Koncsik Marcell:[1]

Extraterritorial application of human rights conventions: is a cause-effect notion of jurisdiction finally recognized?

This paper explores the extraterritorial applicability of human rights conventions by analyzing the jurisprudence of international and regional human rights bodies and courts. First, we introduce the problem of extraterritoriality and examine the concept of jurisdiction from a human rights perspective. In section II, the article considers the spatial model and the effective control test applied by human rights courts to establish States' extraterritorial obligations. Section III deals with the broader personal model and evaluates the pertaining controversial jurisprudence of the European Court of Human Rights. In section IV, we propose that besides the spatial and the personal models, a more progressive cause-effect notion of jurisdiction is gaining acceptance in contemporary jurisprudence, particularly in cases concerning transboundary environmental harm and in the business and human rights context. In section V, the study concludes and briefly compares the spatial-, the personal- and the causal models of extraterritoriality.

I. Introduction

1. Scope of application of human rights conventions

The majority of human rights conventions define their scope of application based on the notion of jurisdiction exercised over the right holder.[2] In the human rights context, jurisdiction refers to the State's actual competence to exercise control or authority over territory (or individuals).[3] Accordingly, the European Convention on Human Rights ['ECHR'] stipulates that 'The High Contracting Parties shall secure *to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention',[4] the American Convention on Human Rights ['ACHR'] lays down that States parties 'undertake to respect the rights and freedoms recognized herein and to ensure *to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms […]'.[5] Similarly, the Convention against Torture[6] and the Convention on the Rights of the Child[7] also require States' jurisdiction for human rights obligations to arise. The

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[2] Marko Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford University Press, 2011 ['Milanovic 2011'], 2.

[3] *Ibid*, 8.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04 November 1950, ETS No.005, U.N.T.S. Vol. 213, 221, No. 2889 ['ECHR'], Article 1.

[5] American Convention on Human Rights "Pact of San José, Costa Rica", San José, 22 November 1969, U.N.T.S. Vol. 1144, 123, No. 17955, Article 1(1).

[6] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, U.N.T.S. Vol. 1465, 85, No. 24841, Article 2(1).

[7] Convention on the Rights of the Child, New York, 20 November 1989, U.N.T.S. Vol. 1577, 3, No. 27531, Article 2(1).

applicability of these instruments therefore all depend on one criterion: jurisdiction. The wording of the International Covenant on Civil and Political Rights ['ICCPR'] is a notable exception from the above, since the treaty stipulates that a 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 [...]',[8] which appears to conjunctively require that the right holder has to be both in the State party's territory and under its jurisdiction at the same time. However, the above jurisdictional clause was consistently interpreted by both the Human Rights Committee[9] ['HRC'] and the International Court of Justice[10] ['ICJ'] to contain a disjunctive requirement, that is either within the State's territory or under its jurisdiction. On the other hand, there are some human rights treaties that do not limit their scope of application based on the notion of jurisdiction, among which the International Covenant on Economic, Social and Cultural Rights[11] ['ICESCR'] is by far the most significant.

2. Jurisdiction as a threshold criterion for human rights obligations

We must emphasize that the concept of jurisdiction in a human rights context is different from that in general international law.[12] Jurisdiction in general international law refers to States' permission to exercise legal authority in a given situation,[13] while as *Marko Milanovic* points out, in a human rights context jurisdiction serves as 'a threshold criterion, which must be satisfied in order for treaty obligations to arise in the first place'.[14] Hence, instead of a *de jure* competence of States, jurisdiction is understood as *de facto* power over territory or individuals in that sense.[15] While this concept is accepted by most human rights bodies, the practice of the European Court of Human Rights ['ECtHR'] is not that straightforward whether mere factual control can establish States' jurisdiction, as the Court took a rather *de jure* jurisdiction approach in its infamous *Bankovic* decision.[16] All in all, jurisdiction in this context serves as a prerequisite for the applicability of human rights conventions. The rationale behind requiring a jurisdictional link as a prerequisite is that States cannot reasonably be obliged to guarantee human

[8] International Covenant on Civil and Political Rights, New York, 16 December 1966, U.N.T.S. Vol. 999, 171, No. 14668 ['ICCPR'], Article 2(1).

[9] Human Rights Committee ['HRC'], *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, 1981 ['*Lopez Burgos v. Uruguay*'], ¶12.3; HRC, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 ['HRC General Comment 31'], ¶10.

[10] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C. J. Reports 2004 [*'Wall Advisory Opinion'*], ¶¶108-109.

[11] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, U.N.T.S. Vol. 993, 3, No. 14531.

[12] Claire Methven O'brien: The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal. *Business and Human Rights Journal*, Vol. 3, Issue 1, 2018, 53.

[13] Cedric Ryngaert: *Jurisdiction in International Law*. Oxford University Press, 2008, 5-10.

[14] Marko Milanovic: From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review*, Volume 8, Issue 3, 2008, 416; *Catan and others v. Moldova and Russia*, Applications nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012 ['*Catan and others v. Moldova and Russia*'], ¶103.

