University of Cyprus

DISSERTATION

EXTRATERRITORIAL APPLICATION OF THE ECHR FOLLOWING THE LANDMARK CASE OF AL-SKEINI: IS TIME FOR A NEW MODEL OF JURISDICTION?

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ABSTRACT

The present thesis investigates the extraterritorial application of the European Convention on Human Rights with a particular emphasis on the impact of the landmark case *Al-Skeini and Others v. United Kingdom*, which explicitly acknowledged the personal model of jurisdiction, accepted that Convention rights can be divided and tailored, and disregarded the idea of territorial space that used to be prevalent. In light of the said case, it is concluded that significant questions still remain, most notably with regard to the territorial principle's position and where it stands today, the interaction between the spatial and personal models of jurisdiction and the deployment of deadly force. The present thesis suggests that the current models of jurisdiction be replaced by a functional model of jurisdiction that is based on causational factors and/or on an evaluation of the extent of responsibility based on whether the State in question was in a position to foresee the potential outcome of its actions (or inactions).

LIST OF ABBREVIATIONS

ECHR	=	European Convention on Human Rights
ECtHR	=	European Court on Human Rights
HR	=	Human Rights
UK	=	United Kingdom

INTRODUCTION

1.1 PREFACE

According to Article 1 of the European Convention on Human Rights (ECHR), the obligation of a contracting State to protect and respect those human rights that are protected by the Convention apply to all individuals "*under their jurisdiction*".[1] Therefore, in order for a State to be held accountable for breaching the Convention, the exercise of jurisdiction is a "*threshold criterion*" as well as a "*necessary condition*".[2] The British Supreme Court Judge, Lord Dyson, had commented on the phrasing of the said Article of the ECHR, and noted characteristically that a "*small number of apparently simple words have proved to be remarkably troublesome*" for the European Court of Human Rights (ECtHR).[3] The legal interpretation of these words is in fact one of the topics that has generated the most debate in recent years. Moreover, other scholars have argued that the interpretation of Article 1 regarding jurisdiction had advanced to the point where any judgment on the matter would be thoroughly scrutinized.[4] Lea Raible, has nicely remarked that this is because every new Court decision on the subject tends to either add more confusion or establish a distinct line of case law from the rest.[5] However, it may come as a shock to learn that this was not always the case. With only a few exceptions, ECtHR jurisprudence was mostly standardised and cohesive before the two-thousands. The pivotal moment occurred in 2001 when, following four decades of steadily expanding the scope of the Convention's applicability, the Court in Strasbourg abruptly ended its consistent line of

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art. 1.
[2] *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019) para 178.
[3] Lord Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?' < https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> accessed 15 December 2022.
[4] Barbara Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons' (2012) 33 Michigan J Intl L 692, 694; Conall Mallory, 'A second coming of extraterritorial jurisdiction at the European Court of Human Rights?' (2021) 82 QIL 31-51, 31.
[5] Lea Raible, 'The extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game-Changers' (2016) 2 Eur Human Rights L Rev 161,161.

jurisprudence in the case of *Banković v. Belgium et al* (Banković),[6] where the Court ruled that jurisdiction is '*mainly territorial*' and only arises extraterritorially in rare situations, dismissing its prior decisions that have significantly expanded the scope of the Convention's obligations.[7]

The law concerning the scope of the ECHR's Article 1 jurisdiction has been in upheaval since the Banković judgement was released. Although in parts it has appeared solid, stable, and understandable, in some other parts it has been completely illogical, inconsistent, and aimless. As a result, there have been several critical jurisprudences, political, legal and judicial opinions on how the Convention should be interpreted in terms of its extraterritorial application.[8] However, the harshest criticism of the adopted approach of the Court following Banković, came from the Court itself. Judge Bonello criticised the Court in a landmark separate opinion for its failure or unwillingness to develop a consistent and paradigmatic system that was based on fundamental principles and uniformly applicable across the broadest range of jurisdictional conflicts.[9] His criticism is only a small fraction of the criticism leveled at the ECtHR for how it interprets the scope of the Convention's application. There is already a growing body of jurisprudence that examines both the shortcomings in the Court's approach and the possible directions it might take in order to build a more coherent, accepted, and principled perspective on the issue of extraterritorial jurisdiction.

1.2 THE 'NOTION' OF JURISDICTION WITHIN THE CONTEXT OF THE ECHR

Scholars have defined jurisdiction as being the *"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*

[6] *Banković and Others v. Belgium et al* (dec) App no 52207/99 (ECtHR, 12 December 2001)
[7] *ibid* para 59.
[8] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 264.
[9] *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) paras 110-114.

rights-holders and states parties",[10] or as being the "*condition sine qua non for people to have human rights enforceable against the State and for the State to have obligations towards those people*".[11] That said, what would be the best definition for 'state jurisdiction' and what does it include within the context of the ECHR?

Defining jurisdiction is important as one cannot examine the applicability of the ECHR either territorially or extraterritorially, without first examining the notion of its jurisdiction. As it has already been mentioned in the preceding section, the 'jurisdictional clause' within the ECHR is the first, which reads: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention".*[12] Nevertheless, the part referring to *'within their jurisdiction*' is yet unclear and has remained to the ECtHR to be clarified and defined. In other words, this clause provides that member states of the ECHR should ensure that anyone that falls within their jurisdiction; enjoys those rights and freedoms that are protected by the Convention.[13]

Evidently, the Convention is not clarifying within its text the notion of jurisdiction and thus the ECtHR has undertaken the tough task "*of not only giving flesh to general, undefined terms, but also of adaptation of them to the realities of an ever changing European society*".[14] Nevertheless, the jurisprudence that has been provided until this day on the topic has radically criticised the case-law of the ECtHR on the topic of jurisdiction as being inconsistent, confusing and "*flawed*".[15]

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[10] Samantha Besson, *"The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To"* (2012) 25 Leiden Journal of International Law 857, 860.
[11] Mariagiulia Giuffre, "*A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights*" (2021) 82 QIL 53-80, 54.
[12] ibid (n 1).
[13] ibid.
[14] Gałka KU, "The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State" (2015) 17 International *Community* Law Review 474, 478.
[15] ibid (n 8).

Moreover, it is important to highlight that the text of Article 1 reads "*within their jurisdiction*" instead of "*within their territory*", which is an important distinction because the avoidance to use the word 'territory' may intentionally indicate that member states of the ECHR may be obligated to apply the ECHR to situations beyond their territory and thus give a wider scope to their jurisdiction. Given the above, the establishment of whether a state bears jurisdiction over a given situation is of great importance as the establishment of jurisdiction is that "*threshold criterion*"[16] that would determine whether a state should be held responsible for acts or omissions that stem from its obligations as a contracting party of the ECHR. Therefore, this implies that applications against states that hold no jurisdiction over given situations, would be held inadmissible before the ECtHR.

The present paper examines the evolvement of the notion of 'jurisdiction' through the ECtHR's case-law and attempts to provide an extensive commentary on the said evolvement.

1.3 OUTLINE AND ORGANISATION

1.3.1. Research Questions

The present thesis is essentially a doctrinal study. It aims to examine critically the central features of the relevant legislation and case law in order to create an arguably correct and sufficiently complete statement on the Court's reasoning.

The method is a two-part process, which involves locating the sources of the law and then interpreting and analysing them. Such a doctrinal research process can be described as a qualitative rather than a quantitative one. The layout of the present contribution has been built

[16] ibid (n 9).

on three main research questions, which have worked as three main pillars. The said research questions are as follows:

i. Does the Convention apply extraterritorially, i.e. outside the territory of the Member States of the Council of Europe?
ii. What test is to be followed in order to determine whether contracting States have triggered jurisdiction extraterritorially pursuant to Article 1 of the ECHR?
iii. What test is best to be followed in order to adopt a more efficient and just approach for both the contracting States of the ECHR and the victims of potential violations?

1.3.2. Research Outline

The present paper commences with a Preface (Section 1.1.) and an Introduction to the notion of Jurisdiction within the context of the ECHR (Section 1.2.), which together form the Chapter of Introduction, in order to build to the reader a solid understanding of the notion of Jurisdiction, how it has been interpreted by the Court and what it may include.

