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Human rights elephants in an era of globalisation : commodification, crimmigration, and human rights in confinement
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7 Sophisticating the net II
The scope of state obligations

7.1 Introduction

After establishing that certain conduct is attributable to one or more states under the secondary rules of international law, the question arises whether such conduct also constitutes a violation of that state's primary international obligations – in the present inquiry, whether the conduct constitutes a violation of the state's international human rights obligations. To answer this question, the scope of the human rights obligations of the state should be established in order to assess whether particular act or omission falls within its ambit. At this point, it should be reiterated that the focus here is on *treaty*-based as opposed to customary-based obligations.[1]

The scope of a state's treaty-based human rights obligations is delineated in a number of ways. Discussions have particularly ensued over the past decade in relation to the geographical delineation of international human rights obligations. At their core, these discussions focus on the tension between international human rights law's territorially-geared scope of application and contemporary realities of extraterritorial practices.[2]

On the one hand, the application of international human rights law is indeed typically limited by so-called jurisdictional clauses. These clauses contain threshold criteria in the sense that they determine in which instances state parties are bound to respect the human rights obligations contained in the specific instrument. They henceforth have a significant bearing on the substantive rights enshrined in the respective human rights instruments in the sense that they condition these rights and the associated obligations: the rights enshrined and the obligations owed by the state only exist, as it were, in the totality of situations where the state exercises jurisdiction; in any other situation the state has no obligations to uphold the particular rights enshrined in the particular instrument in question. Jurisdiction, in short, determines the

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1 In fact, the idea that any jurisdictional condition of customary international human rights law would be more encompassing than the jurisdictional provisions in treaty regimes is not characterised by uniform, widespread state practice or *opinio juris*: Kessing, 2017, p. 85. To the contrary, "it is quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law": Milanovic, 2011, p. 3.

2 See e.g. Coomans & Kamminga, 2004; Gammeltoft-Hansen, 2011; Gibney, 2016; Milanovic, 2011; S. R. Ratner, 2015; Tzevelekos, 2015; Vandenhole & Gibney, 2014.

scope of application of international human rights law.[3] As emphasised in chapter 2 and further explored below, jurisdiction in international human rights law has frequently been reflexively associated with the state's territory 'as the primary realm of state power'.[4] From this perspective, there is a presumption that obligations under international human rights law apply principally in the domestic sphere and do not extend beyond the state's sovereign territory.[5]

On the other hand, as chapter 2 has also highlighted, globalisation and the availability of advanced technologies provide states with ample opportunities to operate beyond their own territory in dealing with a variety of issues, including in the area of confinement.[6] Under the gaze of globalisation state power has been reconfigured and is consequently not necessarily constrained by territorial limitations to the same extent as it used to be in the past. States can therewith exercise power with increasing ease both domestically and abroad and are more than before able to impact upon the enjoyment of human rights far beyond their own sovereign borders.[7]

The international human rights law framework has dealt with this tension through so-called 'extraterritorial human rights obligations'.[8] Thus, the power that states exercise beyond their territorial borders has informed calls in favour of reinterpreting the territorial inclination of human rights in order to allow for extraterritorial applicability.[9] At the same time, some powerful counterarguments exist against a broad extraterritorial application of human rights, including the arguments that such an approach would amount to human rights imperialism and that other legal avenues could on many occasions be expected to be more effective in providing recourse and protection.[10] According to some, extraterritorial jurisdiction remains the exception to the norm,[11] whereas others argue that it is somehow more than exceptional.[12]

Arguments for extraterritorial obligations have to certain extents been adopted by international monitoring bodies. In this section, the extraterritorial scope of selected international or regional human rights instruments with a particular relevance for the case studies central to this research will be

3 The concept of jurisdiction therewith has acquired a unique meaning and function in the domain of international human rights law, constituting an altogether different concept from jurisdiction in general public international law which purports to delineate the lawful exercise of authority by states to prescribe and enforce laws.
4 Den Heijer, 2011; Gammeltoft-Hansen, 2011; Vandenhole & Van Genugten, 2015.
5 Vandenhole & Van Genugten, 2015, p. 1.
6 Grear & Weston, 2015, p. 26.
7 Vandenhole & Gibney, 2014, pp. 1–2; Vandenhole & Van Genugten, 2015, p. 1.
8 See, for a further exploration of definitional issues in relation to the use of the terminology 'extraterritorial', Gibney, 2013.
9 Da Costa, 2013; Gammeltoft-Hansen, 2011; Liguori, 2015. See also Skogly, 2017, who maintains that extraterritorial human rights obligations have become the 'new normal'.
10 Den Heijer, 2015, pp. 358–361.
11 See for example Coomans, 2011, p. 5; S. Miller, 2009, p. 1223; S. R. Ratner, 2001, pp. 268–269.
12 Mantouvalou, 2005.

addressed.[13] This concerns the ICCPR, ICESCR, the Convention Against Torture (CAT), and the ECHR. Furthermore, the Organization of American States Charter system (OAS Charter system) and the Inter-American Convention on Human Rights (ACHR) will be included as they provide interesting grounds for comparison.[14] As will be outlined below, the tension between territorial presumptions – requiring treaty regimes to stay veracious to the fundamental tenet that international human rights obligations in principle rest upon territorial states – and extraterritorial practices – requiring treaty regimes to show resilience in order to remain of sufficient relevance as protection frameworks – has gradually guided the interpretation and development of 'jurisdiction' under each treaty regime, albeit to varying extents. In turn, however, this tension has also led to a number of complexities that obfuscate the way in which international human rights law has been able to adapt to commodification realities. These complexities will be illustrated by looking at the case law of the ECommHR and the ECtHR specifically, identifying six complexities that arise and that have seriously complicated the doctrine of extraterritorial jurisdiction.

7.2 Staying veracious to the fundamental tenet of territorial state obligations

Most of the abovementioned human rights treaties substantiated their jurisdictional scope of application by means of the notion of territoriality. In general, the jurisdictional scope of these treaties is thus congruent with the fundamental tenet of international human rights law that obligations are, in principle, obligations of the territorial state. Some of these treaty regimes have sought

13 That is not to say that other treaties – such as the UN Convention on the Rights of the Child (CRC) – are not important for settings of confinement. However, for present purposes the analysis will focus on treaties that are not limited in scope in terms of their addressees.

14 The Inter-American system of human rights is distinctive in the sense that it is based on two separate yet interrelated instruments: the OAS Charter system, which comprises the OAS Charter and the American Declaration on the Rights and Duties of Man ('American Declaration'), on the one hand, and the ACHR on the other. Both instruments contain human rights provisions and complement one another: whereas state parties to the ACHR are bound by the provisions contained therein, other member states of the OAS are bound by the American Declaration. The American Declaration thus functions as a default instrument that is of continued relevance due to the failure of some OAS member states to ratify or accede to the American Convention: see also Cerna, 2014, p. 1213. Both instruments are furthermore interrelated in the sense that they operate through a common organ: the Inter-American Commission on Human Rights (IACommHR). Amongst others, the IACommHR can receive communications from both individuals and groups concerning alleged violations of human rights. The IACommHR should not be confused with the Inter-American Court of Human Rights (IACtHR), which is a judicial organ established under the ACHR and which can, under certain conditions, decide cases – referred to it by state parties or the IACommHR – against OAS Member States that have accepted its contentious jurisdiction.

such congruence by explicitly referring to states' territories, whereas ohers have done so by interpreting the jurisdictional scope in territorial terms.

7.2.1 The ICCPR

Article 2(1) ICCPR constitutes the jurisdictional clause of the Covenant. It explicitly mentions the territory of the state:

> "Each State Party to the present Covenant undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [...]" (emphasis added).

The proper meaning of this provision has been disputed, with commentators reaching opposite conclusions in relation to the scope of applicability of the Covenant.[15] This controversy is reflected in the preparatory work of the ICCPR. Indeed, Da Costa concludes on the basis of an elaborate examination of the ICCPR's *travaux préparatoires* that Article 2(1) ICCPR was considered controversial and a variety of issues were consequently not clearly agreed upon by the drafters of the Covenant.[16] As she likewise points out, however, three key issues emerge from the *travaux*: (i) Article 2(1) ICCPR was throughout the process regarded as a key provision; (ii) in drafting it, the drafters were primarily concerned with the protection of nationals abroad by and against the authorities of the state on whose territory they resided rather than with extraterritorial acts by states; and (iii) the US explicitly addressed its intention to exclude areas where the US exercised jurisdiction for particular purposes, such as those areas that were under its military occupation as well as leased territories, from its obligations.[17]

The obligations enshrined in the Covenant have been framed in territorial terms, albeit not exclusively so given that Article 2(1) ICCPR refers to the jurisdiction of the state as either a cumulative or an alternative ground for obligations to arise: indeed, it speaks about 'within its territory *and* subject to its jurisdiction'. This ambiguity is further complicated by the fact that the jurisdictional clause of the Optional Protocol to the ICCPR, which regulates the HRCee's monitoring of the ICCPR, is crucially different from the jurisdictional provision of the ICCPR itself in that it does not contain a reference to the state's territory but merely refers to the state's jurisdiction.[18] The ambiguous phrasing

15 For an overview of this debate, see Da Costa, 2013, pp. 17–19.
16 Da Costa, 2013, pp. 19–20.
17 Da Costa, 2013, pp. 40–41.
18 Article 1 of the Optional Protocol to the ICCPR reads: "[a] State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals *subject to its jurisdiction* who claim

of the jurisdictional clause of the ICCPR will be further analysed below when the ICCPR is discussed from the perspective of resilience. Still, it should be noted that the ICCPR has been interpreted primarily in territorial terms: the ICJ held in relation to the ICCPR that the "the exercise of jurisdiction is primarily territorial".[19] At the same time, as will be addressed below, this has not prevented the development of exceptional bases for extraterritorial jurisdiction.

7.2.2 The ICESCR

Contrary to the ICCPR, the ICESCR does not explicitly refer to territoriality in the treaty text. In fact, it does not even have a specific jurisdictional clause delineating the Covenant's scope of application. Article 2(1) ICESCR simply states that

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Confusion as to the scope of applicability of the ICESCR does consequently not stem from an abundance of criteria applicable – territory *and* jurisdiction – but rather from a lack of any provision. Still, it is generally assumed that the realisation of economic, social, and cultural rights as codified in the ICESCR has a territorial scope: "it normally takes place on the territory of states".[20] This in part can be derived from the nature of such rights – states simply cannot be expected to uphold all dimensions of economic, social, and cultural rights of everyone everywhere – and in part from rules of customary international law – as Article 29 of the Vienna Convention on the Law of Treaties ('VCLT') states, a treaty is binding upon the entire territory of a state party "[u]nless a different intention appears from the treaty or is otherwise established".[21] The primarily territorial reading was confirmed by the ICJ, which held that the Covenant "guarantees rights which are essentially territorial".[22]

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to be victims of a violation by that State Party of any of the rights set forth in the Covenant. […]" (emphasis added).

19 ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, ICJ Reports 2004, 136, ('Wall Advisory Opinion'), para. 109.

20 Coomans, 2011, p. 2.

21 See also Dennis, 2010, p. 127.

22 ICJ, *Wall Advisory Opinion*, para 112.

7.2.3 The CAT

The CAT contains two jurisdictional clauses, i.e. Article 2(1) relating to the prohibition of torture and Article 16(1) relating to the prohibition of other cruel, inhuman or degrading treatment of punishment.[23] Although a legal distinction in this regard appears to be drawn between torture on the one hand and other forms of cruel, inhuman or degrading treatment or punishment on the other, the Committee against Torture (CATee)[24] has stated that the obligations to prevent both are "indivisible, interdependent and interrelated".[25] Both jurisdictional clauses refer explicitly to territory. Article 2(1) CAT reads:

> "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*" (emphasis added).

Article 16(1) CAT similarly refers to territories under the jurisdiction of state parties:

> "Each State Party shall undertake to prevent *in any territory under its jurisdiction* other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I […]" (emphasis added).

Although the jurisdictional clauses of the CAT thus explicitly refers to territory, the question of relevance remains how the phrase 'in any territory under its jurisdiction' should be understood. As Da Costa shows, the potential extraterritorial application of the Convention was not exhaustively dealt with at the

23 The CAT was adopted on 10 December 1984 and entered into force on 26 June 1987. The Convention is different in nature from both the ICCPR and ICESCR as it focuses not on an extensive catalogue of human rights protections but, unsurprisingly, on protection against torture as well as other cruel, inhuman, or degrading treatment or punishment. It is therefore limited in scope yet highly ambitious in setting a single global standard of obligations related to what is often considered to be one of the core and most fundamental human rights and one of the most significant protections of human dignity: the prohibition of torture is recognised in various international human rights treaties as well as in customary international law and is both absolute and non-derogable. For an explanation of the difference between absolute and non-derogable rights, see Nowak & McArthur, 2008, p. 119.

24 The Committee against Torture was set up by virtue of Article 17(1) CAT. It monitors the implementation of the CAT and assesses the compliance of states with the Convention. See, for a critical appraisal of the CATee and the overlap of its mandate with that of the HRCee, Ingelse, 2000.

25 Committee against Torture, *General Comment no. 2*, 24 January 2008, UN Doc. CAT/C/GC/2, para 3. As the Committee states, "[i]n practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment".

drafting stage.[26] Nevertheless, during the drafting phase the argument was raised that the phrase 'within its jurisdiction' might be interpreted too widely so that it would cover also citizens of a state residing abroad. It was therefore proposed to change the language to that of 'any territory under its jurisdiction', whilst it at the same time was emphasised that "such wording would cover torture inflicted aboard ships or aircraft registered in the State concerned as well as occupied territories".[27] From this perspective, at least *some* extraterritorial application of the CAT was envisaged.[28] The specific reference to 'territory *under its jurisdiction*' can hence not be equated to a state's sovereign territory per se. The extraterritorial scope of the CAT will be returned to below.

7.2.4 The OAS Charter system

The OAS Charter System consists of two instruments: the OAS Charter and the American Declaration. On a number of occasions, the OAS Charter refers to fundamental rights and human rights.[29] At the same time, the OAS Charter does not specify the meaning of these fundamental and human rights – rather, this has been expanded upon in the American Declaration, which was adopted simultaneously with the OAS Charter in 1948 and which provides a catalogue of rights and, notably, duties of the individual. The legal status of the American Declaration remains somewhat ambiguous, but this has not prevented the Inter-American Commission on Human Rights (IACommHR) from applying it as a legally binding instrument for all OAS member states.[30]

26 Da Costa, 2013, p. 268.
27 See Commission on Human Rights, *Report on the Thirty First Session, Economic and Social Council, Supplement no. 6*, UN Doc. E/CN.4/1347, para 178(32).
28 See, similarly, Nowak & McArthur, 2008, pp. 116–117.
29 Article 3(1) of the Charter, for instance, refers to the proclamation by American States of "the *fundamental rights of the individual* without distinction as to race, nationality, creed or sex" (emphasis added). Article 17 of the OAS Charter states that "[e]ach State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the *rights of the individual* and the principles of universal morality" (emphasis added).
30 The American Declaration was developed around the same time as the UDHR and has largely fulfilled a similar catalyst function as the Universal Declaration. Like the UDHR, it was, moreover, intended to constitute an aspirational rather than legally binding catalogue, although the exact legal status of the American Declaration has been subjected to debate. The IAcommHR, for one, has continuously maintained that the American Declaration is legally binding. More specifically, it has argued that the reference to 'human rights' in the 1967 amendment to the Charter necessarily refers to the American Declaration, as it had been the only catalogue of human rights in the Inter-American human rights system in existence at the time, and that the American Declaration subsequently acquired treaty status due to the ratification of these amendments to the Charter by OAS member states. For analysis of the IACommHR's position, see Cerna, 2014, who argues that the assertion that the American Declaration is legally binding is useful as a mechanism yet ultimately a legal fiction. Furthermore, what the legal effect of the Declaration as a binding treaty would be

The subsequent question of relevance here is what the jurisdictional scope of the American Declaration is. However, since the American Declaration was at least initially not meant to function as a legally binding treaty but rather as a standard of achievement, the drafters gave no proper consideration to the question how it should be applied in practice.[31] The American Declaration therefore does not contain an express jurisdictional clause.[32] At the same time, since it was not anticipated during the drafting stage that the Declaration would function as a treaty and that it would be applied to individual states, no strong inference can be drawn from such absence. At a minimum, nothing suggests that the drafters of the American Declaration had anything else in mind than territorial application, and it was only after the IACommHR started to apply it to OAS member states that the jurisdictional question came up in the first place.

7.2.5 The ACHR

The ACHR – being the second regime of the Inter-American system of human rights – on the other hand was always envisaged to be a binding treaty and consequently *does* have a jurisdictional provision.[33] Indeed, Article 1(1) of the American Convention reads:

> "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to *all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms […]" (emphasis added).[34]

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remains unclear: it could be taken to mean either that the American Declaration is legally binding for all OAS member states, or that it is binding "to the extent that it assists in interpretation of the American Convention on Human Rights, which is binding on States that have ratified it": Balouziyeh, 2012, p. 157. Criticism in relation to the position of the IAcommHR has also been raised by member states, particularly the US. Throughout, the United States has indeed maintained that the American Declaration is a "non-binding instrument that does not itself create legal rights or impose legal obligations on signatory States": IACommHR, *Human Rights Situation of Refugee and Migrant Families and Unaccompanied Children in the United States of America*, 24 July 2015, OAS/Ser.L/V/II. 155, para 33. See also IACtHR, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, 14 July 1989, Advisory Opinion OC-10/89, para 12.

31 Cerna, 2004, p. 141.

32 Article 2 of the American Declaration on the 'right to equality before law' has sometimes erroneously been referred to as the Declaration's jurisdictional clause, yet this provision rather stipulates an autonomous substantive right.

33 The ACHR, which is also known as the Pact of San José, was adopted in 1969 and came into force after the eleventh state party – Grenada – ratified the instrument in 1978.

34 Article 1(2) of the American Convention subsequently limits the interpretation of 'persons' to human beings (as opposed to the broader category of legal persons).

Contrary to the provisions of the ICCPR and the CAT, no reference is thus made to states' territories. Interestingly, similarly to the ICCPR, a reference to persons "within its territory and subject to its jurisdiction" was included in earlier drafts of the ACHR, but the reference to territory was omitted in the final version.[35] Still, the phrase 'all persons subject to their jurisdiction' has been interpreted by the IACommHR partially along territorial lines, although case law in relation to the scope of obligations remains scarce. In *Saldaño v. Argentina*, the Commission considered that

> "States Parties have undertaken to respect and ensure the substantive guarantees enshrined in the Convention in favour of persons 'subject to their jurisdiction.' As implicitly established by the case law of the Commission and the Inter-American Court, *this protection must extend to all human beings present within their national territory*, irrespective of their nationality or status".[36]

As such, the Commission first and foremost finds that the protection of the ACHR extends to all human beings in a state's territory merely on account of the fact that they are, indeed, in that state's territory. Admittedly, as further addressed below, the Commission in turn argues that the meaning of 'jurisdiction' in Article 1(1) ACHR is not limited to such territorial reading but that states in certain circumstances may also have obligations when acting extraterritorially:

> "The Commission does not believe, however, that the term 'jurisdiction' in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the *acts and omissions of its agents which produce effects or are undertaken outside that state's own territory*".[37]

Still, as the Commission makes clear, obligations *always* apply to *all human beings* present within a state's national territory, and only occasionally – *under certain circumstances* – in extraterritorial contexts. Territorial application is hence the norm, extraterritorial application the exception.

35 This could imply that the drafters did not envisage mere territorial application when drafting the Convention. However, the *travaux préparatoires* (only available in Spanish) do not provide a conclusive answer in this regard: they only state that "*la Comisión resolvió aprobar el texto del Artículo 1 tal como aparece en el Proyecto […], suprimiendo de su primer párrafo la cláusula que dice "que se encuentre en su territorio":* OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos – Actas y Documentos* (San José de Costa Rica, 07-22.11.1969), OEA/Ser.K/XVI/1.2, p. 295. See also Medina Quiroga, 2016, p. 15.

36 IACommHR, *Victor Saldaño v. Argentina*, 11 March 1999, Ann. Rep. IACommHR 1998, 289, paras 16-17 (emphasis added).

37 IACommHR, *Victor Saldaño v. Argentina*, paras 16-17 (emphasis added).

7.2.6 The ECHR

The debate on jurisdictional application gained particular traction in the context of the ECHR. Indeed, the jurisdictional scope of the ECHR has been extensively scrutinised by scholars who, at times, have maintained widely divergent opinions as a result of the somewhat schismatic nature of case law of the European Court of Human Rights ('ECtHR').

The human rights obligations contained in the ECHR are circumscribed by the jurisdictional provision in Article 1 ECHR:

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

Given that no reference to territory is made, the scope of application of the ECHR depends on the meaning given to the phrase 'within their jurisdiction'. As Da Costa argues, the *travaux préparatoires* are hardly clarifying: they are, firstly, only a supplementary means of interpretation due to the well-established doctrine that the ECHR is a 'living instrument', and, secondly, do not consider the meaning of 'jurisdiction' as such.[38] As she likewise outlines, however, the drafting history has at times been referred to in order to argue that jurisdiction under the ECHR should be considered territorial in nature: notably, previous drafts of Article 1 ECHR referred to persons 'residing within [Member States'] territories' respectively persons 'living in [Member States'] territories', yet the drafters rather ironically deemed such terminology to be prone to ambiguity and the phrase 'within their jurisdiction' was accordingly adopted.[39] On the basis of the *travaux*, a plausible – albeit inconclusive – argument that the term 'jurisdiction' is in principle to be understood in territorial terms may hence be developed.

Case law of the ECtHR to a certain extent entertains such argument: an intrinsic link between the Convention and the territories of member states is clearly acknowledged by the Court. Thus, according to the ECtHR, "the jurisdictional competence of a state is primarily territorial" and "Article 1 of the Convention must be considered to reflect this ordinary and essentailly territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".[40] As such, jurisdiction is "presumed to be exercised normally throughout the

38 Da Costa, 2013, pp. 93–94.
39 Da Costa, 2013, pp. 94–96.
40 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), 12 December 2001, Application no. 52207/99, paras 59 and 61. This conclusion has been repeated by the Court in subsequent case law.

State's territory".[41] Similar to the ICJ's opinion in relation to the ICCPR,[42] the ECtHR has thus clearly and unequivocally expressed that the ECHR's jurisdictional limitation is primarily territorial. As explicitly recognised by the ECtHR in *Banković*, deviance of this main rule would be exceptional and would require specific justification.[43] Nevertheless, this has not obstructed the ECtHR to develop extraterritorial models of jurisdiction as part of a resilient effort vis-à-vis conduct of states abroad, as examined below.

7.3 SHOWING RESILIENCE IN THE FACE OF EXTRATERRITORIAL STATE CONDUCT

Most human rights instruments discussed here hence connect their jurisdictional scope one way or the other with the notion of territory. This accords with a veracious stance to the fundamental tenet that international human rights obligations are, in principle, obligations of territorial states. Over time, however, the jurisdictional provisions of these treaties have generally been interpreted to also include, in exceptional circumstances, extraterritorial conduct of states. In this sense, the treaties showcase a certain level of resilience in the face of state conduct abroad, including in situations where states act extraterritorially in nodal governance settings involving two or more states. Such resilience under the various treaty regimes will now be analysed.

