RECONCEPTUALISING EXTRATERRITORIALITY UNDER THE ECHR AS CONCURRENT RESPONSIBILITY: THE CASE FOR A PRINCIPLED AND TAILORED APPROACH

Alexandros Demetriades*

The law surrounding the extraterritorial application of the European Convention on Human Rights raises two key controversies which have troubled legal scholars for over two decades. First, the conceptual foundations of jurisdiction remain unclear. Secondly, the nature and extent of a respondent State's responsibility regarding extraterritorial violations of Convention rights has been bedevilled by uncertainty. This paper aims to clarify these issues. The author advocates a purposive interpretation of the case law which would give rise to what may be termed a 'concurrent and tailored' model of extraterritorial State responsibility. In devising this model, the paper makes two propositions. First, it explores the doctrinal basis of jurisdiction and argues that when a High Contracting Party to the Convention is operating in the territory of another signatory State, this should lead to the concurrent jurisdiction of both States under Article 1 ECHR. Secondly, the paper examines the nature of a respondent State's obligations and consequent responsibility when it is acting extraterritorially. The author proposes that this responsibility should be tailored according to that State's factual ability to secure the enjoyment of Convention rights in the circumstances of each case.

Keywords: Extraterritoriality, ECHR, concurrent responsibility, jurisdiction, positive obligations, attribution

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* LL.M. (LSE); B.A. (Hons) (Cantab) (Downing College). Email address: alexandros.demetriades94@gmail.com.

I. INTRODUCTION

The European Convention on Human Rights ('ECHR' or 'the Convention') is the bedrock of human rights protection in Europe. Article 1 ECHR imposes an international law obligation on State Parties to 'secure' the Convention rights of all persons within their jurisdiction. The provision

refers to the jurisdiction of each High Contracting Party to the Convention.[1] A State's jurisdiction, along with its obligations under the Convention, is usually confined to its territory.[2] Exceptionally, the European Court of Human Rights ('ECtHR' or 'the Court') has held that a State's jurisdiction under Article 1 (and, therefore, its obligations) may be extended beyond its territory (i.e. extraterritorially).[3]

The law regarding the extraterritorial application of the ECHR has become increasingly important as more State Parties to the Convention engage in cross-border activities. The Court has developed the law of extraterritoriality to ensure that States are held accountable for the commission of human rights violations, even if these occur outside their own territory. The aim was to avoid the creation of 'a regrettable vacuum in the system of human-rights protection'.[4]

Two elements of the law regarding the extraterritorial application of the ECHR are particularly controversial. First, the conceptual nature of jurisdiction under Article 1 ECHR is uncertain. This compromises the ability of applicants to determine whether they come within the purview of a State's jurisdiction and, consequently, whether that State is obliged to secure their Convention rights.

Secondly, the nature and extent of the obligations imposed on respondent States, when acting extraterritorially, is unclear. The Court's jurisprudence does not specify whether the obligations imposed on States are positive (to ensure the enjoyment of rights) or negative (to respect rights). This is significant because, while positive obligations are tailored to the factual (i.e. *de facto*) ability of the respondent State to secure the Convention rights of the victim, negative obligations are not. Without distinguishing between different types of obligations, it becomes impossible to ascertain the extent of the responsibility incumbent on respondent States when their obligations

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1 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 Leiden Journal of International Law 857, 862.

2 *Banković v Belgium* App no 52207/99 (ECtHR, 12 December 2001) para 59.

3 Ibid para 61.

4 *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 78.

are breached.[5] In turn, the measures required of States in order to discharge this responsibility become indeterminable.

To address these issues, this paper proposes an alternative interpretation of the case law. This will lead to the adoption of what may be termed a 'concurrent and tailored' model of State responsibility. This model is based on two novel propositions. First, the exercise of extraterritorial jurisdiction by a respondent State under the Convention should give rise to the concurrent responsibility of the State on whose territory the violation is committed, as well as the State acting extraterritorially.[6] Secondly, the respective responsibility of each State should be tailored to its ability to secure the victim's Convention rights on the facts of each case. This tailoring of obligations could be achieved by recognising that positive obligations are incumbent on both the territorial State and the State acting extraterritorially. The proposed model goes some way towards achieving the 'functional' approach advocated by some commentators.[7] However, the present approach is rooted in the doctrinal framework developed by the ECtHR.

The analysis begins by establishing the premise that a principled and tailored approach to determining State responsibility is desirable. This article will then examine the doctrinal basis for achieving these end goals beginning with jurisdiction. It is argued that jurisdiction is a creature of both law and fact. In cases of extraterritoriality, there is a theoretical fragmentation of jurisdiction so that one State possesses the legal right to exercise jurisdiction and another State exercises it in fact. It will be argued that this divergence leads to concurrent jurisdiction under Article 1 ECHR.

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5 Responsibility is the difference between the standard expected of the State (i.e. its obligation) and the actual conduct of the State. It follows that the scope of a State's responsibility is contingent upon the extent of its original obligations.

6 The responsibility in question is 'concurrent' rather than 'shared'. This is because each respondent State's responsibility arises out of the breach of a distinct primary obligation. This is evident in the analysis below.

7 Youval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) Law and Ethics of Human Rights 47.

Having established concurrent jurisdiction and therefore concurrent obligations, this paper will distinguish between the different models of extraterritorial jurisdiction (those based on territorial control and those based on personal control over the victim). It is argued that, depending on the model used, different obligations should be incumbent on the respondent States. These respective obligations (and consequent responsibility) should be tailored to the State's factual ability to safeguard the Convention rights in the circumstances. The main doctrinal tool used to attain this tailored approach is the distinction between positive obligations and negative obligations. This dichotomy depends on whether the relevant conduct can be attributed to the respondent States.

Finally, the proposed model of concurrent responsibility will be evaluated to determine whether it achieves the prevalent purpose of the law on extraterritoriality by filling the 'vacuum' in human rights protection, whether it is consistent with the jurisprudence of the ECtHR and with related areas of public international law, and whether it constitutes a politically acceptable model.

II. Should a Principled and Tailored Approach be adopted to determine State Responsibility under the ECHR?

This paper proposes a principled approach that will allow the extraterritorial responsibility of Contracting Parties to be tailored according to the States' ability to secure the enjoyment of Convention rights in the circumstances of each case. The first step is to ask whether this ultimate goal is desirable.

1. The Need for a Principled Approach

For the purposes of this paper, a principled approach is one which is characterised by clarity and doctrinal consistency. In order to attain such clarity, the ECtHR should identify the type of obligation which binds the respondent State when it acts extraterritorially, as well as the extent of this obligation. To achieve doctrinal consistency, the law of extraterritoriality must not be internally incoherent. Furthermore, where possible, the law of extraterritoriality should be consistent with the norms of public international law unless the Court explicitly states that it is attributing a *sui generis* meaning to certain concepts. Adopting a principled approach would

allow the Court to devise a theoretically sound conception of jurisdiction under Article 1 ECHR. It would also enable respondent States to predict *ex ante* the extent of their responsibility arising out of human rights violations.

It has been judicially acknowledged that the law of extraterritoriality 'has [...] been bedevilled by an inability [...] to establish a coherent and axiomatic regime'.[8] Admittedly, the Court's task of developing an impartial legal doctrine of extraterritorial jurisdiction is unenviable. Such cases often arise in politically charged conditions, such as the war on terror.[9] Nevertheless, given the politically contentious issues raised, a coherent legal analysis of State responsibility is necessary. The alternative would be, through lack of guidance, to allow unlimited discretion to the Committee of Ministers ('Committee') when supervising the execution of the Court's judgments.[10] Putting these politically sensitive cases before this political body, without legal constraints, could lead to the collapse of legal doctrine into political chaos.

This paper argues that the Court should explicitly delimit States' responsibility within its judgments, without rejecting the orthodox view that the Court's judgments are 'essentially declaratory'.[11] The Court could provide the parameters of responsibility, without necessarily prescribing a remedy, thereby providing legal guidance to the Committee. This proposition is consistent with the Court's practice of becoming increasingly involved in the execution of its own judgments.[12]

2. Is a Tailored Approach Desirable?

The proposed model of 'concurrent and tailored responsibility' aims to ensure that the responsibility of each respondent State is 'tailored' to its ability to secure the enjoyment of the Convention rights in the

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8 Concurring Opinion of Judge Bonello, *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011) para 4.