[15] Milanovic 2011, 8.

[16] *Banković and Others v. Belgium and Others*, Admissibility Decision of 12 December 2001, Application no. 52207/99, Reports 2001-XII ['*Bankovic*'], ¶¶59-61.

rights to anyone in the world without some connection to the State concerned.[17] However, as the ICJ declared in its *Wall Advisory Opinion*, 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory',[18] which opens the door to the extraterritorial application of human rights conventions.

3. Defining extraterritorial application of human rights conventions

Human rights treaties are applied extraterritorially when the individual whose human rights have been violated was not physically within the territory of the perpetrator State when the infringement occurred.[19] International jurisprudence up until recently accepted only two models to extend human rights protection extraterritorially: the spatial and the personal models.[20] Under these models, States can exercise extraterritorial jurisdiction either by exerting effective control over foreign territory or power and authority over an individual located outside their territory.[21] Recent jurisprudence however suggests that a third model is emerging, which requires States to exercise effective control over the source of the human rights violation instead of the right holder,[22] which we refer to as the causal model.

This article subsequently examines the three models of extraterritoriality briefly introduced above. In section II, we first analyze the spatial model through the practice of the HRC and ECtHR and critically assess the controversaries surrounding the effective overall control test. The study details the personal model in section III, by highlighting the inconsistent jurisprudence of the ECtHR after the *Bankovic* decision. In section IV, we propose that the causal model is gaining progressive acceptance, especially in cases of transboundary environmental harm and in the business and human rights context. The article concludes by briefly comparing the three models of extraterritoriality.

II. The spatial model

To put it simply, States' human rights obligations apply outside their national territory under the spatial model when they exercise effective control over a foreign territory, thereby extending their jurisdiction to individuals located within that territory.[23] The spatial model is rather uncontested in international jurisprudence, as – *inter alia* – the ICJ,[24] the HRC[25] and the Committee on Economic, Social and Cultural Rights

[17] Nicola Wenzel: *Human Rights, Treaties, Extraterritorial Application and Effects*, Max Planck Encyclopedias of International Law, May 2008, ¶5.
[18] *Wall Adivsory Opinion*, ¶109.
[19] Milanovic 2011, 8.
[20] *Ibid*, 119.
[21] Marko Milanovic: Al-Skeini and Al-Jedda in Strasbourg. *European Journal of International Law*, Volume 23, Issue 1, 2012 ['Milanovic 2012'], 122.
[22] Abe Chauhan: A Causal Model for the Extraterritorial Application of Human Rights Treaties. *The Oxford University Undergraduate Law Journal*, Issue 8, 2019 ['Abe Chauhan'], 119.
[23] Karen da Costa: *The Extraterritorial Application of Selected Human Rights Treaties*, Brill-Nijhoff, 2012 [' Karen da Costa'], 56-57.
[24] *Wall Advisory Opinion*, ¶109; *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Rwanda), Judgement, I.C.J. Reports 2005, ¶179.
[25] HRC, Concluding Observations of the Human Rights Committee on the Initial Report of Israel, 18 August 1998, CCPR/C/79/Add.93, ¶¶10,31.

['CESCR'][26] have all consistently accepted control over territory as extending human rights obligations extraterritorially. The functioning of the spatial model is well illustrated by the reasoning given in *Loizidou v. Turkey* by the ECtHR, which concerned the military invasion of Northern Cyprus by Turkey in 1974 and the attempt by Titina Loizidou to return to her former home and properties.[27] The Court declared that although the applicability of the Convention is based on the concept of jurisdiction, it does not equal the national territory of the State concerned, since effective control over a foreign territory brings the affected individuals within the States' jurisdiction. [28]

1. The effective overall control test endorsed by the ECtHR

In *Loizidou,* the ECtHR established Turkey's extraterritorial jurisdiction under the effective overall control test triggered by the presence of a large number of Turkish troops in northern Cyprus and declared that in such circumstances no detailed analysis is needed over which exact policies and actions the occupying State exercises control, suffice it to say that it is in 'overall' control of that territory.[29] Therefore, if a State exercises such overall control, all individuals within the concerned territory fall within its jurisdiction and the State owes extraterritorial human rights obligations to all of them.[30] Note, however, that the effective overall control test applied in *Loizidou* is not equivalent to the effective control test adopted by the ICJ in its *Nicaragua*[31] and *Genocide*[32] decisions, since the prior serves to determine the exercise of State jurisdiction in a human rights context, while the latter was used to attribute the conduct of non-state actors to States exercising control over them. The distinction between jurisdiction and attribution and the effective control tests pertaining to them was also stressed by the ECtHR in its *Catan and others v. Moldova and Russia* decision.[33] A crucial element of the effective overall control test pronounced by the Court in *Loizidou* is that *de facto* control over territory is sufficient to establish the State's jurisdiction, therefore the control does not have to be legitimate and even States' indirect acts – such as those executed through a subordinate local administration – can trigger their responsibility for extraterritorial human rights violations.[34] This approach was also adopted by the HRC in General Comment 31, affirming that mere factual control suffices to establish a jurisdictional link.[35]