Next follows the Chapter of Literature Review, which forms the main part of the research and which consists of three parts. The first part aims to present the evolvement of the notion of Jurisdiction of the ECHR (Section 2.1.), and provide a deeper analysis regarding the said notion. Notably, and as a first instance, an analysis of the judgement of Al-Skeini is provided, as well as an elaboration on the changes on the theory on the subject of extraterritorial application of the ECHR that it has brought (Sub-Section 2.1.1), to work as a basis for the analysis of the Models of Jurisdiction that existed prior to Al-Skeini that follows, accompanied by an analysis as to how they were shaped following the said landmark case (Sub-Section 2.1.2).

The second part of the Chapter of Literature Review (Section 2.2.) engages with addressing the questions of on the issue of extraterritorial application of the ECHR that were left unanswered by the release of the judgement of Al-Skeini, with a particular focus on the relationship between the existing models of jurisdiction (Sub-Section 2.2.1.), the deployment of deadly force (Sub-Section 2.2.2.) and the indication that was given in Al-Skeini that rights can be 'divided and tailored', which however lacked guidelines as to how this can be achieved (Sub-Section 2.2.3.).

The final part of Literature Review (Section 2.3.) suggests a new model of Jurisdiction, namely the Functional Jurisdiction Model which should be driven by the notions of causation, foreseeability and remoteness in order to determine the scope of extraterritorial application of the Convention (Sub-Section 2.3.1.). Moreover, it is observed that the proposed model of Jurisdiction is beyond hypothetical, as the said model of Jurisdiction is identifiable within the Court's case-law, without the Court explicitly admitting that it follows the said model of Jurisdiction, or any other model that departs from the original two (Sub-Section 2.3.2.).

The third and final Chapter is that of Conclusions, where the findings and outcomes that derive from the research are summarised.

1.3.3. Significance of Research

Although there is a number of studies available that engage with the issue of extraterritorial jurisdiction of Contracting States of the ECHR, nevertheless, only a small number of studies to date engage with the issue of extraterritorial *application* of the Convention. In other words, although there is a satisfactory amount of jurisprudence that analyses the Courts' case-law on the subject of extraterritoriality of the ECHR, only few studies have attempted to interpret the current status-quo on the said subject, without only forming unconnected criticisms of the past judgements of the Court like most of the studies on the topic. Moreover, this study ultimately aims to provide answers to the contracting States, as well as potential victims, as to what they

should expect in extraterritorial situations and form a standard of prediction as to how much the scope of extraterritorial jurisdiction of States could potentially stretch depending on the situation.

In connection to the previous paragraph, the present study also attempts to pioneer in that it suggests a new model of jurisdiction, the application of which will benefit both the side of the contracting States, as well as that of the victims, in better identifying their rights and obligations over a given situation.

That being said, and although the epicentre of the present project is not purely unique, its synthesis, the connections it does between the literature, and the outcomes and suggestions that it reaches, are indeed original, aiming to fill in a gap in the literature, or at least untangle the complex issues with which it engages, and make them simpler and more comprehendible to the reader and those interested in the subject.

LITERATURE REVIEW

2.1 THE EVOLVEMENT OF JURISDICTION OF THE ECHR

2.1.1 Al-Skeini as a Point of Reference

Before a deeper analysis of the notion of Jurisdiction of the ECHR and its evolvement through the case law of the ECtHR, it is of paramount importance that some facts regarding the case of Al-Skeini are presented as background information, due to the fact that Al-Skeini was a "turning point" to the case-law of the ECtHR, the reason for which will be analysed in detail in the sections that follow:

The Al-Skeini case concerned the direct or indirect deaths of six Iraqi civilians by British soldiers in Iraq in 2003, time when the United Kingdom (UK) was involved in the war in the country. The relatives of the victims claimed that the victims fell under the jurisdiction of the UK according to Article 1 of the Convention and thus the UK had breached its obligation under Article 2 for an adequate and effective investigation of the cause of death of the victims. The judgement in Al-Skeini ruled that the victims indeed fell under the jurisdiction of the UK and that the UK had indeed the obligation to investigate the deaths of the victims.[17]

2.1.2 Models of Jurisdiction: Spatial and Personal

Before the case of Al-Skeini was introduced, the literature and case law concerning the extraterritorial application of the ECHR was based on two models of jurisdiction; namely the Spatial and Personal models of jurisdiction.[18] The spatial model of jurisdiction was introduced

[17] *Al-Skeini* (n 9).
[18] Petra Stojnic, '*Gentlemen at home, hoodlums elsewhere: The extraterritorial Application of the European Convention on Human Rights*' (2021) X OUULJ 137-170, 141; Marko Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg*' (2012) 23 (1) EJIL 121.

in the case of *Loizidou v Turkey.*[19] The said model supports that a state acquires jurisdiction in situations where it '*exercises effective control*' over a given area beyond its national territory.[20]

On the other hand, according to the personal model of jurisdiction, a state acquires jurisdiction in situations where it exercises "*authority and control*" over a person. Moreover, the Court stated in the case of *Cyprus v Turkey*[21] that "*authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as, by the acts or omissions, they affect such persons or property, the responsibility of the State is engaged*".[22] In Al- Skeini the Court applied the personal model of jurisdiction, and specifically stated that in instances where force is used by state agents extraterritorially, then the individual affected is considered to be *"under the control of the State's authorities into the State's Article 1 jurisdiction*'[23] and further stated that '*what is decisive in such cases is the exercise of physical power and control over the person in question*".[24]

The ECtHR highlighted that a state acquires extraterritorial jurisdiction in instances where "*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*".[25] Thus, the Court found that the UK exercised jurisdiction over the victims as the UK exercised in Iraq at the time some public powers that are usually exercised by a government.[26] Therefore, it is observed that the ECtHR had put in application a hybrid model in combination of the spatial and personal models by highlighting that the contracting State had, in the case of Al-

[19] *Loizidou v Turkey* App no 55721/07 (ECtHR, 23 February 1995).
[20] ibid 62.
[21] *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).
[22] ibid.
[23] *Al-Skeini* (n 9) 136.
[24] ibid.
[25] ibid 135.
[26] ibid 149.

Skeini, both exercised public powers and authority and control over the individuals concerned.[27]

The innovation in Al-Skeini is that it differentiated its theorisation from the Banković precedent[28] which was previously the leading case on the subject of extraterritorial jurisdiction of the ECHR, as follows: The Banković case concerned the deaths and injuries of victims that were suffered as a result of NATO bombings in Belgrade in 1999. In Banković, the Court rejected the claim of the applicants unanimously; and famously stated that extraterritorial jurisdiction is acquired where a state exercises "*effective control of the relevant territory and its inhabitants abro*ad" and where it "*exercises all or some of the public powers normally to be exercised by that Government*".[29] In Al-Skeini, the Court differentiated its position from Banković, by accepting that jurisdiction is also acquired in instances where a State agent exercises authority and control over an individual, and thus explicitly recognised and supported the personal model.

Nevertheless, the Court had gradually shown its support for the personal model in the post-Banković case-law that was produced but had not taken the step to openly support it like it did with Al-Skeini. In the case of *Issa and Others v Turkey*,[30] the applicants, who were Iraqi nationals, claimed that a group of their relatives who were shepherds from an Iraqi province close to the Turkish border came across Turkish soldiers in the hills who were allegedly conducting military operations in the region and who treated them cruelly and violently. The bodies of the shepherds with gunshot wounds and extensive mutilation were discovered after the Turkish troops left the area. However, the Court was unable to conclude whether the applicants' relatives had been killed by Turkish military shooting based on the material it had at its disposal. As a result, the Court was not persuaded that the relatives of the petitioners had been subject to Turkish jurisdiction for the purposes of Article 1 of the Convention.

[27] Milanovic (n 17).
[28] *Bankovic* (n 6).
[29] ibid 71.
[30] *Issa and Others v Turkey* (2004) 41 EHRR 567.

