for example Costa, 2013, pp. 17-41 for a more in-depth discussion on the preparatory work and the controversy and debate on the wording of Article 2(1) of the ICCPR relating to the extraterritorial application of the Covenant.
[103] ACHPR, General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), 2015, paras. 137-138; ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], (Application No. 36925/07), 2019, paras. 191-196; ECtHR, *Georgia v Russia* (II) [GC], (Application No. 38263/08), 2021, paras. 329-332.

have an obligation to respect and secure human rights for everyone 'within their jurisdiction'.[104] In examining the phrasing closer, the wording indicates that the threshold criterion or limitation of the jurisdictional clause actually consists of *State jurisdiction*. State jurisdiction is an abstract threshold for the recognition of human rights, baring one main issue, without establishing State jurisdiction over certain people, these people cannot claim the rights in said Convention. Consequently, if a jurisdictional link cannot be established between a Convention State and an alleged human rights victim that State has no human rights obligations towards that person.[105] Ergo, jurisdiction under Article 1 is a threshold criterion, which makes the enjoyment of the rights of the Convention dependent on jurisdiction, due to this, the meaning, interpretation and clarification of jurisdiction by the Court is of paramount importance.

[104] Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), of 4 November 1950, ETS No. 5 (Protocol 11, ETS No. 155).
[105] Besson, 2012, pp. 862-863.

3. The Strasbourg Court's Development of the Convention States' Jurisdiction Under Article 1

3.1. Exceptions to the General Principles of Territorial Jurisdiction

The previous chapter briefly examined the generally recognised principles on extraterritorial State jurisdiction, i.e., State agent authority and control as well as, effective control over an area. The following subchapter analyses these principles closer and seeks to identify how the Court has argued in its application of the Convention to acts taking place outside the borders of Convention States relying on these principles.[106] However, the Court has recognised that there are exceptions to these two traditional principles. Therefore, this Chapter also sets out to identify and analyse these exceptions to give a better understanding of the reasoning of the ECtHR in the cases analysed in the succeeding chapters.

The ECtHR has recognised in its case law, as an exception to the principle of territoriality, that a States Parties jurisdiction under Article 1 of the ECHR may extend to acts of its authorities which produce effects outside its own territory.[107] However, the Court has been somewhat unclear in its statement on the principle, expressing merely that the Contracting Party's responsibility 'can be involved' in these circumstances.[108] It thus becomes more important to examine the Court's case law to attempt to identify the defining principles. Regarding State agent authority and control it is recognised that acts of diplomats and consular agents, present on foreign territory, and in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.[109] Additionally, the Court has recognised that a Contracting State exercises extraterritorial jurisdiction when it, through the consent, invitation or acquiescence of the Government of that specific territory, exercises all or some of the public powers normally exercised by that Government.[110] Hence, the Court has found that:

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[106] These principles have been laid down in, among other cases *Al-Skeini,* ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011.

[107] See, e.g., ECtHR, *Loizidou v. Turkey* [GC, preliminary objections], (Application No. 40/1993/435/514), 1996, para. 62 and *Loizidou v. Turkey* (merits), 18 December 1996, para. 52; ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 69.

[108] ECtHR, *Drozd and Janousek v. France and Spain*, (No. 12747/87), Judgment of 26 June 1992.

[109] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para 81.

[110] ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 71.

> where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.[111]

However, again the Court at most holds that States 'may be responsible for breaches of the Convention' if the acts in question are attributable to the Contracting State rather than to the territorial State. Furthermore, it has been demonstrated in the Court's case law that, in certain circumstances, the use of force by a State's agent which operates outside its territory may bring the individual under the control of the State's authority and consequently also under the State's jurisdiction under Article 1 of the Convention.[112] This principle has been applied for instance when an individual has been taken into the custody of State agents abroad, such as in *Öcalan v. Turkey*, where the ECtHR found that the applicant in the case, once handed over to the Turkish officials by the Kenyan officials, was 'effectively under Turkish authority and therefore, within the "jurisdiction" of that State for the purposes of Article 1 of the Convention', although Turkey in this instance exercised its authority outside its territory.[113] Correspondingly, the Court in *Issa v. Turkey* indicated that the applicants' relatives would have been within Turkish jurisdiction by virtue of the Turkish soldiers' authority and control over them when they took them to a nearby cave and executed them, even though the act occurred in Northern Iraq.[114] The Court also, in a similar manner, in *Al-Saadoon and Mufdhi v. the United Kingdom* found that the two Iraqi nationals, who were detained in a British-controlled military prison in Iraq fell within the jurisdiction of the UK, as the United Kingdom exercised 'total and exclusive control over the prison' and thus also over the individuals detained in it.[115] Noteworthy is also that the Court in *Medvedyev v. France* held that the applicants were within French jurisdiction for the purpose of Article 1 of the Convention, not solely due to the exercise by French agents of full and exclusive control over a ship and its crew, from the time of its interception in international waters, but decisive was also the exercise of *physical power and control* over the persons in question.[116]

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[111] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para 81(135).
[112] Ibid, para 81(136).
[113] ECtHR, *Öcalan v Turkey* [GC], (Application No. 46221/99), 2005, para. 91.
[114] ECtHR, *Issa and Others v. Turkey*, (Application No. 31821/96), 2004, paras. 72-81.
[115] ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, (Application No. 61498/08), 2009, paras. 86-89.
[116] ECtHR, *Medvedyev and Others v. France*, (Application No. 3394/03), 2010, para. 67.

The second exception to the principle of territory, is the exercise of effective control by a State of an area outside its national territory, this could occur as a consequence of either lawful or unlawful military action. States in such instances, and in such areas, have an obligation to secure the rights and freedoms set out in the Convention. This obligation derives from the mere fact of such control, regardless of whether that control is exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration.[117] Therefore, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. If the fact of such domination over the territory is established, or the local administration survives as a result of the Contracting State's military and other support, that State is responsible for the administration's policies and actions. In such circumstances, the controlling State has the responsibility under Article 1 to secure the full range of substantive rights set out in the Convention within the area under its control and is liable for any violation of those rights.[118] Whether or not a Contracting State exercises effective control over an area outside its own territory is a question of fact, and thus a question of interpretation. The Court must therefore in determining if effective control exists primarily consider the strength of the particular State's military presence in the area.[119] Some other indicators, such as the extent to which its economic, military and political support for the local administration provides it with influence and control over the region may also be relevant.[120]

When drafting the ECHR, the States Parties decided on Article 56 which would apply to territories overseas for whose international relations they were responsible. Although, not directly pertinent to the matter under consideration in this thesis, Article 56 paragraph 1 provides a mechanism whereby any State may decide to extend the application of the Convention so as to also apply to territories overseas for whose international relations they are responsible.[121] In accordance with Article 56 of the Convention Contracting Parties can also withdraw parts of their territory from the scope of the Convention. If a State does not adhere

[117] See ECtHR, *Loizidou v. Turkey* [preliminary objections], (Application No. 15318/89), 1995, para. 62; ECtHR, *Cyprus v. Turkey* [GC], (Application No. 25781/94), 2001, para. 76; ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 70; *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, paras. 314-316; and *Loizidou v. Turkey* (merits), 18 December 1996, para. 52.

[118] ECtHR, *Cyprus v. Turkey* [GC], (Application No. 25781/94), 2001, paras. 76-77.

[119] See *Loizidou v. Turkey* (merits), 18 December 1996, para. 16 and 56 as well as *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, para. 387.

[120] *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, paras. 388-394.

[121] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 81(140).

to this condition, it retains jurisdiction and is responsible for violations committed on that territory, despite possibly no longer controlling the area where the violation took place. States might decide not to withdraw a territory in accordance with Article 56 because it does not wish to admit it has lost control over the concerned area.[122] The 'effective control' principle of jurisdiction set out in the section above, does not replace this system of declarations under Article 56. The mechanism under Article 56 was included and exists for historical reasons and cannot be interpreted in the present as surpassing the scope of the term 'jurisdiction' in Article 1. The Court asserts that:

> The situations covered by the 'effective control' principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.[123]

3.2. The Understanding of Article 1 of the ECHR

3.2.1. A Restrictive Approach by the Court Concerning Extraterritorial Acts

Until the decision in *Banković,* with a handful of exceptions, the Court's jurisprudence on extraterritorial jurisdiction was largely settled and coherent. Before *Banković* the Court had steadily expanded the reach of the Convention's obligations, however, in the present case the Court almost totally disregarded its previous standpoint on the issue, declaring that jurisdiction should be 'primarily territorial' and that extraterritorial State jurisdiction should only arise in 'exceptional circumstances'.[124] Since then, every new judgment from the Court seems to add a new line of case-law different from the rest and give rise to another layer of confusion.[125] The preceding subchapter analysed the Court's approach to the traditional exceptions to the territorial principle and indicated several ambiguities regarding the Court's reasoning on extraterritorial State jurisdiction. For one thing, the reference to 'exceptional circumstance' is hardly a clear category of activities and has included certain kinds of force, detention, control and findings of physical power and control over individuals. Additionally, the Court's

[122] See ECtHR, *Assanidze v. Georgia* [GC] (71503/01) judgment of 8 April 2004, where 'the matters complained of were directly *imputable* to the local authorities of the Autonomous Republic of Ajaria, but only the Georgian State's *responsibility* was engaged under the Convention., See also, Caflisch, 2017, p. 184.
[123] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 81(140), see also ECtHR, *Loizidou v. Turkey* [GC, preliminary objections], (Application No. 40/1993/435/514), 1996, paras. 86-89.
[124] *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 59.
[125] Mallory, 2021, p. 32.

approach, understanding, and judgment on the issue of extraterritorial jurisdiction and on the concept overall have tremendously changed. The present subchapter, thus, seeks to identify the approach by the Court regarding this issue previously, as well as analyses certain important judgments on extraterritoriality leading up to the present.

The cases, *Loizidou* and *Soering* provide a brief insight into the Court's line of thought, and how the Court previously believed the notion of State jurisdiction should be interpreted under Article 1. In *Loizidou* it was stated that the ECHR is a constitutional instrument of European public order.[126] Correspondingly, the Court in *Soering* asserted that the Convention does not govern actions committed by States not parties to the Convention, nor does it intend to be a means of requiring the Contracting States to impose Convention standards on other States.[127] Making the Court's standpoint on extraterritorial State jurisdiction evident. However, for a more comprehensive understanding the thesis continues by examining the early case of *Bancović.*[128] The case was seen as inadmissible by the Court, and in deciding so the Court confirmed its position regarding territorial jurisdiction being the primary principle relied upon in establishing jurisdiction.[129]

Although the Court found the application to be inadmissible, the reasoning by the Court is of significant relevance in the further investigation on extraterritoriality. Especially important is the following passage which is found in the Court's decision on the admissibility of the case of *Bancović*:

> The Convention is a multilateral treaty operating, subject to Article 56.2 of the Convention, in an *essentially regional context and notably in the legal space (contexte jurisdique) of the Contracting States.* The [Federal Republic of Yugoslavia] clearly does not fall within this legal space. *The convention was not designed to be applicable throughout the world, even in respect of the conduct of Contracting States.* Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[130] [emphasis added]

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[126] ECtHR, *Loizidou v. Turkey* [GC, preliminary objections], (Application No. 40/1993/435/514), 1996, para. 75.
[127] See ECtHR, *Soering v. The United Kingdom*, (Application No. 14038/88), 7 July 1989, para. 86.
[128] The case of *Banković and Others v. Belgium and Others*, concerns the air strikes by NATO on the area of the FRY in 1999, during the conflict in Kosovo between Serbian and Kosovar Albanian forces. More specifically, the application concerned the bombing of the Radio Televizija Srbije (RTS) on 23 April by NATO forces. ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, paras. 6, 8 & 28.
[129] Ibid, para. 82; ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, (71412/01), 2007.
[130] ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 80.

The Court, thus, seems to have thought, at least at that moment in time, that the jurisdiction of the ECHR was confined to events situated within the European 'legal space'. The decision of *Bancović* also illustrates the caution that was, and still in certain instances is, shown by the Court in extending the applicability of the ECHR based on the effects of certain activities.[131] The case was on the above basis declared inadmissible, after the Court rejected a 'cause-and-effect' notion of jurisdiction, regarding the effects of the NATO bombing in Belgrade. Hence, concluding that an individual abroad who is negatively affected extraterritorially by a Contracting State's actions by itself is inadequate for the ECHR to become applicable.[132] Nonetheless, the preceding discussion highlights the importance of establishing jurisdiction when States act extraterritorially, even though the Court in the above case(s) was reluctant to expand Contracting States' jurisdiction outside the European legal space in these types of situations, it implies not, *a contrario* that jurisdiction under Article 1 of the ECHR can never exist outside the territory covered by the Council of Europe Member States, no such restrictions can be seen by the Court in its case law.[133] Nevertheless, subsequently, this reasoning by the Court in the cases discussed above, seems to have been superseded, especially in relation to cases connected with events during the second intervention in Iraq, which are analysed below.

3.3.2. The Broadening of the Understanding of within a State's jurisdiction

The second intervention in Iraq was carried out by a Coalition of armed forces, under unified US command, and with a large force from the UK. When the forces had displaced the current regime the US and UK became Occupying Powers within the meaning of Article 54 of the Hague Regulations.[134] The Permanent Representative of the UK and US also addressed a joint

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[131] Ibid. In *Banković* it was also stated that jurisdiction should be understood as 'primarily territorial', para. 59.

[132] ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 75; see also ECtHR, *M.N. and Others v Belgium* [GC], (Application no. 3599/18), 2020, para. 112.

[133] See, among other examples ECtHR, *Issa and Others v. Turkey*, (Application No. 31821/96), 2004; ECtHR, *Öcalan v Turkey* [GC], (Application no. 46221/99), 2005; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, (Application No. 61498/08), 2009; and ECtHR, *Medvedyev and Others v. France*, (Application No. 3394/03), 2010.