9 *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011).

10 Article 46 ECHR.

11 *Assanidze v Georgia* App no 71503/01 (ECtHR, 24 March 2004) para 202.

12 Costas Paraskeva, 'European Court of Human Rights: From Declaratory Judgments to Indications of Specific Measures' (2018) 1 European Human Rights Law Review 46, 55-56.

circumstances. This will depend on the degree of control that the respondent State exercises over the situation which gives rise to a violation of Convention rights.

Support for this tailored approach to extraterritorial obligations had been given by Sedley LJ in the UK Court of Appeal in *R (on the application of Al-Skeini) v Secretary of State for Defence*.[13] However, he correctly concluded that, at the time, such an approach could not be reconciled with the Strasbourg jurisprudence.[14] At that time, *Banković v Belgium* was high authority on extraterritoriality. This case concerned the aerial bombing of the Serbian Television headquarters in Belgrade by NATO forces. The Court held that the Convention States which partook in the operation did not have jurisdiction under Article 1 ECHR. In doing so, the Grand Chamber explicitly rejected that Convention rights could be 'divided and tailored in accordance with the particular circumstances of the extra-territorial act in question'.[15]

Since *Banković*, the Grand Chamber has reassessed this position. In *Al-Skeini v UK*, the Court dealt with the deaths of the applicants' relatives at the hands of British soldiers in Southern Iraq during the UK's security operations there. The Court held:

> It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention *that are relevant to the situation of that individual*. In this sense, therefore, the *Convention rights can be 'divided and tailored'*.[16]

Some writers have suggested that this judgment has overruled *Banković* on this point, thereby allowing the Court to 'tailor' the extraterritorial responsibility of respondent States according to the degree of control exercised over the impugned situation.[17] Even on a narrow reading of the

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13 [2005] EWCA Civ 1609, para 197.

14 Ibid para 207.

15 *Banković* (n 2) para 75.

16 *Al-Skeini* (n 9) para 137 [emphasis added].

17 Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 3.19.

judgment, it is clear that it is open to future judgments to consider whether a tailored approach to extraterritorial responsibility is appropriate. Given this opportunity, it is necessary to make the case for consolidating this dictum.

The argument in favour of the tailored approach to extraterritorial State responsibility is based on the untenability of the alternative approach. The alternative is what may be termed a '*standardised*' conception of State responsibility (i.e. equivalent to the responsibility of the State if the violation had occurred by the State's agents in its own territory). This would likely give rise to a responsibility to remedy the violation through nothing less than *restitutio in integrum*.[18] 'Standardised responsibility' is objectionable because it disregards the hostile institutional context in which human rights operate.[19] Therefore, human rights obligations (and responsibility) should be determined pragmatically. The tailored approach will preserve the integrity of the European human rights regime. Conversely, standardised responsibility could lead to the imposition of an 'unrealistic'[20] level of responsibility on Convention States. This responsibility would be impossible to discharge through individual or general measures because the respondent State may lack the requisite control to implement such measures extraterritorially. Hence, the responsibility imposed by the Court will not translate into tangible results, undermining the integrity of the ECHR regime. This explains the Court's unwillingness to impose 'an impossible or disproportionate burden' on respondent States.[21] It follows that, if the Court's judgments are to contribute to 'the maintenance and further realisation of human rights',[22] they must adopt a tailored approach by making

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18 *Papamichalopoulos v Greece (Just Satisfaction)* App no 14556/89 (ECtHR, 31 October 1995) para 34.

19 Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014) 95.

20 Olivier De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 185, 205.

21 *Osman v UK* App no 87/1997/871/1083 (ECtHR, 28 October 1998), para 116; Concurring Opinion of Judge Yudkivska, *Sargsyan v Azerbaijan* App no 40167/06 (ECtHR, 16 June 2015).

22 Statute of the Council of Europe (entered into force 5 May 1949) 87 UNTS 103, Article 1(b).

State responsibility commensurate to each State's ability to secure the enjoyment of Convention rights in the circumstances.

III. Jurisdiction under Article 1 ECHR

Article 1 ECHR indicates that a State's obligation to 'secure' Convention rights is confined to persons within that State's jurisdiction. Hence, jurisdiction is a necessary hurdle when devising a principled approach to State obligations and consequent responsibility under the ECHR.[23]

It will be argued that jurisdiction can emanate either from legal right or from factual (i.e. *de facto*) control. When these two elements are exercised by different States (as in cases of extraterritoriality), this should trigger concurrent jurisdiction.

1. 'Primarily Territorial' Jurisdiction

The ECtHR has held that jurisdiction is 'primarily territorial'.[24] Implicit in this dictum are two presumptions. First, there is a negative presumption that a State will not exercise its jurisdiction beyond its lawful territorial borders. This presumption is normative (i.e. based on the norms of public international law regarding territorial title) and will be rebutted 'exceptionally'.[25] It is always displaced in cases of extraterritorial jurisdiction.

Secondly, the positive presumption of territoriality operates so that a State is presumed to exercise jurisdiction throughout the whole of its *de jure* territory.[26] The Court has applied this positive presumption in cases where the respondent State had no factual control over the area in question.[27] Therefore, this appears to be a normative presumption that the State with territorial title in international law also has jurisdiction under Article 1

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23 Michael O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'' in Alphonsus Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 131.

24 *Banković* (n 2) para 59.

25 Ibid para 61.

26 *Ilascu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 312.

27 Ibid para 331.

ECHR. The generally accepted view is that this presumption may be rebutted in 'exceptional circumstances'.[28]

2. Establishing Extraterritorial Jurisdiction

Jurisdiction answers the question of whether the victim is sufficiently proximate to a respondent State. There are three ways to establish this link extraterritorially.

A. Customary Extraterritoriality

A State may have extraterritorial 'jurisdiction resulting from non-territorial legal competence'.[29] This form of extraterritoriality may be exercised through consular agents and other instances recognised by customary international law.[30]

B. 'Effective Overall Control' ('The Spatial Model')

Alternatively, extraterritorial jurisdiction may be established over a territory using the 'spatial model'.[31] This model was devised in *Loizidou v Turkey (Preliminary Objections)*.[32] That case concerned a Greek-Cypriot woman who was prevented from accessing her property located within the territory of the 'Turkish Republic of Northern Cyprus' ('TRNC'), a subordinate local administration established by Turkey within the *de jure* territory of Cyprus. In its judgment, the ECtHR formulated the test of 'effective overall control' to establish extraterritorial jurisdiction over a territory. The Court emphasised that extraterritorial jurisdiction may be found when the

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[28] Partly Dissenting Opinion of Judge Bratza *et al.*, *Ilascu* (n 26), para 3. See Kjetil Mujezinović Larsen, 'Territorial Non-Application of the European Convention on Human Rights' (2009) 78 Nordic Journal of International Law 73, 93.

[29] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 Human Rights Law Review 521, 522.

[30] *Banković* (n 2) para 73.

[31] Ralph Wilde, 'Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties' (2007) 40 Israel Law Review 503.

[32] App no 15318/89 (ECtHR, 23 March 1995).

respondent State exercises factual control over the territory, even if such control is unlawful in international law.[33]

The 'effective overall control' threshold was subsequently lowered in *Ilascu v Moldova and Russia*, which arose as a result of the applicants' imprisonment and ill-treatment within the territory of the 'Moldavian Republic of Transdniestria' ('MRT'), a secessionist local administration within Moldova. In this case, the Court established Russia's extraterritorial jurisdiction over the territory of the 'MRT' because Russia exerted 'decisive influence' over the 'MRT' administration.[34] This less demanding threshold focuses on 'military, economic, financial and political support', rather than military presence.[35] 'Decisive influence' has been established when the military presence of the respondent State is minimal, as long as the local administration survived '*by virtue'* of the support rendered by the respondent State Party.[36] The Court has used the two tests together and interchangeably, particularly in its judgments concerning the 'Nagorno-Karabakh Republic' ('NKR').[37]

C. 'State Agent Authority and Control'[38] ('The Personal Model')

Extraterritorial jurisdiction may also be established on the 'personal model'.[39] This is premised on the respondent State bringing the applicant within its *de facto* control through the operation of its agents outside its own territory. This too is a factual relationship between the respondent State and the applicant, irrespective of the lawfulness of the State's actions.[40]

The personal model was applied in *Öcalan v Turkey*, where the leader of the Kurdistan Workers' Party was held to have entered Turkey's jurisdiction as

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33 Ibid para 62.

