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Europe and extraterritorial asylum

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2 | The extraterritorial applicability of human rights

The question of the territorial, and therewith the personal, scope of a state's obligations under human rights treaties is central to discussions on external measures of immigration control. Because human rights are commonly presented as the foremost constraint to the state's liberty to control the entry of foreigners, any discussion on the legal framework governing external migration policies requires understanding of the conditions giving rise to the extraterritorial applicability of human rights. The current chapter explores the general theory on the (extra)territorial applicability of human rights. Chapter 4 more specifically addresses issues of personal and material scope of the prohibition of *refoulement* and the right to leave any country, including his own.

2.1 INTRODUCTION

In the year 1906, the Consolidated Mining and Smelting Company Limited of Canada bought a zinc and lead smelter located along the Columbia river in the city of Trail, Canada, which is close to the international border with the State of Washington. In the following decades, the capacity of the plant expanded rapidly and so did the amount of sulphur released from the plant. The harmful effects of the emissions were noticed in the State of Washington, where the land and trees of the Columbia River Valley, used for logging and farming purposes, were affected. After the government of the United States had filed complaints with the government of Canada, both countries agreed to put the dispute before a Mixed Arbitral Tribunal. In its final decision, reported on March 11, 1941, the Tribunal considered that

'under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'¹

1 Ad Hoc International Arbitral Tribunal 11 March 1941, *Trail Smelter Arbitration* (*United States v Canada*), United Nations, *Reports of International Arbitral Awards*, Vol. III (United Nations publication, Sales No. 1949.V.2), p. 1965; re-printed in 35 *American Journal of International Law* (1941), p. 684-736. The history and legal legacy of the Trail Smelter Arbitration was

On this basis, the Tribunal considered Canada to be responsible for paying damages for harm in the United States from future smelter emissions. It is on the basis of the same ‘principles of international law’ that the International Law Commission (ILC) has now drafted the Articles on Prevention of Transboundary Harm from Hazardous Activities, obliging states to take all necessary measures to prevent or minimize the risk of harm from activities on its own territory to the territory of another state, also with regard to activities which are not as such prohibited by international law.²

In 2006, the European Court of Human Rights was faced with, on face value at least, quite a similar question of law. Mr Mohammed Ben El Mahi complained before the European Court of Human Rights that, as a Muslim, he had been discriminated against by Denmark, which had permitted the publication of a series of cartoons in the Danish newspaper *Jyllands-Posten*. Mr Ben El Mahi was joined in his complaint by the Moroccan National Consumer Protection League and the Moroccan Child Protection and Family Support Association – all of them based in Morocco. The applicants considered these cartoons to be offensive caricatures of the Prophet Muhammad, in particular the one showing him as a terrorist with a bomb in his turban. Like the Arbitral Tribunal in *Trail Smelter*, the European Court referred to ‘relevant principles of international law’ in deciding whether Denmark could be held accountable for the harmful effects these cartoons produced outside its territory. The European Court unanimously found that the application was inadmissible:

‘The Court considers that there is no jurisdictional link between any of the applicants and the relevant member State, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extra-territorial act. Accordingly, the Court has no competence to examine the applicants’ substantive complaints under the Articles of the Convention relied upon.’³

Offensive cartoons are not to be equated with toxic fumes, but the outcome of the two cases is strikingly different. It illustrates how, apparently, divergent ‘principles of international law’ govern questions of territorial scope of the state’s obligations under human rights law. The special nature of human rights, and in particular the requirement that an individual must be ‘within the jurisdiction’ of the state, sets limits to the duty of states to secure human rights outside their own territory.

recently explored in R.M. Bratspies and R.A. Miller, *Transboundary Harm, Lessons from the Trail Smelter Arbitration*, Cambridge University Press (2006).

2 Articles 1 and 3 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities 2001, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10).

3 ECtHR 11 December 2006, *Ben El Mahi a.o. v Denmark*, no. 5853/06.

Under the general regime of international law – primarily dealing with horizontal interstate relations – the question whether a state has committed an internationally wrongful act is normally answered on the basis of two elements: (a) whether specific conduct may be attributed to the state concerned, and (b) whether that conduct was in conformity with the obligations binding that state.⁴ There is no rule of general character stipulating that these obligations can only be situated within the state's territory. This corresponds to the very purpose of international law to regulate interstate contacts and relations. Substantial material parts of international law, such as international humanitarian law, international maritime law and the law on diplomatic relations are premised on the understanding that states do act outside their territorial sovereignty and that when they do so, their activity should be subjected to common agreement. In accordance with this rationale, the International Law Commission has affirmed that 'the acts or omissions of organs of the State are attributable to the State as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.⁵ And in its commentary on Article 29 Vienna Convention on the Law of Treaties, which holds that '[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory', the ILC has underlined that this provision does not exclude the 'obvious' possibility of extraterritorial application of treaties.⁶ In so far

4 Article 2 Draft Articles on Responsibility of States for Internationally Wrongful Acts, text adopted by the International Law Commission at its fifty-third session in 2001 (A/56/10), annexed to UN General Assembly Resolution 56/83 of 12 December 2001.

5 Report of the International Law Commission on the work of its twenty-seventh session, *Yearbook of the ILC 1975*, Vol. II, p. 84.

6 Article 29 VCLT is primarily designed to prevent states, in the absence of specific territorial provisions or declarations such as federal-, metropolitan- or colonial clauses, from restricting the territorial application of a treaty to only a part of its territory. It transpires from the drafting history of the Vienna Convention that several governments had indeed feared that Article 29 VCLT could be read as excluding the possibility of extraterritorial application of treaties. But the ILC clarified that the provision does not 'cover the whole topic of the application of treaties from the point of view of space' and felt it unnecessary to insert a further paragraph stipulating the 'obvious fact' that treaties may apply outside the territories of the parties; see Summary records of the eighteenth session, *Yearbook of the ILC 1966*, Vol. I (Part Two), p. 46-47, 50; Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *Yearbook of the ILC 1966*, Vol. II, p. 213-214; Sir H. Waldock, Third report on the Law of Treaties, *Yearbook of the ILC 1964*, Vol. II, p. 12. On occasion, the rule laid down in Article 29 VCLT and, in conjunction with that rule, the system of territorial reservations or declarations made under a human rights treaty, is nonetheless advanced as argument against the possible extraterritorial application of human rights treaties: C. Rozakis, 'The Territorial Scope of Human Rights Obligations: the Case of the European Convention on Human Rights', Report Venice Commission, Strasbourg 30 Sept. 2005, No. CDL-UD(2005)022rep, p. 5; S. Kavaldjieva, 'Jurisdiction of the European Court of Human Rights: Exorbitance in Reverse?', 37 *Georgetown Journal of International Law* (2006), p. 534-537. The European Commission of Human Rights and the House of Lords have affirmed however that territorial declarations or provisions allowing

as international law does localize the enjoyment of the rights and obligations of a treaty in a specific area, such restrictions must follow from the particular wording or object of a treaty.

In the context of human rights law – primarily dealing with the vertical relationship between the state and the individual – the prevailing paradigm is however that human rights treaties only govern the relationship between a state and its subjects and the circle of a state's subjects is traditionally defined either with reference to nationality or the territory in which a person is present. It follows that, while under the law governing interstate relationships the determination of state responsibility for international wrongful conduct depends on an assessment of state activity in relation to the state's international obligations, under human rights law a further assessment is introduced: that of the relationship between the state and the individual. In many human rights treaties, this relationship has found expression in the requirement that victims of human rights violations must be within the 'jurisdiction' of a state.

Although the notion is currently widely accepted that a state which ventures abroad and affects the human rights of an individual situated outside its territorial borders may be held responsible under human rights treaties, the circumstances giving rise to such responsibility remain subject to controversy. This chapter aims to identify the key principles of international law governing the field of extraterritorial human rights obligations. In particular, the chapter focuses on the meaning of the notion of 'jurisdiction', which appears the crucial requirement for engaging a state's responsibility for extraterritorial human rights violations.

The chapter first sets out, in sections 2.2-2.4, the different purport of the concept of 'jurisdiction' in general international public law and human rights law. It is argued that the ordinary function of 'jurisdiction' within international law – which is primarily to allocate competences between states – is not to be equated with the specific delimiting function of the concept of 'jurisdiction' in human rights law. In section 2.5, a comparative analysis is made of the methods and criteria applied by international courts and human rights bodies in interpreting the term jurisdiction and in defining the extraterritorial reach of human rights treaties. In section 2.6, the analysis is broadened to human rights treaties which do not contain a general clause as to their personal or territorial application, with a view to determining whether a general doctrine on the extraterritorial application of all human rights treaties can be identified.

for territorial restrictions should not be interpreted as limiting the scope of the term 'jurisdiction' in Article 1 of the European Convention but merely as indicating the governmental entities which are bound by the Convention: House of Lords 13 June 2007, *Al-Skeini and Others v. Secretary of State for Defence*, [2007] UKHL 26, para. 86 ('In particular, there is an important difference between *the legal system* to which any Act of Parliament extends and *the people and conduct* to which it applies', emphasis in original); EComHR 26 May 1975, *Cyprus v Turkey*, nos. 6780/74, 6950/75, p. 136-137 at para. 9.

The chapter submits that, although not always consistent and operating on sometimes contradictory premises, international case law has moved towards the acceptance that human rights obligations serve as a code of conduct for all activity of a state, regardless of territorial considerations, and that exercises (or omissions) of factual power by the state which directly affect a person in the enjoyment of human rights are sufficient for considering that person to be under the jurisdiction of the state. Although it has been argued that this reasoning may overstretch the meaning of the term jurisdiction in international law, the chapter emphasises that the term jurisdiction fulfils different functions in general international law and human rights law, allowing for a different construction of that term within the human rights context.

2.2 THE CONCEPT OF JURISDICTION IN INTERNATIONAL LAW

In public international law, the concept of 'jurisdiction' is often understood as closely connected to the notion of sovereignty. Jurisdiction is described as an ingredient or an aspect of sovereignty: laws extend so far as, but no further than the sovereignty of the state which puts them into force.⁷ Whereas 'sovereignty' is referred to as the general legal competence of states (or as the legal personality of statehood), 'jurisdiction' refers to particular exercises of sovereignty (or particular exercises by states of their legal personality). In this connection, 'jurisdiction' is essentially a right of states to regulate conduct, international law setting the limits to this right and domestic laws prescribing the extent to which states make use of this right.⁸ A state may exercise 'jurisdiction' within the limits of its sovereignty, and is not entitled to encroach upon the sovereignty of other states.

The ordinary and essentially territorial notion of 'jurisdiction' may also be explained from its quality as an attribute of state sovereignty.⁹ Since sovereignty is in the present world organized along territorial demarcations, the starting point of assessing 'jurisdiction' is also territorial. States are, as a rule, exclusively competent in respect of their territories and may not intervene in

7 F.A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', 186 *Recueil des Cours de l'Académie de Droit International* (1984), p. 20; I. Brownlie, *Principles of Public International Law*, Oxford University Press, 6th Ed. (2003), p. 105-106; M. Shaw, *International Law*, Cambridge University Press, 5th Ed. (2003), p. 572; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, London: Longman, 9th Ed. (1992), Vol. I, p. 457.

8 Jennings and Watts (1992), p. 456-7. Mann (1984), p. 20. In his earlier treatise, Mann emphasized the function of jurisdiction as delimiting the *right* of states to exercise powers: F.A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *Recueil des Cours de l'Académie de Droit International* (1964), p. 9-15.

9 The terminology is taken from ECtHR 12 December 2001, *Banković and others v Belgium and others*, no. 52207/99, para. 61.

the territories of other sovereign powers.¹⁰ In the *Lotus* case, the Permanent Court of International Justice stated this rule as follows:

‘[F]ailing the existence of a permissive rule to the contrary – [a state] may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.’¹¹

Thus, when states would act within the territory of another state they will normally breach the rule of non-intervention and act beyond their jurisdiction. This may also be seen as an ‘excess’ or ‘overstepping’ of jurisdiction.

Two types of ‘jurisdiction’ are generally discerned. Legislative (or prescriptive) jurisdiction refers to the capacity to make decisions or rules. Enforcement (or executive) jurisdiction refers to the capacity to ensure compliance with those rules. One of the differences between the two manifestations of jurisdiction is that it is well-established in international law that legislative ‘jurisdiction’ may be based on other grounds than territorial considerations.¹² A state has – to a certain extent – the capacity to make laws concerning its own nationals living abroad, for example regarding the levy of taxes, the supply of state benefits or the recruitment of military conscripts.¹³ Legislative ‘jurisdiction’ over nationals living abroad is not unfettered but remains subject to the rule of non-intervention. This implies that it will generally not be allowed for a state to impose upon its nationals, or other persons for that matter, who are resident in another country, obligations which run counter to the local laws of that country. If France were to prohibit its citizens living abroad to work on *Quatorze Juillet* this would most likely collide with the sovereignties of other states and be an unlawful exercise of ‘jurisdiction’.¹⁴

But nationality is not the only legal title for exercising legislative ‘jurisdiction’ over foreign territories. Many states assert criminal ‘jurisdiction’ over non-nationals committing offences against their nationals living abroad, over offences against vital state interests, or over offences of serious concern to the international community as a whole.¹⁵ Other examples of extraterritorial

¹⁰ Brownlie (2003), p. 297; Shaw (2003), p. 572; Mann (1984), p. 20.