[134] ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 143. The duties of Occupying Powers can be found mainly in Articles 42 and 56 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) ("the Hague Regulations"), as well as Articles 27-34 and 47-78 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (of 12 August 1949) ("the Fourth Geneva Convention"). Additionally, duties of Occupying Powers are also found in certain provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977 ("Additional Protocol I"). ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 89.

letter to the President of the Security Council, where they stated that the Occupying States, acting through the Commander of Coalition Forces, created the Coalition Provisional Authority (CPA) to 'exercise powers of government temporarily, and, as necessary, especially to provide security'.[135] During the relevant time period the Coalition Forces consisted of six divisions which were under the overall command of United States generals. Each division had responsibility for a particular geographical area of Iraq, the UK having command of the Multinational Division (South-East), including Basra. The British forces, during this period, carried out two main functions, the maintenance of security in the area, including arrests, patrols, protection of infrastructure, essential utilities and anti-terrorist operations as well as acting to support the civil administration in a variety of ways.[136]

Reconsidering now the requirement of 'exceptional circumstances', in the case of *Al-Skeini* the Court found that following the regime's removal from power, and until the accession of the interim Iraqi government, the UK (together with the US) assumed the exercise of some of the public powers which are normally exercised by a sovereign government. The Court established that these constituted 'exceptional circumstances' where the UK, through its soldiers, engaged in security operations in Basra, and during the period in question, 'exercised authority and control over individuals killed in the course of such security operations'. Therefore, in *Al-Skeini* a jurisdictional link was established between the deceased and the United Kingdom for the purposes of Article 1 of the Convention. Remarkably, in *Al-Skeini* the third applicant's wife's death was also found to have a jurisdictional link to the UK. Despite her being killed during an exchange of fire between a patrol of British soldiers and unidentified gunmen and it was not known which side fired the fatal bullet. However, the Court found that it was sufficient that the death occurred in the course of a UK security operation for it to create a jurisdictional link between the UK and this deceased also for the purposes of Article 1 of the Convention, a significant ruling in the protection of civilians human rights.[137] Additionally, concerning the protection of human rights in the case, one of the main issues considered by the Court was not

[135] Ibid, para. 11. See also, 'Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council', (S/2003/538), p. 1.
[136] ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, paras. 20-21.
[137] Ibid, paras. 149-150. The Court also noted that the procedural obligation under Article 2 of the Convention continues to apply in difficult security conditions, including in the context of armed conflict and continued by affirming that the obligation under Article 2 entails that 'all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life'. Ibid, para. 164.

whether the deceased had been shot by British soldiers but instead, whether or not appropriate steps had been taken to safeguard civilians in the vicinity.[138]

The Court in the above case disregarded one of the key exceptions to the general principle of territoriality, which is effective control. It was, according to the Court, unnecessary to establish whether jurisdiction in *Al-Skeini* resulted from effective military control, as it already established jurisdiction on another ground, that is due to the applicants' family members being killed on the territory where the UK was responsible for the maintenance of security and the deaths occurring in the course of British security operations. In fact, the elements of the case seemed to indicate that the UK was far from exercising effective control over the territory it occupied in South-eastern Iraq.[139] Consequently, the case of *Al-Skeini* showed that to exercise jurisdiction, it was not necessary to show the existence of 'effective control' over foreign territory. For a jurisdictional link to arise it was simply sufficient to establish that a State had responsibility for the maintenance of order and was engaged in security operations in that particular area.[140]

The Court followed the same reasoning when it decided on the finding of State jurisdiction in the case of *Hassan v. United Kingdom*. The Court noted that it was unnecessary to decide whether the UK had effective control over the area, as the Court found another reason for concluding that the respondent State had jurisdiction over the victim.[141] Following the arrest of the applicant's brother, by British troops, and until his arrival at the camp, he was under the UK soldiers' *physical power and control*, ergo, he fell within UK jurisdiction under the principles outlined in *Al-Skeini.*[142] Noteworthy is that the respondent Government in *Hassan* claimed that the case related to an earlier period, before the end of active hostilities and the beginning of the occupation, and also before, the UK assumed responsibility for the security of South-eastern Iraq. Therefore, the respondent State argued that such conduct should not be attributed to it in a period of international armed conflict, in a territory where also another State

[138] Ibid, para. 170.

[139] Ibid, paras. 138-140.

[140] Ibid, paras. 126-127. See also ECtHR, *Hassan v. the United Kingdom*, [GC], (Application No. 29750/09), 2014, para 75; Caflisch, 2017, p. 186.

[141] ECtHR, *Hassan v. The United Kingdom*, [GC], (Application No. 29750/09), 2014, para. 75.

[142] See, ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 136 which sets out that: 'the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction.'

Party to the Convention, other than the occupant State, was active and where these organs had to act in accordance with the rules of IHL.[143] The Grand Chamber, however, rejected this argument and pointed out that the judgment in *Al-Skeini* also stemmed from a period when IHRL and IHL applied concurrently. Thus, highlighting the point made in the introduction that IHRL should not be interpreted in isolation, but in conformity with other rules of international law, as far as possible. This reasoning applied to Article 1, as well as to the other provisions of the Convention. Furthermore, the UK argued that following the arrival of the victim at the camp, jurisdiction had shifted from the respondent State to the US. The Court, nevertheless, found that under the agreements governing the administration of the camp, the applicant's brother was under the *authority and control* of the UK. In consonance with those agreements, he was held as a British prisoner, therefore, it was up to British authorities to classify their prisoners under the Third and the Fourth Geneva Conventions, even if United States troops carried out certain aspects of the detention in the camp, this did not cancel British authority and control over the aspects of detention relevant to the applicant's claim.[144]

The reasoning concerning jurisdiction by the Court in the above cases is significant. In *Hassan,* the Court found that the victim had been under the United Kingdom's jurisdiction from the moment he was captured to the time of his release. Thus, the conclusion supports the Court's findings in *Al-Skeini.* Consequently, the determination regarding jurisdiction reached by the Court no longer rests on the notion of effective military control exercised over a particular area or strict factual control over a person. Rather, it rests on *specific powers* of decision and control,[145] which certainly confirms the erosion of territoriality, the corresponding enlargement of extraterritorial jurisdiction in the Strasbourg Court's case law and the shift in the interpretation of jurisdiction to a more functional approach.

3.3. Expansion of the Traditional Approaches to Extraterritorial Jurisdiction

Under the traditional rules of jurisdiction, both the concept of effective control and the concept of attribution are closely tied to the notion of territoriality and jurisdiction. A State is, therefore, seen as responsible for the actions of its officials or agents, within territory it has effective control over and may be held accountable for the conduct of non-State actors, if it exercises

[143] ECtHR, *Hassan v. The United Kingdom*, [GC], (Application No. 29750/09), 2014, paras. 71 & 76.
[144] Ibid, paras. 77-78.
[145] Caflisch, 2017, p. 192.

factual control over them. The functional model of jurisdiction seeks to expand this scope of responsibility and attribution beyond the territorial limit of a State. Other Human Rights Courts have in numerous cases adopted a broader understanding of effective and overall control and in some instances also attributed actions by non-State actors to the States supporting them.[146]

The Court gradually started to expand States jurisdiction under Article 1 after *Bancović*. In the Northern Cyprus cases, for instance in *Cyprus v. Turkey*,[147] it was demonstrated that jurisdiction under Article 1 of the ECHR can arise not only from territorial sovereignty, but also from lesser degrees of control and dominance, such as occupation, 'effective overall control', or 'global control'.[148] Thus, setting aside the decision in *Bancović,* where the Court concluded that some limited manifestations of power are insufficient to produce overall control or global control.[149] It was established by the ECtHR in *Al-Skeini*, that whether a State exercises a sufficient level of control depends on factual determinations, the strength of presence, or 'the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'.[150] This could include a wide range of measures, for example, proven willingness to provide additional military support, storage of military equipment, statements of political support, or economic measures taken against the territorial State, etc. Nevertheless, it is not necessarily required that the conduct of a local administrative body is imputable for the purpose of State responsibility or obligations.[151] Taking the above principles into consideration, the ECtHR found that States exercised effective

[146] See e.g., the case of *Bosnia and Herzegovina v. Serbia and Montenegro* where the ICJ held that Serbia was responsible for the genocide committed by Bosnian Serb forces during the Bosnian War, despite the atrocities taking place outside Serbia's territory. The ICJ found that Serbia had exercised effective control over the Bosnian Serb forces and in addition, provided them with military and financial support which contributed to the commission of the genocide. In a similar manner, the ICJ in the case of *Nicaragua v. United States (1986)* held that the United States was responsible for the actions of the rebel group the Contras, as it had trained and funded them in attacking Nicaragua targets. The United States had, thus, not only provided material support to the Contras but also exercised direct and indirect control over their activities according to the ICJ.

[147] ECtHR, Cyprus v. Turkey, (Application No. 25781/94), 2001.

[148] ECtHR, *Loizidou v. Turkey* - preliminary objections, (Application No. 15318/89), 1995; ECtHR, *Cyprus v. Turkey* [GC], (Application No. 25781/94), 2001.

[149] In that case of *Banković,* a bombing, although spelling death and destruction, was regarded as insufficient to produce the level of control needed to bring the victims under Article 1 jurisdiction. ECtHR, *Banković and Others v Belgium and Others* [GC]*,* (Application no. 52207/99), 2001.

[150] ECtHR, *Al-Skeini and Others v. UK* [GC], (Application No. 55721/07), 2011, para. 139.

[151] ECtHR, *Mozer v. Moldova and Russia* [GC], (Application No. 11138/10), 2016, paras. 102-110; Janig, 2021, pp. 3-4.

control over territories in *Loizidou v. Turkey*,[152] and it was concluded that the Russian Federation exercised effective control over Crimea and the city of Sevastopol.[153]

In later instances the authority required for State jurisdiction to arise seemed to have been reduced further to simply 'control', or even less as was shown in *Pad and Others v. Turkey,* where the shooting from a military helicopter, hovering in foreign airspace, was held sufficient for giving rise to jurisdiction under Article 1 of the Convention.[154] In comparing the two cases of *Bancović* and *Pad v. Turkey,* there are some obvious similarities in regard to the facts of the cases. According to the ECtHR's decision in *Bancović,* extraterritorial jurisdiction is not generated by mere air raids, but a certain degree of duration and intrusiveness is required. Furthermore, the effect of the Convention was, as the inadmissibility of *Bancović* shows, originally considered as being limited to the European 'legal space'. Yet the decision of *Pad v. Turkey,* as well as the other Iraqi cases discussed previously, illustrate how that limitation tends to disappear, as does the absolute requirement of effective control. Consequently, this means that the activities of armed contingents deployed by European nations in any part of the world, at least in theory, can now be ascribed to these nations.

Based on the foregoing discussion, one could argue that the criterion for the ECHR to apply is not territorial at all, but functional. The functional approach to jurisdiction is thus not a third approach besides the spatial model and the personal model of jurisdiction as some authors believe, but instead, the correct understanding of which personal and territorial jurisdiction are specific instances. This does not equate to jurisdiction having no territorial, temporal and personal dimensions, because it has, however, these are mere consequences of jurisdiction. It was long considered by the Court that a State's jurisdiction was to be exercised within that State's own territory and mostly on its own nationals, however, this has gradually changed. States increasingly exercise jurisdiction beyond their own borders and perform acts that produce effects in other countries, and consequently, they in some instances exercise jurisdiction over non-nationals as well. Therefore, it is undoubtedly so that, as the concept of

[152] See ECtHR conclusion in *Loizidou v. Turkey* [GC], (Application No. 40/1993/435/514), 1996, paras. 51-57.
[153] ECtHR, *Ukraine v. Russia (RE Crimea)*, (Applications Nos. 20958/14 and 38334/18), 2020, para. 352.
[154] The Court found that in the case it was not necessary to determine the exact location of the impugned events as the Turkish Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives and it was not disputed by the Parties that the victims of the alleged events came within the jurisdiction of Turkey. ECtHR, *Mansur PAD and Others v. Turkey*, (Application No. 60167/00), 2007, Paras. 54 and 55.

jurisdiction has evolved, so have the separate territorial, personal, and temporal scopes of human rights treaties as well.[155]

[155] Besson, 2012, p. 863. Agreeing with Besson, Karen da Costa draws the same conclusion that jurisdiction arises from a factual relationship between the victim and the State Party instead of from a strict legal relationship between the applicant and the State Party, such as the nationality link of the victim. See Costa, 2013, p. 50 as well as, McGoldrick, 2004, p. 62. The conclusion by Costa is based on the output of the HRCee on this issue where the Committee has found that a State's extraterritorial jurisdiction arises from 'the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.' HRCee, *Sergio Euben López Burgos v Uruguay*, (Communication No. R.12/52), 1984, UN Doc. Supp. No. 40 (A/36/40) at 176, para. 12.2.

4. Jurisdiction in the Context of Diverse Conflicts

4.1. The ECtHR's Jurisdiction in Relation to the United Nations

A great deal of operations and actions in conflicts, nowadays, are conducted under Security Council resolutions or enforced by the Security Council under Chapter VII. Thus, the question concerning the possible responsibility of Convention States on account of acts or omissions linked to their membership of the UN is of significance in the establishment of jurisdiction over alleged human rights violations abroad. The case of *Behrami and Behrami* reveal valuable insight into the Court's reasoning regarding attribution and jurisdiction, especially concerning the personal model of jurisdiction.[156] Additionally, the case illustrates how complex conflicts, with multiple parties involved, including the UN, can be when trying to establish jurisdiction and attribution.