34 *Ilascu* (n 26) para 392.

35 Ibid paras 382-394.

36 *Catan v Moldova and Russia* App nos 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) paras 111-123.

37 *Chiragov v Armenia* App no 13216/05 (ECtHR, 16 June 2015) para 186.

38 *Al-Skeini* (n 9) paras 133-137.

39 Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011) 173.

40 *Al-Skeini* (n 9) paras 136-137.

soon as he was within the 'authority and control'[41] of Turkish officials, even though this occurred in Kenya. This model unequivocally applies when applicants are in the custody of the respondent State. Moreover, the personal model will apply when State agents operate extraterritorially in territories where the sending State wields 'public power'.[42] It remains unclear whether the mere use of force by State agents will trigger extraterritorial jurisdiction.[43]

It should be noted that establishing jurisdiction extraterritorially is contingent on the operation of persons which can be attributed to the respondent State outside the latter's territory.[44] Attribution is determined according to the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA').[45]

3. The Conceptual Foundations of Jurisdiction

A. Purely Legal?

In *Banković*, the Court held that jurisdiction under Article 1 ECHR should mirror the meaning of the term in public international law.[46] In this sense, '[j]urisdiction is the term that describes the limits of the legal competence of a State ... to make, apply, and enforce rules of conduct upon persons'.[47]

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41 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) para 91.

42 Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, 131.

43 Cf. *Banković* (n 2) and *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009) para 25.

44 Vasilis Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 Michigan Journal of International Law 129, 136.

45 ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the work of its Fifty-third session, (A/56/10) (2001); See also *Loizidou v Turkey (Merits)* App no 15318/89 (ECtHR, 18 December 1996) para 52, where the ECtHR stated that it adheres to the public international law rules of attribution.

46 *Banković* (n 2) para 61.

47 Christopher Staker, 'Jurisdiction' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 309.

This dictum should not be read as suggesting that Article 1 jurisdiction is a *purely legal* relationship between the respondent State and the victim. There are two objections to this interpretation. First, the Court has recognised that extraterritorial jurisdiction can be established when the respondent State exercises unlawful factual control over the victim both pre-*Banković*[48] and post-*Banković*.[49] Secondly, a purely legal notion of jurisdiction should not be adopted because, in that case, jurisdiction (and the human rights obligations attached to it) could only be established when the State was acting within its legal competence. A State acting unlawfully would therefore be able to freely violate human rights.[50] Thus, the predominant view is that jurisdiction incorporates a factual element.[51]

B. Purely Factual?

Most commentators suggest that Article 1 jurisdiction denotes a factual relationship between the perpetrating State and the victim.[52] Milanovic argues that jurisdiction should be established whenever a State exercises *de facto* power over a victim.[53] While there is a compelling case for *including* a factual element within jurisdiction, it is unclear why jurisdiction should denote an *exclusively* factual relationship between the respondent State and the victim.

It is argued that a unitary factual doctrine of jurisdiction is inappropriate because: (i) it is inconsistent with the case law; (ii) it is theoretically incoherent; and (iii) it may lead to the creation of a 'vacuum' in the human rights regime.

First, an exclusively factual concept cannot be reconciled with the Court's case law. On a factual view of jurisdiction, actual power will give a State

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48 *Loizidou (Preliminary Objections)* (n 32) para 62.

49 *Chiragov* (n 37) para 186.

50 King (n 29) 536.

51 Wilde (n 31) 508.

52 Karen Da Costa, *Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers 2013) 253.

53 Milanovic (n 39), 41. See also Loukis Loucaides, 'Determining the extra-territorial effect of the European Convention: Facts, Jurisprudence and the Bankovic case', (2006) 4 European Human Rights Law Review 391, 394.

jurisdiction over a person. Logically, the loss of power should lead to the absence of jurisdiction. This has consistently been refuted in the judgments concerning the 'MRT'.[54] In these cases, the Court has held that Moldova, as the sovereign territorial State, retains jurisdiction over the relevant territory, even though it does not meet the factual threshold required (i.e. 'effective overall control' or 'decisive influence'). Moreover, the Court has clarified that jurisdiction was found '*because* Moldova was the territorial State'.[55] Another rejection of the purely factual view came in *Sargsyan v Azerbaijan.* In this case, the ECtHR held that Azerbaijan retained jurisdiction even though control over the relevant territory was disputed. The Court stated:

> Even in exceptional circumstances, when a State is prevented from exercising authority over part of its territory...it does not cease to have jurisdiction within the meaning of Article 1 of the Convention.[56]

Such cases cannot be explained on a purely factual view as jurisdiction clearly emanates from legal title over the territory.[57]

Furthermore, the factual conception of jurisdiction cannot explain instances of extraterritorial jurisdiction recognised in international law and under the ECHR. For example, the actions of diplomatic agents may bring an individual outside their State's territory within the scope of its jurisdiction under the Convention.[58] This extraterritorial jurisdiction emanates from the State's 'lawful competence' and not from factual control.[59]

The second objection is theoretical. In advancing his factual perspective, Milanovic argues that 'the source [of sovereignty] is in the effectiveness of State power over a territory and its inhabitants'.[60] However, a constitutionally organised entity does not necessarily amount to a sovereign State. Illustrative of this point are pseudo-states, such as the 'TRNC',

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54 *Ilascu* (n 26) para 333; *Braga v Moldova and Russia* App no 76957/01 (ECtHR, 17 October 2017) paras 22-23.

55 *Mozer v Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016) para 99 [emphasis added].

56 App no 40167/06 (ECtHR, 16 June 2015) para 130.

57 Milanovic (n 39) 107.

58 *X v Federal Republic of Germany* App no 1611/62 (ECommHR, 25 September 1965).

59 King (n 29) 537.

60 Milanovic (n 39) 59.

established on territory over which Cyprus remains sovereign, despite the lack of factual control. Therefore, it is argued that sovereignty necessarily includes a legal element. Furthermore, sovereignty is a precondition for jurisdiction under the Convention because only sovereign States may ratify the Convention, thereby obtaining jurisdiction under Article 1 ECHR. Hence, jurisdiction cannot be viewed in purely factual terms.

Finally, a purely factual view of jurisdiction is undesirable on policy grounds. If a State Party cedes administration of a territory to another body, thereby relinquishing its factual control, then, on the purely factual view of jurisdiction, no Contracting Party will have jurisdiction over this territory. For example, while Cyprus retains sovereign title over the buffer zone on the island, it has ceded control of that territory to the United Nations Force in Cyprus ('UNFICYP'). If the ECtHR does not recognise the jurisdiction of Cyprus over the buffer zone, this would create a human rights 'vacuum' within the *éspace juridique* of the Convention. This limitation has been recognised even by proponents of the factual conception of jurisdiction.[61]

C. Dual Nature

It is clear that, to align the concept of jurisdiction with the case law, jurisdiction must encompass both factual and legal elements.[62] One should attempt to give this view some coherent theoretical foundations.

It is argued that jurisdiction, in the public international law sense, has two component elements: (i) a subject and (ii) an object. The 'subject' of jurisdiction is the delimitation of different States' rights to exercise jurisdiction *in international law* so as to avoid a 'clash of sovereignties'.[63] In this respect, jurisdiction is limited to cases where the State has a sovereign right to act. Conversely, the 'object' of jurisdiction in the public international law sense is *municipal law* jurisdiction[64] (i.e. the ability of a State to constitutionally organise itself in order to make and enforce rules). This is a matter of domestic law and is therefore treated as fact from the perspective

61 Larsen (n 28) 84.

62 King (n 29).

63 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 22.

64 Besson (n 1) 870.

of international law.[65] Domestic law jurisdiction may exist in contravention of international law.