7.3.1 The ICCPR

The HRCee has clarified the jurisdictional reach of the ICCPR in individual communications, general comments, and concluding observations. It first did so in individual communications relating to the military dictatorship that was in power in Uruguay between the mid-1970s and mid-1980s.[44] Particularly relevant are those communications related to the abduction of individuals who were considered to be opposition members by Uruguayan state agents operating abroad.[45] Whereas Uruguay argued that these cases were inadmissible now that the abductions had occurred outside its territory, the HRCee held that Article 1 Optional Protocol and Article 2(1) ICCPR do not imply that state parties cannot be held responsible for human rights violations that occur

41 ECtHR, *Ilascu and others v Moldova and Russia,*; ECtHR, *Assanidze v Georgia*, 8 April 2004, Application no. 71503/01, para. 139; ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 55721/07, para 131; ECtHR, Hirsi Jamaa, para. 71.
42 ICJ, *Wall Advisory Opinion*, para 109.
43 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 59 and 61.
44 Da Costa, 2013, p. 43.
45 HRCee, *Lopez Burgos v. Uruguay*, 29 July 1981, Comm. no. 52/1979, UN Doc. CCPR/C/13/D/52/1979; HRCee, *Celiberti de Casariego v. Uruguay,* 29 July 1981, Comm. no. 56/1979, UN Doc. CCPR/C/13/D/56/1979.

extraterritorially.[46] Notably, in *Lopez Burgos v. Uruguay*, the HRCee considered that

> "although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil."[47]

More specifically, the Committee held that the wording of Article 1 Optional Protocol does not refer to the place where the alleged 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".[48] Moreover, although Article 2(1) ICCPR mentions the territory of state parties, it "does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it".[49] It indeed "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".[50] This reflects a strong resilient approach: in light of extra-territorial conduct of states, a strict territorial reading is regarded inappropriate.

The HRCee thus approached the issue by focusing not so much on the reference to territory but rather on the factual relationship between applicant and state party.[51] This signifies a *personal* model of jurisdiction: due to the amount of effective power or control over a person abroad, the state's jurisdiction is extraterritorially triggered. The HRCee confirmed such personal model of extraterritorial jurisdiction *inter alia* in its discussions of the second and third

46 HRCee, *Report of the Human Rights Committee, GA Thirty-Sixth Session, no. 40,* 29 July 1981, UN Doc. A/36/40, p. 176, para 12.3.
47 HRCee, *Lopez Burgos v. Uruguay,* para. 12.1; see similary HRCee, *Celiberti de Casariego v. Uruguay, para. 10.1.*
48 HRCee, *Lopez Burgos v. Uruguay,* para. 12.2; see similary HRCee, *Celiberti de Casariego v. Uruguay, para. 10.2.*
49 HRCee, *Lopez Burgos v. Uruguay,* para. 12.3; see similary HRCee, *Celiberti de Casariego v. Uruguay, para. 10.3.*
50 HRCee, *Lopez Burgos v. Uruguay,* para. 12.3; see similary HRCee, *Celiberti de Casariego v. Uruguay, para. 10.3.*
51 See, in support of this view, Da Costa, 2013, p. 50.

periodic reports of the USA,[52] in its discussion of the sixth period report of the UK,[53] and in its General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant.[54] The HRCee unequivocally confirmed that the somewhat ambiguous wording "within its territory and subject to its jurisdiction" in Article 2(1) ICCPR should be read disjunctively: the ICCPR obligations apply both to persons within a state's territory *and* persons subject to the state's jurisdiction.[55] It furthermore emphasised that 'power or effective control' is the relevant criterion to establish whether a state exercises extraterritorial jurisdiction on the basis of this personal model.

In various Concluding Observations, the Committee has furthermore maintained that extraterritorial jurisdiction may also be established on the basis of a *spatial* model of jurisdiction, i.e. where a state party has effective control over a physical area rather than over a person. As a key example, the HRCee has indicated in various periodic reports concerning Israel that Israel's ICCPR obligations apply in the Occupied Territories.[56] More specifically, it held that Israel's obligations under the ICCPR apply to *anyone* within the Occupied Territories – the basis for jurisdiction here is henceforth a spatial one rather

52 It held that the USA should "acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory as well as its applicability in time of war […]": HRCee, *Concluding Observations regarding the United States*, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, para 10.

53 The HRCee held in relation to those detained in facilities in Afghanistan and Iraq by the UK that "[t]he State party should state clearly that the Covenant applies to all individuals who are subject to its jurisdiction or control": HRCee, *Concluding Observations regarding the United Kingdom of Great Britain and Northern Ireland*, 30 July 2008, UN Doc. CCPR/C/GBR/CO/6, para 14.

54 According to the HRCee, ""States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights *to all persons who may be within their territory and to all persons subject to their jurisdiction*. This means that a State party must respect and ensure the rights laid down in the Covenant *to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party*. […] *This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained* […]": Human Rights Committee, *General Comment no 31* (emphasis added).

55 Although these often will coincide, i.e. where individuals find themselves both in the state's territory and in the state's jurisdiction. The United States in particular objected to a disjunctive reading, both on the basis of the *travaux preparatoires* and a literal interpretation of Article 2(1) ICCPR: see e.g. Human Rights Committee, *Consideration of the initial report of the USA, Summary record of the 1405th meeting,* 24 April 1995, UN Doc. CCPR/C/SR.1405, para. 20. Da Costa debunks the US argument, however, as "[t]o apply a conjunctive reading would make the reference to jurisdiction redundant, since as a general rule arising from the territoriality principle jurisdiction is normally exercised in relation to a state's territory": Da Costa, 2013, p. 70. For a different perspective, see Dennis, 2010, pp. 122–127. See also Oberleitner, 2015, pp. 150–152.

56 See, notably, HRCee, *Concluding Observations of the Human Rights Committee on the Second Report of Israel,* 21 August 2003, UN Doc. CCPR/CO/78/ISR. See also HRCee, *Concluding Observations of the Human Rights Committee on the Third Report of Israel*, 3 September 2010, UN Doc. CCPR/C/ISR/CO/3, para. 5.

than a personal one. The appropriate test under this spatial model is that of 'effective control' over an area: indeed, "under the circumstances, the Covenant must be held applicable to the occupied territories and those areas of southern Lebanon and West Bekaa *where Israel exercises effective control*".[57] Such a position has consequently been adopted by numerous UN bodies.[58]

Whilst the positions and findings of the HRCee are authoritative, they are not legally binding.[59] It is therefore particularly interesting that the ICJ has on two occassions also dealt with the extraterritorial application of the ICCPR and has by and large confirmed the approach of the HRCee. First, in the *Wall Advisory Opinion*, the ICJ concluded in a smilar vein that "while the exercise of jurisdiction is primarily territorial, it may sometimes be exercised outside the state territory" and consequently that the ICCPR also applies "in respect of acts done by a State in the exercise of its jurisdiction outside its territory".[60] In turn, the ICJ confirmed this position in *Case Concerning Armed Activities On The Territory Of The Congo (DRC v. Uganda)*: "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 occupied territories".[61]

It accordingly appears justified to conclude that a state's ICCPR obligations apply to persons in three distinct situations: to (i) those within its territory (territorial jurisdiction), (ii) those outside the state's territory yet within the power or effective control of the state (personal jurisdiction), and (iii) those within other territories under the effective control of the state (spatial jurisdiction). However, this tripartite framework has been problematised by the HRCee itself, in particular in relation to the territorial basis of jurisdiction. Indeed, in response to the second and third periodical reports of Cyprus, the HRCee considered a situation where the state did not exercise control over the entirety of its territory due to the occupation of parts of it by a foreign power. The HRCee specifically considered that "the State party, as a consequence of events that occurred in 1974 and resulted in the occupation of part of the territory of Cyprus, *is still not in a position to exercise control over all of its territory*

57 HRCee, *Concluding Observations of the Human Rights Committee on the Initial Report of Israel*, 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10 (emphasis added).

58 See for example Report of the Secretary General, *Human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, 13 April 2017, UN Doc. A/HRC/34/38, paras. 6-7.

59 See HRCee, *87th Session, Summary Record of the 2380th Meeting, Consideration of Reports under Article 40 of the Covenant, Second and Third periodic reports of the United States of America*, 27 July 2006, UN Doc. CCPR/C/SR.2380, para. 57. The views have also been disputed in the literature. See, notably, Dennis, 2010, pp. 122–127.

60 ICJ, *Wall Advisory Opinion*, para 109-111. In coming to this conclusion, the ICJ referred explicitly to the HRCee. For the significance of this reference to the HRCee for the latter's position, see Wilde, 2013, p. 665.

61 ICJ, *Case Concerning Armed Activities On The Territory Of The Congo*, 19 December 2005, ICJ Reports 2005, 168, para 216.

and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction".[62] This position appears to question both the basic rule of territorial jurisdiction and the disjunctive reading of Article 2(1) ICCPR by the HRCee itself. Whereas General Comment 31, which interpreted Article 2(1) ICCPR, suggested that the ICCPR obligations apply both to persons within a state's territory *and* persons subject to the state's jurisdiction, the HRCee in the Concluding Observations on Cyprus seems to suggest that the decisive condition is that of 'subject to its jurisdiction' given that it holds that the territorial ground is insufficient to raise Covenant obligations where the state is no longer in effective control over (parts of) its own territory. This approach seems to be more workable in that it does not require the state "to do the impossible",[63] yet it calls the ICCPR's exact scope of application into question. In essence, the HRCee appears to adhere to a pragmatic approach that takes into account the *de facto* authority, power and control exercised by the state, whether it be over a person, a foreign land, or – henceforth – its own territory. The tripartite structure of jurisdiction under the ICCPR as outlined above therefore should be adjusted accordingly: a state's ICCPR obligations apply to (i) those within its territory, *except where the state has lost effective control over (parts) of its territory* (territorial jurisdiction), (ii) those outside the state's territory yet within the power or effective control of the state (personal jurisdiction), and (iii) those within other territories under the effective control of the state (spatial jurisdiction). In each of these three legs, including the territorial one, 'effective control' appears the crucial and decisive element.

7.3.2 The ICESCR

In the context of the ICESCR, the UN Committee on Economic, Social and Cultural Rights ('CESCR') has also recognised extraterritorial obligations. It has, however, taken a different approach than the tripartite structure developed in the context of the ICCPR. Indeed, it (i) introduced the criterion of 'effective control' in the context of economic, social, and cultural rights, and (ii) interpreted the 'international component' of Article 2(1) ICESCR.

Thus, first, the CESCR has clarified that the ICESCR applies extraterritorially where a state party exercises effective control over territory, which especially came to the fore in the context of military occupation. In relation to Israel's state reports, the CESCR recognised such a spatial basis for extraterritorial jurisdiction by clarifying that ICESCR obligations "apply to all territories and

62 HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, 6 April 1998, UN Doc. CCPR/C/79/Add. 88, para. 3 (emphasis added).
63 Da Costa, 2013, p. 58.

populations under [the state's] effective control".[64] This position has largely been confirmed by the ICJ: with express reference to the position taken by the CESCR, the ICJ held that the ICESCR may apply extraterritorially by maintaining that "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."[65] As previously mentioned, in *DRC v. Uganda* the ICJ furthermore concluded more generally 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 occupied territories".[66]

Notably, in 2011, the CESCR held that "States parties have the primary obligation to respect, protect and fulfil the Covenant rights *of all persons under their jurisdiction* in the context of corporate activities undertaken by State-owned or private enterprises".[67] This should, however, not be understood as implying that a personal model of extraterritorial jurisdiction exists under the ICESCR. The statement indeed does not imply that state parties exercise jurisdiction where they have, for example, effective control over persons, but rather that state parties have obligations vis-à-vis all individuals who find themselves in the jurisdiction of that state. In other words, it says nothing about potential bases for (extraterritorial) jurisdiction but rather concerns the implications of establishing such jurisdiction.

Second, the extraterritorial application of the ICESCR has in a more general sense been derived from the reference to the international plane in Article 2(1)

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64 CESCR, *Concluding Observations regarding Israel's Initial Report*, 4 December 1998, UN Doc. E.C.12/1/Add.27, at para 8. Furthermore, as the CESCR explicates at para 12, such obligations are not offset by obligations of international humanitarian law: even during armed conflict the economic, social and cultural rights enshrined in the Convenant must be respected. The extraterritorial application of the ICESCR on the basis of effective control over territory or people was later confirmed in CESCR, *Concluding Observations on the second periodic report of Israel*, 23 May 2003, UN Doc. E/C.12/1/Add. 90, para 31. See also the 1994 Concluding Observations on Morocco's state reporting in which the CESCR held that the Covenant applies to the occupied territories of Western Sahara: CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco*, 30 May 1994, UN Doc. E/C.12/1994/5, para. 10.

65 ICJ, *Wall Advisory Opinion*, para 112.

66 It is evident that this also applies to the rights enshrined in the ICESCR, in particular now that the ICJ in its reasoning explicitly referred to its earlier findings on the applicability of economic, social and cultural rights in the *Wall Advisory Opinion* case: ICJ, *Case Concerning Armed Activities On The Territory Of The Congo*, para 216.

67 CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, 12 July 2011, UN Doc. E/C.12/2011/1, para 3 (emphasis added). In a similar vein, the Maastricht Guidelines, which were established by members of the International Commission of Jurists and elaborate upon the nature and scope of economic, social, and cultural rights, note that violations "are in principle imputable to the State *within whose jurisdiction* they occur": CESCR, *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 2 October 2000, UN Doc. E/C.12/2000/13, Guideline 16 (emphasis added). The Maastricht Guidelines are not legally binding but have acquired significant authority in guiding the implementation of ICESCR rights.

ICESCR. The CESCR clarified 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".[68] In various General Comments on the protection of particular rights, the CESCR has further highlighted the international character of the ICESCR obligations.[69] As such, the ICESCR rights are framed in a context of international cooperation and assistance and apply to 'everyone' without any further delimitation.

Those general duties of international cooperation and assistance are not made dependent upon a jurisdictional link, yet their weakness rests in the fact that they are so broad and ill-defined that it is difficult to delineate *a priori* what is exactly expected from a state party. In essence, the provision appears to require states to *take measures* towards the progressive realisation of economic, social, and cultural rights but does not *entitle particular recipients* to assistance from state parties.[70] Nevertheless, over the years the CESCR has attempted to provide further substance to the scope of obligations both in general and in relation to particular rights. It has outlined that states' duties of cooperation and assistance include an obligation to extraterritorially protect economic, social, and cultural rights "by preventing their own citizens and national entities from violating [rights] in other countries".[71] Thus, "States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant".[72] The more general duties of international cooperation and assistance have thus been given substance by the CESCR in particular in relation to the activities of corporate actors abroad.

In fact, the CESCR even appears to unify the two distinct bases for extraterritorial application of the Covenant:

68 CESCR, *General Comment no. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, UN Doc. E/1991/23, para 13 (emphasis added). As some scholars outline, since a reference to the international plane is included in the provision, a certain extraterritorial scope was arguably intended by the drafters and therefore part of the ICESCR: see Coomans, 2011, p. 7.

69 See for example CESCR, *General Comment no. 14, The Right to the Highest Attainable Standard of Health*, 11 August 2000, UN Doc. E/C.12/2000/4, at para 39.

70 See also Langford, Coomans, et al., 2013, p. 64.

71 CESCR, *General Comment no. 19, The Right to Social Security*, 4 February 2008, UN Doc. E/C.12/GC/19, para. 54.

72 CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, para 5. The CESCR clarified in the context of business activities that these obligations stem *inter alia* from the phrasing of Article 2(1) ICESCR: see CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, UN Doc. E/C.12/GC/24, para 27.

> "[t]he Covenant establishes specific obligations of States parties at three levels – to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory *in situations over which States parties may exercise control*".[73]

The Committee hence no longer speaks about exercising control over territory, but about exercising control over *situations*, which arguably encapulates the spatial ground for extraterritorial jurisdiction as well as the more general duties of international cooperation and assistance.[74] As the words of the CESCR evidence:

> "Extraterritorial obligations arise *when a State party may influence situations located outside its territory*, consistent with the limits imposed by international law, *by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction*, and thus *may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory*."[75]

In this sense, the reference to 'control over *situations*' seems to include both the previously identified spatial model of extraterritorial jurisdiction, as well as the state-corporate relationship where a state controls a situation by exercising control over activities of corporations domiciled in its territory and/or under its jurisdiction.[76] The CESCR at the same time stresses, however, that

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73 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* para 10 (emphasis added).

74 Given the nature of economic, social, and cultural rights, it does in general not make sense to maintain that a state has to uphold such rights vis-à-vis anyone over who it exercises effective control on the basis of a personal model. As the analysis of the ECtHR's case law below also evidences, where a state exercises effective control over territory it can be assumed to be responsible for the entire human rights catalogue, including the full range of economic, social, and cultural rights, whereas where a state exercises effective control over persons such obligations should arguably be 'divided and tailored'. In the latter type of situations, it is likely that states are primarily bound by certain civil and political rights, for example to refrain from violating the right to life or the right to be free from torture or other inhuman or degrading treatment, yet it is less likely that they are responsible for upholding most economic, social, and cultural rights. See also Altwicker, 2018, who advocates for the broader use of the 'control over situations' criterion in international human rights law.

75 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* para 28 (emphasis added).

76 When considering the tripartite nature of human rights obligations, this latter type of control is, as the CESCR outlines, particularly relevant in the context of the obligation to *protect*: "a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. […] In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence […] respect Covenant rights": CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* paras 32-33. These approaches largely align with standards

the latter "does not imply the exercise of extraterritorial jurisdiction by the States concerned".[77] As such, it remains important to distinguish the latter form of control over situations – where a territorial state to certain extents controls the conduct of domestic companies operating abroad – from the former form of control over situations – where a state exercises extraterritorial jurisdiction proper on the basis of effective control over territory.[78]

The extraterritorial application of ICESCR rights along these lines has been explicitly recognised and confirmed in the Maastricht Principles.[79] They reflect states' obligations to respect, protect, and fulfil rights where states' conduct has effects beyond borders as well as the idea that states must proactively take measures to realise human rights universally through international cooperation and assistance.[80] Furthermore, they confirm the importance of influence over *situations* and reiterate the various applicable tests:

> "A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
> a) *situations* over which it *exercises authority or effective control*, whether or not such control is exercised in accordance with international law;

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proposed in the literature: see, in particular, Narula, 2013; Ryngaert, 2013.

77 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, para 33.

78 A practical difficulty in this regard is that the duties of international cooperation and assistance appear hardly justitiable: the Optional Protocol to the ICESCR – which recognises the CESCR's competences to receive individual communications – outlines in Article 2 that "Communications may be submitted by or on behalf of individuals or groups of individuals, *under the jurisdiction of a State Party*, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party" (emphasis added). Similar to the Optional Protocol to the ICCPR, the Optional Protocol to the ICESCR hence explicitly refers to the jurisdictional link between individual(s) and the state party. This provision in and of itself does not alter the scope of the ICESCR as such, but sets out the admissibility requirements for individual communications. Given the condition that an individual or group of individuals needs to be under the jurisdiction of a state party, the Optional Protocol arguably does not accommodate situations where individuals fall within the ambit of a state's duties of international cooperation and assistance but outside the scope of that state's jurisdiction, for example where economic, social, and cultural rights are ostensibly curtailed by corporate actors as a result of an alleged failure of the state in which the corporate actor is domiciled to take reasonable measures that could have prevented the event. Hence, again, the obligations to *inter alia* control domestic corporate actors operating abroad require states to take measures but do not entitle particular recipients.

79 Not to be confused with the Maastricht Guidelines. The Maastricht Principles were adopted after extensive research and consultations by a group of 40 international human rights experts: *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights* (adopted 28 September 2011), available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 (last accessed 31 May 2019).

80 Maastricht Principles, Principle 8. See also Khalfan & Seiderman, 2015, p. 15.

b) *situations* over which State acts or omissions *bring about foreseeable effects on the enjoyment of economic, social and cultural rights*, whether within or outside its territory;
c) *situations* in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is *in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially*, in accordance with international law".[81]

Although the Maastricht Principles are of a soft law nature, read together with the case law of the ICJ and with the statements of the CECSR, as well as with the doctrinal discussions in scholarship, it appears that they to a large extent reflect current consensus.

7.3.3 The CAT

As previously outlined, the *travaux* of the CAT shows that at least *some* extraterritorial application of the CAT was envisaged during the drafting stage. Nevertheless, the extraterritorail application of CAT obligations has been challenged in particular by the United Kingdom and the United States.[82] In response to the UK, the CATee maintained that the notion of jurisdiction in Article 2(1) and Article 16(1) CAT includes "all areas under the *de facto* effective control of the State party's authorities".[83] Similarly, in responding to the US' observations, the CATee held that the notions of jurisdiction in Article 2(1) and Article 16(1) CAT include "all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised."[84] The CATee furthermore held that state parties should ensure that Article 2(1) and Article 16(1) CAT "apply to, and are fully enjoyed, by *all persons under the effective control of its authorities*, of whichever type, wherever located in the world".[85] From these responses it appears that the CATee recognises both the spatial and the personal model of jurisdiction. The Committee confirmed this more explicitly in its 2008 General Comment no. 2, in which it unequivocally stated that "the concept of 'any territory under its jurisdiction' […] includes any territory or facilities and must be applied to protect any

81 Maastricht Principles, Principle 9 (emphasis added).
82 For an extensive and in-depth analysis of their positions, see Da Costa, 2013, pp. 273–299. See also Nowak & McArthur, 2008, pp. 98–99.
83 CATee, *Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories,* 10 December 2004, CAT/C/CR/33/3, para 4(b).
84 See CATee, *Conclusions and recommendations of the Committee against Torture, United States of America,* 25 July 2006, CAT/C/USA/CO/2, para 15.
85 See CATee, *Conclusions and recommendations of the Committee against Torture, United States of America,* para 15 (emphasis added).

person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party".[86] As it subsequently confirmed,

> "'any territory' includes *all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control*, in accordance with international law. […] [T]he scope of "territory" under article 2 *must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention*."[87]

The spatial and personal model of jurisdiction have therewith been firmly entrenched in the CATee's views. On the other hand, it should be recalled that extraterritorial jurisdiction is, in principle, exceptional and complements the basic rule of territorial jurisdiction. Therefore, the conclusion of some that the CATee's General Comment no. 2 "is a bold and welcome reaffirmation of the universality of the prohibition of torture"[88] should be interpreted with caution: the prohibitions enshrined in the CAT are admittedly universal yet state parties' obligations only apply extraterritorially in those exceptional situations where a particular level of control over territory or persons is exercised.