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[26] Committee on Economic, Social and Cultural Rights ['CESCR'], Concluding observations on Israel, E/C.12/1/Add.90, 23 May 2003, ¶31.
[27] *Loizidou v. Turkey,* App. no. 15318/89, Judgment, 18 December 1996.
[28] *Ibid*, ¶56.
[29] *Ibid*.
[30] *Al-Skeini and others v. the United Kingdom,* App. no. 55721/07, Judgment, 7 July 2011 [*'Al-Skeini'*], ¶138.
[31] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Merits, Judgment, I.C.J. Reports 1986, ¶115.
[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, ¶¶402–407.
[33] *Catan and others v. Moldova and Russia*, ¶114.
[34] *Loizidou v. Turkey*, Preliminary Objections, App. no. 15318/89, Judgment, 23 March 1995, ¶62; Michael Duttwiler: Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights. *Netherlands Quarterly of Human Rights,* Vol. 30, Issue 2, 2012, 150.
[35] HRC, General Comment 31, ¶10; Karen Da Costa, 56.

2. The ECtHR's controversial practice after Bankovic

Despite its seemingly consistent early practice, the ECtHR made the effective overall control test quite confusing in its *Banković and Others v. Belgium and Others* decision, concerning the aerial bombardment of Belgrade by NATO forces in April 1999 during the Kosovo crisis. The Court interpreted 'jurisdiction' within the meaning of Article 1 ECHR from a general international law perspective and declared that States' jurisdiction is primarily territorial and an exceptional extraterritorial jurisdiction arises when the State concerned exercises effective control over a foreign territory by asserting 'all or some of the public powers normally to be exercised by that Government'.[36] This line of reasoning appears to confuse jurisdiction as a threshold criterion for applicability in a human rights context with jurisdiction as States' legal authority to regulate under general international law.[37] Indeed, instead of a *de facto* control, the Court seemingly required States to exercise a degree of *de jure* control over the concerned territory to pronounce on their extraterritorial obligations, which in my view contradicts its prior practice adopted in *Loizidou*. If human rights bodies were to follow the sentiment in *Bankovic*, the threshold for establishing effective overall control would be extremely high, as it would require some sort of a 'structured military administration' on the occupied territory.[38]

However, it appears that the Court later lowered this threshold once again in its *Issa v. Turkey* decision, when it deemed the exercise of extraterritorial jurisdiction plausible through significantly lower level of effective control over territory.[39] It can be summarized, that the Court now accepts substantial military, political or economic influence over a foreign territory to extend States' human rights obligations extraterritorially under the spatial model, as clarified in *Ilaşcu and Others v. Moldova and Russia*.[40] In its more recent jurisprudence, the ECtHR also resorted to the spatial model and the effective overall control test, for example in its *Chiragov v. Armenia*[41] and *Sandu v. Moldova and Russia*[42] decisions. We can conclude, that although the acceptance of the spatial model is uncontested in international law, the test applied by the different human rights bodies to determine whether States exercise effective control over foreign territory is to some extent controversial and needs to be further clarified.

III. The personal model

1. Practice of the Human Rights Committee

Besides the spatial model, human rights bodies and courts generally recognize extraterritorial obligations when States' exercise authority and control through their agents over an individual located outside their national territory, even if no effective

[36] *Bankovic*, ¶71.
[37] Milanovic 2011, 27.
[38] *Ibid*, 137.
[39] *Issa v. Turkey*, App. No. 31821/96, Judgment, 16 November 2004 ['*Issa v. Turkey*'], ¶¶72-74.
[40] *Ilaşcu and Others v. Moldova and Russia*, App. no. 48787/99, Judgment, 8 July 2004, ¶¶379-382.
[41] *Chiragov and others v. Armenia*, App. no. 13216/05, Judgment, Merits, 16 June 2015, ¶169.
[42] *Sandu and others v. the Republic of Moldova and Russia*, App. nos. 21034/05 and 7 others, Judgment, 17 July 2018, ¶¶36-38.

control over the concerned territory can be asserted.[43] Accepting that control over just one single person can establish the perpetrator State's jurisdiction, largely extends the scope of human rights instruments compared to a much tighter approach under the spatial model. The personal model was endorsed by the HRC in its *Lopez Burgos v. Uruguay* and *Casariego v. Uruguay* decisions, concerning the abduction, incommunicado detention and torture of Uruguayan political refugees in Argentina and Brazil by Uruguayan agents. Even though the human rights violations took place outside the territory of Uruguay and it could hardly be argued that the State exercised effective control over any parts of Argentina and Brazil, the Committee held that the prerequisite of jurisdiction 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State'.[44] The Committee made its often quoted observation in these decisions, that 'it would be unconscionable to so interpret the responsibility under […] the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[45] Therefore, the Committee interpreted the jurisdictional requirement under Article 2(1) of the ICCPR in a rather personal nexus between the perpetrator State and the individual whose human rights have been violated.[46]