Usually, the legal right to exercise jurisdiction coexists with the ability to do so in fact (i.e. domestic law jurisdiction). However, in cases of extraterritoriality, there is a fragmentation between the two components so that one State has the right to exercise jurisdiction in international law (*de jure* jurisdiction) and another has the *de facto* ability to control the individual through municipal constitutional organs (*de facto* jurisdiction). In order to be considered an exercise of jurisdiction, the actions of these municipal constitutional organs must reflect the acts of a sovereign State.[66]

It is argued that the Court has treated each constituent element of what may collectively be called 'public international law jurisdiction' as being able, in itself, to establish jurisdiction under Article 1 ECHR. This explains why sometimes jurisdiction may be established through legal right (*de jure* jurisdiction) while, in others, it may be established through factual control (*de facto* jurisdiction). Thus, jurisdiction, for the purposes of Article 1, is exclusive only when factual control is justified by virtue of a sovereign right in international law so that *de facto* and *de jure* jurisdiction are exercised by the same State.[67]

4. Concurrent Jurisdiction in Extraterritorial Cases

If each constituent element of public international law jurisdiction satisfies the Article 1 threshold, it follows that when different Contracting Parties exercise sovereign rights and factual control over the victim or territory respectively, concurrent jurisdiction is established under the ECHR.[68] Given

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65 *German Interests in Polish Upper Silesia (Germany v Poland)*, [1926] PCIJ Rep Series A No 7, 19.

66 Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 European Journal of International Law 1223, 1245. A similar concept to *de facto* jurisdiction has been developed by Miller in the form of 'functional sovereignty'. However, her view differs from that propounded here because she ignores the legal nature of intra-territorial jurisdiction absent any factual control.

67 Besson (n 1) 869.

68 Tzevelekos (n 44) 164-166.

that factual jurisdiction is well established and set out above, this section will focus on the argument in favour of retaining the sovereign State's intra-territorial *de jure* jurisdiction, even if that State has no factual control over the victim.[69] This *de jure* jurisdiction will operate concurrently with the *de facto* jurisdiction of the respondent State, which exerts factual control over the victim.

It should be recognised that concurrent jurisdiction was not always the norm. In the early case of *An v Cyprus*,[70] the (now defunct) European Commission of Human Rights ('ECommHR') held that the Republic of Cyprus could not be held responsible for violations occurring within the territory of the 'TRNC'. This suggests that the *de jure* jurisdiction of Cyprus over the relevant territory had been displaced because it did not factually control that territory.

It is argued that *An* does not reflect the current position of the law. First, the case has little precedential value as it was decided prior to the development of the law of extraterritoriality. Moreover, the Commission had reached an incorrect result in *Loizidou* itself.[71] Secondly, *An* has arguably been overruled by a string of cases recognising that the sovereign State will retain its *de jure* jurisdiction over a given territory, even if it does not control that area in fact. This will operate concurrently with the *de facto* jurisdiction of the State acting extraterritorially. The above proposition was first endorsed in *Ilascu* where, despite concluding that Russia exercised *de facto* jurisdiction over the 'MRT', the Grand Chamber held:

> ... [W]here a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation ... it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory.[72]

The principle that sovereignty will trigger Article 1 jurisdiction was reaffirmed in absolute terms in *Sargsyan*.[73] It appears that, since *An*, the ECtHR has never explicitly displaced the positive presumption that a

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69 *Al-Skeini* (n 9) paras 133-140.

70 App no 18270/91 (ECommHR, 8 October 1991).

71 *Chrysostomos, Papachrysostomou and Loizidou* App nos 15299/89, 15300/89 and 15318/89 (ECommHR, 4 March 1991).

72 *Ilascu* (n 26) para 333.

73 *Sargsyan* (n 56) para 130.

sovereign State exercises jurisdiction under Article 1 ECHR over the whole of its *de jure* territory (i.e. the positive presumption of territoriality), even in cases where the sovereign State lacks factual control. Consequently, this presumption has crystallised into an immovable rule of law.[74]

The logical first query is why the Court has not recognised concurrent jurisdiction in the cases pertaining to the 'TRNC'. The applicants in these cases alleged that Turkey violated their Convention rights. If the applicant only brings a claim against one State, then only that State's responsibility may be determined by the ECtHR.[75] Those who argue that concurrent jurisdiction in *Ilascu* is an aberration and that *Loizidou* is the rule are suggesting that the Court's omissions are more authoritative than its statements.[76]

In *Cyprus v Turkey*, the Court stated that, had it found that Turkey did not have jurisdiction over the 'TRNC', this:

> would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account...[77]

De Schutter interprets this statement as establishing that Turkey's effective overall control over the 'TRNC' had displaced Cyprus' jurisdiction for the purposes of Article 1.[78] However, he recognises that this is contrary to the subsequent judgment of *Ilascu.* With hindsight, the better view is that the Court was not using a legal term of art. Rather, it was describing the practical situation which would have occurred.

It must be recognised that the argument for an irrebuttable positive presumption of territoriality is unorthodox. Some writers maintain that it is 'possible for a State to lose jurisdiction under Article 1 over a part of its

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74 Antal Berkes, 'The Nagorno-Karabakh Conflict before the European Court of Human Rights: Pending Cases and Certain Forecasts on Jurisdiction and State Responsibility' (2013) 52 Military Law & Law of War Review 379, 425.

75 *Jaloud v The Netherlands* App no 47708/08 (ECtHR, 20 November 2014) para 153.

76 *Loizidou (Merits)* (n 45).

77 *Cyprus v Turkey* (n 4).

78 De Schutter (n 20) 218.

territory'.[79] To support this proposition, they cite *Azemi v Serbia*, which dealt with Serbia's responsibility for the non-enforcement of a Kosovar court's judgment. The Court declared the application inadmissible *ratione personae* for the unrelated reason that the applicant failed to challenge a 'particular action or inaction' of Serbia.[80]

Even if *Azemi* is considered to be authority that Serbia's jurisdiction over Kosovo has been eliminated, this does not disprove the absolute presumption that a sovereign State retains jurisdiction over the whole of its *de jure* territory. Istrefi has argued that, while falling short of recognising Kosovo's sovereignty, *Azemi* has created a 'presumption of neutrality' over the territory in question, thereby implicitly recognising that Serbia had ceased to be the lawful sovereign.[81] This would distinguish the present case from *Ilascu* and would explain the ECtHR's decision. Indicative of this underlying influence in the Court's reasoning is the reference to the applicant as 'a national of Kosovo'.[82] This may be contrasted with the Court's reference to the applicants in *Behrami and Behrami v France* as residents of 'Mitrovica in Kosovo, Republic of Serbia'.[83]

It is argued that the loss of sovereignty is the only 'exceptional circumstance' where the Court will disapply the positive presumption that the State will retain jurisdiction over the whole of its *de jure* territory. In any other constraining factual situation, the Court will merely 'limit' the positive presumption.[84] In this case, the respondent State would retain jurisdiction by virtue of its sovereign title but would only owe positive obligations to take measures within its power to secure the enjoyment of human rights in the relevant territory.[85]

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79 Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs White & Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 101.

80 App no 11209/09 (ECtHR, 5 November 2013) para 47.

81 Kushtrim Istrefi, '*Azemi v Serbia*: Discontinuity of Serbia's d*e jure* Jurisdiction over Kosovo' (2014) 4 European Human Rights Law Review 388, 393.

82 *Azemi* (n 80) para 1.

83 App no 71412/01 (ECtHR, 2 May 2007) para 1.

84 *Ilascu* (n 26) paras 312-313.

85 Samantha Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdiction, Duties and

One should also briefly mention the personal model. It is argued that, in *Al-Skeini*,[86] the victims were also, theoretically, within the jurisdiction of Iraq as the territorial State. However, Iraq is not a party to the Convention. Therefore, the ECtHR rightly refrained from giving judgment on Iraq's obligations.[87]

The above analysis reveals that the positive presumption that the sovereign State will retain jurisdiction throughout the whole of its lawful territory will not be rebutted unless sovereign title to that territory is lost. Therefore, cases of extraterritoriality should always engage the concurrent responsibility of the State on whose territory the violation occurs, as well as the State which establishes extraterritorial *de facto* jurisdiction. Judge Yudkivska has given support to the aforementioned proposition by arguing, both extrajudicially[88] and in her Concurring Opinion in *Sargsyan*,[89] that concurrent jurisdiction in cases concerning extraterritoriality is now the norm.

IV. Extraterritoriality as 'Concurrent and Tailored' Responsibility under Article 1 ECHR

Having established that concurrent jurisdiction should be triggered in cases of extraterritoriality and that concurrent responsibility could arise, it is necessary to examine the doctrinal tools used to tailor each State's responsibility. This analysis is based on two key distinctions: (i) between positive and negative obligations under the ECHR and (ii) responsibility arising from territorial and non-territorial situations.

