EXTRA-TERRITORIAL JURISDICTION OF THE EUROPEAN COURT OF HUMAN RIGHTS: The Concept of Functional Jurisdiction.

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Declaration Form

The work I have submitted is my own effort. I certify that all the materials used in this Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed Date

Francis Anayochukwu Igiriogu ***21st May 2012***

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Abstract

This study promotes 'functional concept of jurisdiction' by examining the extraterritorial jurisdiction of the European Court of Human Rights, how the court exercises its authority when violation takes place outside the territory of the violating State. This is done with the aid of doctrinal analysis, by relying on international law, case laws, legal principles and concepts and the writings of scholars as its material basis. The aim is to make the case laws of the European Court of Human Rights much clearer and hence minimize the frustration occasioned by the inconsistency of its case laws in the national courts of the Council of Europe members.

International State responsibility doctrine considers every state responsible for its internationally wrongful acts no matter where the violation takes place. Reflection into the basic human rights jurisdictional clauses shows that there is a lacuna in the jurisdictional clause of the European Convention on Human Rights in Article 1 which requires the State parties to secure to everyone 'within their jurisdiction' the rights in the convention. This provision is anachronistic since it encourages territorial focus in this age of globalization. It is time to revise this provision so that it will be in tune with the contemporary jurisdictional clause that requires States to secure the convention rights to everyone 'subject to their jurisdiction' broadly speaking as found in more recent human rights treaties.

KEY WORDS

International Law, European Convention on Human Rights, Doctrinal Analysis, Extra-territorial Jurisdiction, Human Rights, European Court of Human Rights, State Responsibility, Jurisdictional Clause, Functional Jurisdiction.

List of Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
AFCHPR	African Commission on Human and Peoples Rights
AFCtHPR	African Court on Human and Peoples Rights
ARCHR	Arab Charter on Human Rights
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Act
CISHRC	Commonwealth of Independent States Human Rights Convention
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HCP	High Contracting Party
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILM	International Legal Material
IRA	Irish Republican Army
MRT	Moldavian Republic of Transdniestria
NATO	North Atlantic Treaty Organisation
PCIJ	Permanent Court of International Justice

PKK	Workers Party of Kurdistan
RIAA	Reports of International Arbitration Awards
TRNC	Turkish Republic of Northern Cyprus
UKHL	United Kingdom House of Lords
VCLT	Vienna Convention on the Law of Treaties.

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CHAPTER 1

Introduction

1.1 General Background

The human rights law guarantees not only fundamental rights and freedoms, but also the means by which redress can be obtained when they are violated. This is done by empowering courts with the responsibility of interpreting and applying the laws. For the right bearer to benefit from this judicial function, the courts must have clear jurisdiction to hear such complaints. If a court or tribunal that is given judicial functions is not given this jurisdiction, the beneficiary of the right will not be able to get any legal remedy. This study concerns one such situation, i.e. extra-territorial jurisdiction, a situation where the court assumes authority beyond its usual territorial boundary.

This researcher was motivated to examine this question by his experience in litigating human rights in Nigerian courts. This experience showed how the victims of human rights and human rights activists were frustrated by the failure of the courts to exercise human rights jurisdiction in some situations. The problem entails both financial and psychological cost including to those offering *pro bono* legal services since this often leads to filing fresh application in courts with the attendant cost, time and protocol. The issue in question may be an urgent matter that would have been averted by initiating legal process; such chance is lost and the damage would have been completed before the next suit is instituted. Sometimes, due to financial constraints, the case is abandoned and the victim is left to mourn his fate without redress. Such situation gives the impression of 'false' legal victory for the perpetrator of the abuse and the human rights defender is seen as 'incompetent'. Hence, it is invaluable for rules and principles of law to be effective, coherent and predictable so that human rights lawyers can give informed legal advice to their clients.

This study will examine the extra-territorial jurisdiction of the ECtHR. This court is established to '...ensure the observance of the engagements undertaken by the High Contracting Parties in the convention and the protocols thereto'.[1] Clearly here the ECtHR is empowered to deal with cases concerning whether any HCP has breached the ECHR or not. However this task appears to be complicated if one pays close attention to Article 1 of the ECHR which requires the HCPs to '... secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this convention'. The problem arises from the phrase 'within their jurisdiction'. Does this limit the courts' jurisdiction to the territorial confine of

[1] Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, (hereinafter ECHR).

the HCPs or does this extend beyond their borders to all places they exercise power or authority? The answer is invaluable because it can mean assuring jurisdictional authority to the ECtHR (as seen in article 9) everywhere the obligation of the HCP is violated.

The case law of the ECtHR in this matter is far from clear and consistent. While some of the court's decisions appear to support territorial limit, others have favoured extra-territorial jurisdiction.

1.2 Aims and Significance of the Research.

This research examines the question of extra-territorial jurisdiction and legal doctrines related thereto as it affects ECtHR. This is necessary in view of the inconsistency that has characterised the case law of the court regarding its interpretation of Article 1 of ECHR. The ECtHR is not only *primus inter pares* among other regional human rights bodies in terms of case law development, but its jurisprudence is closely followed by courts within Council of Europe. Indeed, its individual complaint mechanism has rightly been described as the '...crown jewel of the world's most advanced international system for protecting civil and political liberties' (Helfer 2008:159). Therefore, there is need to clarify the case law and principles of the ECtHR to avoid the frustration which is seen in some national courts that are eager to follow the precedent of the court. As *Lord Rodger* of Earlsferry stated in the case of *Al-Skeini & Others v Secretary of State*, (House of Lords, United Kingdom),

> The problem which the House has to face, quite squarely, is that the judgements and decisions of the European Court do not speak with one voice. If the differences were merely in emphasis, they could be shrugged off as being of no great significance. In reality however, some of them appear much more serious and so present considerable difficulties for national courts which have to try to follow the jurisprudence of the European Court.[2]

To forestall the above scenario, the research will promote, in the end, functional concept of jurisdiction; determining jurisdiction based on violation of human rights obligations of HCPs. This will provide a consistent yardstick to ascertain the extra-territorial jurisdiction of the ECtHR. If human rights are to have true meaning, the mechanism of ensuring their enjoyment should be certain, effective and consistent. This will also save human rights lawyers and activists in Europe the misfortune of speculating what the legal position is for the application of the ECHR since this is key for a right based application of the European human rights laws.

[2] (2007) UKHL judgement 26, paragraph 67.

1.3 Research Questions

From the challenge the research seeks to confront, the research questions are simply:

a. What is the justification for using human rights obligation to determine a state's responsibility outside its territory? and
b. When should the European Court of Human Rights exercise extra-territorial jurisdiction?

1.4 The Material Basis

This is a library based research. To answer the research questions reliance will be made on relevant statutes, legal concepts and doctrines, international law, case laws and the writings of scholars. These will be critically analysed to answer the research questions.

1.5 Delimitation of Study

This study concerns the extraterritorial jurisdiction of the ECtHR and relies heavily on the court's case law. Mindful of the word limit, the analysis of the cases are very brief - often pointing to the most important legal principle of the judgement in the researcher's view. The same constraint is seen in the examination of the jurisdictional clauses of other human rights mechanisms where some of them that bring out the relevant provisions are briefly examined.

1.6 Content of Chapters

Chapter 1 of the study introduces the work and deals with the aims of the research, the main research questions and the data used for the study. Chapter 2 provides the analytical perspective and theoretical framework. Chapter 3 examines the doctrine of state responsibility with implication for violations of human rights and IHL while Chapter 4 looks at the jurisdictional clauses of other human rights mechanisms. In Chapter 5, the jurisprudence of the ECtHR is analysed and reflects on the views of scholars regarding article 1 of ECHR. That chapter also contains examination of the difference between the jurisdictional clause of ECHR and others. Chapter 6 introduces the concept of functional jurisdiction whereas the general conclusion and recommendations are given in Chapter 7.

CHAPTER 2

Theoretical Framework and Perspective.

2.1 The Relevant Legal Doctrines

The nature of the research questions posed in this study requires making critical inquiry into the legal doctrines related to 'Extra-Territorial Jurisdiction' as perceived in the case laws of ECtHR. Doctrinal analysis is helpful to critically assess the validity of different legal positions and views. That way the legal concepts which best explain the issues at stake are better understood.

Doctrinal Analysis refers to the assessment of legal doctrines which include-legal concepts and principles of all types, cases, statutes, laws, rules etc within the legal framework (Hutchinson and Duncan 2010:18). It involves the careful consideration of judicial opinions with a view to identify ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings and otherwise exercising the characteristic skill of legal analysis (Posner 1981:113). Doctrinal analysts consider not only whether an opinion is clear, well reasoned and consistent with the precedents, the statutes and the constitution but also whether a position is right in the sense that it is consistent with certain premises about justice and administrative practicality (Posner 1981:114). It is analysis that points out the logical inconsistencies and raise normative questions about the wisdom of various doctrines (Redish 1985:1381). Doctrinal analyst also draws attention of the judiciary to any error in its finding and provokes a new course of legal reasoning (Tiller and Cross 2006:518).