¹¹ PCIJ 7 September 1927, *S.S. ‘Lotus’ (France v Turkey)*, PCIJ Series A. No. 10, p. 18-19.

¹² See in particular M. Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1972-1973), p. 179.

¹³ According to Lowe: ‘States have an undisputed right to extend the application of their laws to their citizens, wherever they may be. This type of jurisdiction has a longer history than jurisdiction based upon the territorial principle.’ V. Lowe, ‘Jurisdiction’, in: Evans (2003), p. 339.

¹⁴ For a more comprehensive analysis of limits to legislative jurisdiction over foreign territories, see Akehurst (1972-1973), p. 188-190.

¹⁵ Also known as the passive personality principle, the protective principle and the universal principle.

legislative 'jurisdiction' concern anti-trust or bankruptcy laws regarding foreign economic activities producing effects within the legislating state. In the *Lotus* case the Permanent Court of International Justice held the competence of states to enact legislation on acts outside their territories not to be subject to a general prohibitive rule:

'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the 'jurisdiction' of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (...). [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its 'jurisdiction'; within these limits, its title to exercise 'jurisdiction' rests in its sovereignty.'¹⁶

While states may have the 'jurisdiction' to levy taxes on its own nationals living abroad or to try non-national criminals who have committed offences abroad, a state will normally not have 'jurisdiction' to enforce these legislative or judiciary measures without the consent of the other state.¹⁷ A state may not simply enter into another state in order to collect taxes, recruit military conscripts or arrest criminals. This is what the PCIJ referred to when holding that failing the existence of a permissive rule to the contrary, a state may not exercise its power in the territory of another state.¹⁸ Thus, enforcement 'jurisdiction' must be grounded in international custom or international agreement. There are, of course, many examples of states permitting other states to act within their territories. Under international custom and through bilateral and multilateral treaties, consular officers stationed abroad may perform a wide variety of functions such as the issue of passports, travel documents, and visa, or act as notary and civil registrar.¹⁹ Under treaties concluded within the framework of the Council of Europe, European states are entitled to service writs, records of judicial verdicts or rogatory letters in other Member States and may Members States be obliged to comply with criminal judgments and

16 S.S. '*Lotus*', p. 19. See also the separate opinion of Judge Fitzmaurice in ICJ 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Reports 1970, p. 104 at para. 70: 'It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction in such matters (...), but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits-though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State'. For a comment: Mann (1984), p. 26-31.

17 Lowe, in: Evans (2003), p. 351; Mann (1984), p. 47.

18 *Supra* n. 11.

19 Various consular practices are now codified in the 1963 Vienna Convention on Consular Relations, 596 UNTS 261, see in particular Article 5.

orders of seizure and confiscation served in another Member State.²⁰ Under bilateral treaties, the Spanish *Guardia Civil* is allowed to patrol the territorial waters of Senegal for the purpose of intercepting illegal migrants, the Dutch police is allowed to continue the hot pursuit of drug traffickers crossing the Belgian border, and the United States exercises 'complete jurisdiction and control' in the Guantánamo Bay Naval Base under a lease established by the 1903 Cuban-American Treaty.²¹ In all these examples, states enforce, either directly or indirectly, their domestic laws in the territory of another state. State intervention in the territory of another state is sanctioned by the competent authority: the other state. Extraterritorial enforcement 'jurisdiction' comes into being as a result of agreement.

In general international law therefore, the primary function of 'jurisdiction' is to allocate state competences and to determine whether a state is entitled to act. 'Jurisdiction' presupposes the existence of a legal title.

2.3 THE CONCEPT OF JURISDICTION IN HUMAN RIGHTS LAW

Although human rights treaties undoubtedly form an integral part of international public law, they operate somewhat differently than treaties governing inter-state relationships.²² Whereas treaties entered into under the general regime of international law give rise to reciprocal rights and duties between states, human rights treaties do not only create interstate obligations, but, more importantly, give rise to a collection of one-way obligations a state owes to a particular set of individuals.²³ Whereas the addressee of an obligation under

20 See eg European Convention on Mutual Assistance in Criminal Matters, *ETS* 30 (1959); European Convention on the International Validity of Criminal Judgments, *ETS* 70 (1970); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, *ETS* 141 (1990).

21 Agreement between Spain and Senegal to launch joint military police patrols, concluded on 21 August 2006 (see extensively chapter 6.2); Treaty between the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxemburg on cross-border law enforcement, 8 June 2004; Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, 23 February 1903.

22 B. Simma, 'How Distinctive Are Treaties Representing Collective Interest? The Case of Human Rights Treaties', in: V. Gowlland-Debbas (ed.), *Multilateral Treaty-Making*, The Hague: Martinus Nijhoff Publishers (2000), p. 87.

23 The Inter-American Court of Human Rights stated it as follows: 'modern human rights treaties (...) are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.' Inter-Am. Ct. H.R. 24 September 1982, The Effect of Reservations on the Entry into Force of the

general international law will normally be another Contracting State, the addressee of human rights obligations is a group of individuals the membership of which is variable and to some extent indeterminate. The legal bond of the individual with the Contracting State does not consist of an act of signature or ratification, but is subject to less tangible criteria reflecting a degree of attachment of the individual with the Contracting State. This legal bond may come into existence or come to an end as a result of circumstances relating to the individual, such as the fact of birth, death, immigration or emigration. It may also be the result of actions emanating from the state. By invading Kuwait in 1991 for example, Iraq was considered to have extended its human rights obligations under the ICCPR to the populace of Kuwait.²⁴

Although there is no uniformity in methods whereby various human rights instruments try to capture, or legally define, the group of individuals to which states owe the human rights obligations set out in the treaty, the notions of 'jurisdiction' and 'territory' have an obvious appeal. The International Covenant on Civil and Political Rights speaks of 'all individuals within its territory and subject to its jurisdiction' (Article 2(1)); the European Convention on Human Rights speaks of 'everyone within their jurisdiction' (Article 1); the Convention on the Rights of the Child speaks of 'each child within their jurisdiction' (Article 2(1)); and the American Convention on Human Rights speaks of 'all persons subject to their jurisdiction' (Article 1(1)). But other treaties, such as the International Covenant on Economic, Social and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination against Women do not contain a general provision limiting the scope of obligations either *ratione personae* or *ratione loci*, although some of the material provisions contained in these treaties do embody language from which a particular scope can be inferred. The Refugee Convention, for example, divides the various rights contained therein to refugees 'present in the State party's territory', refugees 'lawfully staying in the country of refuge', and refugees 'who have their habitual place of residence in the State party's territory'.²⁵

It appears from the drafting histories of the various human rights conventions that the choice for the term 'jurisdiction' in delimiting their scope was not self-evident. While the Drafting Committee of the ICCPR had originally confined the scope of obligations of a state Party to 'persons under its jurisdiction', this requirement was subject to ongoing discussions during the preparatory stages. A US draft had substituted the words 'under its jurisdiction' for 'within its territory', but in 1949 a French proposal to replace the word

American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, para. 29. In a similar vein: ECtHR 18 January 1978, *Ireland v United Kingdom*, no. 5310/71, para. 239.

24 HRC 10 October 1991, Fifteenth annual report, UN doc. A/46/40, para. 652.

25 Almost all substantive rights in the Refugee Convention specify to which category of refugees the protection applies. See in particular Articles 12-34 Convention Relating to the Status of Refugees, 189 UNTS 150 (Geneva, 28 July 1951).

territory for jurisdiction was provisionally adopted.²⁶ France had submitted that a state should not be relieved of its obligations to persons who remained within its jurisdiction merely because they were not within its territory.²⁷ At a practical level it was further argued that nationals residing abroad wishing to join associations within a Contracting State's territory should be able to rely on the ICCPR, as should nationals wishing to have access to the courts of their state and nationals invoking a right to enter their mother country as laid down in Article 12 (4) ICCPR.²⁸ On the other hand it was contended, in particular by the US, that a reference to 'jurisdiction' alone would neither suffice, since a state would normally not be able to protect (or enforce) the rights of persons living outside its territory who might be subject to its (legislative) 'jurisdiction'; in such cases action would be possible only through diplomatic channels.²⁹ In the final stages of the negotiations it was eventually decided to refer both to territory and jurisdiction – resulting in what later has been termed 'this awkwardly formulated provision'.³⁰

During the preparatory stages of the European Convention, the first draft (which limited its applicability '*to all persons residing within the territories*'³¹ of the Member States) triggered a proposal to replace the words 'residing in' by 'living in', so as to expand the reach of the future Convention. This proposal led to a second one:

'Since the aim of [the first,] amendment is *to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention*, and since the words 'living in' might give rise to a certain ambiguity, the ... Committee should adopt the text contained in the draft Covenant of the United Nations Commission: that is, *to replace the words "residing within" by "within its jurisdiction"* [...].'³²

The choice for insertion of the term jurisdiction appears to have been inspired by the drafting process of the UN Covenants, the early stages of which took place at the same time, and where at that moment a reference to jurisdiction had been provisionally agreed upon. The proposal was approved by the Committee of Experts; later changes of Article 1 ECHR only related to other

26 See M.J. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff (1987), p. 53-54.

27 *Ibid.*

28 *Ibid.* Also see United Nations, Official Records of the General Assembly, Tenth Session, Annexes, A/2929, Part II, Chap. V, 1955, para. 4. For a commentary, see M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl am Rhein: Engel, 2nd Ed. (2005), p. 30-31, 43-45.

29 Bossuyt (1987), p. 54.

30 Nowak (2005), p. 43.

31 See *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights* (hereafter: *TP*) part II, p. 276 (8 Sept. 1949); emphasis added.

32 *Ibid.*, p. 200 (5 Feb. 1950), emphasis added.

elements of this provision.³³ Although the word 'territory' was reintroduced into the draft text of the ICCPR one year later, the corresponding provision in the ECRH remained unchanged.

Under the Convention on the Rights of the Child, the wordings chosen in the ECRH were eventually preferred above those of the ICCPR. The original draft of Article 2 of the CRC had delimited the scope of obligations of Contracting States to children 'in their territories'. In considering to opt for the wordings chosen in the ICCPR, it was indicated that the dual requirement of territory and jurisdiction could give rise to uncertainty, with as example mentioned the legal status of children who are within a state's territory but outside its 'jurisdiction', such as diplomats' children.³⁴ The Finnish delegation had subsequently proposed – 'in order to cover every possible situation' – to delete the reference to territories and keep only the reference to jurisdiction – 'such as in the European Convention'. The provision was, without further comment, amended accordingly.³⁵

In interpreting the territorial scope of human rights treaties, various authors rely heavily on the *travaux préparatoires*, resulting in sometimes opposing propositions as regards the scope of respective treaties.³⁶ Although it is true that in the legislative history of the ICCPR, CRC and the ECRH different arguments were brought forward for inserting the notion of 'jurisdiction', one should be hesitant to infer from these variances alone that the purport of the word 'jurisdiction' differs among these treaties. The reasons submitted for insertion of the word 'jurisdiction' were of rather footloose nature and it is clear that the drafters shared similar concerns and did indeed pay close attention to the wordings chosen in other human rights treaties. Perhaps the main conclusion to be drawn from the preparatory works is not that they signify the exact envisaged personal scope of application, but rather that they reflect a common understanding that the notions of 'territory' and 'jurisdiction' do not necessarily coincide; and that states will sometimes encounter diffi-

33 TP part II, p. 236 and 260 (15 Feb. 1950); TP part IV, p. 218, for the text as adopted by the Conference of Senior Officials (15 June 1950).