In deciding on the admissibility of *Behrami* the Court relied heavily on the traditional principles of extraterritorial jurisdiction. An especially important characteristic in determining if the applications in *Behrami* were compatible with the personal model of jurisdiction and *ratione personae* was that the Federal Republic of Yugoslavia (FRY), prior to the material events complained about, had agreed in a military/technical agreement to the presence of international troops. The International Kosovo Security Force (KFOR) had been deployed under UNSCR 1244 and was made up of contingents which were grouped into multinational brigades and under the authority of a commanding country, of which France and Germany were a part. Under the resolution and the aegis of the UN a civil administration was established, which assigned KFOR full military control in Kosovo. Additionally, UNMIK's mission in the area was one of international interim administration, hence, the powers conferred to it by the Security Council included all the prerogatives of the legislature and the executive along with the running of the judicial system. Therefore, at the material time, the international forces present in the country exercised the powers of public authority, which would normally be exercised by the government of the FRY. Kosovo was, therefore, consequently under the effective control of these international forces. Thus, one of the main questions for the Court, except the question

[156] Similarly as the case of *Bancović,* the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, concerning acts performed by the international Kosovo security force (KFOR) and UN Interim Administration Mission in Kosovo (UNMIK) in Kosovo under the aegis of the UN. These cases were also seen as inadmissible by the Court.

of if State jurisdiction was engaged under Article 1 of the Convention, was whether the Court at all, had jurisdiction to examine the acts of the States that were present in these civil and security capacities, or rather if responsibility for the alleged actions, and omissions, laid with the UN.[157]

The Court found that the conduct complained of was directly attributable to the UN and not the respondent States. In support of this view, the Grand Chamber pointed out that Security Council Resolution 1244 allowed the presence of an international security force in Kosovo. The force in question acted on the basis of Chapter VII of the UN Charter, as well as on delegation by the Council. The key issue was whether or not the ultimate decision-making power and control lay with the Security Council. From the Security Council, a chain of command reached from the Council down to KFOR and NATO. The multinational brigades were led by an officer of the 'leading nation' of the operation in question. That officer in turn was placed under the orders of the KFOR commander, who in turn was subordinated to NATO. Regarding KFOR's lawful exercise of functions delegated to the Security Council in Chapter VII of the Charter of the United Nations, its conduct was in principle attributable to the Organisation. UNMIK, unlike KFOR, was placed directly under the Security Council's authority and the alleged omission was also imputable to the UN.[158]

Therefore, concerning the Court's jurisdiction *ratione personae*, the Grand Chamber noted that the UN was an intergovernmental organisation endowed with an international legal personality separate from that of its Member States, and hence not a Party to the ECHR.[159] In comparison, the Court in *Bosphorus v. Ireland,* concluded that the Convention did not prevent its States Parties from transferring sovereign powers to the EU, an organisation to which they were Member States. However, the Court stated that such States would remain accountable for the behaviour of its organs, regardless of whether that behaviour was necessary to discharge international obligations or not. Additionally, if such conduct resulted from international obligations arising from the State's membership in the EU, and if this membership provided protection that would be at least equivalent to that offered under the Convention 'there was a presumption that the State had not breached the Convention. If the protection offered was

[157] ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], (71412/01), 2007.
[158] Ibid.
[159] Ibid.

clearly inadequate, however, that presumption was reversed'.[160] The issue, thus, became whether the Court had jurisdiction *ratione personae* to examine the conduct of States acting on behalf of the UN and to determine the nature of the relationship between the Strasbourg Court and the UN acting under Chapter VII of its Charter.[161] All States Parties to the European Convention on Human Rights were United Nations members as well, and one of the objectives of the Convention was to ensure the protection of the rights guaranteed by the Universal Declaration of Human Rights.[162] Of significant importance is the binding nature of the UN's basic objective and the powers of the Security Council under Chapter VII, which allows the Council to meet its objective. The key goal of the UN is the preservation of world peace and international security, and the Council's primary task is reaching this goal, in certain cases through coercive measures, ergo, an exception to the prohibition of the unilateral use of force.[163]

The Court emphasised that resolutions by the Security Council under Chapter VII of the UN Charter were essential to the UN's mission and the goal to preserve international peace and security. The effectiveness and the Security Council's mission relies heavily on the contribution of the Member States. The Court, thus, concluded that the Convention could not be interpreted in such a way that the actions and omissions of Contracting States, which are covered by Security Council resolutions, could be placed under the ECtHR's jurisdiction. Neither should acts or omissions which were committed prior to or during UN missions aimed at preserving international peace and security, as this would amount to interference in the accomplishment of the UN key mission of peace and get in the way of effective conduct in such operations. The effectiveness of the missions depends on the will and support of the Organisation's Member States, therefore, the ECtHR concluded that the Convention cannot be read or interpreted in any way that would allow the Court to question activities covered by Council resolutions. The same reasoning can be applied to the deliberate acts of the respondent States. The Court stated in accordance with the above conclusion that:

[160] ECtHR, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], (No. 45036/98), Judgment 30 June 2005; Caflisch, 2017, pp. 187-188.
[161] See, Caflisch, 2017, pp. 187-188.
[162] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), of 4 November 1950, ETS No. 5 (Protocol 11, ETS No. 155), p. 5.
[163] For a further discussion on the ruling in *Bosphorus*, see Costello, 2006, as well as Caflisch, 2017, pp. 185-189.

> when a permanent member of the Security Council voted in favour of the particular resolution under Chapter VII and the deployment of troops on a peacekeeping mission: strictly speaking such acts might not be obligations resulting from membership of the United Nations, but they were essential to the effective fulfilment by the Security Council of its mandate under Chapter VII, and therefore to the UN's accomplishment of its paramount task of maintaining peace and security. The complaints must be declared incompatible *ratione personae*.[164]

The above conclusion has not been greeted with much enthusiasm. Nevertheless, it would seem, that the conclusion reached by the Court, is justified by cogent practical considerations. If actions executed or performed by national contingents, which are contributed by Member States under Chapter VII operations, could be challenged before the ECtHR by individuals of any nationality and in almost any situation, this could mean the end of such contributions, for what European State would take the risk of facing judicial challenges at any time?[165]

The issue of the Court's jurisdiction *ratione personae* during military operations under Security Council authorisation is evidently complex. This is due to the control over the armed operation on the territory of a State, Party or not to the Convention, lies not with the contingent-contributing State, but with the UN. Such operations are directly conducted and controlled by the Organisation, which in itself is not Party to the Convention, and hence, cannot be brought before the Court for alleged human rights violations. However, due to the requirement of offering a complete and effective protection of human rights, the Court will not readily concede that such operations would be fully imputable to the Organisation, in exclusion of responsibility or jurisdiction on the part of the contingent-contributing, and participating States Parties.[166] Except in operations directly undertaken by the Security Council under Article 42, which states that the Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'[167] However, this could lead to a serious gap in the protection of human rights of individuals, therefore, the above conclusion by the Court is true, as long as the agreements concluded between the Council and the troop-contributing States attribute no substantial power in their management to the national State.[168] This relationship is further examined in the subchapter below.

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[164] ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], (71412/01), 2007.
[165] Caflisch, 2017, pp. 185-189.
[166] Ibid, pp. 195-196.
[167] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 42.
[168] Caflisch, 2017, pp. 195-196.

4.2. Jurisdiction of Contingent-Contributing States in Security Council Operations

One key case in understanding the Court's reasoning on extraterritoriality of troop-contributing Convention States is that of *Bosphorus*. The case had significant implications for human rights protection within territories controlled by Contracting States. The case affirmed the principle that States cannot escape their obligations under international human rights law by recognising or creating 'puppet States'. This principle is crucial in preventing human rights abuses and trying to ensure accountability for violations committed within such territories. Furthermore, the case also highlighted the prominent role of the ECtHR as a guardian of human rights and the Court demonstrated its commitment to upholding human rights standards and holding States accountable for their actions by asserting its jurisdiction over acts committed within areas effectively controlled by a Contracting State. In doing so, The Court emphasised that the ECHR should be interpreted broadly to ensure effective protection of human rights.[169]

As concluded in the previous subchapter, the Court has found that, an alleged violation of the Convention cannot be attributable to a Contracting State on account of a decision or measure emanating from a body of an international organisation of which that State is a member. However, the Court has recognised that such a conclusion can leave a gap in the protection of individuals' human rights. Therefore, the Court has noted that this is true, as long as it has been established or even alleged that the protection of fundamental rights generally afforded by the international organisation in question is 'equivalent' to that ensured by the Convention and where the State concerned was not directly or indirectly involved in carrying out the impugned act.[170] However, this principle is largely based on the Court's interpretation, as the applicants in *Behrami* referred to the case of *Bosphorus* and argued that the protection of fundamental rights by KFOR was in no way equivalent to that offered by the Convention, as was established

[169] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], (No. 45036/98), Judgment 30 June 2005.
[170] Ibid. See also, Judgment 30 June 2005. ECtHR, *Gasparini v. Italy and Belgium*, (No. 10750/03), Decision, 12 May 2009 and ECtHR, *Klausecker v. Germany*, (No. 415/07), Decision, 2015, para. 97.

in *Bosphorus*.[171] Nevertheless, the Grand Chamber did not find the applicants arguments compelling.[172]

Considering the previously discussed judgments in the thesis, concerning Security Council operations and extraterritorial jurisdiction, the decision by the Strasbourg Court in *Jaloud v. The Netherlands* seems unexpected. The case concerns an incident at a checkpoint established and manned by the Iraqi Civil Defence Corps (ICDC), however, at the time of the incident Netherland military personnel had been employed there to 'observe and advise'.[173] The facts of the case concerning jurisdiction, does not correspond to the previously discussed Iraqi-cases, as the death of the applicant's son in the present case did not occur in the course of a security operation nor had the Netherland forces at any time exercised physical authority or control over the affected individuals, since they had never been in their custody. On these grounds the respondent State, therefore, claimed that their actions were not sufficient to generate a hierarchical relationship which would render the Netherlands responsible. According to the respondent State, State authority rested with the Iraqi security forces who were manning the checkpoint where the incident occurred. Additionally, the respondent State claimed the degree and control needed to bring the relevant area within the Netherlands' jurisdiction for the purpose of Article 1 was not fulfilled as the Netherlands' forces had only been present in south-easter Iraq in limited strength, and not in any capacity that could be compared to the control the UK exercised in Iraq in *Al-Skeini*.[174] Lastly, the respondent State argued that they should not be found to have exercised effective control over the checkpoint as this geographical area was so small that there would be no meaningful difference between the 'control over an individual' and 'control over a territory' test of jurisdiction.[175] Instead, the Netherlands argued that authority rested with the US or the UK, as they also exercised authority over the Dutch

[171] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], (No. 45036/98), Judgment 30 June 2005, para. 108 states that: 'The Convention must be interpreted in such a manner as to allow States Parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international cooperation.' The paragraph continues by stating that: 'It is not therefore contrary to the Convention to join international organisations and undertake other obligations where such organisations offer human rights protection equivalent to the Convention.'

[172] The Court concluded that the case of *Behrami* differed from the situation in *Bosphorus*, as the conduct challenged there was the confiscation by an Irish Minister acting on Irish territory of an aeroplane leased by the applicant's company. Consequently, the Court's jurisdiction *ratione personae* suffered no doubt. ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], (No. 45036/98), Judgment 30 June 2005.

[173] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, para. 117.

[174] Ibid, paras. 117–118.

[175] Ibid, para. 120.

contingent, and were regarded as Occupying Powers in Iraq at the relevant time.[176] These arguments by the respondent State are compelling, and adhere to earlier judgments by the Court, for this reason the Strasbourg Court's line of reasoning in the case seem even more inconsistent to its earlier conclusions.

Regarding the issue of jurisdiction in the case, the Court began by pointing out that the status of an Occupant Power in the sense of Article 42 of the 1907 Hague Regulations on Land Warfare, is not decisive.[177] The activities of the multinational force and the relationship between different contingents were in practice governed by a series of memoranda of understanding and rules of engagement. In the letter from the Foreign Minister of the Netherlands to the Dutch Parliament, it was stated that the Netherlands Government retained *full command* over its contingent in Iraq. Consequently, contingents other than those of the 'leading nations' received daily orders from foreign commanding officers. Nevertheless, the contributing States remained free in their implementation of the memoranda and the rules of engagement. Additionally, the Government of the Netherlands issued an *aide-mémoire* and instructions on the conduct of its troops. Thus, according to the Court, even though the Dutch troops were stationed in South-eastern Iraq, and placed under the command of a British officer, the Netherlands was responsible for maintaining security in that particular area, excluding other participating States, and thus retained full authority of its forces. Hence, it was not significant that the checkpoint in question was nominally manned by Iraqi troops, as these troops were subordinated to and supervised by coalition officers. Neither was it relevant that the UK and US were more formally seen as Occupying Powers, as it was specifically the Netherland troops who were authorised to maintain security in that particular area and over that specific checkpoint.[178]

In discussing the Court's approach to the 'cause-and-effect' notion of jurisdiction in chapter 3.2.1. regarding *Bancović* and the inadmissibility of the case, the Court has more recently, as illustrated by the foregoing discussion on *Jaloud,* acknowledged the 'procedural limb' of obligations being applicable. In *Jaloud,* the Court disregarded the responding States arguments of it not being an Occupying Power. Neither had the Netherlands assumed any public powers normally to be exercised by a sovereign government, at least in the traditional sense. The

[176] Ibid, paras. 140 & 113.
[177] Ibid, para. 142.
[178] Ibid, paras. 146-150.