The actual process of analysis by which doctrines are formulated owe more to the subjective, argument based on methodologies of the humanities than to the more detached data-based analysis of the subject-matter (Chynoweth 2008:30). The normative character of the law also means that the validity of doctrinal research must inevitably rest on developing a consensus within the intellectual community, rather than appealing to any external reality (ibid at 30).

2.2 Jurisdiction as a Theoretical Concept

Jurisdiction is one of those concepts that are susceptible to different interpretations. In legal parlance, it is usually used to demarcate the scope of the legal competence of a State or the regulatory authority to make, apply and enforce rules (Lowe 2003:329). State jurisdiction is based on the principle of State sovereignty, which is exercised through legislative, executive or judicial actions (Shaw 2003:404). Legislative jurisdiction covers the ability of applying

laws to persons and things within its territory. In certain circumstances this may also extend abroad. Executive jurisdiction refers to the capacity of the State to enforce its laws (Shaw 2003:576, Kamchibekova 2007:90). Jurisdiction is a defining characteristic of statehood and an important basis for State interaction (Byers 1999:53). Unless there is express consent by the host State, jurisdiction to enforce is generally restricted to the State's territory (Kamchibekova 2007:90).

Judicial jurisdiction relates to the power of the State to subject persons or things to the process of its courts and tribunals (Shaw 2003:578, Kamchibekova 2007:90). In international law it is used to describe the scope of the right of an international court to adjudicate cases between the parties before them (Lowe 2003:330). It is exercised on different grounds e.g.; territorial, personal, national, protective, universal and other grounds (Shaw 2003:576-7, Kamchibekova 2007:90, Lowe 2003:332, Brownlie 2003:106 and Byers 1999:53-54).[3] It is generally accepted that jurisdiction is primarily territorial (Shaw 2003:577, Kamchibekova 2007:90, Lowe 2003:336, Brownlie 2003:106 and Byers 1999:53). The territorial basis of jurisdiction is sometimes justified on the grounds of the convenience of the forum and the presumed existence of the interest of the State where the crime is committed (Lew 1978:168).

A State's territory includes both its territorial waters which extend to twelve miles from its coast, and the airspace above its land (Lowe 2003:336). As a result States exercise jurisdiction regulating traffic for ships off their coasts and for aircraft in their skies. Territorial jurisdiction is normally exercised in the place where the crime is committed. However, there are instances where the commission of a crime occurs in more than one state, creating confusion as to which state should assume jurisdiction over the same case. To resolve this situation, international law has developed 'Subjective' and 'Objective' territorial jurisdictions (Lowe 2003:337, Kamchibekova 2007:91). While the former permits jurisdiction over offences commenced within the state but not completed there; the latter allows jurisdiction over offences which have their consummation within the state although it did not begin there (Kamchibekova 2007:91, Lowe 2003:337-8). The objective territorial jurisdiction is sometimes seen as the 'effects doctrine' where a state may regulate activity occurring outside the state if that activity has or is intended to have effects within it (Kamchibekova 2007:91)

Globalization has made contacts among nationals of different states a lot easier. It has also created situation which gave ground for misunderstanding relating to business, marriage, treaty based rights etc and even disputes concerning where they are settled by resorting to different legal *fora*. The exercise of extra-territorial jurisdiction is concerned with such exceptional circumstances in which a State is entitled to exercise its authority in the territory of another State (Lowe 2003:333). The war on terror, not constrained by national borders, provides other examples of these kinds of situations where the human rights of persons located often far away from a territory of a given State, are violated by the conduct of that state, its agents (Gondek 2005:350) or other independent actors. One approach of regulating these kinds of transnational conducts has been to expand the jurisdiction of courts or other

[3] Due to the scope of this research, the emphasis that will be placed will be on the territorial principle of jurisdiction, especially when it is legally permissible for state to extend its jurisdiction beyond its borders.

domestic institutions to assume direct authority over the transactions, including those elements outside the territorial boundaries of the regulating State (Putnam 2009:459-60).

Ratification of ECHR by the member States of Council of Europe implies submitting to its machinery for monitoring human rights conducts within European region. This mechanism is the ECtHR which should give attention to human rights matters inside the jurisdiction of HCPs. The objective is to hold them accountable to '...secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this convention'.[4] This jurisdiction stems from article 19 of the ECHR which empowers the ECtHR to '...ensure the observance of the engagements undertaken by the High Contracting Parties in the convention and the protocols thereto'. Although the task assigned to the court here appears to cover the territory of the HCPs, does it preclude it from inquiring into egregious abuse by any HCP outside its borders? To answer this question, it will be of interest to see if the principle of State responsibility for international wrongful act is important.

[4] Article 1 of the European Convention on Human Rights (ECHR) 1950

CHAPTER 3

The Doctrine of State Responsibility in International Law.

3.1 Introduction

As members of the international community, States assume different international obligations for maintenance of world peace and order as well as to respect and promote human rights. These obligations are contained in different treaties, agreements, anchored on the United Nations Charter and in customary international law. Respect for obligations assumed under treaties is in keeping with the principle of *pact sunt servanda*. State responsibility in international law concerns the duty of a State for failure to respect the obligations imposed by the international law (Wallace 2002:175). It covers all kinds of internationally wrongful conduct (Crawford and Olleson 2003:449). Contemporary international law also recognises the concept of '*erga omnes*'- that is - obligation owed by every State to the international community as a whole (Wallace 2002: 175). The ICJ identified these obligations in the *Barcelona Traction* case as deriving from; 'the outlawing of acts of aggression, and of genocide ... rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'[5]

3.2 The Draft Articles of International Law Commission

The ILC is a body of legal experts established in 1948 by the United Nations General Assembly,[6] in pursuance of the Charter mandate of '...encouraging the progressive development of international law and its codification'.[7] The draft articles which were prepared by the ILC constitute modest attempt to formulate State responsibility principles under international law. Most of these principles were already in existence dispersed in various treaties, agreements, judicial decisions, practice etc. Although the ILC started to study State responsibility in 1949, it was only in November 2001 at its 53rd session that it formally adopted the Articles on the Responsibility of States for internationally wrongful Act (Wallace

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[5] *Barcelona Traction Case* ICJ Report 1970 p.3 at p.32
[6] By General Assembly Resolution 174 (II) of 21 November 1947.
[7] See article 13(a) of the United Nations Charter which was signed on 26th June 1945 in San Francisco and came into force on 24th October 1945.

2002:175). These Articles 'seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for internationally wrongful acts'[8] It is important to consider this because violation of international human rights law is wrongful act.

As the ILC concluded 'every internationally wrongful act of a State entails the international responsibility of that State'.[9] The provisions of the ILC draft on ARSIWA constitute the basic principles underlying responsibilities as a whole; i.e. that a breach of international law by a State entails its international responsibility.[10] Already before the UN came into existence the PCIJ has affirmed in *Phosphates in Morocco* that when a State commits an internationally wrongful act against another State, international responsibility is established 'immediately as between the two States'[11]. The ICJ also applied this principle in the *Interpretation of Peace Treaties, Second Phase* when it held that 'refusal to fulfil a treaty obligation involves international responsibility'[12]

It should be noted that, there can only be an internationally wrongful act of a State when conduct consisting of an action or omission '(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation'[13]. This is condition precedent for a State's international responsibility. The PCIJ in the above mentioned *Phosphates in Morocco* connected international responsibility with the existence of an 'act being attributable to the State and described as contrary to the treaty rights of another State'.[14] The ICJ in the *Diplomatic and Consular Staff* case held that;

> ...first, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[15]

This means that the obligation must be binding on the State in question at the time of breach of the said obligation[16]. In any case, a State is said to breach international obligation if its act does not conform to what is expected of it by that obligation.[17] There are debates as to whether there must be fault for a State to incur international responsibility. Some argue that the affected State must have suffered some actual harm or damage before the breaching State incurs international responsibility (Bollecker-Stern 1973 cited in Crawford and Olleson 2003:460). However, articles 2 and 12 of ARSIWA do not require fault before a State incurs international responsibility. Much depends on the provision of the primary obligation in a

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[8] ILC commentary, Official Records of the General Assembly 56th Session, Supplement No.10 (A/56/10 chap.IV.E.1)
[9] ILC Draft Articles (ARSIWA), Article 1.
[10] No 1 commentary of article 1
[11] *Phosphates in Morocco, Preliminary Objections*, 1938 PCIJ, series A/B, No.74, p.10 at p.28
[12] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, ICJ Reports 1950, p.221
[13] Article 2 of ARSIWA
[14] Phosphates in Morocco, note 11 supra p.28
[15] United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, p.3 at p.29 para. 90
[16] Article 13 ARSIWA
[17] Article 12 of ARSIWA

given case, which may or may not require mental element (see Crawford 2002: 83-85, Crawford and Olleson 2003:460).

State is only responsible for acts or omissions which can be attributed to it. Article 4(1) of ARSIWA provides that the 'conduct of any State organ shall be considered an act of that State under international law'. It further provides that such act is that of the State; 'whether the organ exercises legislative, executive, judicial or any other functions, whatsoever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State'.

