Extraterritorial Jurisdiction of the ECHR in the Context of Analysis of Relevant Cases: Which Model Is Effective?

Kamran Khalilov[*]

Abstract

The issue of extraterritorial jurisdiction of the ECHR is no longer confidential, it is openly discussed and often regulated by law. The purpose of this article is to elucidate the contradictory provisions of the European Convention on Human Rights (ECHR) concerning extraterritorial jurisdiction that may arise from a signatory state's actions on another state's territory. Additionally, the Strasbourg Court's application of the Convention to international armed conflicts will be examined. This article aims to clarify the conflicting aspects of the ECHR regarding extraterritorial jurisdiction arising during the activities of a signatory state in the territory of another state and to determine how the Strasbourg Court applied the Convention to international armed conflicts in this context. According to Article 1 of the ECHR, member states are obliged to recognize the rights and freedoms set out in the Convention to everyone "within their jurisdiction". Nevertheless, the Strasbourg Court did not precisely explain when and how the jurisdiction of the ECHR regarding the extraterritorial actions of signatory states emerged. In other words, there is no particular provision for extraterritorial aspects. Therefore, this study analyzes two essential models presented by the ECtHR for solving the problem. While the spatial model is based on the state's control over a particular territory, the personal model consists of the power of authority that the state exerts on individuals through its agents. The topic of this article establishes an obvious background by examining numerous court cases on both models. In addition, this research explores the functional and third models under alternative approaches and presents the author's views on which model will be effective. Additionally, this article provides the author's arguments after analyzing the ECtHR's reference to IHL norms through its case law. The author focuses on applying the balance method to solve the problem. In conclusion, this study suggests that extraterritorial jurisdiction under the ECtHR is an important legal tool for maintaining a workable balance between the Convention's regional identity and its universalist aspirations.

Annotasiya

AİHK-nın ərazidənkənar yurisdiksiyası məsələsi artıq məxfi deyil, o, açıq şəkildə müzakirə olunur və çox vaxt qanunla tənzimlənir. Bu araşdırmanın məqsədi AİHK-nı imzalayan dövlətin başqa dövlətin ərazisindəki fəaliyyəti zamanı yaranan ərazidənkənar yurisdiksiya ilə bağlı ziddiyyətli aspektləri aydınlaşdırmaqdır. Əlavə olaraq, Strasburq Məhkəməsinin bu Konvensiyanı beynəlxalq silahlı münaqişələrə tətbiqi də analiz ediləcəkdir. AİHK-nın 1-ci maddəsinə əsasən, üzv dövlətlər Konvensiyada təsbit olunmuş hüquq və azadlıqları "öz yurisdiksiyaları daxilində" hər kəsə tanımağa borcludurlar. Buna baxmayaraq, Strasburq Məhkəməsi AİHK-nı imzalayan dövlətlərin ərazidənkənar hərəkətləri ilə bağlı yurisdiksiyasının nə vaxt və necə yarandığını dəqiq izah etməyib. Başqa sözlə, ərazidənkənarlıq aspekti barədə xüsusi müddəa yoxdur. Buna görə də bu araşdırma

[*] LL.M. from Vilnius University, PhD candidate at Baku State University.

problemin həlli üçün AİHM tərəfindən təqdim olunan iki əsas modeli təhlil edir. Məkan modeli dövlətin müəyyən ərazi üzərində nəzarətinə əsaslansa da, şəxsi model dövlətin öz agentləri vasitəsilə fərdlərə tətbiq etdiyi səlahiyyət gücündən ibarətdir. Bu məqalə mövzusu hər iki model üzrə çoxsaylı məhkəmə işlərinin tədqiqi ilə açıq bir fon yaradır. Bundan əlavə, bu tədqiqat alternativ yanaşmalar altında funksional və üçüncü modelləri araşdırır və hansı modelin effektiv olacağı ilə bağlı müəllifin fikirlərini təqdim edir. Əlavə olaraq, bu məqalə AİHM-in öz presedent hüququ vasitəsilə beynəlxalq humanitar hüquq normalarına istinadını təhlil etdikdən sonra müəllifin arqumentlərini təmin edir. Müəllif problemi həll etmək üçün balans metodunun tətbiqinə diqqət yetirir. Yekun olaraq, bu araşdırma göstərir ki, AİHM çərçivəsində ekstraterritorial yurisdiksiya Konvensiyanın regional kimliyi ilə onun universalist istəkləri arasında işlək tarazlığı saxlamaq üçün mühüm hüquqi alətdir.

CONTENTS

Introduction 85
I. The Theoretical and Legal Background for Extraterritorial Jurisdiction of the ECHR under Article 1 88
II. The Spatial Model: Effective Overall Control 93
A. Case of Loizidou v. Turkey: Effective Control Triggers Responsibility 94
B. "Banković and Others v. Belgium and Others" as the Most Controversial Case of the Strasbourg Court 96
C. Chiragovs and Others v. Armenia: The Role of the Separatist in State Responsibility 98
III. Personal Model: State Agent Authority 100
A. Cyprus v. Turkey (EComHR): Turkey's First Test with the Problem of Extraterritorial Jurisdiction 101
B. Öcalan v. Turkey: The Importance of Detention 102
C. Al-Skeini and Others v. the United Kingdom 104
IV. Alternative Models for Extraterritorial Application of the ECHR 107
A. The Functional Model 107
B. The Third Model 109
C. The Balanced Approach 111
Conclusion 117

Introduction

Recently, appeals to the European Court of Human Rights (hereinafter ECtHR) related to armed conflict or other cases of violence are increasing.[1] This creates conditions for the emergence

[1] Marco Sassoli, The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts, in *International Humanitarian Law and International Human Rights Law* 34, 44 (2011).

of a new actual topic. The application of the European Convention on Human Rights (hereinafter ECHR or the Convention) to armed conflicts requires determining the nature of the extraterritorial jurisdiction of the Convention and, simultaneously, examining relevant aspects of interaction with International Humanitarian Law (hereinafter IHL). Since its adoption, the ECHR has been one of the most important and consulted sources of International Human Rights Law (hereinafter IHRL). This Convention differs from other existing sources in the field of human rights protection in international law. The primary distinction is that Article 1 of the Convention is not limited to defining obligations for states but also tries to define the boundaries of the sphere in which states perform these obligations.

This is proven by the statement in Article 1 of the Convention that "*The High Contracting Party shall secure the rights and freedoms contained in Section I of this Convention within their jurisdiction*".[2] However, the concept of "within their jurisdiction" mentioned in this provision is controversial and needs clarification. Because, in numerous conventions and other documents adopted in the field of IHRL,[3] the concept of jurisdiction, determining the nature and scope of the obligations of the member states, has not been fully and accurately explained. Therefore, the explanation of jurisdiction has been interpreted in both theory and practice giving it an autonomous form and character.

For instance, in the first draft text prepared by the Consultative Assembly of the Council of Europe, the persons who will benefit from the protection mechanism of the Convention are defined as "*all persons residing within the territory of the states*".[4] Subsequently, when the Subcommittee's proposal to replace "residing within" with "living in" was rejected, the scope of the Agreement was defined as "within their jurisdiction", rather than "within their territory".[5] It is clear that during the preparatory discussions, the Committee could not reach a complete and precise conclusion about the application limits of extraterritorial jurisdiction of states. Simply put, the attempts and changes made in all the discussions on the Project were aimed at expanding the scope of the convention and reaching more people. Therefore, as noted by Rick Lawson, the Committee of Experts did not attempt to limit the scope of the jurisdiction to be only "territorial". The scope of the contract was defined as "within the jurisdiction", offering a more flexible

[2] European Convention on Human Rights, art. 1 (1950).
[3] *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 17 (1949).
[4] Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention of Human Rights: Volume II, 276 (1975).
[5] Council of Europe, Collected Edition of the "Travaux Préparatoires" of the European Convention of Human Rights: Volume III, 200 (1976).

definition.[6] In particular, the interpretation of jurisdiction was rendered even more complicated by the ECtHR's determination in *Banković v. Belgium*.[7]

Over time, the extraterritorial military exercises of states have expanded, posing a unique challenge for the Strasbourg Court. The question was simple. How and by what methods will the extraterritorial jurisdiction of the ECHR be determined? The precise clarification of the application of the ECHR's provisions to extraterritorial activities and the determination of the degree of the state's responsibility are two of the most problematic issues facing the Strasbourg Court. This is because the exercise of jurisdiction is a necessary condition for holding a contracting state liable for an act or omission.[8]

When analyzing the nature and extent of extraterritorial jurisdiction, the Court also raises two important issues: first, the "effective overall control" of the signatory state in another territory; and second, whether the act of the state agent or authorized representative falls under its jurisdiction (state agent authority).

In fact, the duty of the court extends beyond just determining the applying conditions and boundaries of the jurisdiction. While trying to resolve this issue, the Court should examine the relationship between International Human Rights Law and International Humanitarian Law. Because the extraterritorial activity of states in armed conflicts reveals another problem for the study, representing the second side of the topic's relevance. The basic issue is to safeguard a person from all forms of damage. Thus, war and armed conflicts provide ideal circumstances for the infringement of human rights and freedoms. This emphasises the need for closely monitoring human rights during times of armed conflict.[9]

In other words, the Strasbourg Court recently started following a new path in the cases it analyzed, trying to clarify the relationship between the ECHR and the Geneva Conventions (hereinafter Geneva Convention).[10] In particular, the interpretation of the application of Articles 2 and 5 of the Convention to armed conflicts, the consideration of IHL norms, and the arguments about whether the ECHR is effective during armed conflicts reveal once again how important the topic is. Although these instances are seen as precautions against limiting the possibilities of another legal field of the Convention, the Strasbourg Court should not undermine the Convention's credibility and legal protection.

---

[6] Rick Lawson, Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights, in *Extraterritorial Application of Human Rights Treaties* 83, 88-89 (2004).

[7] Banković and Others v. Belgium and Others, ECHR No. 52207/99 (2001).

[8] Al-Skeini and Others v. the UK, ECHR No. 55721/07, § 130 (2011).