34 S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Dordrecht, Martinus Nijhoff (1992), p. 147.

35 *Ibid.*

36 It has sometimes been derived from the *travaux préparatoires* that neither the ECHR nor the ICCPR should be interpreted as being extraterritorially applicable. Kavaldjieva concludes from the legislative history of the ECHR that the drafting Committee was mainly concerned with narrowing down the scope of territorial obligations from which she infers that jurisdiction should be interpreted as a territorial concept alone; Kavaldjieva (2006), p. 531-534. A similar reading of the *travaux* is given by the ECtHR in *Banković*, para. 63. Noll concludes that although the ECHR does have extraterritorial effect, the drafting history of the ICCPR strongly suggests that Contracting Parties were not prepared to give the Covenant extraterritorial scope, G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *International Journal of Refugee Law* (2005), p. 557-564.

culties in ensuring human rights, in particular in situations of colliding state sovereignties.³⁷

2.4 ON THE DIFFERENT FUNCTIONS OF JURISDICTION IN GENERAL INTERNATIONAL LAW AND HUMAN RIGHTS LAW

While under general international law the concept of jurisdiction serves to allocate state competences, in human rights law the term is used to define, as appropriately as possible, the pool of persons to which a state ought to secure human rights. These two different functions have also been described as the 'substantive' notion of jurisdiction as opposed to the 'remedial' notion.³⁸ It has transpired, in the time span of more than sixty years since the conclusion of the ICCPR and ECHR, that the various treaty monitoring bodies – and the European Court of Human Rights in particular – have encountered notorious difficulties in reconciling these two notions. On a conceptual level, it appears that these difficulties stem from two reasons in particular.

The first is that, in opting for the term 'jurisdiction', the drafters of the human rights conventions appear not to have dwelled on situations in which states would violate the sovereignties of other states, on situations in which state sovereignties would overlap or situations where there is no clear demarcation of competences at all.³⁹ This has left the present-day human rights practitioner, including the various monitoring bodies, with the rather peculiar presumption reflected in human rights treaties that states only act within clearly defined 'jurisdictional' bounds, and that it is only if states act in accord-

37 On this point, see also Mr. Tomuschat, former member of the Human Rights Committee: 'The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, 'to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity against their citizens living abroad.' Individual Opinion appended to HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979.

38 A. Orakhelashvili, 'Restrictive Interpretation of the Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', 14 *European Journal of International Law* (2003), p. 540.

39 Leaving aside emergency clauses, such as Art. 15 ECHR, which anticipate situations of war.

ance with those bounds, that individuals would fall under the scope of human rights protection. The main difficulty with this presumption is that it would risk denial of human rights protection in situations where states do act outside of their jurisdiction. How should, for example, reliance be placed on the term jurisdiction in the much commented upon case of *Banković*, where it could be argued that the NATO Member States lacked a legal title to bomb the television and radio station in Belgrade, but where the bombings nonetheless had drastic repercussions on the persons working in that station? It would of course greatly hamper the effective protection of human rights if the condition of an individual falling under a state's 'jurisdiction' in human rights law is understood as requiring that a state has legitimately exercised power for an individual to be able to benefit from human rights protection.

Although the *Banković* decision is not altogether illuminating in addressing this point, the European Court of Human Rights has in several other cases tacitly acknowledged that the remedial function of jurisdiction should prevail over the substantive – or allocating – function.⁴⁰ Other treaty monitoring bodies and the International Court of Justice have taken a similar approach. The fact that South Africa no longer had a legal title to administer the territory of Namibia, did not release it from its obligations towards the people of Namibia.⁴¹ And by invading Kuwait, Iraq clearly violated the territorial sovereignty of Kuwait and overstepped its 'jurisdiction', but this did not preclude the Human Rights Committee from establishing that this unlawful exercise of 'jurisdiction' brought Kuwaiti citizens within the 'jurisdiction' of Iraq for the purposes of the ICCPR.⁴² Accordingly, it is now commonly accepted that in situations of an overstepping of jurisdiction, the personal scope of human rights protection is not a question of legitimacy but of fact.⁴³ It is not relevant whether a state has a legal title to act, but it is relevant whether

40 See eg ECtHR 23 March 1995, *Loizidou v Turkey* (preliminary objections), no. 15318/89, para. 62: '[T]he responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'; and ECtHR 16 November 2004, *Issa a.o. v Turkey*, no. 31821/96, paras. 69, 71. Also see EComHR 12 October 1989, *Stocké v Germany* (report), no. 11755/85, para. 167 ('An arrest made by the authorities of one State on the territory of another State, without the prior consent of the State concerned, does not [...] only involve State responsibility vis-à-vis the other State, but [it] also affects that person's individual right to security under Article 5(1). The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.')

41 ICJ 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion), ICJ Reports 1971, para. 118.

42 *Supra* n. 24.

43 This point is also stressed in Scheinin's appraisal of the extraterritorial effect of the ICCPR, who observes that 'facticity creates normativity'. M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in: F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2004), p. 73-81.

the link between the individual affected and the state is sufficiently close as to oblige the state to secure that individual's rights. In *Banković*, the ECtHR was thus right in its statement that extraterritorial exercises of 'jurisdiction' need 'special justification',⁴⁴ but when it has been established that a state acts extra-territorially, the question of justification becomes moot.

A second conceptual issue raised by the different functions of jurisdiction under human rights and general international law is that under the latter, the question whether a state is competent to enact legislation or to enforce its laws abroad will normally depend on the subject matter at issue. Hence, a person may well fall under the jurisdiction of state A in respect of subject matter X, but under the jurisdiction of state B in respect of subject matter Y. But the various human rights conventions have incorporated jurisdiction as a requirement that that an individual must fall 'within' – or, in the case of the American Convention on Human rights, 'be subject to' – the jurisdiction of a contracting state, which then enlivens a duty on the side of the state to ensure (all) the rights and freedoms set forth in the respective treaties.⁴⁵ This formulation may be taken as reflecting the presumptions, firstly, that an individual falls under the jurisdiction of either one state or another, and secondly, that the state within which jurisdiction the person is placed, is obliged to secure the full spectrum of human rights to that person.⁴⁶ Such presumptions are obviously problematic, as it may well be – and this will especially be so in extraterritorial situations – that activities of a state only affect a person within the sphere of one particular human right and not with regard to others and it may moreover be so that a state is simply not legally entitled or factually able to guarantee human rights across the full spectrum.

In *Banković*, the European Court of Human Rights adhered to a rather one-dimensional approach to this matter where it considered that the obligation to ensure persons within their jurisdiction the rights and freedoms of the Convention cannot 'be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.⁴⁷ But, adding to the conceptual confusion, in *Banković* and several other cases the general formula is also used that only extraterritorial acts which 'constitute an exercise of jurisdiction' can engage the protection of the European Convention.⁴⁸ This gives rise to the question whether it is the nature of the act of the state or rather the nature of the relationship between the state and the individual which

44 *Banković*, para. 61.

45 The ECHR, ICCPR and CRC merely require the contracting states to ensure (or secure) 'the rights'; while the ACHR expressly speaks of the 'free and full exercise' of those rights.

46 The second presumption is upheld by M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005), p. 130.

47 *Banković*, para. 75.

48 *Ibid.*, para. 67; ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, para. 314; *Ben El Mahi v Denmark*; ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom* (admissibility), no. 61498/08, para. 85.

should be decisive in the establishment of a 'jurisdictional link'. Problematic, further, is that by stating that it is only in exceptional cases that extraterritorial acts of states can constitute an exercise of jurisdiction, the Court appears to be caught up in some logical fallacy, as it is difficult to see – from the ordinary meaning of the term jurisdiction – which acts of a state done out of public authority, regardless of whether they are effectuated in- or outside the state's territory, do not constitute an assertion of its sovereignty and hence an exercise of 'jurisdiction'.

2.5 INTERNATIONAL CASE LAW ON THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS

It is now time to explore in more detail the relevant views and decisions of international courts and monitoring bodies on the criteria to be applied in giving extraterritorial effect to human rights. Regarding these criteria, international case law appears to distinguish between two types of situations. Under the first type, control over foreign *territory* as a result of occupation or otherwise, various international courts have accepted that by virtue of such control, a state is bound to respect its obligations under human rights treaties in respect of all activity it undertakes within that territory, rendering it unnecessary to separately establish whether a specific act brings the affected individual within the 'jurisdiction' of the occupying state (section 2.5.1). The second type, that of control over *persons*, comprises a variety of situations through which individuals may be brought within the 'jurisdiction' of a state as a consequence of a more or less incidental link between the individual and the state whose acts produce effects outside its territory (section 2.5.2). This latter category is particularly relevant for this study but, unfortunately, also subject to considerable dispute. Section 2.5.3 deals with what may develop into a *third* category, in which the state, also in the absence of an assertion of control or authority over a person in a foreign territory, may nonetheless incur positive duties vis-à-vis that individual.

2.5.1 Jurisdiction resulting from control over territory

Let us start our survey of this category of situations with what perhaps is a platitude. A state has 'jurisdiction' over territory when it is the sovereign power with regard to that territory. Amongst other things, this implies that a state ought to secure a governmental structure capable of securing human rights throughout its territory. In *Ilascu a.o. v Moldova and Russia*, in which the European Court not only was faced with the question whether detainees in the break-away region of Transnistria, Moldova, were within the 'jurisdiction' of Russia by virtue of Russia's support for the rebel forces, but also had to

determine whether conversely, the detainees could still be considered to come within the 'jurisdiction' of Moldova, the Court considered that 'jurisdiction' is presumed to be exercised normally throughout the state's territory and that this presumption may be limited in exceptional circumstances only, in particular where a state is prevented from exercising authority in part of its territory.⁴⁹ The Court found that Moldova had lost effective control over the separatist regime but it stressed that this did not discharge Moldova from its positive obligation to take all diplomatic, economic, judicial or other measures that it is in its power to take to secure release of the applicants.⁵⁰

In situations where a state, by invitation or force, assumes control over a foreign territory, there would seem to be an inherent logic for extending a state's human rights obligations to the persons resident in the occupied territory. This logic not only stems from the fact that activities of the controlling state may have a notable impact on those resident there, but also from the imperative that persons may otherwise be rendered void of meaningful human rights protection.

The question of applicability of human rights to an occupied territory can be considered from a multitude of perspectives. In the context of occupation by force, a recurring theme concerns the relationship between human rights law and international humanitarian law, whereby it has been suggested that the former only applies in times of peace while the latter forms the *lex specialis* in times of war.⁵¹ A more general question is whether, by encroaching upon the territorial sovereignty of another country, a state should not simply assume the international obligations of the territorial sovereign and therefore abide by all rules, including international treaties, previously applicable to that

49 ECtHR 8 July 2004, *Ilascu a.o. v Moldova and Russia*, no. 48787/99, para. 312. Also see ECtHR 8 April 2004, *Assanidze v Georgia*, no. 71503/01, para. 139. A similar presumption was proposed in R.A. Lawson, 'Out of Control – State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?', in Castermans, Van Hoof & Smith (eds.), *The Role of the Nation State in the 21st Century – Essays in Honour of Peter Baehr* (1998), p. 113.

50 *Ibid.*, para. 331. Cf. *Banković*, where the ECtHR expressly rejected a 'gradual approach' to the concept of 'jurisdiction' as was proposed by the applicants in that case.

51 The prevailing doctrine, however, is that human rights law also applies in times of war and that, in situations of armed conflict, the protections under human rights and international humanitarian law complement one another. The applicable standard of human rights protection may be influenced by international humanitarian law as the applicable *lex specialis*. See *inter alia* ICJ 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (hereafter '*Wall Opinion*'), ICJ Reports 2004, para. 106; ICJ 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, para. 25; ICJ 19 December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (hereafter '*Armed Activities on the Territory of the Congo*'), ICJ Reports 2005, para. 216; IACHR 29 September 1999, *Coard et al. v the United States*, Case 10.951, Report No. 109/99, para. 39-42. *Contra* M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *American Journal of International Law* (2005), p. 119-141.

territory.⁵² This proposition finds support in Article 43 of the Hague Regulations of 1907, obliging occupying powers to, unless absolutely prevented, respect the laws in force in the occupied country.⁵³ In *Armed Activities on the Territory of the Congo*, the ICJ considered this obligation to comprise the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.⁵⁴

But the question of applicability of human rights treaties to occupied foreign territory is more often addressed from the perspective of the obligations flowing from treaties ratified by the occupying state itself. The European Court of Human Rights, UN treaty monitoring bodies and the International Court of Justice have all unequivocally accepted that by invading a territory and occupying it, a state becomes obliged to extend its human rights obligations to activities it undertakes in that territory.⁵⁵ Reference to specific human rights obligations was explicitly made by the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it considered that, being the occupying power, Israel exercised territorial 'jurisdiction' over the Occupied Palestinian Territory, which was sufficient to engage the responsibilities of Israel under the ICCPR, CRC and ICESR regarding the human rights consequences of the construction of the Wall.⁵⁶ The advisory

52 Meron, mainly discussing applicability of ILO Conventions to occupied Palestinian territory, formulated the rules of thumb that 1) in case of prior application of a multilateral convention of a treaty to the territory in question, a state must respect the norms of that treaty; and 2) in case of the occupant but not the territorial sovereign having ratified a treaty, there is a presumption against applicability of that convention, but adding that the needs of the population must always be taken into account. T. Meron, 'Applicability of Multilateral Conventions to occupied Territories', 72 *American Journal of International Law* (1978), p. 550-551.