Netherland contingent was under the 'operational control of the commander of the Multinational Division, South East (MND (SE))', which had a UK officer.[179] In addressing to whom actions should be attributed, the Court, under the same category of jurisdiction, stated that:

> the fact of executing a decision or an order given by an authority of a foreign State is not in itself sufficient to relieve a Contracting State of the obligations which it has taken upon itself under the Convention … The respondent Party is therefore not divested of its "jurisdiction", within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE), a United Kingdom officer. *The Court notes that the Netherlands retained "full command" over its military personnel*, as the Ministers of Foreign Affairs and of Defence pointed out in their letter to Parliament.[180] [emphasis added]

Additionally, the Court found that:

> The practical elaboration of the multinational force was shaped by a network of Memoranda of Understanding defining the interrelations between the various armed contingents present in Iraq. The letter sent to the Lower House of Parliament on 6 June 2003 by the Ministers of Foreign Affairs and Defence (see paragraph 57 above) emphasises that *the Netherlands Government retained full command over the Netherlands contingent in Iraq*.[181] [emphasis added]

Therefore, as it appeared from the relevant sources, the composing of distinct rules on the use of force remained in the reserved domain of the individual sending State. Consequently, the Netherlands assumed responsibility for providing security in the area, to the exclusion of other participating States, and as the quote above shows, retained full command over its contingent there. Hence, it did not matter that the checkpoint was nominally manned by the ICDC as they were subordinate to the Coalition Forces.[182] Neither was the Netherlands placed 'at the disposal' of, nor 'under the exclusive direction or control' of any other State.[183] On account of this the Court held that, and in accordance with the conclusion reached in *Al-Skeini*, regarding attribution:

> whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and

[179] Ibid, paras. 112-115.
[180] Ibid, para. 143.
[181] Ibid, para. 146.
[182] Ibid, paras. 147-150.
[183] Referring to Article 6 of the International Law Commission's draft articles on State responsibility. ILC, 2001, Draft articles on responsibility of States for internationally wrongful acts; and ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, para. 153.

> freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored.[184]

The decision by the Court somewhat corresponds to the decision by the Court in *Al-Skeini,* where it was not relevant that the US was also seen as an Occupying Power as the United Kingdom was authorised to uphold security in the particular area where the incident occurred. However, in comparison with the earlier cases, especially those of *Banković* and *Behrami,* the Court seems to have implemented a much looser requirement for the creation of a jurisdictional link under Article 1, as well as taken a huge step forward in the consideration of civilians' human rights. Given the aforementioned extension of a State's jurisdiction, the Court's decision in the case of *Georgia v. Russia (II)*, discussed below, appears even more peculiar.

4.3. Jurisdiction During the Active Phase of an International Armed Conflict

The decision of the Strasbourg Court in 2021, regarding the case of *Georgia v. Russia (II),* concerned the Russian army (and separatist forces placed under their control) and their 'indiscriminate and disproportionate' attacks against civilians and their property on the territory of Georgia.[185] The application was lodged in the context of the armed conflict which occurred between Georgia and the Russian Federation in August 2008.[186] In the case the Court needed to consider two main issues. First, if Russia exercised effective authority and control over the territories where the alleged human rights violations took place. Either direct control or indirect control through separatist forces and irregular troops allegedly committing human rights violations in the area.[187] Second, how the Court should approach violations that occurred during the active phase of an international armed conflict.[188]

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[184] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, para. 154 and ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 137.

[185] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 8.

[186] On the night of 7 to 8 August 2008 the Georgian artillery attacked the administrative capital of South Ossetia, Tskhinvali. Russian ground forces, assisted by the Russian air force and the Black Sea fleet, penetrated into Georgia by crossing through Abkhazia and South Ossetia and penetrating into the neighbouring regions in undisputed Georgian territory. On 10 August Georgian armed forces withdrew from the Tskhinvali region and the Gori district. The Russian armed forces, however, progressively invaded the Georgian territories of Abkhazia, South Ossetia, the village of Perevi, as well as the 'buffert zone' which included the zones bordering South Ossetia and Abkhazia. ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, paras. 35-39(i-iv).

[187] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 48 a.

[188] Russia challenged the application on mainly two bases: the alleged violations had occurred in an armed conflict and in the immediate aftermath of an armed conflict started by Georgia's attack on South Ossetia, and the State's attack on Russian peacekeepers and nationals in South Ossetia. Hence, the military response by the Russian Federation was legitimate under public international law and IHL, and Russia's obligations should thus be defined and governed exclusively by IHL over which the Court had no jurisdiction. Secondly, Russia alleged that the

The Court referred to the general principles relating to the concept of jurisdiction under Article 1 of the Convention, as laid down in among other cases, *Al-Skeini*. In the present case the Court emphasised that a distinction should be made between the military operations which were conducted during the active phase of the hostilities and those that took place during the occupation phase. Thus, all relevant violations needed to be examined in their own context.[189] In the case the Court found that the Russian armed forces had undeniably carried out military operations in the context of the international armed conflict between Georgia and the Russian Federation, including in the area of South Ossetia and in undisputed Georgian territory. Firstly, the Court examined if the events which occurred during the active phase of the hostilities fell within the jurisdiction of the Russian Federation, and thus also explored the nature of the control the State exercised during its military operations in South Ossetia and the 'buffer zone'.[190]

The Court, in the present case, had to examine whether the conditions which were previously applied by the Court in its case law regarding extraterritorial jurisdiction, could determine the exercise of extraterritorial jurisdiction by a State in respect of military operations carried out during an international armed conflict.[191] A particularly important fining by the Court was that in the event of military operations, for example, armed attacks, bombing or shelling which are carried out during an international armed conflict, it is not possible to generally speak of 'effective control' over an area. The very nature of an armed conflict, i.e., fighting between military forces seeking to establish control over an area in a 'context of chaos', prevents the parties from having effective control over an area. This is also true in the case of *Georgia v. Russia (II)*, where most of the fighting took place in areas previously under Georgian control.[192] Therefore, the Court found that it is not possible, on the basis of effective control, to determine if Russia had jurisdiction. Instead, the Court examined if there was State agent authority and control over the direct victims of the alleged violations and if this constitutes State jurisdiction for the Russian Federation under Article 1 and in accordance with the Court's previous judgments.[193]

events the applicant State complained about took place outside the jurisdiction of the Russian Federation and outside its effective control. ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 49.

[189] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, paras. 83 & 84.

[190] Ibid, paras. 109–110.

[191] Ibid, para. 125.

[192] Ibid, paras. 126 & 111.

[193] Ibid, para. 127.

Acts of Contracting States performing, or producing effects outside their own national territory, only in exceptional circumstances amount to the exercise of State jurisdiction under Article 1.[194] In most cases examined by the Court since its decision in *Bancović*, the Court has found that the decisive factor in establishing State agent authority and control over individuals situated outside the State's borders, was the exercise of *physical power and control* over the affected persons.[195] The Court has also in some instances gone beyond physical power and control in cases concerning arrests or detentions, and in determining State agent authority and control.[196] However, compared to the present case, where the Court is required to examine the alleged violations during the active phase of hostilities and in the context of an armed conflict, it according to the Court, diverges significantly from the situations of the previous cases.[197]

The Court in the case heavily relies on the reasoning in the early *Bancović* ruling and especially highlights paragraph 75 which read as follows:

> In the first place, the applicants suggest a specific application of the "effective control" criteria developed in the northern Cyprus cases. They claim that the positive obligation under Article 1 extends to securing the Convention rights in a manner proportionate to the level of control exercised in any given extra-territorial situation. The Governments contend that this amounts to a "cause-and-effect" notion of jurisdiction not contemplated by or appropriate to Article 1 of the Convention. The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.[198]

On the basis of the above considerations, the Court follows its early reasoning regarding the notion of 'control', be that 'State agent authority and control' over individuals or 'effective control' by a State over a territory. Furthermore, taking into account the very nature of armed confrontation, and the aim of establishing control over an area, the decision seems to indicate

[194] Ibid, paras. 128-129. See also ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 67; ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para 132; ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], (Application No. 36925/07), 2019, para. 178; ECtHR, *M.N. and Others v Belgium* [GC], (Application No. 3599/18), 2020, para. 102.
[195] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 130. See ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 136; ECtHR, *M.N. and Others v Belgium* [GC], (Application No. 3599/18), 2020, para. 105.
[196] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 131. See, for example, ECtHR, *Issa and Others v. Turkey*, (Application No. 31821/96), 2004 and ECtHR, *Mansur PAD and Others v. Turkey*, (Application No. 60167/00), 2007.
[197] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, para. 133.
[198] ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 75.

that there could be no 'effective control' over an area. However, this also excludes any form of 'State agent authority and control' over individuals.[199] Hence, the Court:

> therefore considers that the conditions it has applied in its case-law to determine whether there was an exercise of extraterritorial jurisdiction by a State have not been met in respect of the military operations that it is required to examine in the instant case during the active phase of hostilities in the context of an international armed conflict.[200]

The Court recognises that such an interpretation of the notion of jurisdiction in Article 1 of the Convention, 'may seem unsatisfactory to the alleged victims of acts and omissions by a respondent State during the active phase of hostilities in the context of an international armed conflict outside its territory but in the territory of another Contracting State', and also to the State in whose territory the active hostilities are taking place.[201] Nevertheless, the Court notes that, it is not 'in a position to develop its case law beyond the understanding of the notion of "jurisdiction" as established to date' and that these types of situations have a large number of alleged victims, exceedingly contested incident, and are difficult circumstances, and such situations are 'predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict)'.[202] Thus, if the Court is to be entrusted 'with the task of assessing acts of war and active hostilities in the context of an international armed conflict outside the territory of a respondent State, it must be for the Contracting Parties to provide the necessary legal basis for such a task.'[203] Therefore, having regarded the above factors, the Court concluded, that the events that occurred during the active phase of the hostilities did not fall within the jurisdiction of Russia for the purpose of Article 1 of the Convention, a serious setback in the protection of civilians' human rights.[204]

[199] ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, paras. 136-137.
[200] Ibid, para. 138.
[201] Ibid, 140.
[202] Ibid, para. 141.
[203] Ibid, para. 142.
[204] Ibid, para. 144.

5. The Functional Model as a Way of Safeguarding Human Rights

5.1. The Advantage of a Functional Approach to Jurisdiction

In *Al-Skeini,* the Court found that as the UK had assumed the exercise of some of the public powers, especially the maintenance of security, which were normally to be exercised by a sovereign government. The UK assumed authority and control through its soldiers in these 'exceptional circumstances' over the individuals who had been killed in the course of their security operations.[205] What mattered for the conclusion by the Court in the case was the *functional* connection between the deceased and the British forces, which was established through the security operation's implementation. Of relevance was also that the operation itself involved an assumption of 'public powers,' which are normally to be exercised by a sovereign government,[206] and in this particular case had been sanctioned by UN Security Council Resolutions and regulations of the Coalition Provisional Authority in Iraq. It can thus be argued, that the UK on that *de jure* basis was expected to conduct jurisdictional functions on the territory of Iraq, and that these functions should have been in line with the human rights obligations as set out in the ECHR and hence retaining State obligations for as long as the acts in question are attributable to the UK rather than to the territorial State.[207]

In the concurring opinion of Judge Bonello, he expresses that the establishment of whether the victims fell within United Kingdom jurisdiction should have been based on a 'functional jurisdiction' test. Although, the current judgment has developed the Court's case law concerning extraterritorial jurisdiction and 'placed the doctrines of extraterritorial jurisdiction on a sounder footing than ever before', Bonello still does not consider 'wholly satisfactory the re-elaboration of the traditional tests to which the Court has resorted.'[208] He notes that:

> The Court's case-law on Article 1 of the Convention (the jurisdiction of the Contracting Parties) has, so far, been bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies.[209]

[205] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, para. 149.
[206] Ibid, para. 149.
[207] Ibid, para. 135.
[208] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, Concurring Opinion of Judge Bonello, para. 3.
[209] Ibid, para. 4.

Up until *Al-Skeini,* the Court has, in matters concerning the extraterritorial jurisdiction of Contracting Parties, generated a number of key judgments which have been based on a need-to-decide basis, and what Bonello regards as 'patchwork case-law at best.' This has resulted in that the established doctrines seem to overreach in certain instances, such as can be argued in the judgment in *Jaloud*, and fall short in other situations, as for the civilians affected by the actions of NATO in *Bancović* or by the Russian Federation in *Georgia v. Russia (II)*. Such results are unavoidable, as the Court has tailored its principles to a set of specific facts, and those principles seem to stagger when applied to situations in which other than those particular facts are relevant. Consequently, standards and principles developed in one judgment may appear justifiable in that instance, yet be inappropriate in another.[210] The judicial decision-making process by the Strasbourg Court can be seen more as an experiment, where a number of different approaches to extraterritorial jurisdiction have been tested on a case-by-case basis, instead of ultimately establishing a universal application and understanding of jurisdiction under Article 1.[211]

When becoming Contracting Parties to the Convention, States under Article 1 undertake to secure to 'everyone within their jurisdiction' the rights and freedoms set out in the Convention. This Article continues to be the cornerstone of the Convention. At the same time, the Convention, as set out in the Preamble, recognises the importance of the Universal Declaration of Human Rights and emphasises 'the universal and effective recognition and observance' of fundamental human rights.[212] As Bonello highlights, the reference in the ECHR to 'universal' rights hardly indicates that the Convention should be interpreted as only applying to certain territories, specific persons, in only particular circumstances.[213] Bonello illustrates the absurdity if jurisdiction would not have a functional element by the following example:

> If two civilian Iraqis are together in a street in Basra, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street –

[210] Ibid, para. 5.
[211] Ibid, para. 7.
[212] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), of 4 November 1950, ETS No. 5 (Protocol 11, ETS No. 155), Article 1 and Preamble.
[213] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, Concurring Opinion of Judge Bonello, para. 9.