Both Christian Tomuschat in his individual opinion annexed to the cases above and Manfred Nowak in his commentary to the ICCPR agree, that enabling States to evade responsibility for human rights violations committed by their agents abroad by reference to a strict territorial notion of jurisdiction would lead to 'utterly absurd' and 'manifestly unreasonable' results, which would run counter to what the drafters of the Covenant intended.[47] In General Comment 31, the HRC reaffirmed in more general terms that States owe extraterritorial obligations under the ICCPR to 'anyone within the power or effective control of the State party',[48] which once again interprets the jurisdictional requirement in a personal relation, rather than in a territorial context.[49] The personal model was also adopted by other human rights bodies without any substantial difference, as for example can be seen in the practice of the Committee Against Torture[50] or the Inter-American Commission on Human Rights. [51]

2. The ECtHR's rejection of the personal model

[43] Milanovic 2011, 173.
[44] *Lopez Burgos v. Uruguay*, ¶¶12.1-12.3; *Casariego v. Uruguay*, ¶¶10.1-10.3.
[45] *Lopez Burgos v. Uruguay*, ¶12.3.
[46] *Ibid*, ¶12.2; Karen da Costa, 50.
[47] *Lopez Burgos v. Uruguay*, Appendix, Individual opinion of Christian Tomuschat, Communication No. R.12/52; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, N.P. Engel, 2005, 682.
[48] HRC General Comment 31, ¶10.
[49] Karen da Costa, 56.
[50] Committee Against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008, ¶16.
[51] Inter-American Commission on Human Rights ['IACHR'], *Coard et Al. v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, ¶37; IACHR, *Alejandre et al. v Cuba*, Case 11.589, Report No. 86/99, September 29, 1999, ¶23.

Contrary to the above, the case-law pertaining to the ECHR is full of controversaries when it comes to the personal model.[52] In an early decision regarding the Turkish occupation of Northern-Cyprus, the European Commission of Human Rights held that States 'are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility', which indicates that similarly to the HRC, the European Commission interpreted the notion of jurisdiction in a rather personal relation between the perpetrator State and the individual affected.[53] This approach was reaffirmed by the Commission in its *Chrysostomos et al v. Turkey* decision, which also interpreted the Conventions' scope of application in a personal, rather than territorial nexus.[54] It thus appears that in early jurisprudence the personal model was without much trouble applied to the ECHR and as Marko Milanovic observes, this jurisdictional concept was limitless and not exceptional at all.[55] The ECtHR has, however, radically departed from this theory in its *Bankovic* decision, by proposing that the only exceptional circumstance when the Convention could apply extraterritorially is when a State party exercises effective control over foreign territory.[56] On this ground, the Court found that NATO member States did not exert effective control over Belgrade where the aerial bombardment occurred and thus no jurisdictional link can be established between the respondent States and the affected individuals, rendering the application inadmissible.[57] The Court's general international law approach to jurisdiction within the meaning of the Convention and its reluctance to apply the personal model was heavily criticized in literature by for example Lawson[58] and Wilde,[59] who consider that *de facto* control over either territory or individuals should suffice to establish States' jurisdiction under the Covenant and thus render their human rights obligations extraterritorially applicable.

3. Post Bankovic acceptance of the personal model: Issa and Al-Skeini

Just three years after *Bankovic*, the Court could not maintain its prior position and eventually endorsed the personal model in the case of *Issa v. Turkey*, but insisted that its applicability can only be exceptional.[60] The case concerned the killing of Iraqi shepherds by Turkish soldiers close to the border of Iraq and Turkey, and though the Court deemed the application unfounded, it declared that even in absence of effective overall control over a foreign territory, States parties might bear extraterritorial obligations when they

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[52] *Al-Skeini and others v. the United Kingdom*, App. no. 55721/07, Judgment, 7 July 2011 [*'Al-Skeini'*], Concuring Opinion of Judge Bonello, ¶¶4-6.
[53] European Commission of Human Rights, *Cyprus v. Turkey*, Decision, App. Nos 6780/74 and 6950/75, 26 May 1975, 136.
[54] European Commission of Human Rights, *Chrysostomos et al v Turkey*, App. Nos 15299/89, 15300/89 and 15318/89, 4 March 1991, ¶31.
[55] Milanovic 2011, 182.
[56] Cedric Ryngaert: Clarifying the Extraterritorial Application of the European Convention on Human Rights. *Utrecht Journal of International and European Law*, Vol. 28, Issue 74, 58.
[57] *Ibid*; *Bankovic*, ¶82.
[58] Rick Lawson: Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights. In: Fons Coomans and Menno Kamminga: *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, 86.
[59] Ralph Wilde: Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties. *Israel Law Review*, Vol. 40, No. 2, 2007, 507–508.
[60] *Issa v. Turkey*, ¶68.

exercise authority and control over an individual through their agents operating abroad,[61] which essentially means the acceptance of the personal model. Therefore, as Judge Bonello observed, '*Issa* flies in the face of *Banković',*[62] since the Court not only contradicted itself by accepting the personal model, but did it with reference to the exact same jurisprudence cited by the applicants and unanimously rejected by the Grand Chamber in *Bankovic*.[63] However, even after the clear contradiction between *Bankovic* and *Issa,* the Court never altered openly its position in later cases regarding the exceptional nature of extraterritorial jurisdiction[64] and maintained that its jurisprudence is coherent when it comes to the Conventions' extraterritorial applicability.[65]

