A functional-impact model of jurisdiction: Extraterritoriality before of the European Court of Human Rights

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1. *Introduction*

In the two insightful articles of this Zoom-in, Mallory and Raible contest, to different extents, the lack of a principled approach on extraterritorial jurisdiction by the European Court of Human Rights (ECtHR or the Court). They ask, *inter alia*, whether time has arrived for a moment of clarity fathoming current mutable readings of jurisdiction whose outcomes are at times erratic and unpredictable.[1] In particular, Mallory emphasizes how the Court is progressively retreating from its leadership position in the evolving notion of extraterritorial jurisdiction.[2] Indeed, as discussed in Section 4, it appears that UN Treaty monitoring bodies and other regional courts are leaving the Strasbourg Court behind in search of a more expansive applicability of human rights treaties outside territorial borders, in particular with regard to the right to life.

Some of the most recent decisions of the Court have been criticized for 'promoting fragmentation in international law, but also [for] pushing

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[1] C Mallory, 'A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?' (2021) 81 QIL-Questions of Intl L 33; L Raible, 'Extraterritoriality between a Rock and Hard Place' (2021) 81 QIL-Questions of Intl L 28.

[2] Mallory (n 1) 48.

the Court to an extremely isolated position worldwide and thus discrediting its role as a human rights guarantor in Europe.'[3] Therefore, a more sweeping stance in the judgments of the Court becomes indispensable to stay credible in the face of the various transboundary violations of human rights, including climate change/environmental destruction cases and international armed conflicts.

In the field of human rights law, the concept of jurisdiction has acquired an obligatory dimension,[4] requiring Contracting Parties to human rights treaties to secure fundamental rights to individuals falling within their jurisdiction, both within and outside State borders. Whilst in general international law jurisdiction refers to the power and legal authority to affect people (and property),[5] jurisdiction in human rights law would be engaged (and thus human rights obligations triggered) also when a State exercises *de facto* authority, not necessarily *de jure*.[6] Therefore, international human rights bodies, *in primis* the ECtHR and the UN human rights committees, interpret jurisdiction as reflecting a *factual* notion through the exercise of State power or authority, regardless of the legality of the act under public international law.[7]

State jurisdiction is a *conditio sine qua non* for people to have human rights enforceable against the State and for the State to have obligations toward those people. The relational nature of jurisdiction between a subject and the authorities is key to understanding the normative relationship that unites State parties to a human rights treaty with their subjects.[8] A State will therefore be responsible for complying with its human rights obligations each time a person is subject to or is within its jurisdiction, ie, that individual is within the territory of the State concerned, under its

[3] See, eg, *Georgia v Russia* App no 38263/08 (ECtHR, 21 January 2021) Partly Dissenting Opinion Judge Pinto De Albuquerque para 2.

[4] C Ryngaert, *Jurisdiction in International Law* (OUP 2015).

[5] See, *inter alia*, A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British YB Intl L 187.

[6] See, generally, L Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (OUP 2020)

[7] Ryngaert (n 4).

[8] S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden J Intl L 857. See also C Focarelli, *International Law as a Social Construct* (OUP 2013) 397-98.

control, or affected by organs acting on behalf of that State. In Cannizzaro's words on extraterritoriality,

> 'The logic of fundamental human rights is not to accord to individuals selective protection, *ratione loci*, but rather to reduce the unfettered discretion of public authority. Limiting their effect to a definite geographical space, or to pre-determined conditions of application, would subvert the logic and the very *raison d'être* of the sphere of fundamental rights pertaining to individuals'.[9]

The heated scholarly debate unfolding on jurisdiction shows how

> '[i]ncreasingly … the categories [for the exercise of jurisdiction] have proved to be too fixed – and perhaps too few – to serve the interests of States … and the needs of the system (including new needs responding to new commitments to human values). Developments have blurred the traditional categories, suggesting that the assumption of rigid categories (territoriality, nationality) are no longer valid, and that a more flexible jurisprudence would better serve the purposes of the law and the needs of the system'.[10]

In Section 2, I will briefly introduce the concepts of 'extraterritorial jurisdiction' and 'effective control'. Whilst the notions of 'personal control' and 'territorial control' are not explicitly mentioned in the text of the ECHR, the Court has so far used them to include situations where a State exercises extraterritorial jurisdiction. As the list of typical situations in which a jurisdictional link arises is not exhaustive,[11] nothing prevents the Court from proposing a new test, which can better encompass unprecedented situations. Therefore, in Sections 3 and 4, I will explore the feasibility of a comprehensive paradigm based on functional jurisdiction and public powers, a paradigm that is at the same time complemented by an approach to jurisdiction based on the control exercised by the State over an individual's enjoyment of human rights, either within or outside

[9] E Cannizzaro, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels' (2014) 25 Eur J Intl L 1094.

[10] L Henkin, 'International Law: Politics, Values and Functions. General Course on Public International Law' (1989) 216 Recueil des Cours de l'Académie de Droit International 280, 291.

[11] *Georgia v Russia,* Jointly Partly Dissenting Opinions of Judges Yudkivska, Wojtyczek, and Chanturia (n 3).

territorial borders. More specifically, in Section 3, I will attempt to show how a functional reading of jurisdiction, which is not reliant on physical control and the positive/negative nature of State obligations,[12] would offer a more coherent stance to the Court in a vast array of cases, including State action at sea and the innumerable (interstate and individual) complaints concerning armed conflicts and active hostilities.[13]

Furthermore, I will cast light on the notion of 'special features' used by the Court in an increasing number of judgments to justify the engagement of extraterritorial jurisdiction. Being contingent on the particular circumstances of each case, the scope of the 'special features' doctrine has been left undefined, fostering legal uncertainty. Therefore, I will investigate whether and to what extent this formula can still be integrated within a *functional-impact* model of jurisdiction. Whilst full stability in the law is unlikely to be reached,[14] what will emerge is a portray of jurisdiction as a 'variable geometry notion',[15] flexible enough to encompass an ample range of conducts, including those presumably occurring in a context of 'chaos'.[16]

Section 4 will bring other human rights bodies into the discussion. Over the last years, general comments and decisions regarding individual communications by UN treaty bodies have adopted more expansive interpretations of jurisdiction, going well beyond the current approach of the ECtHR.[17] I aim to contribute to the inspiring debate, launched on

[12] According to Besson, negative and positive obligations are inseparable and complementary, as also confirmed by *Isaak v Turkey* App no 44587/98 (ECtHR, 28 September 2006) para 106; and *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) para 35; Besson (n 8) 879.

[13] While my analysis goes beyond State action at sea, it partly builds on Moreno-Lax's thorough understanding of functional jurisdiction, which takes extraterritorial maritime migration multi-actor interventions as a key case in point. See V Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *S.S. and Others v Italy*, and the "Operational Model"' (2020) German L J 401–404.

[14] See Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Hart Publishing 2020) 200.

[15] D Mauri, 'On American Drone Strikes and (Possible) European Responsibilities: Facing the Issue of Jurisdiction for "Complicity" in Extraterritorial Targeted Killings' (2019) 28 Italian YB Intl L 268.