7.3.4 The OAS Charter system

In the context of the OAS Charter system, the fact that the American Declaration has no express jurisdictional clause has not prevented the IACommHR from finding extraterritorial jurisdiction.[89] The IACommHR has found extraterritorial jurisdiction in cases where OAS member states exercise 'effective control' over persons abroad as a result of military occupation, military control, or detention.[90] Such a personal model was prominently confirmed in *Coard and Others v. the United States,* which concerned US military interventions in Gre-

86 Committee against Torture, *General Comment no. 2*, para 7.
87 Committee against Torture, *General Comment no. 2*, para 16 (emphasis added).
88 Kalin, 2008, p. 295.
89 A notable example of such cases is IACOmmHR, *The Haitian Centre for Human Rights et al. v. United States*, 13 March 1997, Case 10.675, Report no. 51/96 ('*Haitian Interdiction case*'). As will be argued below in the context of the *Soering* case of the ECtHR, however, framing such cases as exercises of extraterritorial jurisdiction is erroneous given that the exercise of jurisdiction in such cases is remarkably territorial and the crux of such cases does not centre around the notion of extraterritorial jurisdiction but rather around the scope and content of positive obligations and substantive duties. This type of cases is therefore left out of consideration for now and will be revisited in the context of the ECtHR's *Soering* case: see section 7.4.5.6. below.
90 See also Cerna, 2004, p. 152.

nada.[91] Although the United States had not challenged the American Declaration's extraterritorial application, the Court considered *proprio motu* that

> "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a *person subject to its authority and control*."[92]

This personal model of extraterritorial jurisdiction was also confirmed in cases concerning detention. Most prominently, in *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba,* the Commission held in relation to the US' detention of 'unlawful combatants' at Guantánamo Bay that

> "where persons find themselves *within the authority and control of a state* and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. Where it may be considered that the protections of international humanitarian law do not apply, however, such persons remain the beneficiaries at least of the non-derogable protections under international human rights law. *In short, no person, under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable human rights*".[93]

7.3.5 The ACHR

The IACommHR also detailed bases for extraterritorial jurisdiction in the context of the ACHR. In *Saldaño v. Argentina*, it maintained that the personal model

91 IACommHR, *Coard and Others v. United States*, 29 September 1999, Case 10.951, Report no. 109/99.

92 IACommHR, *Coard and Others v. United States*, para 37. See similarly IACommHR, *Armando Alejandre Jr. and Others v. Cuba*, 29 September 1999, Case 11.589, Report no. 86/99, para 23. Notably, in this case, the Commission used the requirement of 'authority and control' and the phrase 'power and authority' as exchangable concepts: IACommHR, *Armando Alejandre Jr. and Others v. Cuba,* para 25.

93 IACommHR, *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba,* 13 March 2002, 41 ILM (emphasis added).

of jurisdiction also applies to the American Convention.[94] In *Ecuador v. Colombia*, the IACommHR furthermore clarified that what is decisive under the personal model is "whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual".[95] As the Commission continued, "the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment".[96] Over time, the IACommHR has frequently referred to the standard of 'authority and control', at times even without referring to territoriality at all, and this standard consequently seems to continuously guide the Commission in its considerations and decisions.[97] No spatial model of jurisdiction has been developed in the Inter-American human rights system: to the contrary, the approach of both principal entities has been argued to be "decidedly nonterritorial".[98]

For a long time, the authoritative status of the Commission's case law on extraterritorial application remained open to discussion given that the Inter-American Court of Human Rights ('IACtHR') did not deal with the matter.[99] In 2018, however, the Court published its long-awaited *Advisory Opinion OC-23/17*, in which it dealt with the question of extraterritorial jurisdiction for the very first time.[100] The Court confirmed that a state's extraterritorial jurisdiction is engaged where the state exercises authority over a person abroad

94 Although in the concrete case "the petitioner has not adduced any proof whatsoever that tends to establish that the Argentine State has in any way *exercised its authority or control* either over the person of Mr. Saldaño, prior or subsequent to his arrest in the United States, or over the local officials in the United States involved in the criminal proceeding taken against him": IACommHR, *Victor Saldaño v. Argentina*, para 21 (emphasis added). Note, however, that the Commission's reasoning arguably confuses questions of jurisdiction and attribution. Indeed, whereas the exercise of authority or control over the *applicant* could be used to establish (extraterritorial) jurisdiction, the exercise of authority or control over *the local officials in the United States* could be used to attribute their conduct to the respondent state. In other words, had it been established that Argentina exercised authority or control over the local officials in the United States, this would have meant that their conduct could potentially be attributed to Argentina on the basis of the international law rules of attribution, yet this would not have automatically meant that the petitioner was also within Argentina's jurisdiction for human rights purposes. It would still have to be established that Argentina exercised authority or control over him *through* those local officials in the United States on the basis of *inter alia* the personal model of extraterritorial jurisdiction.

95 IACommHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, 21 October 2010, Inter-state Petition IP-02, Report no. 112/10, para 99.

96 IACommHR, *Franklin Guillermo Aisalla Molina (Ecuador v. Colombia)*, para 100.

97 Compare Hathaway et al., 2011, pp. 414–415.

98 Cleveland, 2010, p. 251.

99 Cassel, 2004a, p. 175.

100 IACtHR, *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, 15 November 2017, Advisory Opinion OC-23/17.

or when that person is under its effective control abroad, either by means of conduct undertaken outside the territory of the state (extraterritorial conduct) or conduct with effects outside of the state's sovereign territory.[101] In this sense, the Court confirmed the personal model of extraterritorial jurisdiction, although arguably it has gone even further. In finding that jurisdiction under the American Convention covers any situation in which a state exercises effective authority or control over persons either inside or outside of its sovereign territory,[102] the Court indeed also held that "states must ensure that their territory is not used in such a way that it may cause significant damage to the environment of other States or areas outside the limits of its territory" and that "[t]herefore, States have an obligation to avoid causing transboundary damage".[103] Consequently, the Court accepted an alternative jurisdictional link, i.e. "when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights".[104] Given that the Court has embedded this alternative model for exceptional jurisdiction in a due diligence standard, it opened the door for extraterritorial jurisdiction where a state has no effective control over territory or persons but is rather "factually linked" to extraterritorial situations, knows about the risk of wrongful acts, and is in a position to protect on the basis of its effective control over activities occurring on its own soil.[105] However, as Berkes aptly recognizes, "the devil is in the details: the question whether the new jurisdictional link would place a reasonable or unbearable burden on States depends on its limits."[106] These limits have not been clearly marked by the Court in its Advisory Opinion, and it henceforth remains to be seen how the newly invigorated standard of extraterritorial jurisdiction will be applied – and, maybe even more important, will be limited – in the future.

7.4 The complexity of resilience: The ECHR as a showcase example

Extraterritorial jurisdiction has also been developed in the context of the ECHR, which can be traced back to the early decisions of the European Commission of Human Rights (ECommHR).[107] Nevertheless, the development of extraterrit-

101 IACtHR, *Advisory Opinion OC-23/17,* para 81.
102 IACtHR, *Advisory Opinion OC-23/17,* para 104(d).
103 IACtHR, *Advisory Opinion OC-23/17,* para 104(f) (original in Spanish).
104 IACtHR, *Advisory Opinion OC-23/17,* para 104(h) (original in Spanish).
105 Berkes, 2018.
106 Berkes, 2018.
107 Before the entry into force of Protocol 11 in 1998, individuals had to file their complaints with the ECommHR first. If the Commission found that the individual's case was well-founded, it would launch a case before the ECtHR on behalf of the individual. With the entry into force of Protocol 11, the ECommHR was abolished and individuals could take their case directly to the ECtHR.

orial jurisdiction models under the ECHR has been characterised by frequent ambiguities, inconsistencies, and controversies. This section will zoom in on the ECHR framework in order to illustrate the potential complexity and ambiguity of extraterritorial jurisdiction models.

7.4.1 The European Commission of Human Rights

First indications of extraterritorial jurisdiction were provided in *X. v. the Federal Republic of Germany*, in which the ECommHR indicated that nationals may be within a member state's jurisdiction even when domiciled or residing abroad.[108] The Commission acknowledged that extraterritorial jurisdiction may exist where state officials operating abroad, including diplomatic and consular representatives, perform certain functions.[109] At the same time, the ECommHR referred specifically to the performance of functions vis-à-vis a state's *own* nationals abroad, and this early case law therefore provides limited insight in the more general extraterritorial applicability of the Convention.

In *X v. UK*, the ECommHR dealt with the issue in more general terms and without reference to the applicant being a national of the member state. It held that authorised state agents "bring other persons or property within the jurisdiction of that state *to the extent that they exercise authority over such persons or property*. Insofar as they affect such persons or property by their acts or omissions, the responsibility of the state is engaged."[110] This, essentially, reflects a personal model of jurisdiction, which was later confirmed in a number of cases.[111] Notably, in *Cyprus v. Turkey*, the Commission held that

> "the High Contracting Parties undertake to secure the rights and freedoms defined in Section 1 to everyone 'within their jurisdiction' […]. The Commission finds that this term *is not […] equivalent to or limited to the national territory* of the High Contracting Party concerned. It is clear from the language, in particular of the French text, and the object of this Article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to *all persons under their actual authority and responsibility*, whether that authority is exercised within their own territory or abroad".[112]

It consequently restated the rule set out in *X v. UK* that where state agents exercise effective authority abroad over persons or property, the state's juris-

108 ECommHR, *X. v. Federal Republic of Germany*, 25 September 1965, Application no. 1611/62.
109 ECommHR,X v. Germany, p. 168.
110 ECommHR, *X. v. United Kingdom* (Admissibility), 15 December 1977, Application no. 7547/76, p. 74 (emphasis added).
111 See, for example, ECommHR, *W.M. v. Denmark*, 14 October 1992, Application no. 17392/90.
112 ECommHR, *Cyprus v. Turkey* 26 May 1975, Application nos. 6780/74 and 6950/75, para 8 (emphasis added).

diction and responsibility may be engaged.[113] A similar test was applied by the Commission in *Freda v. Italy,* where it found that claimant had been within the jurisdiction of Italy from the moment he had been handed over in Costa Rica by Costa Rican police officials to Italian police officials who transported him back to Italy, which effectively amounted to an extraterritorial exercise of authority over claimant.[114] Similarly, in *Sanchez Ramirez v. France,* the Commission held that applicant – who had been kidnapped in Sudan by Sudanese police officers and was handed over to French police officers – was effectively under the authority of France from the moment he was handed over to French officials and deprived of his liberty in a French military plane, and therewith within France's jurisdiction.[115]

According to the Commission in *X. and Y. v. Switzerland,* the personal model of extraterritorial jurisdiction also applies where state agents operate within their territorial borders but their actions have extraterritorial *effects* and individuals are therewith brought under their authority or control.[116] In this case, the Swiss Federal Aliens' Police prohibited German national X – who was in an extra-marital relationship with Y who lived in Liechtenstein – to enter both Switzerland and Liechtenstein for two years. The Swiss Federal Aliens' Police was authorised to do so pursuant to a bilateral treaty between Switzerland and Liechtenstein. The Commission held that

> "Switzerland is certainly responsible, under Article 1 of the Convention, for the procedure and for the effect which the prohibition of entry produced in its own territory. But it must also be held responsible insofar as the prohibition of entry produced an effect in Liechtenstein. According to the special treaty relationship existing between Switzerland and Liechtenstein Swiss authorities when acting for Liechtenstein do not act in distinction from their national competences. In fact on the basis of the treaty they act exclusively in conformity with Swiss law and it is only the effect of this act which is extended to Liechtenstein territory. That means that it was Swiss jurisdiction which was used and extended to Liechtenstein. Acts by Swiss authorities with effect in Liechtenstein bring all those to whom they apply under Swiss jurisdiction within the meaning of Article 1 of the Convention."[117]

However, the Commission seems to have conflated matters in at least two distinct ways. On the one hand, the Commission has conflated the international law notion of enforcement jurisdiction and the international human rights law notion of jurisdiction. Thus, the Court bases its finding that Swiss jurisdiction was used and extended to Liechtenstein on the fact that Switzerland pronounced the prohibition of entry on the basis of its competences and the

113 ECommHR, *Cyprus v. Turkey*, para 8.
114 ECommHR, *Freda v. Italy* (Admissibility), 7 October 1980, Application no. 8916/ 80.
115 ECommHR, *Ramirez Sances v. France,* 24 June 1996, Application No. 28780/95, p. 161-162.
116 ECommHR *X. and Y. v. Switzerland*.
117 ECommHR *X. and Y. v. Switzerland*, para 3 (emphasis added).

Liechtenstein authorities could not exclude the enforcement thereof, yet this generally is not a relevant indicator of the existence of (extraterritorial) jurisdiction as understood in the context of international human rights law. It proves that Switzerland had the authority to exercise its enforcement jurisdiction on the basis of its lawful competences, but not that Switzerland's human rights obligations under the Convention henceforth applied vis-à-vis the applicant. The finding of jurisdiction in the sense of Article 1 ECHR in this case thus seems to be based on an erroneous interpretation of the notion and consequently on a misidentification of relevant criteria. On the other hand, the Commission has arguably conflated questions of attribution and jurisdiction.[118] It first finds that the impugned acts are attributable to Switzerland. On the basis of this finding of attribution, the Commission consequently concludes apparently without further adue that the applicant was within Switzerland's jurisdiction, yet it does not outline why this is the case or what the conditions for such extraterritorial jurisdiction are. One could on this basis wonder "whether *any* extraterritorial effect of acts attributable to a state party will necessarily fall within a state's jurisdiction".[119] It would have been more convincing had the Commission applied the previously established criterion of 'effective control or authority' by looking whether Switserland exercised such effective control or authority through the acts attributable to it.

A final case of the ECommHR that should be mentioned here is the case of *Hess v. UK* – not only because it concerned a setting of detention involving multiple states, but also because of the specific conclusions reached by the Commission. The case dealt with a military prison in the British sector of Berlin jointly administered by France, the UK, the US, and the USSR, yet the complaint was brought against the UK only.[120] The Commission considered that "there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention".[121] However, since the UK was only one of four partners in a joint quadrapartite organisation, the ECommHR held that its participation did not mean that the administration and supervision of the prison were matters within its jurisdiction.[122] Indeed, the Commission explicated that "the joint authority cannot be divided into four separate jurisdictions and [...] therefore the United Kingdom's participation in the exercise of the joint authority and consequently in the administration and supervision of Spandau Prison is not a matter 'within the jurisdiction' of the United Kingdom, within

118 See similarly Da Costa, 2013, pp. 102–103.
119 Da Costa, 2013, p. 103 (emphasis added).
120 ECommHR, *Hess v. United Kingdom* (Admissibility), 28 May 1975, Application no. 6231-73. The USSR and USA were not parties to the ECHR and France had not accepted the individual complaints mechanism at the time.
121 ECommHR, *Hess v. UK*, p. 73.
122 ECommHR, *Hess v. UK*, p. 73-74.

the meaning of Art. 1 of the Convention."[123] It therefore declared the application incompatible *ratione personae*, yet simultaneously highlighted that in future cases extraterritorial prison establishments administered jointly by multiple states could come within the purview of the ECHR if agreements to that effect are entered into after the Convention came into force vis-à-vis the state concerned.[124] Given that the Commission does not further elaborate upon the matter, it remains unclear how this relates to the finding of incompatibility *ratione personae*. This also raises a number of questions, particularly as to the exact meaning of the Commission's *obiter dictum*. According to the Commission, the joint authority cannot be divided into four separate jurisdictions and *therefore* the administration and supervision of the detention facility is not a matter within the jurisdiction of the UK. It is difficult to see how this conclusion would have been different if the agreement had been concluded after the entry into force of the ECHR, in particular where it would have been concluded similarly with states who are not party to the Convention. Certainly, the entry into force of the ECHR prior to the conclusion of agreements would not – or not necessarily – alter the structure of the joint quadrapartite organisation and would accordingly not make the joint authority all by a sudden dividable 'into four separate jurisdictions'. Whilst the *conclusion* of such an agreement would fall within the scope of the Convention *ratione temporis*, the acts *implementing* such an agreement would still fall outside the scope of the Convention *ratione personae* beause of the identified impossibility to divide joint authority into separate jurisdictions. Consequently, issues could potentially arise in relation to the conclusion of the agreement by the member state, but not in relation to the acts implementing it.[125]

7.4.2 The European Court of Human Rights

The ECommHR hence developed and maintained the criterion of 'authority and control over persons and property' to determine the extraterritorial scope of the ECHR. It therewith focused primarily on a personal model of extraterritorial jurisdiction, which complemented the presumptive territorial application of the Convention. The ECtHR, however, dealt with the matter of extraterritorial

123 ECommHR, *Hess v. UK*, p. 74.
124 ECommHR, *Hess v. UK*, p. 74.
125 Compare Schaub, 2011, p. 180. It might be true, however, that the *obiter dictum* reflects a different rationale. The UK *in casu* lacked the de facto power to secure the release of Hess because the USSR was explicitly against such a release. Finding jurisdiction in such a situation would have amounted to an empty vessel, since the UK in fact wanted to release the applicant but was prevented from doing so by another state in the quadripartite collaboration. According to Lawson, had the UK been the single power obstructing the release of Hess, the ECommHR might have had less difficulties in establishing jurisdiction: Lawson, 2004, pp. 91–92. See also Buyse, 2008, pp. 278–279.

jurisdiction in its own distinctive way. In *Drozd and Janousek v. France and Spain*, which concerned applicants' allegation that they had not received a fair trial by the Andorran judiciary which consisted of French and Spanish judges, it recognised for the first time that 'jurisdiction' in Article 1 ECHR is not limited to the sovereign territory of a state.[126] Subsequently, over the years, the ECtHR has developed a personal and a spatial model of extraterritorial jurisdiction – and has, arguably, even gone a step further – as will be traced below.

7.4.2.1 The European Court of Human Rights: a spatial model

A landmark decision in relation to spatial jurisdiction was the case of *Loizidou v. Turkey*, in which claimant claimed that her rights under Article 8 ECHR and Article 1 of Protocol No. 1 were violated by Turkey now that she was prevented from accessing her property due to Turkey's military occupation of part of Cyprus.[127] In its judgment on the preliminary objections, the Grand Chamber of the Court considered that

> "although Article 1 […] sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. […] Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises *effective control of an area outside its national territory*."[128]

As such, the Court developed a spatial test of jurisdiction in *Loizidou*: wherever a state exercises effective overal control over an area, it exercises jurisdiction.[129] This spatial test of 'effective overal control' was confirmed by the

126 ECtHR, *Drozd and Janousek v. France and Spain*, para 91. In this case, the Court assessed whether applicants were within the defendant states' jurisdiction by examining whether the acts of the French and Spanish judges sitting as members of the Andorran judiciary could be attributed to France or Spain, an approach which seems to unduly confuse the tests of attribution and jurisdiction: see ECtHR, *Drozd and Janousek v. France and Spain*, para 96.

127 ECtHR, *Loizidou v. Turkey* (Grand Chamber, Preliminary Objections), Judgment of 23 March 1995, Application no. 40/1993/435/514; and ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits).

128 ECtHR, *Loizidou v. Turkey* (Grand Chamber, Preliminary Objections), para 62 (emphasis added).

129 In its judgment on the merits, the Court consequently held that applicant was under Turkey's jurisdiction for the purpose of the ECHR: "It is obvious from the large number of troops engaged in active duties in northern Cyprus […] that [Turkey's] army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the [Turkish Republic of Northern Cyprus, 'TRNC']. Those affected by such policies or actions therefore come within the 'jurisdiction' of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and

Court in amongst others *Cyprus v. Turkey*, *Manitaras and Others v. Turkey*, and *Kyriacou Tsiakkourmas and Others v. Turkey*.[130] In these judgment, the Court stressed that the *full* set of substantive rights set out in the ECHR and the ratified additional Protocols apply whenever a country exercises spatial jurisdiction.[131]

The spatial test was subsequently applied in *Ilaşcu and Others v. Moldova and Russia* and *Chiragov and Others v. Armenia*, albeit in a rather peculiar fashion. The case of *Ilaşcu and Others v. Moldova and Russia* concerned arrests by Russian-backed authorities in the separatist enclave of Transnistria in Moldova.[132] The Court held that the Moldovan Republic of Transnistria ('MRT') "remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation".[133] Given this "continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate", the Court held that Russia's jurisdiction was engaged in Transnistria.[134] Therewith, the Court arguably lowered the required standard of control under the spatial test of extraterritorial jurisdiction: it no longer refers to the requirement of 'effective overall control' over territory – which Russia seemingly did not have – but instead bases its finding of jurisdiction on Russia's 'effective authority' or at least 'decisive influence'. However, in the subsequent case of Catan and Others v. Moldova and Russia,[135] the Court backtracked from its reference in *Ilaşcu* to "effective *authority*, or at the very least […] decisive influence" by now speaking about "effective *control* and decisive influence", therewith arguably reinstating its previously developed spatial standard for extraterritorial jurisdiction.[136]

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freedoms set out in the Convention therefore extends to the northern part of Cyprus": ECtHR, *Loizidou v. Turkey* (Grand Chamber, Merits), para 56.

130 ECtHR, *Cyprus v. Turkey (Grand Chamber)*, para 77; ECtHR, *Manitaras and Others v. Turkey* (Admissibility), 3 June 2008, Application no. 54591/00, para 27; ECtHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, 2 June 2015, Application no. 13320/02, paras 150-151.

131 ECtHR, *Cyprus v. Turkey (Grand Chamber)*, para 77; ECtHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, para 150.

132 ECtHR, *Ilaşcu and Others v. Moldova and Russia*.

133 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, para 392.

134 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, paras 393-394.

135 ECtHR, *Catan and Others v. Moldova and Russia* (Grand Chamber), 19 October 2012, Applications nos. 43370/04, 8252/05 and 18454/06, para 115.

136 Also in the later cases of *Mozer v. the Republic of Moldova and Russia* and *Apcov v. the Republic of Moldova and Russia*, where the Court got additional opportunities to clarify this matter, it maintained the same standard of 'effective control and decisive influence', which confirms the ongoing validity of the effective control criterion – although the added value of the 'decisive influence' criterion remains unclear. See ECtHR, *Mozer v. the Republic of Moldova and Russia* (Grand Chamber), 23 February 2016, Application no. 11138/10, para 110; ECtHR, *Apcov v. the Republic of Moldova and Russia*, 30 May 2017, Application no. 13463/07, para 23.

Furthermore, as some have suggested, the Court in *Ilaşcu* may have conflated attribution and jurisdiction, or at least may have treated both aspects in an intermingled fashion.[137] In the subsequent case of Catan, however, the Court explicitly denied that it had conflated these issues.[138] As outlined above, in this case, the Court again used the spatial model to establish extraterritorial jurisdiction on behalf of Russia, on the basis that "the 'MRT''s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the 'MRT' administration" at the material time.[139] As it consequently states, however,

> "the Court has established that Russia exercised effective control over the 'MRT' during the period in question. In the light of this conclusion, and in accordance with the Court's case-law, it is not necessary to determine whether or not Russia exercised detailed control over the policies and actions of the subordinate local administration […]. By virtue of its continued military, economic and political support for the 'MRT', which could not otherwise survive, Russia incurs responsibility under the Convention for the violation of the applicants' rights to education."[140]

Notwithstanding the fact that the Court explicitly states that it does not conflate attribution and jurisdiction, it ultimately remains unclear on the basis of this ambiguous paragraph whether the Court considers Russia to be responsible for *all* acts of the MRT administration or whether Russia is responsible for failing to fulfil its positive obligations by not protecting individuals within Transnistria against human rights infringements by the MRT authorities.[141]

In *Chiragov and Others v. Armenia*, the Court similarly held that applicants – who alleged that they could not enjoy their properties in the Azerbaijani district of Lachin which they were prevented from returning to due to the Nagorno-Karabakh conflict – were within Armenia's jurisdiction on the basis of the spatial model.[142] Indeed, in a similar vein as in *Ilaşcu* and *Catan*, the Court held that

> "the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the [Nagorno-Karabakh Republic, 'NKR'], that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the 'NKR' and its administration survives by virtue of the military, political, financial and other support

137 See for example Milanovic, 2011, p. 139.

138 ECtHR, *Catan and Others v. Moldova and Russia,* para 115.

139 See ECtHR, Catan and Others v. Moldova and Russia, paras 122-123. In para. 114, Court explicitly mentions that it uses the spatial rather than the personal model.