Thus even though State as an abstract entity does not act as such, it is vicariously liable to the acts of its officers which the law sees as its agents. This means if the primary obligation has provision for *mens rea* in the breach in question, it is the mind of these agents of the State that should be call into question. The courts have severally applied this principle of article 4 to judicial problems. In *Salvador Commercial Company Case*, the tribunal held that; '...a state is responsible for the acts of its rulers, whether they belong to legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity'.[18] The ICJ confirmed the principle in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, when it held that; 'According to a well-established rule of international law, the conduct of any organ of a state must be regarded as an act of that State. This rule is...of a customary character...'[19]

The State is also responsible under international law even though the person or entity is not an organ of the State but is empowered by State law to exercise governmental authority.[20] This can be seen in the prevailing privatization in many countries where States entrust to the private sectors important social services that are supposed to be government functions. Similarly the State is no less responsible even when the act of its agent is *ultra vires* the official authority such agent ordinarily has.[21] This is why the IACtHR held in *Velásquez Rodríguez* that;

> This conclusion...is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority; under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[22]

Indeed, 'if such unauthorised or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory'.[23] As a general rule, the acts of private persons are

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[18] *Salvador Commercial Company case*, Reports of International Arbitration Awards (RIAA), vol. XV, p.455 (1902) at p.477

[19] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports 1999, p.62 at p.87, para.62

[20] Article 5 ARSIWA

[21] Article 7 ARSIWA

[22] *Velásquez Rodríguez,* Inter-Am. Ct.H.R, Series C, No.4 (1989) at para.170.

[23] Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt (1993) 32 ILM 933.

not attributable to the State under international law (Crawford 2002:110). State however incurs international responsibility if a non agent of the State is acting under the instruction, guidance or control of the State in doing the wrongful act.[24] Hence, the *Appeal Chamber* of ICTY stated in *Prosecutor v. Tadic* that 'The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals...'[25]The situation is similar where the State adopts internationally wrongful act that was not originally performed by its agent as its own. Such State is responsible in international law for such conduct.[26] Application of this principle is seen in the *Diplomatic and Consular Staff* case.[27] The ICJ held that the subsequent approval by decree of the Iranian State of the acts of the militants who seized United States embassy and their personnel made the wrongful acts that of the Iranian State.[28] In essence, the doctrine of State responsibility maintains that if a State has assumed international obligation, it is not free to disregard its obligation and there is accountability if it violates same. Again if the State has assumed to act in certain way, e.g. to protect human rights but refuses to do so, it has committed wrongful act by omission.

3.3 State Responsibility and Violation of International Humanitarian Law.

IHL is part and parcel of international law and as such the general principles of State responsibilities for internationally wrongful act are still applicable. IHL, also known as 'Law of Armed Conflict' and 'Law of War' is concerned with the protection of vulnerable individuals, groups and humanity in general in time of armed conflict (Borda 2008:739). In essence it introduces 'forced' compassion in the field of combat. This is because 'no matter how tolerant in principle of basic considerations of military necessity' (Kalshoven 1991:827) the IHL rules set guideline on how combatants will treat the wounded, the sick, prisoners of war and civilians. The principles of IHL are laid down in many treaties, the major ones being ; the Hague Convention of 1907 on Land Warfare;[29] the four Geneva Conventions of 1949[30]

[24] Article 8 ARSIWA
[25] Case IT-94-1, *Prosecutor v. Tadic* (1999) ILM, vol.38,p.1518 at p.1541 para.117
[26] Article 11 ARSIWA
[27] United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980, p.3
[28] Ibid p.35 para.74
[29] Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague on 18th October 1907.
[30] Convention (I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War. All four conventions were signed at Geneva on 12th August 1949.

and Additional Protocol (I) of 1977 for the protection of victims of international armed conflict.[31]

As stated before, every State is responsible for its internationally wrongful acts or refusal to act when it is required by a law if this is attributable to it under international law; provided its act constitutes a breach of the assumed international obligation.[32] The armed forces provide a good example of an organ of a State whose acts may be attributable to the State (Kalshoven 1991:827). This need not be formal armed forces of a State and can extend to persons or group of persons conscripted by a state to wage war. Article 3 of the Hague Convention (IV) on Land Warfare 1907 clearly provides that; 'A belligerent party which violates the provisions of the said regulations shall ... be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.[33]

In *Prosecutor v. Furundzija*, the ICTY held that; 'Under the current international humanitarian law, in addition to individual criminal liability, State responsibility may ensure as a result of State officials engaging in torture or failing to prevent torture or to punish torturers'.[34] Similarly, ICJ made it clear with respect to Article IX of the Genocide Convention 1948 that;

> ...the reference in Article IX to the responsibility of a State for genocide or for any of the other acts enumerated in Article III does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.[35]

States responsibility for violation of IHL is reinforced by the fact that most of the rules consist of peremptory norms in international law. In both international and non international armed conflict, these rules protect 'basic rights of the human person' which are classical examples of *jus cogens* (Sassóli 2002:414). It is trite principle of international law that peremptory norms (*jus cogens*) are binding on every State irrespective of any legal undertaking thereof.

3.4 State Responsibility and Violation of International Human Rights Laws.

The principle of State responsibility for internationally wrongful acts equally applies to all human rights related international obligations assumed by State; the exception is only where

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[31] Adopted at Geneva on 8th June 1977. See generally (Kalshoven 1991:827-830)
[32] Articles 1 & 2 ARSIWA
[33] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex; Regulations Concerning the Laws and Customs of War on Land, signed at Hague on 18th October 1907
[34] *Prosecutor v. Furundzija*, Judgement of 10 December 1998, 38 ILM 317 (1999) para.142
[35] Application of the Convention on the Prevention and Punishment of the crime of Genocide; Preliminary Objections, I.C.J Reports 1996 p.595 para.32.

the content or implementation of such international responsibility is governed by special rules of international law.[36] State Parties to every human rights convention have agreed to give effect to the treaty obligations arising therefrom[37]. These human rights obligations of States go beyond refraining from committing human rights abuse by States or its agents. It includes positive obligation of States to create enabling environment that will investigate abuse, punish offenders and compensate victims; repeal laws that are not human rights friendly and enact new laws where necessary.[38]

This principle of responsibility for disregarding State's obligation has been reaffirmed in many court decisions by ECtHR. In *A v. United Kingdom*[39] the court found that there was no effective deterrence mechanism in place in United Kingdom, which made step-father of a nine-year-old to inflict serious bruises on the child. It was held that United Kingdom was responsible for violating the ECHR in that it failed to amend its laws to prohibit such violence against children. Similarly in *Vetter v. France*[40], due to absence of clarity in French law specifying the exact discretion of police authorities in listening to surveillance devices; France responsibility was held to be engaged for violating the ECHR. The State is responsible for such breach in international law even if its internal law does not see it as such. This is because a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[41]

3.5 Concluding Remarks

From the foregoing, it is not in doubt that States are not free to do whatever they like if they have assumed international responsibility. As members of comity of nations, they are entrusted with responsibility not only towards their citizens but also to other nationals, States and the global community at large. The violation in question need not be the direct action of the State agents. It can even be the private acts of individuals or group that can establish responsibility as long as the State assumed the obligation to protect or ensure rights. These principles are applicable to regional conventions as well like the ECHR which seek to protect shared values. The ECHR contains international obligations and its realization also requires adhering to the principles of international State responsibilities enunciated above.

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[36] Article 55 ARSIWA
[37] See articles 2 ICCPR, 2 ICESCR, 1 ECHR, 1 ACHR, 1 ACHPR, 2 & 3 CRC etc
[38] See article 2(2) & (3) ICCPR.
[39] Judgement of 23rd September 1998, App. No. 25599/94
[40] Judgement of 31st May 2005, App. No. 59842/00.
[41] Article 27 of VCLT, signed 23rd May 1969 and entered into force on 27th January 1980

CHAPTER 4

ECHR and Other Human Rights Treaties.

4.1 Introduction

Since the 'bone of contention' which is addressed by this study concerns the extraterritorial jurisdiction of the ECHR, it is important to see closely the jurisdictional basis of this convention in line with those of other human rights systems. How is this jurisdictional issue interpreted in relation to the extraterritorial accountability set by the other human rights instruments?

4.2 The International Covenant on Civil and Political Rights.

The ICCPR[42] on this question raises no ambiguities. This instrument which is one of the international bills of rights is monitored by the Human Rights Committee[43] (HRC). Article 2(1) of this covenant provides that;

> Each State Party to the present covenant undertakes to respect and *to ensure to all individuals within its territory and subject to its jurisdiction* the rights recognised in the present covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Emphasis added)

The HRC has had many opportunities to clarify the scope of the above article. In the case of *Lopez Burgos v. Uruguay*,[44] HRC stated that the article does not imply that a State Party concerned cannot be held accountable for violations of rights under the covenant which its agents committed upon the territory of another State.[45] According to this Committee 'it would be unconscionable to so interpret the responsibility under article 2 of the covenant as to permit a State Party to perpetrate violations of the covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[46] There is no room for a State to 'export' the violation of human rights that are forbidden in its own territory to other States.