53 Regulations concerning the Laws and Customs of War on Land, annex to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

54 *Armed Activities on the Territory of the Congo*, para. 178.

55 Already before the explicit pronouncements of various international courts on the applicability of a state's human rights obligations to occupied territory, the ICJ had considered, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, that 'certain general conventions such as those of a humanitarian character' to which the occupying State is party, should apply to the persons resident in the occupied territory, see paras. 118-122.

56 *Wall Opinion*, para. 109. The ICJ brought forward three arguments in favor of extraterritorial applicability of the ICCPR: (1) the object and purpose of the ICCPR implicates that it would be natural that states exercising jurisdiction outside the national territory should be bound to comply with its provisions; (2) the HRC has consistently found the ICCPR to be applicable to states exercising jurisdiction on foreign territory; and (3) the *travaux préparatoires* of the ICCPR indicates that the drafters 'only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.' In considering the ICESR applicable to Occupied Palestinian Territory, the ICJ reasoned that although the ICESR contains no

opinion confirmed the position repeatedly taken up by the HRC and the CESCR in respect of Israel's human rights obligations in the occupied Palestinian territories.⁵⁷ In establishing whether Israel was an 'Occupying Power', the ICJ merely referred to Article 42 of the Hague Regulations, which stipulates that 'Territory is considered occupied when it is actually placed under the authority of the hostile army'.⁵⁸ In *Armed Activities on the Territory of the Congo*, the ICJ further specified that the presence of military forces does not necessarily signify that an intervening state has become an occupying power. It must also be demonstrated that the intervening state has substituted its own authority for that of the local authorities.⁵⁹

What is not entirely clear is whether the fact of occupation enlivens a duty to secure the full compliance with human rights treaty provisions throughout that territory, including for example the setting up of legal arrangements necessary for the fulfilment of all kinds of positive obligations; or that the state should merely ensure that its own agents operating in that territory act in accordance with human rights standards. In its advisory opinion on the Wall, the ICJ confined Israel's obligations arising from the ICCPR and ICESCR to activity undertaken by Israeli state organs within the occupied territories and not to activities of the Palestinian authorities. As regards the latter, the Court merely noted that Israel was under the obligation 'not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities'.⁶⁰ These findings were in conformity – and indeed based upon – the HRC's concluding observations on Israel of 2003, where the Committee had considered that 'the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for *all conduct by the State party's authorities or agents in those territories* that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law'.⁶¹

But in its first concluding observations on Israel in 1998, the Committee had appeared to use broader language in noting that it was 'deeply concerned that Israel continues to deny responsibility *to apply fully the Covenant* in the

provision on its scope of application which may be explicable by the fact that the Covenant guarantees rights which are 'essentially territorial', 'it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.' *Ibid.*, para. 112.

57 CESCR 4 December 1998, Concluding observations on Israel, E/C.12/1/Add.27, para. 6; CESCR 23 May 2003, Concluding observations on Israel, E/C.12/1/Add.90, para. 11; HRC 18 August 1998, Concluding observations on Israel, CCPR/C/79/Add.93, para. 10; HRC 21 August 2003, Concluding observations on Israel, CCPR/CO/78/ISR, para. 11.

58 *Wall Opinion*, para. 78.

59 *Armed Activities on the Territory of the Congo*, paras. 173, 177.

60 *Wall Opinion*, paras. 111-112.

61 HRC 21 August 2003, Concluding observations on Israel, CCPR/CO/78/ISR, para. 11, emphasis added.

occupied territories'.⁶² This was despite Israel's insistence that the overwhelming majority of powers and responsibilities in the West Bank and Gaza had been transferred to the Palestinian authorities.⁶³ In *Armed Activities on the Territory of the Congo*, the ICJ also appeared to broaden the scope of obligations of Uganda beyond those concerning the own acts and omissions of its armed forces. It derived from Article 43 of the Hague Regulations a duty to 'restore and ensure' public order and safety in the occupied territory. And in respect of applicable human rights law, the responsibility of Uganda was found to be engaged not only for the acts and omissions of its own military forces, but also for 'any lack of vigilance in preventing violations of human rights (...) by other actors present in the occupied territory, including rebel groups acting on their own account'.⁶⁴ The rebel groups in question concerned various Congolese factions which received active support from the Ugandese army, but which functioned sufficiently autonomous as to preclude the possibility of attributing their activity to Uganda.

The issue of the precise scope of human rights protection to be accorded in a foreign territory has also been addressed under the European Convention on Human Rights, especially in a long series of cases concerning the Turkish occupation of northern Cyprus. In the 'early' Cyprus-cases, the former European Commission, in line with its decisions in cases concerning activities of state agents abroad,⁶⁵ considered that persons or property in Cyprus could be brought within the jurisdiction of Turkey, but only to the extent that Turkish armed forces, being agents of the Turkish state, 'exercised control over such persons or property' and in so far they 'by their acts and omissions, affect such persons' rights and freedoms under the Convention'.⁶⁶ But the European Court of Human Rights took the Turkish responsibilities in northern Cyprus to be wider. In the case of *Loizidou*, the Court referred to the object and purpose of the Convention and considered that having effective control over an area outside its national territory enlivens the obligation 'to secure, in such an area, the rights and freedoms set out in the Convention', while adding that it was immaterial whether this control was exercised 'directly, through its armed

⁶² HRC 18 August 1998, Concluding observations on Israel, CCPR/C/79/Add.93, para. 10

⁶³ HRC 4 December 2001, Addendum to the Second Periodic Report, Israel, CCPR/C/ISR/2001/2, para. 8.

⁶⁴ *Armed Activities on the Territory of the Congo*, para. 179.

⁶⁵ See, *infra* notes 74-78 and accompanying text.

⁶⁶ EComHR 26 May 1975, *Cyprus v Turkey*, nos. 6780/74 and 6950/75, para. 10; EComHR 10 July 1978, *Cyprus v Turkey*, no. 8007/77, para. 21. In the case of *Chrysostomos and others*, the Commission found the applicants' arrest, detention and trial in northern Cyprus, handled by the Turkish Cypriot authorities, acts which were not imputable to Turkey: EComHR 8 July 1993, *Chrysostomos, Papachrysostomou and Loizidou v Turkey*, nos. 15299/89, 15300/89 and 15318/89.

forces or through a subordinate local administration'.⁶⁷ And more pronouncedly, in *Cyprus v Turkey*, the Court held:

'Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'⁶⁸

This reasoning has been upheld in all subsequent cases concerning the activities of the Turkish Republic of Northern Cyprus.⁶⁹

A marked difference between the situation in northern Cyprus (and the eastern Congo) on the one hand, and the occupied Palestinian territories on the other is that the so-called Turkish Republic of Northern Cyprus (and arguably, the various rebel Congolese factions) could indeed be labelled as a subordinate administration, whereas the Palestinian Authority endeavours precisely to function as autonomously as possible from the Israeli authorities. Presumably, the reasoning of both the ICJ and the European Court must be that in respect of situations where effective control is exercised over foreign territory, a presumption is formed that the state is capable of ensuring the full application of its human rights obligations there, also in respect of the activities of a local entity. But this presumption may be considered not to apply if a local entity, such as the Palestinian Authority, functions autonomously from, and is inherently resistant to influence asserted by, the occupying state.⁷⁰

67 *Loizidou* (preliminary objections), para. 62. Accordingly, in the merits phase the Court held the question whether Turkish forces were directly involved in the impugned denial of Mrs Loizidou's access to her property in northern Cyprus was not to be decisive for a finding concerning Turkey's responsibility. Instead, it found that by virtue of the Turkish army exercising effective overall control, Turkish responsibility was engaged also for the policies and actions of the local 'TRNC' administration: ECtHR 18 December 1996, *Loizidou v Turkey* (merits), no. 15318/89, para. 56.

68 ECtHR 10 May 2001, *Cyprus v Turkey*, no. 25781/94, para. 77.

69 Eg ECtHR 26 September 2002, *Andreou Papi v Turkey*, no. 16094/90; ECtHR 20 February 2003, *Djavit An v Turkey*, no. 20652/92, paras. 21-22; ECtHR 31 July 2003, *Eugenia Michaelidou Developments Ltd. a.o. v Turkey*, no. 16163/90, para. 28; ECtHR 31 March 2005, *Adali v Turkey*, no. 38187/97, paras. 186-187; ECtHR 3 June 2008, *Andreou v Turkey*, no. 45653/99; ECtHR 24 June 2008, *Solomou a.o. v Turkey*, no. 36832/97, paras. 50-51; ECtHR 24 June 2008, *Isaak v Turkey*, no. 44587/98, paras. 76-77.

70 The ECtHR's pronouncements on the question to what extent, and on what basis, Turkey should assume responsibility for the activities of the 'TRNC' are not entirely clear. See especially the *Loizidou* judgments, where the Court noted not only that effective control over foreign territory may be exercised through a subordinate administration (merits at para. 52, preliminary objections at para. 62), but also that this effective overall control would consequently implicate that Turkey becomes responsible for the activities of the subordinate

2.5.2 Jurisdiction resulting from control over persons

When a state is in control of a foreign territory, there are strong imperatives for considering the state bound to ensure the human rights of persons in that territory. Activities of the controlling state may obviously have a notable impact on the persons residing there and the very fact that a state is 'in control' logically implies that the state has it, at least to some extent, within its abilities to ensure the human rights of persons living there. Moreover, to consider the state not bound to respect human rights in that territory could result in the creation of a human rights vacuum, because the original sovereign will normally have become unable to fulfil its function as the human rights guarantor in that territory. By contrast, in situations of ad hoc activities of a state in foreign territory, or where activities of and within a state produce effects in foreign territories, the existence of a 'jurisdictional link' between the acting state and the affected individual may be less obvious.⁷¹ Not only may it be less straightforward to establish that a state has impacted upon fundamental rights of persons, the persons so affected will normally be able to continue to rely on the protection of their own government, which is under a duty to protect its inhabitants also from outside interference by other states.⁷²

International human rights bodies have, however, considered human rights conventions not to be without meaning in this context. In making some comparative observations on the manner in which the various international human rights bodies have adjudicated the matter, this section submits that in essence, two approaches are adhered to. Under the first approach, the requirement of 'jurisdiction' is understood as embodying nothing more (and nothing less) than just any exercise of state authority; while under the second approach the concept of 'jurisdiction' is conceived as giving expression to some predefined relationship between the state and the individual, other than the alleged human rights violation itself, which must exist for the state's human rights obligations to become engaged.

The first approach is most evidently present in the case law of the former European Commission of Human Rights and in that of the Human Rights

administration (merits at para. 56). This appears to be a circular form of argument and moreover not one which distinguishes all too clearly between questions of attribution and of jurisdiction. On this point extensively, M. Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties', 8 *Human Rights Law Review* (2008), p. 436-446.

71 The term 'jurisdictional link' was first introduced in *Banković*, para. 82, and repeated in *inter alia* *Ben El Mahi v Denmark*; and ECtHR 14 December 2006, *Markovic v Italy*, no. 1398/03, para. 50.

72 In the case of *Alzery*, in respect of activities of US agents on the territory of Sweden, the Human Rights Committee noted that 'at a minimum, a State party is responsible for acts of foreign officials exercising acts of sovereign authority on its territory, if such acts are performed with the consent or acquiescence of the State party', HRC 10 November 2006, *Mohammed Alzery v Sweden*, no. 1416/2005, para. 11.6.

Committee. The formula consistently used by the European Commission in various cases where state activity produced ‘incidental’ effects in foreign territories was that ‘authorised agents of a State bring other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property’; and that ‘[i]n so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.’⁷³ Under this formula, affected individuals were deemed to fall under the jurisdiction of the acting state in situations concerning *inter alia* a prohibition imposed by the Swiss Federal Aliens’ Police on a German citizen to enter Liechtenstein,⁷⁴ a decision of the Danish ambassador to allow the GDR police to recover a group of GDR nationals present in the Danish embassy in Berlin,⁷⁵ the arrest and recovery for prosecution purposes by law enforcement personnel of persons present in another country,⁷⁶ and the decision of the Swedish government to cover with concrete the wreck of a cruise ferry which had sunk in international waters while sailing under Estonian flag and carrying a substantial number of Swedish nationals.⁷⁷

On reflection, and this is also evident from the wide variety of circumstances under which it was deemed to be met, the test adopted by the European Commission does not entail much of a threshold at all. We may assume that all acts of a state’s agents constitute an assertion of that state’s authority (with as possible exception acts of commercial nature) and thereby, in so far as persons are sufficiently affected by that act, bring persons within its jurisdiction. It did not matter for the Commission whether the exercise of authority consisted of a legislative or executive measure or an assertion of physical control, it did not matter whether the act was committed abroad or only produced effects abroad, and it did not matter whether the exercise of authority was duly sanctioned – or, an assertion of jurisdiction proper – under international law.⁷⁸ Hence, the approach of the Commission may be summarized as one in which States Parties must always act in conformity with the European

73 *Infra* notes 74-78. Also see, EComHR 25 September 1965, *X v Federal Republic of Germany*, no. 1611/62; EComHR 15 December 1977, *X v United Kingdom*, no. 7547/76; EComHR 12 October 1989, *Stocké v Germany*, no. 11755/85, para. 166; and EComHR 18 January 1989, *Vearncombe v United Kingdom and Germany*, no. 12816/87. For an extensive appraisal of the approach of the European Commission of Human Rights, see R.A. Lawson, ‘Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights’, in: Coomans and Kamminga (2004), p. 90-95.