140 ECtHR, Catan and Others v. Moldova and Russia, paras 150.

141 See similarly Milanovic, 2012b.

142 ECtHR, *Chiragov and Others v. Armenia* (Grand Chamber), 16 June 2015, Application no. 13216/05.

> given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention".[143]

Similar to *Ilaşcu* and *Catan*, the Court does not make clear whether it considers Armenia to be responsible on the basis of its negative or on the basis of its positive obligations. Thus, the Court does not specify whether Armenia is responsible for the conduct of the NKR separatists (on the basis of a certain test of attribution), or whether it is responsible for failing to adequately fulfil its positive duties in areas under its jurisdiction to protect the applicants from third-party conduct (in casu conduct of the NKR separatists) that infringes upon applicants' entitlements under Protocol 1 to the Convention.[144] The latter explanation appears most plausible because the Court in *Catan* has explicitly rejected the idea of a conflation of attribution and jurisdiction.[145] This explanation on the basis of a positive obligations test is supported by amongst others Judge Ziemele in her partly concurring, party dissenting opinion.[146] At the same time, like its judgments in *Ilaşcu* and *Catan*, the Court's findings do not excel in clarity or comprehensibility: for purposes of transparency it

143 ECtHR, *Chiragov and Others v. Armenia*, para 186.

144 Again, some argue that the Court amalgamated the concepts of attribution and jurisdiction: see notably the dissenting opinion of Judge Gyulumyan in *Chiragov and Others v. Armenia.* See also Milanovic, 2015.

145 ECtHR, *Catan and Others v. Moldova and Russia*, para 115.

146 As she maintains, "[t]here is no question but that persons such as the applicants who cannot access or claim compensation for their property should be able to do so. To my mind, however, Armenia's responsibility lies in its positive obligations under these Articles": para 1 of the partly concurring, party dissenting opinion of Judge Ziemele in *Chiragov and Others v. Armenia*. It should be noted, however, that Judge Ziemele did not conclude that Armenia had jurisdiction over Nagorno-Karabakh, but nevertheless found that it had failed to comply with its positive obligations under the Convention and the Protocol to the Convention. Furthermore, she notes in para 5 that "even if Armenia does have jurisdiction over Nagorno-Karabkh it is necessary, in order to find violations of the Convention, to attribute those alleged violations to Armenia, so one needs to have evidence that Armenia prevents the applicants from accessing their property in Lachin". However, in relation to the latter consideration, attributing the alleged violations – i.e. the active prevention of applicants from accessing their property – is not the only way to find violations of the Convention: to the contrary, violations of *positive* obligations are as much a violation of the Convention as are violations of negative obligations. In other words, where it could be established that Armenia has failed to uphold its positive obligations under the Convention, one can readily establish that the Convention is violated as such – no further test of attribution of the impugned violation of negative obligations needs to be undertaken per se. Moreover, Judge Ziemele finds that Armenia has violated its positive obligations in relation to applicants whilst simultaneously arguing that Armenia did not have jurisdiction over the territory concerned. This appears problematic to the extent that she does not make clear on what basis Armenia had positive obligations vis-à-vis the applicants in the first place.

would have significantly helped had the Court explicitly stated that it applied either of both alternative options in establishing Armenia's responsibility.[147]

Another interesting aspect of the *Ilaşcu* judgment is that the Court notes that

> "the words 'within their jurisdiction' in Article 1 of the Convention must be understood to mean that a State's jurisdictional competence is primarily *territorial* […], but also that *jurisdiction is presumed to be exercised normally throughout the State's territory*. This presumption may be limited in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory. […] The undertakings given by a Contracting State under Article 1 of the Convention include, in addition to the duty to refrain from interfering with the enjoyment of the rights and freedoms guaranteed, positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory […] *Those obligations remain even where the exercise of the State's authority is limited in part of its territory*, so that it has a duty to take all the appropriate measures which it is still within its power to take."[148]

The Court consequently held that the applicants were not only in Russia's jurisdiction but *also*, still, within the jurisdiction of Moldova, and although Moldova was limited in exercising authority in part of its territory, it could still be held responsible on account of its failure to discharge its *positive* obligations under the Convention.[149] The exercise of extraterritorial jurisdiction by a state through its effective overall control over part of another state's territory does hence not absolve the latter state from its obligations under the Convention: the territorial state's obligations still apply on the basis of its territorial jurisdiction, although in certain circumstances its responsibility is limited to its positive obligations only.[150]

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147 Since the positive obligations approach appears most fruitful, it would have been dilligent had the Court explained not only *that* Armenia's (positive) obligations apply, but also *why* it has not adequately fulfilled those obligations on the basis of an examination of the due diligence standard. The same applies *mutatis mutandis* to Court's reasoning in *Ilaşcu* and *Catan*.

148 ECtHR, *Ilaşcu and Others v. Moldova and Russia,* paras 312-313 (emphasis added).

149 ECtHR, *Ilaşcu and Others v. Moldova and Russia,* paras 353 and 352.

150 This was confirmed in ECtHR, *Ivanþoc and Others v. Russia and Moldova,* 15 November 2011, Application no. 23687/05, and subsequently in *Catan* and *Mozer*, where the Court in each instance confirmed that the jurisdiction of both Russia and Moldova was engaged. See also ECtHR, *Assanidze v. Georgia,* para 139-140 and ECtHR, *Sargsyan v. Azerbaijan* (Grand Chamber), 16 June 2015, Application no. 40167/06, paras 129-131 and 151, which did not concern *occupied* areas but rather *disputed* areas. In both cases, the Court found jurisdiction on behalf of Georgia respectively Azerbaijan.

7.4.2.2 The European Court of Human Rights: a personal model

In addition to the spatial model, the ECtHR also developed a personal model of extraterritorial jurisdiction. In the case of *Öcalan v. Turkey*, applicant had been arrested by Turkish officials in Kenya and was subsequently flown to Turkey. The Court held that he had been effectively under Turkish authority from the moment he had been handed over to the Turkish officials by Kenya, and as such was within Turkey's jurisdiction.[151] This case confirms that an extraterritorial act is capable of bringing a sole individual within the state's jurisdiction, which ultimately depends on the level of control exercised over that individual by the state concerned. In *Issa and Others v. Turkey,* the Court confirmed more generally that "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but *who are found to be under the former State's authority and control* through its agents operating – whether lawfully or unlawfully – in the latter State".[152] The Court based this consideration on the argument that "[a]ccountability in such situations stems from the fact 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".[153] This implies a rather strong resilience on behalf of the ECtHR: in light of globalisation developments that make it increasingly easy for states to operate abroad, the reach of human rights is expanded accordingly.

Whilst it seems that the personal test has developed rather organically as part of the Convention's living instrument doctrine, such characterisation would be deceiving – in particular when regarding the admissibility decision in *Banković et al. v. Belgium et al.*, which was delivered *before* the judgments of the Grand Chamber respectively the Chamber in *Ocälan* and *Issa*, but *after* the admissibility decisions in both of these cases. The applicants in *Banković* complained that the NATO bombing of the radio and television station Televizije Srbije (RTS) in Belgrade on 23 April 1999 violated the rights to life (Article 2 ECHR) and freedom of expression (Article 10 ECHR).[154] A lot has been written about the decision of the Grand Chamber in *Banković* and it is by no means within the purview of this research to recount this discussion in full.[155] What is particularly interesting to note, however, is that the Court in a much-criticised decision held that the Convention did not apply to the NATO bomb-

151 ECtHR, *Öcalan v Turkey*, 12 March 2003 Application no. 46221/99, para 91.

152 ECtHR, *Issa and Others v. Turkey*, 16 November 2004, Application no. 31821/96, para 71 (emphasis added).

153 ECtHR, *Issa and Others v. Turkey*, para 71.

154 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 28.

155 See amongst others Da Costa, 2013, pp. 125–161; Happold, 2003; Holcroft-Emmess, 2012; Lawson, 2004; Roxstrom, Gibney, & Einarsen, 2005.

ings in Belgrade as there would not be a convincing jurisdictional link between the victims and the respondent states.[156] The Court reached this decision on the basis of an assessment of *inter alia* the ordinary meaning of the phrase 'within its jurisdiction', the existence of state practice, and existing case law.[157] As the Court amongst others maintained, the obligation in Article 1 ECHR to secure to everyone 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".[158] In this regard, "the applicants' approach does not explain the application of the words 'within their jurisdiction' in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose".[159] Contrary to the findings in *Öcalan* and *Issa*, in *Banković*, the Court did not explicitly recognise that exercising control over persons abroad may be an 'exceptional circumstance' in which jurisdiction may be engaged extraterritorially and the Convention may apply abroad. Consequently, it did not apply – or even mention – the personal test at all. Had the Court acknowledged and applied the personal model in *Banković*, it might have reached a different conclusion altogether.[160]

To a certain extent, the judgments in *Öcalan* and *Issa* thus moved away from the strict approach taken by the ECtHR in *Banković*. In later 'post-*Banković*'[161] case law, the personal model of jurisdiction was confirmed and to a certain extent expanded by the Court.[162] In *Medvedyev and Others v. France*, for instance, French military personnel took control over merchant ship the *Winner* (flying under Cambodian flag) which was carrying significant quantities

156 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 82.
157 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 59-73.
158 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 75.
159 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), paras 75. A different approach than the approach taken in *Issa* can be recognised here: compare ECtHR, *Issa and Others v. Turkey*, para 71.
160 Indeed, it could be plausibly argued that the precision-targeted air strikes of the allied forces constituted an exercise of authority and control by the NATO states' agents operating abroad: see Da Costa, 2013, p. 164. For a different perspective, see Happold, 2003, p. 90.
161 The *Banković* case seems to mark an important point in time: given that it fitted awkwardly in the Court's existing line of case law, the decision did not only raise significant criticism but also put a spotlight on future cases in which the extraterritorial reach of the Convention had to be interpreted. There is therefore reason to distinct the Court's jurisprudence *before* the *Banković* case from the Court's case law *after* the *Banković* case: see, similarly, Altiparmak, 2005, pp. 298–299; Da Costa, 2013, p. 181; Den Heijer, 2011, p. 46; Holcroft-Emmess, 2012, p. 11; Lawson, 2004; Roxstrom & Gibney, 2017, p. 141, who discuss the pre-*Banković* and post-*Banković* cases almost as if they concerns different eras.
162 In some cases in which extraterritorial jurisdiction *prima facie* seemed to be of importance, the case ultimately was decided on other grounds: see, notably, ECtHR, *Behrami and Behrami against France and Saramati against France, Germany and Norway* (Grand Chamber, Admissibility), 2 May 2007, Application nos. 71412/01 and 78166/01, and the commentary by Buyse, 2008, p. 270.

of drugs off the coast of Cape Verde.[163] The crew members were confined under military guard until the boat had been towed into Brest harbour, which took 13 days.[164] When being brought before the judicial authorities upon their arrival, crew complained about arbitrary deprivation of liberty (Article 5(1) and 5(3) ECHR).[165] When the case reached the ECtHR, the Chamber noted that "the *Winner* and its crew were *under the control of French military forces, so that even though they were outside French territory, they were within the jurisdiction of France* for the purposes of Article 1 of the Convention".[166] The Chamber thus confirmed the personal model of extraterritorial jurisdiction: due to the control exercised by French military forces over the applicants, they were within the jurisdiction of France at the time.[167] Both parties referred the case to the Grand Chamber, which in its judgment likewise held that the applicants were within France's jurisdiction: France exercised "full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France".[168] As such, in determining extraterritorial jurisdiction on the basis of the personal model, what matters is the factual control exercised by a state, although the Grand Chamber in *Medvedyev* does not spell out precise conditions in this regard.

On a slightly different basis, in *N.D. and N.T. v. Spain* the Court also confirmed the personal model by concluding that a Malian and an Ivorian national who had climbed over the border fence between Morocco and the Spanish enclave Melilla had been within Spain's jurisdiction: irrespective of whether the border fence was located in Spain or not, from the moment that they were arrested by the *Guardia Civil*, they had been under the continuous and exclusive control of Spain and therewith within its jurisdiction.[169] In the words of the Court,

> *"[e]lle estime toutefois qu'il n'est pas nécessaire d'établir si la clôture frontalière dressée entre le Maroc et l'Espagne se situe ou non sur le territoire de ce dernier État. Elle se borne à rappeler, comme elle l'a déjà établi par le passé, que, dès lors qu'il y a contrôle sur autrui,*

163 ECtHR, *Medvedyev and Others v. France*, 10 July 2008, Application no. 3394/03, para 7.

164 ECtHR, *Medvedyev and Others v. France*, paras 11 and 17.

165 ECtHR, *Medvedyev and Others v. France*, para 28.

166 ECtHR, *Medvedyev and Others v. France*, para 50 (emphasis added).

167 The finding of extraterritorial jurisdiction was not hampered by the fact that Cambodia's jurisdiction may also be engaged on the basis of it being the flag state. This is hardly surprising: given that the territorial jurisdiction of a state does not hamper the finding that another state exercises extraterritorial jurisdiction in or over (part of) the former state´s territory on the basis of the spatial or personal model, there seems no valid reason to come to a different conclusion where a state exercises extraterritorial jurisdiction on the basis of the spatial or personal model not in or over foreign *soil* but in or over a ship sailing under foreign *flag*. See also ECtHR, *Ilascu and others v Moldova and Russia*.

168 ECtHR, *Medvedyev and Others v. France*, para 66-67.

169 ECtHR, *N.D. and N.T. v. Spain*, 3 October 2017, Application nos. 8675/15 and 8697/15.

il s'agit dans ces cas d'un contrôle de jure exercé par l'État en question sur les individus concernés (Hirsi Jamaa, précité, § 77), c'est-à-dire d'un contrôle effectif des autorités de cet État, que celles-ci soient à l'intérieur du territoire de l'État ou sur ses frontières terrestres. De l'avis de la Cour, à partir du moment où les requérants étaient descendus des clôtures frontalières, ils se trouvaient sous le contrôle continu et exclusif, au moins de facto, des autorités espagnoles".[170]

A particular discussion that ensued in the context of the personal model, in particular in the post-*Banković* era, is whether extraterritorial jurisdiction can be established beyond the *espace juridique* of the Convention. In *Pad and Others v. Turkey*, the ECtHR confirmed that extraterritorial jurisdiction on the basis of the personal model may also be found beyond the *espace juridique* of the Convention.[171] The Court therewith confirmed its earlier case law in *Issa* and *Öcalan* whilst rebutting any potential unclarity that may exist in this regard as a result of *Banković*, in which the Court had stated that

"the Convention is a multi-lateral treaty operating […] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."[172]

Conversely, in *Pad*, the Court found that "a State may be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State *which does not necessarily fall within the legal space of the Contracting States*, but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State".[173] It therewith thus largely reverted its previous position in *Banković*.[174]

170 ECtHR, *N.D. and N.T. v. Spain*, para 54. The Court seems to equate the exercise of *de jure* control over individuals with effective control. In light of the particular facts of this case, which seem to involve primarily *de facto* rather than *de jure* control on behalf of Spain, it seems that the use of the term '*de jure*' is, if anything, misplaced here and does not stand in the way of establishing jurisdiction on the basis of *de facto* control over persons. See, for further analysis, Pijnenburg, 2017.

171 ECtHR, *Pad and Others v. Turkey* (Admissibility), 28 June 2007, Application no. 60167/00.

172 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 80.

173 ECtHR, *Pad and Others v. Turkey*, para 53 (emphasis added).

174 This position was later confirmed in ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 55721/07, para 142.

7.4.2.3 Exploring six complexities

On the basis of the examination above, with the exception of *Banković*, the spatial and personal models seem to have developed rather organically within the systematics of the ECHR. They seemingly showcase clear-cut approaches of resilience: where states exercise authority and control elsewhere, either over territory or person, they can be held responsible, provided that certain criteria are fulfilled, notwithstanding the fact that the presumption of jurisdiction remains territorial. However, as various strands of case law exemplify, these resilient approaches have been haphazard and ambiguous at times and have featured various contradictory elements that have seriously complicated the development of extraterritorial jurisdiction on a principled basis. Some key complexities will now be discussed in turn.[175]

Complexity I: The puzzling Cyprus-cases

The first complexity concerns the Court's cases concerning the occupied areas in Cyprus. In *Isaak and Others v. Turkey,* the Court explicitly confirmed the spatial and personal tests of jurisdiction:

> "a State's responsibility may be engaged where […] that State in practice *exercises effective control of an area situated outside its national territory*. […] Moreover, a State may also be held accountable for a violation of the Convention rights and freedoms of *persons who are in the territory of another State but who are found to be under the former State's authority and control* through its agents operating […] in the latter State".[176]

The case concerned the death of the applicant, which allegedly resulted from the fact that he was mistreated when participating in a demonstration against the Turkish occupation of part of Cyprus.[177] The Court noted that the events took place in the neutral UN buffer zone, that Turkish forces had allowed Turkish-Cypriot demonstrators with batons and iron bars as well as the 'Turkish Republic of Northern Cyprus' ('TRNC') police to enter the UN buffer zone, and that the police had participated in the beating of Greek-Cypriot demonstrators.[178] It furthermore ascertained that Turkish-Cypriot policemen had

175 An additional contradictory development that is not further discussed here is that, on various occasions, the ECtHR has found that persons residing abroad could rely on the Convention without addressing the question of jurisdiction *at all*. See in this regard Den Heijer, 2011, pp. 47–49. Since Den Heijer has elaborated upon this complexity at length, it will not be recounted here.

176 ECtHR, *Isaak and Others v. Turkey* (Admissibility), 28 September 2006, Application no. 44587/98, p. 19 (emphasis added).

177 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 2-4.

178 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 20-21.

actively taken part in the beating of Isaak and that Turkish armed forces and other 'TRNC' police officers in the area had done nothing to prevent or stop the attack or to help the victim.[179] On this basis, the Court found that applicant was under the authority and/or effective control of Turkey through its agents, therewith confirming the personal model as established in *Issa and Others*.[180] Notwithstanding the fact that the alleged violation occurred in the UN neutral zone, the Court hence had no problems in establishing jurisdiction on behalf of Turkey: it resorted not to the spatial model but to the personal model of extraterritorial jurisdiction.

So far, so good. The subsequent case of *Andreou v. Turkey*, however, complicates the Court's approach. This case concerned a friend of Isaak, who went near the UN buffer zone where Isaak had been killed to pay her respects, at which point she was shot down by Turkish officials standing behind the border line.[181] In this case, the ECtHR held in relation to jurisdiction that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, *which was the direct and immediate cause of those injuries*, was such that the applicant must be regarded as within the jurisdiction of Turkey".[182] Again, the Court seems to have no difficulty in establishing Turkey's extraterritorial jurisdiction, although it does not resort to the spatial test nor – at least not explicitly – to the personal test. Instead, a cause-and-effect reasoning – which strikingly had been explicitly rejected in *Banković* on the basis of a rather principled reasoning –[183] was applied in order to establish extraterritorial jurisdiction. The Court therewith seems to acknowledge an alternative personal model – or a new model of extraterritorial jurisdiction altogether – centred around the notion of cause-and-effect: where acts produce effects abroad, this may amount to an exercise of jurisdiction, but only insofar as those acts can be considered the direct and immediate causes of violations of Convention rights.[184] Such cause-and-effect reasoning may indeed be seen as a particular interpretation of the 'authority and control' criterion of the personal model as previously established in amongst others *Issa* and as confirmed in amongst others *Isaak*,

179 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 21.
180 ECtHR, *Isaak and Others v. Turkey* (Admissibility), p. 21.
181 ECtHR, *Andreou v. Turkey* (Admissibility), 3 June 2008, Application no. 45653/99.
182 ECtHR, *Andreou v. Turkey* (Admissibility), p. 7 (emphasis added).
183 Compare ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 75. Admittedly, the Court in *Andreou* sets the case apart from *Banković* by stating that "[u]nlike the applicants in the *Bankovic and Others* case […] [Andreou] was accordingly within territory covered by the Convention", but the Court does not clarify whether this determination that the alleged violation occurred in the ECHR's *espace juridique* is of importance for the cause-and-effect doctrine applied here. On the basis of *Andreou* it thus remains unclear whether the Court has reversed its critical considerations in *Banković* as to the cause-and-effect approach or whether it considers the cause-and-effect approach applicable only to the Convention's *espace juridique*.
184 See similarly Da Costa, 2013, p. 209.

in the sense that both express a 'direct and immediate link' between the conduct of a state and the alleged violation of an individual's Convention rights,[185] or may be seen as a separate model altogether that is focused not so much around extraterritorial *conduct* but around extraterritorial *effects*, which in turn would mirror the approach of extraterritorial effects taken by the ECommHR (and to a certain extent also that of the IACtHR) as previously discussed.[186] In the context of this particular case, in which Turkish state officials and applicants were physically in the vicinity of each other yet not in the same territory, it is however difficult if not impossible to establish how this basis for extraterritorial jurisdiction should specifically be classified: due to the particularities of this case it is arguable that both interpretations may be applied simultaneously given that the Turkish authorities caused extraterritorial effects *and* seemingly had effective authority and control over applicants.

The case of *Solomou and Others v. Turkey* might be helpful in this regard. This case concerned shots fired by Turkish officials at a man who crossed the UN neutral zone and entered occupied territory, where he attempted to climb a flag pole with Turkish flag.[187] In this case, notwithstanding the fact that applicant had been within occupied territory when he was being shot, the Court for some reason did not apply the spatial model of extraterritorial jurisdiction. Instead, it used the personal model to establish jurisdiction: "the bullets which had hit Mr Solomou had been fired by the members of the Turkish-Cypriot forces […]. In view of the above, the Court considers that in any event *the deceased was under the authority and/or effective control of the respondent State through its agents*".[188] Thus, in this case, the fact that Turkish-Cypriot forces had fired a shot at the applicant was sufficient to establish that Turkey had authority and/or effective control over him and therewith exercised jurisdiction. As *Solomou* seems to imply, the cause-and-effect notion applied in *Andreou* is a particular variant of the personal model in that the direct firing of shots at an individual suffices the condition of authority and/or effective control over the individual concerned. The only difference between the cause-and-effect variant applied in *Andreou* and the 'regular' personal model of extraterritorial jurisdiction as applied in *Solomou* is that in the former

185 See Lawson, 2004, p. 104.

186 It should be reiterated, however, that in all cases discussed here (*Isaak*, *Andreou*, *Solomou* and *Panayi*), not only the effects were extraterritorial but also the conduct was extraterritorial. The main difference between the three cases is thus not so much the extraterritorial nature of Turkey's act, nor the extraterritorial nature of the effects of such conduct, but rather the fact that the acts and effects occurred in *different* extraterritorial spaces in the various cases. Thus, in *Isaak* and *Panayi*, both the extraterritorial act and the extraterritorial effect were situated in the UN buffer zone; in *Andreou*, the extraterritorial act took place in the occupied territory of the TRNC whilst the effect occurred on the Greek-Cypriot side near the Greek-Cypriot National Guard; and in *Solomou*, the extraterritorial act and the extraterritorial effect both took place in the occupied territory of the TRNC.