[9] Hans-Joachim Heintze, *On the relationship between human rights law protection and international humanitarian law*, 86 International Review of Red Cross 789, 789 (2010).

[10] Jaloud v. the Netherlands, (GC) ECHR No. 47708/08, § 96 (2014).

In light of these factors, the main research direction of this article is related to determining the effectiveness of the models applied by the Strasbourg Court. The Court applied two different models (spatial and personal) when analyzing the cases arising from the participation of states in extraterritorial armed conflicts. However, in the application of both models, different approaches have emerged that violate the harmony between the norms of the ECHR and IHL.

The first part of the article will involve a theoretical analysis of jurisdiction and its extraterritorial characteristics. After analyzing the territorial model through cases in the second chapter, the third chapter will subsequently examine the personnel model. Finally, in the last part, the article will focus on two new and alternative models relevant to the topic and their necessity. In the concluding part, the author will summarize the results and state his thoughts.

I. The Theoretical and Legal Background for Extraterritorial Jurisdiction of the ECHR under Article 1

The terms "extraterritoriality" and "extraterritorial jurisdiction" refer to the competence of a state to make, apply, and enforce rules of conduct in respect of persons, property, or events beyond its territory. Such competence may be exercised by way of prescription, adjudication, or enforcement. In the absence of a universally accepted definition, extraterritoriality is an elusive concept that may include a wide variety of practices. Depending on the definition chosen it may encompass, for example, the adoption and adjudication of antitrust legislation, the regulation of the export of toxic waste, and the bringing to justice of terrorists and drug traffickers.[11] The wide variety of matters covered by the concept makes it difficult to draw general conclusions about its status under international law. In this regard, to understand the term extraterritoriality correctly, the concept of "jurisdiction" must first be clarified.

The notion of jurisdiction is one of the concepts that has different aspects and is always open to different interpretations. Jurisdiction is usually used to mean the authority of the state and the regulatory body to prepare and adopt certain laws (perspective-legislative jurisdiction), as well as the power to implement (enforcement-prerogative jurisdiction) these decisions.[12] The primary meaning of jurisdiction under International Law is called "state jurisdiction", which is defined by the boundaries of the principle of state sovereignty. In this sense, the jurisdiction consists of three parts: legislative, executive and judicial.[13]

---

[11] Menno T. Kamminga, Extraterritorially, in *The Max Planck Encyclopedia of Public International Law* 113, 115 (2020).
[12] Ian Brownlie, Principles of Public International Law, 297 (6th ed. 2003).
[13] Malcolm Shaw, International Law, 404 (5th ed. 2003).

Legislative jurisdiction refers to the ability of a state to apply its laws to persons and other things within its territory. This type of jurisdiction can be applied extraterritorially in exceptional cases.[14] Because the emergence of extraterritoriality in terms of legislative powers depends on one state taking over the entire administration in the territory of another state. This happens very rarely. For example, as in the case of *Chiragovs*, which will be discussed, the government of Armenia created extraterritorial legislative jurisdiction in a certain part of the territory of another state. In this case, the occupying state supports and provides for the so-called group or regime it creates from economic, political and social points of view.[15]

Executive jurisdiction is related to the ability of a state to enforce its own laws.[16] Extraterritoriality of this type of jurisdiction is very common.[17] For example, as in the case of *Al-Skeini*, the UK government directly enforces decisions or military orders on the territory of another state (Iraq) without creating any legislative or judicial authority.[18]

Judicial jurisdiction is used in two forms or levels: international law and domestic law. Judicial jurisdiction, in domestic law, refers to the power of a state to subject persons or things to the authority of courts and tribunals existing within its territory.[19] However, in International Law, it is used to describe the nature, conditions, and boundaries of the right of international and regional courts to consider cases between the parties.[20] More precisely, conventions and other normative legal acts adopted by the signatory states play an important role in determining the jurisdiction of international and regional courts. In this regard, the scope of the cases that the Strasbourg Court can consider is determined by the ECHR.

As many normative acts have been adopted in the field of the protection of human rights, the sphere of application of the ECHR norms has been determined. Article 1 of the Convention states:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[21]

The concept of jurisdiction specified in this article of the Convention, in fact, should determine the scope of the obligations undertaken by the signatory states under the Convention. However, during the interpretation of this article, the questions of whether to determine the exact boundaries of the

[14] *Id.*, 576.
[15] Chiragov and Others v. Armenia, ECHR No. 13216/05, § 72 (2015).
[16] Damira Kamchibekova, *State Responsibility for Extraterritorial Human Rights Violation*, 13 Buffalo Human Rights Law Review 87, 90 (2007).
[17] Shaw, *supra* note 13, 586.
[18] *Supra* note 8, § 124.
[19] *Supra* note 13, 578.
[20] Vaughan Lowe, International Law, 330 (2007).
[21] *Supra* note 2, art. 1.

jurisdiction and the distinction between positive and negative obligations remained unanswered. In addition, the question of how and to what extent it will be applied to the extraterritorial activity of states has not been clarified. However, during the interpretation of this article, the questions of whether to determine the exact boundaries of the jurisdiction, the distinction between positive and negative obligations, also how and to what extent it will be applied to the extraterritorial activities of the states remained unanswered. Afterwards, the jurisdictional understanding, which caused serious misunderstandings in the practice of the Strasbourg Court, went through various legal procedures until it reached its current state.

The tendency of interpretations of "jurisdiction" was manifested at the primary stage in the practice of the European Commission of Human Rights (hereinafter EComHR) and subsequently the European Court of Human Rights. Especially, the Strasbourg Court's narrow interpretation of the jurisdictional understanding in the inadmissibility decision in the case of *Banković v. Belgium* led to further deepening of the discussions surrounding the issue and the proposal of alternative solutions. When the Court explained the concept of jurisdiction for the first time in this case, it equated the concept of jurisdiction possessed by states in international law with the jurisdiction provided in Article 1 of the Convention:

"As to the "ordinary meaning" of the relevant term in Article 1 of Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial".[22]

This interpretation meant that the scope of jurisdiction was confined by the principle of territoriality possessed by states. Moreover, it meant that the rights and freedoms of this Convention could be applied in a very limited scope. Indeed, these circumstances could reduce the legal impact of the Convention, which has made considerable contributions to the field of human rights protection. In fact, this interpretation was also contrary to the nature and requirement of the Law of International Responsibility that arises when states violate their human rights obligations. In attributing the violation of international law to the state, the real personality of the perpetrator is forgotten, and the fiction of whether he/she acts as an instrument of the state is taken as the basis.[23]

In assessing whether a breach is imputable to the state, it is immaterial who performs the act or omission that results in the infringement. In other words, the most significant point for attributing the violation to the state is whether there is a connection. Nevertheless, the notion of "jurisdiction" provided in the ECHR should be distinguished from "attribution of conduct" and "state

---

[22] *Supra* note 7, § 59.

[23] James Crawford, Alain Pellet and Simon Olleson, The Law of International Responsibility, 222 (2010).

jurisdiction". Firstly, while jurisdiction concerns the application of the ECHR, attribution of conduct examines whether a state is liable for a violation of the law. The confusion and inconsistency between these two terms are understandable, as both concepts are grounded in the effective control model (the temporary or permanent authority of a state over the lands of another state), and the Strasbourg Court often employs them interchangeably.[24]

Taking into account the analyzed topic, the term attribution of conduct seeks to determine whether the state is responsible for a violation of the law committed in its territory. The question of jurisdiction is whether the violating state exerts control over the victim and, consequently, whether the state is subject to an obligation under the ECHR regarding the deprivation of rights.[25]

Secondly, the concept of jurisdiction under the ECHR has a harmonious relationship with state jurisdiction. The jurisdiction of the Strasbourg Court is a derivative of state jurisdiction.[26] When analyzing Article 1 of the Convention, it becomes clear that the jurisdiction specified here is a threshold criterion.[27] This criterion is an abstract concept and defines the boundaries for the protection of human rights and freedoms within a certain legal framework. In this respect, the framework characterized by the ECHR for jurisdiction is none other than state jurisdiction. So, the meaning of the jurisdiction provided in Article 1 does not solely mean the authority of the court to hear a case, but rather state jurisdiction, with two meanings: whether individuals have certain rights and freedoms in interaction with the state; whether the state has certain obligations to individuals in this mutual relationship. It resembles the relationship between the right holder and the obliged. It can be seen that if the state has no obligation to protect human rights, naturally, the protection claims of individuals lose their validity. The existence of rights and obligations is interdependent, requiring a suitable space for their mutual fulfilment. However, this does not simply mean that the ECHR and Strasbourg Court no longer have jurisdiction if a violation of the law is proven not to have occurred on the territory of a state.

Accordingly, a non-geographical clause is the only appropriate hypothesis for what the geographical scope of the ECHR means and how the jurisdiction will be determined when it goes beyond the territorial boundaries of any contracting state.[28] Accordant with Besson, the interesting fact is that the

[24] Marko Milanović, Jurisdiction and Responsibility: Trends in the Jurisprudence of the Strasbourg Court, in *The European Convention on Human Rights and General International Law* 97, 103 (2018).
[25] *Id*., 124.
[26] ECtHR, Practical Guide on Admissibility Criteria (2011). Available at: https://www.refworld.org/pdfid/4f16c1482.pdf (last visited Oct. 8, 2023).
[27] *Supra* note 7, § 130.
[28] Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 Leiden Journal of International Law 857, 862 (2012).

application criterion of the Convention is by no means regional. In her opinion, the point to be emphasized is the functional feature of jurisdiction.

Furthermore, Besson argues that the term "territorial" is not essential when discussing territorial jurisdiction. The criterion concerns whether the jurisdiction over any given territory is functional. The same approach applies to the personal model which the state's control over people in another territory through its agents.[29] Namely, it is related to the applicability of jurisdiction.

Thus, from the analysis of the decisions of the ECtHR on specific cases, it is clear that the Court applies state jurisdiction and its extraterritorial jurisdiction in parallel. This means that the jurisdiction provided for in Article 1 of the Convention is valid not only for a specific geographical area but also for extraterritorial application.

