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## INTERNATIONAL LEGAL THEORY

# The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to

SAMANTHA BESSON\*

### Abstract

The extraterritoriality or extraterritorial application of international and European human rights treaties refers to the recognition by those treaties' states parties of the international and European human rights of individuals or groups of individuals situated outside their territory and, in a second stage, to the identification of their corresponding duties to those individuals. Examples of extraterritoriality abound in international human rights practice, and in particular in the European Court of Human Rights' case law. Except for vague and often misleading gestures to the universality of human rights, which allegedly requires their extraterritorial application, however, many of the normative considerations underlying the extraterritorial applicability of human rights have not been broached in the human rights law literature. Nor, conversely, have human rights theorists, even among those who take the supply side of human rights seriously, devoted much attention to the threshold criteria for the abstract recognition of human rights and the trigger of the corresponding duties. To remedy some of those shortcomings, this article endeavours to bring some normative human rights theorizing to bear on the European Court of Human Rights' recent practice on extraterritoriality. More specifically, the article delves deeper into the notion of 'jurisdiction' qua threshold criterion for the applicability of the European Convention on Human Rights both within and outside its states parties' territories; distinguishes it from related notions such as authority, coercion, power, or control; and explains its normative consequences.

### Key words

European Convention on Human Rights; extraterritorial application; human rights; jurisdiction; universality

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... 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.

ECtHR, *Issa v. Turkey*, Judgment of 16 November 2004, para. 71

... 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.

ECtHR, *Al-Skeini v. United Kingdom*, Judgment of 7 July 2011, para. 149

## I. INTRODUCTION

The extraterritoriality or extraterritorial application of international and European human rights treaties refers to the recognition by those treaties' states parties of the international and European human rights of individuals or groups of individuals situated outside their territory and, in a second stage, to the identification of their corresponding duties to those individuals. Examples of extraterritoriality abound in international human rights practice, and in particular in the recent case law of the European Court of Human Rights (ECtHR or the Court): the European Convention on Human Rights (ECHR) was said to apply to the Turkish occupation of Northern Cyprus in *Loizidou*,<sup>1</sup> to the United Kingdom's prisons and operations in Iraq in *Al-Saadoon* and *Al-Skeini*,<sup>2</sup> to the French interdiction of a Cambodian vessel and coercive law enforcement at sea in *Medvedyev*,<sup>3</sup> or to the Italian Revenue Police and Coastguard's ships' border control operations in the Mediterranean in *Hirsi*,<sup>4</sup> albeit, interestingly, not to NATO bombings over Belgrade in *Banković*.<sup>5</sup>

In reaction to those jurisprudential developments, there has been no shortage of academic commentaries, mostly very critical of the cautious stance expressed in the Court's case law and its pragmatic development. However, except for vague and often misleading gestures to the universality of human rights, which allegedly requires their extraterritorial application,<sup>6</sup> many of the normative considerations underlying the extraterritorial applicability of human rights have not been broached in the human rights law literature. Nor, conversely, have human rights theorists, even among those who take the supply side of human rights seriously,<sup>7</sup> devoted much attention to the threshold criterion of jurisdiction for the abstract recognition of human rights and the trigger of the corresponding human rights duties.<sup>8</sup>

1 *Loizidou v. Turkey*, Judgment of 18 December 1996, [1996] ECHR (Rep. 1996–VI).

2 *Al-Saadoon v. United Kingdom*, Judgment of 2 March 2010, [2010] ECHR (Appl. No. 61498/08); *Al-Skeini v. United Kingdom*, Judgment of 7 July 2011, [2011] ECHR (Appl. No. 55721/07).

3 *Medvedyev v. France*, Judgment of 29 March 2010, [2010] ECHR (Appl. No. 3394/03).

4 *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, [2012] ECHR (Appl. No. 27765/09).

5 *Banković v. Belgium and Others*, Decision of 12 December 2001, [2001] ECHR (Rep. 2001–XII).

6 See, e.g., M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (2011), at 55–7, 106; R. Lawson, 'Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR', in A. Buyse (ed.), *Margins of Conflict: The ECHR and Transitions to and from Armed Conflict* (2011), 57 at 75.

7 See, e.g., H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1996), at 166 ff.; J. Nickel, *Making Sense of Human Rights* (2007), at 38 ff.; C.R. Beitz, *The Idea of Human Rights* (2009), at 109 ff.

8 See, however, S. Gardbaum, 'Human Rights as International Constitutional Rights', (2008) 19 EJIL 749, at 764–5.

This is surprising as it is unclear why the universality of human rights (and human rights-holders) ought to imply the universality of human rights duty-bearers vis-à-vis any right-holder without reference to their political and legal relationship.<sup>9</sup> Not only is this a normatively unaccounted-for implication among those promoting an extensive interpretation of the extraterritorial application of international and European human rights law, but it contradicts the way in which international human rights treaties only apply formally to every given state party's institutions and not to all other states at once, and not to other subjects of international law but to states, on the one hand, and only vis-à-vis certain individuals situated in a specific relationship to them and not to everyone, on the other. What some authors underestimate is the meaning and the role of the threshold criterion for the application of human rights, i.e., state jurisdiction qua relationship between a certain state party and certain individuals. And when they consider it, they are too quick to assimilate it to some kind of mere factual power or control test for some,<sup>10</sup> or to a mere capability to respect human rights requirements for others.<sup>11</sup> Neglect for the notion and role of jurisdiction explains in return why those authors are at pains to account for the limited extraterritorial application of the ECHR, and of international human rights law more generally, and why they situate themselves in constant opposition to human rights treaty bodies' and the ECtHR's practice.<sup>12</sup>

To remedy some of those shortcomings, this article endeavours to bring some normative human rights theorizing to bear on the ECtHR's recent practice on extraterritoriality. It hopes thereby to provide a different reading of the Court's case law and show that it has been wrongly depicted by some authors as fragmented and even contradictory.<sup>13</sup> More specifically, the article delves deeper into the notion of 'jurisdiction' that is the threshold criterion for the applicability of the ECtHR both within and outside its states parties' territories; distinguishes it from related notions such as sovereignty, authority, coercion, power, or control; and explains what its normative consequences are.

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- 9 See, e.g., Nickel, *supra* note 7, at 38 ff.; J. Tasioulas, 'The Moral Reality of Human Rights', in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007), 75. Cf. O. O'Neill, 'The Dark Side of Human Rights', (2005) 81 *Int. Aff.* 427.
- 10 See, e.g., Milanovic, *supra* note 6, at 8; Lawson, *supra* note 6, at 75; S. Cleveland, 'Embedded International Law and the Constitution Abroad', (2010) 110 *Columbia Law Review* 231.
- 11 See, e.g., *Al-Skeini*, *supra* note 2, Concurring Opinion of Judge Bonello, paras. 11–12.
- 12 See, e.g., G. Neuman, 'The Extraterritorial Constitution after *Boumediene v. Bush*', (2009) 82 *Southern California Law Review* 259, at 269–70, regarding explanations about restricting the territorial scope of constitutional rights (presumably, however, there is more at stake here than a question of foreseeability of duties incurred by the recognition of human rights with extraterritorial application); or Milanovic, *supra* note 6, at 219–22, regarding the contrast between universality and effectiveness (presumably, however, a right cannot be said to be universal if it cannot be effectively protected through corresponding duties). See also D. McGoldrick, 'The Extraterritorial Application of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (2004), at 41. For the same opinion, see M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Banković"', in Coomans and Kamminga, *supra* 125 at 136.
- 13 See for this critique: M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', (2012) 23(1) *EJIL* 121; Lawson, *supra* note 6, at 63 ff. Of course, it is quite remarkable that the Court decided to overrule part of its *Banković* (*supra* note 5) precedent in *Al-Skeini* (*supra* note 2), albeit without recognizing that it was doing so: for instance, it has now abandoned the *espace juridique européen* requirement, but also the prohibition of 'tailoring and dividing' human rights.

Jurisdiction is a threshold criterion for the applicability of most international and European human rights treaties: it conditions the applicability of those rights and duties on political and legal circumstances where a certain relationship exists between rights-holders and states parties.<sup>14</sup> I would like to argue that jurisdiction qua normative relationship between subjects and authorities actually captures the core of what human rights are about qua normative relationships between right-holders and institutions as duty-bearers. It is no wonder, therefore, that the ECHR has made the relationship of jurisdiction a pivotal notion to understanding who the right-holders, but also the duty-bearers, of ECHR rights are.<sup>15</sup> In effect, I would like to show that the limited extraterritorial application of the ECHR no longer is the problem some say it is, once we face some of the hard normative questions in human rights theory, and endorse an account of human rights that ties them to the exercise of political and legal authority. One may even venture as far as to say that given those ties between human rights and political authority through jurisdiction, it should come as no surprise that the ECtHR takes political concerns seriously when deciding cases of extraterritorial application of the Convention.<sup>16</sup>

A final note on this article's scope is in order. First of all, the focus on the ECHR and not on other international human rights treaties or regimes may be explained by reference to the well-developed case law of the ECtHR on the issue,<sup>17</sup> and by the Court's specifically supranational judicial take on the question.<sup>18</sup> The proposed normative understanding may then be applied *mutatis mutandis* to other international human rights regimes.<sup>19</sup> Most international human rights treaties in force entail non-exclusively territorial jurisdiction clauses similar to the ECHR's,<sup>20</sup> although some

14 See also *Lopez Burgos v. Uruguay*, Communication No. 52/1979, Views of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, paras. 12.2 and 12.3 on this very notion of 'relationship between the individual and the State'.

15 See also J. P. Costa, 'Qui relève de la juridiction de quel(s) Etats au sens de l'article 1er de la Convention européenne des droits de l'homme?', in L. Condorelli (ed.), *Libertés, justice, tolérance; Mélanges en hommage au doyen Gérard Cohen-Jonathan* (2004), 483 at 500, who regards jurisdiction as the cornerstone or *pièce angulaire* of the Convention. See also O'Boyle, *supra* note 12, at 125.

16 See on the overpoliticized nature of the case law, however: Milanovic, *supra* note 6, at 4; R. Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention of Human Rights', in Coomans and Kamminga, *supra* note 12, 83 at 115–16; McGoldrick, *supra* note 12, at 71; Lawson, *supra* note 6, at 75. For the same opinion, see O'Boyle, *supra* note 12, at 136.