> same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.[214]

Instead, in determining State jurisdiction, also in extraterritorial cases the Court should ask the following questions: 'did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims?'[215] If the answer to the questions is yes, the actions, or non-actions should surely fall within the jurisdiction of the State in question.[216] Numerous actors have agreed with the reasoning of Bonello and proposed a functional test for jurisdiction.[217] In *Hanan v. Germany,* it was pointed out that this test can be affirmed where it is within a State's power to perform certain functions that are consistent with their ratification of the Convention, the protection of human rights, the investigation of human rights abuses, etc.[218] In *Georgia v. Russia (II),* the partly dissenting opinion of judges Yudkivska, Wojtyczek and Chanturia argued that the High Contracting Parties should secure the rights and freedoms of the ECHR, to 'everyone under its State power' and that the scope of the rights and freedoms secured 'should be adequate to the extent of the scope of effective State power'.[219] In their view a jurisdictional link, therefore also arises:

> every time a State undertakes pre-planned extraterritorial actions involving the use of instruments of State power directly affecting private parties, such as coercion or force. The process of planning and deciding about general methods and specific actions, as well as carrying out the decisions taken, creates a jurisdictional link and places the persons affected under the public power of the State in question, or to use other words, under the control of that State.[220]

Besson follows this reasoning and argues for a coherent approach to jurisdiction, which would consider that a State exercises control also through operational conducts and policy measures, which are deliberate expressions of State powers.[221] Considering this, a jurisdiction link could be established when one or more States exercise control over the preparation and execution of

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[214] Ibid, para. 15.
[215] Ibid, para. 16.
[216] Ibid.
[217] Including Strasbourg judges in various separate opinions, see *Al-Skeini and Others*, Concurring Opinion Judge Bonello (n 18) paras 3–20; *Georgia v Russia*, Dissenting Opinion Judge Albuquerque (n 3) para 26.
[218] ECtHR, *Hanan v. Germany,* (Application No. 4871/16), 2021.
[219] ECtHR, *Georgia v. Russia* (II) [GC], (Application No. 38263/08), 2021, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia, para. 3.
[220] Ibid, para. 5. See also, *Carter v. Russia*, where the Court held that the poisoning of Mr Litvinenko had been the result of a planned and complex operation executed by two States agents acting on behalf of Russia, ECtHR, *Carter v. Russia,* (Application No. 20914/07) (n 26), 2021, para. 159.
[221] Besson, 2012, pp. 864–865.

an action or a policy affecting individuals extraterritorially. Such a reading would ensure that the human rights of individuals are considered in all stages of military actions and honour the true universality of human rights.[222] The involvement of European States in military operations is not a one-off exercise of State authority. Rather, participation is part and parcel of a pre-planned policy, which is often essential to the success of the actual operation. Functional jurisdiction would, thus, not only be engaged when State authorities exercise effective operational control but also when public powers are exercised through both the development and implementation of general policies or targeted policing operations, which either produces effects abroad or are enforced beyond national borders.[223]

Applying the above medium, the conclusion that was reached in the previously mentioned *Banković* case should, and would, have been significantly different. The Court, should have taken into account the broader framework of programmed operational action within which the bombing was carried out, and not disregarded the foreseeable consequences, that is the impact on the lives of the civilian targets, and loss of life.[224] Similarly, in *Georgia v. Russia (II),* the Court did not recognise extraterritorial jurisdiction on account of effective control during the active phase of the hostilities or acknowledge that the civilian targets unwillingly were under the decision-making power of the Russian military commanders, who enforced a pre-planned operation (by means of an army), which per se is an exercise of public powers, and thus also, with the above reasoning, an exercise of State jurisdiction.[225] Therefore, decisive is not only the actual airstrike or other direct military activity, but also the preparation, planning, as well as final order should all be relevant in the establishment of a jurisdictional link with the victims. All stages of the military operation ought to be taken into consideration. States that are conducting activity and operations abroad should assess if their actions are in compliance with human rights and human rights treaties in all stages.[226] The basis of the foregoing statement is

[222] Giuffré, 2021, p. 64.

[223] ECtHR, *Al-Skeini and others v. The United Kingdom*, (Application No. 55721/07), 2011, para. 131.

[224] In comparison, see *Ergi v. Turkey*, where the Court held that the planned military action had been executed without taking sufficient precautions 'to protect the lives of the civilian population.' See, ECtHR, *Ergi v. Turkey,* (Application No. 23818/94), 1998, paras. 79 and 81. See also Moreno-Lax, 2020, p. 403.

[225] ECtHR, *Georgia v. Russia*, (Application No. 38263/08), 2021, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia. paras. 6–8; Giuffre, 2021, p. 65.

[226] Mallory, 2021; Giuffre, 2021, p. 65.

that States who export armed conflict outside their national borders should also be obligated to export human rights to protect the individuals affected by their actions or non-actions.[227]

5.2. Contradicting Decisions by the Strasbourg Court

Since *Banković,* the jurisprudence on jurisdiction under Article 1 of the Convention has been in a state of flux. At certain points it has appeared stable, settled and almost intelligible. However, at other times it has been confusing, contradictory and lacking in sense of direction. The *Al-Skeini* decision, arriving after a decade of simmering ambiguity by the Court, attempted to reconcile its restrictive tendencies from *Banković*.[228] Whilst *Banković* indicated that a Contracting Party could not exercise jurisdiction as to give rise to obligations under the Convention over a territory outside of the European legal space, merely three years later in *Issa v. Turkey*, the Grand Chamber suggested that Turkey could have exercised such spatial control temporarily in northern Iraq.[229] A similar contradiction can be found when the Court in *Banković* suggested that the Convention's obligations could not be 'divided and tailored' based on the extent or type of jurisdiction exercised. Nevertheless, the Court did just that in reducing Moldova's responsibility to positive obligations in a case concerning the separatist region of Transnistria in *Ilascu and Others v Moldova and Russia*.[230] Furthermore, *Banković* suggested that 'instantaneous' acts could not give rise to jurisdiction, and yet a series of Chamber decisions concerning shots being fired across the UN buffer-zone in Cyprus,[231] as well as potentially firepower from helicopters in Iran,[232] appeared to find jurisdiction precisely through such instantaneous acts of force. Still the Court, after already having deviated from the decision in *Banković,* later returned to rely on it in some cases, ruling out instantaneous jurisdiction. Consequently, the *Banković* ruling was in certain instances anomaly, inconsistent with the rest of the Court's jurisprudence and something to avoid, while at other times it was an authority and still relied upon to enforce a restrictive notion of jurisdiction, such as in *Georgia v. Russia (II)*.[233]

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[227] See ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, Concurring Opinion of Judge Bonello, paras. 37-39 for a brief discussion on 'human rights imperialism'.
[228] Mallory, 2021, pp. 36-37.
[229] ECtHR, *Issa and Others v. Turkey*, (Application No. 31821/96), 2004, para. 74.
[230] ECtHR, *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), 2004, paras. 72-78. However, note that this decision was a rare divided opinion with 11-6 on the question of Moldovan jurisdiction.
[231] ECtHR, *Andreou v. Turkey*, (Application No. 45653/99), 2008.
[232] ECtHR, *Mansur PAD and Others v. Turkey*, (Application No. 60167/00), 2007.
[233] Mallory, 2021, pp. 36-37.

The Court's reasoning regarding extraterritoriality becomes exceedingly intriguing in the recent admissibility decision in the case of *Ukraine and the Netherlands v. Russia*. Here the Court could have, if it would have applied the same grounds for the finding of effective control and State jurisdiction as in *Georgia v. Russia (II),* as it was actually written, principally excluded the entirety of the war in Ukraine from the scope of the Convention.[234] However, the Court does not adhere to the standard it set out in *Georgia v. Russia (II)*. If the Court would have overruled the judgment in *Georgia v. Russia (II)* it would have been a massive step forward by the Court regarding the question of extraterritoriality. However, it does not do, instead the Court starts qualifying the decision.[235] As much as the Court's decisions regarding extraterritorially have been confusing and in some instances fragmented, especially taking into account the decision regarding the active phase of hostilities in *Georgia v. Russia (II),* the Court has not entirely excluded extraterritorial jurisdiction in situations of international armed conflicts.[236] When the Court refers back to its decision in *Georgia v. Russia (II)* it states that in that particular case 'there was a clear, single, continuous five-day phase of intense fighting during which Russian troops advanced on Georgian territory seeking to establish control',[237] therefore, the Court was able to refer to the 'five-day war' as a distinct active phase of hostilities. Additionally, the Court was able to separate out complaints which it identified as concerning military operations carried out during the active phase of hostilities.[238] The Court further states that since it found jurisdiction to exist in respect of the detention and treatment of civilians and prisoners of war even during the period of the 'five-day war',[239] 'there can be no doubt that a State may have extraterritorial jurisdiction in respect of complaints concerning events which occurred while active hostilities were taking place.'[240] Consequently, the judgment in *Georgia v. Russia (II)* cannot be seen as authority for excluding a specific temporal phase of an international armed conflict entirely from a State's Article 1 jurisdiction.[241] However, as Milanovic notes:

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[234] Milanovic, 2023(a).
[235] Ibid.
[236] This can be seen for example in, ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 556. See judgments in *Cyprus v. Turkey*, *Al-skeini and Others, Hassan* and *Georgia v. Russia (II)*.
[237] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 558.
[238] Ibid.
[239] Ibid, paras. 238-239, as well as paras. 268-269.
[240] Ibid, para. 556.
[241] Ibid.

> the whole point of all that 'context of chaos' stuff in GvR was *precisely* to exclude entirely a specific temporal phase of an IAC – 'active hostilities' – and to do that with regard the actual conduct of hostilities. The reader will by now surely have become aware that the Court had no intention of applying GvR in this case, yet didn't want to overrule it – that awaits some future judgment.[242]

In *Ukraine and the Netherlands v. Russia* the Court articulates the criteria for the spatial and personal models of jurisdiction.[243] The personal model of jurisdiction, according to the Court,[244] encompasses two distinct, albeit potentially overlapping scenarios.[245] First, and as already covered numerous times in the thesis, when States agents exercise physical power and control over the victim or the property in question,[246] which also clearly includes cases in which the individual is in custody,[247] or cases in which freedom of movement or action is subject to a lesser form of restraint.[248] Secondly, the personal model of jurisdiction, which covers isolated and specific acts of violence involving an element of proximity.[249] Hence, jurisdiction has been found in respect of the beating or shooting by State agents of individuals outside that State's territory.[250] As well as in the extrajudicial targeted killing of individuals by State agents in the territory of another Contracting State, outside the context of military operations.[251] Responsibility, in these types of situations, stems from the fact that Article 1 of the Convention cannot be interpreted as allowing a Contracting State to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory. Permitting such actions would undermine the effectiveness of the Convention both as a guardian of human rights and as a guarantor of peace, stability and rule of law in Europe.[252]

Noteworthy in the Court's decision in *Ukraine and the Netherlands v. Russia* is paragraph 549 which reads as followed:

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[242] Milanovic, 2023(a).
[243] Ibid.
[244] See, ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, paras. 569 & 570.
[245] Ibid, para. 568.
[246] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, para. 136.
[247] See ECtHR, *Öcalan v Turkey* [GC], (Application no. 46221/99), 2005.
[248] ECtHR, *Medvedyev and Others v. France*, (Application No. 3394/03), 2010.
[249] See, ECtHR, *Georgia v. Russia*, [GC], (Application No. 38263/08), 2021, paras. 129-130, and ECtHR, *Carter v. Russia,* (Application No. 20914/07) (n 26), 2021, paras. 129-130.
[250] See, ECtHR, *Isaak v. Turkey*, (44587/98), 2006.
[251] ECtHR, *Carter v. Russia,* (Application No. 20914/07) (n 26), 2021, paras. 129-130.
[252] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 570, see also, ECtHR, *Carter v. Russia,* (Application No. 20914/07) (n 26), 2021, para. 128.

> Even in cases where it is established that the alleged violations occurred in an area under the respondent State's effective control (and thus within its *ratione loci* jurisdiction), the latter will only be responsible for breaches of the Convention if it also has *ratione personae* jurisdiction. This means that the impugned acts or omissions must have been committed by State authorities or be otherwise attributable to the respondent State.[253]

The Court in the above paragraph correctly identifies the two traditional types of extraterritorial jurisdiction. However, it continues, to incorrectly make a State's jurisdiction depend on both the finding of personal *and* territorial jurisdiction. Even in doing so, the Court does not actually decide on these grounds in the case. Instead it, in accordance with its prejudice, affirms in the remainder of the paragraph, that a State will be responsible for their acts or omissions, i.e. the breach must be attributable to it.[254] Thus, the conduct constitutive of jurisdiction, which may or may not be the same as the conduct constitutive of the violation, must be attributable to the State. This demonstrates the reason some attribution issues can be decided at the admissibility stage instead of on the merits. Therefore, the State must exercise jurisdiction through its own agents or organs, such as controlling an area with their own armed forces. The Court, in turn, must establish whether certain individuals have this relationship with the State. To do so, the Court needs to apply the attribution standards of the law of State responsibility.[255]

The Court did not only apply the personal concept of jurisdiction, but also the spatial model of jurisdiction to Eastern Ukraine, and on these basis found that Russia had effective control over the separatist territories.[256] The Court refers to multiple different factors of influence and control, starting with Russia's direct military presence in the relevant areas. For example, the Court notes that Russian soldiers were present in the armed groups, and also that 'regular Russian troops were deployed in their military units, notably to participate in certain battles'.[257] Additionally, the Court did not find any evidence to support the explanation by the Russian Federation on how the separatist forces acquired their weapons and equipment throughout the conflict.[258] The Court also took into account that the concerned troops had been deployed in that particular area in order to be available for further deployment to eastern Ukraine, which

[253] Ibid, para. 549.
[254] Milanovic, 2023(a)
[255] Ibid. The attribution standards of the law of State responsibility (ARSIWA) are considered to express customary international law and, thus, binding law, and therefore neither just relevant nor to simply be taken into consideration.
[256] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 576 et seq.
[257] Ibid, para. 610.
[258] Ibid, para. 638.

the Court saw as a further example of the military support by the Russian Federation to the separatist forces.[259] The Court, therefore, deemed that all the above actions by the Russian Federation exhibited that Russia played an active and significant role in the financing of the separatist entities.[260] Therefore the Court concluded that:

> the separatist operation as a whole was being managed and coordinated by the Russian Federation. The Court finds that the appointment of various different leaders of the major armed groups to "government" positions following the "referendums" was subject to Russia's approval and marked a critical step in the transition of the array of irregular armed groups into a single "separatist administration".[261]