Thus, in the said case the ECtHR refused to blindly apply the Banković precedent and thus highlighted that "*a state may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating- whether lawfully or unlawfully- in the latter State*".[31] Therefore, the Court indicated that it had to be determined whether the Turkish armed forces operated in the given territory at the given time and had detained and killed the victims, in order to determine whether Turkey had jurisdiction over the victims according to the personal model of jurisdiction.[32] Similarly, in *Öcalan v Turkey*,[33] a case that concerned the arrest of the applicant in an aircraft in Nairobi, Kenya, by Turkish security forces, the Court took the position that the victim came under the jurisdiction of Turkey due to the fact that he came under the authority and control of Turkish officials.[34]

Lastly, in the case of *Isaak and Others v Turkey*[35] the Court accepted the application that concerned the killing of a person by the police of the illegitimate 'Turkish Republic of Northern Cyprus' within the UN buffer zone in Cyprus, and supported that although the events that concerned the case in question took place in an area where Turkey did not exercise effective overall control, the Court ruled that the victim was under the authority and effective control of Turkey through its agents.[36]

In Al-Skeini the Court commented that the case-law that was decided after the case of Banković (and of before A-Skeini) was not solely about control over given areas, but they were related to the exercise of physical power and control over the victims.[37] Therefore, the ECtHR instead of significantly departing from the precedent on the matter by expressly recognising the

[31] *Issa* (n 29) 71.
[32] Stojnic (n 17) 144.
[33] *Öcalan v Turkey* [GC] (2005) 41 EHRR 985.
[34] ibid, 91.
[35] *Isaak and Others v Turkey* (dec.) App no 44587/98 (ECtHR, 24 September 2008).
[36] ibid.
[37] *Al-Skeini* (n 9) 136.

personal model of jurisdiction, in the case of Al-Skeini it instead attempted to create a 'bridge' between the two models of jurisdiction, and somehow attempted to provide a new perspective to the Banković case where the Court had not taken sufficiently into consideration the personal model.[38]

Despite that the decision in Al-Skeini 'pioneered' in the sense that it expressly recognised the personal model of jurisdiction, the logic from Banković is still boldly identifiable in the judgement. Notably, the Court made reference to the requirement of exercising public powers in order to determine jurisdiction, and further noted that where authorities of the state in question exercise executive or judicial functions extraterritorially, then the state in question is thereby responsible for breaches of the convention and thus gave great weight to the exercise of public powers for the determination of the existence of jurisdiction.[39]

Moreover, the Court in Al-Skeini although it adopted a personal model approach, it did not expressly overrule the approach adopted in Banković and especially the spatial model approach, which implies that Banković may still be considered in future cases regarding this topic that may arise.[40]

Lastly, in Al-Skeini the Court acknowledged the territorial principle and highlighted that the jurisdictional competence of contracting states is '*primarily territorial*' and notably commented that "*acts of the contracting states performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases*".[41] Therefore, the Court evidently continued to support its previous

[38] Stojnic (n 17) 144-5.
[39] ibid.
[40] ibid.
[41] Milanovic (n 17).

theorisation as expressed in Banković, namely that extraterritorial jurisdiction is recognised only exceptionally.[42]

2.1.3 Al -Skeini: admission that rights can be 'divided and tailored'

Another notable development of Al-Skeini in comparison to Banković is the admission of the Court that the rights protected by the ECHR can be 'divided and tailored', position which it had previously explicitly rejected in Banković by stating that "*the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1…can be divided and tailored in accordance with the particular circumstances of the extraterritorial act in question"*,[43] meaning that either all Convention rights applied or none of them.

Nevertheless, the Court in Al-Skeini departed from the abovementioned position of Banković and held that in situations where effective control of an area is exercised by a contracting party, it is then under responsibility according to Article 1 "*to secure, within the area under its control, the entire range of substantive rights set out in the Convention*".[44] Similarly, in situations where a contracting State through its agents exercises authority and control over a person, it undertakes the obligation pursuant to Article 1 to "*secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual*".[45] The admittance by the Court that Convention rights can be divided and tailored, opened the way for the acceptance of the personal model that it had previously rejected in Banković.

2.1.4 Departing From the idea of "Legal Space"

[42] ibid.
[43] *Bankovic* (n 6) 75.
[44] *Al-Skeini* (n 9) 138.
[45] ibid.

In connection to the previous sub-section, the reasoning in the Al-Skeini judgement was also substantially differentiated from that of Banković by departing from the idea of 'legal space', or as otherwise called '*espace juridique*', which as was defined in Banković, meant that the application of the Convention was substantially limited to the territorial borders of the member States and that it did not apply beyond their borders. Notably in Banković, the Court had avoided to recognise the extraterritorial application of the ECHR by famously stating that "*the Convention is a multi-lateral treaty operating .... in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space*".[46] Therefore, the Court had chosen in Banković to interpret Article 1 of the Convention in a way that excluded its extraterritorial application and the protection of the convention rights from the behaviour of the Contracting States abroad. Nevertheless, as explained to an earlier section of the present paper, in the case-law that followed Banković, the Court avoided the application of the doctrine of '*espace juridique*'[47] and accepted that the ECHR had extraterritorial application through the state agents of contracting states. However in Al-Skeini, the Court highlighted that jurisdiction can indeed arise outside the territory of the member States of the Council of Europe and thus explicitly overruled the problematic notion of '*espace juridique*', which inhibited applicants from bringing complaints regarding the behaviour of the contracting parties to the Convention abroad.[48]

To summarise the above, despite the fact that the Court did not expressly overrule the Banković precedent and maintained the requirement for the exercise of public powers in order to establish jurisdiction, Al-Skeini introduced a substantial and significant development in the extraterritorial application of the Convention by expressly accepting the personal model of

[46] *Bankovic* (n 6) 80.
[47] *See* the cases of *Issa, Öcalan, Pad* and *Isaak.*
[48] Stojnic (n 17) 148.

jurisdiction and setting aside the previous requirement for '*espace juridique*' and by further accepting that rights can be divided and tailored.

2.2 UNANSWERED QUESTIONS AFTER AL-SKEINI

Al-Skeini has been the most significant case-law produced in the subject of extraterritorial application of the ECHR following that of Banković, due to the fact that it provided many answers to the questions that the Banković judgement had left unanswered. Nevertheless, the judgement in Al-Skeini was not panacea and left some uncertainties, which are recorded and analysed in the subsections that follow.

2.2.1 Relationship between the Models of Jurisdiction

The two models of extraterritorial jurisdiction are presented and explained in the Al-Skeini judgement, namely the Spatial model which provides for effective control over an area and the Personal model which provides for authority and control over persons via state agents.[49] Nevertheless, within the text of the judgement, there is no indication as to the relationship between the said models. One can assume that in cases where effective control is exercised over an area, that control is also exercised on the people of that area through state agents.[50] However, the same assumption cannot be made for the opposite scenario.

Instead of providing characteristic or distinctive definitions of the two models, the judgement in Al-Skeini further blurred their relationship as the Court referred to the Bankovićs' requirement for holding public powers for jurisdiction to be established; while referring to the personal model of jurisdiction.[51] It is rather confusing that the Court made this reference to the

[49] Stojnic (n 17) 150; *Al-Skeini* (n 9) 135.
[50] ibid.
[51] ibid.

Banković's requirement for public powers, as this requirement had been previously correlated to the spatial model of jurisdiction, instead of the personal.[52]

Following this observation, it has been argued that the spatial model is transformed to the personal model the smaller the area to which it is applied,[53] such as vessels. For example, in *Medvedyev and others v France*,[54] France had taken control over a Cambodian ship and the crew aboard. Similarly, in *Al-Saadoon and Mufdhi v United Kingdom*,[55] the UK exercised authority and control over a specific prison in Iraq. Therefore, other than the difference in scale, there has been no specific distinction of the two concepts by the Court, and their relationship still remains unclear, as well as the test that applies to extraterritorial jurisdiction.[56]

2.2.2 Deployment of Deadly Force

Al-Skeini was explicitly associated in its text with the application of the personal model of jurisdiction, but to which extent does this model apply to situations where deadly force is deployed over individuals? In the very recent case of *Georgia v Russia (II)*[57] it was stated by the Court that '*the shooting of an individual by State Agents constitutes the ultimate form of the exercise of State control*'.[58]

Nevertheless, in Banković and Al-Skeini the position of the Court was that the killing of an individual amounted to exercising authority and control over it only in situations where the state in question exercised public powers, thus meaning that if the given individual is killed by modern weaponry e.g. through the drop of missiles, there would be no '*authority and*

[52] *Bankovic* (n 6) 71.
[53] ibid (n 5) 161.
[54] *Medvedyev and Others v France* [GC] (2010) ECHR 384.
[55] *Al- Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9.
[56] Even in newer to Al-Skeini cases, such as *Jaloud v the Netherlands* [GC] App no 47708/08 (ECtHR, 20 November 2014), both models of jurisdiction are presented, but again there is no specific indication as to their distinction in application.
[57] *Georgia v Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) 9.
[58] ibid.