[16] For example, *Georgia v Russia* (n 3) para 126.

[17] See eg, UN HRC, *AS and Others v Italy* (27 January 2021) UN Doc CCPR/C/130/D/3042/2017; 'General comment no 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life' (30 October 2018) UN Doc CCPR/C/GC; UN Committee on the Rights of the Child, 'Communications no

QIL by Mallory and Raible, asking to what extent the Strasbourg Court, whose interpretation of the ECHR has often been informed by the approach of international courts and human rights committees, would positively rely in the near future on the interpretation of human rights principles articulated by these other bodies – in particular with regard to the *impact* of State actions on the enjoyment of individual rights as an element to affirm extraterritorial jurisdiction.

2. *A brief overview on jurisdiction and effective control*

Under Article 1 of the ECHR, '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Since the phrasing of Article 1 'under its jurisdiction' is not geographically limited,[18] the ECtHR has inferred jurisdiction not only from territorial sovereignty, but also from lesser degrees of dominance, such as occupation or 'effective overall control.'[19] I have provided elsewhere a reconstruction of the evolution of extraterritorial jurisdiction and the 'effective control' test before the ECtHR,[20] so, for reasons of space, such a complex body of case law cannot be thoroughly commented here. Whilst the jurisprudence of the Court is marred by doctrinal uncertainty and lack of internal coherence, jurisdiction is today conceived of as being essentially 'functional', ie, it pertains to the function of jurisdiction. It concerns the legal relationship that unites State parties to a human rights treaty and their subjects through the exercise of State power or de facto control – without restriction of its scope to a given territory or to nationals.[21]

79/2019 and no 109/2019' (2 November 2020) UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019.

[18] See *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011) para 140.

[19] *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 February 1995) (ECtHR, 18 December 1996) (Preliminary objections and merit); *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) (Judgment – Just Satisfaction).

[20] M Giuffré, *The Readmission of Asylum Seekers under International Law* (Hart Publishing 2020).

[21] Y Shany, 'The Extraterritorial Application of International Human Rights Law' (2020) 409 Recueil des Cours de l'Académie de Droit International 30-31

Despite jurisdiction and causation being two discrete concepts,[22] the Court has sometimes conflated them to infer a jurisdictional link under Article 1 of the ECHR. What emerges from the Court's case law is that 'pure causation is insufficient to establish jurisdiction in relation to utterly accidental and unpredictable outcomes. However, the proximate and predictable results must be taken into account when planning and executing State action, whatever the location of its agents and of the action itself.'[23] Indeed, when exercising its functions (both in programming and enforcing a certain action), the State should assess what reasonably foreseeable consequences its conduct has on the enjoyment of human rights by persons under its jurisdiction.

In *Bankovic and Others v Belgium and Others*, the Court has emphasized the requirement of legal authority to establish jurisdiction.[24] However, a joint reading of the ECtHR case law reveals how the concept of 'effective control' triggering Article 1 of the ECHR also involves those State actions that may fall short of arresting, detaining, or extraditing the individuals concerned.[25] 'Effective control' in the personal mode can imply any coercive conduct imposed on a person through the use of direct force (ie, by shooting or bombing), the exercise of physical power and control in a situation of proximate targeting (even outside of either the context of a military operation, a situation of arrest or detention),[26] 'but

[22] S Vezzani, 'Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani' (2018) Rivista di Diritto Internazionale 1086 ff.

[23] Moreno-Lax (n 13) 402. See also, *Bankovic v Belgium* App no 52207/99 (ECtHR, 12 December 2001) (Admissibility) para 75.

[24] The *Bankovic* argument – whereby extraterritorial jurisdiction is 'as a general rule, defined and limited by the sovereign territorial rights of the other relevant States' – was reaffirmed, more recently, in *MN and Others v Belgium* App no 3599/18 (ECtHR, 5 May 2020) para 99.

[25] See eg, *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010). With regard to State security forces acting abroad, see *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005); and *Ilich Sanchez Ramirez v France* App no 59450/00 (ECtHR, 4 July 2006). On cases of military presence abroad, see, *Al Saadoon and Mufdhi v United Kingdom* App no 61498/08 (ECtHR, 30 June 2009); *Al-Skeini v UK* (n 18); *Al-Jedda v UK* App no 27021/08 (ECtHR, 7 July 2011). With regard to military interventions amounting to effective control see *Markovic and Others v Italy* App no 1398/03 (ECtHR, 14 December 2006); *Mansur PAD and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007) (Admissibility).

[26] See *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021) para 161.

also less intrusive measures like forcing a boat off of its course',[27] or killing someone in an exchange of fire where it is not known which side fired the fatal bullet.[28]

3. *Taking 'functional jurisdiction' and 'public powers' seriously: What role for 'special features'?*

In light of the foregoing, this Section aims to introduce the notion of 'functional jurisdiction' discussing what the content and scope of 'State functions' are, when a State does start exercising its public powers, and whether the planning of a State action – whose execution has reasonably foreseeable consequences on the rights of persons – contributes to engage the jurisdiction (including 'contactless' jurisdiction) of that State.[29] It will also explore the nebulous concept of 'special features' recently used by the Court to infer extraterritorial jurisdiction.

According to Judge Albuquerque, in many of the ECtHR's cases,

> 'jurisdiction depend[s] upon the *de facto* authority exercised by the State over a person, a group of persons, property or an area, regardless of the instantaneous or continuous nature of the State action, or the intentional, deliberate, negligent or collateral character of the damage caused, or the legality of the State action or even the determination of the substantive law applicable to the facts in issue'.[30]

It thus comes as a surprise the Court's argument (in *Georgia v Russia*) that 'the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of

[27] Bank, 'Refugees at Sea; Introduction to Article 11 of the 1951 Convention' in Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol A Commentary* (OUP 2011) 841

[28] See *Al-Saadoon v UK* (n 25).

[29] On contactless control and jurisdiction, see M Giuffré, V Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to 'Contactless Responsibility' for Forced Migration Flows' in Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar 2019).

[30] *Georgia v Russia*, Dissenting Opinion Judge de Albuquerque (n 3) para 9.

chaos' excludes jurisdiction.[31] Indeed, if a jurisdictional link is established every time a person is detained, injured or murdered abroad, as a result of the exercise of State prerogatives, it would be questionable the denial of such control when many more people are detained, injured, or murdered (including during the chaotic phase of active hostilities or an airstrike).[32] Moreover, if jurisdiction is engaged under Article 1 of the ECHR in respect of 'isolated and specific acts',[33] it is even more so when a State carries out a large-scale operation, which has a preparatory phase, a decision-making phase and an executive phase with far-reaching consequences for the affected victims.[34]

In *Hanan v Germany*, the Court deals with the duty to investigate following a military operation abroad. Here, the fact that Germany was already investigating the deaths of civilians caused by an airstrike in Kunduz, ordered by German Colonel K., was not considered enough to establish jurisdiction.[35] Instead, and rather than offering a principled reading of jurisdiction, the Court makes the jurisdictional link contingent on 'special features', such as the obligation for Germany to investigate the deaths of a military attack under domestic law and customary humanitarian law and the fact that Afghani authorities were not able to conduct investigations themselves.[36]