187 ECtHR, *Solomou and Others v. Turkey*, 24 June 2008, Application no. 36832/97.

188 ECtHR, *Solomou and Others v. Turkey*, paras 50-51 (emphasis added).

case, the effects of the state's conduct did not materialise in the same extraterritorial territory as where the conduct originated from. As such, it might be conceptually troublesome to speak about proper 'authority and/or effective control' over persons in the former case: the respondent state in fact had generally no authority and/or effective control over those individuals since it was, frankly, not even present in the territory concerned, but its actions nevertheless brought those individuals within its jurisdiction given the direct and immediate effect thereof, notwithstanding the fact that such effect materialised in a different territory. It might well be that for this reason, the Court prefers to maintain a conceptual distinction between authority and/or effective control over persons that are in the same territory on the one hand, and jurisdiction on the basis of a cause-and-effect reasoning where individuals whose rights are allegedly being violated are present in a different territory than the territory where the violating conduct originates from.

This is not to say, however, that the Court maintains a consistent and clear conceptual and practical distinction between these bases of extraterritorial jurisdiction. The case of *Kallis and Androulla Panayi v. Turkey* is illustrative in this regard: the case concerned the applicants' son who served in the Cyprus National Guard and had, off-duty and unarmed, entered the UN buffer zone in order to exchange his hat with one belonging to a Turkish-Cypriot soldier, after which he was shot dead by a Turkish-Cypriot soldier whom the UN Peacekeeping Force in Cyprus (UNFICYP) had allegedly observed entering the buffer zone.[189] The ECtHR subsequently held that the applicants' son had been within Turkey's jurisdiction at that point, but it does not make clear on what basis it comes to such conclusion:

> "the Court points out that in the case of *Cyprus v. Turkey* […] it found that since it had effective overall control over northern Cyprus, Turkey's responsibility could not be confined to the acts of its own soldiers or officials in northern Cyprus but had also to be engaged by virtue of the acts of the local administration which survived 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 it has ratified, and that violations of those rights are imputable to Turkey […]. According to the Government's own version of the facts, Stelios Kalli Panayi died as a result of the use of lethal force by Turkish or Turkish-Cypriot soldiers. Moreover, when he was hit by the bullets, he was entering the territory of the 'TRNC'. Under these circumstances Stelios Kalli Panayi must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1 (see, *mutatis mutandis, Solomou and Others v. Turkey*, […]). The responsibility of the respondent State under the Convention is accordingly engaged."[190]

189 ECtHR, *Kallis and Androulla Panayi v. Turkey*, 27 October 2009, Application no. 45388/99, para 11.

190 ECtHR, *Kallis and Androulla Panayi v. Turkey,* paras 26-27.

Whilst the Court thus finds extraterritorial jurisdiction, it remains opaque what test it has applied to come to that conclusion. Its reference to *Cyprus v. Turkey* and the effective overall control of Turkey over northern Cyprus seems to indicate a spatial approach, yet both the perpetrating Turkish-Cypriot soldier and the applicants' son had not been *in* the TRNC when the latter was shot – although the applicants' son was about to enter the occupied territory. In turn, the reference to *Solomou* seems to imply that the Court *mutatis mutandis* applied the personal test of authority and/or effective control over the applicant, which indeed seems better suited in light of the particularities of this case, but the Court does not explicitly state that the applicants' son had been within Turkey's authority and/or effective control – in fact, it does not even mention this threshold condition. Instead, the Court seems to implicitly rely on a cause-and-effect reasoning in a similar fashion as in *Andreou*, yet this is puzzling given that cause and effect took place in the same territory (i.e. the UN buffer zone) and one would thus expect on the basis of previous case law – in particular on the basis of *Isaak*, in which cause and effect also both materialised in the UN buffer zone – that the Court would simply rely on the general model of personal jurisdiction and the according test of 'authority and/or effective control'. Instead, the Court does not even refer to the *Isaak* case in relation to the issue of admissibility. Furthermore, if the Court indeed relied on a cause-and-effect approach, this does not explain why the Court refers solely to *Solomou* (and not *Andreou,* as one might expect in a case where the cause-and-effect rationale is being applied) nor why the fact that the applicants' son was about to enter the TRNC is considered a relevant circumstance for establishing jurisdiction on this basis. *Panayi* thus seems to diffuse or even confuse the various bases for extraterritorial jurisdiction, which materially seems to lead to a more protective approach but conceptually leads to further unclarity.

Complexity II: the appropriate test in cases of extraterritorial military detention

Various of the post-*Banković* cases confirming the personal model of extraterritorial jurisdiction concerned military troops operating abroad.[191] Specifically,

191 In *Saddam Hussein v. Albania and Others*, for example, applicant complained about his arrest by US troops deployed in Iraq, with his complaint being directed against all states of the Council of Europe that were considered to have supported the coalition forces in Iraq. The ECtHR confirmed both the personal and spatial models of control, but held that in this case that applicant had failed to demonstrate that any of the respondent states had jurisdiction on the basis of their control of the territory or on the basis of their control over him as a person given that he had not demonstrated that the respondent states had any responsibility for, or any involvement or role in, his arrest and detention. The fact that the respondent states allegedly were part of a coalition with the US was considered insufficient as a basis for jurisdiction, in particular given that the impugned actions were carried out by the US, the task of providing security in the area where the actions took

various of these cases concerned contexts of extraterritorial military *detention*, which of course is of particular interest for the research at hand. The case law of the ECtHR in this regard has, however, arguably been complicated and rather haphazard.

Al-Saadoon and Mufdhi v. UK concerned the arrest of two Iraqi nationals by British military forces in Basra in 2003. They were arrested as they had allegedly orchestrated violence against the 'multi-national force' ('MNF') and were considered security threats.[192] Applicants were briefly detained as 'security internees' at Camp Bucca, an American facility in Iraq, after which they were transferred to a British-operated facility in Iraq.[193] Later, applicants were classified as 'criminal detainees' in relation to the killings of two British soldiers in southern Iraq and their case was referred to the Iraqi High Tribunal, although they initially remained under British custody.[194] At a later stage, their transfer to Iraqi custody was requested by the Iraqi authorities, which in turn was challenged by applicants before the ECtHR *inter alia* because their eventual transfer would likely result in their execution following an allegedly unfair trial.[195] In its assessment of jurisdiction, the Court first reiterated that Article 1 ECHR "sets a limit, notably territorial, on the reach of the Convention".[196] With reference to *Hess*, the Court consequently considered in relation to the two British-run detention facilities established on Iraqi territory that "given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction".[197] Applicants thus were within the UK's jurisdiction until they were physically transferred into the custody of Iraq on 31 December 2008.[198] However, it ultimately remains unclear whether the Court applied the spatial or the personal model of extraterritorial jurisdiction in *Al-Saadoon*: it appears to apply the former test without explicitly referring to a particular geographical area but rather to the premises as such.

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place was assigned to the US and the overall command of the coalition was vested in the US authorities. See ECtHR, *Saddam Hussein v. Albania and Others* (Admissibility), 14 March 2006, Application no. 23276/04.

192 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), 30 June 2009, Application no. 61498/08, paras 25-26.

193 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 25-26.

194 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 27-30.

195 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), para 94. The ECtHR already issued interim measures on 30 December 2008 ordering that UK should not transfer applicants into Iraqi custody, but the British authorities nevertheless transferred them into the physical custody of Iraq a day later on the basis of 'exceptional circumstances': ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, paras 55-58. See also Cross & Williams, 2009, p. 689.

196 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 84-85.

197 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), paras 87-88.

198 ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom* (Admissibility), para 89.

In *Al-Jedda v. the United Kingdom,* the Court was provided with a chance to shed light on this matter, which it, however, arguably did not do.[199] In this case, applicant – an Iraqi and British national –was detained in a British-run facility in Basrah after he had been arrested on the basis of British intelligence by US military forces.[200] The Court briefly held that

> "[t]he internment took place within a detention facility in Basra City, controlled exclusively by British forces, and the applicant was therefore within the authority and control of the United Kingdom throughout ([…] see also *Al-Skeini and Others v. the United Kingdom* […] *§ 136,* […] and *Al-Saadoon and Mufdhi v. the United Kingdom* […] *§ 88* […])".[201]

Thus, the fact that a detention facility site wat exclusively controlled by British forces was sufficient to establish extraterritorial jurisdiction, although it again remains unclear whether the Court reaches this conclusion on the basis of a spatial model (with the detention premises being the controlled 'area') or a personal model (with applicants being *de facto* and *de jure* controlled by the UK). This unclarity is fostered by the fact that the Court refers to both *Al-Saadoon* – which, as outlined above, seems to apply a *spatial* model albeit in a peculiar fashion – and paragraph 136 of the *Al-Skeini* decision – which, as will be further highlighted below, deals exclusively with the *personal* model of jurisdiction.[202] Ambiguity about the standard used thus persists and *Al-Jedda* consequently seems to shed little light – or even seems to dim some of the existing light – on the conceptual framework of extraterritorial jurisdiction.

Later case law still seems conflicted on the matter. In *Hirsi Jamaa and Others v. Italy*, which however did not concern extraterritorial detention as such, the Court held that the spatial model does not include "instantaneous extraterritorial acts" and its application should be determined on the basis of the particular facts of the case, "for example full and exclusive control over *a prison* or a ship".[203] Full and exclusive control over a prison thus fulfils the spatial test of extraterritorial jurisdiction. At the same time, in the alternative it could still be argued that the Court in essence applied a personal test, in which the condition of 'authority and control over persons' is fulfilled by the *de facto* exclusive control of the UK over the detention facility in which those persons were detained. This alternative interpretation seems particularly plausible, in turn, in light of the Court's later case law in *Hassan v. UK*.[204] In this case, which did concern military detention abroad, the Court explicitly found

199 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), 7 July 2011, Application no. 27021/08.
200 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), para 10.
201 ECtHR, *Al-Jedda v. United Kingdom* (Grand Chamber), para 85
202 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 136 and 138.
203 ECtHR, *Hirsi Jamaa and Others v. Italy*, para 73 (emphasis added).
204 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber) 16 September 2014, Application no. 29750/09.

jurisdiction on the basis of the personal model, not on the basis of the spatial model. Notwithstanding the fact that detention took place in a US-run facility, jurisdiction on behalf of the UK was indeed established because of its authority and control over the victim in question.[205]

Complexity III: Al-Skeini and 'public powers'

The case of *Al-Skeini* concerned the killing of one of the applicants – Baha Mousa – whilst in custody in a UK-run facility in Iraq and the killing of five applicants by British military troops on patrol in Basra. In its assessment of the jurisdictional threshold of Article 1 ECHR, the Grand Chamber first reiterated the principle that jurisdiction under Article 1 ECHR is primarily territorial,[206] that it is presumed to be exercised normally throughout the state's territory,[207] and that extraterritorial acts can only constitute an exercise of jurisdiction ex Article 1 ECHR in exceptional cases.[208] The Court subsequently summarised the personal model and the spatial model. In relation to the personal model, the Court held that

> "[f]irst, it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others […]. Secondly, the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). […] In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. This principle has been applied where an individual is taken into the custody of State agents abroad. […] The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question. […] It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored' (compare *Banković*, cited above, §75)".[209]

205 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 78.
206 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 59.
207 Compare ECtHR, *Ilaşcu and Others v. Moldova and Russia.* See ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 131.
208 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 131.
209 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 134-137.

Without admitting it, the Grand Chamber contradicts its earlier findings in *Banković* on various points. First, contrary to what the Court found in *Banković*, the power to kill a person *prima facie* appears very much to amount to 'the exercise of physical power and control over the person in question' and should therefore arguably result in extraterritorial jurisdiction on the personal model. Second, the Court here states that the Convention rights can be 'divided and tailored', whereas in *Banković* it maintained the exact opposite position, i.e. that "the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 […] can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question".[210] The fact that the Court in *Al-Skeini* asks to 'compare' (instead of, for example, to 'contrast') its finding with the *Banković* case without admitting that it came to a completely contradictory finding in the latter case is hence, as Milanovic has argued, a "somewhat cheekily" request.[211] In any event, by now pointing out that Convention rights can be divided and tailored, the Court seems to clarify that states cannot be expected to do the impossible when exercising extraterritorial jurisdiction on the basis of the personal model, i.e. to continuously secure the full range of negative and positive Convention rights wherever they exercise authority and/or effective control over a person abroad.[212] Third, and maybe most fundamental for the judgment at hand, the Court refers to *Banković* when maintaining that it has recognised that extra-territorial jurisdiction may be based on the exercise by a state of all or some of the public powers normally to be exercised by the territorial state. However, in the *Banković* case, the reference to 'public powers' did not concern the personal model but the spatial model. The Court has here displaced this criterion which, as will be shown below, was ultimately decisive for its puzzling conclusions.[213]

In relation to the spatial model, the Court in *Al-Skeini* reiterated that

> "Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration […]. Where the fact of such domination over the territory is

210 ECtHR, *Banković et al. v. Belgium et al.* (Grand Chamber), para 75.

211 Milanovic, 2012a, p. 129.

212 This clarification was later on confirmed by the Grand Chamber in ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 75. States can hence no longer sustain the argument that their extraterritorial conduct does not give rise to *any* obligations under the Convention because they are not able to secure *all* rights enshrined therein in a particular situation.

213 See similarly Milanovic, 2012a, p. 128.

established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. It is a question of fact whether a Contracting State exercises effective control over an area outside its own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region […]."[214]

Thus, where extraterritorial jurisdiction is established on the basis of the spatial model, the Contracting State has to respect, protect, and fulfil *all* substantive Convention rights for all within the area concerned. Under this model rights can therefore not be divided and tailored to the circumstances.

Subsequently, however, the Grand Chamber uses a rather puzzling approach in determining jurisdiction in the case at hand which does not *prima facie* fit well with the principles identified. As the Grand Chamber concludes,

"following the removal from power of the Ba'ath regime and until the accession of the Interim Government, *the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government*. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. *In these exceptional circumstances*, the Court considers that the United Kingdom, *through its soldiers engaged in security operations in Basrah during the period in question*, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention."[215]

Instead of answering the question whether the applicants were within the jurisdiction of the UK on the basis of an exercise of effective control by the UK over the territory concerned (i.e. the spatial model) or an exercise of control and authority by the UK over an individual (i.e. the personal model), the Court comes to a bewildering mix of both tests centred around the notion of 'public powers'. In essence, the Grand Chamber finds a jurisdictional link between all applicants and the UK on the basis of the personal model, but at the same time it makes this jurisdictional link contingent on the exercise of some 'public powers' by the UK in Iraq, a concept that has previously only been applied to establish extraterritorial jurisdiction on a spatial basis and that remains ill-defined at best, "nebulous"[216] at worst. It henceforth appears that the Court has created a test of jurisdiction that incorporates elements of both models, but is squarely neither. As Milanovic criticises, this peculiar test means that

214 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), paras 138-139.
215 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 149.
216 Milanovic, 2012a, p. 139.

if the UK had *a contrario* not exercised public powers in Iraq, the personal model would seemingly not have applied, which in turn seems fundamentally at odds with the findings in amongst others *Issa*, *Öcalan*, and *Pad*.[217]

The introduction of the 'public powers' element in *Al-Skeini* is even more peculiar given that in subsequent cases it has not been reiterated. Notable examples in this regard are the judgments in *Hassan v. the United Kingdom* and *Jaloud v. the Netherlands* of September respectively November 2014.

The case of *Hassan* concerned the arrest of the applicant's brother, an Iraqi national, and his subsequent detention by British military forces in a British-run section of a US-operated detention facility (Camp Bucca) on the basis that he was suspected of posing a threat to security. After interrogation by both UK and US officials, he was however declared a non-combatant not posing a security threat and was allegedly released, yet he did not contact his family and his body was recovered months later far away from Camp Bucca with bullet wounds in his chest and with his hands tied with plastic wire.[218] In order to establish whether the applicant's brother had been within the UK's jurisdiction, the Court considered it unnecessary to decide whether the UK had effective control over the area concerned given that it found that the United Kingdom exercises jurisdiction on the basis of the personal model.[219] With explicit reference to the personal model as summarised in *Al-Skeini*, the Court indeed considered that

> "[f]ollowing his capture by British troops early in the morning of 23 April 2003, until he was admitted to Camp Bucca later that afternoon, Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction".[220]

The Court furthermore found that the applicant's brother remained within the jurisdiction of the UK after his admission to Camp Bucca, irrespective of the fact that it is a US-run facility: in light of the arrangements operating at Camp Bucca at the time, the applicant's brother continued to fall under the UK's authority and control.[221] However, the Court did not refer to the condition of 'public powers' as applied in *Al-Skeini*, which seems rather inconsistent. The material facts in *Al-Skeini* took place when the UK had assumed

217 *Al-Skeini* as such significantly progressed the case law of the Court, but did not – as some might have expected – overturn the *Banković* decision in this crucial regard: see Milanovic, 2012a, pp. 130–131.
218 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 29.
219 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 75.
220 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 76. The Court dismisses the UK's argument that the personal model should not apply in 'the active hostilities phase of an international armed conflict': ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 76-77.
221 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 78.

authority for the maintenance of security in South-East Iraq and the victims were killed in the course of security operations carried out pursuant to that assumption of authority, whereas the material facts in Hassan took place before that period, i.e. before the UK had declared that the active hostilities phase of the conflict had ended and before the UK had assumed responsibility for the maintenance of security in South-East Iraq.[222] Against this background, it seems peculiar that the Court in Hassan does not reiterate that the application of the personal model is conditioned by the notion of 'public powers': far more than in Al-Skeini, in the present case it is very questionable that the UK was in fact exercising public powers in the region at the time, and it consequently appears questionable whether the Court would have found jurisdiction on the basis of the personal model if it had factored in its previously established public powers condition. Given its complete silence in this regard, one can only wonder why the Court does not, contrary to what it is implying, apply a similar test as in *Al-Skeini.*

The case of *Jaloud v. The Netherlands* concerned the death of an Iraqi citizen, who was shot at a checkpoint in Iraq which at the time was under the command of a Dutch officer.[223] The applicant, who was the father of the deceased, claimed that the Netherlands had inadequately investigated the fatal shooting and had therefore breached the positive limb of Article 2 of the ECHR. The Dutch government argued that the victim had not been within its jurisdiction since the United States and the United Kingdom were the 'occupying powers' in Iraq under UN Security Council Resolution 1483, not the Netherlands, and furthermore argued that it *had not assumed any public powers normally to be exercised by a sovereign government* – only the United States and the United Kingdom, which had set up the Coalition Provisional Authority, had done so according to the Dutch government.[224] The Netherlands' contingent in Iraq had, as the Dutch government furthermore argued, always been under the operational control of the British commander of the Multinational Division (South East).[225] The Grand Chamber rejected the arguments of the Netherlands, however, on the basis of an elaborate discussion of the chain of command as applicable at the time:

> "Although Netherlands troops were stationed in an area in southeastern Iraq where [Stabilization Force in Iraq, SFIR] forces were under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there. […] That being so, *the Court cannot find that the*

222 ECtHR, *Hassan v. the United Kingdom* (Grand Chamber), para 75.
223 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber).
224 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 113-114 (emphasis added). The Netherlands therewith explicitly referred to the 'public powers' element as developed in *Al-Skeini*.
225 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), para 115.

> *Netherlands troops were placed 'at the disposal' of any foreign power*, whether it be Iraq or the United Kingdom or any other power, *or that they were 'under the exclusive direction or control' of any other State* (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility, […]). […] Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its 'jurisdiction' within the limits of its SFIR mission and *for the purpose of asserting authority and control over persons* passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the 'jurisdiction' of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention."[226]

At first sight, it seems that the Court is confusing the questions of attribution and jurisdiction: its considerations that the Netherlands had not placed its troops at the disposal of a foreign power and had retained full command over its contingent essentially concern the question whether the conduct of the forces concerned can be attributed to the Netherlands, not the question whether the victim was within the Netherlands' jurisdiction for the purpose of the Convention.[227] As others have already argued, however, the Court has dealt with the questions of attribution and jurisdiction *simultaneously* in the quoted part above: given that the Netherlands relied heavily on the argument that the conduct of its soldiers in Iraq could not be attributed to it since they were operating under UK command, the Court *first* had to resolve this issue of attribution before it could resolve the issue of jurisdiction proper.[228] Whereas

226 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 149-152 (emphasis added).

227 This critique has for example been outlined by Den Heijer, 2015, p. 362, as well as by the two concurring opinions of Judges Spielmann and Raimondi in the *Jaloud* case.

228 Haijer & Ryngaert, 2015, p. 178; Milanovic, 2014. For a contrary perspective, see Rooney, 2015, who challenges the idea that an 'attribution test' cannot as a matter of methodology and in light of international law on state responsibility be applied as a test of jurisdiction, and argues that the Court in *Jaloud* adopted such an 'attribution test' instead of the personal or territorial models of jurisdiction. Her reasoning is, however, unpersuasive in that she seems to value attribution and jurisdiction as *alternatives* rather than as coherent prerequisites: indeed, she for example argues that "an attribution test is concerned with determining *who* should be held responsible rather than *whether* the ECHR is applicable abroad. In this way, an attribution test signals a lack of concern by the ECtHR that the actions took place abroad. The arbitrary delimitation on the extraterritorial application of the ECHR provided by the two jurisdiction tests confirmed in *Al Skeini* is no longer applicable": Rooney, 2015, p. 409. She maintains this view *inter alia* on the basis of the assertion that conflating attribution and jurisdiction would not be methodologically unsound nor in conflict with international law on state responsibility. In doing so, she relies heavily on the ILC Draft Articles, but simultaneously she for example does not refer to the *Tehran*

in many cases the question of attribution is implicitly dealt with, in this case it indeed makes sense to deal with it explicitly given the line of arguments of the respondent state: had the Court established that the conduct could not be attributed to the Netherlands, this would automatically mean that the Netherlands had not exercised jurisdiction through such conduct, as such conduct would not be its own. The Court's approach is thus accurate, although the Court could have elucidated more explicitly what it was doing under the header of 'jurisdiction' in its judgment.[229] In sum, the Court *first* held that the conduct of the Dutch forces in Iraq was still attributable to the Netherlands because it could not find that those troops were placed at the disposal of, or under the exclusive direction or control, of another state, and *subsequently* found that the Netherlands had exercised jurisdiction "within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint".[230] Thirdly – and this may explain some of the confusion amongst commentators as to the Court's approach – the Court *again* deals with attribution under a particular sub-heading called 'attribution', yet this time the Court did not examine whether the conduct of troops in Iraq can generally be attributed to the Netherlands but rather whether the *actual impugned conduct* can be attributed to the Netherlands, which it concludes in the affirmative: "[t]he facts giving rise to the applicant's complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the responsibility of the Netherlands under the Convention".[231]

The Court's approach in finding jurisdiction seems to be consistent with the personal model of extraterritorial jurisdiction, yet it remains unclear to what extent the criterion as formulated by the Grand Chamber here – the exercise of jurisdiction '*for the purpose of* asserting authority and control over persons' – differs from the previously established understanding that the personal model is based on the *actual* exercise of authority and control over

Hostages case in which the ICJ clearly outlined that state responsibility is a two-step process. Ultimately, Rooney does not make convincingly clear why the second step of the process could simply be circumvented by one overarching test of attribution, nor how this could be justified in light of the underlying rationales of the jurisdictional clause of the ECHR and – by extension – those of other treaties. Furthermore, her argument that attribution and jurisdiction *could* be conflated has little explanatory value of whether they *should* be conflated in the first place.