control'.[59] Interestingly, the cases of *Issa*,[60] *Pad*[61] and *Isaak*[62] suggest that killing via modern weaponry without taking control over a certain area are triggers of jurisdiction for the country that uses them. The application of the *Banković* approach and personal model to cases with similar facts that involve the killing of people through the deployment of deadly force, is highly problematic and completely contradictory to *Pad*,[63] where the Court emphasised that a State may be held liable for Convention violations of individuals who were found to be under the former State's authority and control through its agents operating - either lawfully or unlawfully - in the latter State while they were on the territory of another State that was not a Contracting State.[64]

The subject involving the personal model and the killings through modern weaponry, such as missiles and plane bombing, was further perplexed with the judgement in *Georgia v Russia (II)*[65] where it was decided that Russia had not triggered jurisdiction under neither model and was thus held not responsible for breaches of Convention rights that happened during the armed conflict between the two countries at the time. The Court specifically held that an armed conflict between armies creates chaos and that subsequently there is no effective control over the territory; to put it in the Courts' specific words: "*The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area*".[66]

[59] Milanovic (n 17).
[60] *Issa* (n 29).
[61] *Pad and Others v Turkey* (dec.) App no 44587/98 (ECtHR, 24 September 2008): In this application, it was claimed that Turkish soldiers had murdered seven Iranian men in north-western Iran in May 1999. Turkey acknowledged dropping bombs from a helicopter after suspecting the presence of terrorists during the incident. Additionally, it said that in order to have good relations with Iran, it had agreed to pay the sum of money the Iranian government was claiming in compensation for the killings.
The money was declined by the families of the victims.
[62] *Isaak* (n 34)
[63] Stojnic (n 17) 152.
[64] ibid.
[65] ibid; *Georgia v Russia* (n 54).
[66] *Georgia v Russia* (n 54) 137 -138.

Moreover, the Court made an effort to differentiate this case from previous case-law that had suggested that the mere use of lethal force was sufficient for triggering jurisdiction (e.g. *Issa*) and noted that those (previous) cases involved an element of proximity, and further noted that the case of *Georgia v Russia (II)* is much different in that it involved an international armed conflict which concerns bombing and shelling by Russian armed forces.[67]

That being said, the Court appears to be attempting to exclude the use of heavy weaponry that cause distraction to a larger scale, from those situations that the distraction is smaller in scale and '*involve the element of proximity*'. Nevertheless, given modern weaponry as a means for applying deadly force, it is hard, or even impossible to distinguish which cases fulfil the requirement of '*proximity*' and which are not, and where there is an armed conflict situation and where there is not. That being said, there is an urgent need for the clarification by the Court of the correlation between the deployment of deadly force and the personal model, which at the moment remains unclear and rather confusing.[68]

2.2.3 How rights are to be 'Divided and Tailored'?

The Court indicated in Al-Skeini that ECHR protected rights can be '*divided and tailored*',[69] but nevertheless, the Court did not provide sufficient directions as to 'how' and 'when' can protected rights be '*divided and tailored*'. Although the Court did state in Al-Skeini that Article 2 should be interpreted loosely without placing unreasonably high burdens, due to the fact that conditions in Iraq are significantly more difficult than they are in the United Kingdom,[70] Al-Skeini and subsequent cases have provided little specific guidance regarding how rights are to be divided and tailored. This issue is particularly significant because, although it is a given that a person's right to life should be protected, the Court's scrutiny of State actions to protect rights,

[67] ibid 131-132; Stojnic (n 19) 153.
[68] ibid
[69] See subsection 2.1.3.
[70] *Al-Skeini* (n 2) 168-177.

as well as the potential inclusion of specific Articles, call for careful consideration and principled reasoning. The controversial nature of this issue was apparent in *Jaloud*,[71] which concerned the examination into the circumstances surrounding the death of an Iraqi citizen (the applicant's son) who suffered gunshot wounds in Iraq in April 2004 during an incident involving Netherlands Royal Army forces, which involved the Dutch authorities. The applicant expressed his displeasure that the inquiry into his son's shooting had not been adequately independent or efficient. In deciding the said case, the judges were almost divided on whether or not States should be given some leniency in exceptional circumstances like occupation and armed conflict and how rigorously the Court should scrutinise State action in this situation, despite being unanimous in finding jurisdiction and a breach of the procedural obligation under Article 2.[72]

2.3 INTRODUCTION TO THE FUNCTIONAL JURISDICTION MODEL

Jurisprudence on the issue of extraterritorial jurisdiction basically indicated that *'[i]ncreasingly … the categories [for the exercise of jurisdiction] have proved to be too fixed – and perhaps too few – to serve the interests of States … and the needs of the system (including new needs responding to new commitments to human values). Developments have blurred the traditional categories, suggesting that the assumption of rigid categories (territoriality, nationality) are no longer valid, and that a more flexible jurisprudence would better serve the purposes of the law and the needs of the system'*[73]

This section supports and aims to present the theorisation that since the situations that trigger jurisdiction extraterritorially that have been identified by the Court are not exhaustive, the

[71] *Jaloud v The Netherlands* [GC] App no 47708/08 (ECtHR, 20 November 2014).
[72] ibid.
[73] E Cannizzaro, 'The EU's Human Rights Obligations in Relations to Policies with Extraterritorial Effects: AReply to Lorand Bartels' (2014) 25 Eur J Intl L 1094.

Court should thus develop a new test that would better address those unprecedented situations. That being said, in this Section a functional jurisdiction model is being presented and evaluated. The proposed model of jurisdiction, as analysed in detail in the sub-sections of this section that follow, is based on the control that a contracting State has exercised over an individual. Indicatively, this Section will also attempt to demonstrate how the proposed functional model of jurisdiction would provide the Court with a more just approach in the majority of cases, including complicated scenarios that involve interstate armed conflicts and hostilities.[74]

Moreover, this Chapter also gives attention to the notion of '*special features*' that has been increasingly being used by the Court in recent case-law related to extraterritorial jurisdiction, but which is yet accompanied with legal uncertainty, and test whether the '*special features*' doctrine could potentially work within the proposed functional model of jurisdiction.[75]

2.3.1 Causation, Foreseeability and Remoteness

It has already been indicated at an earlier section of the present thesis that Article 1 of the ECHR, which is the jurisdictional clause of the ECHR reads that the contracting States are responsible for the protection of rights and freedoms of those individuals that fall '*within their jurisdiction*'. Obviously the said '*within their jurisdiction*' indication is not a reference to a specific territory, the ECtHR has inferred jurisdiction from other less extreme forms of domination, such as occupation or effective overall control, in addition to territorial sovereignty.[76] Although the Court's jurisprudence is plagued by doctrinal ambiguity and a lack of internal consistency, jurisdiction is now viewed as being primarily '*functional*', that is, it relates to the function of jurisdiction. Without limiting its application to a specific region or to

[74] Besson (n 3) 879; Giuffre (n 11) 56.
[75] ibid (n 11) 56.
[76] *Loizidou* (n 20)

nationals, it deals with the legal relationship that exists between State parties to a human rights treaty and their people as a result of the exercise of State authority or de facto control.[77]

Despite the fact that jurisdiction and causation are two separate ideas, the Court has occasionally combined them to suggest a jurisdictional connection under Article 1 of the ECHR. The Court's case law shows that pure causation is inadequate for establishing jurisdiction in connection to special situations. Whatever the location of the State's agents and the action itself, the immediate and foreseeable results must be considered when planning and carrying out State action.[78] In fact, the State should consider the reasonably foreseeable effects its actions have on the rights and freedoms of people under its control while performing its duties.

Moreover, the Court stressed the need for legislative authority to establish jurisdiction in Banković. A collective interpretation of the ECtHR case law, however, demonstrates how the idea of '*effective control*', which triggers Article 1 of the ECHR, also incorporates those State measures that may not involve arresting, detaining, or extraditing the individuals in question. In the personal model, '*effective control*' can refer to any coercive behavior applied to an individual through the use of direct force, such as shelling or bombing, the use of physical force and control in a situation of proximate attacking, irrespective of whether such force is exercised in the context of an active warfare, a situation of arrest or detention.[79]

The ambiguities that remained following Al-Skeini show that the extraterritorial jurisdictional jurisprudence is still plagued by an inability or reluctance to establish a consistent and axiomatic regime that is based on fundamental principles and uniformly applicable across the

[77] Y Shany, 'The Extraterritorial Application of International Human Rights Law' (2020) 409 Recueil des Cours de l' Academie de droit International 30.
[78] Giuffre (n 11) 58.
[79] Giuffre (n 11) 58.

broadest range of jurisdictional controversies.[80] Considering the intent of Article 1 and the ECHR as a whole, it is necessary to identify the appropriate scope of the extraterritorial application of the ECHR.