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[42] Adopted by General Assembly Resolution 2200A (XXI) of 16th December 1966 and entered into force on 23 March 1976
[43] Established by article 28 of ICCPR
[44] Communication No. 52/1979: Uruguay 29/07/1981, CCPR/C/13/D/52/1979. Human Rights Committee – Thirteenth Session.
[45] Paragraph 12.3 ibid
[46] Ibid

What is unlawful *ab initio* in international law remains so even where human rights abuse is institutionalised within a State's domestic legal structure and such cannot be ground to 'export' same to another States.[47]

The HRC in its general comment has underscored the point that a State Party 'must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that State Party, even if not situated within the State Party'[48]. Turkey made reservation to article 2 of ICCPR when it ratified the instrument by indicating that its obligation is limited to 'the national territory where the constitution and the legal and administrative order of the Republic of Turkey are applied'.[49] The Government of Greece reacted by stating that;

> This reservation is contrary to the letter and the spirit of the convention. Indeed, a State Party must respect and ensure the rights laid down in the covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of such State Party. Accordingly, this reservation is contrary to the object and purpose of the covenant.[50]

The extraterritorial application of this covenant was recognised by the ICJ when it held that 'the drafters of the covenant did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their national territory'.[51] According to this court the covenant is applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[52]

4.3 The American Convention on Human Rights.

The ACHR came into force on 18th July 1978.[53] It is the equivalent of the ECHR for the American States. Article 1(1) of this convention settles the jurisdictional controversy by providing the following;

> The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and *to ensure to all persons subject to their jurisdiction* the free and

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[47] This is because such State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty' - article 27 of VCLT.
[48] Paragraph 10, General Comment No. 31 (80) on -The Nature of the General Legal Obligation Imposed on States Parties to the Covenants; CCPR/C/21/Rev.1/Add.13, 26 May 2004, adopted 29 March 2004.
[49] United Nations Treaty Collection Databases available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (accessed 25/04/2012)
[50] Ibid.
[51] Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, ICJ Reports 2004, p.136 at p.179 para.109.
[52] Ibid p.180 para.111.
[53] Organisation of American States, American Convention on Human Rights 'Pact of San José', Costa Rica, 22 November 1969 available at http://www.unhcr.org/refworld/docid/3ae6b36510.html (accessed 23/04/2012).

> full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition. (Emphasis added)

At the same time article 1(2) narrows this responsibility by stating that 'person' means every human being'. The IACtHR and IACHR, the bodies that are empowered to oversee compliance to the convention,[54] had the opportunity to interpret the extraterritorial scope of Article 1. In *Alejandre et al V Cuba*[55] the contention was whether IACHR has jurisdiction over the acts of Cuba State agents that took place in international air space. The Commission held that;

> The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because... when agents of a State, whether military or civilian, exercise power and authority over persons outside national territory, the State's obligation to respect human rights continues... The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organisation under their authority.[56]

The IACHR arrived to this same conclusion by reasoning differently that the 'essential rights of the individual are proclaimed in the Americas on the basis of equality and non-discrimination, 'without distinction as to race, nationality, creed or sex''[57] . Similarly in *Coard et al V United States*,[58] it was held that;

> Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction...In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[59]

This is consistent with the convention's definition of 'person' as 'every human being',[60] not just nationals of member states or persons found in member states territory. It is clear from the foregoing that the jurisdictional clause of the ACHR has the potential for extraterritorial application.

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[54] See Article 33 ibid

[55] *Alejandre et al V Cuba*, Case 11.589, Report No. 86/99, September 29 1999- Int. Am. C.H.R, available at http://www1.umn.edu/humanrts/cases/86-99.html (accessed 23/04/2012) .

[56] Paragraph 25, ibid.

[57] Paragraph 23, ibid. See also article 1(1) of ACHR.

[58] *Coard et al V United States* Case 10.951, Reports No.109/99, September 29 1999, Int. Am. C.H.R, available at http://www1.umn.edu/humanrts/cases/us109-99.html (accessed 23/04/2012)

[59] Paragraph 37, ibid. See also paragraph 23 of Alejandre's case in note 50 supra.

[60] Article 1(2) ACHR

4.4 The African Charter on Human and Peoples Rights.

The ACHPR[61] jurisdiction clause as stated in Article 1 provides that;

> The Member States of the Organisation of African Unity parties to the present charter shall recognise the rights, duties and freedoms enshrined in this chapter and shall undertake to adopt legislative or other measures to give effect to them.

This provision is unique in that it does not limit state parties' obligation to persons 'within jurisdiction' or 'subject to jurisdiction'. Indeed, there is no difficulty for the AFCtHPR[62] to apply the extraterritorial principle in its jurisprudence. This position is reinforced by article 60 of ACHPR which enjoins the AFCHPR[63] and by implication the AFCtHPR; to 'draw inspiration from international law on human and peoples' rights... the charter of the UN... the Universal Declaration of Human Rights, other instruments adopted by the United Nations'. The jurisdiction of the AFCtHPR can therefore be viewed as broad enough to accommodate extraterritorial jurisdiction. Its jurisdiction shall extend 'to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'[64]

4.5 The Commonwealth of Independent States Human Rights Convention.

The CISHRC[65] is another regional instrument of interest which was adopted by the 'formerly constituent republics of the Soviet Union'.[66] The jurisdictional provision of this instrument resembles that of the ECHR requiring the Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms set out in the present convention'.[67] Since some of the parties to the CISHRC are also HCPs to the ECHR, it is natural to expect harmonious approaches between the two instruments.

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[61] Banjul Charter adopted 27th June 1981 but came into force 21st October 1986 , available at http://www.unhcr.org/refworld/docid/3ae6b3630.html (accessed 23/04/2012)

[62] AFCtHPR was established by article 1 of the Protocol to the African Charter on Human and Peoples Rights, adopted in Ouagadougou Burkina Faso in June 1998. It came into force on 25th January 2004. AFCtHPR was created to 'complement the protective mandate of the African Commission on Human and Peoples Rights' according to article 2 of the Protocol.

[63] Established by article 30 of ACHPR

[64] Article 3(1) of the Protocol in note 61 supra.

[65] Adopted 26 May 1995 in Minsk Russia available @ http://www.unhcr.org/refworld/docid/49997ae32c.html (accessed 23/04/2012).

[66] Oxford dictionaries (online) available at http://oxforddictionaries.com/definition/Commonwealth+of+Independent+States (accessed 23/04/2012)

[67] Article 1 of CISHRC in note 65 supra

4.6 Arab Charter on Human Rights.

By contrast the ARCHR[68] provision governing jurisdiction resembles the ACHR and ICCPR. It provides that;

> Each State party to the present Charter undertakes to *ensure to all individuals subject to its jurisdiction* the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.[69] (Emphasis added).

As argued for ICCPR jurisdictional provision, this ARCHR provision is apt to make the State parties responsible for extraterritorial human rights violations.

4.7 Concluding Observation.

It can be seen that the jurisdictional clauses in the systems examined here, except for the ACHPR, is either to secure to everyone 'within jurisdiction', or everyone 'subject to jurisdiction' the rights in question. Even though both clauses aim at the same goal, the meaning is not the same as will be shown later.

[68] First adopted on 15th September 1994 but later reviewed and readopted on 22nd May 2004 and came into force on 15th March 2008, available @ http://www1.umn.edu/humanrts/instree/loas2005.html (24/04/2012)
[69] Article 3(1) ibid.

CHAPTER 5

The Jurisprudence of the ECtHR.

5.1 Introduction

The major controversy relating to the extraterritorial jurisprudence of the ECtHR is the interpretation that is to be given to the jurisdictional clause of the ECHR. It provides that HCPs should 'secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this convention'.[70] This chapter will briefly show how the ECtHR has interpreted, through a review of its cases, the implication of extraterritorial accountability of States.

5.2 Loizidou v. Turkey.[71]

A Cypriot national brought this application alleging that she has been prevented by Turkish forces from returning to her home and enjoying her property. She was also allegedly detained by members of the Turkish Cypriot police force for more than ten hours after taking part in protest march against Turkish military occupation in Northern Cyprus. Among the issues for determination in this case was whether the applicant was 'within the jurisdiction' of Turkey for the purpose of Article 1; by virtue of the activities of Turkish military in Northern Cyprus.[72]The court held that 'under its established case law the concept of 'jurisdiction' under Article 1 of the Convention is not restricted to the national territory of the Contracting States'.[73] The court further noted that;

> ...in conformity with the relevant principles of international law..., the responsibility of a contracting Party could also arise when as a consequence of military action- whether lawful or unlawful- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it is exercised directly, through its armed forces, or through a subordinate local administration.[74]

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[70] Article 1 ECHR
[71] Eur. Court HR, Loizidou v. Turkey, judgement of 18 December (merits), Reports of Judgements and Decisions 1996-VI.
[72] See paragraphs 12-16 ibid
[73] Para. 52 Ibid
[74] Ibid

In reaching its decision, the court emphasised that it must take into account any relevant rules of international law when resolving disputes concerning jurisdiction; while at the same time being conscious of the convention's 'special character as a human rights treaty'.[75] The finding on extraterritorial jurisdiction in this case was based on 'effective control' of Northern Cyprus by Turkey. It is not clear however from the judgement what amounts to effective control; whether effective control encompasses the territory and the individual(s) and if jurisdiction can extend to where only the individual or territory is controlled.