The Court had already applied this 'special features' doctrine in previous Article 2 procedural obligation cases, such as *Güzelyurtlu and Others v Cyprus and Turkey*[37], *Romeo Castano v Belgium,*[38] *and Georgia v Russia.*[39] However, *Hanan* reveals the concerns of some of the judges for a decision that could 'excessively broaden the scope of application of the Convention'.[40] The Grand Chamber was eager to emphasize that it was

[31] *Georgia v Russia* (n 3) para 126.
[32] *Georgia v Russia*, Partly Dissenting Opinion Judge de Albuquerque (n 3) para 27.
[33] *Georgia v Russia* (n 3) para 132.
[34] *Georgia v Russia*, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia (n 3) para 11.
[35] *Hanan v Germany* App no 4871/16 (ECtHR, 16 February 2021).
[36] ibid paras 141-142.
[37] *Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019) para 192.
[38] *Romeo Castaño v Belgium* App no 8351/17 (ECtHR, 9 July 2019).
[39] *Georgia v Russia* (n 3) para 332.
[40] *Hanan v Germany,* Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke (n 35) para 7.

not making any ruling on the substantive element of Article 2, despite its determination of a jurisdictional link for the procedural component of the right to life.[41]

In resorting to the 'special features' formula to infer extraterritorial jurisdiction in complex situations, especially when European States are engaged in armed confrontations outside their borders, the Court 'does not consider that it has to define *in abstracto* which "special features" trigger the existence of a jurisdictional link […], since these features will necessarily depend on the particular circumstances of each case and may vary considerably from one case to the other.'[42]

It is thus to be seen whether these findings will be considered too much of a stretch being the outer limits of where some judges, at pains with an 'overly expansive vision of the Court as an adjudicator of the totality of armed conflict'[43] are willing to go. By now, it seems that renouncing to ground its reasoning on a construct of more universal application, the Court intentionally avoids engaging in thorny issues, such as either the jurisdiction of European States or the scope of fundamental rights during their overseas activities, thus strategically resorting to the flexible and contested concept of 'special features' to justify the *ad hoc* exercise of jurisdiction.[44]

Instead of such piecemeal approach, which risks undermining the Court's credibility, these cases could have been more coherently addressed if the Court had relied on a functional test to affirm jurisdiction outside the territory of the respondent State. For instance, in *Hanan*, Germany's jurisdiction could have been established by relying on the fact that, through its State agents deployed in Afghanistan, Germany was in the position (and had the power with their enforcement actions) to directly exercise control over the applicant's sons killed by the Kunduz airstrike.

[41] *Hanan v Germany* (n 35) paras 143-144.

[42] *Güzelyurtlu and Others v Cyprus and Turkey* (n 37) para 190.

[43] *Georgia v Russia*, Concurring Opinion Judge Keller (n 3) para 4.

[44] See, *inter alia*, Milanovic, 'Georgia v. Russia No. 2: The European Court's Resurrection of Bankovic in the Contexts of Chaos' (2021) EJILTalk <www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos>.

Having said that, and without going beyond the – at times contradictory – understanding of jurisdiction the Court has developed to date,[45] some common threads in its case law can be traced and knotted together to provide a clearer and more coherent pathway to jurisdiction. I believe enhanced consistency would rest on the notions of *functional jurisdiction* and *public powers* as well as on the *impact* the actions and omissions of State authorities have on the enjoyment of rights. By appraising 'the facts against the principles which underlie the fundamental functions of the Convention', the Court should 'stop fashioning doctrines which somehow seem to accommodate the facts.'[46] At the same time, as Strasbourg judges appear unwilling to get rid of the 'special features' formula altogether, a pragmatic approach could see the Court using 'special features' as an auxiliary tool, with the sole purpose of corroborating its prior principled reasoning on jurisdiction (neatly based on a functional-impact model). This does not mean that jurisdiction and potential responsibility should be assessed, for instance, under international humanitarian law or the law of the sea. But as long as 'special features' include references to other areas of law (eg, international humanitarian law or the law of the sea), these considerations could be imported into the reading of the term jurisdiction to aid (ie, to reinforce) the Court's interpretation and application of international human rights law in the specific circumstances. Such a contextual interpretation, which encompasses other applicable rules of international law, would be in line both with international practice and with the concept of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[47]

[45] *Georgia v Russia*, Dissenting Opinion Judge Albuquerque (n 3) paras 9–12. See also, *Al-Skeini and Others*, Concurring Opinion Judge Bonello (n 18) paras 4 and 7.

[46] *Al-Skeini and Others*, Concurring Opinion Judge Bonello (n 18) para 8.

[47] See IAComHR, Inter-state Petition IP-02, Report No 112/10, Inter-Am CHR, OEA/Ser.L/V/II.140 Doc 10 (21 October 2011) para 121; UN HRC, *AS and Others v Italy* (n 17) para 7.6, 7.8; *AS and Others v Malta* (13 March 2020) UN Doc CCPR/C/128/D/3043/2017 paras 6.6, 6.7. On this point, see also, M Longobardo, S Wallace, 'The 2021 ECtHR's Decision on *Georgia v Russia (II)* Case and the Application of Human Rights Law to Extraterritorial Hostilities' (2022) 26 Israel L Rev (forthcoming); and E Papastavridis, 'The European Convention of Human Rights and Migration at Sea: Reading the "Jurisdictional Threshold" of the Convention Under the Law of the Sea Paradigm' (2020) 21 German L J 419.

3.1. *Functional jurisdiction in planning and executing extraterritorial actions*

Several actors (including Strasbourg judges in various separate opinions)[48] have proposed a functional test for jurisdiction. As a third-party intervention in *Hanan v Germany* has pointed out, this test can be affirmed 'where it is within a State's power to perform certain functions that are consistent with their ratification of the Convention, the protection of human rights, the investigation of human rights abuses, etc.'[49] In their partly dissenting opinion in *Georgia v Russia*, judges Yudkivska, Wojtyczek and Chanturia argued that

> 'a High Contracting Party shall secure the [ECHR] rights and freedoms […] to everyone under its State power and the scope of the rights and freedoms to be secured should be adequate to the extent of the scope of effective State power'.[50]

Therefore, in their view, a jurisdictional link also arises

> 'every time a State undertakes *pre-planned extraterritorial actions* involving the use of instruments of *State power directly affecting private parties*, such as coercion or force. The process of planning and deciding about general methods and specific actions, as well as carrying out the decisions taken, creates a jurisdictional link and places the persons affected under the *public power* of the State in question, or to use other words, under the control of that State'.[51]

I believe that a coherent approach to jurisdiction would consider that a State exercises control also through policy measures and operational

[48] See *Al-Skeini and Others*, Concurring Opinion Judge Bonello (n 18) paras 3–20; *Georgia v Russia*, Dissenting Opinion Judge Albuquerque (n 3) para 26.