74 EComHR 14 July 1977. *X. and Y. v Switzerland*, nos. 7289/75 and 7349/76.

75 EComHR 14 October 1992, *W.M. v Denmark*, no. 17392/90.

76 EComHR 24 June 1996, *Ramirez v France*, no. 28780/95; EComHR 2 October 1989, *Reinette v France*, no. 14009/88; EComHR 7 October 1980, *Freda v Italy*, no. 8916/80.

77 EComHR 8 September 1997, *Bendréus v Sweden*, no. 31653/96.

78 As regards this last point, in *Stocké* the Commission explicitly found the question whether Germany had illegitimately encroached upon the territorial sovereignty of France irrelevant for establishing whether the person affected by this activity fell under its jurisdiction: *Stocké v Germany*, para. 167. Also see *Bendréus v Sweden*.

Convention, irrespective of territorial constraints.⁷⁹ For individuals situated abroad to be able to rely on the Convention, they would merely need to show that they are sufficiently affected in their enjoyment of human rights – which does not appear to be a different test than the establishment of their status as ‘victims’ in the meaning of current Article 34 of the European Convention. Accordingly, the Commission’s test may also be described as tantamount to, as the ECtHR would later put it in its *Banković* decision, an approach under which ‘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’, a reasoning which the Court forcefully rejected.⁸⁰

The Human Rights Committee and the Inter-American system of human rights protection have proceeded from a rationale similar to that of the European Commission. The Human Rights Committee has repeatedly affirmed that ‘it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory’.⁸¹ Under this rationale, the Committee considered the apprehension and detention of Uruguayan nationals by Uruguayan security forces in the territory of Brazil and Argentina, with the connivance or acquiescence of local authorities, to bring the victims within the ‘jurisdiction’ of Uruguay.⁸² This conclusion was based on the consideration that the term ‘jurisdiction’ in Article 1 of the Optional Protocol to the ICCPR refers 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.⁸³ The Committee further affirmed that, for the question of enlivening a state’s duties under the ICCPR in such a situation, it was immaterial whether the state was internationally competent to undertake the activity in the territory of another state.⁸⁴ In several other views, the Committee considered that the refusal by Uruguayan authorities to renew the passports of Uruguayan citizens living abroad ‘is clearly a matter within

79 This is also the conclusion drawn by judge Rozakis from the Commission’s case law: Rozakis, in: Venice Commission (2006), p. 61.

80 *Banković*, para. 75.

81 HRC 29 July 1981, *Celiberti de Casariego v Uruguay*, no. 56/1979, para. 10; and HRC 29 July 1981, *Lopez Burgos v Uruguay*, no. 52/1979, para. 12.

82 *Ibid.*

83 *Ibid.*

84 *Celiberti de Casariego v Uruguay*, para. 10.3.

the ‘jurisdiction’ of the Uruguayan authorities’ and that the authors were ‘subject to the ‘jurisdiction’ of Uruguay’ for the purpose of the ICCPR.⁸⁵

The Human Rights Committee has not departed from this line of reasoning in later views. Worth mentioning is the case of *Ibrahima Gueye*, on the question whether retired Senegalese soldiers of the French Army residing in Senegal should be treated equally with French nationals in the enjoyment of their pension rights. The Committee considered that the authors were ‘not generally subject to French ‘jurisdiction’, except that they rely on French legislation in relation to the amount of pension rights’. This was sufficient to bring the authors within the purview of the Covenant.⁸⁶ In General Comment 31, the Committee has now formulated as a general rule 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.’⁸⁷ Although the comment speaks of ‘power or effective control’ as a general condition for engaging the protection of the Covenant, these terms did not feature in the Committee’s views on the passport- and apprehension cases, nor in the view in *Ibrahima Gueye*.⁸⁸

Under the Inter-American system of human rights protection, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have both considered that the obligation to uphold the rights of any person subject to the jurisdiction of each American state may refer to conduct with an extraterritorial locus, and that ‘[i]n principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control’.⁸⁹ In

85 HRC 23 March 1982, *Vidal Martins v Uruguay*, no. 57/1979, para. 7; HRC 31 March 1983, *Lichtensztejn v Uruguay*, no. 77/1980, para. 6.1; HRC 31 March 1983, *Montero v Uruguay*, no. 106/1981, para. 5; HRC 22 July 1983, *Nunez v Uruguay*, no. 108/1981, para. 6.1.

86 HRC 3 April 1989, *Ibrahima Gueye et al. v France*, no. 196/1983, para. 9.4. For other more recent pronouncements see: HRC 15 November 2004, *Loubna El Ghar v Libyan Arab Jamahiriya*, no. 1107/2002 (concerning the refusal of the Libyan consular authorities in Morocco to issue a passport to a Libyan citizen residing in Morocco); and HRC 30 July 2009, *Munaf v Romania*, no. 1539/2006 (concerning the transfer of an Iraqi-American national from the Romanian embassy in Baghdad to the multinational forces in Iraq).

87 HRC 26 May 2004, General Comment 31, CCPR/C/21/Rev.1/Add.13, para. 10.

88 The ramifications of the wording chosen in the general comment may be considerable, as illustrated by the dissenting opinion of Kälin in the case of *Munaf v Romania*: ‘Thus, the test is not, as argued by the State party, whether it had “custody of” or “authority over” the author, or whether it relinquished custody of him to the MNF-I [the multinational forces in Iraq – author], but whether it had “power or effective control” over him for the purposes of respecting and ensuring his Covenant rights’: Dissenting opinion on the Admissibility Decision of Committee member Mr. Walter Kälin appended to HRC 21 August 2009, *Mohammad Munaf v Romania*, no. 1539/2006.

89 *Coard et al. v the United States*, para. 37 (concerning the deprivation of liberty of citizens in and from Granada by invading United States armed forces); IACHR 29 September 1999, *Alejandro et al. v Cuba* (hereafter ‘*Brothers to the Rescue*’), case no. 11.589, report no. 86/99,

Brothers to the Rescue, the shooting down by the Cuban air force of two civilian aircraft in international space was sufficient to consider the aircrafts' unfortunate passengers to have been subjected to the 'authority' of Cuba, without there being any further special relationship between Cuba and the victims.⁹⁰

But the proposition that human rights must always govern the extraterritorial conduct of states was challenged by the European Court of Human Rights in its *Banković* decision – rendered by the Court's Grand Chamber and unanimously. The ECtHR found the Convention not to apply to air-strikes by NATO member states which were also party to the Convention, on the television and radio facilities in Belgrade, because it was not persuaded that there was any 'jurisdictional link' between the victims of the air-strikes and the respondent states and that therefore the applicants and their deceased relatives were not 'capable of coming within the jurisdiction of the respondent States'.⁹¹

The *Banković* decision has been much commented upon elsewhere and need not be in full explored here.⁹² It suffices to point to what was perhaps the most crucial consideration propounded by the Court in restricting the extra-territorial potential of the ECHR, namely that the rights and freedoms defined in the Convention cannot be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.⁹³ The Court reasoned that such an approach would render the words 'within their jurisdiction' in Article 1 'superfluous and devoid of any purpose' because it would equate the jurisdiction requirement with the question whether a person can

para. 23 (concerning the shooting of two civilian aircraft by a Cuban jet fighter outside of Cuban airspace). Also see IACHR 13 March 1997, *The Haitian Centre for Human Rights et al. v. United States*, case no. 10.675, report no. 51/96, paras. 164-178 (in which several violations of the American Declaration of the Rights and Duties of Man were found on account of the US interception of Haitian refugees on the high seas); and IACHR 11 March 1999, *Victor Saldano v Argentina*, report no. 38/99, para. 17.

⁹⁰ *Brothers to the Rescue*, para. 25.

⁹¹ *Banković*, para. 82.

⁹² See eg Lawson, in: Coomans and Kamminga (2004), p. 83-123; M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic'', in: Coomans and Kamminga (2004), p. 125-139; Orakhelashvili (2003); M. Happold, 'Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights', 3 *Human Rights Law Review* (2003), p. 77-90; Milanovic (2008); M. Gondek, 'Extraterritorial application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?', 52 *Netherlands International Law Review* (2005), p. 349-387; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia (2009), p. 169-178; Kavaldjieva (2006), p. 520-522; E. Roxstrom, M. Gibney and T. Einarsen, 'The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005), p. 55-136; A. Ruth and M. Trilsch, 'International Decisions: Bankovic v Belgium (Admissibility)', 97 *American Journal of International Law* (2003), p. 168-172.

⁹³ *Banković*, para. 75.

be considered to be a victim of a violation of rights guaranteed by the Convention.⁹⁴ Accordingly, the Court appeared to suggest that the notion of 'effective control' as established in its case law on Northern-Cyprus requires something more than a determination that (i) a state has asserted authority over a person present in a foreign territory; and that (ii) the person can be considered a victim of a violation of a Convention right. Although the Court did not elaborate on the contents of this required additional threshold, one may safely deduce that the Court did not deem every exercise of authority affecting a person's enjoyment of human rights sufficient to bring that person under its 'jurisdiction'. Some further relationship between the individual and the state is required which can be said to amount to a 'jurisdictional link' and which is made operational through the notion of 'effective control'. Several authors have concluded from this part of the *Banković* decision that the Court would at the least require that the exercise of state authority takes place over a certain duration and/or has overall repercussions on the person concerned.⁹⁵

It appears however that the Court, without expressly recognising so, is slowly distancing itself from that doctrine, with several more recent decisions and judgments pointing towards a more generous understanding of 'jurisdiction'. In one of the first post-*Banković* judgments, in the case of *Issa*, the Court adopted the formula earlier used by the Human Rights Committee in referring to the 'fact' (sic) 'that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.⁹⁶

This 'fact' (or rather principle) does appear to have been accorded decisive weight in more recent Strasbourg case law. What is particularly notable about the post-*Banković* case law of the ECtHR is that the 'effective control'-criterion has been applied rather arbitrarily. On the one hand, one could say that in several post-*Banković* decisions in which the ECtHR concluded that applicants were brought within the jurisdiction of a State Party, the power exerted by the state over the individual was of such an intrusive and all-encompassing nature that it indisputably amounted to an exercise of 'effective control'. Thus, in the cases of *Öcalan*, *Medvedyev* and *Al-Saadoon*, which all concerned the extraterritorial arrest and continuing deprivation of liberty, the Court en-

⁹⁴ Ibid.

⁹⁵ Rozakis, in: Venice Commission (2006), p. 64; Happold (2003), p. 87.

⁹⁶ *Issa a.o. v Turkey*, para. 71; the formula was repeated in ECtHR 28 September 2006, *Isaak v Turkey* (admissibility), no. 44587/98; ECtHR 3 June 2008, *Andreou v. Turkey* (admissibility), no. 45653/99; and *Solomou a.o. v Turkey*, para. 45.

countered no difficulties in accepting that the applicants were within the state's jurisdiction.⁹⁷

But in several cases concerning the use of force in foreign territories of a rather incidental nature, some of which display striking factual similarities with the case of *Banković*, the Court also accepted that the targeted persons were within the jurisdiction of a State Party. Notable are the cases of *Pad*, concerning fire discharged from Turkish helicopters just over the border with Iran, and *Solomou* and *Andreou*, where the Court reasoned that fatal gunfire discharged by Turkish-Cypriot forces in the neutral UN buffer zone in Cyprus had brought the victims within the 'authority and/or effective control' of Turkey.⁹⁸ Similar to *Brothers to the Rescue* but seemingly contradictory to *Banković*, the mere use of incidental force sufficed to bring the victims within the jurisdiction of the State Party.