Responsibilities' in Anne Van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and International Law* (Oxford University Press 2018) 161.

86 *Al-Skeini* (n 9).

87 Maarten Den Heijer, 'Procedural Aspects of Shared Responsibility in the European Court of Human Rights' (2013) 4 Journal of International Dispute Settlement 361, 373.

88 Ganna Yudkivska, 'Territorial Jurisdiction and Positive Obligations of an Occupied State: Some Reflections on Evolving Issues Under Article 1 of the European Convention' in Anne Van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and International Law* (Oxford University Press 2018).

89 *Sargsyan* (n 56).

1. Positive and Negative Obligations

Article 1 ECHR imposes an 'obligation to secure' the Convention rights on Convention States. Implicit in the wording are two types of obligations: negative obligations and positive obligations.[90]

Negative obligations are the State's obligations to respect the rights of persons within its jurisdiction. This requires State agents to refrain from interfering with individuals' enjoyment of their Convention rights.[91] Negative obligations are breached through the actions of State organs. Therefore, the standard applied when assessing this breach is one of strict liability because a State is presumed to have absolute control over its own organs.[92] There is no support in the jurisprudence for a tailored approach to determining the extent of negative obligations.[93] Therefore, upon the finding of a violation, the responsibility imposed on the respondent State is standardised.

Conversely, positive obligations are obligations 'to adopt reasonable [...] measures to protect the rights of individuals'.[94] Such obligations require respondent States to act in order to safeguard human rights within their jurisdiction. This includes an obligation to prevent human rights violations committed by private actors.[95]

The ECtHR has held that the scope of substantive positive obligations ('positive obligations') is determined according to the standard of due diligence (i.e. what can reasonably be expected from a diligent State in the circumstances),[96] even though it did not explicitly use this term.[97] Hence,

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90 Dinah Shelton and Ariel Gould, 'Positive and Negative Obligations' in Dinah Shelton (ed), *Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 569.

91 Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe 2007) 11.

92 William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 101.

93 *Banković* (n 2) para 75.

94 Akandji-Kombe (n 91) 7.

95 Shelton and Gould (n 90) 563.

96 Ibid 577.

97 *Osman* (n 21) para 116; Tzevelekos (n 44) 133.

whether the State has discharged its positive obligation will be 'subjectively' tailored according to its ability to secure Convention rights through the prevention of the relevant violations.[98] Positive obligations could therefore impose 'obligations of conduct',[99] which may be discharged when the State takes the necessary measures towards achieving a result, even if that result is not attained.[100] Such tailored obligations will, in case of a breach, give rise to a similarly tailored responsibility.

The extent of the positive obligation of the notional diligent State is determined according to the degree of control exercised by the respondent State over the situation which leads to the violation. In assessing the relevant level of control, it is suggested that the Court should take into account factors such as the State's relationship with the perpetrators of the violation, the State's ability to assert its authority over the relevant situation, and the measures which it could have taken to alleviate the damage done to the victim. An equivalent analysis is implicitly employed by the Court to mitigate the positive obligations owed by respondent States in accordance with a 'constraining *de facto* situation'.[101]

The Court has refused to draw a clear distinction between the two types of obligations, stating that:

> The boundaries between the State's positive and negative obligations [...] do not lend themselves to precise definition. The applicable principles are nonetheless similar.[102]

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98 *Ilascu* (n 26) para 313; See also Christos Rozakis, 'The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights' in *The Status of International Treaties on Human Rights* (Council of Europe 2005) 70.

99 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide ("Bosnian Genocide Case") (Bosnia and Herzegovina v. Serbia and Montenegro*) [2007] ICJ Rep 43, para 430.

100 Timo Koivurova, 'Due Diligence', *Max Planck Encyclopedia of Public International Law* (2010) paras 1-3.

101 *Ilascu* (n 26) para 333.

102 *Joannou v Turkey* App no 53240/14 (ECtHR, 12 December 2017) para 89.

However, as is evident from the above analysis, one cannot argue that the principles governing the two types of obligations are analogous.[103] Therefore, the Court should distinguish between negative and positive obligations.

The basis of the aforementioned dichotomy lies in the concept of attribution. Negative obligations can only be engaged when the violating *acts* are attributable to the State (i.e. committed by State agents). Conversely, positive obligations are breached by the *omission* of State authorities to prevent a violation within the State's jurisdiction. Therefore, positive obligations to protect are engaged when the perpetrating conduct is committed by actors which are *not* attributable to the State when committing these acts.

2. Remedying a Conceptual Paradox

Usually, whether the State is in breach of its positive or its negative obligations is clear. However, in cases of extraterritoriality, it may not be clear whether the perpetrators' actions are imputable to the State through the application of ARSIWA (e.g. are the actions of the local administration of the 'MRT' attributable to Russia?).

This is problematic. Whether there is a violation by the State will depend on whether the obligation is positive or negative. The former imposes a due diligence standard on the State, whereas the latter imposes strict liability. However, whether an obligation is positive or negative can only be determined retrospectively, after identifying whether the violating actions are imputable to the respondent State. Thus, the Court cannot apply the classic sequence of identifying a primary breach of an international obligation followed by an application of the secondary rules on attribution. Instead, the Court should determine whether the relevant conduct is attributable to the State and *then* establish whether that State has violated its primary obligations depending on whether these are positive or negative.

3. Responsibility under the Personal Model

The personal model of establishing extraterritorial jurisdiction applies when agents attributable to the respondent State (i.e. State agents) operate outside

[103] Tzevelekos (n 44) 152-157.

the territory of their State. In this rubric, extraterritorial jurisdiction emanates from control over the *victim* and is therefore non-territorial. Having established that *Al-Skeini* permits a tailoring of the State's obligations (and consequent responsibility) in such cases, it is necessary to examine how this adjustment should occur.[104]

Given the non-territorial nature of the jurisdiction in question, it is argued that the State's extraterritorial responsibility should be limited in three respects: (i) the obligations should only be owed to persons under the authority of State agents; (ii) the obligations should only be owed in relation to the rights relevant to the situation; and (iii) the extent of the positive obligations owed should depend on the State's ability to secure the relevant rights on the facts of each case.[105] Therefore, the responsibility imposed on the respondent State will be tailored according to its ability to secure the Convention rights.

Limitation (i) follows from the fact that, on the personal model, only certain individuals will be brought within the State's jurisdiction. Limitation (ii) is evident in *Al-Skeini*, where the Court held that the UK would only be responsible for the rights 'that are relevant to the situation of that individual'.[106] Limitation (iii) arises because the extent of positive obligations is determined according to what can reasonably be expected from a diligent State in the circumstances. It is argued that positive obligations may, in principle, be imposed on the respondent State which exercises personal extraterritorial jurisdiction. However, it is likely that these obligations will be mitigated because a diligent State can do very little to ensure the enjoyment of Convention rights without a governmental apparatus in the territory.[107] For example, one cannot expect State agents operating extraterritorially to secure the applicant's right to a fair trial (Article 6 ECHR), absent an 'impartial tribunal' in the relevant territory.[108]

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104 *Al-Skeini* (n 9) para 137.

105 King (n 29) 538.

106 *Al-Skeini* (n 9) para 137.

107 Cf. Milanovic (n 39) 210 who argues that positive obligations should not arise at all unless the State's extraterritorial jurisdiction is established on the basis of territorial control.

108 King (n 29) 540.

This tailored responsibility of the State acting extraterritorially is supplemented with that of the State on whose territory the violation occurs. As established above, the *de jure* territorial State will retain jurisdiction over the applicant. As with all situations within its territory, the State will be responsible for 'securing' the Convention rights *in toto*. Therefore, in principle, it will owe both positive and negative duties to individuals within its jurisdiction.

The territorial State's obligations will also be commensurate to its ability to secure the Convention rights. If its agents did not participate in the infringement of the applicant's rights, the violating conduct cannot be attributed to the territorial State. This should only engage this State's positive obligations to prevent violations. Therefore, the extent of these obligations will depend on the degree of control exercised by the territorial State over the situation which gave rise to the violation.[109]

4. Responsibility under the Spatial Model

When a State exercises extraterritorial jurisdiction based on its *de facto* control over territory (i.e. the spatial model), it will be obliged 'to secure, within the area under its control, *the entire range of substantive rights* set out in the Convention'.[110] The State, whose jurisdiction is 'territorial-based', will owe both positive and negative obligations under Article 1 ECHR.[111] When the respondent State's agents commit human rights violations in a territory over which it has factual control, that State is in breach of its negative obligations because the impugned conduct is attributable to it by virtue of Article 4 ARSIWA. Therefore, the ensuing responsibility is 'standardised' and cannot be tailored.