[49] Rights and Security International, '*Hanan v Germany* - Grand Chamber of the European Court of Human Rights (application no. 4871/16)' (26 February 2020) <www.rightsandsecurity.org/action/litigation/entry/hanan-v-germany-grand-chamber-of-the-european-court-of-human-rights>.

[50] *Georgia v Russia*, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia (n 3) para 3.

[51] ibid para 5. Also in *Carter v Russia*, the Court held that the poisoning of Mr Litvinenko had been the result of a planned and complex operation executed by two States agents acting on behalf of Russia, *Carter v Russia* (n 26) para 159.

conducts, which are deliberate expressions of State powers based (at times) on long-term strategies and cooperative practices.[52] In this regard, a jurisdictional link can be established when either one or more States exercise control over the preparation and execution of an action/policy affecting individuals outside territorial borders. This reasoning would ensure 'the *universal* and effective recognition and observance' of fundamental human rights, as enshrined in the Preamble to the ECHR. Therefore, for instance, jurisdiction over civilians can be affirmed in armed conflicts, including during the active hostilities stage, which is the operative expression of State powers requiring a well-planned and lengthy preparation. To give another example, European States might also engage jurisdiction whenever their authorities, with knowledge of a particular distress event at sea, decide to delay (in the framework of their containment policies) the executive part of their intervention (with belated succors resulting in the predictable death of people in danger); and whenever they delegate to a third country (with which they have established solid cooperative and long-standing *non-entrée* policies) the rescue/interdiction and pullback of the shipwrecked to unsafe ports of departure.

The participation of European States either in a military or border patrolling operation is not a one-off exercise of State authority, but rather part and parcel of a pre-planned policy, which is essential to the success of the actual operation. In this view, functional jurisdiction is not only engaged when State authorities exercise effective operational control through direct physical constraint over persons or territory, but also when public powers are exercised through the development and implementation of general policies or targeted policing operations either producing effects abroad or enforced beyond borders.[53]

For example, in *Bankovic*, the Court could have reached a different conclusion on jurisdiction if it had taken into account the broader framework of programmed operational action within which the actual bombing was carried out, without disregarding the foreseeable consequences

[52] Besson (n 8) 864–865.
[53] *Al-Skeini v UK* (n 18) para 131.

that such pre-planned State action could have on the life of civilian targets.[54] Likewise, in *Georgia v Russia*, the Court did not recognize extra-territorial jurisdiction during the active phase of the hostilities (8 to 12 August 2008). It failed indeed to acknowledge that the civilian targets unwillingly found themselves under the decision-making power of the Russian military commanders who enforced a pre-planned operation by means of an army, which is *per se* an exercise of public powers (and therefore of jurisdiction).[55]

Accordingly, in an armed conflict, it is not only the actual airstrike that has relevance in establishing a jurisdictional link with the victims, but the full preparation and planning of the military operation leading to the final order by a commander to drop the bomb. An agent of the State, by giving the order to launch an attack, operates within the limits of the powers delegated to them for the purpose of conducting State security-relevant activities. They have thus both the authority to directly affect the life of the people under their control and the *de jure* power to avert the foreseeable outcome. As the attack (whether by drone, helicopter, or poisoning assassination) creates a jurisdictional link, the State should assess 'its compliance with the provisions of Article 2 [of the ECHR] in advance, and [should also] conduct an independent and effective investigation into the deaths in its aftermath.'[56]

The sovereign authority nexus through the establishment of a public powers relation can thus trigger (functional) jurisdiction, which is manifested through legislative, executive, and/or adjudicative activity.[57] When assessing whether jurisdiction is engaged in a particular situation, it is therefore crucial to conduct a comprehensive evaluation where also the knowledge of the State on the foreseeable consequences of its actions/omissions and the impact these might have on the rights of people under its control is taken into account.

[54] *Contra*: In the leading *Ergi v Turkey* case, the Court held that the planned military action had been executed without taking sufficient precautions 'to protect the lives of the civilian population'. See, *Ergi v Turkey* App no 23818/94 (ECtHR, 28 July 1998) paras 79, 81. See also Moreno-Lax (n 13) 403.

[55] *Georgia v Russia*, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia (n 3) paras 6–8.

[56] Mallory (n 1) 208.

[57] Moreno-Lax (n 13) 403.

To give an example, the functional nature of State jurisdiction at sea distinguishes maritime frontiers from land borders. On the one hand, there are maritime borders drawn on maps, which delineate a physical area in which a State exercises its diverse degrees of sovereignty according to the legal regimes of the different maritime zones. Here, the powers that the State exercises are functional, for the protection of certain interests that international law deems fundamental within that maritime zone.[58]

On the other hand, there is a 'functional maritime frontier',[59] which materializes wherever the State performs its functions of border control, including on the high seas, beyond the physical space delimited by the 'map maritime frontier'.[60] While engaged in such extraterritorial activities, States exercise powers pertaining to border control prerogatives, which find their legal basis in national policies or bilateral/multilateral cooperation mechanisms. Such legal bases (legislative jurisdiction) limit and shape the content of the acting State's enforcement jurisdiction, namely its power 'to take executive action in pursuance of or consequent upon the making of decisions or rules'.[61] When States 'offshore' their migration controls, they move only part of the border's legal regime, as not all the elements linked with the territory can apply outside the territory. Nevertheless, all the elements concerning the persons under control do apply. This means that fundamental rights (such as the right to life and the prohibition of torture and inhuman and degrading treatment) are binding also when States cooperate with a proxy in the interdiction/pullback of migrants to ports of departure or activate their search and rescue services outside their territorial jurisdiction.

Whilst persons whose rights are infringed during rescue and patrol operations directly conducted by European States clearly fall under the personal mode of jurisdiction,[62] the situation is slightly more complex when rescue and pullbacks are delegated to a non-European country (funded, assisted, informed, and equipped by its European partners) to

[58] See, generally, M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007)

[59] S Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 Leiden J Intl L 661, 672.

[60] ibid.

[61] I Brownlie, *Principles of Public International Law* (6th edn, OUP 2003) 297.

[62] See, *Hirsi v Italy* App no 27765/09 (ECtHR, 23 February 2012).

avoid physical contact with the potential victims in the attempt to escape jurisdiction and rescue responsibilities.[63] However, even these operative situations of 'contactless' control, as much as they are different from an army mission to bomb specific targets in a city or to combat insurgents in a civil war, are all 'forms of exercise … of public power over the persons affected,'[64] who fall under the decision-making power of State authorities, and therefore under their jurisdiction. Indeed, any law-enforcement activities, such as large-scale military missions abroad (whether by means of boots-on-the-ground confrontations or aerial bombing), tactical operations on the national soil as well as immigration and border management, are primary State functions in which the State – through its well-planned actions of enforcement – exercises control over people under its jurisdiction, even in the absence of a legal title over the territory where the potential violation occurs.[65]

In this regard, it is questionable the fact that jurisdiction (eg, in *Georgia v Russia*) is affirmed during the occupation phase but not a few days earlier, during the active hostilities period, when Russia brought under its *de facto* control all those civilians killed and injured by the airstrike organized and executed by State authorities. Jurisdiction shall indeed be considered affirmed also during the initial muddled phase where the kinetic use of force (whether through artillery or at distance bombing) by State authorities, who are exercising their public powers through a well-planned activity, causes loss of human lives.