The leading case in the ECtHR's jurisprudence is now *Al-Skeini v. the United Kingdom*, which concerned the killing of five Iraqi nationals by British soldiers on patrol in southern Iraq and one who was arrested, detained and eventually killed at a UK detention facility located in Iraq. After the House of Lords rejected the application of the relatives of the five Iraqis killed on patrol due to the UK's lack of effective control over the concerned Iraqi territories *per Bankovic*,[66] the ECtHR finally clarified some (but not all) controversaries. Although the Court endorsed both the spatial- and the personal models, it apparently 'mixed' the two tests which serve to determine effective overall control over territory and State agent authority over individuals.[67] In *Bankovic,* the Court rejected the application by holding that the respondent States did not exercise effective control over the territory of Belgrade as they never exerted public powers within Yugoslavia, whereas in *Al-Skeini* the ECtHR deemed the public powers exercised by the UK over the Iraqi individuals (and not the territory!) justifying its extraterritorial obligations.[68] Thus, it seems that the Court intentionally blurred the line between the spatial and the personal models to justify the exceptional nature of extraterritorial jurisdiction under the Covenant.[69]

It can also be observed from the ECtHR's more recent jurisprudence that sometimes it does not differentiate sharply between the extraterritoriality models, as for example in *Medvedyev v. France,*[70] *Jaloud v. the Netherlands*[71] and *Pisari v. Moldova and Russia,*[72] the Court did not clarify whether it was the spatial- or the personal model triggering the States' extraterritorial obligations, but – apparently – rather a combination of the two.[73]

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[61] *Ibid*, ¶71.
[62] *Al-Skeini,* Concurring Opinion of Judge Bonello*,* ¶5.
[63] Milanovic 2011, 183.
[64] See for example: *Pad and Others v. Turkey*, App. No. 60167/00, Judgment, 28 June 2007, ¶53; *Solomou and Others v. Turkey*, Judgment, App. No. 36832/97, 24 June 2008, ¶¶44-51.
[65] Milanovic 2012, 127.
[66] House of Lords, *Al-Skeini and others* (Respondents) v. *Secretary of State for Defence* (Appellant), Session 2006–07, [2007] UKHL 26, 13 June 2007.
[67] Milanovic 2012, 128.
[68] *Ibid*; *Al-Skeini*, ¶¶135-136.
[69] *Ibid.*
[70] *Medvedyev and others v. France*, App. no. 3394/03, Judgment, 29 March 2010, ¶¶64-67.
[71] *Jaloud v. The Netherlands,* App. no. 47708/08, Judgment, 20 November 2014, ¶152.
[72] *Pisari v. the Republic of Moldova and Russia,* App. no. 42139/12, Judgment, 21 April 2015.
[73] Lea Raible: The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers. *European Human Rights Law Review*, Vol. 2, 2016, 164-165.

All in all, I must agree with Judge Bonello, that the European Court's jurisprudence regarding the Convention's extraterritorial applicability and especially the personal model is hectic and it can be considered 'patchwork case-law at best'.[74]

IV. The causal model

Having examined the more generally accepted spatial and personal models, this section proposes that a third, much broader concept of extraterritoriality is emerging in contemporary jurisprudence, which we refer to as the causal model. As we have seen, both the spatial and the personal models require the perpetrator State to exercise jurisdiction over the right-holder, either through effective control over territory or authority over the concerned individual to render States' human rights obligations extraterritorially applicable. Conversely, responsibility under the causal model is triggered by the State's effective control over the source of the violation and not the victim *stricto sensu*.[75] To put it simply, States would incur responsibility under the causal model if they were in a position to effectively prevent (or remedy) foreseeable human rights violations by exercising due diligence over the source of the harm and their failure to do so is in direct causal relation with the human rights abuse.[76] In my view, accepting such a broader concept of extraterritoriality is preferable, as it would greatly contribute to the universal realization of human rights,[77] yet it would not equal an unlimited responsibility for all human rights violations, as feared by the ECtHR in *Bankovic*.[78]

1. Acceptance of the causal model by the Human Rights Committee

A broader understanding of extraterritoriality is reflected in General Comment 36, issued by the HRC in 2018 on the right to life.[79] The Committee apparently extended the ICCPR's scope of application beyond the notion of the spatial and the personal models by declaring, that a State party owes human rights obligations to 'all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control'.[80] Hence, instead of requiring States parties to exert effective control over territory or individuals, the Committee considered the exercise of power or effective control over the mere possibility to enjoy one's right to life as establishing a jurisdictional link between the perpetrator State and the affected individual, thereby