It is unclear whether the actions of the subordinate local administration (which is often created where extraterritorial jurisdiction is established on the spatial model) should be imputed to the respondent State. A starting point is the *Cyprus v Turkey* judgment. The Grand Chamber held:

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109 Tzevelekos (n 44) 162.

110 *Al-Skeini* (n 9) para 138 [emphasis added].

111 King (n 29) 542. In this respect, it is immaterial whether jurisdiction emanates from the respondent State's sovereign right or its factual control over the territory.

> Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.[112]

The Court uses the obscure term 'responsibility engaged'. It does not specify how Turkey's responsibility arises. This uncertainty is exacerbated as the Court continues by stating that the acts of private individuals may also 'engage that State's responsibility'.[113] Given that the actions of private individuals can only engage Turkey's positive obligations to prevent a violation, this indicates that the cited paragraph could encompass responsibility arising out of a breach of both Turkey's negative *and* its positive obligations. The interpretations open to the Court are considered in turn.

On one interpretation, the Court may be stating that Turkey is responsible for the actions of its own agents *and* for the actions of the local administration under Article 4 ARSIWA. There are two objections to this interpretation. Primarily, this would mean that the actions of the local administration would always engage Turkey's negative obligations. In case of violation, this would lead to 'standardised responsibility', thereby precluding any tailored approach. Secondly, the actions of the 'TRNC' administration would probably not be attributable to Turkey under Article 4 ARSIWA. This is because the administration is not a State organ under Turkey's internal law.[114] Furthermore, it is unlikely that the 'TRNC' administration will satisfy the high threshold of 'complete dependence' which is required in order to be attributed to Turkey as a *de facto* State organ.[115] Even if the 'TRNC' is held to be 'completely dependent' on Turkey, attribution under Article 4 ARSIWA cannot be convincingly applied across all cases of extraterritoriality. For example, it would be fictitious to view the agents of the 'MRT' administration as Russian State organs given the lesser degree of control exercised by Russia.[116] Indicative of this is *Catan v Moldova and Russia*, where the 'MRT' administration shut down schools which used the Latin alphabet,

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112 *Cyprus v Turkey* (n 4) para 77.

113 Ibid para 81.

114 *Bosnian Genocide* (n 99) para 388.

115 Ibid paras 392-394.

116 Berkes (n 74) 415.

despite Russian efforts to the contrary.[117] Therefore, due to the internal incoherence which this approach would create within the law of extraterritoriality, it should be rejected.

On an alternative interpretation, the actions of Turkey's State organs and the 'TRNC' administration may, once again, both be attributable to Turkey. However, the acts of the local administration may be so attributed under Article 8 ARSIWA if it is subject to the 'direction and effective control'[118] of Turkey. In the *Bosnian Genocide Case*, the International Court of Justice ('ICJ') confirmed that effective control must be exercised 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken'.[119] This indicates the difficulty of successfully invoking Article 8 ARSIWA.

In stark contrast, the ECtHR has held that:

> It is not necessary to determine whether [...] Turkey actually exercises detailed control over the policies and actions of the authorities of the 'TRNC'. It is obvious [...] that her army exercises effective overall control over that part of the island. Such control [...] entails her responsibility for the policies and actions of the 'TRNC'.[120]

This different approach by the ECtHR may indicate that it is adopting a lower threshold for attribution which is *sui generis* to the ECHR. However, the Court has maintained that it is applying the public international law rules of State responsibility.[121]

A further objection to the lax approach to Article 8 ARSIWA is that it would lead to internal incoherence within the law of extraterritoriality. This is because the issue of attribution arises at two stages when determining extraterritorial responsibility. First, a finding of extraterritorial jurisdiction is usually premised on the operation of *agents* attributable to the State outside its territory.[122] The imputability of these agents to their State is determined

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117 *Chiragov* (n 37) para 149.

118 Tzevelekos (n 44) 137. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1984] ICJ Rep 392, paras 115-116.

119 *Bosnian Genocide* (n 99) paras 396-400.

120 *Loizidou (Merits)* (n 45) para 56.

121 Ibid para 52.

122 Milanovic (n 39) 51-52.

according to ARSIWA. However, an issue of attribution also arises at a later stage, when the Court is considering whether the *violating act* is attributable to the respondent State. It is at this later stage that the Court purports to employ the more lenient approach to attribution.

This less stringent approach to Article 8 ARSIWA would require the Court to apply the same doctrine of attribution at each stage of the assessment, but with diverging meanings. This division of attribution would undermine the clarity of the law. Consequently, it is argued that the *Loizidou* 'effective overall control' test should only be read as a test to establish jurisdiction over the relevant territory, and not as an alternative to the *Bosnian Genocide* test of attribution.[123]

Despite these difficulties, the Court appears to have adopted this interpretation, stating that 'violations are [...] imputable to Turkey'.[124] However, the *violation* would be attributable to the respondent State, even if it arose from a breach of a positive obligation by omitting to prevent the actions of private parties. This is because only the respondent State owed primary obligations under the ECHR. The relevant question, which the Court did not answer clearly, was whether the *conduct* which amounted to the violation was attributable to the State. In light of this uncertainty, the adoption of the aforementioned interpretation cannot be considered unequivocal.[125]

The Court should have adopted a different interpretation. The better view is that the responsibility of the *de facto* controlling State (i.e. the respondent State with extraterritorial *de facto* jurisdiction) could be engaged *either* through a breach of its negative obligations (due to the acts of its own organs) *or* by virtue of a breach of its positive obligations (by failing to prevent the agents of the local administration from committing a violation).[126] This is the only interpretation open to the Court if it wishes to conform to the principles of public international law as, on the application of the *Bosnian Genocide*

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123 Ibid 49-50.

124 *Manitaras v Turkey* App no 54591/00 (ECtHR, 3 June 2008) para 27.

125 Rick Lawson, 'Life after Banković: On the Extraterritorial Application of the ECHR' in Alphonsus Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 99.

126 Milanovic (n 39) 46-51.

'effective control' test, it is unlikely that the local administration's conduct will be attributable to the respondent State. A similar interpretation was endorsed by Judge Ziemele in *Chiragov*.[127]

Given that the obligation binding the respondent State is a positive one, its extent will vary according to that State's factual control over the relevant situation. In principle, if a considerable degree of control is exercised over the impugned conduct, the obligation could be equivalent to that imposed if the local administration had been a conventional organ of the respondent State. However, where the factual control exercised by that State is reduced, the Court will be free to impose a mitigated obligation and, if that obligation is breached, tailored responsibility.

In addition to the responsibility of the *de facto* controlling State, the sovereign State retains jurisdiction over the whole of its *de jure* territory. Consequently, any violation of Convention rights which occurs within this territory also engages its own positive obligations under the ECHR, which are tailored to the constraining factual circumstances, provided its own agents were not involved.[128]

The proposed approach is consistent with the Court's willingness to hold Parties to the Convention concurrently responsible for their omissions in the face of violations by private actors.[129] Furthermore, the most recent jurisprudence of the Court appears to be moving towards the 'concurrent and tailored' model. One such example can be found in the case of *Güzelyurtlu v Turkey and Cyprus*, in which the Grand Chamber held that both Turkey and Cyprus had jurisdiction in relation to the investigation of the murder of three Turkish Cypriot victims, which had occurred on territory controlled by Cyprus.[130] As a result, a positive obligation to carry out an effective

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127 Partly Concurring, Partly Dissenting Opinion of Judge Ziemele, *Chiragov* (n 37), para 12. However, Judge Ziemele suggested that positive obligations could arise even in the absence of the respondent State's jurisdiction over the territory in question. This is contrary to the wording of Article 1 ECHR.

128 *Ilascu* (n 26) para 333.

129 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 1 July 2010).

130 App no 36925/07 (ECtHR, 29 January 2019).

investigation under Article 2 ECHR was incumbent on both respondent States.