5.3 Cyprus v. Turkey.[76]

This case followed a petition by State of Cyprus concerning egregious human rights violation suffered by Greek Cypriots and even some Turkey Cypriots in Northern Cyprus which was under the administration of TRNC with the support of Turkey. The contention in this case, similar to Loizidou's case, was whether the acts of the TRNC were also attributable to Turkey and thereby considering persons therein 'within the jurisdiction' of Turkey under Article 1 of ECHR. The court noted that; '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'.[77] Regarding the extent to which Turkey is responsible for the violation of human rights in Northern Cyprus, the court held that;

> Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the convention and those additional protocols which she has ratified, and that violations of those rights are imputable to Turkey.[78]

The court was mindful of the special character of the convention as 'an instrument of European Public Order (Ordre Public) for the protection of individual human beings....'[79] Failure to hold Turkey accountable will result 'in a regrettable vacuum in the system of human rights protection in the territory in question...'[80] The court thus found Turkey to be responsible based on Article 1 because it has 'effective overall control over Northern Cyprus'. This is different from the case of Loizidou where the emphasis was 'effective control'. It is not clear if control must always be over both the territory and persons herein.

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[75] Para. 43 ibid
[76] Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV.
[77] Para.77 ibid.
[78] Ibid
[79] Para.78 ibid
[80] Ibid

5.4 Bankovic and Others v. Belgium and Others.[81]

This case arose from an application brought by six people (who were all citizens of the Federal Republic of Yugoslavia) in protest for bombing of Serbian Radio Television headquarters in Belgrade by NATO forces which caused many destruction and deaths. The applicants approached the ECtHR because the NATO members involved in the bombing are all HCPs to the ECHR. The main issue for determination was whether the applicants and their deceased relatives were 'within the jurisdiction' of the HCPs involved in the NATO bombing. In answering the question, the court was satisfied that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial'.[82]

According to the court, Article 1 of the convention 'must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case'.[83]The court admitted as in previous cases that '...the responsibility of a Contracting Party was capable of being engaged when as a consequence of military action (lawful or unlawful) it exercised effective control of an area outside its national territory'.[84]The nexus, according to the court, between the applicants and the respondents was the 'impugned act which, wherever decided, was performed, or had effects outside of the territory of those states'.[85]

The court maintained that in deciding the case it should have regard to the 'special character of the convention as a constitutional instrument of European public order...'[86] and as 'multi-lateral treaty operating...in an essentially regional context and notably in the legal space...of the contracting States'.[87] It was held that Federal Republic of Yugoslavia did not 'fall within this legal space' and that the convention was not meant 'to be applied throughout the world, even in respect of the conduct of contracting states'.[88] The court accordingly upheld submission of the respondent states that the bombardment which caused peoples' lives and property did not engage their convention responsibility. The case was thus declared inadmissible for want of jurisdiction. It is clear here that ECtHR formulated another principle in Bankovic's case. The emphasis was no longer on 'effective control' whether 'overall' or not but rather on 'multi-lateral treaty operating... in the legal space of the Contracting States'.

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[81] *Bankovic and Others v. Belgium and Others*, (dec.) [GC] ,no. 52207/99, ECHR 2001-XII.
[82] Para. 59 ibid.
[83] Para. 61 ibid
[84] Para. 70 ibid.
[85] Para. 54 ibid
[86] Para. 80 ibid
[87] Ibid
[88] Ibid

5.5 Ilascu and Others v. Moldova and Russia.[89]

This case was brought by four Moldovan nationals who alleged breach of their convention rights by Moldavian Republic of Transdniestria (MRT), a separatist group from Moldova which is not internationally recognised as a State. Among the issues for determination was whether the illegal activities of MRT brought the applicants, based on Article 1, 'within the jurisdictions' of Moldova (for inaction) and Russia (for supporting the rebels). The ECtHR made it clear that member States must 'answer for any infringement of the rights and freedoms protected by the convention committed against individuals placed under their 'jurisdiction''.[90] It reaffirmed the principle that jurisdiction is presumed to be exercised within State's territory but that such presumption is limited to 'where a State is prevented from exercising its authority in part of its territory'.[91]

According to the court a State may be found responsible under Article 1, where 'as a consequence of military action- whether lawful or unlawful- it exercises in practise effective control of an area situated outside its national territory'.[92] Besides, if a HCP exercises overall control over an area outside its national territory, 'its responsibility is not confined to the acts of its soldiers or officials in that area but also extends to acts of the local administration which survives there by virtue of its military and other support'.[93] Such responsibility does not abate even when agents of HCP are acting *ultra vires*, because States 'are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected'.[94] After examining evidence before it the court found the applicants to be within jurisdictions of Moldova and Russia. The principles of 'overall control' and 'effective control' were vigorously emphasised in this case and there is no indication as to what amounts to 'effective control' or even 'overall control'.

5.6 Ocalan v. Turkey.[95]

The applicant in this case is a Turkish citizen and leader of the Workers Party of Kurdistan (the PKK). Earlier he was wanted by Turkish government for engaging in subversive and terrorist activities that claimed many lives. As a result he was arrested with the help of Kenyan authorities in Nairobi Kenya, tried before Turkish courts and sentenced to death. The application challenged the processes of his arrest as well as the trial and sentence. Among the

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[89] Ilascu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII.
[90] Paragraph 311 ibid.
[91] Paragraph 312 ibid
[92] Paragraph 314 ibid, see also para.52 Loizidou v. Turkey (Merit) note 66 supra
[93] Paragraph 316 ibid, see also para.77 Cyprus v Turkey note 71 supra
[94] Paragraph 319 ibid, see article 7 ILC
[95] *Ocalan v. Turkey* (GC) no. 46221/99, ECHR 2005-IV , (judgement of 12 March 2003).

issues for consideration by the ECtHR involved the time the applicant came within Turkey's jurisdiction. The court found that "Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the 'jurisdiction' of that State for the purpose of Article 1 of the convention, even though in this instance Turkey exercised its authority outside its territory".[96] The court restated the special character of the European Convention as a human rights treaty that must be interpreted in light of other rules of public international law.[97] As the court reasoned;

> ...the convention is a living instrument which must be interpreted in the light of the present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.[98]

The applicant was found to be 'within jurisdiction' of Turkey and as such Turkey was held to be responsible for some of the human rights violations claimed in the application. The court held that the applicant did not have a fair trial that led to his death sentence and that it amounted to inhuman treatment.[99]

5.7 Al-Skeini and Others v. The United Kingdom[100]

The applicants here are six Iraqi nationals who accused the UK of being responsible for their relatives' deaths when the British army was in Basrah Iraq. The issue for resolution was whether the deceased relatives of the applicants were 'within jurisdiction' of the UK at the time of their death. The ECtHR noted that 'A State's jurisdictional competence under Article 1 is primarily territorial...acts of the contracting States performed or producing effects outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases'.[101] At the same time it emphasised the point that, anytime the State through its agents 'exercises control and authority over an individual... the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under section 1 of the convention that are relevant to the situation of that individual'.[102]

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[96] Paragraph 93 ibid.
[97] Paragraph 190 ibid.
[98] Paragraph 193 ibid.
[99] Paragraph 213 ibid
[100] *Al-Skeini and Others v. The United Kingdom,* [GC] no. 55721/07, ECHR 2011 (judgement of 7 July 2011) .
[101] Paragraph 131 ibid
[102] Paragraph 137 ibid

When it comes to ascertaining whether a State exercises effective control outside its territory, the court held that this is a question of fact.[103] The court viewed the European convention as a 'constitutional instrument of European public order'.[104] It further stated that the provisions of the convention must be interpreted and applied so as to make its safeguards practical and effective.[105] All the deceased relatives of the six applicants were therefore found to be 'within jurisdiction' of the UK even though the killings took place in Basrah Iraq. This case obviously is the opposite of the decision in Bankovic's case and has considerably sharpened the principles of extraterritorial jurisdiction in the court's jurisprudence.

5.8 Analysis of Article 1 of ECHR and Scholars Views.

The scope of jurisdiction under Article 1 of ECHR remains to be one of the most fundamental questions for the convention system (Miller 2010:1229). This is understandable since it determines who will benefit from the rights guaranteed under the convention. Since the ECtHR's interpretation and application of the principles of extraterritoriality are not consistent, it is not surprising to see contrasting positions taken by scholars. For example, Loucaide believes that the convention has laid down rules of conduct for the State parties whenever and wherever they exercised effective authority over individuals (Loucaide 2007:84). He justified this on the ground that the convention was a reaction to the serious human rights violations that Europe witnessed during the Second World War; violations that were not confined within the territory of one particular country (ibid at 76). Miller on the other hand disagrees that the convention and indeed the case law of the ECtHR can be construed as such, and adheres to a 'far narrower interpretation of extraterritorial jurisdiction' (Miller 2010:1225). She argues that such interpretation will make the mechanism no longer European but 'a global system for protecting human rights' (ibid at1230).