[74] *Al-Skeini*, Concurring Opinion of Judge Bonello, ¶5.
[75] Samantha Besson: Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!, *ESIL Reflections*, Volume 9, Issue 1, 28 April 2020, available: https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/.
[76] *Ibid;* Abe Chauhan, 119; Tilmann Altwicker: Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts. *European Journal of International Law*, Vol. 29, No. 2, 2018 ['Altwicker'], 604.
[77] Ibrahim Kanalan: Extraterritorial State Obligations Beyond the Concept of Jurisdiction. *German Law Journal*, Vol. 19, No. 01, 2018, 51-52.
[78] Altwicker, 590-591.
[79] HRC, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 ['HRC General Comment 36'].
[80] *Ibid*, ¶63.

accepting an 'impact' notion of extraterritoriality.[81] As for the threshold of such impact, the Committee considered that individuals whose right to life have been impacted by the States' conduct in a 'direct and reasonably foreseeable manner' come within the jurisdiction of the concerned State, reflecting that causality is a crucial criterion in assessing whether extraterritorial human rights obligations could arise.[82] Although some States parties were reluctant to accept this extensive jurisdictional approach,[83] it is not unprecedented in the Committee's practice to extend the ICCPR's scope of application on a similar ground. In its 2014 concluding observations on the United States, the Committee addressed the issue of extraterritorial surveillance conducted by the National Security Agency and concluded that the US should conform both its domestic and extraterritorial surveillance activities to its ICCPR obligations.[84] This conclusion also suggests that the HRC deemed the human rights obligations of the US extraterritorially applicable even in absence of effective control over territory or the surveilled individuals.[85]

2. Transboundary environmental harm and extraterritorial human rights obligations

The causal model has attracted particular attention recently in cases concerning transboundary environmental harm and pertaining human rights violations. In such cases, transboundary environmental harm emanating from the territory of State *A* causes human rights violations within the territory of State *B* without the polluter State ever exercising *stricto sensu* effective control over the territory of State *B* or the affected individuals.[86] Therefore, it would be problematic to argue that the polluter State's jurisdiction could extend to the victims of the human rights abuse under either the spatial or the personal model, leaving them unprotected under such circumstances. Recent jurisprudence, however, suggests that the polluter State's extraterritorial human rights obligations can also be triggered if it exercises effective control over the source of the transboundary harm rather than the victims of the human rights violations.[87] Accordingly, *Viñuales* argues that the polluter State's human rights obligations apply extraterritorially when its actions or omissions lead to transboundary environmental harm and such harm is in direct causal relation with the human rights abuse outside its national territory.[88] The 'test'

[81] Daniel Møgster: Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR, EJIL:Talk!, 27 November 2018, available: https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/.
[82] HRC General Comment 36, ¶63.
[83] See for example: Austrian comments on the Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the right to life, available: https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.
[84] HRC, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, ¶22(a).
[85] Marko Milanovic: Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. *Harvard International Law Journal*, Vol. 56, No. 1, 2015, 142.
[86] Alan Boyle: Human Rights and the Environment: Where Next? *European Journal of International Law*, Vol. 23, Issue 3, 2012, 638.
[87] Jorge E. Viñuales: A Human Rights Approach to Extraterritorial Environmental Protection?, In: Nehal Bhuta: *The Frontiers of Human Rights*. Oxford University Press, 2016, 219.
[88] *Ibid*, 192-197.

suggested by *Viñuales,* therefore, appears to be three-pronged requiring, first, effective control over the source of the harm, second, the polluter State's failure to abide by its due diligence obligations, and third, a sufficiently proximate causal nexus between the State's conduct and the human rights infringement.

The ICJ would have had the perfect opportunity to endorse (or reject) such an extensive extraterritoriality concept pertaining to transboundary environmental harm in the *Aerial Herbicide Spraying* case between Ecuador and Columbia.[89] The case concerned the aerial spraying of toxic herbicides by Columbian authorities near its border with Ecuador to destroy coca plantations, which caused human rights violations on the Ecuadorian side of the border. In this case, Columbia did not exercise effective control over the territory of Ecuador or the Ecuadorians affected by the herbicides, but exerted control over the source of the environmental harm which lead to human rights abuses, thus the Court could have resorted to the causal model to hold Columbia responsible. Regrettably, the ICJ was not required to render a judgment in the case, as the parties eventually reached an agreement in 2013.[90]

Finally in 2017, the causal model was officially endorsed for the first time by the Inter-American Court of Human Rights ['IACtHR'] in its advisory opinion concerning the extraterritorial scope of the American Convention on Human Rights.[91] The Court declared, that when human rights are infringed through transboundary environmental harm 'the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory'.[92] The rationale behind this new jurisdictional link is, as the Court held, the polluter State's effective control over the source of the harm and the failure to comply with its due diligence obligations to prevent transboundary damage.[93] It thus appears, that the IACtHR – similarly to *Viñuales* – applied a three-pronged test to determine extraterritorial jurisdiction by looking at the polluter State's control over the source of the harm, compliance with its due diligence obligations and the causal connection between the State's acts or omissions and the human rights abuse. By accepting the causal model, the Court greatly extended the extraterritorial scope of human rights, yet it omitted to clarify the exact threshold of the test applied, as it did not elaborate on the nature and proximity of the causal link, the gravity of human rights violations triggering extraterritorial obligations and the scope of the new jurisdictional link.[94]