As can be seen, there is still a gap in the precise and complete interpretation of the concept of jurisdiction stipulated by the ECHR. In my opinion, the following definition would be appropriate to explain the concept of extraterritorial jurisdiction under Article 1 of the Convention. The extraterritorial jurisdiction of the ECHR should be understood as a concept that: a) establishes the relationship between the state and violations committed outside its territory in terms of place and person; b) develops regardless of a specific geographical location; and c) cannot be limited by the concept of state jurisdiction.

While the state jurisdiction determines the limits of jurisdiction specific to a certain area, the Court is not satisfied with these limits only. As noted above, in the case of *Banković v. Belgium*, the Strasbourg Court interpreted the concept of jurisdiction of the ECHR in a narrow sense. However, the Court always refrained from making such a decision in subsequent cases. Because, over time, states committing human rights violations outside their territories made it possible to look at the issue from a new perspective.

All these created the basis for discussing and clarifying the meaning of terms such as *effective overall control* and *state agent authority* in Strasbourg practice. The Strasbourg Court envisages the extraterritorial application of the Convention in three different situations:

- the establishment of effective control by a contracting state to the Convention over another territory outside its borders;
- to exercise direct control over individual persons by a contracting state or its organs;
- to exercise sovereignty power by diplomatic or consular bodies.[30]

[29] *Id.*, 863.

[30] Füsun Arsava, *AİHK'nun Extraterritorial Geçerliliği Bağlamında AİHM'nin İçtihatlarında Görülen Hareketlilik*, 25 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi 590, 591 (2019).

The common aspect of all three situations points to the exercise of sovereign power over individuals in respect of Article 1 of the ECHR. The difference is that the power of sovereignty is used directly in one situation *(by keeping individuals under control by direct orders and instructions),* and indirectly *(by providing effective control over a territory)* in another.[31]

II. The Spatial Model: Effective Overall Control

As mentioned earlier, it is normal for a state to establish effective control within its sovereign borders. However, Court practice to date has indicated that the requirement of the principle of sovereignty is excluded in cases where states create effective control with extraterritorial activities in legal or non-legal forms. This criterion was developed in connection with the case of Northern Cyprus and later confirmed in other relevant decisions of the Court.[32] It is immaterial whether the effective control established by a signatory state in another territory is exercised by its army or by another local armed group affiliated with it. The ECtHR's conclusion regarding local armed groups in particular is that if these armed groups continue their existence with the financial and military support of a state, this is enough for that state to bear responsibility.[33]

Determining the degree of effective control depends on the nature of the case before the court. However, in general, the primary criteria that ensure the existence of effective control are the presence of another state's army or army groups on the territory; the amount of financial and military assistance given to local armed groups; and opportunities to influence the activities of domestic administration.[34] On the other hand, it does not matter whether the effective control created by the state in another territory is legal or illegal.

In general, the establishment of control by one state in another territory is carried out in two circumstances. The first is the origination of control by another state within the boundaries given with the consent of the territorial state. Consent is the main criterion and severely limits the activity of the state. The second criterion is the control over the territory in other cases where there is no consent or agreement.[35] This situation can be legal or illegal. Since it reflects the application of a certain force, this type of control is carried out in accordance with the principle of jus ad bellum in international law and the

[31] Gerhard Thallinger, Grundrechte und Extraterritoriale Hoheitsakte, 179 (2008).
[32] Loizidou v. Turkey, ECHR No. 15318/89, § 62 (1995).
[33] Ilascu v. Moldava and Russia, ECHR No. 48787/99, § 316 (2004).
[34] Arsava, *supra* note 30, 592.
[35] Marko Milanović, Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy, 26 (2011).

principles of jus in bello,[36] which indicate the criteria for the law of war.[37] As a result, whether the activity of the state establishing authority over the territory is legal or not is not a matter of dispute. In that regard, the Strasbourg Court's case law should be analyzed to create a more understandable background of the application of effective overall control under the spatial model applied to armed conflicts.

A. Case of Loizidou v. Turkey:[38] Effective Control Triggers Responsibility

The decision of the ECtHR in this case has special consequences, established by the fact that the concept of jurisdiction can be applied extraterritorially. This indicates the circumstances in which the signatory state may be responsible for its acts.[39] In this case, the claimant, a citizen of Cyprus, Titina Loizidou, participated in a rally organized on March 19, 1989, for the return of Greek refugees living in the region. Later, she was arrested by Turkish policemen in the region bordering the territory occupied by Türkiye, brought to Nicosia and released after being detained for more than 10 hours.[40] Loizidou appealed to the European Court of Human Rights and claimed his rights under Articles 3, 5, 8, and Article 1 of Additional Protocol No. I of the Convention were violated.

The ECtHR rejected Türkiye's preliminary claims regarding the non-recognition of the respondent state and the legal status of the Turkish Republic of Northern Cyprus and proceeded with the case.[41] The initial objections of the Turkish Government regarding the lack of territorial jurisdiction (ratione loci) in this case deserve attention. The Turkish government noted that the defendant was the state of Northern Cyprus; therefore, it claimed that the Strasbourg Court did not have ratione loci jurisdiction over this case from the beginning. Additionally, the Turkish government noted that the events did not take place in the territory of the Republic of Turkey but in another state.[42]

[36] International humanitarian law, or jus in bello, is the law that governs the way in which warfare is conducted. IHL is purely humanitarian, seeking to limit the suffering caused. It is independent from questions about the justification or reasons for war, or its prevention, covered by jus ad bellum.
[37] Milanović, *supra* note 35.
[38] Regarding *Loizidou v. Turkey* case, the Court held two sessions at different times. The first of these is the decision on preliminary objections dated March 23, 1995. The other decision is: Loizidou v. Turkey, ECHR No. 15318/89 (1996).
[39] Ralph Wilde, *Triggering State Obligations Extraterritoriality: The Spatial Test in Certain Human Rights Treaties*, 40 Israel Law Review 503, 514 (2007).
[40] *Supra* note 32, § 12-13.
[41] *Id.*, § 42-52.
[42] *Id.*, § 55.

In response to Turkey's initial objections, the Court emphasized that a signatory state to the Convention can be held responsible if it establishes effective control as a result of a legal or illegal military operation outside its territory.[43] The claimant also noted that the Turkish Republic of Northern Cyprus is not recognized by any state or international organization other than the Government of Turkey, and since Turkey occupied this territory, the controlling state should be held responsible for the violation of the law.[44]

From the study of this case, it is clear that although the judges described the control established by Turkey outside its borders with the word *"effective"* in their primary decisions on the issue, later, they put forward the opinion that this control is also *"overall"*:

"[...] It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. [...] Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention. Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus".[45]

To sum up, the court found that if the effective control exercised by a state over another territory is merely "overall", this is sufficient for that state to be responsible for the violation occurring.[46] The court continued the approach adopted in this case later in the *Cyprus v. Turkey* case, stating that since Turkey has effective overall control over the territory of Nothern Cyprus, the Turkish government is also responsible for: the activities of the army and other authorized representatives of Turkey; and the activities of the local administration that maintain their existence with the financial and military support of the Turkish government.[47]

Another remarkable point in *Loizidou* was that the court did not consider Turkey's activity in the territory of Northern Cyprus as an "occupation". It can be assumed that the court followed the route to avoid referring to IHL.

Apparently, even toward the end of the 1990s, the court did not indicate the relationship of the Convention to Humanitarian Law. Underscoring the importance of considering IHL in this case, Judge Pettiti added that if the claimant was indeed expelled from occupied territory, then the court must analyze the relevant norms and application criteria of the 1949 Geneva Conventions.[48]

---

[43] *Id*., § 62.
[44] *Id*., § 48-49.
[45] *Id*., § 56.
[46] *Supra* note 35, 137.
[47] Cyprus v. Turkey, ECHR No. 25781/94, § 17 (2001).
[48] *Supra* note 32, 34-35 (Pettiti, J., dissenting).

B. "Banković and Others v. Belgium and Others" as the Most Controversial Case of the Strasbourg Court

The case of *Banković v. Belgium* has been the most questioned and criticized case, both in theory and in subsequent practice. The most important feature of this case was remembered by laying the foundations of a new concept called "legal space" in Strasbourg practice.

In 1999, 16 people died as a result of the bombing of the building of the Serbian Radio and Television during the attacks carried out by NATO air forces against Yugoslavia. The relatives of the deceased who applied to the ECtHR claimed that Articles 2 and 10 of the Convention were violated.[49] In respect of the claimant's argument, the respondent states are included in the territorial (ratione loci) jurisdiction.[50] In justifying this claim, the claimant referred to the "effective control" hypothesis adopted in *Loizidou*.[51] In this context, the respondent's primary objection was that the claimants generally lacked jurisdiction in "raitone personae" (an immunity granted to certain officials based on the office they hold, rather than in relation to the act they have committed). One of the important issues was related to the interpretation of Article 1 of the Convention. While interpreting Article 1 of the Convention, the Strasbourg Court stated that the scope of application of the concept of jurisdiction in the Convention is limited to state jurisdiction based on the principle of sovereignty.[52] However, the question arises when the extraterritorial jurisdiction of a state is established.

In keeping with the discretion of the court, it happens under the exception. This exception is that as a result of the occupation of that territory by another state with the consent or invitation of one state, the occupied state is deprived of public services that can be used in normal situations and this opportunity is transferred to the occupying state.[53] However, none of the previous similar cases mentioned such an approach.[54]

As mentioned above, one of the most important aspects of this case was that it included the term legal space (espace juridique) in the discussion about the concept of jurisdiction. The Strasbourg Court referred to this term when explaining the difference between the case of *Banković* and the case of *Cyprus v. Turkey*, stating that the Convention applies to a legal space consisting largely of the territory of member states:

---

[49] *Supra* note 7, § 9-11.
[50] *Id*., § 30.
[51] *Id*., § 46.
[52] Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 European Journal of International Law 529, 539 (2003).
[53] *Supra* note 7, § 71.
[54] Orakhelashvili, *supra* note 52, 544.