Miller's argument is oblivious of the fact that no human rights mechanism is *sui generis* in the sense that they all form part of global human rights protection. Even the ECtHR has accepted the principle that the Convention should be interpreted 'as far as possible in harmony with other principles of international law of which it forms part'.[106] It cannot be denied that 'individual rights inhere simply by virtue of a person's humanity'[107] and not necessarily by being European, African, Asian or American. Therefore ignoring violation because European State commits same outside Council of Europe territory is hypocritical. Besides, such interpretation does not put into consideration the fact that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

[103] Paragraph 139 ibid
[104] Paragraph 141 ibid
[105] Paragraph 162 ibid
[106] See Bankovic note 81 supra, paragraph 57.
[107] Coards et al v. United States note 58 supra paragraph 37

context and in the light of its object and purpose'.[108] The treaty's object and purpose are gleaned, apart from the text, also from the preamble, annexes, agreement between the parties and even preparatory work leading to the treaty.[109] The ECHR preamble that the Council of Europe's 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world... and on the other by a common... observance of the human rights upon which they depend' rather points to the extraterritorial nature of Article 1.

Gondek views the restricted approach to jurisdiction based on Article 1 as essentially territorial to be unjustifiable one which introduces strong presumption on territoriality (Gondek 2005:356). He added that though Article 1 imposes a limit on the applicability of the convention, it also has an inclusive dimension which aims to determine fairly persons entitled to the Convention guarantees in line with the object and purpose of the Convention which is protection of human rights and fundamental freedom of human beings (ibid at 362). Similarly, Ovey and White are convinced that 'the wording of article 1 does not introduce any territorial limitation to the convention' (2002:21-22). This notwithstanding, the ECtHR attached special importance to the 'ordinary meaning' of 'jurisdiction' in its decision in Bankovic's case disregarding the 'object and purpose' of the Convention and its context (Altiparmak 2004:223). With this type of interpretation, the court seemed to promise HCPs that 'their own legal interests will be accorded a predominant legal significance in the process of interpreting an instrument which supposedly protects an individual as such' (Orakhelashvili: 2003:568).

5.9 'Within Jurisdiction' or 'Subject to Jurisdiction'

This brings to the fore the difference between 'within jurisdiction' as seen in ECHR and CISHRC and 'subject to jurisdiction' as seen in ICCPR, ACHR and ARCHR. The wordings of jurisdictional clause is important because 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'[110] In the context of jurisdiction wherein the clauses are used, 'within' means; (1) inside something; (2) not further off than; and (3) occurring inside.[111] 'Within jurisdiction' therefore implies territoriality because the word 'within' situates 'jurisdiction' at the sovereign territorial authority of the State. On the other hand, 'subject to' in the context it is used means; (1) likely or prone to be affected by (a particular condition or occurrence, typically an unwelcome or unpleasant one); (2) dependent or conditional upon; and (3) under

[108] Article 31 (1) of *Vienna Convention on the Law of Treaties* adopted at Vienna on 23 May 1969 and entered into force on 27 January 1980 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 01/05/2012)

[109] See articles 31 (2) & (3) and 32 ibid.
[110] Article 29 VCLR 1969.
[111] Oxford Dictionaries, available at http://oxforddictionaries.com/definition/within (accessed 27/04/2012)

the authority of.[112] Thus, person 'subject to jurisdiction' clearly refers to any person who is likely to be affected by State actions or inactions; who is dependent or/and under the authority of the State. This is so because 'within its territory' and 'subject to its jurisdiction' as seen in Article 2(1) of ICCPR should be read as a disjunctive conjunction (Buergenthal 1981:72-91) meaning two different things.

From the foregoing, it is clear that person 'subject to jurisdiction' does not have territorial barrier unlike person 'within jurisdiction' that has to justify that one falls within the chequered exceptions propounded by the court. In fact, there is no justification for the HRC and IACtHR to look for any exceptional circumstance before holding a state responsible for extraterritorial right abuse. It can be seen from this perspective why the ECtHR often emphasise on the primacy of territorial jurisdiction. It is submitted that the literal interpretation of the ECHR jurisdiction clause permits such conclusion. This distinction in the jurisdictional clause of ECHR and other international mechanisms was impliedly admitted by Mantouvalou (2005:148) when she suggests that the jurisprudence of other international instruments cited by applicants in Bankovic's case did not convince the court 'either because the relevant conventions do not contain a clause similar to article 1 of the ECHR or because the applicants did not provide enough evidence'.

Despite the clear difference in the jurisdictional clauses, it is established principle of the ECtHR's case law that the convention must be seen as 'a living instrument to be interpreted in light of present-day conditions'.[113] Reflecting 'present-day conditions' in interpreting Article 1 will certainly show that the convention is human rights treaty meant to protect individuals not States. This means construing the convention in such a way as to aid but not to frustrate individuals whose rights are violated anywhere by HCPs, access to the court. Moreover, the object and purpose of the ECHR necessitates interpreting 'within their jurisdiction' to have the same meaning as 'subject to their jurisdiction'. Literal interpretation of Article 1 of ECHR will be counterproductive in holding HCPs responsible for extraterritorial human rights violation as seen in *Bankovic*'s case.

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[112] Ibid available at http://oxforddictionaries.com/definition/subject?q=subject+to#subject__17 (accessed 27/04/2012). See also Longman (2000) Longman Business English Dictionary, Suffolk: Pearson Education, p. 474.

[113] See *Bankovic*'s case note 81 supra; *Soering v. the United Kingdom* judgement of 7 July 1989, Series A no. 161 paragraph 102; *Dungeon v. the United Kingdom* Judgement of 22 October 1981, Series A no. 45; *V v. the United Kingdom* [GC], no. 24888/94, ECHR 199-IX; and *Mathews v. the United Kingdom* [GC], no. 24833/94 ECHR 1999-I

5.10 Extent of Control and Authority.

Jurisprudence of the ECtHR is rife with issues of control, finding jurisdiction where the respondent State has 'effective control'[114] or 'overall control'.[115] However, it is not clear when 'control' is 'effective' or 'overall' before it can ground extraterritorial jurisdiction. Altiparmak agrees that jurisdiction should be seen as one of control; 'who does and can control the conduct that harms the rights and freedoms defined in the European Convention on Human Rights?' (Altiparmak 2004:241). Pederson on the other hand, suggests that 'effective control' and 'occupation' should be based on factual control by the respondent States armed forces' which gives them the 'ability to issue directives to the inhabitants of the conquered territory and to enforce them' (Pederson 2004:298). However, Loucaides maintains that violation of the convention should not depend on whether the respondent State has committed the violation within her territory or any other territory she has 'overall or effective control' (Loucaides 2007:84). He submits that the decisive factor should be whether such State has violated the convention in respect of any person in question and whether the State 'has exercised de facto or de jure actual authority' over the alleged victim (ibid).

Relying on 'effective' or 'overall' control to found extraterritorial jurisdiction will be very restrictive and has the tendency of denying many victims access to the court as seen in *Bankovic*'s case. Any type of control or authority over the victim that makes him susceptible to rights abuse by the State or its agents should be able to bring him within the jurisdiction of that State. Indeed, the jurisprudence of the ECHR supports this approach. In *Chrysostomos and Papachrysostomou v. Turkey*,[116] it was found that what was necessary was 'to secure the rights and freedom defined in section 1 to all persons under their *actual authority and responsibility*, whether that authority is exercised within their territory or abroad'.[117] (Emphasis added). Certainly 'actual authority' is not the same as 'effective' or 'overall' control. It signifies any control or authority which makes the victim vulnerable to human rights abuse. In *X v. Federal Republic of Germany*,[118] the facts disclosed acts of respondent State's consular agent abroad where there was no effective control by the State, yet it was held that citizens of a State could be within its jurisdiction even when they are abroad. Thus, criteria for the exercise of jurisdiction 'must turn on whether a human rights treaty's guarantees are significantly affected by some member State's action, no matter where these happen to take place' (Mantouvalou 2005:160).

The case law of the ECtHR has made it difficult to ascertain the extent of territorial jurisdiction beyond the borders of a State party (Pedersen 2004:279). This is because the court has articulated many exceptions to territorial jurisdiction which are far from being consistent.

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[114] As seen for instance in Ocalan v. Turkey; Al-Skeini v. United Kingdom and Ilascu v. Moldova and Russia supra.
[115] As seen in Cyprus v. Turkey and Loizidou v. Turkey supra.
[116] App. Nos. 15299/89, 15300/89, Report of Commission adopted 8 July 1993.
[117] Ibid paragraph 96.
[118] App. No. 1611/62, Year Book of the European Convention on Human Rights, vol. 8 p.158.