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[89] *Aerial Herbicide Spraying* (Ecuador v. Colombia), Order of 30 May 2008, I.C.J. Reports 2008.
[90] Marko Milanovic: Aerial Herbicide Spraying Case Dead in the Air, EJIL:Talk!, 17 September 2013, available: https://www.ejiltalk.org/aerial-herbicide-spraying-case-dead-in-the-air/.
[91] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017, ¶104(h), available: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.
[92] *Ibid*, ¶101.
[93] *Ibid*, ¶102.
[94] Berkes Antal: A New Extraterritorial Jurisdictional Link Recognised by the IACtHR, EJIL:Talk!, 28 March 2018, available: https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/ ['*Berkes* 2018'].

We further note that, although the IACtHR might appear to have accepted the very 'cause-and-effect' notion of jurisdiction that the ECtHR so rigorously rejected in *Bankovic*, considering that it would lead to State's jurisdiction over 'anyone adversely affected by an act imputable to a Contracting State' and render jurisdiction devoid of any purpose,[95] this is not the case. In this regard, I concur with Antal Berkes that the test applied by the IACtHR does not extend the scope of human rights unlimitedly, as States' extraterritorial obligations are triggered by their failure to exercise due diligence over the source of the harm and thus not all individuals fall within the State's jurisdiction whose rights have been infringed.[96] Consequently, a much broader (but not unlimited!) causal model seems to be now accepted in cases of transboundary environmental harm resulting in extraterritorial human rights violations.

3. The causal model in a business and human rights context

Besides transboundary environmental harm, the causal model also appears to be progressively accepted in the field of business and human rights regarding home States' duty to prevent human rights abuses by transnational corporations domiciled within their territory. In this case, States' extraterritorial obligations arise when they exert control over corporate nationals and fail to comply with their due diligence obligations to prevent or mitigate extraterritorial human rights violations committed by the concerned business enterprise.[97] Therefore, States' responsibility is triggered by their failure to abide by their positive human rights obligations and not because the acts of the transnational corporation are attributable to them.[98]

It is now undisputed that States' human rights obligations will only be fully discharged if on the one hand, they do not directly interfere with the enjoyment of human rights (obligation to respect) and on the other, they exercise due diligence to prevent, punish, investigate or redress the harm caused by third parties, such as corporations, within their territory or jurisdiction (obligation to protect).[99] According to the 2011 UN Guiding Principles on Business and Human Rights this obligation only applies within the State's territory or jurisdiction, as it declares that 'at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses'.[100] Conversely, I am prone to agree with Oliver De Schutter that this conclusion is by now outdated and such obligation is indeed accepted in contemporary jurisprudence.[101] Among human rights bodies, the CESCR has always been the most liberal to extend the Covenant's scope of application and even in its earlier practice, the

[95] *Bankovic*, ¶75.
[96] *Berkes* 2018.
[97] Antal Berkes: Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights, in: Yannick Radi: *Research Handbook on Human Rights and Investment.* Edward Elgar Publishing, 2018, 304-343.
[98] *Velásquez Rodríguez v. Honduras,* Merits, IACtHR Series C No. 4, Judgment, 29 July 1988, ¶172.
[99] HRC General Comment 31, ¶8; *Fadeyeva v the Russian Federation*, App. No. 55273/00, Judgement, 30 November 2005, ¶92; United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 2011, 1.
[100] *Ibid*, 3-4.
[101] Oliver De Schutter: Towards a New Treaty on Business and Human Rights. *Business and Human Rights Journal*, Vol. 1, No. 1, 2015, 45.

Committee recognized States' extraterritorial obligations to prevent their corporate nationals from committing human rights violations outside their national territory.[102] In General Comment 24, the CESCR generally declared that 'States parties' obligations under the Covenant did not stop at their territorial borders' and they are obliged to prevent human rights violations abroad by corporations domiciled in their jurisdiction by exercising due diligence.[103] The Committee considered the State's mere capacity to influence the enjoyment of human rights outside its territory through control over corporate nationals to render its human rights obligations extraterritorially applicable.[104] Thus, the Committee appears to accept that even absent effective control over territory or individuals, a causal nexus between the State's acts or omissions and the human rights abuse is sufficient to trigger responsibility.

The HRC took a similar approach in its recent *Basem Ahmed Issa Yassin v Canada* decision, concerning Canada's responsibility for failing to prevent human rights violations by two Canadian corporations conducting construction works on expropriated lands in the occupied Palestinian territories.[105] Although the Committee deemed the application unfounded, it confirmed that States parties are obliged to ensure that human rights are not impaired by the extraterritorial conduct of companies that are under their jurisdiction.[106] Once again, the HRC considered control over the source of the violation and not the affected individuals to render States' human rights obligations extraterritorially applicable, but did not elaborate on the exact jurisdictional concept endorsed. In this regard, Committee members Olivier de Frouville and Yadh Ben Achour concluded in their concurring opinion annexed to the decision, that a jurisdictional link exists between the home State and the victim of human rights violations when the State has effective capacity to regulate the perpetrator business enterprise and the violation was reasonably foreseeable.[107] They consequently noted that, 'if it can be determined that the State has sufficient influence over a corporation, then the State exercises, even indirectly, power and effective control over persons who are affected by the activities of the corporation in another country'.[108] In my view, the HRC essentially endorsed the causal model in the above decision, since it considered that even in absence of effective control over territory or individuals, a causal nexus between the State's acts or omissions to regulate the conduct of corporations and the extraterritorial human rights abuse is sufficient to hold the home State responsible.