"[...] In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention".[55]

It can be concluded that the violation of law can enter the legal space in two cases: a) when the violation is committed by the contracting state in a certain territory; and b) when the violation occurs in the territory of the contracting state.[56] However, such a narrow approach was never used in subsequent court cases. Furthermore, the court has not argued in any of its judgments that the decision in the *Banković* case was erroneous.

In this case, as in *Loizidou* judgment, there is no indication of the ECHR's interaction with IHL. However, several questions were raised by Judge Jean-Paul Costa. The most considerable of the questions was whether it was necessary to refer to the 1907 Hague Rules and the 1949 Fourth Geneva Convention when investigating the extraterritorial military activities of states. Additionally, could the court analyze crimes as a result of air attacks conducted during peace operations?[57] However, the court refrained from examining these issues and explained jurisdiction as a term for a specific field. The court's view on Article 15 (Derogations) of the Convention will be discussed in more detail in the second chapter of this study.

To summarize, the negative and criticized conclusions reached by the Strasbourg Court in *Banković* case were as follows: the court equated the concept of jurisdiction in the Convention with that of the state jurisdiction; by limiting the scope of the Convention, the court has reduced its purpose and legal effect. However, the "living instrument" qualification, purpose and subject of the Convention played an important role in the interpretation of Loizidou decision;[58] and the court failed to clarify the difference between effective control created as a result of extraterritorial military operations and air attacks.[59]

---

[55] *Supra* note 7, § 80.
[56] Christina Cerna, Hurst Hannum, Christopher Greenwood and Tom Farer, *Bombing for Peace: Collateral Damage and Human Rights*, 96 Proceedings of the Annual Meeting 95, 101 (2002).
[57] Joana Abrisketa, The Problems the European Court of Human Rights Faces in Applying International Humanitarian Law, in *The Humanitarian Challenge: 20 Years European Network on Humanitarian Action* 201, 209 (2015).
[58] *Supra* note 35, § 71-85.
[59] Lawson, *supra* note 6, 111-112.

Indeed, according to some authors, if the court had explained the difference between the two acts, especially the nature of the airstrike, there would have been no reason to deny that the violations committed fell within the jurisdiction of the states.[60]

C. Chiragovs and Others v. Armenia: The Role of the Separatist in State Responsibility

The main subject of this case concerns six Azerbaijani refugees from the Lachin district of Nagorno-Karabakh, occupied by Armenia.[61] The brief history of the incident is that during the collapse of the USSR, the Nagorno-Karabakh Autonomous Oblast (NKAO) became a self-governing region of the Azerbaijan Soviet Socialist Republic. From a geographical point of view, there was no common border between Nagorno-Karabakh and the Armenia Soviet Socialist Republic, and the Lachin district, which is the focus of the claim, is located on the border between Armenia and NKAO.[62]

On September 2, 1991, the local representatives announced the establishment of "The Republic of Nagorno-Karabakh"[63] consisting of Karabakh and Shaumyan districts and declared that it would not be under the jurisdiction of Azerbaijan. As a consequence, these calls and movements made by local Armenians turned into an armed conflict. Lachin district, where the claimants lived during the attacks, was occupied by the Armenian army on May 17, 1992.[64]

The six claimants in this case appealed to the Strasbourg Court regarding violating their rights stipulated by Articles 8, 13, and 14 of the ECHR and Article 1 of Protocol No. 1.[65] The extraterritorial aspect of this case is striking. The claimants allege that the army and local government operating in the territory of "The Republic of Nagorno-Karabakh" (hereinafter "NKR") are directly subordinate to Armenia. In this regard, both the claimants and the third party, Azerbaijan, submitted several documents to the court as evidence.[66] Among this evidence, numerous bilateral agreements, normative legal acts, state financial packages and budget aid reports indicate cooperation between Armenia and the "NKR" in the political, economic, and military spheres.[67]

---

[60] Kerem Altıparmak, *Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq*, 9 Journal of Conflict and Security Law 213, 223 (2004).
[61] *Supra* note 15.
[62] *Ibid*.
[63] Declaration Proclaiming "The NKR" (1991), https://president.az/az/pages/view/azerbaijan/karabakh (last visited Jan. 2, 2023).
[64] *Supra* note 15, § 15-20.
[65] *Id*., § 3.
[66] *Id*., § 58.
[67] *Id*., § 59-86.

The most essential of them were undoubtedly Resolutions No. 822, 853, 874, and 884, adopted by the UN.[68] On the one hand, all four resolutions confirmed that Nagorno-Karabakh and its surrounding regions belong to the Republic of Azerbaijan *de jure* at the international level. On the other hand, these indicated that the Armenian army occupied Nagorno-Karabakh.

The court noted that the state's jurisdiction is defined in two forms within the ECHR: 1) the spatial model – a state's control over the territory outside its borders; and 2) the personal model – the state's control over people in another territory through its agents.[69] The court added that this includes the use of public power normally exercised by a state, in whole or part, by another state with its consent or invitation.[70] It is clear that the court referred to both approaches in Al-Skeini and Ilascu decisions, which will be discussed later.

However, the exciting aspect is that the court noted that analyzing the hypothesis of establishing control over individuals is not essential in this case. According to the court's perspective, the crucial factor is whether Armenia has applied effective control over Nagorno-Karabakh and whether it continues to do so.[71] The Court does not limit its examination to the occupation of the Lachin district where the claimants reside. Instead, it considers the broader claim that Armenia effectively controls the entire Karabakh region.[72] Secondly, although Azerbaijan ratified the ECHR in 2002, the violations occurred long before this date. Therefore, another critical point is whether the effective control created by Armenia continues beyond the date of Azerbaijan's ratification.[73]

From the analysis of the court, it became clear that there are several important mutual relations between Armenia and the "NKR", such as the signing of the military cooperation agreement in June 1994. The court evaluated this fact as the first official document establishing Armenia's presence in the region.[74] In addition, the court also stated local governments were given loans in different years and continuous financial assistance.[75] In particular, the court considered the facts of the case of *Zalyan, Sargsyan and Serobyan v. Armenia*[76] to indicate that the Armenian army was not satisfied with being located in Nagorno-Karabakh. In addition, the activities of Armenian law enforcement officers and the jurisdiction of Armenian courts

---

[68] Resolutions of the UN, No. 822, 853, 874, and 884. Available at: https://digitallibrary.un.org/?ln=en (last visited Oct. 12, 2023).
[69] *Supra* note 15, § 167.
[70] *Id*., § 168.
[71] *Id*., § 169.
[72] *Id*., § 170.
[73] *Id*., § 171.
[74] *Id*., § 175.
[75] *Id*., § 181-185.
[76] Zalyan and Others v. Armenia, ECHR No. 36894/04 & 3521/07 (2016).

are dominant in this area.[77] Taking into account all, the Strasbourg Court reached the following conclusion:

"[…] from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the district of Lachin. The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention [...]".[78]

The Court discussed the existence of both hypotheses in the case, but in the end, by applying the spatial model, it accepted that Armenia created effective control over Nagorno-Karabakh.[79] Furthermore, one of the Judges Sir Motoc noted that the court's use of characteristic terms such as *high integration*,[80] *occupation*,[81] *local army groups* and reference to General International Law[82] was a progressive event. According to Judge Motoc, the mentioned terms are reminiscent of the decisions of the UN Security Council. This approach is almost a turning point and innovation in Strasbourg's practice.[83]

The essential points, in this case, are the following: this case is one of the rare cases in which a third state (Azerbaijan) joins and becomes a party to support the claimant's arguments, and the court interpreted the relationship between a state and the territory under its control under "high integration". The use of this phrase by the court was clear proof of the existence of strong economic, political and social relations and financial support between the Armenian government and the so-called "NKR".

III. Personal Model: State Agent Authority

Another hypothesis regarding the extraterritorial application of jurisdiction is called the personal model. The Strasbourg Court referred to this model for the first time in the years following the case of *Banković*. In this respect, the application history of the personal model can be divided into two parts: the previous Strasbourg case practice; and the post-Banković case practice.[84] The essence of the personal model is that if a state controls individual representatives, they also come under the jurisdiction of the state.

---

[77] *Supra* note 15, § 182.
[78] *Id*., § 186.
[79] Javid Gadirov, International Law and the Karabakh Question, in *Liberated Karabakh: Policy Perspectives by the ADA University Community* 33, 37 (2021).
[80] *Supra* note 15, Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, § 3.
[81] *Id*., § 168.
[82] *Id*., § 2.
[83] *Id*., 85 (Motoc, J., concurring).
[84] Milanović, *supra* note 24, 181-183.

Namely, any act or omission performed by those individuals creates responsibility for the state.[85]

According to the Court, the personal model falls into three categories in general. Those indicate in which cases the extraterritorial activities of states are included in the scope of the personal model: activities of diplomatic and consular staff; activity carried out by one state by exerting force (for example, occupation) on the territory of another state; and the using by another state of the public powers it possesses with the permission or consent of one state.[86] In that regard, the related Strasburg case law should be examined to better understand the personal model and determine the degree of control exerted over individuals.

A. Cyprus v. Turkey (EComHR): Turkey's First Test with the Problem of Extraterritorial Jurisdiction

The main subject of this case concerns the military operation carried out by Turkey on the territory of Cyprus on 20 July 1974. As a result of this operation, on 30 July 1974, the north of Cyprus was occupied by Turkey. Acting as the claimants, Cyprus complained about Turkey to the EComHR for the following reasons: the restriction of freedom of movement of the local population; the death of numerous civilians during military operations; and the evacuation of large numbers of people from their place of residence and confiscation of their property.[87] The mentioned facts also formed the basis of the second application by Cyprus on 21 March 1975.[88] Thus, the Commission established the personal model hypothesis for the first time with this decision. In this context, the signatory state may recognize the guaranteed rights and freedoms to everyone under its authority and responsibility regardless of its borders. More specifically, authorized agents of a state (including diplomatic craw and members of the army) are not limited to being within the jurisdiction of the state while operating in another region.[89] If these agents obtain additional control over people and property in another region, such individuals and goods are regarded to be subject to the state's jurisdiction.[90]

There was a difference of opinion among the authors on the theory regarding this case. Sarah Miller stated that the Commission's decision was erroneous. According to her idea, this decision of the Commission is just to indicate the difference between the formal jurisdiction established by the annexation of a state and the real control or functional jurisdiction effectuated by Turkey over Cyprus. More concretely, in Miller's view, the control over

[85] *Id.*, 197.
[86] *Supra* note 7, 134-136.
[87] Cyprus v. Turkey, ECHR No. 6780/74 & 6959/75, § 127 (1975).
[88] *Id.*, § 128.
[89] *Id.*, § 129.
[90] *Id.*, § 136.