In light of the foregoing, the distinction between territorial and extra-territorial jurisdiction would be an artificial one, as jurisdiction purely ought to be 'functional' in the sense that it is affirmed whenever the compliance or the infringement of any of the functions of a State is within its authority and control. In other words, the facts fall within the jurisdiction of a State whenever the action (or inaction) of State agents is enforced through the exercise of their public powers; and whenever it is within the power of the State to investigate and punish the perpetrators of a violation or to compensate a victim.[66] Therefore, regardless of the lawfulness

[63] See, eg, *S.S. and Others v Italy* App no 21660/18 (pending before the ECtHR).

[64] *Georgia v Russia*, Joint Partly Dissenting Opinion Judges Yudkivska, Wojtyczek and Chanturia (n 3) para 6.

[65] For a similar view, see *Georgia v Russia*, Partly Dissenting Opinion of Judge Albuquerque (n 3) para 27.

[66] See also, *Al Skeini v UK,* Concurring Opinion Judge Bonello (n 18) paras 11-13.

of the State's conduct/omission, jurisdiction is engaged whenever a sovereign-authority link is established between the State and those under its (legal and/or factual) power and (either *de jure* or *de facto*) control. To put it with the words of Judge Bonello in his concurring Opinion in *Al-Skeini,*

> 'when it is within a State's authority and control, whether a breach of human rights is, or is not, committed, whether its perpetrators are, or are not, identified and punished, whether the victims of violations are, or are not, compensated, it would be an imposture to claim that, ah yes, that State had authority and control, but, ah no, it had no jurisdiction'.[67]

4. *Human rights bodies and the 'impact model'*

Complementing a functional approach to jurisdiction with an impact model, both facts and legal duties should be gauged to determine what consequences on human rights are *reasonably foreseeable*. The Court of Strasbourg has at times firmly rejected a model of jurisdiction grounded on the mere 'impact' that State action may have on the enjoyment of human rights by individuals placed outside a State Party's territory.[68] However, in some other cases, it has also tacitly accepted such an approach,[69] relying on 'contiguous concepts (such as attribution and causation) in an attempt to prove a "proximity" between State conduct and the impugned event – in other words, a relation of power.'[70]

The 'impact' model of jurisdiction has also been endorsed in most regional, and in the universal, systems of protection of human rights. Whilst UN human rights monitoring bodies are, in some circumstances, more progressive in the interpretation of the relevant treaties than the ECtHR, in some other instances, they either follow their regional counterpart or adopt a more restrictive position in the protection of human

[67] ibid para 12.
[68] See *Bankovic v Belgium* (n 23).
[69] See *Kebe v Ukraine* App no 12552/12 (ECtHR, 12 January 2017); *Women on Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009); *Andreou v Turkey* (n 12)*; Stephens v Malta* App no 11956/07 (ECtHR, 21 April 2009). For a recollection of all these cases, see Mauri (n 15) 259–62.
[70] Mauri (n 15) 263.

rights.[71] Moreover, although reducing the fragmentation of international law through cross-referencing between international courts and tribunals with a different purpose and structure is not necessarily bound (or at least likely) to produce positive effects,[72] cross-fertilization between human rights bodies can nonetheless be a fruitful trend to both avoid isolated positions worldwide and construe a more coherent approach to handle new complex cases having transboundary elements that warrant innovative interpretative solutions.

It does not pass unnoticed, for instance, the fact that the Court of Strasbourg, in all its cases dealing with the right to life abroad, has not even mentioned General Comment 36, issued by the UN Human Rights Committee (HRC or the Committee). According to General Comment 36, the right to life provides a positive obligation for ICCPR States Parties to ensure the respect of the right at issue and its protection, including the safeguard from '*reasonably foreseeable* threats and life-threatening situations that can result in loss of life', as well as situations which do not result in death.[73]

General Comment 36 also explains how 'all persons over whose enjoyment of the right to life [a State] exercises power or effective control' fall under that State's jurisdiction.[74] Individuals whose 'right to life is […] *affected* by [State] military or other activities in a *direct and reasonably foreseeable* manner'[75] come under the jurisdiction of that State, and the obligation to prevent loss of lives raises upon the State. Indeed, the actions and omissions of State authorities whose mandate and role warrant them to intervene (and nonetheless either fail to act or act with unjustifiable delay) may have a direct and reasonably foreseeable impact on the right to life of individuals outside their territory.[76] In other words, the

[71] B Cali, C Costello, S Cunningham, 'Hard Protection through Soft Courts? 'Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German L J 355-357.

[72] See P Lobba, T Mariniello, *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill 2017) 1-3.

[73] UN HRC, 'General Comment 36' (n 17) para. 7.

[74] ibid para 63.

[75] ibid para 63. See also UN HRC, *Munaf v Romania* (30 July 2009) UN Doc CCPR/C/96/D/1539/2006 para 14.2.

[76] UN HRC, 'General Comment 36' (n 17) para 22.

existence of a link between a State and a certain factual situation creates the law, in accordance with the principle *ex facto jus oritur*.[77]

In accordance with Article 31(3)(c) of the VCLT, Article 1 of the ECHR should be interpreted also considering other relevant rules of international law. This means for example, that in the context of an armed conflict, due consideration could be given to international humanitarian law. So while planning and executing an attack targeting a military objective, a State must carefully assess what is reasonably foreseeable as incidental damage taking all feasible precautions to protect civilians. For instance, the African Commission on Human and Peoples' Rights makes plain how, during armed conflict, the right to life needs to be interpreted with reference to the rules of international humanitarian law.[78] According to General Comment No 3,

> 'a State shall respect the right to life of individuals outside its territory. […] The nature of these obligations depends, for instance, on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected, or whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life. In any event, customary international law prohibits, without territorial limitation, arbitrary deprivation of life'.[79]

As emphasized in the UN Interim Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, 'the increasingly transnational nature of State actions entails a need to ensure that States abide by their fundamental human rights obligations when acting beyond, or when their domestic acts cause injury outside, their territorial boundaries.'[80]

[77] G Distefano, *L'ordre internationale entre légalité et effectivité. Le titre juridique dans le contentieux territorial* (Pedone 2002) 257.

[78] ACHPR, 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights' (4 –18 November 2015).

[79] ibid.

[80] 'UN Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (7 August 2015) UN Doc A/70/303 para 11.