17 For a detailed review, see, e.g., Lawson, *supra* note 6; Milanovic, *supra* note 6.

18 See also Milanovic, *supra* note 6, at 4.

19 For a similar argument, see Milanovic, *supra* note 6, at 4; O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', (2006) 6 *Baltic Yearbook of International Law* 183, at 192.

20 On the extraterritoriality of international human rights law outside the ECHR, see, e.g., T. Meron, 'Extraterritoriality of Human Rights Treaties', (1995) 89 *AJIL* 78; Y. Shany and O. Ben-Naftali, 'Living in Denial: The Application of Human Rights in the Occupied Territories', (2003–4) 37(1) *Israel Law Review* 17; R. Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties', (2007) 40(2) *Israel Law Review* 503; R. Wilde, 'Compliance with human rights norms extraterritorially: "human rights imperialism"?', in L. Boisson de Chazournes and M. Kohen (eds.), *Le droit international et la quête de sa mise en oeuvre. Liber Amicorum Vera Gowlland-Debbas* (2010), at 319; M. Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in Coomans and Kamminga, *supra* note 12 at 73; McGoldrick, *supra* note 12; M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009); G. Goodwin-Gill, 'The Extraterritorial Reach of Human Rights Obligations: A Brief Perspective on the Link to Jurisdiction', in L. Boisson de Chazournes and M. Kohen (eds.), *Le droit international et la quête de sa mise en oeuvre; Liber Amicorum Vera Gowlland-Debbas* (2010), at 293; G. Grisel, *Application extraterritoriale du droit international des droits de l'homme* (2010); Milanovic, *supra* note 6, at

contain none at all, as is the case of the UN Covenant on Economic, Social and Cultural Rights.<sup>21</sup> Second, the focus on international or regional human rights law, and not on domestic and comparative constitutional human rights law, has to do with the specific function of international and European human rights that are complementary to domestic constitutional or fundamental rights and not comparable in their role. Even though they share the same structure and content by and large, their complementary function becomes particularly evident, I will argue, in matters of personal scope of the protected rights, both within and outside the state's territory. This is why I concentrate mostly on the ECtHR's case law in the article, and only briefly explain now and then why it may differ from a domestic constitutional court's practice on extraterritoriality.<sup>22</sup>

The article's argument is three-pronged. The first section of the article pertains to the *notion of jurisdiction* as a trigger for human rights protection in the ECHR and its delineations from related notions in international law (the 'which concept of jurisdiction' question) (2). The second section relates to the *assessment of jurisdiction* and in particular the assessment of its constitutive elements and types (the so-called 'models of jurisdiction' question<sup>23</sup>) (3). The third section pertains to the normative *consequences of jurisdiction* in terms of the types of rights and duties applicable (the 'all-or-nothing jurisdiction' and 'all-or-nothing rights and duties' question) (4). Finally, a coda at the end of the article identifies and briefly addresses some of the challenges remaining for the extraterritorial application of international and European human rights law (5).

34–9 and 11 ff.; F. Hampson, 'The Scope of the Extraterritorial Applicability of International Human Rights Law', in G. Gilbert, F. Hampson, and C. Sandoval (eds.), *The Delivery of Human Rights: Essays in Honour of Professor Sir Nigel Rodley* (2011), at 157. See, e.g., Art. 2 International Covenant on Civil and Political Rights, which states that '[e]ach State Party . . . 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).

21 Interestingly, there is still some uncertainty about the extraterritorial applicability of the UN Covenant on Economic, Social and Cultural Rights that does not have a jurisdiction clause: on this issue, see the essays in Coomans and Kamminga, *supra* note 12. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, paras. 102–113; and the 2011 Maastricht Principles on the Extraterritorial Obligations of States in the area of ESC Rights (hereafter 'ETO Principles'), available online at [www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20Final%20Version%2017.10.2011.pdf](http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20Final%20Version%2017.10.2011.pdf), and especially Art. 9: 'A State has obligations to respect, protect and fulfill 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; 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' (emphasis added).

22 Contrast, e.g., the ECtHR's *Al-Skeini*, *supra* note 2, with the US Supreme Court's *Boumediene v. Bush*, (2008) 128 S. Ct. 2229, or the ECtHR's *Hirsi*, *supra* note 4, with the US Supreme Court's *Sale v. Haitian Centers Council*, (1993) 113 S. Ct. 2549. For a comparison of the evolutions of the two practices, see Cleveland, *supra* note 10.

23 See Milanovic, *supra* note 6, at 118 ff., for the term 'jurisdiction model'.

## 2. THE NOTION OF JURISDICTION

To understand the notion of jurisdiction, it is important to start by understanding how it functions as a threshold criterion (subsection 2.1), what its meaning should be (subsection 2.2), how it should be distinguished from other, related notions (subsection 2.3), and how its domestic and international law dimensions should be carefully delineated (subsection 2.4).

### 2.1. Jurisdiction as threshold criterion

*Pro memoria*, the extraterritoriality, or extraterritorial application, of the ECHR refers to the recognition (French for ‘securing’ in Article 1 ECHR) of ECHR rights by states parties and the identification of the corresponding duties on their part to individuals or groups of individuals situated outside their territory.<sup>24</sup>

The notion of extraterritoriality itself implies that the territorial application of human rights is the principle, but that there can be exceptions.<sup>25</sup> Human rights ordinarily apply to subjects situated within the territorial boundaries of the state, but there are circumstances in which they can and should also apply outside those boundaries. It is important to note this reference to ‘can and should’ because the correlation between human rights and duties implies that the application of human rights not only is required in certain circumstances that need to be identified, but that it also has to be possible before it can be required (by reference to the ‘ought implies can’ principle).

To determine what the geographical scope of the ECHR amounts to and whether it can and should extend beyond the territorial boundaries of any state party, the only resort is to a non-geographical clause: Article 1 ECHR’s threshold criterion for the application of the Convention.<sup>26</sup> Article 1 ECHR reads as follows: ‘*Obligation to respect human rights*. The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention’ (emphasis added).

The threshold or liminal criterion for the application of ECHR rights consists in *state jurisdiction*. It is an abstract threshold for the recognition of human rights in the first place. Without state jurisdiction over certain people, those people do not have human rights against that state and that state has no human rights duties

24 See *Al-Skeini*, *supra* note 2, para. 130: ‘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.’ See also Milanovic, *supra* note 6, at 7–9. It is important therefore to clearly delineate the extraterritorial application of the ECHR from its so-called ‘boomerang effect’ (in French: *effet ricochet*) as exemplified in extradition cases (e.g., *Soering v. United Kingdom*, Judgment of 7 July 1989, [1989] ECHR (Ser. A. 161); *Chahal v. United Kingdom*, Judgment of 15 November 1996, [1996] ECHR (Rep. 1996-V); *Al-Saadoon*, *supra* note 2; *Hirsi*, *supra* note 4): in those decisions, what constituted a violation of the ECHR on a given state party’s territory, and therefore under its jurisdiction, was the state party’s decision that pertained to people situated on its territory, where its jurisdiction was presumed, but that implied sending them away to another state, and outside the state party’s jurisdiction, where they would suffer potential violations of their human rights. Of course, in practice, many cases discussed in this article combine elements of extraterritoriality and boomerang effect: see, e.g., *Al-Saadoon*, *supra* note 2; and *Hirsi*, *supra* note 4.

25 See *Banković*, *supra* note 5; *Al-Skeini*, *supra* note 2; and *Hirsi*, *supra* note 4.

26 See *Al-Skeini*, *supra* note 2, para. 130.

towards those people. The relational nature of jurisdiction between a subject and the authority needs to be stressed, as it corresponds to the relational nature of human rights between a right-holder and a duty-bearer. Article 1 ECHR situates human rights within a relationship of jurisdiction and makes them dependent on it: jurisdiction both requires the recognition of human rights normatively (jurisdiction as normative trigger of human rights) and provides the conditions for the corresponding duties to be feasible (jurisdiction as practical condition of human rights). Jurisdiction amounts, therefore, at once to a normative threshold and a practical condition for human rights.<sup>27</sup>

Interestingly, the criterion for the ECHR to apply is not territorial at all, but functional:<sup>28</sup> it pertains to the function of jurisdiction. Jurisdiction has territorial, temporal, and personal dimensions, of course, but those are mere consequences of jurisdiction. When territorial jurisdiction is mentioned, it should not therefore be understood to mean that jurisdiction is territorial in nature, but only that territory is used as shorthand for the function of jurisdiction. The same may be said about personal jurisdiction by reference to nationality and jurisdiction on nationals only.<sup>29</sup> In practice, states parties' jurisdiction was long exercised mostly within a state's territory and mostly on nationals, but things have gradually changed: states parties now exercise jurisdiction more and more beyond their domestic boundaries and often exercise jurisdiction at home on non-nationals as well. In short, the territorial, personal, and temporal scopes of the ECHR have all evolved with the evolution of jurisdiction itself.

It is important to realize this as the Convention could have had an application scope restricted to a given territory, to nationals, and to a specific period in time, the way this is done in certain domestic constitutions.<sup>30</sup> Instead, its drafters chose to refer solely to the normative relationship that unites states parties to their subjects. We know, for instance, from the *travaux préparatoires* that the reference to 'residents' was intentionally eluded to avoid moving from the nationality restriction to another one, i.e., to that of residence only and hence to territory.<sup>31</sup>

This functional approach to jurisdiction is actually testimony to a common feature in all post-1945 international human rights law: the idea of supplementing domestic human rights law by international human rights that would secure the minimal right to political membership and hence the right to have (human)

27 See, on the second practical dimension of jurisdiction for human rights, L. Wildhaber, Speech given on the occasion of the opening of the judicial year, Strasbourg, 31 January 2002, (2002) *Annual Report of the European Court of Human Rights* 20, at 23–4: 'We do have to realise that the Convention was never intended to cure all the planet's ills and indeed cannot effectively do so . . . When applying the Convention, we must not lose sight of the practical effect that can be given to those rights.'