The present thesis suggests that the personal and spatial models of jurisdiction be replaced by a functional model, according to which a person who is causally impacted by an act or omission of a contracting State will fall under its jurisdiction. The determination of whether a contracting State bears jurisdiction over a situation, would be determined based on two factors: Firstly (a) there would be a determination on the factor of causation, and (b) a determination in relation to the scope of responsibility.[81] By using the causation test, it is aimed to be proved whether the action or inaction of the State in question caused the negative result. The causation test questions whether the detrimental effect would have happened if it was not for the defendant State's earlier action or inaction. The suggested test is necessary to determine the extent of liability since it would be absurd to hold a defendant State accountable for negative outcomes that were out of their control.[82]

The concepts of foreseeability and remoteness are used to evaluate the scope of responsibility. While the principle of remoteness works to defend States where there is insufficient proximity between the State's act or omission and the harm, the principle of foreseeability requires that the harm suffered could have been foreseen as a consequence of the act or omission by a reasonable person at the time it was carried out. The functional model does not imply that anyone who has been harmed by an act attributable to a Contracting State, irrespectively of where the act in question has been committed or its consequences felt, being brought within

[80] Al-Skeini (n 9) 4 (Judge Bonello).
[81] Stojnic (n 17) 156.
[82] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) The European Journal of International Law 471.

the jurisdiction of that State, as it includes the principles of foreseeability and remoteness that will convict a State despite the causation test establishing a factual causal link.[83]

2.3.2 The Functional Model of Jurisdiction Identifiable in Case-Law

There is precedent for applying the functional, based on causation, model of jurisdiction, despite the Court's rejection of it in Bankovic.[84]

In the case of *Andreou v. Turkey*,[85] a protester who was on Greek Cypriot territory was shot by the Turkish forces who were on Cypriot territory occupied by the Turkish forces. Insisting that it had no influence over either the UN buffer zone or the Greek-Cypriot National Guard ceasefire line, the Turkish government claimed that the impacted person did not come within its jurisdiction. The Court expressed a different opinion, stating that even though the applicant had sustained his injuries in a region over which Turkey had no control, the close-range shooting that had been the immediate and direct cause of those injuries required that the applicant be regarded as falling under Turkish jurisdiction in accordance with Article 1.[86] The Court consequently emphasised on the causal relationship between the activities of State agents and the negative result.

Moreover, as an addition to the aforementioned case, the functional, based on causation model, is consistent with the Court's recently introduced case law. As was discussed above, there is a sequence of case-law the decisions of which have supported the personal model without the requirement for the exercise of public powers by the defendant State.[87] In that respect, in the case of *Hassan v. United Kingdom*[88] the victim had been under the physical power and control of British soldiers while he was imprisoned in Iraq, thus the Court

[83] Ibid (n 76).
[84] *Bankovic* (n 6) 75.
[85] *Andreou v Turkey* App No 45653/99 (ECtHR, 27 October 2009).
[86] ibid 25.
[87] E.g the cases of *Issa, Öcalan, Pad* and *Isaak.*
[88] *Hassan v UK* [GC] App no 29750/09 (ECtHR, 16 September 2014) 75.

determined that the UK had jurisdiction over him as the Court acknowledged that this case was connected to a time when the UK and its coalition allies announced the end of the active hostilities phase but was before the UK took over responsibility for upholding security in parts of Iraq.[89] Therefore, the Court determined that the UK had jurisdiction over the victim since he had been under the physical power and control of UK soldiers when he had been imprisoned, despite the fact that the UK had not yet exercised any form of public powers as the requirement that was previously set in Al-Skeini.[90]

The Court appears to be heading toward adopting a model of jurisdiction based on cause and effect, without making it clear that it is heading towards this direction, as seen by the Court's expansive interpretation of the authority and control of State agents.

2.3.3 The 'Special Features' Doctrine

Judge Albuquerque has notably stressed that according to many Court cases on the issue of extraterritorial jurisdiction, *'jurisdiction depend[s] upon the de facto authority exercised by the State over a person, a group of persons, property or an area, regardless of the instantaneous or continuous nature of the State action, or the intentional, deliberate, negligent or collateral character of the damage caused, or the legality of the State action or even the determination of the substantive law applicable to the facts in issue'.*[91]

Thus, the Court's affirmation in the case of *Georgia v. Russia* that the mere reality of armed conflict and combat between hostile military forces striving to establish authority over a region in a setting of disorder eliminates jurisdiction is somewhat surprising.[92] In fact, if a jurisdictional link is established each time a person is imprisoned, injured, or killed abroad due to the use of State powers, it would be doubtful to deny such control when many more people

[89] *Hassan* (n 82) 75.
[90] ibid 76.
[91] *Georgia v Russia* (n 54) Dissenting Opinion of Judge de Albuquerque, para 9.
[92] ibid, para 126.

are imprisoned, hurt, or killed, even in situations of active hostilities or airstrikes.[93] In addition, when a State conducts a large-scale operation that involves a planning phase, a decision-making phase, and an execution phase with far-reaching repercussions for the affected victims, jurisdiction is engaged under Article 1 of the ECHR in respect of '*isolated and specific acts*'.[94]

The Court addresses the responsibility to look into a military action abroad in *Hanan v. Germany*.[95] In this case, it was not thought sufficient for the establishment of jurisdiction the fact that Germany was already looking into the civilian deaths brought on by an attack in Kunduz that was authorized. Instead of providing a principled reading of jurisdiction, the Court conditions jurisdiction on '*special features*' such as Germany's domestic legal and customary humanitarian law obligations to investigate the deaths caused by a military attack and the inability of Afghani authorities to do so.[96]

The Court had previously used the '*special features*' theory doctrine in decisions involving Article 2 procedural obligations, including *Güzelyurtlu and Others v. Cyprus and Turkey*,[97] *Romeo Castano v. Belgium*,[98] and *Georgia v. Russia*.[99]

When applying the '*special features*' approach to extraterritorial jurisdiction in complicated circumstances, particularly when European States are involved in military conflicts outside their borders, the Court "*does not feel that it is necessary to identify in abstracto which special features trigger the presence of a jurisdictional link*", as these features will inevitably rely on the specific circumstances of each case and may vary greatly from one instance to another.[100]

[93] ibid, para 127.
[94] ibid, paras 11 and 132.
[95] *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021).
[96] ibid.
[97] *Güzelyurtlu* (n 2) paras 141-2.
[98] *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019).
[99] *Georgia v Russia* (n 54); Giuffre (n 11) 60.
[100] ibid (n 92) para 190.

It would be interesting to see if these conclusions will be perceived as too far-fetched as they represent some judges' willingness to go in pursuit of an excessively broad view of the Court as the arbiter of all armed conflict.[101] By this point, it appears that the Court has given up trying to base its arguments on a framework that would have more universal applicability. Instead, it appears that the Court deliberately steers clear of contentious topics like the jurisdiction of European States or the scope of fundamental rights when they engage in activities abroad, instead strategically turning to the contested and open-ended notion of '*special features*' to support the ad hoc exercise of jurisdiction.[102]

If the Court had relied on a functional test to affirm jurisdiction outside the territory of the respondent State, these cases may have been dealt more coherently rather than in such a fragmented manner, which runs the danger of eroding the Court's credibility. For instance, in Hanan, Germany's jurisdiction could have been established by relying on the fact that, through its state agents stationed in Afghanistan, Germany was in a position to directly exercise control over the applicant's sons who were killed by the Kunduz airstrike and had the authority to do so through enforcement actions.[103]

In connection to the previous paragraph, and without departing from the notion of jurisdiction as it has been built by the Court through the years, the Court has established to date, some common patterns in its case law which can be discovered and put together to give a clearer and better approach to the understanding of jurisdiction. It is hereby believed that improved consistency should be based on the concepts of functional jurisdiction and public powers; as well as the effect that the actions and inactions of State authorities have on human rights. The Court ought to "*avoid creating concepts which somehow seem to serve the facts*" by assessing

[101] ibid (n 94) para 4.
[102] ibid (n 95).
[103] *Hanan* (n 90).