There are, further, several cases in which the ECtHR accepted that the Convention applied to executive or adjudicative measures which were specifically directed at persons resident abroad – much in line with the passport-cases brought before the Human Rights Committee. In the case of *Haydarie*, concerning the Dutch government's refusal to issue a provisional residence visa to a person living in Pakistan, the Court expressly discarded the argument that the Convention could not apply because the applicant was outside the jurisdiction of the state refusing to issue the visa.⁹⁹ In *Minasyan and Semerjyan*

⁹⁷ In the Chamber judgment in *Öcalan*, the Court noted that the material difference with *Banković* was that Mr. Öcalan was arrested and then had been physically forced to return to Turkey by Turkish officials; as a result he was 'subject to their authority and control'. In its Grand Chamber judgment, the Court confirmed this proposition and found it 'common ground' that arrest, followed by a physically enforced return, brought Öcalan within the jurisdiction of Turkey, ECtHR 12 March 2003, *Öcalan v Turkey* (Chamber), no. 46221/99, para. 93; ECtHR 12 May 2005, *Öcalan v Turkey* (Grand Chamber), no. 46221/99, para. 91. ECtHR 10 July 2008, *Medvedyev and Others v France* (Chamber), no. 3394/03, paras. 50-51; ECtHR 29 March 2010, *Medvedyev and Others v France* (Grand Chamber), no. 3394/03, para. 67 (referring to 'the full and exclusive control' exercised over the ship and its crew); ECtHR 30 June 2009, *Al-Saadoon and Mufdhi v the United Kingdom*, no. 61498/08, para. 88 (referring to the 'the total and exclusive *de facto*, and subsequently also *de jure*, control exercised over the premises where the individuals were detained').

⁹⁸ In *Pad*, the ECtHR simply reasoned that since Turkey had already admitted that the fire discharged from its helicopters just over the border with Iran had caused the killing of the applicants' relatives, the alleged victims were within the jurisdiction of Turkey, ECtHR 28 June 2007, *Pad a.o. v Turkey*, no. 60167/00, paras. 54-55. See also *Solomou a.o. v Turkey*, paras. 50-51 and *Andreou v Turkey*. On the extraterritorial use of force and the question of jurisdiction, see further *Isaak v Turkey* (where the Court found that Turkey had violated Article 2 ECHR on account of the involvement of Turkish-Cypriot soldiers in the killing of Mr. Isaak in the neutral UNFICYP buffer zone); *Issa v Turkey*, paras. 74-77 (concerning the alleged killing by Turkish forces operating in northern Iraq of seven shepherds); and ECtHR 11 January 2001, *Xhavara a.o. v Italy and Albania*, no. 39473/98 (concerning the ramming by the Italian navy of a vessel carrying Albanian migrants).

⁹⁹ ECtHR 20 October 2005, *Haydarie a.o. v the Netherlands*, no. 8876/04). Also see ECtHR 1 December 2005, *Tuquabo-Tekle v the Netherlands*, no. 60665/00, para. 26.

v Armenia, the Court found a violation of Article 1 of Protocol No. 1 ECHR on account of the Armenian authorities having expropriated and demolished a flat in Yerevan, in respect of the owners who were at that time living in the United States.¹⁰⁰ Likewise, in *Zouboulidis v Greece*, Article 1 of Protocol No. 1 ECHR was considered to have been violated due to the Greek authorities refusing to pay supplements to the expatriation allowance of a Greek diplomat living in Prague.¹⁰¹ A final case worth mentioning in this connection is *Kovačević and others v Slovenia*, where the Court did expressly address the jurisdiction issue in respect of the impossibility of several Croatian citizens to withdraw currency from a Slovenian bank, which had partially been caused by legislative amendments adopted by the Slovenian National Assembly. The Court observed that:

‘[t]he applicants’ position as regards their foreign-currency savings deposited with the Zagreb Main Branch was and continues to be affected by that legislative measure. This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged.’¹⁰²

The reasoning is noteworthy, as it indicates that the Court finds the Convention applicable also in respect of a legislative measure of *generally applicable nature* which directly affects a person resident abroad, and without employing the notion of ‘(effective) control’ as delimiting criterion.

There are, in fact, many more decisions rendered by the ECtHR wherein violations (or interferences) of Convention rights are found in respect of persons resident abroad but where the issue of jurisdiction is not addressed at all.¹⁰³ A majority of these cases concern measures taken by a Contracting State within its own territory but which produce effects in respects of persons

100 ECtHR 23 June 2009, *Minasyan and Semerjyan v Armenia*, no. 27651/05.

101 ECtHR 25 June 2009, *Zouboulidis v Greece* (No. 2), no. 36963/06.

102 ECtHR 9 October 2003, *Kovačević a.o. v Slovenia*, nos. 44574/98, 45133/98, 48316/99.

103 See *inter alia* ECtHR 25 October 2006, *Martin v the United Kingdom*, no. 40426/98 (where a British court-martial in Germany under the NATO Status of Forces Agreement was found to have been conducted in violation of Article 6 (1) ECHR); ECtHR 4 November 2008, *Carson a.o. v the United Kingdom*, no. 42184/05 (concerning the pension rights of British nationals who had emigrated and were formerly working in the UK); ECtHR 9 July 2009, *Tarnopolskaya a.o. v Russia*, no. 11093/07 (concerning pension rights of former USSR citizens who had emigrated to Israel); ECtHR 22 September 2009, *Stochlak v Poland*, no. 38273/02 (where violation of Article 8 ECHR was found in respect of a father resident in Canada on account of the Polish authorities’ insufficient action to secure the return of his child who was abducted by the mother to Poland); ECtHR 12 October 2006, *Mayeka and Mitunga v Belgium*, no. 13178/03 (where the Court not only found a violation of Articles 3 and 8 ECHR on account of the Belgian authorities having failed to make proper arrangements for the arrival of a deported child in the Congo, but also in respect of the mother who was residing in Canada and who was not appropriately informed and consulted in respect of the decisions taken regarding her daughter).

who are at the material time resident abroad. Although it may seem self-evident that the Court holds the state as a matter of principle accountable for all executive or adjudicative measures taken within its ordinary territorial jurisdiction which directly interfere with a person's human rights (thus also in respect of a person who just happens to be (temporarily) resident abroad), these decisions do signify that the Court not always conditions the personal scope of human rights protection on an individual being within the state's physical or effective control. This having said, the Court's case law remains inconsistent. In the decision in *Ben El Mahi*, on the Danish cartoons, the Court found the refusal of the Danish public prosecutor to initiate criminal proceedings against the publishing newspaper not to engender a 'jurisdictional link' with the Muslim complainants, even though the complaint concerned state activity executed within its own territory which arguably directly affected the complainants residing in a foreign territory.¹⁰⁴ Although the Court's reluctance to accept that Mr Ben El Mahi could invoke the Convention may well have been influenced by a fear of opening the floodgates, it is unfortunate that the Court does not explain why the matter of banning a publication affecting Muslims living abroad is fundamentally different from the issuing of legislation which affects bank account holders in a foreign country. A relevant difference may be that in the cartoons case the publication was not directly targeted at the complainants, rendering the group of potential victims indeterminate. But this is a matter which is normally examined under the victim-requirement laid down in Article 34 ECHR, which already imposes the threshold that there must be a sufficiently direct link between the applicant and the damage allegedly sustained.¹⁰⁵

Certainly, to accept that human rights are a guide to all the conduct of a state having an impact outside its borders can create all sorts of practical and legal issues. Although the precise motives underlying the *Banković* decision remain rather obscure, the Court's reluctance to simply accept that all forms of international activity remain covered by human rights standards may well

104 For a similar factual constellation see *Weber and Saravia v Germany*, where the Court eventually declined to pronounce itself on the question whether the legislative extension of powers of the German *Bundesnachrichtendienst* regarding the monitoring of telecommunications all around the world could bring the persons whose conversations had been recorded within the jurisdiction of Germany and thereby within the ambit of Convention protection. Instead of addressing the 'Bankovic-argument' brought forward by the German government, the Court found the complaints inadmissible because 'even assuming that the applications are compatible *ratione personae* with the Convention' the legislative amendments constituted a justified interference with their right to private life; ECtHR 29 June 2006, *Weber and Saravia v Germany*, no. 54934/00, para. 72.

105 Cf. ECtHR 27 July 2010, *Aksu v. Turkey*, nos. 4149/04 and 41029/04, paras. 32-34, concerning the publication of a book allegedly containing offensive statements in respect of persons of Roma origin. In considering the applicant to be a victim, the Court accorded decisive weight to the factor that the applicant was entitled to initiate compensation proceedings before domestic courts.

have been influenced by an understanding that states may find themselves ill-equipped to live up to each and every human rights standard when they engage themselves in activities in foreign countries. Difficulties may arise, for example, from an overlap or conflict with other standards, such as the laws in force in the other country; a lack of practical capabilities a state may have in guaranteeing human rights protection; or a perceived lack of willingness on the part of states to submit themselves to human rights standards when engaging in, for instance, peace keeping operations.¹⁰⁶

But what also transpires from the post-*Banković* case law is that the European Court of Human Rights has shown itself both able and willing to accommodate this type of concerns with the imperative of effective human rights protection. A prominent case, in this respect, is *Medvedyev v France*, where the Court first accepted that a ship and its crew sailing under the Cambodian flag in international waters which was boarded by a team of French armed commandos on account of suspicions of drug trafficking, was being brought under the control of France and therefore its jurisdiction in accordance with Article 1 ECHR. But the Court also acknowledged, subsequently, that the operation took place under 'wholly exceptional circumstances' and considered these circumstances to justify the time it inevitably took for the French authorities to bring the persons placed under arrest before a judge.¹⁰⁷ A similar approach was adhered to by the Court in the admissibility decision in the case of *Al-Saadoon and Mufdhi*, concerning a potential conflict between the human rights obligations incumbent on the United Kingdom and the local laws in Iraq. As regards the question whether the United Kingdom's obligations under the ECHR in respect of the activities of its armed forces in Iraq could be modified or displaced by obligations it owed to Iraq, the Court considered this not to be a question 'material to the preliminary issue of jurisdiction', but one which needed to be addressed under the merits of the complaints.¹⁰⁸ In both these

¹⁰⁶ As regards this latter argument, see for example the anxieties voiced by the governments of France and Norway in the case of *Behrami*. The Norwegian government submitted that extension of the European Convention to peacekeeping mission could deter states from participating in such missions. Jointly, the French and Norwegian governments contended that establishing separate liability under human rights law for states contributing to peacekeeping missions could jeopardize the necessary integrity, effectiveness and centrality of the mission. ECtHR 2 May 2007, *Behrami and Behrami v France and Saramati v France, Germany and Norway*, nos. 71412/01 and 78166/01, paras. 90-91.

¹⁰⁷ *Medvedyev v France* (Grand Chamber), paras. 130-131.

¹⁰⁸ *Al-Saadoon and Mufdhi* (Chamber), paras. 88-89. But see ECtHR 14 May 2002, *Gentilhomme a.o. v France*, nos. 48205/99, 48207/99 and 48209/99, para. 20, where the Court, in expressly noting that 'a State may not actually exercise jurisdiction on the territory of another without the latter's consent, invitation or acquiescence', considered that the French refusal to allow certain children to enrol in French state schools in Algeria constituted an implementation of a decision imputable to Algeria, taken by the sovereign on its own territory and therefore beyond the control (and therewith the 'jurisdiction') of France. See, on a possible conflict between human rights protection in a foreign country and respect for the territorial sovereignty of that country more extensively, chapter 4.5.

cases, the ECtHR departed from a presumption of applicability of the ECHR to the situation on account of the factual involvement of the respondent state (i.e. the condition of jurisdiction was considered satisfied), and accommodated the special circumstances into its interpretation of the scope of the substantive norm at issue. This approach may serve to underscore that human rights law is sufficiently flexible to cope with various exceptional issues which may arise when human rights obligations are considered to be extraterritorially applicable, without it being necessary to simply deprive human rights treaties of meaning in those contexts.

It is now time to make two preliminary conclusions. The first is that, in virtually all cases concerning incidental foreign activity of the state, the term 'jurisdiction' has been perceived as a criterion giving expression to factual assertions of state sovereignty. Although there are various cases – such as the passport-cases before the Human Rights Committee or those concerning restitution proceedings in respect of property of foreigners before the ECtHR – in which state activity could be labelled as recognised assertions of 'jurisdiction' with extraterritorial implications under international law, it does not appear that the question whether a state has legitimately exercised jurisdiction is as such material for delimiting the personal scope of application of a human rights treaty. Rather, the various monitoring bodies have all confirmed that human rights protection should be based on the tenet that *de facto* activity gives rise to *de jure* responsibilities.¹⁰⁹

Secondly, it is increasingly accepted by human rights bodies, either in fact or as a principle of law, that a state must always be guided by the human rights obligations it has entered into, thus regardless of territorial considerations. In propounding the much discussed 'effective control' threshold in its *Banković* decision, the European Court of Human Rights may have been guided by a fear of opening up an arena of indeterminacy, but in its later judgments and decisions the Court does appear to have taken a more practicable approach, in which it has not only (tacitly) acknowledged that the criterion of effective control is rather unworkable in its application to all the various forms in which states may more or less incidentally impact upon the fundamental rights of persons in other territories; but also that human rights law is sufficiently flexible to cope with various issues which are likely to come to the fore if states are considered bound by human rights in undertaking extraterritorial activity.