229 See similarly Haijer & Ryngaert, 2015, p. 178; Milanovic, 2014. The idea that jurisdiction cannot be established without an implicit or explicit test of attribution was also highlighted by Judge Gyulumyan in her dissenting opinion in *Chiragov* (see in particular paras 52-59 of the dissent).

230 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-152.

231 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 151-155. Compare Sari, 2014, who argues that the Court has confused the criteria to be applied in its two attribution inquiries, i.e. the one preceding the decision on jurisdiction and the one succeeding the decision on jurisdiction.

persons. Importantly, the Court in its considerations on jurisdiction does not refer to the element of 'public powers' that it had previously introduced in *Al-Skeini* as a necessary criterion under the personal model, and the judgment in *Jaloud* is therewith, similar to *Hassan*, seemingly more in line with the decisions in amongst others *Öcalan*, *Issa*, *Pad*, and *Solomou* – in which the exercise of public powers was not dealt with as an element of personal jurisdiction. It is arguable – although certainly not uncontested – that the controlling of a checkpoint amount to the exercise of public powers,[232] but it remains unclear whether the Court has either dealt with the criterion of 'public powers' implicitly – which would be striking given the explicit arguments made by both parties on the matter – or has intentionally or unintentionally not dealt with it at all.

Consequently, *Hassan* and *Jaloud* raise questions as to the coherence and clarity of the Court's case law. In particular, it remains enigmatic that the exercise of 'public powers' was not part of the Court's assessment, at least not explicitly, notwithstanding the fact that the Court in *Al-Skeini* relied heavily on the very same notion and notwithstanding the fact that both the Netherlands, the respondent government, and the applicant in *Jaloud* referred to the notion in their argumentation before the Court.[233] In turn, this could be taken to mean that the Court has reversed the *Al-Skeini* decision insofar as it would no longer consider the 'exercise of public powers' to be a constitutive element of the personal model. More precisely, it could be taken to mean that the exercise of public powers *could* be an indicator of extraterritorial jurisdiction under the personal model but that the lack of such exercise of public powers does not *a contrario* mean that the personal model does not apply.

This latter position seems to be confirmed in *Pisari v. Moldova and Russia*.[234] The facts in *Pisari* are to certain extents comparable to those in *Jaloud*: applicants' son, a Moldovan national, was shot by a Russian soldier at a peacekeeping security checkpoint on Moldovan territory separating Moldova from Transnistria.[235] The applicants, relying on Article 2 of the Convention, complained that their son had been killed by state agents and that the domestic authorities had not carried out effective investigations.[236] In deciding upon the admissibility of the case, the Court noted that neither

232 This argument was explicitly made by the applicants and was explicitly rejected by the respondent state: ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 114, 128-129, and 135.

233 ECtHR, *Jaloud v. the Netherlands* (Grand Chamber), paras 114 and 128.

234 ECtHR, *Pisari v. the Republic of Moldova and Russia*, 21 April 2015, Application no. 42139/12.

235 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 6. The checkpoint was created pursuant to a 1992 agreement between the Russian and Moldovan Presidents putting an end to the military conflict in the Transnistria region. The checkpoint was manned by personnel from Moldova, Russia, and Transnistria: ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 30.

236 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 32.

Russia nor Moldova had disputed their jurisdiction and reiterated briefly, with reference to *Al-Skeini* and *Jaloud*, the personal model: the use of force by a state's agents operating abroad may under certain circumstances bring individuals under the control of the respective state and therewith within their jurisdiction.[237] Such instances "*may include* the exercise of extra-territorial jurisdiction by a Contracting State when, in accordance with custom, treaty or other agreement, its authorities carry out executive functions on the territory of another State *(see Al-Skeini […] §§135 and 149)*".[238] Thus, referring explicitly to the relevant passage in *Al-Skeini*, the Court provides that extraterritorial jurisdiction under the personal model *may* be exercised when state authorities carry out executive functions abroad. As such, the concrete exercise of 'executive functions' (or 'public powers')[239] could suffice to fulfil the personal test but is not a *condicio sine qua non*.

Complexity IV: Hirsi Jamaa and the confusion of jurisdiction standards

The topic of extraterritorial jurisdiction came to the fore again in 2012 in *Hirsi Jamaa and Others v. Italy*. Applicants, 11 Somali and 13 Eritrean nationals, were intercepted on the high seas together with approximately 200 individuals whilst they were crossing the Mediterranean Sea from Libya to Italy, and were subsequently returned to Libya pursuant to a bilateral agreement without the opportunity to apply for asylum.[240] Applicants relied on Article 3 of the Convention and claimed that Italy had exposed them to the risk of ill-treatment in Libya (i.e. direct refoulement) and to the risk of being repatriated to Somalia

237 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33.

238 ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33 (emphasis added). In relation to Russia, the Court holds that "the checkpoint in question, situated in the security zone, was manned and commanded by Russian soldiers in accordance with the agreement putting an end to the military conflict in the Transdniestrian region of Moldova […]. Against this background, the Court considers that, in the circumstances of the present case, Vadim Pisari was under the jurisdiction of the Russian Federation": ECtHR, *Pisari v. the Republic of Moldova and Russia*, para 33. In relation to Moldova, the Court observes the applicants' statement that they did not want to pursue their application in relation to Moldova because they did not consider Moldova responsible for their son's death and because they did not consider that Moldova had insufficiently investigated the circumstances of his death. On the basis of this, "[t]he Court sees no reason not to accept the applicants' position and is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the complaints against the Republic of Moldova": ECtHR, *Pisari v. the Republic of Moldova and Russia*, paras 34-35. Still, it would have been preferable if the Court had, at least *obiter dictum* and in general terms, reiterated that jurisdiction is presumed to be exercised normally throughout the State's territory and that the territorial state continues to have positive obligations even where the exercise of its authority is prevented or limited in part of its territory.

239 Given the reference to the relevant sections of *Al-Skeini* in *Pisari*, both criteria may be interpreted synonymously.

240 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 9-14 and 85.

respectively Eritrea (indirect refoulement), and relied furthermore on Article 4 of Protocol No. 4, which prohibits collective expulsions.[241] In assessing jurisdiction, the Court considers that the events occurred on the high seas on board of military ships flying the Italian flag.[242] On this basis, the Court concludes that applicants were indeed within Italy's jurisdiction given the *de jure* control that Italy exercised over them.[243] This reasoning appears to be flawed, however: whereas under international law a state may exercise prescriptive jurisdiction over registered ships flying its flag, this recognition of jurisdictional authority is not connected to the jurisdiction threshold of Article 1 ECHR. The Court in *Hirsi Jamaa* confused these distinct understandings of the notion of jurisdiction.[244] It concluded that *since* the ship concerned was flying the Italian flag, and Italy *thus* had prescriptive jurisdiction, the threshold criteria of jurisdiction in the sense of Article 1 ECHR was *therewith* also fulfilled, which ultimately appears to constitute an erroneous interpretation of both the significance of jurisdiction under public international law and the distinct jurisdictional threshold in Article 1 ECHR.[245]

This would have been highly problematic, were it not that the Court in *Hirsi Jamaa* did not stop its jurisdictional inquiry here. Although the Court initially bases its finding of extraterritorial jurisdiction simply (yet erroneously) on the principle of flag state jurisdiction, it consequently highlights that even if Italy had not been the flag state, in a similar vein as in *Medvedyev*, applicants would still have been within Italy's jurisdiction given the continuous and exclusive *de facto* control of the Italian authorities over them.[246] In other words, the Court recognises that the personal model of jurisdiction can also be successfully applied to the case at hand in light of the *de facto* situation, therewith confirming that applicants would still have been within Italy's jurisdiction in case the ship had sailed under a third country's flag. *Hirsi Jamaa* therewith to a large extent recognises the earlier ruling in *Medvedyev* that what matters is not merely the *de jure* situation but, importantly, also the *de facto* control exercised by a state.[247]

241 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 3.
242 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), para 76.
243 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 77-78.
244 And, by extension, in the relevant considerations in *Banković* and *Medvedyev* that were reiterated by the Court in *Hirsi Jamaa*, para 537.
245 See, similarly, Milanovic, 2011, p. 167.
246 ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), paras 80-81.
247 See ECtHR, *Medvedyev and Others v. France*, para 67. Compare ECtHR, *N.D. and N.T. v. Spain*, para 54. See also S. Kim, 2017, p. 59.

Complexity V: extraterritorial detention settings

This section turns to two somewhat problematic cases that are of particular relevance here as they concern extraterritorial confinement specifically: *Stephens v. Malta* and *Vasiliciuc v. Moldova*.[248]

Stephens concerned the detention of applicant in Spain following a request for extradition by the Maltese authorities on the basis that he was suspected of having conspired in drug trafficking. Whilst awaiting extradition, the applicant challenged the lawfulness of the arrest warrant before the Maltese judicial authorities on the basis that the court that had issued the warrant was not competent to do so. On appeal, the Constitutional Court of Malta held that the arrest warrant was indeed null and void on the basis of a procedural defect. Applicant was consequently released on bail in Spain, but was later rearrested and extradited to Malta on the basis of a new extradition request, after which he was found guilty of the criminal charges against him. Before the ECtHR, applicant relied on Article 5(1) of the Convention in complaining about the unlawfulness of his detention by – and this is where it gets particularly interesting for present purposes – the *Maltese* rather than the Spanish authorities. As such, the case is remarkably extraterritorial in nature: during the entire period of his detention prior to extradition, applicant had not been on Maltese soil *at all*. The question whether applicant was within Malta's jurisdiction hence came to the fore, and although the Maltese government had not raised an objection to being held accountable for the alleged facts, the Court decided to deal *proprio motu* with the matter.[249]

The Court's approach is however far from axiomatic. The Court first remarks that "[t]he question to be decided is whether the facts complained of by the applicant can be *attributed* to Malta".[250] It subsequently reiterates that following Article 1 ECHR "the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention".[251] Thereafter, the Court refers to a plethora of cases to reflect that the notion of jurisdiction is essentially territorial and other bases of jurisdiction remain exceptional and require special justification.[252] The Court hence apparently attempts to deal with questions of attribution and jurisdiction at the same time, which – as outlined

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248 ECtHR, *Stephens v. Malta (no. 1)*, 21 April 2009, Application no. 33740/06; ECtHR, *Vasiliciuc v. the Republic of Moldova*, 2 May 2017, Application no. 15944/11.
249 ECtHR, *Stephens v. Malta (no. 1)*, para 45.
250 ECtHR, *Stephens v. Malta (no. 1)*, para 45 (emphasis added).
251 ECtHR, *Stephens v. Malta (no. 1)*, para 48.
252 ECtHR, *Stephens v. Malta (no. 1)*, para 49.

before in the context of *Jaloud* – is not necessarily unsound.[253] Similar to *Jaloud*, however, the Court could once again have been more clear in its approach. Rather than stating that the question to be decided *is* one of attribution (full stop),[254] the Court could more clearly have expressed that it has to examine *both* the questions of attribution and jurisdiction, although it to a certain extent implies such an approach by referring to both jurisdiction and attribution when stating that "*the exercise of jurisdiction* is a necessary condition for a Contracting State to be able to be held responsible for *acts or omissions imputable to it* […]".[255]

Although the Court does not excel in clarity, in the end it thus seems to apply a sound approach to determining the responsibility of Malta under the Convention in the present case. One would consequently expect that the Court would engage in an analysis of (a) whether the detention of the applicant can be attributed to Malta, and (b) whether applicant was within Malta's jurisdiction, in order to determine whether Malta's responsibility is engaged. The Court indeed seems to start off with a test of attribution, by noting that

> "the applicant was *under the control and authority of the Spanish authorities* in the period between his arrest and detention in Spain on 5 August 2004 and his release on bail on 22 November 2004. In so far as the alleged unlawfulness of his arrest and detention is concerned, *it cannot be overlooked that the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities* pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition. […] By setting in motion a request for the applicant's detention pending extradition, *the responsibility lay with Malta to ensure that the arrest warrant and extradition request were valid* as a matter of Maltese law, both substantive and procedural. In the context of an extradition procedure, *a requested State should be able to presume the validity of the legal documents issued by the requesting State* and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, *a technical irregularity which the Spanish court could not have been expected to notice* when examining the request for the applicant's arrest and detention. *Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain*. […] The Court would also add that both the Civil Court and the Constitutional Court accepted without further inquiry that Malta has breached Article 5 of the Convention as a result of the applicant's arrest and detention on the strength of a defective arrest warrant. […] In the light of the above,

253 Similar to *Jaloud*, it is not *prima facie* clear that the impugned act can be attributed to the respondent state, and the Court therefore logically first has to explicitly resolve this issue before dealing with the question of whether such act brings the applicant within the respondent state's jurisdiction. Compare Haijer & Ryngaert, 2015, p. 178; Milanovic, 2014.

254 ECtHR, *Stephens v. Malta (no. 1)*, para 45.

255 ECtHR, *Stephens v. Malta (no. 1)*, para 48 (emphasis added).

> the Court considers that the applicant's complaints under Article 5 engage the responsibility of Malta under the Convention."[256]

This reasoning seems to be flawed in at least two regards. First, it is unclear on what basis the Court reaches the conclusion that applicant's detention has to be attributed to Malta. Applicant was detained in Spain by Spain's *de jure* state organs which by no means were placed at the disposal of Malta and which were not acting in any way under Malta's direction or control – in fact, the Court recognises this reality in its very first sentence by outlining that applicant had continuously been under the control and authority of Spain. As such, applicant's detention was arguably attributable to Spain, not Malta.[257] It could be that the Court considers Malta's responsible for the impugned act on the basis of derived responsibility for direction or control of conduct ex Article 17 Draft Articles, but this is not likely given that the Court refers solely to attribution of the act itself and does not even imply that derived responsibility would be in play. Secondly, the Court's reasoning is flawed in the sense that it concludes seemingly on the sole basis of its attribution determination that the applicant's complaints "engage the responsibility of Malta".[258] It therewith seems to skip over the question of jurisdiction altogether.[259]

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256 ECtHR, *Stephens v. Malta (no. 1)*, paras 51-54 (emphasis added).

257 See also Den Heijer, 2012, pp. 30–31; Milanovic, 2011, p. 205.

258 ECtHR, *Stephens v. Malta (no. 1)*, para 54.

259 Which is at odds with the Court's earlier reiteration that the exercise of jurisdiction is a *necessary condition* for holding a contracting state responsible under the Convention for acts or omissions imputable to it: ECtHR, *Stephens v. Malta (no. 1)*, para 48. However, it seems that as a matter of policy the outcome of the case is fair: it is Malta, not Spain, that is ultimately the cause of the *unlawful* detention. It would have been a more promising strategy if the Court had either explicitly dealt with derived responsibility, or if it had not focused on the act of detention as such but on the act of issuing an arrest warrant itself. Since this arrest warrant was issued by the *de jure* Maltese (judicial) authorities, there is no problem in attributing this particular act to Malta. In turn, the personal model could be applied to argue that Malta exercised authority and control over the applicant, not on the basis of the act of detention but on the basis of issuing the arrest warrant which Spain *had* to follow up upon as a result of its treaty obligations, and that applicant was therefore within its jurisdiction insofar as the material scope of the arrest warrant is concerned. In turn, whilst the issuing of the (defect) arrest warrant as such does not constitute a violation of the negative obligation enshrined in Article 5 of the Convention, Malta nevertheless could be held responsible on account of its *positive* obligations under the same provision. On the basis of *these* obligation, then, Malta could be held responsible for not adequately preventing the unlawful detention of applicant by Spain as it had not exercised sufficient due diligence and had not taken sufficient reasonable measures to ensure that the arrest warrant would be issued by the correct authority and consequently would not be unlawful. This approach would not only have been more sound in light of the principles of state responsibility, but would also have signified the importance of positive obligations under the Convention as opposed to a fixation on negative obligations.

The case of *Vasiliciuc v. Moldova* is characterised by similar factual circumstances. In this case, applicant – who was about to return from Moldova to Greece where she lived – had been stopped by the Moldovan customs authority at Chisinau Airport because she had failed to declare jewellery. She returned to Greece two weeks later, after having signed a formal undertaking that she would appear before the prosecuting authorities and courts of Moldova when necessary. In doing so, she provided her Greek address and telephone number. Shortly after, the Moldovan authorities brought criminal proceedings against her, but applicant failed to appear before the judiciary as she was unaware of the proceedings now that the authorities had summoned her to appear before the Court via her Moldovan address. The applicant's detention was consequently ordered on the basis that she had absconded from prosecution.

In 2011, Moldova applied to Interpol for an international arrest warrant, after which applicant was arrested in Greece and detained pending her extradition. After 23 days, however, the Greek courts rejected the Moldovan extradition request since there was no relevant extradition agreement between Moldova and Greece. The applicant was thereupon released from detention. Before the ECtHR, applicant complained that contrary to Article 5(1) and 5(3) ECHR, there had been no reasonable suspicion that she had committed an offence and that the Moldovan detention order had not been based on relevant and sufficient reasons. In a similar fashion as in *Stephens,* Moldova as the respondent state had not raised an objection to its accountability under the Convention, but the Court decided to deal with the issue *proprio motu.*[260] Again, the Court reiterated the somewhat problematic statement that "[t]he question to be decided is whether the facts complained of by the applicant can be attributed to Moldova".[261] In turn, the Court applied the reasoning in *Stephens mutatis mutandis* to the case at hand. In fact, in *Vasiliciuc* the diffusion of attribution and jurisdiction seems to be taken a step further: in its header the Court signals that it will deal with jurisdiction, but in reality it applies a mere (and erroneous)[262] test of attribution whilst it does not even mention Article 1 ECHR or the term 'jurisdiction' *altogether*.[263]

260 ECtHR, *Vasiliciuc v. Moldova,* para 22; Compare ECtHR, *Stephens v. Malta (no. 1),* para 45.

261 ECtHR, *Vasiliciuc v. Moldova,* para 22 (emphasis added); Compare ECtHR, *Stephens v. Malta (no. 1),* para 45.

262 Indeed, the fact that applicant was allegedly unlawfully detained *because of* a Moldovan arrest warrant does not mean that the detention itself was carried out *by* Moldova as well: such cause-and-effect reasoning has not been accepted as a principle of attribution under the international rules of state responsibility. The suggestions for a more promising strategy as voiced in footnote 259 henceforth apply *mutatis mutandis* here.

263 Except for once, in the header of the section that consists of paras 21-25. In its considerations, however, the term 'jurisdiction' does not occur at all.

Complexity VI: What about Soering?

One last case warrants attention here: that of *Soering v. United Kingdom*.[264] This case dealt not with extraterritorial conduct but with extraterritorial *effects* of decisions taken by states domestically regarding individuals within their territory. Thus, applicant claimed that he would likely experience death row in the US if he would be extradited by the UK in order to stand trial for murder in the US, which in turn would violate his rights under Article 3 of the Convention.[265] In its judgment, the ECtHR formulated what is now known as the 'Soering principle', i.e. that an issue under Article 3 ECHR may indeed arise in extradition cases "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country".[266] The extraterritorial aspect in this regard concerns thus not the acts of the member state but rather the adverse human rights effects of such decisive acts which ultimately occur on foreign soil.

In reaching its judgment in Soering v. United Kingdom, the Court only marginally referred to the jurisdictional clause of Article 1 ECHR, in relation to which it held that

> " Article 1 (art. 1) of the Convention […] sets a limit, *notably territorial*, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('reconnaître' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art. 3) in particular. *These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction*."[267]

The case of *Soering* is frequently considered in the context of extraterritorial jurisdiction, with several authors claiming that *Soering* establishes a particular

264 ECtHR, *Soering v. United Kingdom*, 7 July 1989, Application no. 14038/88.
265 ECtHR, *Soering v. United Kingdom*, para 76.
266 ECtHR, *Soering v. United Kingdom*, para 91.
267 ECtHR, *Soering v. United Kingdom*, para 86 (emphasis added).

rule or category of extraterritorial jurisdiction.[268] It is maintained here, however, that this interpretation is erroneous: jurisdiction in *Soering* is indeed not extraterritorial but remarkably territorial.

Indeed, the *Soering* case does not so much establish a rule of extraterritorial jurisdiction but should rather be seen in light of the state's positive obligations to protect individuals within its (in this case territorial) jurisdiction for potential human rights infringements by third actors (in this case, a third state). What is at stake is thus *not* the UK's obligation to not apply inhuman or degrading treatment or punishment itself, nor the idea that it should actively interfere with inhuman or degrading treatment or punishment taking place elsewhere, but rather its obligation to exercise sufficient due dilligence in its decision-making in order to protect individuals from inhuman or degrading treatment or punishment by *others*.[269] Consequently, it seems more appropriate to deal with this case in the context of positive obligations than in the context of extraterritorial jurisdiction: the jurisdiction is this case is remarkably territorial as the decision to extradite – which may give rise to an issue under the Convention – is taken domestically and the individual concerned is at the material time residing within the state's territory.[270] There is, indeed, no real question whether Soering was within the UK's jurisdiction when the decision complained about was made: at that point in time, he was both within the UK's territory and within its effective control and authority. The UK's Convention obligations therewith applied to him. The fact that the UK's decision may have extraterritorial effects is consequently of no further interest for establishing jurisdiction, i.e. the question *whether* the Convention rights apply, but rather for delineating the scope of the Convention's positive limb, i.e. *what* the Convention exactly requires from states in protecting individuals against human rights infringements by others and in fulfilling individuals' human rights entitlements. *Soering* was thus not 'missing' in the analysis of extraterritorial jurisdiction under the ECHR provided above, and should in any event not be interpreted as an alternative model of extraterritorial jurisdiction.[271]

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268 Budzianowska, 2012; Da Costa, 2013; Gammeltoft-Hansen, 2011; Miltner, 2012; Roxstrom et al., 2005.

269 See, concurringly, Milanovic, 2011, pp. 8–9.

270 This is, of course, different where the extradition (or *refoulement*) occurs extraterritorially as well, as was for example the case in *Hirsi Jamaa*. On this topic, see also S. Kim, 2017.