"*the facts against the principles which underpin the fundamental functions of the Convention*".[104] While Strasbourg judges seem unwilling to completely abandon the '*special features*' formula, a pragmatic approach might see the Court use '*special features*' as a support tool, with the ultimate purpose of reinforcing the reasoning that it has built on jurisdiction, but based on a functional-impact model. However, as long as '*special features*' make reference to other legal fields (such as international humanitarian law or the law of the sea), these factors could be incorporated into the definition of jurisdiction in order to reinforce how the Court interprets and applies international human rights law in the given situation.[105]

2.3.4 Functional jurisdiction vis-à-vis planning and executing extraterritorial acts

A functional test for jurisdiction has been proposed by a number of scholars and judges in the past given different opportunities.[106] This criteria can be upheld "*when it is within a State's capacity to execute particular functions that are consistent with their ratification of the Convention, the protection of human rights, the investigation of human rights abuses, etc.*" as a third-party intervention in Hanan v. Germany has noted.[107] At this point it is important to give some attention to judges who dissented from the majority's conclusion[108] in the *Georgia v. Russia* case,[109] by arguing that Convention rights and freedoms should be provided to everyone under the State power of a contracting Party, and the scope of the rights and freedoms to be secured should be adequate to the extent of the effective State power. Under its State power, a contracting Party must guarantee the ECHR rights and freedoms to everyone, and the

[104] *Al-Skeini* (n 9) Concurring Opinion Judge Bonello, para 8.
[105] E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German L J 419; Giuffre (n 11) 62.
[106] ibid.
[107] *Hanan* (n 90).
[108] ibid, Joint Partly Dissenting Opinion Judges Yukivska, Wojtyczek and Chanturia, para 3.
[109] *Georgia v Russia* (n 54).

scope of those rights and freedoms must be adequate to the extent of the effective state power.[110]

In light of said judge's opinion, a jurisdictional relationship also arises if a State performs pre-planned extraterritorial activities directly impact individuals, such as coercion or force. Planning and making decisions on general strategies and specific courses of action, and enforcing those decisions establish a jurisdictional link that brings those impacted under the authority and control of the State in question.[111]

A logical approach to jurisdiction, in my opinion, would take into account the fact that a State also exercises control through operational and policy measures, which are conscious manifestations of State authority, sometimes, based on long-term intentions and coordinated actions.[112] When one or more States exert control over the formulation and implementation of a decision or action that affects people outside their borders, a jurisdictional link can be created in this regard. Achieving "*the universal and effective recognition and observance*" of fundamental human rights, as stated in the ECHR's Preamble, would be made possible by this logic.[113] As a result, for example, jurisdiction over civilians can be upheld in armed conflicts, particularly throughout the period stage of active hostilities, which is the practical manifestation of State authorities and necessitates extensive planning.

The involvement of European States in military or border patrol operations is not a one-time demonstration of State authority but instead a component of a long thought strategy that is crucial to the success of the operation. According to this perspective, functional jurisdiction is not only taking place when State authorities exert effective and optimal control through immediate coercion over people or territory, but it also takes place when public powers are

[110] ibid, Joint Partly Dissenting Opinion Judges Yukivska, Wojtyczek and Chanturia, para 3.
[111] ibid, para 5.
[112] Besson (n 10).
[113] ECHR (n 1).

exercised through the formulation and execution of general policies or targeted policing operations that are either having an impact abroad or are enforced extraterritorially.[114]

Similarly in Banković, the Court might have arrived at a different conclusion in its judgement regarding jurisdiction if it had considered the larger context of planned operational action in which the airstrikes took place, without ignoring the predictable effects that such foreseen State action would, almost certainly, have on lives of people.[115] The Court similarly rejected extraterritorial jurisdiction in Georgia v. Russia for the first five days of the war between the two countries, when hostilities were active. In fact the Court overlooked the fact that the civilian populations of pats of Georgia fell against their will under the authority of the Russian army; who had carried out a well-planned armed attack, which is by definition the exercise of public powers and thus of jurisdiction. In light of this, in the context of active hostilities, the whole planning and preparation of the operation leading to the commander's ultimate order for bombardment is also relevant in establishing a link of jurisdiction with the victims. By granting the order to attack, a state agent acts within the bounds of the authority granted to them for the aim of carrying out actions that are related to state security. Therefore, they have the legal right to prevent the likely consequence as well as the power to directly influence the lives of those who are under their control. [116] That said, the State should evaluate "*its compliance with the provisions of Article 2 [of the ECHR] in advance and [should also] conduct an independent and effective investigation into the deaths in its aftermath*" because a hostile attack, by whatever means used, creates a jurisdictional link.[117]

[114] Giuffre (n 11) 64.
[115] ibid 65.
[116] ibid.
[117] C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) 81 QIL-Questions of Intl L 33.

The development of a public powers' relationship can produce a sovereign authority connection that can lead to the establishment of functional jurisdiction.[118] It is essential to perform a thorough analysis when determining whether jurisdiction is present in each circumstance, taking into account the State's awareness of the likely outcomes of its acts and inactions and how those outcomes may affect the rights of those under its control.

As a paradigm to the previous paragraph, maritime frontiers are different from land borders due to the pragmatic nature of State sovereignty at water. From one standpoint, there are maritime borders marked on maps that outline an area in which a State exercises its various levels of sovereignty in accordance with the various marine zones' governing laws. In this case, the State's powers are functional and are used to safeguard specific interests that international law regards as essential within that maritime zone.[119]

From another standpoint, a maritime frontier exists anywhere the State exercises its border control functions, even on the high seas. States engage in these extraterritorial operations while exercising border control rights and powers, which are governed by national laws or procedures for cooperation. Legal bases such as legislative jurisdiction set boundaries and form the enforcement jurisdiction of the acting State, i.e. its authority to act executively in response to or as a result of establishing decisions or rules.[120] States that 'offshore' their immigration restrictions only relocate a portion of the legislative framework that governs borders because not all of the factors connected to a territory are applicable outside of it. All of the factors pertaining to the people under authority, however, do apply. This implies that fundamental rights, primarily the right to life and prohibition of torture, apply even when States work with a surrogate to stop or pull back migrants from points where they depart from or activate their search and rescue operations outside their legal boundaries. Although it is obvious that people

[118] ibid.
[119] Giuffre (n 11) 66; M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007).
[120] ibid.

whose rights are violated during hostile operations directly carried out by European Contracting States a jurisdictional link is established, things are more complicated when powers are assigned to a non-European state through funding or other assistance, in an effort to avoid interaction with the potential victims aiming to avoid the creation of the jurisdictional link that can potentially create responsibilities.[121] Even though they differ from an army operation of bombing specific city targets, these operational scenarios of 'contactless' control are all forms of exercising public power on affected people who are subject to the authority of State authorities and as a result, subjects to their jurisdiction.[122] As a matter of fact, any operations, including large-scale military operations abroad, whether through ground combat or air strikes, strategic operations nationally, and border and immigration control, are essential State functions in which the State exercises control over those under its jurisdiction through carefully planned enforcement actions, even extraterritorially. Thus, it is unclear why in cases such as Georgia v. Russia[123] jurisdiction is found during the occupation phase, but not some days prior when hostilities took place, where Russia effectively had under its control all civilians killed and injured by the airstrikes that it had carried out on Georgian soil, which were planned and executed by State officials. The use of lethal force by any means by State authorities, who are exercising their public powers through planned operations, that cause many deaths of civilian population, shall in fact trigger jurisdiction even during the initial period of active hostilities, even before they result to occupation.[124]

Following the discussion above, it is hard to provide a solid distinction between territorial and extraterritorial jurisdiction, because jurisdiction should only be 'functional' in that it is acknowledged once a States' power and control are violated or any of its tasks are not

[121] ibid, see also for example *S.S. and Others v Italy* App no 21660/18 (ECtHR, 11 November 2019).
[122] ibid.
[123] *Georgia v Russia* (n 54).
[124] Giuffre (n 11) 67.

performed as intended. In other words, a State has jurisdiction whenever its State agents act (or do not act) in accordance with their public authorities, and whenever a State has the ability to look into a violation, penalize the perpetrators, or make restitution to a victim.[125] Consequently, jurisdiction is triggered whenever a sovereign-authority connection is established between the State and those who are under its authority and control, regardless of the legality of the State's act or omission. As famously Judge Bonello highlighted in his Opinion in Al-Skeini: '*when it is within a State's authority and control, whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction*'.[126]