28 This is why, as explained below, the functional approach to jurisdiction is not a third approach besides personal jurisdiction and territorial jurisdiction, but the correct understanding of jurisdiction of which personal and territorial jurisdictions are specific instances.

29 This parallel development between the personal and the territorial scopes of jurisdiction corresponds to the mutual relationship between citizenship and human rights in a democracy. I will come back to the democratic dimension of the ECHR and of jurisdiction qua threshold criterion for the application of human rights later in the article.

30 See, e.g., Neuman, *supra* note 12, at 269–70.

31 See, e.g., Lawson, *supra* note 16, at 88 ff.



rights in that political community and guarantee a minimal level of protection of international human rights in that context.<sup>32</sup> This difference in role (and not in content or structure of the rights<sup>33</sup>) between international and domestic human rights law is most clearly visible in two features of international human rights law: its pressure on *internal* inclusion in the political community by granting human rights to non-nationals and also to non-residents, on the one hand, and its pressure on *external* inclusion in the political community by granting human rights to non-nationals and to non-residents who are situated abroad but are subject to state jurisdiction, on the other.<sup>34</sup>

In turn, this fundamental difference in function between international and domestic human rights law explains why some domestic practices on extraterritoriality have been slower to develop than international and European human rights ones.<sup>35</sup> Importantly, however, this difference lies in the specifically international protection of the right to political membership, and not, as is often alleged, in the opposition between a political conception of human rights and a universal one.<sup>36</sup> Both constitutional and international or European human rights are equally political and universal in the proposed account of human rights. What is universal about international and European human rights indeed is their guaranteeing the right to political membership in any given political community that exercises jurisdiction over the right-holders.

## 2.2. Jurisdiction qua political and legal authority

From the perspective of political theory, jurisdiction is best understood as *de facto* political and legal authority; that is to say, practical political and legal authority that

32 See, e.g., S. Besson, 'Human Rights and Democracy in a Global Context – Decoupling and Recoupling', (2011) 4(1) *Ethics and Global Politics* 19, by reference to H. Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (1951), 147. For an explicit reference to Arendt's 'right to have rights' in the extraterritoriality context, see Judge Pinto's Concurring Opinion in *Hirsi*, *supra* note 4.

33 See, e.g., R. Dworkin, *Justice for Hedgehogs* (2011), 327 ff.; Besson, *supra* note 32.

34 See, e.g., Gardbaum, *supra* note 8, at 764–5; Besson, *supra* note 32. On the productive tension between international human rights and domestic citizens' rights, see also J. Habermas, *Zur Verfassung Europas; Ein Essay*, (2011), at 31–2 and 36–8; S. Benhabib, *Dignity in Adversity; Human Rights in Troubled Times*, (2011), at 16 and 126.

35 Compare the US Supreme Court's decisions in *Boumediene* (*supra* note 22) or *Sale* (*supra* note 22) with the ECtHR's decisions in *Al-Skeini* or *Hirsi*. US case law lags behind that of the ECtHR in two respects: it still focuses on nationality instead of residence when recognizing constitutional rights within US borders, and it has only recently abandoned the test of territorial jurisdiction for functional jurisdiction outside US borders, even though it seems to want to limit its consequences by restricting it to nationals abroad only (see Attorney General Eric Holder's speech available online at [www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html](http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html)). More generally, this is also why it is artificial to compare both courts' practice on the issue of extraterritoriality (e.g., Cleveland, *supra* note 10): here, it is not only the international versus domestic nature of the courts that lies in the way of the comparison, but the differences in the function of the international versus domestic human rights regimes they are applying. Of course, the difference between the two bodies of human rights law is greater if one compares the US Supreme Court with the ECtHR than it would be if we compared the Court with other domestic constitutional courts, especially from within the Council of Europe, due to the greater intermingling between international and domestic human rights sources in Europe.

36 Cf. Milanovic, *supra* note 6, at 76–83; Lawson, *supra* note 6, at 75–6. This is also why the opposition between, on the one hand, so-called 'political' or 'social compact' approaches to jurisdiction and, on the other, so-called 'universal' ones is actually flawed.

is not yet legitimate or justified, but claims to be or, at least, is held to be legitimate by its subjects.<sup>37</sup>

Qua de facto authority, jurisdiction consists in effective, overall and normative power or control (whether it is prescriptive, executive, or adjudicative). It amounts to more than the mere exercise of coercion or power as a result: it also includes a normative dimension by reference to the imposition of reasons for action on its subjects and the corresponding appeal for compliance (e.g., through giving instructions).<sup>38</sup> This is what distinguishes legal and political authority from other forms of authority.

In the case of state jurisdiction,<sup>39</sup> what is at stake is de facto political and legal authority in a broad sense: any appeals for compliance by an institutional act or omission may be regarded as legal acts and omissions. This does not mean, of course, that those acts or omissions are necessarily lawful, but only that they stem from a necessarily lawfully organized institutional and constitutional framework, whether those institutions then act *ultra vires* or not. What matters indeed is that state agents exercise some kind of normative power with a claim to legitimacy, even if that claim ends up not being justified. Nor, conversely, does it mean that all state agents necessarily exercise jurisdiction: some are merely using coercion and their acts lack the required normative dimension. This distinction is particularly important in the case of the military, for instance, as not all military operations may be understood as the exercise of jurisdiction for lack of the normative element.

Including legal and political subjects into the scope of human rights-holders is one of the ways of legitimizing the exercise of normative power and of justifying the claim to legitimate authority that goes with the exercise of de facto authority and jurisdiction over them. Qua democratic states or, at least, democratizing states, ECHR states parties are not allowed to exercise their political and legal authority in ways that do not contribute to justifying the claim to legitimate authority that goes with the exercise of de facto authority. State jurisdiction works, therefore, as a normative trigger for the recognition of human rights and duties. At the same time, however, it provides the practical circumstances for them to be feasible rights and duties in practice: de facto legal and political authority amounts indeed to the institutional framework necessary to enact and protect human rights, and to identify and allocate the corresponding duties in practice.<sup>40</sup>

37 See J. Raz, *Ethics in the Public Domain; Essays in the Morality of Law and Politics* (1995), at 215. Importantly, the reference to de facto authority here is not meant to be contrasted with de jure authority, but with justified or legitimate authority. It should not therefore be confused with the distinction that is made sometimes between de facto and de jure control in the ECtHR's case law (e.g., *Hirsi*, *supra* note 4, at 80–1). The latter distinction opposes the regular or lawful exercise of jurisdiction to the *ultra vires* exercise of jurisdiction, as explained below.

38 See Raz, *supra* note 37, at 212.

39 There is nothing in the notion of jurisdiction that prevents it from applying to other forms of non-state political authority, such as the European Union's, for instance, or other international organizations'. However, since, with the exception of the International Convention on the Rights of Persons with Disabilities, existing international human rights treaties currently only have states as parties, as is the case of the ECHR, I will restrict myself to states' jurisdiction in this article.

40 Note that the implied prima facie circularity of the statement that jurisdiction is both a practical condition of human rights and one that is normatively required may be placated by reference to individuals' collective natural duty of justice to create institutions that can protect human rights (see, e.g., Universal Declaration

Of course, one may question this very link between human rights and political membership in the ECHR and reject the proposed understanding of both jurisdiction and human rights qua political relationship between the state party and its subjects. Various arguments may be put forward, however, in support of the political understanding of human rights, both in general and within the ECHR system.

To start with, human rights are normative relationships between a right-holder and a duty-bearer. But unlike other moral rights, they are systematic rights of all against all, and egalitarian ones at that, to the extent that all human rights subjects have the same rights against all and those rights are constitutive of equal moral status. Those features in turn explain human rights' institutional nature and the fact that they require institutions to pool and mediate the duties equally, but also to identify, specify, and allocate them, and why only institutions can and should be human rights duty-bearers.<sup>41</sup> Another argument for the proposed political and institutional conception of human rights that stems from within the ECHR lies in the democratic underpinnings of all ECHR rights: democracy belongs to the interpretative values of the Convention.<sup>42</sup> It is, moreover, the only process through which Convention rights may be restricted in a justified way (e.g., the reference to the 'necessity in a democratic society' in Article 8(2) ECHR). This is not surprising given that human rights are constitutive of equal moral status, a status that is necessarily relational and which, in circumstances of equal and interdependent stakes between those subjected to law-making, calls for a democratic regime.

Importantly, one should note that the proposed understanding of jurisdiction corresponds to the one that applies both domestically and extraterritorially. The Convention has one single threshold criterion whether it applies territorially or extraterritorially. This is actually how one should understand statements of the European Court in *Issa*, but also in *Banković* or *Al-Skeini* that draw analogies from the circumstances that apply in a state party's territory to those that apply outside its territory.<sup>43</sup> There are no reasons, in other words, why the notion of jurisdiction should be conceived differently depending on whether it applies inside or outside the territory of a state party. On the contrary, evidence from Article 1 ECHR and the Court's case law points to a single threshold in both sets of circumstances.

### 2.3. Jurisdiction and other related notions

State jurisdiction for the purpose of the ECHR ought to be carefully delineated from other understandings of jurisdiction, but also from other connected notions like attribution and capability. Those distinctions are important when considering how

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of Human Rights, Art. 28). On this question, see, e.g., A. Buchanan, *Justice, Legitimacy and Self-Determination; Moral Foundations of International Law* (2004), at 85–97.

41 See Besson, *supra* note 32; Shue, *supra* note 7; Nickel, *supra* note 7; Beitz, *supra* note 7.

42 See Besson, *supra* note 32; P. Gérard, *L'esprit des droits; Philosophie des droits de l'homme* (2007), at 202–8. See also, more generally, A. Moravcsik, 'The origins of human rights regimes', (2000) 54 *Int. Org.* 217.