271 The same erroneous logic has been applied in the context of the Inter-American human rights system. The *Haitian Interdiction case* as referred to in footnote 89 and accompanying text concerned the interdiction and forcible return of Haitian asylum seekers by the United States to Haiti, including the return of Haitians who had been detained in US immigration detention facilities on US territory. According to the petitioners, "many of these boat people had a reasonable fear that they would be persecuted if returned to Haiti, but were denied a proper forum and processing procedures for resolution of their claims" (para 3). The IACommHR held that the US had violated the American Declaration, maintaining – with explicit reference to amongst others *Soering* – that a member state may be in violation of a human rights obligation when subjecting an individual within its jurisdiction to risk in

7.4.2.4 ECtHR: Concluding remarks

Concludingly, although the Court's jurisprudence has been far from axiomatic and has at times been ambiguous and controversial, which arguably results from attempts to balance veracity and resilience, the ECtHR has developed two models of extraterritorial jurisdiction as exceptions to the territorial presumption that are able to capture a range of extraterritorial conduct. As becomes evident from the development of the personal model of jurisdiction, a state party can have human rights obligations vis-à-vis individuals who are not within its territory or a territory that is under its control but over who it exercises *de facto* authority or control in any territory, either within the *espace juridique* of the Convention or elsewhere.[272] As some have argued, from such a perspective the spatial model of extraterritorial jurisdiction may function as a backup option only, i.e. to establish in a rather indirect fashion – on the basis of control over territory – jurisdictional links between applicant and state where it is difficult to do so directly.[273] As Miltner for example maintains, "in the extraterritorial context, it is the state's nexus to persons that becomes the pivotal element of Article 1 jurisdiction, whether established directly

another jurisdiction (para 167). In turn, it has been argued that this case *hence* exemplifies the application of extraterritorial jurisdiction: see Cerna, 2004, p. 147. However, as outlined here, *Soering* does not involve extraterritorial but rather a remarkably territorial jurisdiction. This is likewise the case for those who were first detained on US soil before being returned to Haiti: being on US territory, the US exercised territorial jurisdiction over them and in such capacity *potentially* violated amongst others the non-refoulement obligations as enshrined in *inter alia* Article 33 of the Refugee Convention and its positive obligations under *inter alia* the American Declaration. This has nothing to do with extraterritorial exercises of jurisdiction but rather with questions as to the substantive nature of the state's non-refoulement obligations as well as the substantive reach of its positive human rights obligations. Having said that, contrary to *Soering*, extraterritoriality nevertheless seems to play a rather marginal role in the *Haitian Interdiction* case insofar as those interdicted on the high seas, who were immediately returned without being detained on US soil first, are concerned. Indeed, in respect to these individuals, the US could not possibly have exercised territorial jurisdiction, and an extraterritorial jurisdictional basis should thus be considered *not* in respect of the persecution acts in Haiti, but in relation to the US' non-refoulement and positive human rights obligations. In dealing with the matter, the IACommHR found that the United States Government's act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security (para 171). This reasoning is erroneous insofar as the Commission confuses – similar to the ECtHR in *Hirsi Jamaa* – prescriptive jurisdiction over registered ships flying its flag with the human rights threshold of jurisdiction. This reasoning will not be recounted here in full – see, for a more comprehensive explanation, section 7.4.5.4. above.

272 ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber), para 142.

273 Besson, 2012, pp. 875–876; Miltner, 2012, p. 738.

through some form of [state-agent authority] over persons, or indirectly through attenuated links to foreign territory".[274]

Whilst this perspective is not without its merits – it amongst others provides a clear framework for extraterritorial jurisdiction in which the various bases as developed by the Court can be conceptually unified – one should however remain cautious to not diminish the importance and nuances of both consecutive bases for extraterritorial jurisdiction. For example, whereas it has by now been borne out that under the spatial model of extraterritorial jurisdiction the state has to ensure the full catalogue of human rights enshrined in the Convention, under the personal model of extraterritorial jurisdiction its obligations can be tailored and divided.[275] To say that personal jurisdictional links are to be prioritised whilst spatial jurisdictional links only function as a backup option runs the risk of diminishing the key importance of this difference and may have a blurring rather than illuminating effect on the question what is actually expected from states in extraterritorial contexts. Therefore, it is preferable to maintain a firm distinction between both bases for extraterritorial jurisdiction and to view them as self-standing albeit communicating vessels. Still, as detailed above, the Court itself has at times confused both bases, which in turn shows both the complexity and the developing nature of the topic at hand.

7.5 Rules of derived responsibility as *lex specialis*?

Before turning to the case studies, this section will address an ostensibly powerful critique of the two-pronged system of state responsibility. The criticism underlying this critique entails that "the notion of jurisdiction under human rights law, and especially a rather narrow outlook on that notion, may obstruct [the] application of the law on state responsibility".[276] Thus, Den Heijer points out that

> "the regime on state responsibility has developed specific rules for attributing, for example, conduct of joint organs to a state and for holding states responsible for aid and assistance which is used by another state in violation of international law. These rules aim to ensure that states do not divest themselves of responsibility in situations where their involvement with a violation of an international norm may be indirect but nonetheless of such a decisive or materially important nature that it is appropriate to hold the state responsible. […] [A] state should not be allowed to do through another actor what it cannot do by itself".[277]

274 Miltner, 2012, p. 738.
275 See also Da Costa, 2013, pp. 245–246; Den Heijer, 2015, p. 362.
276 Den Heijer, 2011, pp. 111–112.
277 Den Heijer, 2011, p. 111.

He consequently argues that a narrow interpretation of jurisdiction under international human rights law may render such carefully constructed rules of attribution and derived responsibility little more than empty vessels, since

> "[i]f the proposition is adhered to that the condition of 'jurisdiction' necessarily requires that the state is directly involved in activity affecting an individual, or that the state's activity directly affects an individual (or simply that the individual is under the state's control), some of the rules on state responsibility [...] may become simply inapt to be applied to extraterritorial human rights violations, because these rules see precisely to circumstances where there may only be an indirect link between the individual and the acting state".[278]

Consequently, Den Heijer seems to support the idea that the law on state responsibility as codified in the ILC Draft Articles constitutes a *lex specialis*: the law on state responsibility would have "endeavored to provide appropriate legal solutions" in order to "leave room for accommodating the often intricate forms of international cooperation and assertions of state influence over other international actors".[279]

It is argued here that whilst Den Heijer's critique is essentially a valid one, it could be more precise in pinpointing when exactly rules of state responsibility function as a *lex specialis*. Indeed, the jurisdictional requirement of international human rights law does not *necessarily* restrict the law on state responsibility and is on various occasions a vital part of – rather than anathema to – its functioning. Consider, for example, the case where states act extraterritorially in concert through common organs. The jurisdictional question is not problematic at all in this regard: since the conduct of the common organ is to be considered an act of each of the participating states, it can readily be established whether this act brings – under for example the relevant personal and spatial models – an individual within the jurisdiction of the involved states. Indeed, now that the entire act can be attributed to all of the states involved in the joint act, the question of extraterritorial jurisdiction does not fundamentally differ from a situation where a single state acted extraterritorially.

Consider, furthermore, the case where a state is derived responsible on account of its own involvement in another state's internationally wrongful act on the basis of Article 16, 17, or 18 Draft Articles. Since in these cases responsibility is exceptionally not self-standing but derived,[280] the first relevant question is whether the *acting* state has committed an internationally wrongful act.[281] That question can only be answered through the two-pronged

278 Den Heijer, 2011, p. 112.
279 Den Heijer, 2011, p. 112.
280 ILC Commentaries, at 64-65, paras 5 and 8.
281 Or, in cases of coercion ex Article 18 Draft Articles, whether the act concerned would, but for the coercion, be an internationally wrongful act of the coerced State.

system of state responsibility: (i) the act must be attributed to the acting state, and (ii) the act must constitute a breach of the acting state's human rights obligations, i.e. it must violate the rights of someone within the acting state's jurisdiction. If both components are answered in the affirmative, the act subsequently *could* give rise to derived responsibility on behalf of the *participating* states on the basis of Articles 16-18 Draft Articles. At this point, a differentiation has to be made between Article 18 on the one hand and Articles 16 and 17 on the other. Under Article 18 Draft Articles, it does not matter whether the coercing state has a corresponding duty under international human rights law and the jurisdictional question is therefore not relevant for this test in the first place. Indeed, whether or not jurisdiction can be ascertained on behalf of the coercing state is of no relevance given that the question whether the state would have committed an internationally wrongful act if it had acted itself has no bearing on its derived responsibility ex Article 18 Draft Articles. Since it has already been established in the initial two-pronged test of state responsibility vis-à-vis the acting state that the act, but for the coercion, constitutes an internationally wrongful act of the coerced state, and since the coercing state *automatically* becomes responsible for that act as long as it has knowledge of the circumstances of the act, the jurisdictional link of the coercing state *itself* is no longer required. This fits well with the inherent logic of Article 18 Draft Articles, in particular with the fact that the coerced state will on most occasions be able to rely on *force majeure* in order to preclude its own responsibility.[282] In relation to Article 18 Draft Articles, the *lex specialis* conception of the law on state responsibility as proposed by Den Heijer thus seems to have merit.

This is somewhat different in relation to Articles 16 and 17 Draft Articles. The crucial difference is that these Articles require that the act would *also* have been an internationally wrongful act of the aiding or assisting state respectively the directing or controlling state. This, then, requires one to perform an additional test of jurisdiction, albeit one based on a fictional rather than factual situation: *if* the act could have been directly attributed to the aiding or assisting state respectively the directing or controlling state, would it then constitute an internationally wrongful act? To answer this question, one necessarily needs to assess whether such an act would have brought an individual within the jurisdiction of the cooperating state concerned on the basis of *inter alia* the personal or spatial models of jurisdiction.[283] This makes perfect sense: in

282 ILC Commentaries, at 70, para 4.

283 Viewed in this light, some ambiguity continues to exist however in relation to the question whether Articles 16 and 17 Draft Articles require the act to be opposable to both states under the *very same* international human rights obligations. Referencing the ILC Commentaries, Den Heijer argues that this is not the case since this "corresponds to the rationale of Article 16 that a state should not be allowed to do by another what it cannot do by itself": Den Heijer, 2011, p. 104-105. The ILC Commentaries are, however, less clear about this: they maintain in relation to Article 16 that "[a]n aiding or assisting State may not deliberately procure the breach by another State of *an obligation by which both States are bound*; a State

cases where a state has aided or assisted respectively directed or controlled the acts of another state extraterritorially – that is to say, not on the territory of the cooperating state – it is only congruent with the logic of international state responsibility and with the exceptional nature of extraterritorial jurisdiction to hold the cooperating state responsible for acts that would also have been internationally wrongful if it had performed these acts itself. Otherwise, the odd situation could arise where, for instance, a state that is assisting another state becomes responsible for an internationally wrongful act of the acting state even though it would not have been responsible for the very same act if it had performed such an act through its own agents. Requiring this hypothetical jurisdictional link is thus a logical aspect of derived responsibility on the basis of Articles 16 and 17 Draft Articles. By extension, this logic fits the underlying rationale of the system that Den Heijer aptly pointed out, i.e. that "a state should not be allowed to do through another actor what it cannot do by itself".[284] Indeed, the inverse seems to be largely true as well: a state should be allowed to do through another actor what it can do by itself, *unless* full coercion is concerned – which, again, is appropriately dealt with in Article 18 Draft Articles.[285]

In light of these considerations, the proposition that the law on state responsibility functions as a *lex specialis* should be duly nuanced. Different from what Den Heijer implies, it seems to function as such only in situations of derived responsibility, *not* in relation to for example acts through common organs, which also makes sense in light of the fact that Chapter IV of the ILC

cannot do by another what it cannot do by itself": ILC Commentaries, at 66, para 6 (emphasis added). Likewise, in relation to Article 17, the Commentaries state that "it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of *bilateral obligations, which are not opposable to the directing State*. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance": ILC Commentaries, at 69, para 8 (emphasis added). This seems to provide support to the claim that the act should be opposable to both states under the very same international obligation: the responsibility of the directing state is largely excluded by the Commentaries in cases where bilateral obligations are concerned, seemingly irrespective of the question whether the directing state may have had similar bilateral obligations vis-à-vis the third state involved.

284 Den Heijer, 2011, p. 111.

285 One should not forget that in the scenarios of aiding/assisting and directing/controlling, the acting state remains independently responsible for its internationally wrongful act as well. Requiring a jurisdictional link for these bases of derived responsibility does thus not necessarily frustrate the proper functioning of international state responsibility or the international human rights system as such in the first place, since the responsibility of acting states can be ascertained independently from any further derived responsibilities. Instead, requiring a jurisdictional link between the participating state and the affected individual safeguards that states are not – safe for cases of coercion – unduly held responsible for internationally wrongful acts that would not have been internationally wrongful if they had performed them themselves, *simply* on account of the fact that they aided, assisted, controlled, or directed.

Draft Articles – covering derived responsibility – blurs the distinction between primary and secondary rules of international law.[286] Furthermore, different from derived responsibility ex Article 18 Draft Articles, in the context of Articles 16 and 17 Draft Articles, the law on state responsibility arguably changes the *nature* of the jurisdictional test – i.e. it mandates a test of fictional jurisdiction rather than factual jurisdiction – but does not replace the jurisdictional test altogether. The jurisdictional thresholds that conditionalize the respective human rights treaties thus apply unabatedly, save for coercion ex Article 18 Draft Articles, but the way in which these thresholds are tested differs.

7.6 APPLYING THE FRAMEWORK: RPC NAURU

7.6.1 Nauru's human rights obligations

Nauru became member of the United Nations in September 1999 and has since become party to four of the nine core UN human rights treaties: the UN Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[287] and the Convention on the Rights of Persons with Disabilities (*CRPD*).[288] Nauru signed the ICCPR and the First Optional Protocol in 2001 but has not yet ratified them; it has likewise signed but not ratified the International Convention on the Elimination of All Forms of Racial Discrimination (*ICERD*). Nauru is not bound by any regional human rights mechanism – in fact, the Asia-Pacific region currently has no regional human rights legal instrument,[289] court, or monitoring body.[290] Although some progressive human rights movements have been denoted, there moreover does not appear to be a clear roadmap to achieving comprehensive regional protection in the Asia-Pacific region any time soon.[291]

286 It indeed specifies particular internationally wrongful acts: ILC Commentaries, at 65, para 7.
287 Nauru is also member to the Optional Protocol to the CAT.
288 The remaining core treaties are the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).
289 Except for the ASEAN Human Rights Declaration. Both Australia and Nauru are, however, not members of the ASEAN.
290 Durbach, Renshaw, & Byrnes, 2009; Katsumata, 2009.
291 European Parliament Directorate-General for External Policies Policy Department, 2010, p. 13. It is therefore little surprising that the seminal handbook edited by Moeckli, Shah, and Sivakumaran includes specific chapters on the protection of human rights in the UN, the Americas, Europe, Africa, and on the domestic level, but has no separate entry on

The fact that Nauru has not signed the ICESCR or ratified the ICCPR may appear to be a significant challenge to the scope of Nauru's treaty obligations in the RPC. Indeed, the basis of responsibility under human rights treaty regimes is that states "have willingly, knowingly, and purposely agreed to be bound by the provisions in various human rights treaties".[292] At the same time, this does not mean that Nauru is relieved of human rights obligations beyond the treaties it ratified. On the one hand, whilst the mere signing of a Treaty without subsequent ratification does not bind the state to the respective Treaty's terms, the state should still refrain from defeating the object and purposes of the Treaty in accordance with Article 18 VCLT, a provision that itself is part of customary international law.[293] On the other hand, Nauru is bound by international customary human rights law independent of whether it has signed human rights treaties, yet such customary obligations are, as previously stipulated, not part of the present inquiry.

In sum, treaty-wise, Nauru is bound by the obligations of the treaties it ratified and must in addition refrain from defeating the object and purpose of the treaties it has signed but not (yet) ratified. The jurisdictional scopes of these respective sources consequently determine the responsibility of Nauru in the RPC under international human rights law. For present purposes, analysis will focus on those treaties that have been discussed in this chapter and that Nauru is a party to or has signed, i.e. the CAT and the ICCPR.

As explained above, the jurisdictional clauses of the CAT and the ICCPR refer to the territory of states, therewith staying veracious to the fundamental tenet of territorial state responsibility, although some resilience vis-à-vis commodification developments can also be detected. Establishing Nauru's human rights responsibilities in the RPC under these treaties is henceforth little problematic: given that Nauru exercises territorial jurisdiction, its responsibility is engaged. In relation to the CAT, this means that Nauru's negative and positive obligations apply in relation to the RPC: Nauru should not only respect the rights enshrined in the CAT by refraining from infringements, but should also proactively protect and fulfil them. In relation to the ICCPR, this is slightly different since Nauru is merely a signatory state. Since Nauru does exercise territorial jurisdiction, however, it must generally refrain from defeating the ICCPR's object and/or purpose congruent with article 18 VCLT.[294] This primarily requires Nauru to *refrain* from certain conduct, but may occasionally also entail a call for active engagement in order to ensure that the object and purpose of the treaty are not defeated.[295] *In casu*, the object and purpose of the ICCPR is, according to the HRCee,

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protection in the Asian-Pacific region: Moeckli, Shah, & Sivakumaran, 2014.

292 See Gibney, 2016, pp. 10–17.

293 Guzman, 2008, pp. 177–178; Villiger, 2009, p. 247.

294 Guzman, 2008, pp. 177–178; Villiger, 2009, pp. 242–253.

295 Villiger, 2009, pp. 249–250.

> "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken".[296]

Whilst Nauru's obligations on this basis are not clearly circumscribed, it at least should henceforth refrain from defeating this particular purpose.

Nauru's responsibility is thus engaged. The consequent question is how absolute such responsibility is: as problematised above, within the ICCPR framework the HRCee has considered that states may be precluded from exercising control over all of its territory "and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction".[297] On this basis, it was concluded above that territorial jurisdiction may exceptionally be limited in cases where the state has lost effective control over (parts) of its territory. In the case of the RPC on Nauru, such exceptional circumstances are nevertheless not present. As I assessed elsewhere,

> "the Nauruan Government knowingly and wilfully entered into an MoU, provides special visas to asylum seekers, processes asylum claims under Nauruan law, resettles refugees and is actively engaged in the RPC via various state actors, including its (Deputy) Operational Managers and the Nauruan Police Force. Nothing indicates that Nauru is unwillingly prevented from exercising its authority in the RPC: the RPC cannot be regarded as occupied by a foreign power and Nauru exercises a certain degree of sovereign control over the asylum seekers processed in the RPC".[298]

Nauru's responsibility on the basis of its territorial jurisdiction is, consequently, not limited but applies in full force in the context of the RPC.

7.6.2 Australia's human rights obligations

Australia is party to all core UN human rights treaties except for the ICRMW and the CPED. Of the treaties scrutinised here, Australia is thus party to the ICCPR, the ICESCR, and the CAT. Since, as pointed out above, the Asia-Pacific region has no region-wide human rights treaty,[299] the analysis here will limit itself to these three instruments.

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296 HRCee, *General Comment no. 24*, 4 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6, para 7.

297 HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, para. 3.

298 Van Berlo, 2017d, p. 50.

299 Durbach et al., 2009; Katsumata, 2009. As pointed out above, whilst there is an ASEAN Human Rights Declaration, both Australia and Nauru are not members of the ASEAN.

Since Australia acts extraterritorially in relation to RPC Nauru, its human rights obligations under these various treaties only apply if exceptional circumstances are met. The analysis above has shown that under the ICCPR, what is required in this regard is either power or effective control over one or more individuals abroad or effective control over a physical area. Likewise, under the CAT, extraterritorial jurisdiction arises when a person is under the effective control of a state's authorities or when a state exercises effective control over territory. Under the ICESCR, in addition to the more general yet ill-defined obligations to cooperation and assistance that do "not imply the exercise of extraterritorial jurisdiction by the States concerned",[300] extraterritorial obligations arise if a state exercises effective control over 'situations', which at least includes effective control over territory.[301]

The relevant question is hence whether Australia exercises effective control over (part of) Nauru's territory or over individuals in RPC Nauru as a result of its involvement in the facility. Consensus is lacking in relation to this issue: views on whether Australia exercises extraterritorial jurisdiction in RPC Nauru differ. Some commentators conclude that Australia exercises extraterritorial jurisdiction either because it exercises effective control over *persons* in the RPC, or because it has a significant amount of influence over the stakeholders involved and therefore exercises effective control over the RPC as an *area*.[302] According to some of these authors, however, the lack of transparency in relation to RPC Nauru makes it difficult to establish the precise scope of Australia's effective control.[303] On the other hand, some commentators consider establishing Australia's effective control over offshore processing facilities more problematic. In discussing the comparable facility on Manus Island, Taylor for example argues that Australia does not have effective control over (part of) PNG's territory and hence does not exercise spatial jurisdiction, whilst it also does not fulfil the personal test of extraterritorial jurisdiction because it is PNG that detains.[304] Indeed, generally, personal jurisdiction requires *full* physical control.[305]

The lack of consensus is not only the result of limited transparency, but also of the nodal nature of governance. The 'effective control over territory' and 'effective control over persons' tests by all means are grounded in a *de facto* examination of the given situation as opposed to a mere finding of *de*

300 CESCR, *General comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* 10 August 2017, para 33.

301 It is less likely to include a personal model of extraterritorial jurisdiction: see footnote 74. above.

302 See e.g. Dastyari, 2015b; Foster, 2014; Gleeson, 2015. See also CATee, *Concluding Observations on the Fourth and Fifth Periodic Reports of Australia*, 26 November 2014, UN Doc. CAT/C/AUS/4-5/18888, p. 6. Furthermore, see Van Berlo, 2017d, p. 53.

303 Gleeson, 2015.

304 S. Taylor, 2010, p. 350.

305 Gammeltoft-Hansen, 2011, p. 167.

jure empowerment. It is, in other words, the *factual* situation of power that by and large determines whether a state exercises effective control over either territory or person. As a consequence, the nodal set-up of governance in RPC Nauru significantly hampers a proper assessment in this regard for the factual balance of power continuously shifts and at times is reconfigured altogether. For example, Nauru's influence and power over the arrangements have seemingly grown steadily over the years, amongst others due to the introduction of Nauruan Operational Managers in the RPC in 2014, the fact that Nauru gradually has taken control over the asylum processing system, and the establishment of the Nauru (RPC) Corporation with far-reaching competencies vis-à-vis private contractors. As I previously observed,

> "[w]hilst the effective control requirement necessitates a factual assessment, the facts and power relations thus continuously change, thereby influencing the level of control of the various actors involved in unpredictable and often indiscernible ways".[306]

Consequently, whether or not the threshold for extraterritorial jurisdiction – whether it be on the spatial or on the personal model – is *in casu* met "depends on the specific complaint and the particular involvement of the various actors".[307] Examining the Pacific Solution Mark I, Den Heijer comes to a similar conclusion:

> "[g]iven the plurality of actors involved and the complexity of the legal arrangements, it will depend on the precise complaint at issue and the involvement of the respective parties […] on what account individuals should be considered to fall within the jurisdiction of Nauru or Australia for the purposes of human rights protection".[308]

Generally speaking, however, some observations can be made. First, the introduction of open centre arrangements in 2015 seems to be a significant turning point in terms of effective control. Up until that point, it could be argued that Australia exercised effective control over the individuals detained in the facility on the basis of a personal model: crucially, individuals were detained in the facility by private actors that were contracted, paid, and directed by Australia and whose conduct can, as the previous chapter has analysed, generally be attributed to Australia. More generally, Australia controlled vital aspects of detainees' lives whilst confined, including their healthcare and welfare. At the same time, it should be mentioned that, as likewise analysed in the previous chapter, from the 21st of May 2014 onwards

306 Van Berlo, 2017d, p. 54.
307 Van Berlo, 2017d, p. 55.
308 Den Heijer, 2011, p. 294.

security and garrison personnel of Wilson Security were exercising – as authorised officers – elements of governmental authority as provided for in Nauruan internal law. Since their detention-related conduct can, from that date onwards, as a consequence also be attributed to Nauru, Australia and Nauru jointly had effective control over the confined individuals between that date and October 2015, when open centre arrangements were implemented.[309] Indeed, now that acts of security and garrison providers from that date onwards can generally be attributed to both nations, their consequent effective control – by means of full, physical control – appears given.[310] Contrary to what the ECtHR considered in *Hess*, it is not problematic to divide such exercise of joint control into separate jurisdictions,[311] and Australia thus continues to exercise jurisdiction even though another sovereign nation simultaneously exercises effective control over individuals. Whereas for Nauru this does not change the outcome of the jurisdictional test – it exercises territorial jurisdiction and continues to be responsible on that base – for Australia's responsibilities this finding is of prime importance: Australia's human rights obligations under the ICCPR and CAT apply to those confined in RPC Nauru ever since the implementation of OSB (and, arguably, also before that under the Pacific Solution Mark II), up until the moment that the facilities were changed into open centres.