In its Advisory Opinion on *The Environment and Human Rights,*[81] the Inter-American Court of Human Rights affirms that 'in international law, the bases of jurisdiction are not exclusively territorial, but may be exercised on several other bases as well.'[82] Furthermore, 'if there is a *causal link* between the action that occurred within its territory and the negative *impact* on the human rights of persons outside its territory', the individuals whose rights have been violated come within the jurisdiction of that State.[83] In order for the jurisdiction to arise, the State of origin has to exercise effective control over the act that causes the human rights violation, and when performing such act, the authorities of the State have to know, or should have known, 'of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals, and fail to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger.'[84]

4.1. *'Special relationship of dependency' and a reasonably foreseeable risk*

Along the same lines addressed above, the HRC affirmed, in *AS and Others v Italy*,[85] that once jurisdiction is established, an obligation to rescue and/or cooperate to save the lives of persons in distress emerges. In this case, concerning the tragic death of more than 200 persons in the Central Mediterranean, the Committee innovatively introduced the concept of 'special relationship of dependency'[86] to infer jurisdiction. Certainly, it could have been clearer in defining the pale of this formula as well as the cooperative duties and responsibilities of involved States whose succors were significantly delayed.[87] Indeed, it is not that the shipwrecked were dependent on Italy, but that Italy had the power to save

[81] Inter-American Court of Human Rights (IACtHR), *The Environment and Human Rights*, Advisory Opinion, OC-23/17 (15 November 2017).
[82] ibid para 74-75.
[83] *The Environment and Human Rights* (n 81).
[84] ibid para 120.
[85] *AS and Others v Italy* (n 17).
[86] ibid para 7.8.
[87] The Committee has deemed inadmissible the case against Malta for non-exhaustion of domestic remedies. UN HRC, '*AS and Others v Malta*' (17 May 2017) UN Doc CCPR/C/128/D/3043/2017. On the legal framework of incidents at sea during search

them, as the military cruiser was close enough to help them in the time available. Whilst such 'burdens need to be shared for rescue efforts to be effective in the long run,'[88] the novelty of this case is that jurisdiction was triggered by the fact that 'the individuals on the vessel in distress were directly affected by the decisions taken by the Italian authorities in a manner that was reasonably foreseeable in light of the relevant legal obligations of Italy.'[89]

The Committee availed itself of the law of the sea and the law on search and rescue to contextually interpret jurisdiction and State duties at sea in case of distress[90] (seemingly to the same extent to which, *mutatis mutandis,* international humanitarian law has been employed as a 'special feature' by the ECtHR to infer jurisdiction in case of armed conflicts).[91] However, the Committee did not derive jurisdiction from the duty to cooperate in/coordinate the succors or to respond in a reasonable manner to a distress call stemming from the law of the sea conventions only. It rather seems to merge *de jure* and *de facto* components together[92] entrenching jurisdiction under human rights law on several additional factors that are closely linked to the pivotal element of *knowledge* of both the distressing event and the foreseeable harm. These factual elements include the proximity of an Italian Navy vessel (ITS Libra) that had been alerted and had the ability to intervene in due time (to the best of its

and rescue operations, see G Cataldi, 'Migration in the Mediterranean Sea and Protection of Rights: Some Recent Cases of Italian Practice' in G Cataldi, M Corleto, M Pace (eds), *Migration and Fundamental Rights: The Way Forward* (Editoriale Scientifica 2019) 15-16.

[88] M Milanovic, 'Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations' (2021) EJILTalk <www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations>.

[89] *AS and Others v Italy* (n 17) para 7.8.

[90] See in particular, Reg 33 of the Convention on the Safety of Life at Sea (adopted 1 November 1974, entry into force 25 May 1980) 1184 UNTS 2; and art 4.6 of the International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS.

[91] See *Georgia v Russia* (n 3) paras 332, 324-325; *Hanan v Germany* (n 35) paras 142, 137.

[92] Also the ECtHR has affirmed that 'for the purposes of establishing jurisdiction […] the Court takes account of the particular factual context and relevant rules of international law', *Jaloud v the Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 141.

effective means)[93] and save lives, as well as the actual involvement of Italian authorities in the operation of rescue, even if this was deliberately an unreasonably delayed intervention.[94] The Committee could have certainly delved further into the correlation between all these factors avoiding the risk of conflating jurisdiction with human rights obligations.[95] At the same time, it appears again that the 'special features' doctrine in the case law of the ECtHR, does not then excessively differ from the rationale behind the 'special relationship of dependency' formula used to detect jurisdiction in this other seemingly chaotic context (the high seas) where States bear concomitant search and rescue obligations.

In *AS and Others v Italy*, rather than grounding jurisdiction on the fact that the shipwrecked were in Maltese SAR waters (which are not jurisdictional areas),[96] the Committee could have argued that the responsibility to rescue exists irrespective of the *locus* of the distress.[97] Moreover, it could have smoothed the way for jurisdiction by holding that Maltese and Italian coastguard authorities, *qua* State agents, were exercising public powers, from within their territory, taking decisions and performing rescue services whose effects had an extraterritorial impact. For instance, in appraising jurisdiction, the Committee neglected to stress the crucial fact that the Italian Maritime Rescue Coordination Center (MRCC) ordered ITS Libra to sail away from the vessel in distress, or the fact that

[93] For a similar argument, see, *Ilascu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004)

[94] *AS and Others v Italy* (n 17) para 7.8. On knowledge of the distress event as an element triggering a 'long distance de facto control', see S Trevisanut, 'Is There a Right to be Rescued at Sea? A Constructive View' (2014) 4 QIL-Questions of Intl L.

[95] G Minervini, 'Extraterritorial Jurisdiction Before the Human Rights Committee: First Considerations on S.A. and Others v. Italy' (2021) 15 Diritti umani e diritto internazionale 588.

[96] On the potential overlapping between SAR zones and State jurisdiction, see instead, M Barnabò, 'Verso una sovrapposizione tra zona SAR e giurisdizione statale?' (2020) 5 European Papers 1.

[97] See on this point also, P Vella De Fremeaux, FG Attard, 'Rescue at Sea and the Establishment of Jurisdiction: New Direction from the Human Rights Committee? Part I' (2021) Opinio Juris <http://opiniojuris.org/2021/03/03/rescue-at-sea-and-the-establishment-of-jurisdiction-new-direction-from-the-human-rights-committee-part-i/>. See also, UN HRC, *AS and Others v Italy*, Individual Opinion of Judge Andreas Zimmerman (dissenting) (n 17) para 1. On human rights law as a criterion for the allocation of responsibilities in shared SAR operations, F De Vittor, M Starita, 'Distributing Responsibility between Shipmasters and the Different States Involved in SAR Disasters' (2019) 28 Italian YB Intl L 92–95.

Malta formally accepted to assume the coordination of the rescue operation. Therefore, functional jurisdiction was affirmed from the very moment Italian and Maltese MRCCs were directly alerted about the distress situation until their deliberate decisions either not to intervene (in the case of Malta) or to intervene too late (in the case of Italy) – thus putting into practice their long-standing *non-entrée* cooperative policies aimed at preventing arrivals of migrants in Europe.