It has recognised the acts of Diplomatic and Consular agents;[119] State Agents Authority and Control;[120] Extradition and Expulsion cases;[121] and Acts of State Authorities which produce effects outside their own territory.[122] However, the principles laid down in *Al-Skeini's* case resolved many of the confusion with previous cases especially those created by *Bankovic*. Regarding whether control should be over property, environment or persons before it brings one within State jurisdiction, it was cleared that 'what is decisive in such cases is the exercise of physical power and control over the person in question'.[123] Besides, where a Contracting State exercises effective control over an area outside its national territory, 'it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration'[124]

More so, where such power and control exist, the State is under obligation 'to secure to that individual the rights and freedoms under section 1 of the Convention that are relevant to the situation of that individual. In this sense...the Convention rights can be 'divided and tailored''[125] This is obvious reversal of the court's position in *Bankovic*'s case where it held that 'the wording of Article 1 does not provide any support for...suggestion that the positive obligation in Article 1 to secure 'the rights and freedoms defined in Section 1 of this Convention' can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question...'.[126] As to the Convention operating within the 'legal space (*espace juridique*) of the Contracting States'[127], it held in *Al-Skeini* that it does not mean 'that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States'[128]

5.11 Concluding Observation

The case laws of the ECtHR show different yardstick for measuring extra-territoriality. The exceptions have been variously characterised and the concept of 'effective control' and 'authority' are preponderant in the case laws. Yet it is not clear what the court means by 'effective' control or authority determining same on case by case basis. The jurisdiction

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[119] *X v. Federal Republic of Germany* , App. No. 1611/62, Commission decision of 25 September 1965-Yearbook of the European Convention on Human Rights, vol. 8 pp.158-169; and *X v. the United Kingdom*, App. no. 7547/76, Commission decision of 15 December 1977.
[120] Loizidou v. Turkey, note 71 supra; Cyprus v. Turkey note 76 supra; Ilascu and Others v. Moldova and Russia note 89 supra; Ocalan v. Turkey note 95 supra; and Al-Skeini v. the United Kingdom note 100 supra.
[121] *Soering v. the United Kingdom*, judgement of 7 July 1989, Series A no. 161 pp. 35-36 Para. 91; the Cruz Varas and Others v. Sweden, judgement of 20 March 1991, Series A no. 201 p.28 Paras. 69 & 70; *Vilvarajah and Others v. the United Kingdom*, judgement of 30 October 19991, Series A no. 215 p.34 Para. 103.
[122] *Drozd and Janousek v. France and Spain*, judgement of 26 June 1992, Series A no. 240, p.29 Para. 91.
[123] *Al-Skeini and Others v. the United Kingdom* note 100 supra Para. 136
[124] Para. 138 ibid.
[125] Para. 137 ibid
[126] Bankovic and Others v. Belgium and Others note 81 supra, Para. 75.
[127] Para. 80 ibid.
[128] *Al-Skeini's* case Para. 142 note 100 supra.

clause of ECHR, to 'secure to everyone within their jurisdiction' is anachronistic when compared with those of ICCPR and ACHR. This affects extraterritorial human rights protection. The *Al-Skeini's* case has improved the extraterritorial principles of ECtHR. In any event, the case laws still show 'unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'.[129] Such regime can only be established if the court applies 'functional concept' of jurisdiction.

[129] Concurring opinion of Judge Bonello, Para. 4 ibid.

CHAPTER 6

Functional Concept of Jurisdiction.

6.1 Determining Functional Jurisdiction.

Functional concept of jurisdiction[130] posits that jurisdiction of a State is best determined by referring to the human rights functions (obligations) of that State as enunciated by the treaty in question. This is especially important in determining the extra-territorial jurisdiction of the ECtHR which has generated heated debates.[131] The concept is based on the fact that;

> States ensure the observance of human rights in five primordial ways: firstly, by not violating (through their agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and finally, by compensating the victims of breaches of human rights. These constitute the basic minimum functions assumed by every state by virtue of its having contracted into the convention.[132]

Although the above assertions are *obiter dicta*,[133] they capture fundamental principles that are crucial in resolving the extraterritorial principle inconsistency bedevilling the ECtHR. The determinant to ascertain whether a State has jurisdiction or not should be the human rights obligations the State undertook to respect when it ratified ECHR. This is because, 'Every treaty in force is binding upon the parties to it and must be performed by them in good

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[130] This concept was propounded by Judge Bonello in his concurring opinion in the *Al-Skeini's case*; Note that in this study, human rights 'function' is used synonymously with human rights 'obligation'.

[131] See Loucaides (2007) 'Determining the Extra-territorial Effect of the European Convention; Facts, Jurisprudence and the Bankovic Case' in Loucaides (ed.) *The European Convention on Human Rights*, Leiden: Martinus Nijhoff pp.73-94; Lawson (2004) 'Life after Bankovic; on the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia pp.83; Gondek (2005) ' Extraterritorial Application of the European Convention on Human Rights; Territorial Focus in the Age of Globalization?' *Netherlands International Law Review*, vol.52 p.349; Altiparmak (2004) 'Bankovic; An Obstacle to the Application of the European Convention on Human Rights in Iraq?' *Journal of Conflict and Security Law*, vol.9 p.213; Orakhelashvili (2003) 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights', *European Journal of International Law*, vol.14 p.526; Williams (2005) 'Al Skeini: A Flawed Interpretation of Bankovic', *Wisconsin International Law Journal*, Vol. 23 No. 4: 687-729; Pederson (2004) 'Territorial Jurisdiction in Article 1 of the European Convention on Human Rights', *Nordic Journal of International Law* 73: 279-305; and Miller (2010) 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', the *European Journal of International Law*, vol.20, No. 4 pp. 1123-1246.

[132] *Al-Skeini's* case note 100 supra paragraph 10 of the concurring opinion of Judge Bonello.

[133] Opinion of the judge that does not form part of the *rationes decidendi* (the binding legal principles in a judgement).

faith'.[134]Therefore a State has jurisdiction for the purpose of Article 1 'whenever the observance or the breach of any of these functions is within its authority and control'.[135] The location of such breach is immaterial, what is decisive is that the State failed to perform its convention obligation and such failure violated 'human rights' protected by the Convention. In principle 'the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.[136] This is necessary to refute the assertion that 'The reality of the idea of human rights has been degraded from being a source of ultimate anxiety for usurping holders of public social power, they were turned into bureaucratic small-change' (Allot 2001:287-8).

Functional concept of jurisdiction is reinforced by 'the Convention's special character as a human rights treaty'[137] and the fact that 'increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.[138] The protection individuals are entitled to, from States, as the '*Parens Patriae*'[139] is lost anytime States violate human rights. It is the function of the ECtHR as provided in Article 19 of the ECHR to assume jurisdiction and ensure that State does not shirk its obligation under the convention. This will ensure that there is no human rights protection gap because human rights, like nature, abhor (protection) vacuum. Moreover, the object and purpose of the Convention as an instrument for the protection of individual human beings 'requires that its provisions be interpreted and applied so as to make its safeguards practical and effective'.[140] It is imperative that the ECtHR should 'stop fashioning doctrines which somehow seem to accommodate the facts' on case by case basis but should instead 'appraise the facts against the immutable principles which underlie the fundamental functions of the convention'.[141]

6.2 Functional Jurisdiction and State Responsibility.

Human right is sacrosanct; violation of ECHR by HCP entails State responsibility for the breach of the international obligation assumed thereunder.[142] An internationally wrongful act

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[134] The principle of *Pacta Sunt Servanda,* in Article 26 of VCLT 1969.
[135] Concurring opinion of Judge Bonello, in Al-Skeini's case, para. 11
[136] Paragraph 37 of *Coard et al V United States,* note 58 supra. See also paragraph 23 of Alejandre's case in note 50 supra.
[137] See *Bankovic*'s case at note 77 Para. 57 and *Loizidou*'s case note 67 supra Paras. 43 and 52.
[138] *Ocalan v. Turkey*, no. 46221/99, (First Section) judgement of 12 March 2003, Para. 193
[139] Authority and power of States to protect the weak , see Legal Dictionary – available at http://legal-dictionary.thefreedictionary.com/Parens+Patriae (accessed 03/05/2012)
[140] *Al-Skeini's* case note 100 supra paragraph 162
[141] Concurring opinion of Judge Bonello, Para. 8 ibid.
[142] See for instance paragraphs 316-322 of *Ilascu's* case in note 89 supra.

always entails the international responsibility for that State.[143] This applies to both the negative obligations and the positive obligations undertaken under the ECHR. This is so even if such breach takes place beyond the borders of the HCP. In *McCann v. the United Kingdom*,[144] the UK Special Forces killed 3 IRA suspects to prevent terrorists attack in Gibraltar. In that case the ECtHR held that the UK government was '...required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel ...in the light of the obligations flowing from both domestic and international law'.[145]

The reference to 'international law' herein is a pointer that the UK incurs responsibility not just for its action at the domestic level but also for violating international norms, including the ECHR. Because the human rights obligation of the HCP is not restricted to its territory the UK was said to be obliged to 'protect the lives of the people in Gibraltar'. Besides, the ECtHR recognises that States have responsibility to control criminals and terrorists on their territory who may cause harm in another State.[146] States have transnational obligations in accordance with customary international human rights law in their international operations to the extent that people in a foreign State do not suffer as a result of the first State's action (Skogly and Gibney 2002:789). It is a recognised principle of international law that States shall refrain from causing harm to another State.[147] Where a State harms another State's national, such harm in international law is seen as harm to the second State (Skogly and Gibney 2002:789). The finding of 'responsibility' in the foregoing cases is based on the 'non-observance' of the 'human rights functions' the States undertook to observe.