Thus, it was according to the Court unnecessary to identify what areas were in the hands of what groups.[262] Instead the Court found that:

> The vast body of evidence above demonstrates beyond reasonable doubt that, as a result of Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities, these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation.[263]

In summary, the Court found that Russia effectively controlled the parts of Eastern Ukraine administered by the separatist entities and, therefore, the requirements of the spatial model of jurisdiction were fulfilled. In *Georgia v. Russia (II)*, the Court excluded jurisdiction during the active phase of the hostilities due to the 'context of chaos' element of the conflict. Whilst the issue in the present case basically booted and joined this issue to the merits. This was done partly because most of the alleged violations in *Ukraine and the Netherlands v. Russia* did not specifically concern the conduct of hostilities.[264] Of significant interest was the reasoning by the Court regarding one issue, the death of civilians resulting from shelling that involved the firing of artillery from Russian territory into Ukrainian-controlled territory where the civilians were located. Thus, indicating that the spatial model of jurisdiction could not be applied to this specific situation.[265] Nevertheless, the Court maintained the possibility of the personal model to be applicable, although, this was precisely the type of activity which the Court previously

[259] Ibid, para. 662.
[260] Ibid, para. 689.
[261] Ibid, para. 693.
[262] Ibid, para. 694.
[263] Ibid, para. 695.
[264] Milanovic, 2023(a).
[265] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, paras. 698-699.

excluded from the Convention's coverage in *Georgia v. Russia (II)*.[266] However, in the circumstances of the present case, the Court decided that the issue of shelling was closely connected to the merits of the case and, consequently, was determined on the merits.[267] Hence, the Court avoided having to rely on the principles it set out in *Georgia v. Russia,* concerning the 'context of chaos' element of hostilities.[268]

Ukraine and the Netherlands v. Russia is the most explicit overruling of *Bancović* to date. Furthermore, the Grand Chamber affirmed the Court's approach in *Carter*, where the Court relied on the personal model of jurisdiction in the instance of an extraterritorial assassination, which started the subversive hollowing out of *Georgia v. Russia (II)*, although the Court pretended to apply it faithfully. Thus, if the Court continues this path, it has set out with the two above decisions, it will eventually establish that there is no non-arbitrary way of limiting the personal model of jurisdiction only to targeted violations of the right to life, but instead demand that a minimum approach must apply to all human rights.[269]

5.3. The Relationship Between Attribution and Functional Jurisdiction

There has been much speculation regarding the relationship between jurisdiction and attribution in the Court's approach to the extraterritorial application of the ECHR.[270] Article 1 of the Convention asserts that States must secure to everyone 'within their jurisdiction' the rights set forth in the Convention. In the previous discussion in Chapter 2, it was concluded that the Court has interpreted Article 1 as providing grounds for when a State's obligations under the Convention extend outside of its own territory, which is also confirmed in several of the cases discussed throughout the thesis, and especially in *Al-Skeini,* where it was concluded that a State has extraterritorial jurisdiction when it exercises control over a territory,[271] or when exercising authority and control over an individual.[272] Nevertheless, there is much speculation

[266] Ibid, para. 700.
[267] Ibid, para. 700.
[268] Milanovic, 2023(a)
[269] Ibid.
[270] See for instance, Gondek, 2009, pp. 162-168; Lawson, 2004, pp. 85-88 and Milanovic, 2011, pp. 41-53.
[271] ECtHR, *Al-Skeini and Others v. UK* [GC], (Application No. 55721/07), 2011, para. 138.
[272] Ibid. See also, Chapter II in Responsibility of States for Internationally Wrongful Acts, 2001.

regarding whether an attribution test for establishing Article 1 jurisdiction exists in the Court's jurisprudence.[273]

In 2014 the decision of *Jaloud* provoked renewed interest in the question, and various interpretations of the ECtHR's approach in articulating the relationship between attribution and jurisdiction were put forward.[274] The conclusion by the Court in the case of *Jaloud* suggests that an attribution test was used in order to establish State jurisdiction under Article 1 of the Convention. In short, an 'attribution' test determines who should be held responsible for a rights violation, disregarding whether a State's obligations are engaged extraterritorially in the first place. An attribution test is usually applied in situations where a variety of actors are involved, and it is not instantly apparent which actors should be held responsible for a rights violation. In such a context, an attribution test may be applied to the exclusion of the application of the two traditional tests of jurisdiction.[275] The attribution test does not seek to establish whether the State agent exercised a certain kind of control over the individual such as 'physical force',[276] or 'custody',[277] unlike the State agent authority and control test, in order to trigger the application of the ECHR extraterritorially. Similarly, the attribution test, unlike the control over a territory test, does not aim to establish whether there is sufficient military presence for a sufficient period of time to establish jurisdiction,[278] or whether a specific space, such as a boat or a prison constitutes a 'territory' for the purposes of that test.[279] Depending on what 'test' the Court uses in determining State jurisdiction, it becomes a question of who the State controls, the 'control over the territory-sub-test' provides that State jurisdiction under Article 1 is triggered when a State exercises control over a territory, whilst the 'attribution sub-test' provides that a jurisdictional link is established when the State exercises a degree of control over entities carrying out the human rights violation.[280]

[273] Rooney, 2015, pp. 407-408.
[274] For instance, see Rooney, 2015, p. 407, Milanovic, 2014 and Sari, 2014, pp. 287.
[275] Rooney, 2015, pp. 407-408. Rooney also challenges the proposition that the Court's adoption of an attribution test to establish jurisdiction is methodologically unsound and not in conformity with international law.
[276] ECtHR, *Öcalan v Turkey* [GC], (Application No. 46221/99), 2005, para. 93.
[277] ECtHR, *Al-Skeini and Others v. UK* [GC], (Application No. 55721/07), 2011, para. 136.
[278] ECtHR, *Issa and Others v. Turkey*, (Application No. 31821/96), 2004, para. 75.
[279] See e.g., ECtHR, *Medvedyev and Others v. France*, (Application No. 3394/03), 2010, paras. 66-67; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, (Application No. 61498/08), 2009, para. 88; and Rooney, 2015, p. 408.
[280] Rooney, 2015, pp. 408. See also, Milanovic, 2014; Sari, 2014, p. 293.

The distinction between an 'attribution test' and a 'jurisdiction test', when interpreting the jurisprudence of the ECtHR is not straightforward and can be a matter of emphasis. As previously mentioned, the main difference in emphasis is that the attribution test is concerned with determining who should be held responsible. As such, the Court signals a lack of concern over where the actions took place, resulting in the arbitrary delimitation of the extraterritorial application of the Convention, which was provided by the two jurisdiction tests confirmed in *Al-Skeini,* thus, these are no longer the only relied upon tests. Consequently, territory no longer constitutes a barrier to accountability under the European Court of Human Rights in cases where an attribution test is applied. This may also be the reason the ECtHR has not acknowledged the conflation of the concepts of jurisdiction and attribution in *Jaloud*.[281]

Recently the Court in *Ukraine and the Netherlands v. Russia* has conceptualised the relationship between its approach to spatial jurisdiction and the rules of general international law. The ICJ in *Bosnian Genocide* and in *Nicaragua* distinguished between the two separate and possible ways of attributing the conduct of a non-State armed group or separatist entity to a State:

> First, if the entity was at a higher level of abstraction *completely dependent* upon the state, it would become a *de facto* organ of the state; the only thing distinguishing it from a *de jure* organ would be the lack of formal organ status under the state's domestic law. If the complete dependence test was met, *all* of the acts of the separatist officials would be attributed to the state, even those that were *ultra vires*, so long as they were done in their official capacity. Second, in the absence of such complete dependence, a *specific act* by the separatist group could be attributed to the state if the state instructed the entity or effectively controlled it into committing this act. The former case fits within Art. 4 of the ILC Articles on State Responsibility, the latter under Art. 8.[282]

Milanovic believes that the Strasbourg Court should engage with the above attribution framework of general international law developed by the ICJ and ILC. Especially as its jurisprudence regarding issues in which it has applied the spatial model of jurisdiction so far, has been unclear as to whether the Court regards *all* the acts of such a subordinate entity to be attributable to the State exercising territorial jurisdiction. Although the Court in *Ukraine and the Netherlands v. Russia* attempted to clarify this problem, it does so quite unconvincingly.[283] The Court, on the issue, states that:

[281] See further, Rooney, 2015, p. 409.
[282] Milanovic, 2023(b).
[283] Ibid.

> even where allegations concern an area within the respondent State's *ratione loci* jurisdiction, that State will ultimately only be held responsible for breaches of the Convention if the impugned acts or omissions are attributable to it. In purely territorial cases, it is uncontroversial that the territorial State is responsible for the policies and actions of local administrations. Their acts and omissions are automatically attributable to the territorial State. *It follows that in cases where a State's ratione loci jurisdiction is established outside its sovereign borders, the acts and omissions of the local administrations in the areas concerned will similarly be automatically attributable to the State which has Article 1 jurisdiction*[284] [emphasis added]

Therefore, on the above basis the reason the acts of a 'local administration' in entirely territorial cases are 'automatically' attributable to the territorial State is because the officials of such an administration are *de jure* organs of the State. They for that reason enjoy such status under the concerned State's domestic law. However, the same cannot be said about 'local administrations' in foreign territories occupied by the State, such situations require other principles, as the State's own law will not treat such administrations as parts of the State's organic structure.[285] Applying the above consideration to the situation in *Ukraine and the Netherlands v. Russia*, where Russian law did not regard the officials of the Donetsk or Luhansk People's Republics as being Russian State officials. This scenario is precisely one that the ICJ's complete dependence test was designed to address. It was constructed to close the loophole where a State could treat an entity as an organ in fact, whilst modifying its domestic law to evade responsibility and obligations. However, the Strasbourg Court does not refute this.[286]

After the Court concluded that Russia had controlled the relevant territories of Eastern Ukraine the Court asserts that:

> the finding that the Russian Federation had effective control over the relevant parts of Donbass controlled by the subordinate separatist administrations or separatist armed groups means that the acts and omissions of the separatists are attributable to the Russian Federation in the same way as the acts and omissions of any subordinate administration engage the responsibility of the territorial State. It will be for the respondent Government to demonstrate at the subsequent merits phase of these proceedings, should they wish to do so, that the separatists did not, in fact, control particular pockets of land or commit the particular acts which form the basis of the allegations by the applicant States; or that the specific acts of particular separatists cannot be attributed to them.[287]

[284] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 564.
[285] Milanovic, 2023(b).
[286] Ibid.
[287] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 697.

The Court in the above paragraph treats the Donbass separatist as *de facto* organs of the Russian Federation. In doing so, the Court separates out jurisdiction from attribution at least notionally. However, simultaneously it creates a leap from control over territory to control over non-State entities operating in that territory. In comparison, this would indicate that for example, the conduct of the Palestinian Authority would automatically be attributable to Israel simply because Israel is the occupying power in the territory in which the Palestinian Authority operates. As the Court, again, does not refer to the early work on the issue by the ICJ and ILC, and the principle they set out, it is possible to see it as the Court setting out a Convention-specific rule of attribution.[288] This might be justified in this instance, however, the Court should have explained in more detail how it came to this conclusion and how it relates to the law of attribution under general international law, as interpreted by the ICJ and ICL, and why it found it necessary to deviate from these general rules.[289]

5.4. Functional Jurisdiction in the Court's Judgments

After *Banković* the Court needed to develop and elucidate its approach concerning extraterritorial State jurisdiction. *Al-Skeini*, therefore, became an opportunity for the Court to revive its authority over the issue of Article 1 jurisdiction and provide clarity for future judgments. In *Al-Skeini* the Court seized this opportunity by taking the rare approach of outlining a passage on the 'General principles relevant to jurisdiction under Article 1 of the Convention'. In this passage the Court broke down the exercise of extraterritorial jurisdiction into two categories. First, a spatial basis which would arise where a State exercised de facto effective control over an area abroad and second, where a Contracting Party exercised state agent authority and control over individuals.[290] The Court also listed when such personal jurisdiction may arise including (1) when exercised through diplomatic and consular agents, (2) when State agents exercise public powers on another state's territory and, most contentiously, (3) when an individual is brought into a state's jurisdiction through the use of force.[291] Although, the third element seems promising the Court in *Al-Skeini* disregarded the previous Chamber decision, which has suggested that the act of shooting could give rise an

[288] Milanovic, 2023(b).

[289] Ibid. For a more extensive discussion on the special rules on attribution see, Milanovic, Marko, 'Special Rules of Attribution of Conduct in International Law', *International Law Studies*, Vol. 96, 2020. See also, Responsibility of States for Internationally Wrongful Acts, 2001.

[290] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, paras. 138-140.