Cyprus is not exercised through state agents. This effective control is a territorial jurisdiction (the spatial model) established over the zone of Cyprus. She connected this explanation with the domination that Turkey has created over Cyprus for many years.[91]

However, Milanović disagreed with Miller's view, emphasizing that the court applied this assumption to focus on cases that emerged in the following years. According to Milanović, the model of effective control over the territory mentioned by Miller does not apply in this case. He added that "it is likewise simply anachronistic to read the Commission's case law in light of *Banković*. While it is true that, under the Commission's approach, ECHR states parties would be responsible for violating the ECHR whenever state agents exercise authority and control over individuals, this does not mean that the issues of attribution and the existence of breach of obligation are conflated, just that the obligation is not limited territorially".[92]

The consequences of this case are the following: obviously, the EComHR has a broad understanding of the concept of extraterritorial jurisdiction in this case; and with this decision, the Commission implemented the concept of the personal model, a new hypothesis, to the Strasbourg practice for the first time.

B. Öcalan v. Turkey: The Importance of Detention

One of the most important cases regarding the personal model hypothesis is *Öcalan v. Turkey*.[93] After *Banković*, the court first mentioned the application of this model in *Issa v. Turkey*,[94] but it was finally declared inadmissible for lacking proof. This case concerns the arrest of Abdullah Öcalan, leader of the Kurdistan Workers Party (PKK), by the Turkish government in Nairobi, the capital of Kenya.

In more detail, after being deported from Syria on October 9, 1998, Öcalan requested asylum from countries such as Greece, Russia and Italy at different times, but received a negative response. He was taken to the Greek consulate building in Nairobi on February 2, 1999.[95] After long-term diplomatic talks, the Greek representatives announced that the Netherlands would accept Öcalan. At the end of the meetings, Kenyan agents brought Öcalan to Nairobi airport to leave the country. However, unexpectedly, they handed over Öcalan to Turkish soldiers who were waiting on another plane.[96] The claimant applied to the court alleging that his rights in Articles 2, 3, 5, 14 and other

---

[91] Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, 20 The European Journal of International Law 1223, 1237 (2009).

[92] *Supra* note 24, 182.

[93] Öcalan v. Turkey, ECHR No. 46221/99 (2005).

[94] *See* Issa and Others v. Turkey, ECHR No. 31821/96 (2004).

[95] *Supra* note 93, § 13-15.

[96] *Id.*, § 16-17.

relevant provisions of the Convention were violated.[97] When the aspect of extraterritorial jurisdiction of the case is examined, curious nuances emerge. The necessary question is whether a violation that occurs far beyond the legal space of the ECHR falls within Turkey's jurisdiction.

In the preliminary ruling of the case, Turkey argued that the approach in the Banković decision should be applied. The main cause for this was that Turkey compared this case with *Banković* and requested a similar approach from the Strasbourg Court. In other words, the court could apply the same hypothesis for Turkey in this case, just as it adopted a decision of rejection based on the legal space factor in Banković decision. Yet the court rejected such an approach.[98] When this case was heard in the Grand Chamber, the court tried to clarify the difference between *Öcalan* and *Banković* and came to the following conclusion:

"It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey".[99]

The issue that raises the question is whether the effective control implemented by Turkey is about the person arrested or the place where the incident took place. In the analysis of related opinions of the court, the main issue is about the physical control that Turkey has directly generated over the person.[100] Thus, Turkey's direct physical control over the person was the most essential point that distinguished this case from *Banković*. Because the physical force used in *Banković* was from a long distance and was carried out by an aerial attack.[101]

Several authors point out that *Issa* and *Öcalan* distinguish by the primary implementation of the personal model. According to Hannum, both decisions marked a turning point in the Strasbourg practice by introducing the personal model after *Banković*.[102] Nevertheless, according to some authors, this is not the right approach. For instance, O'Boyle argues that none of *Issa* and *Öcalan* defined the exact boundaries of the state's jurisdiction. He considers that the

---

[97] *Id.*, § 8.
[98] Öcalan v. Turkey, ECHR No. 46221/99, Judgment, § 93 (2003).
[99] *Supra* note 93, § 91.
[100] Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 Michigan Journal of International Law 739, 803-804 (2005).
[101] Kerem Altıparmak, *Sınır dışı Operasyonlarda Papatya Falı: Avrupa Hakları Mahkemesi Davaya Bakacak, Bakmayacak, Bakacak…*, 5 Ankara Avrupa Çalışmaları Dergisi 47, 72 (2006).
[102] Cerna et al., *supra* note 56, 102.

court avoided discussing this fact. Therefore, none of the decisions can be considered a turning point in the application of the personal model.[103]

The essential results regarding this case are the following: with this case, the court has shown that the human rights violation committed by the contracting state can create a jurisdictional status even if it takes place outside the legal limits of the Convention; and as opposed to Issa, Öcalan is a case in which a state is ultimately held liable by applying the personal model to its extraterritorial exercise.

C. Al-Skeini and Others v. the United Kingdom

The Al-Skeini case has long been the most interesting case in the history of the court. This case concerned the amendment of some criteria adopted in *Banković* and the implementation of the personal model. The main theme of the study is the occupation of Iraqi lands by the US Army and various coalition states. According to Resolution No. 1441,[104] adopted by the UN Security Council on 8 October 2002, the British army occupied the Basra region of Iraq and gained control on 5 April 2003.[105] Relatives of six Iraqi citizens who applied to the ECtHR claimed that the UK was responsible. According to the claimant's arguments, victims died in the following circumstances: 1) when the first victim was on the street; 2) the second person, as a result of the raid on his house by British soldiers; 3) with a bullet fired from outside when the third person was in his house; 4) when the fourth victim drove his car on the way; 5) the fifth victim was arrested by British soldiers, beaten, and thrown into the Shat-al-Arab river. A few days later, that person's body was found by the British police on the riverbank; 6) the sixth victim, Baha Mousa, was beaten to death while in custody after being arrested by British soldiers.[106] Therefore, his relative also made an allegation under Article 2 (inappropriate investigation into the death fact) of the ECHR.[107]

The review of the case by the British courts. Al-Skeini was first heard in British courts. This case was considered in the UK in three stages: High Court;[108] Court of Appeal;[109] House of Lords.[110] The British courts have held that the arguments raised against the five claimants are not covered by Article

---

[103] Michael O'Boyle, The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment On "Life After Banković", in *Extraterritorial Application of Human Rights Treaties* 112, 133-34 (2004).
[104] Resolution of the UN, No. 1441 (2002). Available at: https://digitallibrary.un.org/record/478123?ln=en (last visited Oct. 15, 2023).
[105] *Supra* note 8, § 9-10.
[106] *Id.*, § 34-63.
[107] *Id.*, § 95.
[108] Al Skeini and Others v. Secretary of State for Defence, EWHC 2911, No. CO/2242/2004 (2004). (Hereinafter HC).
[109] Al Skeini and Others v. Secretary of State for Defence, EWCA 2911, No. C1/2005/0465, C1/2005/0465 B (2005).
[110] Al Skeini and Others v. Secretary of State for Defence, UKHL 26 (2007). (Hereinafter HL).

1 of the Convention. The court concluded that only violations concerning the sixth claimant should be taken into account.

Firstly, while the case was heard in the Court of Appeal, Judge Lord Brooke took a new view, contrary to the decision taken by the High Court. Judge Brooke noted that in the analysis of this case, as in *Banković*, it is essential to examine the personal model and the hypothesis of effective territorial control. As an example of this view, he cited the case of a person being abducted by state agents on another state's territory.[111]

In fact, this argument had the potential to change the course of the case. Because if the court had made a decision based on this argument, each of the six claimants would have been subject to the jurisdiction of the UK.[112] However, Lord Brooke later stated that he did not criticize the approach in *Banković* and noted that the court did not have a chance to make a different decision in this case.[113]

Moreover, Lord Brooke argued the court should examine whether there has been a violation of Articles 2 and 3 of the Convention, which is the basis of the claim. On the other hand, the Strasbourg Court must analyze whether the respondent state has fulfilled its positive obligations related to the violations. In this context, Baha Mousa is directly under the UK's jurisdiction. Sir Brooke based this argument on three facts: Mousa was arrested by British soldiers; the victim was subjected to direct physical force; and he was detained by British soldiers for some time in the UK-controlled prison.[114] The judge declared that the allegations of the other five claimants were inadmissible as they were not under UK control. The British soldiers could not intentionally and effectively create an obstacle to the rights and freedoms of the other five claimants.[115]

Brooke has shown that the fact of direct control of victims (for instance, the detention of a person in a prison) is a distinctive nuance. Nevertheless, Milanović argued that this approach adopted by Lord Brooke and two other Judges is inaccurate. By applying the personal model, there is no need to have direct control over individuals. For instance, in the case of *Pad* and *Isaak*, the personal model was still applied even though the victims were not under the direct control of Turkey.[116]

Secondly, while analyzing the case, the House of Lords made the following two important arguments referring to *Banković*: 1) the territory of Iraq is outside the legal space of the ECHR, and 2) the jurisdiction of the contracting state should be understood as state jurisdiction. In addition, the House of

[111] S*upra* note 109, § 80.
[112] *Supra* note 24, 189.
[113] *Supra* note 109, § 80.
[114] *Id.*, § 108.
[115] *Id.*, § 110.
[116] *Supra* note 24, 191.