Application of State responsibility principles is also vital at admissibility stage of extraterritorial proceeding cases. However in *Loizidou v. Turkey*[148] the ECtHR stated *inter alia* that the issue of State responsibility is not to be delved into at the admissibility stage and that;

> Such questions belong rather to the merit phase of the court's procedure. The court's enquiry is limited to determining whether the matters complained of by the applicant are capable of falling within the 'jurisdiction' of Turkey even though they occur outside her national territory.[149]

The above position is not fair representation of the court's admissibility ruling regarding State responsibility. It is not possible to determine State jurisdiction as it affects Article 1 of ECHR without regard to State responsibility doctrines, no matter how remote. This is because jurisdiction is the aftermath of responsibility and both concepts are most often linked together

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[143] Article 1 ARSIWA, see *Phosphates in Morocco, Preliminary Objections*, 1938 PCIJ, series A/B, No.74, p.10 at p.28
[144] *McCann and others v. the United Kingdom*, App. No. 18984; Grand Chambers judgement of 27th September 1995
[145] Paragraph 192 ibid.
[146] *Lawless v. Ireland*, App. No. 332/57 – judgement of 1st July 1961.
[147] *Trail Smelter* Case [United States v. Canada] (1941) 3 R.I.A.A 1905
[148] *Loizidou v. Turkey (*Preliminary Objection), App. no. 15318/89, Judgement of 23 March 1995.
[149] Paragraph 61 ibid.

that it will be legally inexpedient to determine them separately. Thus in *Ilascu and Others v. Moldova and Russia*[150], it was held that;

> ...the questions whether the responsibility and jurisdiction of Moldova and the Russian Federation might be engaged under the Convention, and whether the court had jurisdiction *ratione temporis* to examine the applicants' complaints, were closely linked to the merits of the case...[151]

This does not, in any event, mean that State responsibility principles are not considered at all in the court's admissibility decisions. *Loizidous*'s case was declared admissible because there was evidence that 'the applicant's loss of control of her property stems from the occupation of the northern part of Cyprus by Turkish troops and the establishment there of 'TRNC''[152] This means there was *prima facie* attribution of the impugned act to Turkey and the impugned act appeared to breach the ECHR. This is certainly application of Article 2 of ILC's ARSIWA on attribution and the State's vicarious liability for acts of its agents.[153] Similarly in *Bankovic*, the court found that 'the real connection between the applicant and the respondent States is the impugned act'.[154] It is regrettable that the court declared the application inadmissible despite the clear attribution to the State parties involved. What should concern the court is 'whether there is a causal link between a State's actions and some interference with human rights' (Mantouvalou 2005:160). This is attribution and it is part of State responsibility principle.

6.3 Concluding Observation.

Jurisdiction under Article 1 of the ECHR should be best determined by resorting to the human rights functions/obligations of the HCP. A state has jurisdiction if it has reneged any of its human rights obligations. This includes both its positive and negative obligations under the Convention. The location of such breach is immaterial. This is in consonance with the object and purpose of the convention as a human rights treaty which should always be interpreted and applied to make the rights protection effective. This approach ensures consistency in the case law of the ECtHR and avoids case by case formulation of principles that creates confusion.

The court's belief that determination of State responsibility is for the merit stage of court's proceeding is misplaced. There is always 'threshold responsibility' issue in form of '*prima facie*' attribution in admissibility cases. It is this *prima facie* attribution that enables the case to proceed to the merit stage.

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[150] Ilascu and Others v. Moldova and Russia, note 89 supra.
[151] Paragraph 7 ibid.
[152] Paragraph 63 of *Loizidou v. Turkey, (*Preliminary Objection) in note 148 supra.
[153] See articles 4 to 7 of ILC's ARSIWA.
[154] Paragraph 54 of Bankovic and Others v. Belgium and Others note 81 supra.

CHAPTER 7

General Conclusion and Recommendations.

7.1 Conclusion

This study has ended up promoting functional concept of jurisdiction as it affects extraterritorial jurisdiction of ECtHR. It contends that the present practise whereby the ECtHR characterise extraterritorial principles on case by case basis without universal principle applicable to every set of facts creates confusion not only to European national courts but also for human rights defenders worldwide. Before proposing this solution, doctrinal analysis was employed regarding 'extraterritorial jurisdiction' as a legal doctrine that can be best explained using legal concepts. The theory of 'jurisdiction' was examined and the findings have shown that jurisdiction is one of the features of sovereignty that States usually exercise within their territory and occasionally outside their territory. There is evidence as shown by case laws and treaties that owing to the peculiar nature of human rights conventions, their jurisdictional clauses should be interpreted to make human rights safeguards effective and meaningful.

The examination of the doctrine of State responsibility has revealed that States are responsible for the internationally wrongful acts attributed to them constituting breach of their international obligations. Comparison of ECHR jurisdictional clause with some other human rights treaties revealed a lacuna in jurisdictional clause of ECHR. As it is, the provision which requires the HCPs to secure to everyone 'within their jurisdiction' the convention rights, *ipso facto*, favours territoriality rather than ensuring such rights to everyone 'subject to their jurisdiction' as required in ICCPR and ACHR. This accounts for why the ECtHR always emphasise on primacy of territorial jurisdiction in its case law. This does not provide leeway for the court to so interpret Article 1 because that will defeat the object and purpose of the ECHR which is the protection of individual human rights. It does point out, however, that the jurisdictional clause of ECHR is out-of-date in view of the fact that it was drafted in the late forties. The ECtHR should benefit from jurisdictional clauses drafted long after the adoption of ECHR. These jurisdictional clauses reflect the present day reality in human rights protection as seen in ICCPR and ACHR where emphasis is placed on States securing to everyone 'subject to their jurisdiction' the convention rights no matter the *locus delicti*.

The review of the ECtHR jurisprudence on extraterritorial jurisdiction has disclosed the existence of inconsistency in its extraterritorial jurisdiction principles as the doctrines are developed on case by case basis. Even though the court has formulated many exceptions to territoriality, the concept of 'effective control' still appears to be dominant in the case laws. Yet there is no indication on what amounts to such control in that the court takes it to be 'a

matter of fact', relying on case by case evidence to prove effective control. It is now settled however, that control or authority need not be 'effective' or 'overall' before it gives rise to extraterritorial jurisdiction. The *Bankovic*'s case showed deviation from the prior territorial exceptions of the court and developed principles -like the convention operating within the European 'legal space' and that convention rights cannot be 'divided and tailored' according to specific breaches - which are counterproductive to extraterritorial State responsibility in this globalization era.

Al-Skeini's case, on the other hand, remedied most of these defects by clarifying issues muddled up in *Bankovic*'s case. It made clear that what is important is the exercise of physical power and control over the individual and that such control obligates the State to secure rights and freedom under section 1 of ECHR relevant to the situation of the individual not minding the location. In this case, States need not guarantee all the rights in the convention but only such rights that they are in position to protect. Notwithstanding the improvements made by *Al-Skeini*'s case, the problem of inconsistency remains in ECtHR case laws. The court has not articulated the contours of the extraterritorial principle that should be followed in every extraterritorial fact before it. This vacuum can be filled using 'Functional Concept of Jurisdiction'. It is finding jurisdiction based on whether or not the HCPs are carrying out their human rights obligations under the convention. This is because 'the duties assumed through ratifying the convention go hand in hand with the duty to perform and observe them. Jurisdiction arises from the mere fact of having assumed those obligations and from having the capability to fulfil them (or not to fulfil them)'[155]

In other words, the ECtHR should assume jurisdiction if there is failure on the part of states to discharge their human rights obligation especially when it is within the power and authority of such States to carry out such function. The location for the dereliction of human rights obligations in such situation is therefore immaterial. It should also be noted that the concepts of '*erga omnes*' and '*jus cogens*' in international law have universal application and any state that violates them is accountable no matter the place of such violation. The European court can apply this functional concept of jurisdiction to every fact before it and avoid formulating exceptions that often conflict each other. Human rights are best protected when the laws are effective and consistently applied. This is especially important because of the influence and 'pace setting' role of the ECtHR in human rights protection with its jurisprudence being cited (with approval) in many jurisdictions. Adopting this concept will save similar applicants in *Bankovic*'s case the frustration of being denied access to the court in the face of flagrant violation of the ECHR.

[155] Paragraph 13 of the concurring opinion of Judge Bonello in *Al-Skeini's* case note 100 supra

7.2 Recommendations.

a. The jurisdictional clause of the ECHR which provides in Article 1 that HCPs shall 'secure to everyone within their jurisdiction...' should in the meantime be interpreted as HCPs shall 'secure to everyone subject to their jurisdiction' in order to accord with the object and purpose of the convention as a treaty meant to protect individual human rights.

b. The Council of Europe should propose additional protocol to the convention to amend Article 1 of the convention to read that- HCPs shall 'secure to everyone subject to their jurisdiction'. This will bring this provision in line with the present day requirement of human rights protection in a globalized world.

c. The ECtHR shall adopt the 'Functional Concept of Jurisdiction' as the guiding principle for its extraterritorial jurisdiction jurisprudence. It has the advantage of making the case law of the court more consistent and coherent.

d. There is a need for ECtHR to reconsider its judgement in *Bankovic*'s case since *Al-Skeini*'s case has shown that the judgement was given *per incuriam*. This will prevent European national courts from relying on it when similar facts are before them.

Excess Words Justification.

Total Word Count: 16,791.

The study involved examination of different legal doctrines which had to be accommodated in order to answer the research questions raised. Such examination is invaluable due to the nature of the research.

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