43 See *Issa v. Turkey*, Judgment of 16 November 2004, [2004] ECHR (Appl. No. 31821/96), para. 71: '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.' See also, more specifically, *Al-Skeini*, *supra* note 2, para. 149: 'the exercise of some of the public powers normally to be exercised by a sovereign government.'

to assess state jurisdiction in proceedings before the European Court and in the Court's decisions: among the admissibility requirements or the merits, and, among either of those, at what stage in the procedure exactly.<sup>44</sup>

First of all, state jurisdiction is not about *judicial jurisdiction*. It is not about the ECtHR's *ratione personae* or *ratione loci* jurisdiction.<sup>45</sup> Nor is it about domestic courts' jurisdiction qua way of exercising state jurisdiction.<sup>46</sup>

Of course, state and judicial jurisdiction are related:<sup>47</sup> the ECtHR's jurisdiction is a consequence of state jurisdiction,<sup>48</sup> on the one hand, and domestic courts' jurisdiction is a case of exercise of state jurisdiction,<sup>49</sup> on the other. However, they need to be clearly delineated as distinct steps in the reasoning to avoid many of the confluences one observes in practice. This is particularly important when discussing issues of comity towards the executive or the question of the margin of appreciation, as those pertain only to judicial jurisdiction over extraterritorial matters and not directly to state jurisdiction itself.

Second, state jurisdiction is not about *attribution* in the context of the determination of responsibility. Attribution of certain acts to a public institution and state agents, and, more generally, responsibility, only come later once the state's duties have arisen in the first place and have been violated.<sup>50</sup> Without jurisdiction, there are no human rights applicable and hence no duties, and there can be no acts or omissions that would violate those duties that can be attributed to a state and a fortiori no potential responsibility of the state for violating those duties later on.

Of course, the practice refers to 'effective control' as one of the criteria of attribution of the acts of individual agents to states parties.<sup>51</sup> This conceptual resemblance is actually a source of confusion that explains why attribution and jurisdiction are often conflated. True, often in order to assess jurisdiction, the link between the acts or omissions at stake and state agents needs to be assessed at once and at the same time, hence the difficulty in keeping them apart. This would be the case, for instance, in the context of assessing whether there is state jurisdiction when *de facto* organs act or when the acts of state agents need to be delineated from those of an international organization they work for: in those circumstances, attribution to the state is also a

44 See Milanovic, *supra* note 6, at 18–19.

45 See, e.g., the 2011 Admissibility Guide released by the ECtHR ([www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law±analysis/Admissibility±guide](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law±analysis/Admissibility±guide)) which discusses extraterritorial jurisdiction under the Court's competence *ratione personae et loci*. Note that in *Al-Skeini*, *supra* note 2, the Court decided to postpone the discussion of jurisdiction from the admissibility section to the merits.

46 See, e.g., *Markovic v. Italy*, Judgment of 14 December 2006, [2006] ECHR (Rep. 2006-XIV), para. 54.

47 For instance, in *Boumediene*, *supra* note 22, the US Supreme Court's jurisdiction pertained to the Court's jurisdiction on habeas corpus and not only to US state jurisdiction in Guantánamo, or only in a limited way to the extent that *de facto* sovereignty on Guantánamo was accepted: see T. Endicott, 'Habeas Corpus and Guantánamo Bay: A View from Abroad', (2010) 55 *American Journal of Jurisprudence* 1, at 36–9.

48 See, e.g., the 2011 Admissibility Guide, *supra* note 45.

49 See, e.g., *Markovic*, *supra* note 46, para. 54 (even when the facts of the case pending before domestic courts have taken place extraterritorially and there is no (extraterritorial) state jurisdiction on those facts; what matters indeed, when creating (territorial) state jurisdiction in this case, is the domestic courts' jurisdiction).

50 See also O'Boyle, *supra* note 12, at 130 ff.; De Schutter, *supra* note 19, at 190; Milanovic, *supra* note 6, at 41–52. Of course, the term 'responsibility' is used here to refer to the secondary duties triggered by the violation of primary (human rights) duties and not to those primary duties in the first place.

51 See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392, at 62 and 65.

condition of jurisdiction. Some authors therefore regard jurisdiction and attribution as joint steps in the *ex post* reconstruction of the legal situation,<sup>52</sup> but this should not obfuscate their conceptual distinctiveness *ex ante*.

Finally, state jurisdiction is not merely about *feasibility* or *capability*. Some authors, however, regard jurisdiction as the mere capability to respect human rights. For them, if a human rights violation occurs, there was capability to respect human rights and hence jurisdiction.<sup>53</sup>

Of course, the feasibility of duties is part of their concrete requirements (following the principle ‘ought implies can’) and a condition of their existence. This is also clear from the ECtHR’s case law on the identification of positive duties and their allocation to states parties. However, that very question of the concrete feasibility of duties only arises once jurisdiction has been established and the abstract rights recognized. There can be no human rights duties without human rights, and the existence of human rights depends on jurisdiction in the first place. Jurisdiction cannot therefore be directly equated with the feasibility of human rights duties.

True, the question of jurisdiction arises when assessing the general and abstract feasibility of human rights (and, accordingly, of duties). As I explained before, jurisdiction is not only a normative precondition for the recognition of human rights, but also a practical requirement of their feasibility: institutions have to be in place and exercising effective overall normative power for human rights to be protected. Then, however, jurisdiction merely becomes one of the elements of the assessment of the abstract feasibility of human rights.

#### 2.4. Jurisdiction under domestic and international law

By definition, state jurisdiction *qua de facto* legal and political authority is jurisdiction under *domestic law*. This should be understood in a broad sense: state institutions and agents are indeed creatures of domestic law. This does not mean, of course, that their acts and omissions themselves are lawful, but only that they stem from a necessarily lawfully organized institutional and constitutional framework, whether state agents act *ultra vires* or not in practice.

Importantly, what matters for state jurisdiction is *domestic-law* jurisdiction, therefore, and not jurisdiction in *international law*. State jurisdiction may indeed not always be exercised lawfully from the perspective of international law. It may, of course, but it need not be. It suffices here to contrast the intervention of a state into the territory of another state by state consent against military occupation without state consent: while both may trigger human rights protection when there is state jurisdiction according to that state’s law, the latter is clearly unlawful from an international-law perspective.

Domestic law’s and international law’s jurisdiction are not coextensive, therefore, but the former includes the latter.<sup>54</sup> Indeed, jurisdiction under international law is

52 See, e.g., Cleveland, *supra* note 10, at 233–4; De Schutter, *supra* note 19, at 244–5.

53 See, e.g., *Al-Skeini*, *supra* note 2, Concurring Opinion of Judge Bonello, paras. 11–12.

54 This is actually the case for many concepts in international law (e.g., nationality) that are internationally framed through some criteria (e.g., effectiveness in the case of nationality) but refer to a state-related and domestic-law reality only and one that, as a result, varies from state to state.

the competence of each state to prescribe, enforce, and adjudicate, primarily on its territory, but also in exceptional cases outside the latter: e.g., on aircraft and ships, by embassies and consulates or by invitation to do so.<sup>55</sup> International law on jurisdiction is not therefore about defining state jurisdiction in the first place, but depends on its existence and regulates some of its transnational and international implications. It protects a division of labour between territorial states and their respective jurisdiction, on the one hand, and organizes their coexistence when their jurisdiction exceptionally overlaps in extraterritorial circumstances by authorizing it in certain cases, on the other. The function of jurisdiction under international law is very different from that of jurisdiction qua threshold criterion for the applicability of international human rights law, as a result.

This distinction between the international lawfulness of state jurisdiction and the existence of state jurisdiction based on domestic law actually confirms how jurisdiction differs from sovereignty: the former corresponds to the international-law title and right to exercise domestic jurisdiction. This in turn explains why state jurisdiction is not always exclusive; it claims to be exclusive and actually is when it is justified, but it need not be as a matter of fact. And this is why two states may exercise jurisdiction at the same time.<sup>56</sup>

What this means in the ECHR context is that neither the critiques of the ECtHR's decision in *Banković*<sup>57</sup> nor the *Banković* decision itself<sup>58</sup> were right in the end: the state jurisdiction at stake in Article 1 ECHR is clearly a matter of law, but it is a matter of domestic law and not of international law, hence the confusion in the literature between state jurisdiction being a matter of law and it being a matter of international law.<sup>59</sup> This confusion is reinforced by the opposition in the case law of the Court between de jure control (by reference to international law only) and de facto control, and, as to the former, by reference to the lawfulness of the act or omission only.<sup>60</sup> Of course, when domestic-law jurisdiction is exercised outside domestic boundaries, it may sometimes overlap with jurisdiction under international law, albeit not necessarily. Domestic- and international-law jurisdiction are not completely distinct, and

55 On state jurisdiction under international law, see V. Lowe, 'Jurisdiction', in M. Evans (ed.), *International Law* (2006), 335; I. Brownlie, *Principles of Public International Law* (2008), 299.

56 See *Ilascu v. Moldova and Russia*, Judgment of 8 July 2004, [2004] ECHR (Rep. 2004-VII). See also De Schutter, *supra* note 19, at 228. If international organizations acquire human rights duties under international human rights treaties and are submitted to the jurisdiction threshold as a result, the same issues may arise between the organization and the state. See for an instance of the latter: H. Aust, 'Pirateriebekämpfung im Lichte von Grundgesetz und Völkerrecht auf dem verwaltungsgewerrechtlichen Prüfstand', (2012) *Deutsches Verwaltungsblatt* 484.

57 See, e.g., for this critique: Milanovic, *supra* note 6, at 21–34, especially at 27; Cleveland, *supra* note 10, at 233; De Schutter, *supra* note 19, at 195 ff.

58 *Banković*, *supra* note 5, paras. 59–61.

59 See Milanovic, *supra* note 6, at 8: 'jurisdiction is the actual exercise of control and authority by a state, while title and sovereignty establish the state's right in international law to exercise such authority within a specific territory.' See also Milanovic, *supra* note 6, at 53 and 61, however, who, because he does not want to conflate international-law jurisdiction with jurisdiction for the purposes of human rights, actually misses the domestic-law notion of state jurisdiction and artificially distinguishes jurisdiction qua effective power only (without normative dimension) and title to exercise jurisdiction.

60 See *Hirsi*, *supra* note 4, para. 80–81. The Court's reference to de facto control ought not be conflated with de facto authority, as explained *supra* note 37.

the Court in *Banković* was right on this count, but nor are they entirely coextensive.<sup>61</sup> They necessarily overlap to the extent that domestic law's state jurisdiction is the object of jurisdiction under international law. The former includes the latter, but also cases of unlawful exercise of state jurisdiction under international law.