2.3.5 The factor of foreseeability

Facts and legal obligations should be evaluated to establish what effects on human rights are reasonably foreseeable, combining a functional approach to jurisdiction with a model approach. The Court has occasionally rejected a jurisdictional model based solely on the effect that State action may have on human rights by people who are located outside of a contracting States' territory.[127] Nevertheless in other instances, it has also implicitly approved of such an approach, based on adjacent concepts, like attribution and causation, in an effort to find a nexus between State activity and the disputed occurrence, or a power relationship.[128]

The majority of regional and global human rights protection systems have likewise adopted the 'functional' model of jurisdiction. Whereas UN human rights monitoring agencies occasionally interpret applicable treaties more liberally than the ECtHR, there are other times when they either follow their local counterparts' lead or take a more conservative stance towards the

[125] ibid, see also, *Al-Skeini v UK,* concurring Opinion Judge Bonello (n 9) paras 11-13.
[126] *Al-Skeini* (n 9) para 12.
[127] ibid (n 116).
[128] ibid.

protection of human rights.[129] Cross-referencing between human rights bodies can indeed be a beneficial tendency to avoid isolated positions globally and construct a more coherent approach to handle new complex cases having transboundary elements, even though reducing the fragmentation of international law through cross-referencing between international courts with a different purpose and structure is not necessarily to produce positive effects.[130]

For instance, it is notable that the ECtHR has never once brought up General Comment 36, given by the UN Human Rights Committee[131], in any of its judgments involving the right to life abroad. For instance, it is notable that the ECtHR has never once brought up General Comment 36, given by the UN Human Rights Committee, in any of its judgments involving the right to life abroad (HRC or the Committee). General Comment 36 states that the right to life gives ICCPR States Parties a positive obligation to ensure that the right in question is respected and protected, including from reasonably foreseeable risks and potentially fatal events, as well as those that do not directly result to fatalities.[132]

General Comment 36 further outlines how all individuals who are subject to the effective control or exercise of authority by a State over their right to life fall under that State's jurisdiction. The State has a responsibility to prevent the loss of life for those people whose right to life is directly and fairly foreseeable harmed by military or other activity conducted by the State.[133] The right to life of people living outside of a state's borders may be directly and predictably affected by the actions and inactions of state authorities whose mandate and role call for them to take action, but who instead either fail to act or act with unjustified delay.[134]

[129] Gavouneli (n 119) 32.
[130] ibid.
[131] HRC or the Committee.
[132] Gavouneli (n 119); UN HRC, 'General comment no 36 (2018) on Article 6 of International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC, para 7.
[133] ibid para 63.
[134] UN HRC, 'General Comment 36' (n 132) para 22.

Therefore, the law is created when there is a connection between a State and a particular factual event.[135]

Notably Mariagiulia Giuffre argues that according to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, additional pertinent principles of international law shall be taken into consideration when interpreting Article 1 of the ECHR. This suggests, for instance, that international humanitarian law may be properly taken into account during an armed conflict. Therefore, a State must carefully consider what is reasonably foreseeable as collateral damage while planning and carrying out an attack targeting a military objective, taking all practical efforts to protect civilians.[136] By way of example, the African Commission on Human and Peoples' Rights explains how the right to life must be construed in light of international humanitarian law principles when there is an armed conflict.[137] At this point it would be fruitful to note that Giuffre point to the General Comment No. 3 on the African Charter on Human and Peoples, within which it is explicitly stated, unlike the ECHR, that: *'a State shall respect the right to life of individuals outside its territory. […] The nature of these obligations depends, for instance, on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life. In any event, customary international law prohibits, without territorial limitation, arbitrary deprivation of life'.*[138]

[135] ibid.
[136] Giuffre (n 11) 70.
[137] ibid, ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights' (4-18 November 2015).
[138] ibid.

2.3.6 Reasoning Behind the 'Special Relationship of Dependency'

This sub-section argues that the reasoning behind the 'special relationship of dependency' formula used to determine jurisdiction in the high seas, where States bear parallel search and rescue obligations, is not materially different from that of the ECtHR's 'special features' doctrine.

A State begins to exercise authority and control over persons at the same time that it begins to use its public powers by making a decision to activate, or not, or delay rescue services. This is sufficient to cause the application of the relevant human rights treaty once the State becomes aware of the emergency situation and establishes contact with the vessel or persons in danger, and uses its public powers in this way.[139] Therefore, even in situations where there is no direct contact, the requirement for effective control for a State can still be fulfilled, even from a distance, for example, through the deployment of helicopters or drones, and be deemed to put the people concerned under its jurisdiction. According to this perspective, a State could exercise jurisdiction if it had knowledge of the relevant facts, was close by, had a functioning rescue service with sufficient resources, and had the authority to mitigate the risk in accordance with its legal obligations under treaties and customary law. As a result, simply failing to act or choosing not to do so in a crisis scenario can fulfill the requirements that lead to a violation of Convention rights, such as the right to life. Since not all instances of inaction, misjudgment, or ineffective intervention qualify as omissions, the notion of an omission should be related to a failure to act that is evaluated.[140]

As a result, responsibility can also be claimed when state officials fail to take precautions to preserve people's lives and integrity, regardless of physical contact, and do so without placing

[139] Papastavridis (n 105) 419.
[140] ibid.

an impossible or excessive burden on them.[141] In order to determine whether State authorities fell short of taking actions that, if reasonably judged, could have been expected to reduce the risk, they must have acted within the limits of their authority.[142] In a different setting (such as *Osman v. UK*),[143] the Court ruled that if the authorities of a specific State knew or should have known at the time that there was a real and immediate risk to the life of an individual or individuals and they failed to take actions within the scope of their powers that, might have been reasonably expected to avoid the harm of those individuals in danger, they were in violation of international law.[144]

Such as in *Osman v. UK* which is a relatively old case, the Court had previously acknowledged jurisdiction in cases where the State's actions or inactions had an impact on those who were actually under its actual power.[145] In addition, it has accepted jurisdiction when a person's rights have been violated as a result of a Contracting State's "*significant and decisive influence*" either of military, economic, financial, or political nature over a third party.[146]

According to human rights law, there must be some sort of normative power to link the State as a duty bearer with a particular person as a right holder in a certain context. Thus, jurisdiction cannot be claimed towards everyone.[147] State obligations can only be 'divided and tailored' in accordance with the degree of control exercised by State authorities after the jurisdictional nexus is established. However, this is not the place for a thorough critique of 'capacity' as an element of jurisdiction, the mere ability to prevent or respond to human rights violations should not be taken into account as sufficient to establish a jurisdictional relationship if there is no

[141] Papastavridis (n 105) 419.
[142] ibid.
[143] *Osman v the United Kingdom* App no 23452/94 (ECommHR, 28 October 1998) para 116.
[144] ibid.
[145] ibid; Papastavridis (n 105).
[146] Giuffre (n 11) 76; See also *Ilasçu and Others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004); *Catan and Others v. the Republic of Moldova and Russia,* App nos 43370/04, 8252/05 and 18454/06 (19 October 2012); and *Chiragov and Others v. Armenia* App no 13216/05 (ECtHR, 16 June 2015) paras 167-187.
[147] Besson (n 10) 864-5.

actual exercise of public authorities. While the location, being extraterritorial or not, in which this sovereign authority nexus is established is irrelevant in establishing jurisdiction, it is necessary that effective control is actually present at the situation in question, whether through physical contact and use of force, or otherwise, which affects a specific situation and the position of those subjected to an exercise of public powers, irrespective of whether this is happens within the borders of the Contracting State or abroad.[148]

The Court in *Furdik v. Slovakia*[149] stressed that a jurisdictional link without distinctions between territorial and extraterritorial conducts is established when it is brought to the attention of the authorities that a person is in danger due to injuries sustained by an accident and State authorities are in a position to protect those whose life is in danger. In the same way as the unique characteristics of the situations at sea do not permit the existence of zones outside the law without human rights protection, protection of civilians cannot be disregarded during aerial bombing. Consequently, it is not appropriate to regard actions taken by state authority in the air or on the high seas as being above the law.[150]

[148] ibid.
[149] *Furdik v Slovakia* App no 42994/05 (ECtHR, 2 December 2008).
[150] Besson (n 10) 866; Giuffre (n 11) 77.