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[102] CESCR, General Comment 15: The right to water, U.N. Doc. E/C.12/2002/11, 20 January 2003, ¶33; CESCR, General Comment No. 19: The right to social security, E/C.12/GC/19, 4 February 2008, ¶54; CESCR, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, 12 July 2011.

[103] CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, ¶¶26, 32.

[104] *Ibid*, ¶28.

[105] HRC, Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013, CCPR/C/120/D/2285/2013, 26 October 2017.

[106] Ibid, ¶6.5.

[107] *Ibid*, Annex, Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, ¶

[108] *Ibid.*

Besides the CESCR and the HRC, other human rights bodies also appear to accept the causal model in the business and human rights context, such as the Committee on the Rights of the Child,[109] the Committee on the Elimination of Discrimination against Women,[110] the Committee on the Elimination of Racial Discrimination[111] and the Inter-American Commission on Human Rights.[112] Consequently, it is my position that the causal model is now more or less accepted in the field of business and human rights. We lastly note that, although the ECtHR consistently rejected to endorse the causal model so far, there are now three cases pending before the Grand Chamber which provide the Court with the opportunity to revisit its controversial practice. The first is *Hanan v. Germany*, concerning an airstrike near Kunduz, Afghanistan ordered by a member of the German air force in 2009 that resulted in the death of more than a hundred civilians.[113] The factual circumstances of the case are very similar to *Bankovic*, where the Court rejected the application based on the argument that a mere 'cause-and-effect' relation does not establish a jurisdictional link between the States and the victims.[114] Although there are some differences between the two cases,[115] the essential question before the Court is – once again – can causality result in extraterritorial human rights obligations? The other two cases concern extraterritorial surveillance conducted by member States, which also raise the question of a cause-effect jurisdictional notion, as the surveilling States only exercised control over the activity and not the victims of the violation.[116] It thus remains to be seen whether the Court will finally endorse the causal model or stick to its rigid understanding of jurisdiction.[117]

V. Conclusions

This article examined how human rights obligations can be extended extraterritorially under the spatial, the personal and the now emerging causal models of jurisdiction. We first outlined that under most human rights conventions, the exercise of jurisdiction is a prerequisite for obligations to arise in the first place and although it is primarily territorial, jurisdiction can also be exercised outside national territory. The study explored

[109] Committee on the Rights of the Child, General comment No. 16, CRC/C/GC/16, 17 April 2013, ¶43.
[110] Committee on the Elimination of Discrimination against Women, Concluding Observations: India, CEDAW/C/IND/CO 4 – 5, 24 July 2014, ¶15.
[111] Committee on the Elimination of Racial Discrimination, Concluding observations: Canada, UN Doc CERD/C/CAN/CO/19-20, 2012, ¶14.
[112] IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II. Doc. 47/1, 31 December 2015, ¶98.
[113] *Hanan v. Germany*, App. no. 4871/16.
[114] *Bankovic*, ¶75.
[115] See: Dominik Steiger: (Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate, EJIL:Talk!, 25 February, 2020, available: https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/.
[116] *Big Brother Watch and Others v. the United Kingdom*, Application No. 58170/13; *Centrum för Rättvisa v. Sweden*, App. no. 35252/08.
[117] Başak Çali: Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn, EJIL:Talk!, 21 July 2020, available: https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/.

the spatial model of extraterritoriality by detailing the practice of the HRC and the ECtHR and concluded that if States exercise effective control over foreign territory, their human rights obligations apply to all individuals located within the concerned territory. It was assumed, that although the existence of the spatial model is uncontested, the test applied to determine States' effective overall control over territory is rather controversial. The article further analyzed the personal (or State agent authority) model, which deems effective control over an individual – rather than territory – sufficient to establish the State's extraterritorial jurisdiction. It was demonstrated, that the practice of the ECtHR is quite contentious regarding the personal model since its infamous *Bankovic* decision and even its recent jurisprudence, in cases such as *Issa* and *Al-Skeini*, remains inconsistent. Furthermore, the study proposed that a new causal model has been progressively accepted in contemporary jurisprudence, under which States' obligation would apply extraterritorially if they exercise effective control over the source of the violation, rather than the victim of the human rights abuse. The acceptance of the causal model was illustrated in cases of transboundary environmental harm and States' obligation to regulate transnational corporations in the business and human rights context. We concluded that although a cause-effect notion of jurisdiction is now gaining substantial acceptance, it remains to be seen whether all human rights bodies and courts will follow this trend.