Interestingly, from the perspective of human rights, the sole difference between those cases of lawful and unlawful jurisdiction under international law is one of authorization. The internationally lawful nature of a given exercise of domestic-law jurisdiction therefore provides a confirmation of its existence by enhancing its authority and adding a new layer of legitimacy; this explains why the categories of extraterritorial jurisdiction under international law constitute ready cases of state jurisdiction that can be taken up by the European Court's case law. It also explains, as I will argue below, why, in cases of internationally lawful jurisdiction, a presumption of jurisdiction and other facilitated evidence mechanisms are used in the case law, and not in the other cases. Time has come, therefore, to turn to the assessment of the existence of jurisdiction in practice.

### 3. THE ASSESSMENT OF JURISDICTION

When assessing jurisdiction, it is essential to distinguish between the constitutive elements of jurisdiction (subsection 3.1) and the types of jurisdiction and the criteria used for assessing their existence in practice (subsection 3.2).

Failure to see the difference between the two and how they are combined in the ECtHR's case law explains a lot of the current misunderstandings of that case law and the unjustified criticism it is facing.<sup>62</sup> Of course, some of those misunderstandings have been encouraged by the Court's own inability to always disentangle the three elements of jurisdiction qua effective, overall, and normative control, on the one hand, from the ways in which that control is exercised, i.e., territorially and indirectly or personally and directly, on the other.

And this is made even more difficult as the evidence requirements vary depending on whether jurisdiction is territorial and lawful; extraterritorial, general, and lawful; extraterritorial, personal, and lawful; extraterritorial, general, and unlawful; or extraterritorial, personal, and unlawful. The question of the evidence of jurisdiction will be addressed in my third point in this section (subsection 3.3). The combination of the elements, types and evidence of control and hence of jurisdiction may be visualized in Table 1.

61 Interestingly, the ECtHR's case law does not approach the concept of jurisdiction as an autonomous ECHR concept like 'proportionality' or 'degrading treatment'. There are many explanations for this. One of them is that the Convention is a human rights treaty whose applicability does not depend on reciprocity, unlike other international treaties. Another explanation is that the uniform application of the Convention is only a concern once it is applicable and once the threshold criterion has been reached.

62 See, e.g., Milanovic, *supra* note 6, and M. Milanovic, 'Reply to Shany, Lowe and Papanicopolu – Review of Milanovic, M., Extraterritorial Application of Human Rights Treaties', in EJIL-talk, 5 December 2011, available at [www.ejiltalk.org/reply-to-shany-low-and-papanicopolu/](http://www.ejiltalk.org/reply-to-shany-low-and-papanicopolu/); Milanovic, *supra* note 13. Among those critiques, one may mention the critique that the Court is confusing its criteria when it examines the existence of normative power after establishing personal effective control in *Al-Skeini*, whereas the Court has identified constitutive elements of jurisdiction whose existence it tests by reference to different criteria.

TABLE I. The ECtHR's case law on jurisdiction

Control	Elements of control		Effective	Overall	Normative
Types of control					
Territorial control ( <i>Al-Skeini's</i> 'effective control over an area')	Internationally lawful	On domestic territory	Presumption	Presumption	Presumption
		On foreign territory by invitation of the sovereign state	Facilitated evidence by extension? <i>Banković</i> <i>Al-Skeini</i>	Facilitated evidence by extension? <i>Loizidou</i>	Facilitated evidence by extension? <i>Banković</i>
	Internationally unlawful	On foreign territory by unlawful occupation	General evidence <i>Banković</i> <i>Al-Skeini</i>	General evidence <i>Loizidou</i>	General evidence <i>Banković</i>
Personal control ( <i>Al-Skeini's</i> 'state agent control and authority')	Internationally lawful	Through diplomats and consuls	Facilitated evidence by extension? <i>Banković</i> <i>Al-Skeini</i>	Facilitated evidence by extension?	Facilitated evidence by extension?
		Through other state agents, including the military, by invitation	Facilitated evidence by extension? <i>Banković</i> <i>Al-Skeini</i>	Facilitated evidence by extension?	Facilitated evidence by extension? <i>Al-Skeini</i>
		Through other state agents, including the military, in official ships, aircraft or buildings	Facilitated evidence by extension? <i>Banković</i> <i>Al-Skeini</i>	Facilitated evidence by extension?	Facilitated evidence by extension?
	Internationally unlawful	Through state agents, including the military	Personal evidence <i>Banković</i> <i>Al-Skeini</i>	Personal evidence	Personal evidence <i>Al-Skeini</i>
		Through state agents, including the military, in official ships, aircraft or buildings	Personal evidence <i>Banković</i> <i>Al-Skeini</i>	Personal evidence	Personal evidence <i>Al-Skeini</i>



### 3.1. Elements of jurisdiction

Based on the notion of jurisdiction *qua de facto* political and legal authority introduced and adopted previously, one may identify three constitutive elements of jurisdiction: (i) effective power, (ii) overall control, and (iii) normative guidance.

In short, to qualify as jurisdiction, state control should be effective, overall, and normative. First of all, the state's power should be effective and exercised, and not merely claimed. Second, it should be exercised over a large number of interdependent stakes, and not one time only and over a single matter only. Interestingly, the interdependence of stakes is one of the conditions of political membership, and when those stakes are also equal, a condition of democratic membership.<sup>63</sup> Finally, it should be exercised in a normative fashion so as to give reasons for action, and not as mere coercion.

Interestingly, all three elements of the proposed understanding of jurisdiction may also be found in the ECtHR's case law following *Banković*. Generally, the reference to 'authority' has been omnipresent in the case law about jurisdiction, even if it is usually juxtaposed to that of 'control'<sup>64</sup> and sometimes wrongly interpreted by authors as being interchangeable with the latter.<sup>65</sup> Importantly, in *Al-Skeini*, categories of jurisdiction were extensively reorganized and clarified, thus promising a fresh start in the Court's case law on extraterritoriality. At the same time, of course, some of the constitutive elements of the various categories of jurisdiction were also fused and recombined in that decision.<sup>66</sup> In what follows, and for the sake of clarity, however, I will refer to the regime identified in *Al-Skeini* as the most elaborate to date in the Court's case law and as the relevant one, and will discuss its differences from previous decisions when necessary.<sup>67</sup>

To start with, the ECtHR's case law endorses the first element of 'effective control', and this throughout the various phases of the notion's evolution since *Loizidou*. Effective control is usually described as matter of fact that can be assessed as such.<sup>68</sup> The second element of control over a broad range of interdependent issues has been less present in the case law. It was, however, used in *Loizidou* where the Court referred to 'effective *overall* control' over a foreign territory.<sup>69</sup> Curiously, that locution

63 See T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 119 at 130 ff.

64 See *Al-Skeini*, *supra* note 2, para. 134.

65 Note, for instance, ETO Principles, Art. 9, *supra* note 21, which refers to 'authority *or* effective control' (emphasis added).

66 See M. Schaefer, 'Al-Skeini and the Elusive Parameters of Extraterritorial Jurisdiction', (2011) 5 EHRLR 566, 579; Milanovic, *supra* note 13.

67 Note that I am leaving aside some minor decisions of the ECtHR (e.g., *Issa*, *supra* note 43; *Isaak v. Turkey*, Judgment of 24 June 2008, [2008] ECHR (Appl. No. 44587/98); *Pad and Others v. Turkey*, Judgment of 28 June 2007, [2007] ECHR (Appl. No. 60167/00)) that are generally considered as isolated by the literature (see, e.g., Lawson, *supra* note 6) and that have been (indirectly) disavowed by the Court in *Al-Skeini*. On precedents and the interpretive authority of ECtHR's decisions, see, e.g., S. Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – What's in a Name?', in S. Besson (ed.), *The European Court of Human Rights after Protocol 14* (2011), 125.

68 See *Loizidou*, *supra* note 1, para. 62; *Al-Skeini*, *supra* note 2, paras. 133 ff. and 138. See also Judge Rozakis's Concurring Opinion in *Al-Skeini*.

69 See *Loizidou*, *supra* note 1, para. 62.

disappeared from the Court's formula in *Al-Skeini*,<sup>70</sup> most probably due to the focus on personal control in the recent case law. One may, however, assume that by excluding instantaneous and singular exercises of power from counting as jurisdiction, an approach that was not overruled in *Al-Skeini*, the *Banković* decision confirmed the requirement of overall control.<sup>71</sup>

Finally, the normative-guidance element of authority is also present in the Court's case law. One may find it in both *Banković* and *Al-Skeini*, albeit under the following formula: the 'exercise of some or all of the public powers normally to be exercised by a sovereign government'.<sup>72</sup> While in *Banković* the normative element was used in the context of territorial control only,<sup>73</sup> it was no longer mentioned in that context in *Al-Skeini*, but used by the Court in that case as an additional condition to qualify state jurisdiction based on personal authority and control (as a departure from *Issa*, as a result).<sup>74</sup> Of course, it was mentioned not only under the first of the criteria of personal control in *Al-Skeini*,<sup>75</sup> but also in the discussion of the facts of the case themselves where it was also applied to the third criterion of personal control.<sup>76</sup> This is even more interesting as this concern for normative guidance in state jurisdiction was actually articulated by the UK Supreme Court in its *Al-Skeini* judgment when considering whether the UK was handling the equivalent to a civil administration on the ground, albeit leading to a different conclusion than the one the ECtHR embraced in the end.<sup>77</sup>

One may safely argue on all those grounds that, besides effective overall control, normative guidance has become a third constitutive element to be examined by the Court when assessing whether a given act or omission falls within the jurisdiction of a state party.<sup>78</sup> Regrettably, many authors still refer to jurisdiction merely as the

70 See *Al-Skeini*, *supra* note 2, para. 138.

71 See *Banković*, *supra* note 5, para. 71.

72 See *ibid.*: 'In sum, the case law of the Court demonstrates that its recognition of the exercise of extraterritorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.' See also ECtHR, *Al-Skeini*, *supra* note 2, para. 149.