Once a State is aware of the distress situation, establishes (even visual) contact with the vessel or persons in danger, and exercise its public powers by means of a territorially-based decision to activate/non activate/delay rescue services, 'it starts at the same time to exercise authority and control over these persons, sufficient to trigger the application of the [relevant human rights treaty].'[98] Therefore, even in the absence of direct physical force and contact, State's control can still be deemed 'effective' when it determines (even at a distance through, for instance, the use of helicopters or drones) the course of events bringing the persons in question under its jurisdiction.[99] In this view, if a State has knowledge of the circumstances, proximity, an operative rescue service with adequate resources, and the power to avert the risk under its customary and treaty law duty to rescue, it could engage jurisdiction. As a consequence, even an omission or the decision not to intervene in a distress situation can contribute both to 'facilitate the whole process' and to 'create the conditions' leading to an infringement of the Convention (eg, the right to life).[100]

To be realized, rights must be matched with corresponding obligations.[101] According to Crawford,

> 'omission is more than simple 'not-doing' or inaction: it is legally significant only when there is a legal duty to act which is not fulfilled, and its

[98] Papastavridis (n 47) 431.

[99] *Hirsi and Others v Italy* (n 62) para 180. See also *Women on Waves v Portugal* (n 69).

[100] In *Husayn (Abu Zubaydah) v Poland,* the Court put forward these arguments on the facilitating role of the ECtHR's contracting party in extraordinary renditions, App no 7511/13 (ECtHR, 24 July 2014) para 512. See also, *El-Masri v FYROM* App no 39630/09 (ECtHR, 13 December 2012) para 239); Moreno-Lax (n 13) 406.

[101] See, *inter alia,* S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution' (2015) 32 Social Philosophy and Policy 244-45.

> significance can only be assessed by reference to the content of that duty. So an omission is the failure to do that which should be done'.[102]

In embracing Crawford's argument that an omission demands a legal duty to act, Klabbers adds that the fact that the legally relevant omission depends on a legal obligation to act cannot be the complete story.[103] As not all cases of inactivity, mistaken action or unsuccessful intervention amount to omissions, the notion of omission should be linked to a failure to act tested against the mandate and role of the body in question.[104]

Responsibility can thus be affirmed also when State authorities fail to take reasonable measures – 'which [do] not impose an impossible or disproportionate burden on the authorities'[105] – to protect the life and integrity of individuals (regardless of physical contact). Therefore, in assessing the scope of positive obligations, it is to be gauged whether State authorities 'failed to take measures *within the scope of their powers* which, judged *reasonably*, might have been expected to *avoid the risk*.'[106] In a different context, such as in *Osman v UK,* the Court has declared that a State is under a positive obligation to take operational measures to prevent harm against a specific individual if

> 'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of identified individual or individuals […] and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk'.[107]

In its early jurisprudence, the Court had already recognized jurisdiction insofar as the State's acts or omissions affected persons under the State's actual authority.[108] In addition to this, it has acknowledged jurisdiction also when an individual has suffered a violation of his or her

[102] J Crawford, *State Responsibility. The General Part* (CUP 2013) 218.

[103] J Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act' (2017) 28 Eur J Intl L 1154.

[104] ibid 1160.

[105] *Opuz v Turkey* App no 33401/002 (ECtHR, 9 June 2009) para 129.

[106] ibid.

[107] *Osman v the United Kingdom* App no 23452/94 (ECommHR, 28 October 1998) para 116.

[108] On the responsibility of State parties for their acts or omissions, see, *Stocké v Federal Republic of Germany* App no 11755/85 (ECtHR, 12 October 1989) para 131. In *Ivantoc and Others v Moldova and Russia* App no 23687/05 (ECtHR, 15 November 2011)

rights, as a result of the significant and '*decisive influence*' (either military, economic, financial or political) exercised by a Contracting State over a third party.[109]

Under human rights law, jurisdiction cannot be claimed towards everyone, but 'some kind of normative power' must exist to relate the State (as a duty bearer) with a specific individual (as a right holder) in a particular context.[110] Then, only once the jurisdictional nexus is established, State obligations can be 'divided and tailored' according to the level of control exercised by State authorities.

The capacity to influence a given situation as an element sufficient to establish jurisdiction for the purposes of international human rights law has been endorsed by two UN Special Rapporteurs,[111] the UN HRC,[112] and the UN Committee on the Rights of the Child.[113] While this is not the place for a detailed critique of 'capacity' as an element of jurisdiction, it is to be noted that the mere ability to protect or counter human rights violations should not be considered sufficient to create a jurisdictional link if there is no actual exercise of public powers. So, for instance, Sweden – lacking jurisdiction – does not have an obligation under human rights law to build schools in Bangladesh simply because it has the capacity to do so. Jurisdiction warrants indeed an 'external manifestation of the power of the State' (regardless of a legal title to act) by means of prescriptive, executive

para 119, the Court condemns Russia for 'continu[ing] to do nothing […] to prevent the violations of the Convention allegedly committed'.

[109] See *Ilaşcu and Others v. Moldova and Russia* (n 93); *Catan and Others v. the Republic of Moldova and Russia,* App nos 43370/04, 8252/05 and 18454/06 (19 October 2012); and *Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 16 June 2015) paras 167-187.

[110] Besson (n 8) 864–5.

[111] See, 'Extra-territorial Jurisdiction of States over Children and Their Guardians in Camps, Prisons, or Elsewhere in the Northern Syrian Arab Republic', <www.ohchr.org/Documents/Issues/Executions/UNSRsPublicJurisdictionAnalysis2020.pdf>. The authors are Fionnuala Ní Aoláin, Special Rapporteur on the promotion and protection of human rights while countering terrorism, and Agnès Callamard, UN Special Rapporteur on extrajudicial, summary or arbitrary executions.

[112] See, UNCHR, 'General Comment no 36' (n 17).

[113] Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications no 79/2019 and no 109/2019' (2 November 2020) UN Doc CRC/C/85/D/79/2019–CRC/C/85/D/109/2019.

and/or adjudicative authority. Whilst the location (either territorial or extraterritorial) in which this sovereign authority nexus is established is immaterial in determining jurisdiction, what is instead needed is that 'effective control' is actually expressed, whether through physical contact and use of force, by means of the execution of a policy plan (being it a broader military, security, or rescue/non-rescue operative framework) or via the enforcement of a piece of legislation or a court decision, which influences a certain situation and the position of those subjected to an exercise of public powers either domestically or abroad.[114]

As held by the ECtHR in *Furdik v Slovakia*, 'where it has been brought to the notice of the authorities that the life or health of an individual is at risk on account of injuries sustained as a result of an accident'[115] and State authorities are in a condition *de jure* and/or *de facto* to protect those whose life is foreseeably in danger, a jurisdictional link is created without distinctions between territorial and extraterritorial conducts. Just as the special nature of the marine environment does not justify presence of areas outside the law with no protection of human rights,[116] to the same extent, protection of civilians cannot be excluded during aerial bombing. Indeed, State authorities operating either on the high sea or in the airspace should not be deemed as *legibus soluti*.[117]

5. *Concluding observations*

The foregoing analysis conveys a trajectory anything but linear. Certainly, whilst the ECtHR has so far fallen short of adopting a clear-cut principled approach to extraterritorial jurisdiction, it has still made an effort to build up its decisions (not without a certain degree of confusion)

[114] Moreno-Lax defines this exercise of effective control 'situational control' rather 'personal or 'spatial' mode. See Moreno-Lax (n 13) 397 and 403–404.

[115] *Furdík v Slovakia* App no 42994/05 (ECtHR, 2 December 2008) (Admissibility).