5. The Problem of 'Extra-extraterritoriality'

The advocated approach is not without its own difficulties. One problem is that of 'extra-extraterritoriality' which may be illustrated by way of example: if an agent of the 'TRNC' local administration commits a human rights violation in the UN-administered buffer zone, under the proposed model, Turkey would not be held responsible for their conduct.[131] This is because, on the orthodox *Bosnian Genocide* test, the actions of the agent may not be attributed to Turkey. Therefore, their conduct will not extend Turkey's extraterritorial jurisdiction further on the personal model, as this is contingent upon the actions of an agent attributable to Turkey.[132] This is problematic because only Cyprus will be held accountable for the agent's violation and it will only owe a mitigated positive obligation to the victim. Therefore, the applicant's protection under the ECHR will be compromised.

In dealing with the above scenario in *Isaak v Turkey (Admissibility Decision)*, the ECtHR held that violations committed by Turkish and 'TRNC' agents in the buffer zone could extend Turkey's jurisdiction by bringing the victim within the authority and control of Turkey.[133] The Court did not distinguish between the two types of agents. This suggests that the 'TRNC' agents were attributable to Turkey and could, therefore, extend the scope of its jurisdiction.

To reconcile *Isaak* with the proposed model, the Court could introduce a presumption that the actions of the local administration are imputable to the *de facto* controlling State. This would enable the Court to extend Turkey's extraterritorial jurisdiction, while remaining consistent with public international law. The presumption should arise in all cases where the applicant proves spatial extraterritorial jurisdiction. In order to rebut this presumption, the ECtHR should require that the respondent State prove that the specific actions of the local administration's agents cannot be

131 This territory is not under the 'effective overall control' of Turkey.

132 *Al-Skeini* (n 9) para 133.

133 App no 44587/98 (ECtHR, 28 September 2006) 20-21.

attributed to it under the *Bosnian Genocide* 'effective control' test. Where the respondent State's spatial jurisdiction is established and the presumption is rebutted, the Court will be able to fall back on the tailored approach outlined above. The Court could apply this presumption flexibly in order to reach a just result on the facts of each case.[134]

This presumption is justified both practically and theoretically. On a practical level, imposing the burden of proof on the respondent State is warranted because the respondent State should be better able to access evidence in the possession of the subordinate local administration. The shift of the burden of proof may also be explained on three theoretical grounds. Primarily, upon establishing extraterritorial jurisdiction, the Court invariably finds that the support given by the respondent State is a 'but-for' cause for the continuing existence of the local administration.[135] Hence, this connection between the agent of the local administration and the respondent State justifies imposing the burden of proof on the latter. Secondly, this proposition is not a presumption of liability. The presumption is in favour of finding jurisdiction. It is still open to the respondent State to rebut the presumption or to argue that it has discharged its obligations. Finally, the proposed presumption will prevent signatory States from laundering human rights violations by refracting them through various legally void situations. Therefore, the State will be universally accountable for violations to which it is connected. This is consistent with the aim of filling the 'vacuum'.

V. Evaluating 'Concurrent and Tailored' Responsibility in Context

1. Tailored Responsibility rather than Tailored Jurisdiction

De Schutter has argued that jurisdiction, rather than responsibility, should be tailored according to the respondent State's ability to secure the

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134 See *Isaak v Turkey* App no 44587/98 (ECtHR, 24 June 2008) paras 107-108 which indicates that the ECtHR is willing to manipulate the burden of proof when establishing whether a violation has occurred.

135 *Catan* (n 36) para 111.

enjoyment of the Convention rights.[136] In support of this relative concept of jurisdiction he cites *Ilascu*:

> Nevertheless, such a factual situation reduces the scope of that *jurisdiction* in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory.[137]

It is argued that responsibility is a more appropriate stage at which to introduce flexibility. First, the orthodox view is that jurisdiction is a binary threshold.[138] Secondly, the flawed logic in the aforementioned statement is evident. Jurisdiction cannot be 'considered [...] in [...] light of the [...] State's [...] positive obligations' because, prior to establishing jurisdiction, no such obligations exist.[139] For this reason, it is preferable to use responsibility as the conceptual stage at which flexibility can be incorporated. The Court has recently acknowledged that a restrictive factual situation will limit the State's responsibility and not its jurisdiction.[140]

2. Does the Model Remedy the 'Vacuum' Concern?

As suggested, the jurisprudence on extraterritoriality developed in order to avoid a 'vacuum' in the European human rights regime. It is argued that the advocated model effectively addresses this concern. According to the proposed model, the *de jure* sovereign State retains jurisdiction over its territory and is therefore obliged to secure all the Convention rights therein. Hence, when the victim is within the *éspace juridique* of the Convention,[141] they will, at least, have the full protection of the Convention, as guaranteed by the *de jure* territorial State.

3. The Doctrinal Advantages of 'Concurrent and Tailored' Responsibility

The proposed approach should give rise to various doctrinal advantages which contribute to the creation of a principled approach to the law of

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136 De Schutter (n 20) 222.

137 *Ilascu* (n 26) para 333 [emphasis added].

138 Besson (n 1) 878.

139 *Issa v Turkey* App no 31821/96 (ECtHR, 16 November 2004) para 66.

140 *Sargsyan* (n 56) paras 139-140.

141 *Banković* (n 2) para 80.

extraterritoriality. Primarily, adopting a 'concurrent and tailored' model of State responsibility will align the ECtHR jurisprudence on extraterritoriality with related concepts of public international law. As argued, the proposed interpretation of the case law will align the Court's approach to attribution with the ICJ jurisprudence. Furthermore, tailored obligations are imposed in related fields of international law. Under the law of occupation, which may impose parallel obligations to the ECHR,[142] Article 43 of the Hague Regulations Respecting the Laws and Customs of War on Land will impose a tailored obligation on the occupying State in relation to the governing of the occupied territory.[143] Given that extraterritorial obligations under the ECHR may arise even when the respondent State exercises a lower level of territorial control than an occupying State (e.g. Russia over the 'MRT'), it would be counterintuitive to impose more onerous obligations on the respondent State under the ECHR. Therefore, imposing tailored obligations under the ECHR on States exercising extraterritorial jurisdiction will be consistent with those States' parallel obligations in public international law.

The advocated model will also enable the Court to achieve internal coherence within the law of extraterritoriality by aligning the case law on extraterritoriality with the 'pseudo-extraterritorial' cases on *non-refoulement*.[144] While these cases are, strictly speaking, not extraterritorial because the violations occur within the territory of the extraditing State, the Court has consistently treated them as being part of the law of extraterritoriality.[145] An example can be found in *Loizidou (Preliminary Objections),*[146] which cites *Soering v UK* as authority that jurisdiction can be extended extraterritorially.[147]

In extradition cases, the Court has also applied a model of concurrent responsibility. Under the Court's approach, the State to which the applicant

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142 Schabas (n 92) 102.

143 Convention concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (entered into force 26 January 1910) [1910] UKTS 10.

144 Tzevelekos (n 44) 157.

145 Maarten Den Heijer, 'Shared Responsibility before the European Court of Human Rights' (2013) 6 *Netherlands International Law Review* 411, 423.

146 *Loizidou (Preliminary Objections)* (n 32) paras 61-62.

147 App no 14038/88 (ECtHR, 7 July 1989).

is being extradited will be liable regarding any violation of human rights which occurs on its territory. The extraditing State has an independent obligation not to extradite to a place where there is a 'real risk' that the individual's Convention rights will be infringed.[148] This latter obligation is a positive one which requires the extraditing State to prevent violations by a third State.[149] Therefore, a due diligence standard should be applied.[150] Illustrative of this line of cases is *M.S.S. v Belgium and Greece*.[151] In this case, Greece, to which the victim was extradited, was found to be in violation of the applicant's rights under Article 3 ECHR. Moreover, Belgium, as the expelling State, was also held responsible for the violation of Article 3 because its authorities were aware of the risks of degrading treatment posed by the Greek asylum procedure and knowingly exposed the victim to these risks.[152] The similarities with the proposed approach to extraterritoriality are evident. Both lines of cases give rise to concurrent responsibility and both use a subjective notion of State fault in order to determine the extent of responsibility.