73 See *Banković*, *supra* note 5, para. 71.

74 *Ibid.*

75 See *Al-Skeini*, *supra* note 2, para. 135.

76 See *ibid.*, para. 149: 'It can be seen, therefore, that 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.'

77 See UK Supreme Court, *R (Al-Skeini and others) v. Secretary of State for Defence* [2007] UKHL 26. Cf. Wilde, 'Compliance', *supra* note 20, at 338, whose only evidence, however, is that the Court did not apply the formal test of public authority to the facts. But this is only because it did not need to in the absence of the other constitutive elements of jurisdiction.

78 See in the same direction, Goodwin-Gill, *supra* note 20, at 300, 306. Contra: Milanovic, *supra* note 13, who sees this combination of the territorial and personal model as a problem. His difficulty, however, is that he does not see the public-power requirement as one of the three constitutive elements of jurisdiction in all models, but as an element of the criteria of jurisdiction in the territorial model.

actual exercise of control,<sup>79</sup> thus eluding the normative dimension of authority in jurisdiction. One ground for this conclusion may be that the criteria developed by the ECtHR for assessing the existence of jurisdiction have focused mostly on ‘control’, whether of a territorial or personal type.<sup>80</sup> True, the elements that qualify that control, i.e., effectiveness, overall nature, and normativity, and turn it into de facto legal and political authority and jurisdiction, albeit present in *Banković* and again in *Al-Skeini*, appear less prominently and systematically in the Court’s reasoning. This should not make us forget the other constitutive elements of authority when defining and using those criteria, however, and in particular its normative dimension.

Interestingly, the focus on effective overall control only, and the omission of the normative element of jurisdiction when assessing whether human rights should apply, is reminiscent of the test used in democratic theory to know to whom domestic democratic decisions should apply and whom it should include beyond those residing within the polity’s territorial borders. Democratic theorists usually oppose the ‘all-affected principle’ that focuses on affectedness only, on the one hand, to the ‘all-subjected principle’<sup>81</sup> that also requires actual normative subjectedness and not only affectedness, on the other.<sup>82</sup> Again, therefore, the parallel evolution of human rights and democracy or citizenship, emphasized earlier in the article, may be observed in this context as well.

### 3.2. Types of jurisdiction

The existence of state jurisdiction is not easy to assess in practice, and criteria or shorthands are needed. The criteria for assessing the existence of state jurisdiction or de facto political and legal authority can vary. They correspond to types of control, and hence to types of jurisdiction in practice.

Territorial control is one of them, but there are others as well, such as personal control in the ECtHR’s case law and other international human rights practices.<sup>83</sup> Those two types of jurisdiction are also sometimes referred to as ‘models of jurisdiction’ in the literature.<sup>84</sup>

First of all, *territorial control*. The ECtHR’s practice identifies territory or the ‘effective control over an area’ as the main shorthand for jurisdiction: jurisdiction over territory is indeed an indirect and general form of jurisdiction over people. This

79 Milanovic, *supra* note 6, at 8, 27, 32, 34 and 39–41.

80 See *Al-Skeini*, *supra* note 2, paras. 133 ff.; *Hirsi*, *supra* note 4, paras. 76–82.

81 Besides the normative dimension of the ‘all-subjected principle’, one should, of course, not forget the other two dimensions of effectiveness and interdependence. See Besson, *supra* note 32.

82 Cf., e.g., for this critique, S. Näsström, ‘The Challenge of the All-Affected Principle’, (2011) 50(1) PS 116 with E. Erman, ‘Should All Political Contexts Be Democratic? Contours of a Two-Faced Theory of Legitimacy’, in E. Erman and S. Näsström (eds.), *Political Equality beyond Borders* (2012, forthcoming); Besson, *supra* note 32.

83 See also the 2011 ETO Principles, *supra*, note 21, and especially Art. 18: ‘A State in belligerent occupation or that otherwise exercises *effective control over territory* outside its national territory must respect, protect and fulfill the economic, social and cultural rights of persons within that territory. A State exercising *effective control over persons* outside its national territory must respect, protect and fulfill economic, social and cultural rights of those persons’ (emphasis added).

84 See Milanovic, *supra* note 6, at 118 ff.; Cleveland, *supra* note 10, at 229–30; De Schutter, *supra* note 19, at 203–5.

is not a surprise given how political and legal authority has always been exercised and that the territorial state is the primary building block of the international order. Interestingly, this corresponds to the use that is being made of territory to define the boundaries of the democratic people as well.

Of course, jurisdiction may be exercised not only on official territory, where it is presumed by international law, as we will see, but also on foreign territory. The latter may be lawful, on invitation, for instance, (i) or unlawful as in the case of occupation without state consent, either by military force or through a local administration (ii).<sup>85</sup>

Second, *personal control*. There are also cases in the ECtHR's practice where state jurisdiction is recognized without territorial control and merely by reference to direct personal control, i.e., the effective overall normative power over people. This type of jurisdiction is referred to by authors as personal to distinguish it from territorial jurisdiction.<sup>86</sup>

To qualify as state jurisdiction abroad, personal control may be lawful or unlawful from the perspective of international law. Lawful personal control may be exercised through diplomats and consuls (i),<sup>87</sup> through state agents, including the military, by invitation (ii);<sup>88</sup> and through other state agents, including the military, in official ships, aircraft, or buildings (iii).<sup>89</sup> The same applies to unlawful personal control by those various state agents in various places.

Note that the personal and territorial types of jurisdiction should be seen as complementary and not as alternatives, however: state jurisdiction is always personal, indeed, even if it is sometimes presumed by reference to territorial control and hence to indirect or general control over the persons on that territory.<sup>90</sup> This probably explains why the Court refers to personal control as 'state agent authority and control' in *Al-Skeini*,<sup>91</sup> although it is difficult to imagine jurisdiction not being

85 See *Al-Skeini*, *supra* note 2, para. 138: '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 (*Loizidou* (preliminary objections), cited above, § 62; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314–16; *Loizidou* (merits), cited above, § 52).'

86 See Milanovic, *supra* note 6, at 118–20 and 173 ff.

87 See *Al-Skeini*, *supra* note 2, para. 134: 'First, 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.' (emphasis added).

88 See *ibid.*, para. 135: 'Secondly, the Court has recognized the exercise of extraterritorial 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.'

89 See *ibid.*, para. 136: '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.'

90 For a similar point, see Judge Rozakis's Concurring Opinion in *Al-Skeini*, *supra* note 2.

91 See *ibid.*, paras. 133 ff.

exercised by state agents or, at least, not attributable to state agents. Some authors have preferred to refer to personal jurisdiction as functional jurisdiction as a result.<sup>92</sup> However, this assumes that territorial jurisdiction is not functional, and hence not about exercising the function of jurisdiction, which is blatantly wrong. Contrary to what is often assumed and as I explained before, there is no such thing as ‘territorial jurisdiction’ strictly speaking; it is merely personal control exercised through overall effective control over a given territory, whether on the state’s official territory or outside that official territory. Jurisdiction is a function that is exercised either through direct personal control, or through territorial control, and personal and territorial jurisdiction are merely types of jurisdiction as a result.

Importantly, it is more difficult to provide evidence of personal control than of territorial control. I will discuss this below. For the time being, it suffices to say that the existence of all three constitutive elements of jurisdiction should be assessed in each case, and not merely effective control or power whether territorial or personal. Indeed, military occupation with effective control over a territory need not imply jurisdiction, because it lacks, for instance, the normative element of reason-giving and appeal for compliance.<sup>93</sup> Another example may be effective personal control by troops without, however, any normative appeal besides the use of coercion. Potential confusions about this arise from the interchangeable use of territorial or personal ‘control’ and ‘jurisdiction’ in the descriptions of the model by authors and even by the Court itself, whereas jurisdiction is always personal, and what changes is the criterion for assessing the way it is exercised and hence the type of control and not the elements qualifying that control.

### 3.3. Evidence of jurisdiction

In order to understand how the existence of state jurisdiction is to be established in a procedure before the European Court, one may distinguish between the presumption of jurisdiction, first, and its general or individual establishment when it is not presumed, second.

First of all, the *presumption of jurisdiction*. Jurisdiction is presumed over people situated on the official territory of the state party.<sup>94</sup> This presumption stems from international law and the international division of labour between territorial states that entrenches their domestic-law jurisdiction on that territory. Importantly, however, this presumption has to be rebuttable (with respect to either element of jurisdiction), especially if another state exercises full jurisdiction on the state’s territory:<sup>95</sup> this is the consequence of jurisdiction being essentially personal and only being territorial by shorthand for personal control.<sup>96</sup>

92 See in the US, by reference to *Boumediene*, *supra* note 22; Neuman, *supra* note 12, at 261 ff.; Cleveland, *supra* note 10, at 230. See also in the ECHR context, *Al-Skeini*, *supra* note 2, Concurring Opinion of Judge Bonello, paras. 11–12; Schaefer, *supra* note 66, at 581.

93 See *Al-Skeini*, *supra* note 2, para. 149 *a contrario*. See also Schaefer, *supra* note 66, at 579.

94 See *Al-Skeini*, *supra* note 2, para. 131: ‘jurisdiction is *presumed* to be exercised normally throughout the State’s territory’ (emphasis added).

95 *Ibid.*

96 See also Judge Bratza’s Dissenting Opinion in *Ilascu*, *supra* note 56.

An interesting question is whether this presumption should be extended to occupied territories, whether they are lawfully occupied by invitation of the territorial state or unlawfully occupied. If jurisdiction under international law is about co-ordinating and hence facilitating international relations when jurisdiction is exercised beyond borders, it would seem that lawful occupation could well also trigger a presumption of jurisdiction or, at least, some form of facilitated evidence mechanism.<sup>97</sup> International law recognizes a specific exercise of extraterritorial jurisdiction as lawful, and hence contributes to its normative claim to legitimate authority and accordingly to the corresponding expectation that this will trigger human rights protection in return. The main counterargument here would pertain to the right to self-determination of the population whose territory is occupied. It is important, therefore, to make sure that that right can be exercised and that the presumption of jurisdiction, if it is recognized, ceases as soon as that right is exercised.<sup>98</sup>

Second, the *establishment of jurisdiction in cases where it is not presumed*. Outside the domestic territory and outside the cases of lawful territorial control beyond the state's borders, jurisdiction has to be established in each concrete case by reference to its circumstances.<sup>99</sup>

Jurisdiction can be established either generally, as in the context of unlawful territorial control, or individually, as in the cases of lawful and unlawful personal control. Because territorial control is about indirect personal control, however, it may simply be established generally and will extend automatically to all individuals on the territory. By contrast, personal control has to be established individually in each case. Here again, one may wonder whether lawful personal control may not also qualify for a presumption or at least for a regime of facilitated evidence, by extension of the argument made earlier about lawful territorial control and by analogy to the presumption of jurisdiction applicable within the territorial boundaries of a state party.