[291] Ibid, paras. 133-137.

instantaneous jurisdictional connection, and in doing so, it appeared to see that the use of force as only exercising jurisdiction where an individual fell within a State's custody. Additionally, despite this surge for general clarity concerning the matter, the Court infused ambiguity in the specifics of the case, as it declared that the UK had not exercised effective control over southern Iraq during the period of occupation, but rather it had exercised personal jurisdiction through administering public powers in the region. Still, *Al-Skeini* briefly emerged as the framework for future clarity on the extraterritorial application of the Convention and the 'General Principles' section of the judgment was certainly intended to be the framework upon which future incantations of jurisdiction grew from and is regularly quoted in full in Article 1 decisions.[292]

The Court has built its approach to extraterritorial jurisdiction on a case-by-case basis, so if *Al-Skeini* is the template to imitate, in what direction does the Court go when the framework outlined in *Al-Skeini* provides no solution? The answer to that question can be found in the Court's previous and existing judicial culture. For example, the facts of *Jaloud* did not fit comfortably within the framework established in *Al-Skeini*, which recognised only custody not shootings, as creating a jurisdictional link when force was used. Neither were the Dutch forces an occupying power in Iraq, so as to merit consideration of the application of spatial jurisdiction, nor did the facts of the case indicate that jurisdiction was exercised through public powers, as the UK had done in *Al-Skeini*. The Court, thus, resolved the issue by creating what appeared to be a new basis for jurisdiction, which was based on where the respective State exercised a sphere of influence over a precise area.[293] Dutch forces, therefore, exercised jurisdiction by 'asserting authority and control over persons passing through the checkpoint',[294] pushing the understanding of jurisdiction beyond the *Al-Skeini* structure. Even if this notion of a 'sphere of influence' could be constructed from the existing spatial and personal exercises of jurisdiction, the notion was seen as a new, freestanding, exception to the primacy of territoriality.[295]

Milanovic argues that the Court's approach in *Jaloud* confirms the already existing method of the Court entailing two distinct kinds of attribution tests, discussed in the preceding sub-

[292] Mallory, 2021, pp. 37-38.
[293] Ibid, pp. 39-40.
[294] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, para. 152.
[295] Mallory, 2021, pp. 39-40.

chapter, which are related but separate from the concept of jurisdiction. One that precedes the application of the jurisdiction test (attribution of jurisdiction-establishing conduct) and one following the application of jurisdiction test (attribution of violation-establishing conduct). Hence, the preceding attribution test establishes who carried out the jurisdiction-establishing conduct, and the succeeding attribution test relates to whether the act is attributable to the State.[296] The Court resolved the attribution issue in *Jaloud* when it found that the Netherlands troops were not placed, 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, nor were they 'under the exclusive direction or control' of any other State. As well as in stating that the Netherlands exercised its jurisdiction within the limits of its Stabilization Force in Iraq mission and in asserting authority and control over persons passing through the checkpoint.[297]

Nevertheless, the above conclusion by the Court does not withstand scrutiny. The 'jurisdiction' section in the case, is concerned with demonstrating that the respondent State rather than the Occupying Powers (the US and UK) or the ICDC manning the checkpoint, should be held responsible for human rights violation.[298] The Court states that being an Occupying Power is not determinative of jurisdiction, although it in previous cases has found the concept relevant.[299] Similarly, it found that executing a decision or an order given by the authority of a foreign State is not determinative of jurisdiction, as is not the fact that the checkpoint is nominally manned by the Iraqi ICDC.[300] Instead what was decisive for the establishment of jurisdiction was that the Netherlands had 'retained full command'.[301] 'Full command', therefore, became the test that the Court applied and which attributed the actions to the Netherlands, not to the UK, US or the ICDC.[302]

Milanovic believes that the above conclusion by the Court resolves the question of Article 1 jurisdiction. The reasoning by the Court more closely resembles an 'attribution test' rather than

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[296] See Milanovic, 2014 and Rooney, 2015, pp. 411-413.
[297] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, paras. 151-152.
[298] Ibid, paras. 140-151.
[299] Firstly, the Court notes that the status of Occupying Power is not *per se*, within the meaning of Article 42 of the Hague Regulations determinative. Whilst the Court found the concept relevant in other cases, such as in *Al-skeini* (para. 143). The Court did not need to recourse to it in respect of the Northern Cyprus cases in *Loizidou v. Turkey* and *Cyprus v. Turkey,* nor in the determination of the actions in respect of Russia in the Moldovan territory in *Ilaşcu and Others v. Moldova and Russia*.
[300] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, paras. 142-150.
[301] Ibid, paras. 143, 147 & 149.
[302] See further, Rooney 2015, p. 414.

a ‘control over the territory’ or ‘authority and control over an individual test’. This due to the Court aiming to establish which actor had the requisite control over the checkpoint, rather than seeking to determine whether the type of control exercised over the individual was sufficient to establish jurisdiction over that specific individual.[303] Additionally, the Court stated that the Netherlands exercised its ‘jurisdiction’ *within the limits of* its SFIR mission. The above statement corroborates earlier decisions by the Court, meaning it was within the respondent States mandate to be in ‘full command’ of the events at the checkpoint. Thus, the Netherlands was considered to have asserted authority and control while exercising its jurisdiction within the limits of its SFIR mission.[304] Applying an ‘attribution test’ in such cases as *Jaloud,* where multiple parties are involved, makes it possible to identify the responsible party. The findings, identified by the Court in *Jaloud,* however, does not appear be based on previously used principles of effective control over an area or over an individual, but rather a finding based on functional jurisdiction.

5.5. Future Development of the Court’s Approach to State Jurisdiction

Recently the Court’s decision in the case of *Ukraine and the Netherlands v. Russia,*[305] has further developed, or rather confused, the Court’s standpoint on jurisdiction and admissibility. Similarly to *Georgia v. Russia (II),* the case concerned an interstate conflict, where the Court needed to consider the applicability of the ECHR in armed conflict, a crucial decision for the Court’s future jurisprudence in relation to similar complaints. Several of the issues in the cases also concerned the threshold question of Russia’s jurisdiction under Article 1 of the Convention, especially due to the involvement of non-State actors in some of the alleged human rights violations. The Court was, thus, forced to consider the responsibility of Russia in the various stages of the alleged violations, such as commission, complicity and failure to prevent.[306]

[303] Ibid, p. 114.

[304] ECtHR, *Jaloud v. The Netherlands,* [GC], (Application no. 47708/08), 2014, para. 152.

[305] The case, resulting from a joinder of two applications, dealt with questions of human rights violations in Eastern Ukraine, starting in 2014 as well as an application filed by the Netherlands, concerning the 2014 downing of the MH17 airliner over Ukraine. Milanovic, 2023a.

[306] Milanovic, 2023a. Compare also with the Grand Chamber’s admissibility decision in *Ukraine v. Russia re Crimea* (2021) where the Court found that Russia had jurisdiction over Crimea on the basis of control over the territory from the early stages of the conflict. Milanovic, 2023a.

Milanovic identifies one key issue in the Court's decision in *Ukraine and the Netherlands v. Russia*, which he regards as 'flat-out wrong as a matter of both law and broader principle'.[307] That is the implication by the Court that the spatial concept of jurisdiction can only be applied in the Convention's 'legal space', for example, when one Convention State controls the territory of another Convention State. However, it cannot be applied when a Convention State controls the territory of a non-State Party. Is this to say that the European Convention on Human Rights only protects the human rights of Europeans and does not apply when Europeans themselves violate the human rights of other people?[308] In *Banković*, it was stated that: 'The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States'.[309] The 'legal spaces' idea as such becomes a means of restricting the extraterritorial application of the Convention. However, as was concluded in the discussion on *Al-Skeini,* the Grand Chamber believed restricting the application of the Convention, to not include territory occupied by a Convention State, would result in a 'vacuum' of protection under the Convention.[310] In *Ukraine and the Netherlands v. Russia,* the Court revisits its previous stance on spatial jurisdiction within the legal space of the Convention.[311] The Court expresses that it has 'never said that there can only be effective control over an area outside a State's sovereign borders if the area in question falls within the territory of one of the High Contracting Parties'.[312] However, unlike the determination of personal jurisdiction,[313] the Court continues by stating that, 'To date, the Court has never found there to be extraterritorial jurisdiction on account of *ratione loci* jurisdiction over an area outside the sovereign territory of the Council of Europe Member States'.[314] It seems that the Court delineates between the two principles of jurisdiction, indicating that the spatial model has, and should be, applied to the territories of Convention States, whilst the personal model, should, and mostly has, been applied to these territories as well as territories outside them. Milanovic questions the Court's

[307] Milanovic, 2023(b)
[308] Ibid.
[309] ECtHR, *Banković and Others v Belgium and Others,* (Application no. 52207/99), 2001, para. 80.
[310] ECtHR, *Al-Skeini and Others v UK* [GC], (Application No. 55721/07), 2011, para. 142.
[311] See, ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, paras. 562-563 for a closer examination of the Court's line of thought.
[312] Ibid, para. 562.
[313] Ibid, para. 572.
[314] Ibid, para. 563.

aim in describing it as such, is it to imply that it, *should do more* as it refers to 'to date', or is it rather an insinuation that this is how the Convention *should* be applied?[315]

The spatial model has not been applied in any case regarding the territory of a non-Convention State. However, there is a simple explanation, as this specific approach has not been the most suitable in any case brought before the Court. In the Iraqi cases, discussed at length in Chapter 3, the Court adopted a 'special circumstances' approach, and in the most appropriate case, *Al-Skeini,* the Court avoided this issue entirely by using the personal model to cover all six applicants.[316] As the Court refrains from relying on the spatial model of jurisdiction, the Court essentially indicates that Convention States have a greater obligation to respect human rights in Europe than elsewhere. Would it thus be acceptable to come to the conclusion that the spatial model of jurisdiction could not have been applied if Russia had invaded e.g. Belarus instead of Ukraine, and demolished that country as it has Ukraine simply because Belarus itself is not a party to the Convention?[317] Is it truly to respect and protect human rights as the Convention intended? It would thus be unwise to rely on these specific paragraphs and analysis by the Court in future cases. Because of Ukraine being a Convention State, the questions above are mere hypothetical, nevertheless, refrainment by the Court in dealing with such possible instances signals a lack of concern for what European States undertake in other parts of the world.

Regardless of the cynical reading of certain aspects of the admissibility decision above, the conclusion in *Ukraine and the Netherlands v. Russia* is a tremendous step forward in the protection of civilians' human rights.[318] Especially important was the, legally and factually

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[315] Milanovic, 2023(b).

[316] The main reason the Court in *Al-skeini* did not apply the spatial model was that the UK's control over the parts of Iraq which it had occupied was very tenuous, due to the raging insurgency in those areas. Additionally, the House of Lords held that the UK did not actually have control over the Iraqi territory. Therefore, to avoid this issue the Court used the personal model. Milanovic, 2023(b).

[317] ibid.

[318] Another positive aspect of the admissibility decision by the Court is the conceptualisation by the Court regarding the relationship between IHL and the ECHR. The Court, as also identified in the thesis, asserts that the two branches of law can, and should, be applied side-by-side. Furthermore, the Court acknowledges in the decision that there is a potential norm conflict between some of the rules found in these, especially the justifiability of deprivation of life, the principle of proportionality and how Article 2 ought to be interpreted concerning allegations of the unintentional killing of civilians in the context of armed conflict. Similarly, a norm conflict exists not only in this IHL-proportionality 'collateral damage' scenario (which the Court has already to some extent dealt with in e.g. *Finogenov v. Russia*, although strictly from a human rights perspective) but also in connection with the killing of combatants who pose no immediate threat to the lives of others at the time of their death, or that could be captured rather than killed. Additionally, there is a question of whether a *jus ad bellum* violation should matter in the human rights justifiability analysis. Milanovic, 2023(b), See also, ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 720.

unimpeachable, conclusion that the Russian Federation controlled the separatist areas of Eastern Ukraine during the relevant time period, i.e. from 2014 up to the oral hearing in the case in 2022. Additionally, the Court's approach to the jurisdiction issue regarding the downing of the MH17 can also be regarded with optimism. The Court applied the spatial model of jurisdiction, as the missile which downed the MH17 was fired from Russian-controlled territory and the plane was hit in the airspace above Russian-controlled territory, even though both areas were in the hands of separatists, these were seen as under the effective control of the Russian Federation, which applies to both the ground, as well as the airspace above it, even if Ukraine was responsible for managing the passage of commercial aircraft over the territory.[319]

Even though the Court in the case came to the 'appropriate' conclusion from a human rights perspective, applying the spatial approach to the downing of the MH17 opens the potential for arbitrary-line drawing. If the plane were shot down a few kilometres away, while flying over Ukrainian-controlled territory, even if the missile were fired from the exact same Russian-controlled territory and from the same BUK anti-aircraft system, Russia could not be seen to have jurisdiction. Should these two scenarios affecting individuals' lives and human rights in actual fact be treated differently? As Milanovic notes, were the people in the former situation more deserving of the protection of their right to life than the latter? A similar hypothetical situation was also considered by Judge Bonello earlier, regarding the killing of two Iraqi civilians, one before arrest and the other after. In this instance, the application of the personal model of jurisdiction would have been preferable, as it would have applied authority and control over the victims. However, in applying the spatial model the Court avoided some immediate repercussions.[320]

The Court also had to address how its restrictive 'context of chaos' approach in *Georgia v. Russia (II)* could be applied to the downing of the MH17 in *Ukraine and the Netherlands v. Russia*. Thus, it needed to decide whether jurisdiction in respect of the incident was excluded based on the military operation taking place during the active phase of the conflict.[321] The Court found that:

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[319] Milanovic, 2023(b), see also, ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 702.
[320] See further, Milanovic, 2023(b) on these repercussions.
[321] ECtHR, *Ukraine and the Netherlands v. Russia*, (Applications nos. 8019/16, 43800/14 and 28525/20), 2022, para. 703.