4. 'Concurrent and Tailored' Responsibility May Provide More Comprehensive Protection

The recognition of *de facto* and *de jure* jurisdiction under Article 1 ECHR could provide more comprehensive protection for the applicant's Convention rights. This may be illustrated through an example. Take the facts of *Loizidou*, where the applicant was denied access to her property, which was located in the 'TRNC'.[153] It is clear that the applicant has a claim against Turkey for the loss of use of her property under Article 1 Protocol 1 ECHR. This is because Turkey's unlawful actions led to an interference with the applicant's rights in fact. Consider the following scenario. The banks in the Republic of Cyprus prevent the applicant from taking out a mortgage on the legal title of her property. The interference with the applicant's rights operates purely on the legal title to the property. This legal title is not

148 Ibid paras 85-91.

149 Den Heijer (n 145) 422-423.

150 Tzevelekos (n 44) 160.

151 App no 30696/0 (ECtHR, 21 January 2011).

152 Ibid paras 362-368.

153 *Loizidou (Merits)* (n 45).

recognised by Turkey. It would therefore be odd to make Turkey liable for an interference that operates purely at the level of the legal title, which exists by virtue of the State apparatus of the Republic of Cyprus. Recognising the *de jure* jurisdiction of Cyprus over the territory of the 'TRNC', where the property is located, would mean that Cyprus would be subject to a positive obligation to ensure that the applicant is allowed to take advantage of the legal title to her property. This will, in turn, ensure that the applicant could have an effective remedy for interferences with her Convention rights which occur purely on the legal plane.

5. A Practical Obstacle to 'Concurrent and Tailored' Responsibility?

One may argue that recognising concurrent jurisdiction of Contracting Parties would require the applicant to exhaust domestic remedies in both jurisdictions prior to bringing a claim before the ECtHR.[154] Such a requirement would increase the procedural burden on the applicant and would render the possibility of launching a claim against two States merely theoretical. It is argued that the applicant should only have to exhaust domestic remedies in one of the two jurisdictions to render their claim admissible against both States. This is controversial. Nevertheless, the Court has applied this admissibility requirement 'tak[ing] realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant'.[155] Moreover, it has indicated that, when an applicant brings concurrent claims against two States, it will accept that domestic remedies should only be exhausted in one jurisdiction, at least in cases where the authorities in the other jurisdiction had the opportunity to remedy the alleged violation but failed to do so.[156] This 'relaxed approach' to the non-exhaustion of municipal remedies extends to extraterritorial cases.[157]

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154 Article 35 ECHR.

155 *Akdivar v Turkey* App no 21893/93 (ECtHR, 16 September 1996) para 69.

156 *Güzelyurtlu v Cyprus and Turkey* App no 36925/07 (ECtHR, 4 April 2017) paras 197-201.

157 Marko Milanovic, 'The Nagorno-Karabakh Cases' (*EJIL: Talk!*, 23 June 2015) <www.ejiltalk.org/the-nagorno-karabakh-cases/> accessed 24 March 2018.

6. 'Concurrent and Tailored' Responsibility as a Political Compromise

While the above analysis is primarily doctrinal, the politically contentious nature of the law of extraterritoriality requires that we consider the political ramifications of the 'concurrent and tailored' model of responsibility. The extraterritorial application of the Convention has generated political resistance in various respondent States. This resistance has included refusals by respondent States to execute the judgments of the ECtHR,[158] as well as calls to invoke Article 15 ECHR.[159]

It is argued that the proposed model presents an opportunity for a new political compromise regarding the extraterritorial application of the ECHR. First, the model provides a doctrinal framework that allows the respondent State, which is acting extraterritorially, to challenge the extent of its obligations. This differs from the Court's current approach, which does not clearly delimit the scope of these obligations. Under the current approach, a respondent State would have to challenge the applicant's claim by alleging that it lacks jurisdiction. If this challenge fails, then the obligations incumbent on the State would be 'standardised'. This would impose a disproportionate burden on the State which would foster resistance. Conversely, the 'concurrent and tailored' model would allow a respondent State to launch an additional challenge against such claims by arguing that its obligations are mitigated due to the constraining circumstances of the case. This would enable the Court to continue to develop the law of extraterritoriality, extending the jurisdiction of Contracting Parties under Article 1 ECHR in pursuit of according universal protection for Convention rights. The tailored nature of the obligations would ensure that this expansion of jurisdiction will not subject respondent States to obligations which would be impossible to discharge.

Secondly, a respondent State which retains its intra-territorial jurisdiction is likely to accept its potential responsibility under the proposed model for two reasons. First, the obligations incumbent on such States would be mitigated

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158 Interim Resolution CM/ResDH(2014)185 'Execution of the judgments of the European Court of Human Rights in the cases Varnava, Xenides-Arestis and 32 other cases against Turkey' (25 September 2014).

159 Richard Ekins, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat* (Policy Exchange 2015) 8.

and can therefore be discharged relatively easily. Even if the Court finds a violation, the responsibility of the State would be tailored, thus facilitating the execution of the judgment. Secondly, the 'concurrent and tailored' model provides that sovereign legal rights could form the basis for the respondent State's jurisdiction under Article 1 ECHR. Given that the territorial State continues to claim sovereignty over the contested territory, it would probably not dispute the Court's finding of jurisdiction. In exchange, the Court will reaffirm that the respondent State retains its sovereignty over the relevant territory.

VI. Conclusion

The need for a creative reassessment of the law of extraterritoriality has been acknowledged by senior officials at the Council of Europe.[160] It is contended that this reformulation must be conducted with a view to tailoring State obligations and responsibility according to each State's ability to secure the Convention rights on the facts of each case. This tailoring of State responsibility will ensure that the Court's judgment can realistically be executed. This paper has argued that a model of 'concurrent and tailored' State responsibility should be adopted in the case law concerning the extraterritorial application of the ECHR. This model makes two novel propositions. First, it provides that jurisdiction is a creature of both law and fact. Hence, concurrent jurisdiction should be recognised when one State has the legal right to regulate the situation in question, whereas another State has the *de facto* ability to do so. This occurs when one State is acting extraterritorially. Secondly, the model suggests that the obligations of respondent States could be tailored by recognising that respondent States will often be subject to positive obligations when acting extraterritorially.

The Court appears to be moving towards the recognition of concurrent responsibility by consistently holding that the sovereign State's intra-territorial jurisdiction is retained, even in the absence of factual control over

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160 'Enforcing Strasbourg Court's Judgments concerning the Transnistrian region of the Republic of Moldova' (Council of Europe, 19 February 2018) <www.coe.int/en/web/human-rights-rule-of-law/-/enforcing-strasbourg-court-s-judgments-concerning-the-transnistrian-region-of-the-republic-of-moldova> accessed 25 March 2018.

a given victim or territory.[161] The responsibility of the territorial State therefore operates alongside the responsibility of the State which exercises extraterritorial jurisdiction. However, it is argued that the Court should explicitly state that concurrent jurisdiction and responsibility are now the norm in cases concerning the extraterritorial application of the ECHR. Furthermore, the Court is progressively realising the need for a tailored approach to State responsibility, rejecting the old standardised approach to State obligations under the Convention.[162] Nevertheless, the existing jurisprudence is marred by doctrinal uncertainty and does not clearly operate in favour of tailoring State obligations and their ensuing responsibility under the Convention. As advocated above, the case law may be reinterpreted so that extraterritorial violations will usually engage the respondent State's positive obligations. As stated, the extent of these obligations is commensurate to the State's factual ability to secure Convention rights. It has been argued that positive obligations should therefore be used to introduce a tailored approach to State responsibility.

The Court will have ample opportunity to reconsider its approach to extraterritoriality. In the coming years the extraterritorial application of the ECHR will become increasingly important as cases regarding Turkey's military operations in Syria and Russia's support for separatist regimes in the Ukraine reach the ECtHR.[163] Therefore, it is imperative that the Court develops a clear and coherent doctrine of extraterritoriality, which will enable it to fulfil its purpose as the gatekeeper of human rights in Europe.

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161 *Sargsyan* (n 56) para 130.

162 *Al-Skeini* (n 9) para 137; *Banković* (n 2) para 75.

163 Mark Lowen, 'Syria war: Turkish-led forces oust Kurdish fighters from heart of Afrin' (BBC, 18 March 2018) <www.bbc.com/news/world-middle-east-43447624> accessed 25 March 2018; *Ayley and Others v Russia* App nos 25714/16 and 56328/18 (Case Communication, 4 April 2019).