The distinction between territorial presumption and personal evidence has been interpreted by some authors as a distinction between norms and facts.<sup>100</sup> There seem to be traces of this facts-only approach to jurisdiction in the ECtHR's case law in *Al-Skeini*.<sup>101</sup> It is important not to forget, however, that while the exercise of effective, overall, and normative power in practice is a matter of fact that can be

97 See also Judge Bonello's Concurring Opinion in *Al-Skeini*, *supra* note 2, paras. 24–28; De Schutter, *supra* note 19, at 205.

98 By analogy to international occupation law: see M. Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 EJIL 661, at 676–8 and 693–4.

99 See *Al-Skeini*, *supra* note 2, para. 132: 'In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially *must be determined with reference to the particular facts*' (emphasis added). See also para. 137: '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 (see *Loizidou* (merits), cited above, §§ 16 and 56; *Ilaşcu*, cited above, § 387). 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 (see *Ilaşcu*, cited above, §§ 388–94).'

100 See, e.g., Tomuschat's Concurring Opinion in *Lopez Burgos*, *supra* note 14; De Schutter, *supra* note 19, at 244–5.

101 See *Al-Skeini*, *supra* note 2, paras. 131 and 137.

demonstrated or not, jurisdiction itself ought to retain its normative dimension of appealing to compliance and should not be reduced, for procedural reasons, to mere effective control or coercion.

#### 4. THE NORMATIVE CONSEQUENCES OF JURISDICTION

Jurisdiction is an all-or-nothing matter and not a matter of degree: either one is giving reasons for action and requiring compliance, or one is not. It cannot therefore be split into levels and acquired gradually. It comes close to other normative concepts that are also threshold concepts, such as sovereignty or legitimacy.

Once jurisdiction has been established concretely, the question of the scope of the rights (subsection 4.1) and duties (subsection 4.2) arises. There are two questions in particular that need to be broached: the question of the rights applicable and the question of the type of duties triggered. Note that the variations between the rights and duties applicable in and outside a state's territory should not be conflated with the idea of the gradual jurisdiction of the state: the latter is either given or it is not.<sup>102</sup>

##### 4.1. The ECHR rights applicable

The right answer to the question of which ECHR rights are applicable extraterritorially, which was given by the ECtHR in *Al-Skeini* and allegedly as a reversal of the *Banković* decision, is that all the rights and duties applicable in the circumstances of the case may arise.<sup>103</sup> This is a consequence of the indivisibility of ECHR rights in terms of justification, but also of realization.<sup>104</sup> This means that there are no differences between ECHR rights applicable inside and outside a state's territory, provided it has jurisdiction.

Of course, the specific content of the specific rights and their corresponding duties may differ from those that apply domestically inside the state's territorial boundaries, due to the circumstances of the case.<sup>105</sup> This is because, depending on the concrete threats, not all human rights will need protection in the concrete circumstances.<sup>106</sup> This is also because duties always have to be specified in context, by reference to the concrete threats to the protected interest.

This distinction between the same abstract rights but different concrete duties is why authors are often misled in thinking that the rights applicable in extra-territorial circumstances differ in scope from those applicable in domestic ones.

<sup>102</sup> Cf. De Schutter, *supra* note 19, at 217; Lawson, *supra* note 16, at 120, and Lawson, *supra* note 6, at 72 ff, who conflates both things and sees jurisdiction as a matter of degree.

<sup>103</sup> See, e.g., *Al-Skeini*, *supra* note 2, para. 137.

<sup>104</sup> See, e.g., J. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights', (2008) 30 HRQ 984; P. Gilibert, 'The Importance of Linkage Arguments for the Theory and Practice of Human Rights: A Response to James Nickel', (2010) 32 HRQ 425; J. Nickel, 'Indivisibility and Linkage Arguments: A Reply to Gilibert', (2010) 32 HRQ 439.

<sup>105</sup> See Wilde, 'Compliance', *supra* note 20, at 337.

<sup>106</sup> See by analogy within the boundaries of a state's territory: *Marković*, *supra* note 46, para. 53 (on the applicability of Art. 6 ECHR given that state jurisdiction is triggered by judicial proceedings).

It is also probably why the ECtHR insisted in *Al-Skeini* on reversing the idea developed in *Banković* according to which ECHR rights could not be ‘tailored and divided’.<sup>107</sup> Again, however, it is not the ECHR rights that are tailored and divided: they are the same. But it is the specific duties that are bound to be different in the specific circumstances, and this whether we are talking of territorial or extraterritorial applicability.

#### 4.2. The ECHR duties applicable

Negative and positive duties alike may arise from ECHR rights applicable abroad and at the same time. They are indeed necessary complements to each other: negative duties cannot be respected without positive duties to protect and to aid, and vice versa.<sup>108</sup> And this has actually been confirmed in the ECtHR’s case law itself.<sup>109</sup>

Of course, effective overall control will be necessary for positive duties to arise in the first place,<sup>110</sup> but it will have to be assessed in the concrete circumstances. It is not something that can be excluded abstractly from the cases of extraterritorial jurisdiction, whether jurisdiction is exercised by territorial or personal control. This is why proposals that treat negative and positive duties differently in an abstract fashion cannot hold.<sup>111</sup> The reasons for authors to put forward such proposals, however, may stem from the conflation between the specific-effective control requirement of positive duties and the more general jurisdiction requirement for the applicability of the ECHR itself.<sup>112</sup>

Interesting difficulties arise in the context of ECHR positive duties abroad, especially in relation to the shared jurisdiction over those territories or people in practice.<sup>113</sup> In such cases, the fact that jurisdiction is shared must influence how much effective control either of the two states in jurisdiction has in practice over the persons of the rights-holders, and this even if their jurisdiction is presumed as that presumption may be rebutted in practice.

107 See, e.g., *Al-Skeini*, *supra* note 2, para. 137: ‘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)’ (emphasis added).

108 See Shue, *supra* note 7.

109 See, e.g., *Isaak*, *supra* note 67; *Andreou v. Turkey*, Judgment of 27 October 2009, [2009] ECHR (Appl. No. 45653/99).

110 See, e.g., *Osman v. United Kingdom*, Judgment of 28 October 1998, [1998] ECHR (Rep. 1998-VIII), para. 116: ‘For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures *within the scope of their powers* which, judged reasonably, might have been expected to avoid that risk’ (emphasis added).

111 See, e.g., Milanovic, *supra* note 6, at 209 ff. Cf. Y. Shany, ‘Bad Cases Make Bad Law, but Good Law Books! – Review of Milanovic, M., *Extraterritorial Application of Human Rights Treaties*’, in EJIL-talk, 1 December 2011, available at [www.ejiltalk.org/bad-cases-make-bad-law-but-good-law-books](http://www.ejiltalk.org/bad-cases-make-bad-law-but-good-law-books).

112 For this conflation, see e.g., Lawson, *supra* note 6, at 74–5.

113 See De Schutter, *supra* note 19, at 191. See, e.g., the ECtHR Grand Chamber’s pending decision in *Catan v. Moldova and Russia* (Appl. No. 43370/04).



## 5. REMAINING CHALLENGES FOR THE EXTRATERRITORIALITY OF HUMAN RIGHTS

The extraterritorial application of the ECHR, even when it is understood as triggered by the political notion of jurisdiction and human rights proposed in this article, still raises a series of very difficult questions for both human rights theory and human rights practice. Those relate to broader issues of democracy and legitimacy in international relations, and are to date largely unresolved, whether normatively or in the existing case law of the European Court.

For reasons of scope, I will only mention them briefly here, by presenting, first, in each case what the critique is about and, then, how one may go about placating it. I have chosen to focus on six important problems, but many more may, of course, be identified: human rights imperialism (subsection 5.1), human rights coherence (subsection 5.2), human rights pluralism (subsection 5.3), international legal pluralism (subsection 5.4), human right to self-determination (subsection 5.5), *erga omnes* effect of the extraterritorial case law (subsection 5.6), and judicial comity and margin of appreciation (subsection 5.7). This section amounts more to a call for further research than to a complete answer to the complexities we are currently facing.

### 5.1. Human rights imperialism

The first critique often made of the extraterritoriality of human rights is that it enables domestic or regional human rights to apply to people who have not accepted those rights by ratifying the corresponding treaties, or contributed in any way to their elaboration.<sup>114</sup>

This is a version of the classical critique of human rights parochialism and ought to be taken seriously. It cannot indeed simply be evaded by mere gestures at the universality of human rights:<sup>115</sup> that claim needs to be morally justified, indeed, and cultural and moral pluralism raise well-known problems for that claim.<sup>116</sup>

In a nutshell, the critique can be defeated in two ways, however. The first one is to realize that human rights duties are never abstract and always need to be specified in context. As a result, they are necessarily culture-specific and do not lead to different moral orderings from the ones that apply locally. The second response is that for those human rights duties' minima that are still imposed in a universal fashion, e.g., on the basis of previous case law of the ECtHR and its interpretive authority, institutional solutions need to be devised to take all conceptions into account. Thus, inclusion in the deliberation process over those rights may secure representativeness and alleviate the parochial bias to a certain extent. There are problems with the second argument in the extraterritoriality context, however, to the extent that ECtHR judges do not stem from outside the 47 states parties to the Council of Europe, and that domestic institutions and judges assigning the relevant ECHR duties do not include members of the population whose rights are at stake.

<sup>114</sup> See, e.g., Brown, UK Supreme Court, *Al-Skeini*, *supra* note 77, para. 109.

<sup>115</sup> See, e.g., Milanovic, *supra* note 6, at 83–96.