Indeed, as chapter 4 has already detailed in the context of justified interferences with the right to liberty, from that moment onwards, individuals were no longer – at least not formally – *detained*, which seems to be a defining condition for the exercise of personal jurisdiction on the basis of full physical control. With individuals no longer being detained, and with Nauru being in charge of their asylum claims processing, it is difficult to maintain that Australia still exercised effective control over individuals on the basis of full physical control. To the contrary, from October 2015 onwards Australia provided, on the basis of the MoU and Administrative Arrangements, services to accommodate the processing of asylum claims by Nauru, which in general does not amount to any concrete physical control over individuals. Likewise, there is generally no basis to conclude that Australia exercised at any time extraterritorial jurisdiction on the basis of the spatial model, whether it be before or after the facility turned into an open centre. Australia indeed by no means seems to have exercised, at least not *in abstracto*, effective control over the physical territory on which the RPC was located. Rather, it were the Nauruan authorities – including the RPC Operational Managers and the Nauru Police Force – that remained in charge of the premises and that retained the

309 The same goes for the specific period of time in July 2013 when Wilson Security staff was sworn in as reserve officers of the Nauru Police Force Reserve (NPFR).

310 This goes to show how attribution and jurisdiction at times may be mutually informing.

311 The reasoning of the ECtHR in *Hess* has already been nuanced and partially discarded above: see footnotes 120-125 and accompanying text.

right to enter the facility at any time, and that consequently continuously have exercised effective control over their sovereign territory.

As such, *in general*, there is no basis to assume that Australia's obligations under the ICCPR and CAT apply to the RPC after the RPC turned into an open centre.[312] In addition, the observation that Australia at no point exercised extraterritorial jurisdiction under the spatial model also seriously challenges the applicability of Australia's ICESCR obligations to the situation at hand. Since, as outlined above, ICESCR obligations apply where states exercise effective control over 'situations', which in turn is not very likely to include effective control over persons, Australia's obligations under the ICESCR may not arise at all.

The applicability of Australia's self-standing human rights obligations in RPC Nauru seems to have been seriously circumscribed by the introduction of open centre arrangements. Two developments might nevertheless have a mitigating effect in this regard. First, since Australia's involvement in RPC Nauru potentially amounts to aid and assistance to Nauru as explicated in chapter 6, it *could* be argued that Australia's human rights obligations apply on the basis of derived responsibility which could, as outlined above, function as a *lex specialis* of sorts. However, as also explicated above, three conditions need to be fulfilled in this regard: (i) Australia must be aware of the circumstances that make Nauru's conduct an internationally wrongful act, (ii) Australia must give aid or assist with a view to facilitating the commission of that act and must actually give the aid or assist, and (iii) the completed act of Nauru would also have constituted an internationally wrongful act if conducted by Australia. The second criterion has already been problematised in chapter 6: in a general sense it cannot be assumed that Australia intended its aid or assistance to result in human rights violations on the hands of Nauru. In addition, the third criterion is problematic as well since it requires that a jurisdictional test based on a fictional situation is fulfilled. Thus, what is required is that the impugned act by Nauru would, if it could have been directly attributed to Australia, have constituted an internationally wrongful act of Australia, which in turn requires one to establish whether such directly attributable act would have amounted to the exercise of extraterritorial jurisdiction on the basis of the spatial or personal model. Whilst this ultimately depends on the concrete conduct involved, it generally seems unlikely that – after the introduction of open centre arrangements – such test on the basis of a fictional situation will *in casu* be answered in the affirmative. Since detention ended in October 2015, it is unlikely that any of the subsequent acts of Nauru to which Australia provided aid or assistance would have amounted to effective control over territory or over person if they would have been performed by Australia itself. Indeed, if Australia had performed such acts

312 Although specific contextual circumstances related to specific events may prove differently.

itself, this still would, *generally*, not have meant that it either exercised effective control over a certain demarcated territory to the exclusion of the Nauruan authorities, or that it exercised effective control over individuals on the basis of full, physical control. Consequently, whereas Australia's self-standing human rights obligations can generally not be presumed to apply to RPC Nauru post October 2015 given the factual overall lack of effective control over territory or persons, its derived human rights obligations on the basis of its aid and assistance can likewise not be presumed to apply to RPC Nauru after the introduction of open centre arrangements. It should be reiterated that concrete factual situations may lead to different conclusions, for instance when relating to specific conduct amounting to inhuman or degrading treatment that could ultimately result in the exercise of effective control over persons, yet as a matter of general principle the potential of derived responsibility *in casu* thus seems to be significantly circumscribed.

Second, Australia's human rights obligations may still apply to RPC Nauru insofar as positive obligations are concerned. Such positive obligations may indeed arise as a result of Australia's exercise of control over intercepted individuals during their transfer to Nauru. Similar to extradition, states' obligations may indeed arise when an individual is transferred to a country where his or rights are likely to be violated.[313] Such cases generally concern, however, situations in which extradited individuals face a real risk of being tortured or inhumanely or degradingly treated – two unequivocal human rights violations. In the context of RPC Nauru, this is different, in particular after open centre arrangements were introduced: given the assurances sought and monitoring of the facility by Australia, it is difficult to establish *a priori* whether and to what extent the rights of a transferred individual will be violated at RPC Nauru. Before the implementation of open centre arrangements, detention at RPC Nauru could potentially be argued to amount to a foreseeable violation of the human right to liberty and the prohibition of arbitrary detention, yet such objections do generally no longer apply from October 2015 onwards.[314] Consequently, other grounds will have to be provided in order to show that transferred individuals run the risk of having their rights violated, which ultimately depends on a factual assessment of the situation on the ground. This, on the other hand, is obstructed by the non-transparent nature of the facilities. Australia frequently voices that the monitoring mechanisms in place sufficiently safeguard against future violations. Such claims can, in turn, only be refuted by concrete evidence to the contrary. In this regard, the many critical acclaims of amongst others the health situation in RPC Nauru are crucial: expert evidence could indeed raise a powerful counterclaim that transferred indi-

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313 See for example HRCee, *Chitat Ng v. Canada*, 7 January 1994, Comm. no. 469/1991, UN Doc. CCPR/C/49/D/469/1991, para 14. See, in the European context, ECtHR, *Soering v. United Kingdom*.

314 Compare ECtHR, *J.R. and Others v. Greece*, para. 86.

viduals run the risk of having amongst others their rights to health, as well as their rights not to be tortured or subjected to other inhuman or degrading treatment, violated.[315] Hence, when individuals are within Australia's jurisdiction from the moment of interception up until their arrival on Nauru, Australia's positive obligations may prohibit it to transfer those individuals to Nauru, which ultimately is an obligation of due diligence. Australia thus needs to offset the potential risk to individuals' human rights by any viable means available to them, for example by seeking sufficient assurances from the government of Nauru and by closely monitoring the situation through its organs on island.

7.7 Applying the framework: PI Norgerhaven

7.7.1 The Netherlands' human rights obligations

The Netherlands is party to all core UN human rights treaties except the ICRMW. Of the treaties discussed here, it is hence party to the ICCPR, the ICESCR, and the CAT. In addition, the Netherlands is party to the ECHR.

As analysis above has shown, the applicability of each of these treaties includes *at least* the territory of the member state concerned. As a consequence, establishing the Netherlands' human rights responsibilities in PI Norgerhaven is hardly problematic: given that the facility is located on its soil, the Netherlands in principle exercises territorial jurisdiction and its responsibilities under the various treaty regimes are therewith engaged. The Netherlands' negative and positive obligations vis-à-vis those confined in the prison facility hence apply.

This presumption of territorial jurisdiction can only be limited in exceptional circumstances. As mentioned above, the HRCee has considered that states that have lost effective control over (parts) of their territory may be precluded from exercising control over all of its territory "and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction".[316] Likewise, the ECtHR has considered that whilst jurisdiction is presumed to be exercised normally throughout the state's territory, this presumption can only be limited "in exceptional circumstances, particularly where a State is prevented from exercising its authority in part of its territory".[317] In the context of PI Norgerhaven, however, such exceptional circumstances

315 See, for example, the 2018 call for an immediate evacuation by NGO Médecins Sans Frontières on the basis of the mental health situation that is "beyond desperate": Médecins sans Frontieres, 2018.

316 HRCee, *Concluding Observations of the Human Rights Committee on the Third Periodic Report of Cyprus*, para. 3.

317 ECtHR, *Ilaşcu and Others v. Moldova and Russia*, para 312.

do not exist. The Netherlands entered into a bilateral treaty with Norway, which was considered beneficial for both countries for different reasons, and has facilitated the arrangements throughout the period of time in which the Treaty was in force. In fact, the daily operation of the facility was fully within the responsibility of a Dutch Staff and Facility Manager. The Netherlands thus by no means was unwillingly prevented from exercising its authority in the prison facility and the full range of its obligations under the various human rights treaties continues to apply.

7.7.2 Norway's human rights obligations

Norway is party to all core UN human rights treaties except for the ICRMW and the CPED.[318] It is hence party to the ICCPR, the ICESCR, and the CAT. Regionally, Norway is furthermore party to the ECHR.

Similar to Australia's position in relation to RPC Nauru, Norway's human rights obligations only apply in PI Norgerhaven when certain conditions are met. To reiterate, under the ICCPR and CAT, it is required that Norway exercises either power or effective control over individuals abroad or effective control over a physical area. In relation to the ICESCR, Norway would have to exercise effective control over 'situations', which at least includes effective control over territory but is less likely to include effective control over persons. In addition, under the ECHR, in a similar vein as under the ICCPR and CAT, it is required that Norway exercises effective control over persons or effective overall control over territory.

The relevant question here is therefore whether Norway exercised, as a result of its involvement in PI Norgerhaven, effective control over (part of) the Netherlands territory, or, alternatively, over individuals. Different from Australia's involvement in RPC Nauru, the answer to this question in the context of Norway's involvement in PI Norgerhaven seems to be much more straightforward. Indeed, it is uncontested that Norway exercised control over those confined in PI Norgerhaven: prison sentences were executed in accordance with Norwegian law, prison staff was instructed by a Norwegian prison governor, and the facility administrative-wise functioned as an annex of Ullersmo prison in Norway. Such involvement clearly suffices the threshold of full physical control required for establishing personal jurisdiction.[319]

On this basis, the extraterritorial application of Norway's obligations under the ICCPR, the CAT, and the ECHR can readily be established. As pointed out above, however, the personal model of jurisdiction seems to be insufficient

318 Norway has signed the CPED but has not ratified it as of yet.

319 It in fact can be argued to amount to the exercise of 'public powers': compare ECtHR, *Al-Skeini and Others v. United Kingdom* (Grand Chamber) and the discussion in section 7.4.5.3. above.

to trigger the extraterritorial application of ICESCR rights. Therefore, we should also briefly turn to the question whether Norway's involvement in PI Norgerhaven amounts to the required amount of 'control over *situations*'. Whilst this threshold encapsulates a territorial model of extraterritorial jurisdiction, it is arguably broader in that control over 'situations' does not necessarily require effective control over territory as such. In the context of PI Norgerhaven, the involvement of Norway arguably amounts to the required amount of control: Norway enjoys an exclusive decision-making prerogative vis-à-vis the prisoners and henceforth has full effective control over the situation in which they are confined. In fact, Norway has a central position in the enjoyment of economic, social, and cultural rights of prisoners in PI Norgerhaven – who remain subjected to the Norwegian penal system in full – and it therefore also teleologically makes sense that Norway's ICESCR obligations apply in full.

Both the human rights obligations of the Netherlands and Norway hence apply in the prison facility. This means that both their negative and their positive obligations apply. These rights are not mutually exclusive but exist concurrently.

7.8 Conclusion

In this chapter, the second leg of establishing state responsibility for a human rights violation as an internationally wrongful act has been analysed in light of contemporary commodification developments. Specifically, this chapter has questioned the extent to which international human rights law has showcased veracity to its fundamental tenet of territorial state obligations on the one hand, and resilience in the light of commodified realities on the other.

Analysis of the various treaty regimes shows that each instrument has been developed in accordance with both a veracious and a resilient stance, although the balance between both attitudes differs from instrument to instrument. Most of the examined human rights treaties stay veracious to the fundamental tenet in the sense that they connect their jurisdictional scope to the notion of sovereign territory. In the contexts of some treaty regimes, territory is explicitly mentioned in the jurisdictional clause, whereas in the contexts of other treaties territoriality is inferred from, for instance, teleological interpretation (inquiring into the object and purpose of the treaty) or subjective interpretation (looking at the intentions of the state parties as for instance expressed in the *travaux préparatoires*).[320] Human rights obligations thus apply *at least* – and presumedly – in a state's territory. At the same time, all treaty regimes also show particular resilience in the face of commodification realities, as they all have, in their own ways, developed exceptions to the norm of territorial applicability.

320 Such interpretation is in accordance with Article 33 VCLT. See generally also Jacobs, 1969.

Thus, even where states operate abroad, for instance in nodal governance networks of confinement involving two or more states, their human rights responsibilities can still be established on the basis of exceptional bases for extraterritorial jurisdiction. Whilst each human rights instrument has developed its distinct bases for such extraterritorial jurisdiction, what transpires is that most of these bases have been developed along the lines of either a personal, or a spatial, model. Often, this entails that the human rights obligations of states under the various treaty regimes still apply whenever these states exercise authority and control elsewhere, either over a particular territory or over a particular person, provided that particular criteria are met as outlined above.

As such, the various treaty regimes seem to have struck a balance between veracity – territorial state responsibility being the norm – and resilience – extraterritorial jurisdiction being exceptional. At the same time, as has been illustrated in the context of the ECHR, in practice monitoring bodies have not always been able to maintain such balance axiomatically. At least six complexities, identified above, show how a resilient approach through the application of exceptional models of extraterritorial jurisdiction can be, at times, a haphazard, contradictory, confusing, and contested endeavour. The ECtHR has indeed seemingly struggled with striking a fair balance between veracity and resilience in the face of the increasing, at times highly resourceful, involvement of states in extraterritorial settings. As the identified complexities showcase, the fact that each case of extraterritorial conduct involves unique contextual particularities has, at times, constituted a serious impediment for the ECtHR to effectively bring such cases under the umbrella of either the personal or the spatial model. In such instances, the Court has frequently exhibited a high level of resilience in order to nevertheless provide for human rights protection. Conversely, the Court has at times – for instance in the much criticised *Banković* decision – relied heavily on veracity, leaving applicants without protection that could have been provided through a more resilient approach. Ultimately, the Court's case law indicates the significant struggle that monitoring bodies encounter when dealing with the paradoxical need to be both veracious and resilient.

The complexity of striking a balance has been illustrated in this chapter in the context of RPC Nauru. As has been detailed in section 7.6.2., there are indeed difficulties associated with holding Australia as the non-territorial state responsible for human rights obligations. Thus, as a result of the lack of transparency, the nature of the nodal governance network involved, and the ingenuity and tactics employed by both states involved, the determination of extraterritorial jurisdiction on behalf of Australia is, at least in a general sense, problematic. An important turning point seems to be the transformation of RPC Nauru into an open centre, which has further complicated the matter and arguably means that Australia's extraterritorial jurisdiction does, *generally*, not arise. Whilst positive obligations of non-refoulement may to a certain extent offset these difficulties – indeed, such obligations arise whenever Australian

officials take IMAs into custody and transfer them to Nauru – their potential to do so is, as detailed above, ultimately constrained given the nature of positive obligations.

The case study context of PI Norgerhaven, on the other hand, paints a different picture. Section 7.7.2. has shown that holding Norway responsible for its obligations under the various human rights instruments is hardly problematic. Several reasons underly this marked difference with the context of RPC Nauru. First and foremost, the fact that PI Norgerhaven involves confinement in the sphere of criminal justice clearly indicates Norway's extraterritorial responsibility. Indeed, with prison sentences being executed in accordance with Norwegian law, prison staff being instructed by a Norwegian governor, and the facility administratively functioning as an annex of Ullersmo prison in Norway, there is no difficulty in establishing that Norway exercised extraterritorial jurisdiction on the basis of the personal model. Moreover, under the ICESCR, extraterritorial jurisdiction likewise arises given Norway's effective control over the situation in PI Norgerhaven. Second, the arrangements have been clearly documented, responsibilities have been transparently divided, and Norway has never disputed that it exercises jurisdiction in PI Norgerhaven. It ensured, in fact, effective oversight over the facility, even though the level of oversight that could be exercised has been criticised as insufficient.[321]

What this shows is, again, the crucial importance of the 'glocal level' in interpreting resilient and veracious efforts. Indeed, such endeavours may take place most visibly on a macro level, that is, through monitoring bodies' interpretations, but ultimately play out in domestic contexts. Simultaneously, such local contexts continue to inform developments at the global level: in fact, many adjustments to the systematics of international human rights law are not based on observations of macro-level trends of commodification, but on the local contextualised appearances of commodification with which monitoring bodies are faced in applying human rights instruments and in developing their case law. Local occurrences indeed do not only follow models of extraterritorial jurisdiction – they also *shape* them. Consequently, the interaction between the global and the local at the 'glocal' level is dynamic and may, as the case study contexts illustrate, yield nearly opposite results on the basis of *both* the particularities of macro-level instruments and those of localised environments.

Combining the conclusions of the past three chapters, some overarching observations can be made. Private human rights responsibility has largely remained *de lege ferenda* whilst the system of international state responsibility has maintained a presumptive focus on the territorial state. The state's responsibility for private conduct (through means of attribution) or for extraterritorial conduct (through means of extraterritorial jurisdiction) has hence remained exceptional whilst private human rights obligations have remained the nearly

321 See, notably, Sivilombudsmannen, 2016.

sole concern of soft law and voluntary initiatives. The picture that has been painted in these chapters is thus two-fold: international human rights law has been adjusted to a certain extent to commodification in a resilient effort, yet this has continuously been pursued with veracity to the fundamental tenet of territorial states as duty bearers. In other words, developments towards private responsibility and the evolution of extraterritorial (spatial and personal) models of jurisdiction are quintessential expressions of resilience, but such endeavours remain nevertheless confined by the need to stay veracious to the fundamental tenet of territorial state responsibility. This has not seldomly resulted in puzzling and perplexing case law that has not been fully developed or exhaustively dealt with yet. Indeed, present commodification realities continue to pose significant dilemmas for international human rights law and its monitoring bodies. The doctrine of positive obligations has seemingly helped in this regard as it broadens the scope of obligations and allows for new avenues to induce responsibility, yet it has not been a panacea to the limitations of international human rights law's legal technicalities. If anything, positive obligations operate on the same basis – i.e. on the basis of the territorial state as primary duty bearer – and within the same system – i.e. within the two-pronged test of international state responsibility – as the arguably more traditional limb of negative human rights obligations.

A final remark is in order here. At various points, this book has warned against an undue conflation of similar terminologies in different contexts. For example, it has warned against the conflation of 'jurisdiction' in public international law and 'jurisdiction' in international human rights law. Similarly, it has warned against the conflation of 'effective control' as a standard for attribution and 'effective control' as a standard for extraterritorial jurisdiction. At this point, it should be added that one should not unduly conflate the notions of 'jurisdiction' in different human rights law regimes. Admittedly, it is true that the tests for extraterritorial jurisdiction under various human rights instruments show a "remarkable degree of coherence and consistency".[322] Various monitoring bodies have indeed developed spatial and/or personal models of extraterritorial jurisdiction that are comparable – albeit not identical – in terms of their nature and scope. A closer look of the various systems, however, reveals that extraterritorial jurisdiction has developed differently under each of these instruments. The various approaches are indeed highly contextualised and by no means support a theory of convergence.[323] In the context of the ICESCR, for example, the notion of 'control over *situations*' has acquired a particular expansive meaning and has to a large extent replaced the notions of 'control over persons' and/or 'control over territories' that continue to guide the scope of extraterritorial jurisdiction in various other treaty regimes. In the context of the Inter-American system, furthermore,

322 Hathaway et al., 2011, p. 390.
323 Miltner, 2012, pp. 746–747.

extraterritorial jurisdiction for a long time has developed along the lines of a personal model only. Recently, the IACtHR has furthermore inquired into effective control over domestic activities with extraterritorial effect, which also goes to show how the development of extraterritorial jurisdiction under the Inter-American system remains a unique exercise that at times resembles those developments under other treaty regimes but nevertheless follows a distinct trajectory. Consequently, one should be wary of endeavours establishing an overarching set of criteria for extraterritorial jurisdiction under the various treaty regimes: reducing extraterritorial jurisdiction under the various treaty regimes to two generalised models of 'personal' and 'spatial' jurisdiction is not only unwarranted in light of the marked differences between treaty regimes, but also risks losing the richness and nuances of the debates on – and tests of – extraterritoriality under each respective regime. In essence, the scope of extraterritorial jurisdiction under each instrument is the result of a nuanced balancing exercise between human rights' territorial presumption and contemporary extraterritorial realities, and this scope can consequently only be properly understood when viewed in the context of the respective treaty regimes. This furthermore allows for debate and reflection, as it allows for a comparison of the extraterritorial reach of various human rights treaties and therewith raises questions about the appropriate scope of extraterritorial obligations and the extent to which treaty bodies could and should adopt rules developed in the contexts of other regimes. Whereas some have denoted a "shift in the conceptualization of international human rights towards a holistic rights framework, emphasizing the universality, interdependence, 'indivisibility' and justiciability of civil, political, economic, social and cultural human rights",[324] such holism is arguably not favourable insofar as the scope of extraterritorial jurisdiction is concerned. In this sense, calls for a "normative synergy amongst human rights treaties", entailing that normative boundaries between human rights treaties collapse and that the various human rights monitoring bodies "consider their six treaties as interconnected parts of a single human rights 'constitution' and thereby consider themselves as partner chambers within a consolidating supervisory institution",[325] are not shared without further reservation here. Such synergy would not only reduce the importance of context-specific differences between treaty regimes, but would also diminish opportunities for inter-institutional reflection and debate on the proper development of extraterritorial jurisdiction.[326]

324 Petersmann, 2003, p. 381.
325 Petersmann, 2003, p. 381; Scott, 2001, pp. 8–11.
326 The existing opportunities of 'tacit citing' may be preferential in this regard: see Buyse, 2015.