CONCLUSIONS

The study shown above has shown that although the ECtHR has not yet adopted an evident, principled approach to extraterritorial jurisdiction, it has however attempted to base its judgements on the classification of standards established in *Al Skeini v. UK*, albeit with some degree of ambiguity. As a result, although the Court appear to favor a more case-specific and flexible approach, which partly relies on a set of well-established requirements, the Al-Skeini precedent, they also occasionally turn to the unique and special circumstances, looking at the special features of each case, so that to explain away the absence of a methodical and consistent interpretation of extraterritorial jurisdiction.

The Court also appears determined to avoid developing a comprehensive approach that can be thoroughly and logically applied to all instances of human rights violations that happen extraterritorially, which undermines legal certainty for both the parties on the side of applicants as well as that of respondents. Furthermore, given that the Court's guiding principles are not explicitly stated and therefore remain a subject of speculation,[151] it cannot be ruled out that the fragmented approach supporting some of the most recent decisions is intended to avoid a significant level of the Court's involvement in cases involving armed conflict without giving away complete control of those circumstances. Due to the 'special features' criteria, extraterritorial jurisdiction has either been confirmed in some situations while preventing the acknowledgment of human rights violations in the merits phase, or it has been purposely prevented because of ongoing hostilities that have made things a little too 'chaotic'.[152]

[151] Raible (n 5) 27.
[152] See *Georgia v Russia* (n 54) para 126.

A key issue is that people do not seem to understand the significance of each of the special features and how these factual components, either separately or collectively, might be applied to different circumstances. Furthermore, it appears that the Court wishes to allow claims involving the extraterritorial use of force while maintaining rigorous control over who actually has access, as evidenced by its discretionary tailoring of the special features on a case-by-case approach.[153]

Thus, it is possible that the Court's fragmented approach will, maybe intentionally, have the effect of deterring the filing of cases before it concerning armed conflicts, particularly in situations of 'chaos' as those related to the war in Ukraine or concerning Nagorno Karabakh.

This study has also attempted to examine the conclusions that might be drawn from how other international tribunals and UN human rights bodies have handled extraterritorial violations of the pertinent treaties. Essentially, it would be a step backwards for the Court to significantly deviate from the precedent set by other human rights organizations. The ECtHR could, potentially, more clearly establish its jurisdiction by pointing to the State's extraterritorial influence exercised over the human rights of an individual. A functional-impact approach would consider jurisdiction involved whenever State authorities exercise public powers whose implementation has direct and foreseeable extraterritorial impacts on the human rights of the people concerned, complementing rather than undermining the functional interpretation of jurisdiction.

The fact that the respondent State knew or ought to have known the possible consequences of its actions or omissions is one of the crucial components to establish jurisdiction when evaluating whether the respondent State can impact or inhibit violations of the rights of individuals under its control. As a result, novel cases involving state obligations at sea, such

AS and Others v. Italy,[154] may have an impact on other human rights organizations, particularly the ECtHR, which is now dealing with complex issues of migration via sea.[155]

According to a functional approach of jurisdiction, States must abide by the Convention whenever they use their public authority, including during operations at sea, the battlefield or other. Any other interpretation of State responsibilities would support a gray area where there is no established legal framework that can provide victims with the protections and rights guaranteed by the Convention.[156]

It is thought that a more consistent development on jurisdiction would, first and foremost, enhance the Court's legitimacy. A bolder move toward a functional test that also appropriately considers the impact of State action or inaction will help provide the necessary legal certainty for both States and applicants preparing for litigation before an international human rights court.

[154] ibid (n 131).
[155] See *SS and Others v Italy* (n 115) where people stranded in the Mediterranean trying to reach Europe were directed to Libya.
[156] *Medvedyev* (n 51).

BIBLIOGRAPHY

1. ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights' (4-18 November 2015).
2. Besson Samantha, *"The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To"* (2012) 25 Leiden Journal of International Law 857.
3. Cannizzaro E*, 'The EU's Human Rights Obligations in Relations to Policies with Extraterritorial Effects: A Reply to Lorand Bartels'* (2014) 25 Eur J Intl L 1094.
4. Conall Mallory, '*A second coming of extraterritorial jurisdiction at the European Court of Human Rights?*' (2021) 82 QIL 31-51, 31.
5. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 23 December 2022].
6. Demetriades Alexandros, '*Reconceptualising Extraterritoriality under the ECHR as Concurrent Responsibility: the Case for Principled and Tailored Approach*' (2020) 12(1) EJLS 157-194.
7. Gałka KU, "*The Jurisdiction Criterion in Article 1 of the ECHR and a Territorial State*" (2015) 17 International Community Law Review 474.
8. Gavouneli M, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007).
9. Giuffre Mariagiulia, "*A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights*" (2021) 82 QIL 53-80.

10. Harris DJ, O'Boyle M and Warbrick C, Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (Oxford University Press 2018).
11. Lawson R, "Really out of Sight? Issues of Jurisdiction and Control in Situations of Armed Conflict under the ECHR" [2010] Margins of Conflict 57.
12. Lord Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, But is it a Sound One?' < https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> accessed 15 December 2022.
13. Mallory C, '*A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?*' (2021) 81 QIL-Questions of Intl L 33.
14. Milanović and Papić, "The Applicability of the European Convention for Human Rights in Contested Territories" [2021] Philosophy of law and general theory of law 213.
15. Milanovic M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).
16. Milanovic Marko, '*Al-Skeini and Al-Jedda in Strasbourg*' (2012) 23 (1) EJIL 121.
17. Milanovic Marko, '*From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*' (2008) 8 HRLR 411.
18. Miltner Barbara, '*Revisiting Extraterritoriality after Al-Skeini: The ECHR and its Lessons*' (2012) 33 Michigan J Intl L 692.
19. Papastavridis E, '*The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm*' (2020) 21 German L J 419.

20. Plakokefalos Ilias, '*Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*' (2015) 26(2) The European Journal of International Law 471.
21. Raible Lea, '*The extraterritoriality of the ECHR: Why Jaloud and Pisari Should Be Read as Game-Changers*' (2016) 2 Eur Human Rights L Rev 161.
22. Schabas William, *European Convention on Human Rights: A Commentary* (OXFORD UNIV Press 2017).
23. Shany Y, '*The Extraterritorial Application of International Human Rights Law*' (2020) 409 Recueil des Cours de l' Academie de droit International 30.
24. Stojnic Petra, '*Gentlemen at home, hoodlums elsewhere: The extraterritorial Application of the European Convention on Human Rights*' (2021) X OUULJ 137-170.
25. UN HRC, 'General comment no 36 (2018) on Article 6 of International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC.

LIST OF CASES

1) *Al- Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9.
2) *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011).
3) *Andreou v Turkey* App No 45653/99 (ECtHR, 27 October 2009).
4) *AS and Others v Italy* (ECtHR, 27 January 2021).
5) *Banković and Others v. Belgium et al* (dec) App no 52207/99 (ECtHR, 12 December 2001)
6) *Catan and Others v. the Republic of Moldova and Russia*, App nos 43370/04, 8252/05 and 18454/06 (19 October 2012).
7) *Chiragov and Others v. Armenia* App no 13216/05 (ECtHR, 16 June 2015).
8) *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).

9) *Furdik v Slovakia* App no 42994/05 (ECtHR, 2 December 2008).

10) *Georgia v Russia (II)* App no 38263/08 (ECtHR, 21 January 2021) 9.no 44587/98 (ECtHR, 24 September 2008).

11) *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019).

12) *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021).

13) *Hassan v UK* [GC] App no 29750/09 (ECtHR, 16 September 2014).

14) *Ilasçu and Others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004).

15) *Isaak and Others v Turkey* (dec.) App no 44587/98 (ECtHR, 24 September 2008).

16) *Issa and Others v Turkey* (2004) 41 EHRR 567.

17) *Jaloud v the Netherlands* [GC] App no 47708/08 (ECtHR, 20 November 2014).

18) *Loizidou v Turkey* App no 55721/07 (ECtHR, 23 February 1995).

19) *Medvedyev and Others v France* [GC] (2010) ECHR 384.

20) *Öcalan v Turkey* [GC] (2005) 41 EHRR 985.

21) *Osman v the United Kingdom* App no 23452/94 (ECommHR, 28 October 1998).

22) *Pad and Others v Turkey* (dec.) App no 44587/98 (ECtHR, 24 September 2008).

23) *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019).

24) *S.S. and Others v Italy* App no 21660/18 (ECtHR, 11 November 2019).