Lords assessed that although the UK was operating militarily in Iraq, its troops were fewer and did not have effective overall control. In such a situation, the UK could not fulfil its positive obligations under the ECHR. Due to this, the House of Lords concluded that the UK did not have territorial jurisdiction over the five claimants. Regarding the sixth claimant, the House emphasized that jurisdiction was established only based on the personal model.[117]

The ECtHR's understanding of Al-Skeini. In this case, the Strasbourg Court moved away from the narrow interpretation of jurisdiction in the decision of *Banković* and readjusted the concept of legal space. In this context, the court concluded that if agents of a state exercise control over people in the territory of another state, the state will be held responsible for the violation. As an inference of this control, the state accepts the positive obligations stipulated by the Convention towards those people. In fact, this approach revealed two facts: a) rights and freedoms in the ECHR can be divided, and b) these rights and freedoms can be adapted again.[118]

According to this decision, the Strasbourg Court abandoned the limits applied by the concept of legal space adopted in *Banković*. The court stated that if a signatory state occupies the whole or a portion of the territory of another state, the state's responsibility for protecting positive obligations arises. If such responsibility is not established, there will be a massive gap in protecting the rights and freedoms in that area.[119]

Although the court overturned some criteria in *Banković* through this case, *Al-Skeini* cannot be considered a turning point in Strasbourg's history. This argument is based on a necessary fact. Every time the court invoked the personal model presumption, it cited such a fact: "Normally, the British army used the public power Iraq could use".[120] From this argument of the court, it can be considered that if the British army did not use public power and committed a violation at a long distance, the UK's responsibility would not arise.

The consequences of *Al-Skeini* are the following: 1) in this case, the court reorganized the concept of legal space of the Convention and interpreted it in a broad sense; and 2) the personal model presumption, which was rejected in *Banković*, was reapplied.

[117] Marko Milanović, *Al-Skeini and Al-Jedda in Strasbourg*, 23 European Journal of International Law 121, 125-127 (2012).
[118] *Supra* note 8, § 137.
[119] *Id.*, § 142.
[120] *Id.*, § 149.

IV. Alternative Models for Extraterritorial Application of the ECHR

In addressing the extraterritorial application of the ECHR, scholars and jurists have proposed alternative models to navigate the complexities inherent in extending human rights protections beyond national boundaries. These models offer varying perspectives on how to interpret and apply the principles enshrined in the ECHR in situations where state actions transcend territorial limits. By examining these alternative models, we gain insight into the evolving understanding of state responsibility, jurisdictional reach, and the protection of fundamental rights in an increasingly interconnected world. This section explores key alternative models proposed within legal discourse, shedding light on their respective merits, challenges, and implications for the extraterritorial application of the ECHR.

The ECHR stands as a cornerstone of international human rights law, safeguarding fundamental freedoms and liberties within the territorial jurisdiction of its signatory states. However, as the global landscape evolves, challenges arise concerning the application of the Convention's protections beyond national borders. This entry delves into alternative models proposed to navigate the complexities of extraterritorial application, addressing issues such as state accountability, jurisdictional reach, and the protection of individuals in areas beyond direct state control. It has been established that the ECtHR mainly applied two diverse models in extraterritorial armed conflicts: the spatial model and the personal model. However, there are also alternative jurisdictional models for the extraterritorial military activity of states. The biggest reason for the emergence of these models was the incomprehensible situation created by the ECtHR regarding extraterritorial jurisdiction. Many experts objected to the Court's failure to employ territorial and personnel models in the right place. In fact, they were not wrong at all. These discussions, which started in the 1990s, flared up in the early 2000s, especially after the *Banković* case.[121] As a result, although a number of ideas and arguments were voiced in the direction of solving this confusion, it seems that the models proposed by Judge Bonello and Professor Marko Milanović were the most popular in theory and practice. These are the "Functional Model" proposed by Judge Bonello in the case of *Al-Skeini* and the "Third Model" established by Marko Milanović. This part of the study provides an analysis of these models in detail.

A. The Functional Model

Sir Bonello, one of the judges in the case of *Al-Skeini*, first presented the functional model hypothesis in his concurring opinion.[122] In fact, this model

[121] *Supra* note 24, 228.
[122] *See supra* note 8, 78-86 (Bonello, J., concurring).

is more of an improved hypothesis than a new approach to the extraterritorial application of the ECHR.[123] Although Judge Bonello agreed with the court's final decision, he believed that the model on which the court based it was wrong. The Court needs to use convenient reasoning when applying the personal model hypothesis and interpreting the state's responsibility.[124]

In other words, he considers that the court interpreted the models it applied in numerous cases analysed until *Al-Skeini*, either in a broader sense or, as in the case of *Banković*, in a very narrow framework. Therefore, Judge Bonello put forward the idea of five commitments that member states to the Convention must fulfil unconditionally:

"a) by not violating any human rights (under the control of state agents); b) by establishing a regime to prevent human rights violations; c) by investigating allegations of human rights violations; d) by punishing state's agents who violate human rights; e) by compensating the damage caused to the person whose rights have been infringed".[125]

Judge Bonello argued that if any of these obligations under the control of a state were infringed, that state was responsible. He considers that the jurisdiction of the state coincides with the concept of authority and control that it creates in another territory. In this context, it is immaterial whether the jurisdiction is internal or extraterritorial in accordance with the obligations under the ECHR. The jurisdiction should be understood as a functional concept. If a state has control over a certain area, any type of violation that occurs will be subject to the state's jurisdiction.[126]

On the other hand, Bonello assumes that the boundaries of the state's jurisdiction are limited by the liabilities arising from the Convention. Thus, if the violators of the Convention are under the control and authority of the signatory state, these actions are considered to have occurred as a logical result of the state's power.[127]

Afterwards, an essential question arises naturally. *How to determine whether the state establishes authority and control over individuals?* According to his argument, the existence of such authority and control depends on whether the state fulfils its obligations under the Convention. In this context, the functional jurisdiction of the state will set up a natural inference. It means that if a signatory state lacks the power to enforce its obligations in another territory, it has no authority and cannot exercise any influence.[128]

[123] *Id.*, § 8.
[124] *Id.*, § 3.
[125] *Id.*, § 10.
[126] *Id.*, § 10.
[127] *Id.*, § 11-14.
[128] *Id.*, § 19.

Moreover, the basis of Judge Bonello's idea was not to seek new ways and methods to solve the jurisdictional problem but to analyse the principles of human rights and the fundamentals underlying the concept of jurisdiction. Thus, Sir Bonello, who agreed with the common opinion of other Judges in *Al-Skeini*, pointed out that the functional model for determining extraterritorial jurisdiction is more convenient than other models.[129]

Although I agree with the idea of Judge Bonello, I consider that the factual circumstances of each case must be considered to apply the most appropriate jurisdiction model. In addition, when making a decision on a case, the court should compare the hypothesis implemented in previous cases. The author thinks that although the feature of functionality can show itself in the personal model, it does not coincide with the territorial model. Because, in cases such as the state's power applied at a distance, there can be no question of a sign of functionality. Therefore, this hypothesis, which Bonello claims, can be useful for a more personal model approach.

On the other hand, it is impossible to consider the five principles proposed by Bonello in all cases. Because, to protect the balance policy, the Strasbourg court must have an individual approach to each case. However, Bonello's proposal does not coincide with the principle of the individual approach.

B. The Third Model

Taking into account the differences between territorial and personal models, one of the proposed alternative models appears in the academic sphere. In other words, several years of research into the legal relationship between armed conflict and human rights has led to the emergence of a new alternative model. As is known, the most important nuance underlying the personal model is the obligation of state agents to protect the human rights and freedoms that they control. This obligation also applies to violations outside the state's territory. These are positive commitments that the state must fulfil. However, some questions arise: Are the boundaries of the obligation to respect human rights limited by the jurisdiction of the state? Why is the condition of protecting the negative obligation not applied to the state in every place where it can establish control? All these questions create the hypothesis of the Third Model proposed by Marko Milanović.[130] He generated this hypothesis based on the discussion on the sovereignty character of the jurisdiction and the positive and negative differences in the ECHR commitments.

The distinction between a state's liability to respect human rights and its liability to protect human rights is conditional. In fact, if the state has ensured the protection of these rights, it means that the state has taken all necessary

[129] *Id.*, § 21-22.
[130] *Supra* note 24, 209.

preventive measures to ensure that the rights are not violated.[131] An example of this is the case of *Velásquez-Rodríguez v. Honduras*. In this case, the Inter-American Court of HR noted that the state must thoroughly and fully investigate violations of the rights protected by the Convention. On the other hand, if the state does not ensure the free and full use of its rights by the persons under its control, it will be considered to have infringed its positive commitments.[132] This decision indicated that the state should protect the rights under the Convention, and if an infraction occurs, it must fulfil its obligation to investigate and punish.[133]

To violate the obligation to respect human rights, it is enough for the state to form control over the activities of its agents. Nevertheless, as mentioned above, the obligation to preserve human rights involves taking several measures, such as defence, detention, and punishment. As can be seen, the capacity for negative and positive obligations is not the same. Due to this, Milanović considers that if the jurisdiction limitation can be applied for the performance of positive commitments, similar situations are not valid for negative obligations. Simply put, Milanović points out that the obligation to respect human rights is flexible and that these liabilities are viable worldwide.[134]

Within this framework, Milanović analyzes Article 1 of the ECHR. He states that this article only mentions the function of the states to defend human rights, that is, the positive obligation. The question is, does this article of the Convention provide for the commitment to respect human rights (negative obligation)? Yes, of course. The fact that Article 1 of the ECHR does not mention the obligation to respect human rights does not mean that negative obligations can be ignored. In respect of Milanović, the negative liabilities stipulated in the ECHR and other human rights conventions are clear from the interpretation of the relevant articles. In simple words, the commitment to "protect human rights" mentioned in Article 1 also includes the obligation to "respect human rights". The only separation is that while positive obligation can be limited, negative obligation always exists for states everywhere.[135]

Milanović implemented this hypothesis in the case of *Al-Skeini*. He argued that if UK soldiers had not established effective control in the Basra region of Iraq, the UK would not be held responsible for the infringements. Yet according to Milanović, UK jurisdiction would be deemed to have arisen even for such a case. Because even if the UK did not set up effective control in the region, it had a negative obligation to prevent human deaths.[136]

---

[131] *Ibid*.
[132] Velásquez-Rodríguez v. Honduras, Inter-Amer.Ct.HR No. 4, Judgment, § 172-176 (1988).
[133] Hilaire Barnett, Sourcebook on Feminist Jurisprudence, 598 (1997).
[134] *Supra* note 24, 210.
[135] *Id*., 212-215.
[136] *Id*., 216-217.