> While the evidence in the present case shows that the downing of flight MH17 took place in the context of active fighting between the two opposing forces, it would be wholly inaccurate to invoke any "context of chaos" preventing jurisdiction on the basis of effective control over an area from being established.[322]

Albeit the above paragraph seems to set aside the previous ruling in *Georgia v. Russia II,* the Court continued to keep the two situations separate by stating that:

> First, the chaos that may exist on the ground as large numbers of advancing forces seek to take control of territory under cover of a barrage of artillery fire does not inevitably exist in the context of the use of surface-to-air missiles. Such missiles are used to attack specific targets in the air. They may be used in circumstances where there is no armed confrontation on the ground below between enemy military forces seeking to establish control over an area (compare Georgia v. Russia (II), cited above, § 126). There is no evidence in the present case of any such fighting in the areas directly relevant to the missile launch site or the impact site.[323]

> Second, the Court acknowledges that in many instances the available information may be insufficient to enable the circumstances to be elucidated with the precision required in order to determine whether jurisdiction existed. However, the exceptional work of the JIT demonstrates that it is not impossible to pierce "the fog of war" in relation to particular incidents. Its painstaking investigation has provided a great deal of clarity as to the circumstances in which flight MH17 was downed. Most importantly, as noted above, it has shown beyond any doubt that the missile, which had been supplied and transported by the Russian Federation, was launched from and the aircraft was struck over territory under separatist control. As already explained (see paragraph 701), these areas were, the Court has found, within the jurisdiction of the respondent State at the relevant time.[324]

Concluding, that the complaints in the case fall within the spatial jurisdiction of the Russian Federation.[325] The above reasoning by the Court, seeks to distinguish the present case from that of *Georgia v. Russia (II)*, in lieu of attempting to overrule it, nevertheless, not in a very compelling way. Milanovic draws attention to the fact that if the Court regards armed conflict as a 'conflict of chaos', it is 'just completely artificial to draw distinctions between its land and aerial components'.[326] Both land and air warfare can be defined as 'chaotic', as well as neither need to be 'chaotic' depending on the understanding of the word. Considering that the downing of the MH17 in all probability was a mistake on the part of the BUK operators, believing they were firing at a Ukrainian military plane, not a civilian airliner, this was clearly connected to the fighting on the ground. As Milanovic calls attention to, is the above situation that far from, for instance, unintentional artillery shelling happening on land? Would it then not be possible

[322] Ibid.
[323] Ibid, para. 704.
[324] Ibid, para. 705.
[325] Ibid, para. 706.
[326] Milanovic, 2023(b).

to clarify the factual circumstances to also include such situations? Is this not exactly what international criminal tribunals set out to do?[327] Ergo, either should the 'context of chaos' construct not apply at all and the decision in *Georgia v. Russia (II)* be overruled, or it should be applied consistently to all conflicts taking place in the context of armed conflict. Concerning future cases in connection to the Ukrainian conflict, it will be of significance how the Court will manage cases of this nature. Whether the Court will apply the same reasoning as it did in *Georgia v. Russia (II)*, that is excluding these types of 'chaotic' kinetic hostilities from the scope of the Convention, or whether it will try to distinguish such cases on the facts and merits, or whether it will overrule the principles it set out in *Georgia v. Russia (II)*, as the Court has more or less done with *Banković*.[328]

[327] Ibid.
[328] Milanovic, 2023(a)

6. Conclusion

This thesis set out to analyse the application of the European Convention on Human Rights extraterritorially. In doing so, it examined certain judgments by the Strasbourg Court and especially examined how the Court has interpreted jurisdiction under Article 1 of the Convention in relation to Convention States acting abroad. The discussion illustrated the complexity the Court faces in the establishment of State jurisdiction when Convention States undertake different extraterritorial military actions outside their borders, such as actions involving the use of force, actions in the course of UN Security Council operations and actions during the active phase of an international armed conflict. The cases examined in this thesis also demonstrated how difficult it is to draw general standards on jurisdiction from case law beyond grouping similar cases together. Ultimately, the discussion tends to gradually shift into a more functional approach to jurisdiction. Under the functional model, jurisdiction is understood as the authority and control of States over activities which affect the enjoyment of human rights. Consequently, States would have extraterritorial obligations whenever their conduct, or the conduct of private actors over which they exercise authority, would lead to direct or reasonably foreseeable impact on human rights.

The Court, and international human rights law in general, has struggled to define and construct a coherent standard for determining the extraterritorial application of human rights norms, which would reconcile the ethos of universal entitlement. On the one hand, the centrality of borders in delineating State powers needs to be considered and on the other hand, responsibilities under international human rights law protected. Although, the ECtHR has encouraged States to not engage in conduct outside their borders that would be impermissible if undertaken inside them, the attempts to demarcate the precise scope of extraterritorial application through allusion to degrees of control over individuals or areas, or by nature of the obligation itself have led to unsatisfactory, if not arbitrary results. Whenever a State engages in conduct or military operations beyond their borders the extraterritorial application of human rights becomes a prominent issue. The subject continues to be a vividly debated question in international legal scholarship as well as a matter of great practical relevance. Even though the extraterritorial application of the ECHR has for some time been accepted by scholarship and practise, the ECtHR continues to be inconsistent in its application of the Convention to acts taking place outside Convention States' borders. At the centre of the debate on extraterritorial application of human rights treaties is the notion of jurisdiction, how jurisdiction is interpreted,

and the way States are duty-bound and responsible for acts and omissions abroad. A Convention State has treaty obligations towards individuals only as far as a jurisdictional link can be established. Jurisdiction denotes a relationship of power, responsibility, authority, or what has been most important in this thesis, the control of a State over certain circumstances, over a given person or over a space.

Article 1 of the European Convention on Human Rights sets out that Contracting Parties shall secure, the rights in the Convention, to everyone 'within their jurisdiction'. Consequently, the exercise of jurisdiction is a threshold criterion and a necessary condition for a State to be held liable for violations of the Convention. It is remarkable how such a small number of seemingly simple words have proven to be so troublesome for the Court. Convention States' jurisdiction depend on the Court's interpretation of these words, as does the protection of individuals' human rights. Whilst the general jurisdictional principle is that human rights obligations apply to States within their territory, there are certain exceptions. Traditionally, jurisdiction in international human rights law has been determined on the territorial model of jurisdiction and personal model of jurisdiction. These exceptions, however, have been subject to strict criteria, such as the requirement of effective control over territory or the finding of authority and control over a person. The traditional approaches may have been sufficient when cross-border cases were rare, however, with globalisation, transboundary human rights cases have increased rapidly. Consequently, the old paradigm of recognising only limited circumstances in which States bear extraterritorial human rights obligations have quickly become outdated, obsolete and no longer fit to address the current global crises. Therefore, it is time to look beyond these traditional models and shift our attention towards a functional approach and towards universality.

The issue of extraterritorial protection of human rights and functional jurisdiction is a complex and continuously evolving area of international law, which is reflected in the analysed decisions and judgments by the Court. The issue has become pressing as the international community is confronted by more complex conflicts, such as an increase in internal conflicts and military operations, involving multiple troop-contributing nations, and States' providing weapon, intelligence or military support. Whether States can be held responsible for their human rights violations under such circumstances, or to what extent States can exercise jurisdiction over individuals or entities that are not physically present within its borders, are essential questions in the debate on extraterritorial jurisdiction. The notion of jurisdiction

within the context of extraterritoriality has beyond doubt tremendously evolved. However, every new judgment from the Court within this area seems to either add another layer of confusion or line of case-law different from the rest.

In comparison with the earlier cases examined in the thesis, it becomes clear that the Court gradually has come to consider also the overall context of State conduct in determining responsibility for actions violating the human rights of civilians. Still, the Court would benefit from abandoning its method of applying a patchwork of different tests, finding new thresholds, approaches and methods. Such an approach runs the danger of creating arbitrary distinctions. This could be prevented by developing a new uniform and consistent approach based on functional jurisdiction which would use a case-by-case analysis that would take all circumstances into account, rather than allowing for sharp dividing lines, which partly arises from the application of the traditional models. Having said that, such an approach still has certain limitations in its applicability, such as the intensity of power relations, which are factual relations of power entailing direct, significant and reasonably foreseeable potential impact. The shift to functionalism as the basis for extraterritorial application would require States to protect human rights in all situations it is within their power to do so. The functional model of jurisdiction has impacted the concept of control, be it effective control over an area or a person, and debilitated the threshold for State responsibility, obligation and attribution. True universality is taken seriously, and borders lose much of their normative significance. The functional approach does not set aside the traditional approaches to jurisdiction, instead, it seeks to take into account all relevant factors and provide an adequate remedy to effectively protect the human rights of individuals. In order for it to be achievable, the Strasbourg Court should develop a coherent approach to issues concerning extraterritorial State jurisdiction and a consistent and clear standard of analysis. Nevertheless, to date, the Court has not operated with a unified concept of jurisdiction. Rather, jurisdiction has been used as a context-specific concept to take account of factual elements to determine whether a State has exercised a sufficient level of control over persons or spaces.

In examining factual elements, the threshold test usually applied by the Court is that of ‘effective control’. However, recently the Court found that effective control cannot be established during the active phase of hostilities in an international armed conflict, does that mean that human rights violations taking place in such a context are out of the Court’s reach? One must remain optimistic for the future. It would not be the first time the Court would

overrule one of its previous standpoints, such as it has done when it progressed from demanding a certain degree of intrusiveness and duration, as well as requiring that the alleged human rights violation needed to take place within the 'European legal space', to gradually disregarding such requirements. Similarly, the Court revoked its claim that the Convention cannot be 'divided and tailored' to fit specific extraterritorial acts. This shift has already taken place in some of the recent decisions by the Court, where broader standard for jurisdiction and attribution has been established, not only considering formal control and effective control but also overall influence, moving the Court in a direction several other human rights bodies have already adopted in their practice. Even if the Court has not completely overruled its previous restrictive principles on extraterritorial jurisdiction, e.g., setting out that effective control could not be established during the active phase of an armed conflict, still, taking into consideration the particular complex institutional context of the Court and its relationship with the Contracting States, the decision in the recent case of *Ukraine and the Netherlands v. Russia* is an encouraging progression in the protection of civilians. Especially the *ipso facto* decision by the Court regarding State control over separatist.

A great deal of operations and actions in conflict, nowadays, are carried out under Security Council resolutions or enforced by the Security Council under Chapter VII. Thus, the question concerning the possible responsibility of Convention States on account of acts or omissions linked to their membership of the Organisation is also of significance in the establishment of jurisdiction over alleged human rights violations. The Court has in such instances found that the Convention cannot be interpreted in such a manner that it would subject to the Court's scrutiny acts and omissions of Contracting Parties which are covered by United Nations Security Council Resolutions and occur prior to, or in the course of United Nations missions, to secure international peace and security. As doing so would be to interfere with the key mission of the UN, to secure international peace and security. However, the thesis also highlighted actions of national troops, which participate in multinational forces, over which the Court found that the United Nations Security Council had no authority or control over, and whose actions were not found to be attributable to the UN, but rather attributable to the contingent-contributing State. Ergo, case law indicates that as long as a specific military operation is conducted by a specific national contingent, responsibility seems to fall on that nation and jurisdiction appears to extend to the national State of that contingent. Although, the pushing of extraterritorial jurisdiction to such limits may be controversial, it is consistent with the Convention and Court's aim of providing full protection of human rights to everyone.

The Court's approach, undoubtedly, is pulled simultaneously in two competing directions. On the one hand, the Court is compelled to as broadly as possible advance the notion of jurisdiction to enlarge the scope of the Convention's application, and in doing so, eliminate any gaps in the protection of individual's human rights. On the other hand, the Court, simultaneously, appears to be cautious of being too overly expansive. This is connected to the Court's need to continuously consider its position in relation to the Convention States. If the Court were to seriously threaten States' abilities to conduct operations abroad, by providing an overly expansive understanding of a State's extraterritorial obligations, it could jeopardise the State's compliance with the Convention system as a whole, or at least the Court's authority as an arbiter. The Court, thus, seems mindful also of its own legitimacy and authority in respect of both rights' protection and States' compliance. Consequently, the approach by the Court concerning extraterritorial obligations and jurisdiction becomes a manifestation of these competing impulses. Nevertheless, as Judge Bonello questioned in *Al-Skeini*, in ratifying the European Convention on Human Rights, does a State undertake to protect human rights wherever it can, or does it seek to safeguard human rights inside its own borders and breach them elsewhere? Did the Convention and States intend to discriminate between individuals' human rights on the account of territory and nationality?[329] States too often seem willing to export soldiers, weapons and violence, without exporting human rights and guarantees against the atrocities of conflict.

The Court itself seems to prefer a case-by-case approach, eluding the development of a comprehensive and coherent approach, which could be applied to all extraterritorial cases. Consequently, civilians' human rights protection suffers and Convention States are inadvertently left in legal uncertainty. However, considering that the principles the Court rely on depend on how they are interpreted, it is possible that the Court is attempting to avoid a massive involvement in armed conflict cases, without completely losing control of such situations. Thus, it is conceivable that the Court resorts to approaches such as the 'special circumstances' one, or avoids certain issues on account of the 'context of chaos' principle to avoid a massive influx of applications. Moreover, the effectiveness of UN missions depends

[329] ECtHR, *Al-Skeini and others v The United Kingdom*, (Application no. 55721/07), 2011, Concurring Opinion of Judge Bonello, para. 17.

on the will and support of the Organisation's Member States, and what nation would contribute to such operations if it faced possible legal repercussions in all stages?

The Court has made substantial progress, concerning the protection of civilians' human rights, in the twenty years since its decision in *Bancović*. Regarding the pending and future complaints before the Court especially concerning the current conflict in Ukraine, it is difficult to imagine a human rights court, will come to the conclusion that the obliteration of Ukrainian cities, the use of explosive weapons and violations of civilians' human rights is not a proper human rights question simply due to it taking place in an active phase of a conflict, especially as the Court should strive to offer as broad a protection of human rights as possible. Human rights law is a dynamic and ever evolving field, and judicial decisions and evolving norms have a significant impact on the continuing development of this field. As new challenges emerge, and societal attitudes change, the Strasbourg Court must adapt its interpretation of jurisdiction accordingly. Great advancements have taken place in the protection of civilians' human rights during military operations abroad, however, the still varying approaches by the Court indicates that this issue is not in any way complete. The Court has a challenging task ahead of it, it is time for it to reconceptualise extraterritoriality against the background of functionality and universality to address human rights violations in the context of military operations taking place outside Convention States borders. Its interpretation of jurisdiction continues to be shaped by the constantly changing nature of conflicts, and the increasing need for flexible and effective remedies to protect the human rights of individuals living in such situations. The functional model of jurisdiction has the potential of providing a much more nuanced and adaptable framework, in comparison to the traditional models, for addressing complex situations and issues of State responsibility and obligations in an increasingly globalised and interconnected world.

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