109 This is more or less how the ECtHR put it in the case of *Al-Saadoon*.

2.5.3 Jurisdiction and positive obligations

Extraterritorial migration controls not necessarily involve an easily identifiable act on the part of the state which may bring an individual within the state's 'jurisdiction'. As is extensively explored in chapters 5-7 of this study, a state may be involved in a less direct manner in the treatment of migrants in a foreign territory, for example through it having delegated powers to a private air carrier, through it having concluded border control arrangements with another state, or through the setting up of reception facilities which are managed by other actors. In the context of human rights protection, the question which may arise in such situations is whether the state should not, on account of its indirect involvement in the treatment of an individual, incur positive obligations towards that individual. Problematic however, is that the nature of duties to protect and to fulfill (or: positive obligations 'not to omit') may make it difficult to identify what specific conduct of the state would engender a 'jurisdictional link' between the state and the individual.

If one would approach this matter from the doctrine that states can only incur responsibilities under human rights treaties if victims can demonstrate that they have been placed under the effective control (or under the authority) of the state, this would most likely minimize the meaning of human rights in such scenarios. But, dwelling upon the concept of positive obligations in respect of foreign activity in its General Comments, the Committee on Economic, Social and Cultural Rights maintains, as a general formula, that it is incumbent upon states 'to prevent third parties from violating the right[s] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.¹¹⁰ Hereunder, it is shown that the ECtHR and ICJ have in their case law also been willing to accept that the notion of jurisdiction need not necessarily preclude a conclusion that positive obligations not accompanied with exercises of 'effective control' over persons abroad can nonetheless bring those persons within the jurisdiction of the state.

In the case of *Isaak* the ECtHR dealt with an incident that took place in the United Nations buffer zone on Cyprus, during which a Greek Cypriot man was kicked and beaten to death. Although the facts of the case were disputed, the Court accepted that both private citizens and at least four uniformed soldiers belonging to the Turkish or Turkish-Cypriot forces were involved in the incident. The Court held that Turkey had been under an obligation to actively protect Mr Isaaks' life:

110 CESCR 12 May 1999, General Comment No. 12 (The right to adequate food), para. 36; CESCR 11 August 2000, General Comment No. 14 (The right to the highest attainable standard of health), para. 39; CESCR 20 January 2003, General Comment No. 15 (The right to water), para. 35.

‘the Court cannot ignore the fact that the Turkish or Turkish-Cypriot soldiers actively participated in the beating without making any attempt to apprehend Anastasios Isaak or to prevent the counter-demonstrators from continuing their violent behaviour. Thus, they manifestly failed to take preventive measures to protect the victim’s life.’¹¹¹

Presumably, the active presence of Turkish (or the subordinate Turkish-Cypriot) forces and therewith the immediate involvement of the Turkish authorities in the incident rendered it materially easier for the Court to conclude that Mr Isaak was indeed within the ‘jurisdiction’ of Turkey – even though he was not within Turkish ‘effective control’. But there are other cases in which the ECtHR has also acknowledged the existence of positive obligations in respect of individuals present in a foreign country, without there being a direct presence or involvement of agents of the state.

In the case of *Ilascu*, concerning the continuing detention of Moldovan nationals who had been arrested by Russian soldiers and who were subsequently handed over into the charge of the Transdniestrian police, the ECtHR considered that there was ‘a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants’ fate’, also in view of ‘the effective authority, or at the very least the decisive influence’ asserted by the Russian Federation over the separatist regime Transdniestria. The Court considered it of little consequence that the agents of the Russian Federation had not participated directly in the events complained of but observed that it had not made (positive) attempts to put an end to the applicants’ situation throughout their period of detention. The Court concluded that the applicants came within the ‘jurisdiction’ of the Russian Federation for the purposes of Article 1 of the Convention.¹¹² The Court’s acknowledgement of the existence of a jurisdictional link thus appears to be grounded in the dual elements of (1) the initial arrest and handover of the applicants and (2) the subsequent influence (and therewith the power to undertake positive action) asserted by Russia over the separatist regime. By analogy, this reasoning could also inform the duties of states in the context of external processing of asylum claimants – where persons requesting asylum are intercepted or otherwise apprehended and subsequently handed over to other actors with whom arrangements are concluded for status determination, repatriation and/or resettlement.¹¹³

The case of *Treska* concerned two Albanian men who claimed that the Albanian authorities had illegally taken possession of their family’s villa in 1950. To make matters worse the Albanian authorities had sold the house in

111 *Isaak v Turkey*, para. 119. Also see the admissibility decision: ECtHR 28 September 2006, *Isaak v Turkey*, no. 44587/98.

112 *Ilascu a.o. v Moldova and Russia*, paras. 392-394.

113 See chapter 7.

1991 to the Italian government, which had vested its embassy in it. The Treska brothers brought a complaint against both Albania and Italy. As regards the claim directed against Italy, which had only entered into written contact with the applicants in respect of the restitution procedure, the European Court of Human Rights concluded that the brothers were not within Italian jurisdiction. But, on a general note, the Court did pronounce that:

‘Even in the absence of effective control of a territory outside its borders, the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention (see *Ilascu and Others* ...).’¹¹⁴

If taken at face value, the quote has quite striking consequences. Leaving aside all the subtleties and controversial line-drawing exercises of the past, the Court is simply saying that states should always do their best to secure the rights guaranteed by the Convention. An identical formula was used by the ECtHR in the case of *Manoilescu and Dubrescu v Romania and Russia*, also concerning restitution proceedings in respect of a building transferred into the possession of a foreign state.¹¹⁵ In inquiring whether the responsibility of the foreign state, Russia, could be engaged under Article 1 of the Convention by any failure to comply with its positive obligation to secure the Convention rights to the complainants, the Court eventually concluded that this was not the case, but not because such a positive obligation did not exist, but rather because to require the Russian Federation to take positive action would run counter to the Russian State’s entitlement to foreign sovereign immunity.¹¹⁶

That the concept of jurisdiction should not be taken as an obstacle in the consideration of positive extraterritorial obligations finds further confirmation in the Order indicating provisional measures of the ICJ in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. In that case, the ICJ was asked to address the extraterritorial

114 ECtHR 29 June 2006, *Treska v Albania and Italy*, no. 26937/04. Note that the reference to *Ilascu* is not entirely correct: the particular quote concerned Moldova’s obligations in respect of events taking place *within* its territory.

115 ECtHR 3 March 2005, *Manoilescu and Dobrescu v Romania and Russia*, no. 60861/00, para. 101. Also see ECtHR 11 December 2008, *Stephens v Cyprus, Turkey and the UN*, no. 45267/06, concerning the inability of Mr. Stephens, living in Canada, to enter his house located in the UN buffer zone in Cyprus, because the Cypriot national guard had erected a defence post in the garden of his house. The Court firstly observed that in so far as the complaint was directed against Cyprus and Turkey, these states did not have effective control over the buffer zone in which the applicant’s house was located. But the Court subsequently noted that the applicant had neither challenged ‘a particular action or inaction by these States or otherwise substantiated any breach by the said States of their duty to take all the appropriate measures with regard to the applicant’s rights which are still within their power to take’.

116 *Ibid.*, para. 107.

scope of the CERD in respect of alleged racial discrimination practiced and incited by the Russian authorities in several regions of Georgia, both before and in the aftermath of the Russian-Georgian conflict. The complaint related not only to the activities of Russian state agents operating within South Ossetia and Abkhazia, but also to possible duties of due diligence of Russia in respect of the separatist forces in those regions. The ICJ not only found the CERD to apply to Russia's actions within the territory of Georgia, but also held the obligations of Russia to include various duties of a positive nature, by ordering it *inter alia* 'to do all in [its] power to ensure that public authorities and public institutions under [its] control or influence do not engage in acts of racial discrimination'.¹¹⁷

It transpires from the judgments and decisions above that international courts are at the least receptive for claims relating to positive obligations in an extraterritorial setting. The state's responsibility to ensure and protect a person's human rights was in the above mentioned cases derived not from the oversimplified shorthand of effective factual control over the individual, but rather from the power, or capability of the state to positively influence a person's human rights situation. Although scant and hardly accompanied by a well-elaborated doctrine for addressing this type of situations, the available case law leaves room for an understanding that it is not the fact of the affected person having been directly affected or placed under the effective control of a state, but rather the relationship of the state with a particular set of circumstances being of such special nature, which is decisive in enlivening a state's positive obligations.

2.6 HUMAN RIGHTS TREATIES NOT CONTAINING A JURISDICTIONAL CLAUSE

Not all human rights treaties contain a restriction of a general nature relating to their personal or territorial scope. This may, on the one hand, be taken to reflect the idea that these treaties guarantee rights which are essentially territorial or, conversely, be taken to support the notion that the rights contained therein govern a state's conduct wherever it acts.¹¹⁸ In more recent years,

¹¹⁷ ICJ 15 October 2008, *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* (Order), ICJ Reports 2008, p. 353 at para. 149.

¹¹⁸ See, in this respect, the different starting points taken by the International Court of Justice in the *Wall Opinion*, para. 112 ('This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial') and in the Order in the *Case Concerning Application of the International Convention on the Elimination of All Forms of racial Discrimination*, para. 109 ('the Court consequently finds that these provisions of CERD generally appear to apply (...) to the actions of a State party when it acts beyond its territory'). The outcome of the ICJ's analysis of the territorial scope of the ICESCR and CERD in the respective cases is however similar, as further explained below.

the International Court of Justice, the Committee on Economic, Social and Cultural Rights and the Inter-American Human Rights Commission have impliedly or expressly addressed the issue of the extraterritorial applicability of several human rights treaties not containing a jurisdictional or other general delimiting clause, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the American Declaration of the Rights and Duties of Man.¹¹⁹ This section summarizes the relevant jurisprudence and subsequently explores how this jurisprudence relates to the doctrines developed under human rights treaties which do contain a general clause as to their personal or territorial scope.

The question of applicability of the ICESCR to extraterritorial state conduct was addressed by the CESCR in its concluding observations on Israel of 1998 and 2003.¹²⁰ In noting the failure of Israel to report on the situation of the Palestine people in the Occupied Territories, the Committee expressed the view that 'the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction', and that 'the State's obligations under the Covenant apply to all territories and populations under its effective control'.¹²¹ In the *Wall Opinion*, the ICJ used fairly similar terms by holding the ICESCR to apply to territories over which a State party 'exercises territorial jurisdiction'.¹²² It saw this position confirmed, amongst others, by Article 14 ICESCR, which speaks of parties to the Covenant which have 'not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education (...)'.¹²³

In its judgment in *Armed Activities on the Territory of the Congo* the ICJ approached the question whether international human rights law would apply to the conduct of Uganda on the territory of the Congo more generally. It recalled its findings in the *Wall Opinion* and considered that 'international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in

119 Although the American Declaration of the Rights and Duties of Man is not a legally binding treaty, the jurisprudence of both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights holds the Declaration to be a source of binding international obligations for the OAS' member states. While largely superseded in the current practice of the inter-American human rights system by the more elaborate provisions of the American Convention on Human Rights, which does contain a jurisdictional clause, the terms of the Declaration are still enforced with respect to those members of the OAS that have not ratified the Convention, most notably Cuba and the United States.

120 *Supra* n. 57.

121 *Ibid.* (1998), paras. 6, 8; *Ibid.* (2003), para. 31. Also see CESCR 12 May 1999, General Comment No. 12 (The right to adequate food), E/C.12/1999/5, para. 14: 'Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food (...).'

122 *Wall Opinion*, para. 180

123 *Ibid.*, para. 112. The ICJ also found it relevant that Israel had for more than 37 years been the occupying power.

occupied territories'.¹²⁴ On this basis, it found several provisions of the ICCPR, the African Charter on Human and Peoples' Rights (which does not refer to the concept of 'jurisdiction') and the Convention on the Rights of the Child to have been violated.¹²⁵

In its Order indicating provisional measures in the *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, mentioned above, the ICJ had occasion to address the extraterritorial scope of the CERD, which, similar to the ICESCR, does not contain a general jurisdictional clause. In concluding the CERD to govern Russia's acts and omissions in the contested regions, the ICJ did not find it necessary to first establish that the Russian authorities asserted jurisdiction or some form of authority or control over the persons resident there:

'Whereas the Court observes that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which are invoked by Georgia, contain a specific territorial limitation; and whereas the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.'¹²⁶

Three observations can be made: (1) the ICJ focussed exclusively on the 'actions' of state parties, and left issues of jurisdiction, control, and authority aside; (2) the ICJ seemed to operate a presumption that human rights treaties apply to extraterritorial acts of the state *unless* treaty provisions contain a specific territorial limitation; (3) the broad language suggests that, in the eyes of the ICJ at least, this approach is not limited to CERD, but applies to human rights treaties in general.