Milanović's core concept was that the third model would replace the previous versions.[137] However, in my view, there is no need to replace the existing models with the third model. **First**, distinguishing between positive and negative commitments is inappropriate for the Court case law and, as Milanović indicated, would even lead to radical discrimination. Moreover, Milanović notes that there is a risk in implementing the third model. He adds that this model is difficult for the ECtHR's Judges to enforce and it is impossible to know how it will work in practice.[138]

Second, suppose that this model is applied to international armed conflicts. In this case, the state should always respect individuals' right to life, right to liberty and security. However, expecting governments to uphold obligations equally in times of peace and conflict would be absurd. Therefore, the Strasbourg Court does not allow the state to ignore negative obligations under the pretext of war. For instance, the court concluded in *Hassan* that a state cannot deprive individuals of liberty for arbitrary reasons.[139]

I can complete Milanović's ideas with one word. In my opinion, it is about implementing a balance. However, what would achieving balance provide us? Even if it gives nothing, it will still provide something. Contracting states will henceforth refrain from committing human rights violations unless necessary during extraterritorial armed conflicts. In other words, the balanced model promotes the harmonization of legal frameworks by recognizing the complementary nature of human rights law and International Humanitarian Law. Rather than viewing these legal regimes as conflicting or mutually exclusive, the balanced model seeks to reconcile their provisions to ensure a comprehensive and coherent approach to addressing human rights violations in situations of armed conflict or occupation.

C. The Balanced Approach

Within academic discourse, there is growing recognition of the limitations of traditional jurisdictional models and the need for innovative solutions that reconcile conflicting interests and promote harmonious relations between states. Scholarly literature exploring alternative approaches to extraterritorial jurisdiction provides intellectual backing for the adoption of a balanced model, highlighting its potential to enhance legal coherence, mitigate jurisdictional conflicts, and safeguard fundamental rights. This framework is the basis of the balanced approach proposed by the author. It is a reality that the cases of *Al-Skeini*, in particular, played a significant role in applying the Convention to extraterritorial armed conflicts and shedding light on the problems between the ECHR and IHL. Until this case, the traditional approach of the Strasbourg court was to apply the Convention to armed

[137] *Id.*, 219.
[138] *Id.*, 221.
[139] Hassan v. the United Kingdom, ECHR No. 29750/09, § 105 (2014).

conflicts, ignoring or paying less attention to IHL norms.[140] The most obvious example of this was the comments in *Banković* that the norms of ECHR were "indivisible" and "non-tailored".[141]

However, the court held the opposite opinions in numerous cases before that case. For example, the court stated in the McCann that the Convention would not impose an 'unrealistic burden' on member states.[142] In addition, in the case of Osman, the court noted that any obligation in the Convention could not impose an "impossible and disproportionate burden" on the contracting party.[143] Subsequently, the court abandoned the strict interpretation of the provisions of the ECHR and concluded that it is essential to consider the norms of IHL during armed conflicts. The ECtHR's first mention in *Al-Skeini* that the rules of the Convention were "divided and harmonized" were initial steps in this direction.[144]

All these innovations created such a question in itself. If the norms of the Convention can be divided and adapted for extraterritorial application, why ignore the reference to IHL norms? Although the reference approach introduced by the court was a new method called the reconciliation of the ECHR and IHL, it was not revolutionary.[145] On the other hand, it is incorrect to say that each of the preliminary measures toward this harmonization started with *Al-Skeini*. Because in the case of *Varnava v. Turkey*, the court considered it appropriate to interpret Article 2 "as far as possible in the light of the common standards of International Law, including IHL norms".[146]

So can the ECtHR's direct application to IHL norms be considered an intervention in another legal system? In theory, several have criticized the broad interpretation of the jurisdiction in the ECHR and its implementation in extraterritorial armed conflicts. The most necessary factor underlying the critical argument was the scope of application of Article 1 of the Convention. They believe that the direct application of the ECHR to armed conflicts may damage the norms of IHL, and pit two areas of law against each other.[147]

---

[140] Silvia Borelli, *Jaloud v Netherlands and Hassan v United Kingdom: Time for a Principled Approach in the Application of the ECHR to Military Action Abroad*, 16 Questions of International Law 25, 41 (2015).

[141] *Supra* note 7, § 75.

[142] McCann and Others v. the United Kingdom, ECHR No. 18984/91, § 200 (1995).

[143] Osman v. the UK, ECHR No. 23452/94, § 116 (1998).

[144] *Supra* note 8, § 137.

[145] Luke Dimitrios Spieker, *Does Article 15 ECHR Still Matter in Military Operations Abroad? The UK Government's "Presumption to Derogate" – Much Ado About Nothing?*, 79 Heidelberg Journal of International Law 155, 168 (2019).

[146] Varnava and Others v. Turkey, ECHR No. 16064/90, § 185 (2009).

[147] Jonathan Morgan, Richard Ekins and Guglielmo Verdirame, Derogation from the European Convention on Human Rights in Armed Conflict: Submission to the Joint Committee on Human Right, § 2 (2017). Available at: https://judicialpowerproject.org.uk/derogation-from-the-european-convention-on-human-rights-in-armed-conflict-submission-to-the-jchr/ (last visited Feb. 7, 2024).

However, the fact that the court takes into account IHL norms and makes an exception in the articles of the Convention cannot be considered interference. In other words, the court's reliance on differences between the IHL and the ECHR when determining a state's extraterritorial jurisdiction cannot be considered an arbitrary limitation.[148]

The theorists criticizing the interaction of the ECHR with the IHL system during its extraterritorial application raise another question that will lead to discussion. Can absurd consequences appear when applying the provisions of the Convention to International Armed Conflicts? According to them, such a reference can have absurd and harmful inferences.[149] As an instance, Article 2 of the ECHR can be interpreted as prohibiting the killing of enemy forces in armed conflicts unless there is a severe need to protect life. On the other side, Article 5 can be interpreted as a rule limiting the capture of prisoners of war. As a cause, the lack of norms regarding prisoners of war in the list of exceptions in Article 5 can be cited. Therefore, this case does not allow the application of detention for prisoners of war.[150] Nonetheless, in terms of IHL norms, it is normal to kill combatants in a legal war and restrict the freedom of prisoners of war. In appearance, the provisions of the Convention cannot be applied to armed conflicts without considering the norms of IHL. In respect of Meirer, while such a critical approach is to be taken seriously, it should not be overstated.[151]

In general, two essential factors should be analyzed in order not to get an absurd result during the relationship of the ECHR with IHL: the time and nature of the control (over the territory or people) established by a member state in another territory must be clearly defined; the second is to focus on Articles 2 and 5 of the ECHR and the existence of exceptions under Article 15. For example, an exception in Article 2 for "deaths resulting from lawful acts of war" would not produce the absurd inferences that critics claim. As can be seen, the ECtHR should not interpret the rules of the Convention (especially Articles 2, and 5) in a strict and radical way.[152] In this regard, on the interpretation of Article 2, the ICJ Advisory Opinion on Nuclear Weapons stated that IHL norms on the use of lethal force in international armed conflicts constituted a "lex specialis", and that IHL should be referred to for the precise meaning of these acts.[153]

---

[148] Meier Severin, *Reconciling the Irreconcilable? – The Extraterritorial Application of the ECHR and its Interaction with IHL*, 9 Goettingen Journal of International Law 395, 413 (2019).
[149] *Ibid*.
[150] *Supra* note 147, § 5.
[151] Severin, *supra* note 148, 414.
[152] *Ibid*.
[153] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, § 25 (1996). Available at: https://www.icj-cij.org/case/95 (last visited Feb. 7, 2024).

Despite these efforts, the Strasbourg court indicated that the application of Articles 2 and 5 to International Armed Conflicts is not an essential element for states to invoke the derogation. In particular, the court's approach in the case of *Hassan* was to interpret IHL norms with due regard, even if states invoked no derogations.[154] Moreover, determining the reconciliation between IHL and the ECHR under Article 5 was one of the commendable steps taken by the Strasbourg court. For example, the court noted in *Hassan* that the circumstances of derogation in Article 5 should be harmonized with IHL norms on detention "as far as possible".[155] The ECtHR must consider the norms of IHL in each case and avoid a strict interpretation of the rules of the Convention.

The "balance approach" model is not necessarily intended to replace other models outright. Instead, it offers an alternative framework that can complement and enhance existing models, particularly in contexts where they may be inadequate or insufficient. Each model has its own strengths and limitations, and the choice of which to apply may depend on the specific circumstances of a case or situation.

The goal of introducing the "balanced approach" is to provide a more comprehensive and flexible framework for analyzing extraterritorial jurisdiction under the European Convention on Human Rights (ECHR). By acknowledging the complexities of state sovereignty and human rights obligations in diverse contexts, the "balance approach" seeks to offer a nuanced understanding that can address gaps or shortcomings in existing models.

Therefore, rather than replacing other models, the "balance approach" aims to enrich the discourse surrounding extraterritorial jurisdiction and contribute to a more robust understanding of states' responsibilities in protecting human rights, both within and beyond their borders.

Thus, under the "balance approach", the concept of jurisdiction in the first article of the ECHR is interpreted in a flexible and contextual manner, taking into account the need to balance state sovereignty with the protection of human rights, particularly in extraterritorial contexts. This interpretation enables a more comprehensive analysis of state responsibility and accountability for human rights violations, ensuring that individuals are not left unprotected simply because their rights are affected beyond the state's borders.