<sup>116</sup> See for the best discussion to date, A. Buchanan, 'Human Rights and the Legitimacy of the International Order', (2008) 14 *Legal Theory* 39.

More work is required, therefore, on the institutional side of the response to the human rights' imperialism critique of extraterritoriality.

The concern was actually taken seriously early on in the ECtHR's case law on extraterritoriality. In response, for instance, the decisions in *Banković* and *Loizidou* referred to the idea of *espace juridique européen*.<sup>117</sup> That idea was since abandoned in *Al-Skeini*, however, and for good reasons pertaining to coherence with the notion of jurisdiction.<sup>118</sup> The questions relating to human rights' imperialism outside the territory and to the decisions' authority back home, however, have not disappeared and remain unbroached by the Court.

There is a second reading of the human rights' imperialism critique, however, and one that comes closer to a critique of the democratic legitimacy of human rights. It raises well-known difficulties in international occupation law which I will address in that context below.

### 5.2. Human rights coherence

Even if one accepts the necessity to specify human rights duties in context, the reverse critique could be that this creates double standards: certain human rights duties would apply at home only, while others abroad, albeit pertaining to the same human rights.

This is an important critique that targets the egalitarian dimension of human rights within each state party's practice. There may be ways of accommodating the problem, however. One way of doing so may be for domestic judges to reason about those cases the way they would about territorial cases. The objection then, however, is whether domestic human rights case law ought to go through a potential process of levelling down based on the presumably lower standards of human rights protection applied outside the domestic boundaries due to the more limited threats and to the more limited institutional means available to fight back those threats.

### 5.3. Human rights pluralism

Yet another critique pertains to the way of reconciling potential conflicts between the human rights duties at stake, on the one hand, and domestic and international human rights duties, on the other.

Here again, the likelihood of those conflicts looks considerably smaller if one refers to the necessity of specifying the duties in context. However, as I mentioned before, one may not exclude conflicts between minimal interpretations of those respective duties by international or regional bodies and domestic courts. This could be particularly problematic if it is the local interpretation of other human rights or the same human rights that diverges. One way out would be to favour the most beneficial or human rights-protective interpretation (on the model of Article 53 ECHR). Again, however, this question is largely indeterminate in the human rights

<sup>117</sup> *Banković*, *supra* note 5, para. 80; *Loizidou*, *supra* note 1, para. 78. See also Milanovic, *supra* note 6, at 50–1 and 85–93.

<sup>118</sup> *Al-Skeini*, *supra* note 2, para. 142. See also Milanovic, *supra* note 13.

context.<sup>119</sup> Another solution would be to privilege the most democratic determination, i.e., usually the local one, based on some kind of human rights subsidiarity and emulation of an extraterritorial margin-of-appreciation model.<sup>120</sup>

#### 5.4. International legal pluralism

The next critique pertains to the relationship between international human rights law and other international law norms and regimes, such as international humanitarian law, international refugee law and international criminal law. Among those, it is really the former that matters most for the critique given that it also generates duties for states and potentially conflicting ones.

One should start by saying that the question is not new and has been raised outside the extraterritoriality debate. Furthermore, it only has a limited scope as it arises in the context of armed conflicts. The common position on the issue is that both international humanitarian law and international human rights law apply concurrently. Of course, the *lex specialis* principle that commands considering international humanitarian law as specific<sup>121</sup> does not cut much ice in concrete circumstances of conflict.

It is important to note in any case that what triggers the application of those other regimes of international law is not a jurisdiction criterion, or at least not a domestic state jurisdiction one in the sense described in this article. The criterion of occupation in international humanitarian law, for instance, is one of mere power and effective control without any appeal to compliance. The latter may arise later and hence imply jurisdiction and the application of international human rights law, but this need not be the case. Regrettably, the ECtHR avoided the question of the relationship between international humanitarian law's thresholds of occupation and the ECHR's jurisdiction threshold in *Al-Skeini*, by subsuming the case to the personal type of jurisdiction and not to the territorial occupation type.<sup>122</sup>

#### 5.5. Human right to self-determination

This critique is complementary to the human rights imperialism critique. It pertains to the right to self-determination of the population whose human rights are imported due to foreign jurisdiction. Such an import does not fit well with the democratic dimension of human rights according to which one should be the author and interpreter of one's own rights and duties.

The problem is well known within international occupation law. It is common in the context of transformative occupation where the occupying power may and ought to legislate, at least all the way up to transition and not afterwards, including

119 See C. van de Heyning, 'No Place like Home: Discretionary Space for the Domestic Protection of Fundamental Rights', in P. Popelier, C. van de Heyning, and P. van Nuffel (eds.), *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts* (2011), 65.

120 See K. Hessler, 'Resolving Interpretive Conflicts in International Human Rights Law', (2005) 13 *Journal of Political Philosophy* 29.

121 See, e.g., *Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, Case No. IT-94-I-A; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 21. See also Milanovic, *supra* note 6, at 229 ff.

122 See Milanovic, *supra* note 13, s. 2.C.

in order to protect human rights.<sup>123</sup> The difficulty is that while there may be dual jurisdiction exercised in practice, there cannot be dual democratic legitimacy and hence a dual source of legitimate human rights. Of course, one should stress that by analogy to the democratic-boundaries paradox,<sup>124</sup> it is unlikely that the boundaries of human rights will be human rights-proof. One may therefore speak of a paradox of human rights boundaries when considering the ways in which the right to have rights is progressively secured following jurisdiction.

### 5.6. The *erga omnes* effect of judgments

This critique pertains to the kind of judicial reasoning and precedents that may arise from the ECtHR's case law in extraterritorial cases. The problem lies indeed in the justification of the potential interpretive authority or *erga omnes* effect of those precedents for the other 47 states parties' authorities. The Court's judgments' interpretive authority is a contentious enough issue when it pertains to circumstances within the territorial boundaries of any of the 47 states parties.<sup>125</sup>

There are ways out of the critique, however. To start with, it is most likely that the Court's case law pertaining to extraterritorial circumstances will never reach the threshold of consensual minimum given its circumstance-specific nature. Of course, this does not apply to the criteria of control or the notion of jurisdiction itself developed by the Court, but only to the substance of ECHR duties recognized in extraterritorial circumstances. At the same time, however, creating a two-speed system within the ECtHR's case law may not actually be the best of solution at a time of deep crisis of the Strasbourg system. It is indeed a matter of credibility of the system that it develops in a coherent and egalitarian fashion. This raises anew the question of double standards discussed before.

### 5.7. Judicial comity and margin of appreciation

This critique pertains to the importance of respecting comity and the separation of powers, and in particular the power of the executive, when adjudicating on extraterritorial matters, mostly because the questions are usually military in nature.

This is clearly an important point when discussing extraterritoriality cases before domestic courts,<sup>126</sup> but it looks very different from the perspective of the ECtHR. What would come closest would be the margin of appreciation of states parties in matters not yet covered by European consensus and hence by interpretive minima in the Court's case law.<sup>127</sup> Extraterritorial matters are typically matters on which there is no European consensus yet, it seems, and it is highly unlikely that we should see a corpus of precedents arise from the Court's case law on those issues. The margin of appreciation is therefore likely to remain solidly in place.

123 See Sassoli, *supra* note 98, at 676–8 and 693–4, on the limits of human rights legislation by occupying forces.

124 See F. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in R. Pennock and J. Chapman (eds.), *Liberal Democracy, Nomos XXV* (1983), 13; Erman, *supra* note 82.

125 See Besson, *supra* note 67.

126 See, e.g., *Boumediene*, *supra* note 22. See also Neuman, *supra* note 12, at 274 ff.; Cleveland, *supra* note 10, at 270 ff.; Endicott, *supra* note 47, at 36–9; Milanovic, *supra* note 6, at 61–7 and 98–103.

127 See G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2008); Besson, *supra* note 67.

## 6. CONCLUSIONS

My argument in this article has been that we should read the jurisdiction threshold of applicability of human rights in line with the political and relational nature of human rights, and, more specifically, to mean *de facto* legal and political authority. It amounts, I have argued, to three elements: (i) effective, (ii) overall, and (iii) normative power and control. This is a good alternative reading of Article 1 ECHR and of the ECtHR's recently restated position in *Al-Skeini*, and is, more generally, in line with the democratic underpinnings of the ECHR.

Human rights are not the cure to all ills<sup>128</sup> and the fact that they are not need not worry us. Importantly, there are legal alternatives to the ECHR and international human rights law to protect the fundamental interests of those affected by ECHR states parties' acting abroad when those individuals are not subject to those states' jurisdiction. First of all, one should mention the international humanitarian- and occupation-law duties of ECHR states parties, but also the international criminal-law duties of private actors abroad. Second, the states whose territory is concerned have their own international human rights duties to respect, and the respect of those duties should be monitored and promoted. Finally, and relatedly, all ECHR states parties have international responsibilities for human rights and hence responsibilities to help other states abide by their international human rights duties,<sup>129</sup> especially when they intervene in one way or another on their territory and, paradoxically, usually in the name of helping them become human rights-abiding democracies.

Of course, embracing this proposal requires the courage to endorse the paradox of human rights boundaries. Human rights duties are institutional and hence necessarily bounded and, when drawing those boundaries, one can never hope for one state's institutions to respect the human rights of all. What the extraterritoriality of human rights debate shows, therefore, is that, in the human rights context just as in the democratic one, the territorial sovereign state's model is in crisis. Migration on the inside and interventions on the outside make the territorial boundaries of the polity unsatisfactory from the perspective not only of democratic inclusion, but also now of human rights protection. Before we find a better way of securing our equal rights and democratic participation, however, we should be wary about proposals that may lead us to dispose too quickly of the current state-based system, and at spreading the requirements of state jurisdiction so thin that we endanger our democratic institutions and our human rights themselves. This would amount not only to a violation of our own human rights and human rights duties, but also, and this needs to be understood by those who are too quick to wave vague claims about the universality of human rights, to a violation of our responsibilities for the human rights of others.

<sup>128</sup> See Wildhaber, *supra* note 27.

<sup>129</sup> See S. Besson, *A Legal Theory of Human Rights* (2013), manuscript on file with the author, on the difference between human rights duties and responsibilities for human rights, and on the latter's relationship to the responsibility-to-protect doctrine.