[116] *Medvedyev and others v France* (n 25) para 67.

[117] *Hirsi v Italy* (n 62) para 178. See, ECtHR, *Medvedyev v France* (n 25); and *Alejandre v Cuba*, Case 11.589, Inter-American Commission of Human Rights, Report no 86/99, OEA/Ser.L./V/II. 106, doc. 3 rev. (1999) paras 24–25. Cuban agents, operating within Cuba, shot down two aircrafts outside Cuban aerial space. As 'the victims died as a consequence of direct actions of [State] agents', the Inter-American Commission held Cuba responsible.

on the taxonomy of criteria developed in *Al Skeini v UK*.[118] So while Strasbourg judges seem to privilege a more casuistic and flexible approach, which partly rests on a set of well-established requirements (the *Al Skeini* tool-kit *in primis*), they also at times resort to the particular circumstances of each case, *qua* 'special features', to justify the lack of a systematic and consistent interpretation of extraterritorial jurisdiction.

Moreover, on the one hand, the Court appears eager to avoid the construction of an all-encompassing approach that can be comprehensively and coherently applied to all cases of transboundary violations, thereby *de facto* undermining legal certainty for all actors involved in the litigation process. On the other hand, considering that the principles the Court relies on are not plainly disclosed and thus remain a matter for speculation,[119] it cannot be excluded that the intention behind the piecemeal approach underpinning some of the most recent decisions is meant to avoid a massive involvement of the Court in armed conflict cases, without however loosing full control of those situations. Therefore, extraterritorial jurisdiction has been either affirmed in circumscribed circumstances through the 'special features' formula while then foiling the recognition of human rights breaches in the merits phase,[120] or it has been artificially precluded when active hostilities have rendered the situation slightly too 'chaotic'.[121]

One of the main problems is the lack of knowledge on the importance of each special feature, and how these factual elements (either individually or cumulatively) can be transplanted to other contexts.[122] Moreover, it seems that the Court's intent is to open the door for claims on the extraterritorial use of force 'while retaining a strict control on who actually gets in, in the form of discretionary tailoring of the special nature of the features on a case-by-case basis.'[123]

[118] See *Ukraine v Russia* (re: Crimea) App no 20958/14 and 383314/18 (ECtHR, 14 January 2021) para 303; *Chagos Islanders v United Kingdom* App no 35622/04 (ECtHR, 11 December 2012) para 70; *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014) para 74; *Jaloud v the Netherlands* (n 92) para 139.

[119] Raible (n 1) 27.

[120] See *Hanan v Germany* (n 35) para 236.

[121] See *Georgia v Russia* (n 3) para 126.

[122] Milanovic (n 44).

[123] K Mehta, 'Tailoring the Jurisdiction of the ECHR: The ECtHR's Grand Chamber Decision in *Hanan v Germany*' (2021) VerfBlog <https://verfassungsblog.de/tailoring-the-jurisdiction-of-the-echr/>

It is thus likely that the Court's fragmentary approach will have the (perhaps intended) effect of discouraging the litigation of military confrontation issues before it, especially in situations of 'chaos', such as those regarding Eastern Ukraine or Nagorno Karabakh. There are indeed a plethora of interstate cases pending before the Court. For example, the complaint brought by Russia against Ukraine in July 2021[124] might come as a direct reaction to the most recent interstate claims brought by Ukraine against Russia.[125]

This article has also tried to explore what lessons can be learned from other international courts and UN human rights committees dealing with extraterritorial violations of the relevant treaties. Overall, it would be a regressive step for the Court to dramatically distance itself from the case law of other human rights bodies. Observing their fast-paced developments, the ECtHR could, for instance, even more convincingly ground jurisdiction on the (extraterritorial) control exercised by the State over an individual's enjoyment of human rights. Complementing, rather than subverting the functional reading of jurisdiction, a *functional-impact paradigm* would deem jurisdiction engaged whenever State authorities exercise (either legislative, executive, or judicial) public powers whose enforcement has direct and foreseeable extraterritorial consequences on the rights of persons.

In appraising whether the respondent State can either protect, affect, or prevent violations of the relevant rights of persons under its control, the fact that the State knew or ought to have known the potential repercussions of its actions or omissions is, therefore, one of the essential elements to trigger jurisdiction. So innovative cases concerning State duties at sea, such as *AS and Others v Italy* and *AS and Others v Malta,* might have a leading and knock-on effect on other human rights bodies, *in primis* the ECtHR, which is currently confronted with intricate cases of migration by sea.[126]

[124] *Russia v Ukraine* App no 36958/21 (pending).

[125] These cases include the complaint concerning extraterritorial assassination, *Ukraine v Russia* App no 10691/21 (pending), and cases partially tackling events in Eastern Ukraine and the downing of Malaysia Airlines Flight MH17. *Ukraine and the Netherlands v Russia* App nos 8019/16, 43800/14 and 28525/20, lodged respectively on 1 March 2014, 13 June 2014 and 10 July 2020 (pending). See also, Admissibility decision in *Ukraine v Russia* (*Re* Crimea) App nos 20958/14 and 38334/18 (pending). See also *Ukraine v Russia* (VIII) App no 55855/18, lodged on 29 November 2018 (pending).

[126] See *SS and Others v Italy* concerning pushbacks in the central Mediterranean to Libya, App no 21660/18, communicated on 26 June 2019 (pending); *CO and AJ v Italy*

In a functional reading of jurisdiction, States should comply with the Convention whenever they exercise public powers, whether on the high seas during a patrol/rescue operation, in the battlefield during active hostilities, at a checkpoint, or in the context of targeted security operations. Any other exegesis of State obligations would justify 'an area outside the law where victims are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention'.[127]

To conclude, the analysis conducted so far, with no claim of exhaustiveness, would confirm Mallory's preoccupation for an approach of the Court compelled, on the one hand, by the universality principle, and on the other hand, by judges' concern of being overly-expansive thus risking to affect States' overseas strategic, economic, and political interests.[128] At the same time, it forcefully takes in Raible's well-founded and urgent call for a more explicit and principled normative approach in the reasonings of the Court. In joining the debate, I endorse and repropose Mallory's ultimate question: 'could we be moving to a moment of clarity in the Court's approach to Article 1 jurisdiction?'[129]

In answering this query in the affirmative, I first and foremost believe that the credibility of the Court would benefit from a more consistent development on jurisdiction. Additionally, a bolder step toward a functional test, which also duly takes into account the reasonably foreseeable impact of State action/inaction, would contribute to instilling the necessary legal certainty for both States and applicants girding for litigation before an international human rights court.

App no 40396/18 (not yet communicated); *Safi and Others v Greece* App no 5418/15 (ECtHR, 21 January 2015), communicated case to the government in February 2016; and the complaint filed by 11 Syrian nationals violently pushed back to Turkey in 2020 by Hellenic coastguard vessels <https://reliefweb.int/report/greece/new-case-filed-against-greece-european-court-massive-pushback-operation-over-180>.

[127] *Medvedyev v France* (n 25) para 81.

[128] Mallory (n 1) 35.

[129] ibid.