To better understand the balanced approach, it is useful to focus on its positive and negative. On the one hand, the main advantages of the balanced approach to extraterritorial jurisdiction under the ECHR include: By emphasizing proportionate responses, the balanced approach ensures that

[154] *Supra* note 139, § 103.
[155] *Id.*, § 104.

human rights are upheld without unduly infringing on legitimate state interests, such as national security. This helps strike a delicate balance between protecting individual rights and accommodating states' concerns, promoting a more equitable and effective resolution of jurisdictional disputes.

The balanced approach recognizes the importance of considering the specific circumstances of each case when determining jurisdiction under the ECHR. This allows for a more nuanced understanding of extraterritorial human rights violations, taking into account factors such as the severity of the violation, the nature of state involvement, and the impact on affected individuals.

By encouraging cooperation and dialogue between states and international bodies, the balanced approach fosters a collaborative approach to upholding human rights standards. This may lead to increased information sharing, coordinated responses to human rights violations, and diplomatic efforts to address systemic issues, ultimately enhancing the effectiveness of human rights protections in extraterritorial contexts.

One of the key advantages of the balanced approach is its emphasis on the protection of vulnerable populations, such as refugees, migrants, and civilians affected by armed conflict. By prioritizing the needs of these individuals and implementing targeted protection measures, the balanced approach ensures that those most at risk of human rights abuses receive adequate safeguards and support.

In summary, the balanced approach offers a pragmatic and adaptable framework for addressing extraterritorial human rights violations under the ECHR. By balancing the protection of human rights with the legitimate interests of states, this approach promotes effective and equitable jurisdictional outcomes, ensuring robust human rights protections in an increasingly complex global landscape.

On the other hand, while the balanced approach to extraterritorial jurisdiction under the ECHR offers several advantages, it also has some drawbacks. The balanced approach relies on states to strike a proportionate balance between human rights protection and their legitimate interests. However, there is a risk that states may abuse this discretion to justify human rights violations under the guise of national security or other state interests. Without robust checks and balances, states may exploit the ambiguity of the balanced approach to evade accountability for their actions, undermining the effectiveness of human rights protections.

The balanced approach adds a layer of complexity to jurisdictional analysis under the ECHR. Unlike traditional models that provide clear, objective criteria for determining jurisdiction, the balanced approach requires a nuanced consideration of multiple factors, including the specific circumstances of each case. This complexity can create legal uncertainty and make it challenging for states and individuals to predict the outcome of

jurisdictional disputes, potentially leading to prolonged legal battles and inconsistent rulings.

One of the main drawbacks of the balanced approach is its inherent subjectivity and reliance on judicial interpretation. Determining the appropriate balance between human rights protection and state interests can be highly subjective and may vary depending on the interpretation of the court adjudicating the case. This lack of clear, objective criteria may lead to unpredictable outcomes, undermining the certainty and predictability of jurisdictional decisions. However, there is no need to be afraid of unexpected results. Because the court did not take into account the criterion of subjectivity and the specific features of the violation, it has been criticized so far. Perhaps, this criterion will create conditions for restoring the reputation of the court on the relevant issue.

In summary, while the balanced approach offers a pragmatic framework for addressing extraterritorial human rights violations, it also presents several drawbacks, including subjectivity in interpretation, potential for state abuse, and legal complexity. Efforts to mitigate these drawbacks, such as enhancing transparency, accountability, and oversight mechanisms, are essential to ensure the effectiveness and integrity of the balanced approach under the ECHR.

Applying the balanced approach model in a court case involves considering the specific facts and circumstances of the case to strike a proportionate balance between protecting human rights and accommodating legitimate state interests. Here is how the application of this model might play out in a hypothetical court case. Suppose there is a case before the ECtHR involving allegations of extraterritorial human rights violations by State X. The allegations concern State X's involvement in drone strikes targeting suspected terrorists in a foreign country, resulting in civilian casualties.

Assessment of Human Rights Violations: The court would begin by assessing the alleged human rights violations in light of the principles established under the European Convention on Human Rights (ECHR), such as the right to life (Article 2) and the prohibition of torture and inhuman or degrading treatment (Article 3). The court would consider the severity and scope of the alleged violations, including the number of civilian casualties and the extent of suffering inflicted.

Evaluation of State Interests: Next, the court would evaluate the legitimate interests invoked by State X to justify its actions, such as national security concerns or the fight against terrorism. State X may argue that the drone strikes were necessary to protect its citizens from imminent threats posed by terrorist groups operating in the region. The court would carefully examine the evidence presented by State X to substantiate its claims and assess whether the measures taken were proportionate to the threat posed.

Balancing Test: Using the balanced approach, the court would weigh the competing interests of protecting human rights and accommodating state interests. The court would consider factors such as the necessity of the measures taken, the proportionality of the response, and the availability of less intrusive alternatives. It would strive to strike a fair and equitable balance between these competing interests, taking into account the specific context of the case and the rights at stake.

Judicial Review Outcome: Depending on the application of the balanced approach, the court may reach different outcomes in the case. If the court finds that State X's actions were proportionate and necessary to address legitimate security concerns, it may conclude that there was no violation of the ECHR. However, if the court determines that State X's actions were disproportionate or arbitrary, resulting in egregious human rights violations, it may find State X in breach of its obligations under the ECHR and order appropriate remedies or compensation for the victims.

Overall, the application of the balanced approach in a court case involves a careful and nuanced assessment of the competing interests at play, with the aim of ensuring robust human rights protections while accommodating legitimate state concerns. The outcome of the case will ultimately depend on the court's determination of the facts and its application of the relevant legal principles under the ECHR.

The author concludes that the Strasbourg Court should not interfere too much with the Geneva Conventions, but should also protect the reputation of the ECHR. To do this, as I mentioned above, is done with balance. Therefore, there is no nuance that we can say that this is the most effective model for the current era. The Court may apply both models, depending on the circumstances of the case, to maintain a balance between the Conventions. Only on the condition that justice is not violated. By respecting the principles and customary norms of IHL, the balanced model acknowledges the unique legal framework governing situations of armed conflict and strives to maintain harmony between human rights obligations under the ECHR and the exigencies of warfare.

Conclusion

A problematic aspect of the subject was Article 1 of the Convention, which defined jurisdictional boundaries. Article 1 of the ECHR stipulates that member states must preserve the rights and freedoms specified in Section I of this Convention "within their jurisdiction". The most significant question that arose in this direction was how and by what methods the extraterritorial application of the Convention would be carried out. The numerous case practices of the Strasbourg Court revealed various approaches.

This research analyzed the most important cases implemented by the ECtHR. Based on these cases, the Strasbourg Court developed two essential

hypotheses. First is the spatial model, which accordant with the court, if the signatory state can establish full or partial effective control over the territory of another state, it should also be responsible for **violations** of law that may occur in that territory. This study examined that this control also must be "effective" in accordance with the case law. Secondly, this study points out the cases based on the personal model and indicates its results. The use of physical force against or detention of people in another state by authorized state agents would create an opportunity for the application of this model.

Another consequence of this study is the examination of alternative models regarding the interpretation of Article 1 of the ECHR. The functional model put forward by Sir Bonello, one of the Judges in *Al-Skeini*, was based on the connection between control and obligations of states. If a state is able to originate functional control, it must in any case fulfill its obligations under the ECHR. Another alternative model is called "The Third Model" implemented by Marko Milanović. This model is based on the comparison between negative and positive obligations. In this context, the article concludes that while positive commitments are enforceable within certain jurisdictional boundaries, negative commitments remain valid everywhere. Additionally, this study used the method of legal analysis, disputing the proposal that the third model should replace the others. The author compared Milanović's suggestion with several cases and concluded that the personal model and the third model provided equal outcomes.

Finally, it can be concluded that the Strasbourg Court should resort to the policy of balance in order to regulate the participation of member states of the convention in armed activities carried out on the territory of other countries for many years. In fact, they started to do it late. The Strasbourg Court realized that their radical approach against states for human rights violations in armed conflicts led to a major collision: It should not turn into a power struggle between the ECHR and the Geneva Conventions.

In conclusion, the proposal for a balanced model of extraterritorial jurisdiction represents a progressive step towards addressing the complexities of modern transnational legal challenges. By synthesizing principles from the territorial and personal models, while incorporating additional factors, the balanced model offers a principled and pragmatic framework for adjudicating cross-border cases with fairness, efficiency, and respect for international norms. Its adoption would signal a commitment to advancing the rule of law in an increasingly globalized legal landscape.

ANNEX 1

Table 1. **The ECtHR's cases on extraterritorial jurisdiction**

The ECtHR's Cases	**Applicable Model**	**Violated human rights**	**The factor in the base of extraterritorial jurisdiction**	**Does extraterritorial jurisdiction exist?**
Loizidou v. Turkey	Spatial	Right to liberty and security, right to respect for private and family life, protection of property, *etc*.	Occupation, The Exercise of Effective Control Over Part of a Territory	Yes
Banković v. Belgium	Spatial	Right to life, freedom of expression, the right to an effective remedy	To apply force from distance (Air attack)	No
Ilascu v. Moldova and Russia	Spatial	Prohibition of torture, right to liberty and security, right to a fair trial	The Exercise of Effective Control Over Part of a Territory	Yes
Chiragov v. Armenia	Spatial	Right to respect for private and family life, right to an effective remedy, protection of property	Occupation, Providing political, financial, and military support to the local administration	Yes

Cyprus v. Turkey	Personal	Right to life, prohibition of torture, right to liberty and security, right to respect for private and family life, *etc*.	The control of state agents over people and things in the territory of another state	Yes
Issa v. Turkey	Personal	Right to life, prohibition of torture, right to liberty and security, *etc*.	The control of state agents over people and things in the territory of another state	No
Öcalan v. Turkey	Personal	Prohibition of torture, right to liberty and security, prohibition of discrimination	Detaining the victim in the territory of another state and using physical force against him	Yes
Al-Skeini v. the UK	Personal	Right to life, (inappropriate investigation into the death fact)	The killing of people in the territory effectively controlled by a state	Yes
Hassan v. the UK	Personal	Right to life, prohibition of torture, right to liberty and security	Detaining the victim in the territory of another state and using physical force against him	Yes

Source: Compiled by the author.