In the American regional context, the Inter-American Commission on Human Rights has on several occasions considered the American Declaration of the Rights and Duties of Man to apply to conduct of OAS member states in foreign territories.¹²⁷ In *Disabled Peoples' International v the United States* (1987) and *Salas and others v the United States* (1993), without specifically addressing the question of extraterritorial applicability of the Declaration, the Commission declared complaints concerning violations of several rights protected by the Declaration admissible in respect of the human rights consequences of US military operations in Grenada and Panama. In the *Haitian Interdiction* case (1997), more extensively discussed in chapter 4, again without

¹²⁴ *Armed Activities on the Territory of the Congo*, para. 216.

¹²⁵ *Ibid.*, para. 219.

¹²⁶ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Order), p. 353 at para. 109.

¹²⁷ IACHR 22 September 1987, *Disabled Peoples' International et al. v the United States*, no. 9213; IACHR 14 October 1993, *Salas and others v United States*, no. 10.573.

addressing the question of potential extraterritorial applicability issue as such, the Commission found violations of rights protected under Articles I, II, XVIII and XXVII of the American Declaration on account of the US interdiction of Haitian refugees at the high seas and their treatment in and repatriation from the US naval base in Guantanamo, Cuba.¹²⁸ It also concluded that the United States had breached its treaty obligations in respect of Article 33 of the Refugee Convention. In *Coard* (1999), also concerning the US military operations in Grenada in 1983, the Inter-American Commission explicitly confirmed the American Declaration of the Rights and Duties of Man to have extraterritorial application. The Commission held that 'each American State is obliged to uphold the protected rights of any person subject to its jurisdiction' and that this may also refer to 'conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad'.¹²⁹ In using an almost identical formulation in *Brothers to the Rescue*, the Commission found Cuba to have violated the right to life enshrined in Article I of the American Declaration, on account of the shooting down by the Cuban Air Force of two civilian aircraft in international airspace.¹³⁰

Several observations are in order in respect of the case law presented above. In the first place, criteria and terminology used under human rights treaties which do refer to the term jurisdiction, have also been adopted by the various international bodies in determining the extent of a state's extraterritorial obligations under treaties not containing such a clause. Secondly, in respect of the exact standard to be applied in delimiting the territorial scope of treaties, a similar contrast in views, or at least a similar contrast in terminology, as apparent in respect of the human rights treaties discussed in the previous sections, comes to the fore: on the one hand, reference is made to the requirement of persons being subject to the 'jurisdiction' or '(effective) control' of the state, but on the other hand, the ICJ in particular appears to focus primarily on the 'actions' (or 'exercises of jurisdiction') of State Parties without referring to some further threshold. What also transpires from the ICJ's pronouncements, thirdly, is that it advocates a harmonised approach in considering the extraterritorial application of human rights treaties, whereby the nature (or object and purpose) of those treaties would in principle demand that State Parties must always comply with the provisions contained therein.¹³¹ It follows from the available case law, in sum, that the issue of extraterritorial application of treaties not containing a jurisdictional clause has been treated in a similar vein

128 IACHR 13 March 1997, *The Haitian Centre for Human Rights et al. v. United States*, no. 10.675.

129 *Coard et al. v the United States*, para. 37.

130 *Brothers to the Rescue*, para. 23.

131 Reference to the object and purpose of human rights treaties was made in the *Wall Opinion*, para. 109.

as under other human rights treaties and that the issue does not appear to be governed by fundamentally different considerations.

There is, in itself, nothing wrong with such a harmonised approach. It resonates with the increasingly accepted notion that an integrated approach within human rights law should be adhered to and that there are no intrinsic differences between, for example, the categories of economic and social rights and civil and political rights.¹³² Obviously, apart from textual differences, it is difficult to identify a rationale for treating the matter of extraterritorial application of one human rights treaty differently than that of another.

This having said, two reservations are in order. A first is that some human rights treaties do contain specific territorial limitations in respect of certain substantive rights.¹³³ This would most probably imply that although there may be a presumption that human rights treaties do apply to extraterritorial activity, this is different in respect of treaty provisions which are expressly (or impliedly) restricted in territorial scope. This was confirmed in the ICJ's order indicating provisional measures warranted under the CERD, where the Court found it relevant to note that the provisions invoked by Georgia did not contain a specific territorial limitation.¹³⁴ A second reservation is that there may, on the other hand, also be provisions in human rights treaties which contain an inherent international outlook.¹³⁵ The most prominent example is the ICESCR, which imposes the general obligation upon states to engage in international assistance and cooperation to realize the rights recognised in the Covenant.¹³⁶ This obligation is reiterated in several substantive provisions of the Covenant.¹³⁷ Whereas the matter of extraterritorial obligations under treaties safeguarding civil and political rights is generally confined to the question whether a state should incur, on account of its own acts and omissions, specific obligations vis-à-vis persons situated in another state, these 'international' obligations primarily refer to the duty to assist and cooperate with other states in the fulfilment of human rights, regardless of the establishment of some specific 'jurisdictional link' between the state and an individual

132 P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly* (1987), p. 156-222; and G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in: P. Alston and K. Tomasevski (eds.), *The Right to Food*, Dordrecht: Martinus Nijhoff (1984), p. 97-110.

133 See, for examples and a further discussion, chapter 4.3.

134 *Supra* n. 126.

135 F. Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans and Kamminga (2004), p. 185-186; R. Künnemann, 'Extraterritorial Application of the International Covenant on Economic Social and Cultural Rights', in: Coomans and Kamminga (2004), p. 203-204.

136 This general obligation is laid down in Article 2(1) ICESCR. For an extensive discussion S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Antwerpen/Oxford: Intersentia, 2006, p. 83-98, 144-153.

137 See in particular Articles 11, 15(4) and 23 ICESCR.

situated in another state.¹³⁸ This implies on the one hand, that these obligations are much wider in scope and not as such dependant upon specific activity undertaken by a state. But on the other hand, because these obligations refer primarily to interstate cooperation, it may be difficult to construe these duties as regulating the conduct between a state and a particular individual situated in another country.

2.7 FINAL REMARKS

Discussions on the extraterritorial application of human rights have been burdened with a substantial amount of conceptual confusion, in particular in respect of the relationship between the meaning and functions of the notions of territory, jurisdiction and sovereignty within the body of human rights law. One of the aims of this chapter has laid with clarifying some of this conceptual confusion, by disconnecting, first and foremost, the meaning of 'jurisdiction' within human rights law from its ordinary meaning in public international law. This detachment allows for rethinking the concept of jurisdiction under human rights treaties.

To a considerable extent, two divergent approaches fight for supremacy in defining the term jurisdiction as a tool for delimiting the extraterritorial scope of human rights treaties. Under the first approach, which is most evidently present in the case law of the former European Commission and the Human Rights Committee, but also in some judgments and decisions of the European Court of Human Rights, human rights obligations serve as a code of conduct for all activity of a state, regardless of territorial considerations, in which the condition of jurisdiction is satisfied if an act or omission of a state affects a person to such an extent that he or she can be considered a victim of a human rights violation. The rationale behind this approach is as simple as it is appealing from the perspective of effective human rights protection: a state must always be guided by the human rights obligations it has entered into, which can only implicate that it may not do towards a person in another country what it may not do to persons in its own territory. But under the second approach, the condition of jurisdiction is translated into the criterion of 'effective control', which (presumably) embodies the notion that there must be a predefined relationship between the state and the individual, other than

138 M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford: Clarendon, 1998, p. 144. According to the CESCR it is 'in accordance with the provisions of the Covenant that international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard.' CESCR 14 December 1990, General Comment No. 3 (The nature of States parties obligations), para. 14.

the act affecting the individual's rights itself, for a state's extraterritorial human rights obligations to become engaged.

The chapter has submitted that the second approach is not necessarily in 'better' conformity with the international law notion of 'jurisdiction'. If understood as giving expression to factual exercises of the state's sovereignty, regardless of whether they trespass into another state's sovereign prerogatives, the term 'jurisdiction' may well apply to any conduct of the state, whereby that conduct can in itself be sufficient to bring an affected individual 'within' the state's jurisdiction.

Apart from conceptual confusion as to the appropriate meaning of the term jurisdiction in human rights law, a further problem identified in this chapter in regard of the second approach concerns the use of the criterion of (effective) control as a threshold, or mitigating mechanism, for engaging the state's extraterritorial human rights obligations. It does appear that the requirement of '(effective) control' is ill-equipped to adequately respond to the large variety of manners in which states may impact on fundamental rights of persons who remain outside their territory. A first complication is that it is not always clear what the object of control should be: territory, persons, property, factual circumstances, or any of the above?¹³⁹ A second question concerns the definition of control, or: when can a state be said to be in control of an object or a person? Must it be established that the state 'possesses' the person or object? Must it be established that the state has the ability to manage or direct the actions of the person or the object? Does one control a person by refusing him a visa or passport? Is someone within the cross-hairs of a military aircraft within the control of a state? Obviously, it is much easier to establish that a state controls an inert object such as a strip of land, than to find that the state effectively controls a human being – which has the tendency to engage in all sorts of activity of its own accord. To put it otherwise, the criterion of control *over persons* is a rather impracticable requirement and moreover one which is likely to discriminate in the sorts of human rights which it brings within the ambit of extraterritorial human rights protection.

This is not deny that to accept that human rights must always bind the state when it engages in foreign activity raises issues which merit serious consideration. Although the chapter has indicated that human rights law is sufficiently flexible to cope with a variety of challenges which may arise in the context of securing human rights in foreign jurisdictions, there are some issues which have as of yet not, or only scarcely, received attention in international case law.

Perhaps the most salient one concerns the liaison between the law on fundamental rights and the principle of state sovereignty. When states enforce their authority outside their borders, that enforcement, including the guar-

139 Also see Scheinin, in: Coomans and Kamminga (2004), p. 76.

anteering of human rights, may conflict with sovereign interests of other states. This raises the question whether, on the one hand, the paradigm should prevail that states may simply not do abroad what they are not allowed to do at home and that therefore, all extraterritorial activity remains covered by the sending state's obligations incurred under human rights treaties; or that, on the other hand, the paradigm should prevail that when operating in foreign territories – and in the absence of any specific agreements on the matter – states should first and foremost respect the applicable law of the host state, including the relevant human rights standards, also if they differ from those incumbent on the sending state. To adhere to the first approach would correspond to the idea that human rights are universal and form a harmonized standard for the conduct of all states, while the second resonates with the principles of communal autonomy and self-determination and is most pertinently reflected in the doctrine of cultural relativism.¹⁴⁰ If one takes the case of *Al-Saadoon* for example, regarding the handover of an Iraqi criminal suspect who might face the death sentence, the opposing arguments would be that to prevent the Iraqi criminal justice system from having its course would amount to some form of moral imperialism, while to allow the death sentence to be carried out would constitute an affront to the universal aspirations of the right to life.¹⁴¹ One could maintain, on the basis of the drafting history on the place and function of the term 'jurisdiction' within human rights treaties, that the term might serve precisely to prevent situations from arising where states would become obliged under human rights treaties to interfere in matters which essentially belong to the sovereignty of the other state. The present study will elaborate on this theme more extensively in chapter 4.5, in the specific context of grants of extraterritorial asylum, where the case of *Al-Saadoon* is put in comparative perspective with several other judgments on the reconciliation between human rights obligations and the territorial sovereignty of the host state.

Despite these doctrinal issues and the continuing controversy over the extraterritorial scope of human rights, this chapter has identified an emerging consensus among international courts and supervisory bodies that human rights constitute a paramount code of conduct for all state activity. In the vast majority of cases discussed in this chapter, the rationale was upheld, in fact or in principle, that the creation of so-called legal black holes in the system of human rights protection must be prevented and that this is most effectively done by bringing state activity, wherever it takes place, under the ambit of the state's human rights obligations – and without adherence to the rather rigid criterion of 'effective control'. This is an important conclusion in the

140 For a general discussion see, J. Donnelly, 'Cultural Relativism and Universal Human Rights', 6 *Human Rights Quarterly* (1984), p. 400-419.

141 On this debate J.H. Wyman, 'Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law', 6 *Journal of Transnational Law & Policy* (1997), p. 543-570.

context of this study. It allows for the assumption that, when engaged in practices of external migration control, human rights do govern and constrain the external activity of European states. In chapters 5-7, it is examined in more detail what the consequences of this conclusion are for the manner in which European states should arrange the various external migration policies.

