

IN THE EUROPEAN COURT OF HUMAN RIGHTS

AL-SKEINI AND OTHERS V. THE UNITED KINGDOM

Application no. 55721/07

WRITTEN COMMENTS BY

**THE BAR HUMAN RIGHTS COMMITTEE, THE EUROPEAN HUMAN RIGHTS ADVOCACY
CENTRE, HUMAN RIGHTS WATCH, INTERIGHTS, THE INTERNATIONAL FEDERATION FOR
HUMAN RIGHTS, LIBERTY, THE LAW SOCIETY OF ENGLAND AND WALES**

pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 2 of the Rules
of the European Court of Human Rights

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I. INTRODUCTION

1. These written comments are respectfully submitted on behalf of the Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, INTERIGHTS, the International Federation for Human Rights, Liberty and The Law Society of England and Wales (hereafter ‘the Interveners’), pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.¹ Brief details about each of the Interveners, their experience and interest in this matter, are set out in the annex to these comments.

2. The Interveners’ comments address (i) the critical issue of the application of the European Convention on Human Rights (hereafter ‘the Convention’) to individuals outside the territories of the High Contracting Parties, and (ii) the requirement that High Contracting Parties comply with their obligations pursuant to Article 2 of the Convention when carrying out armed operations abroad or in a situation of belligerent occupation. It is submitted that these issues should be resolved by reference to accepted principles of international law and practice, which should inform the interpretation of the Convention.

3. The Convention was drafted and adopted in 1950 in the aftermath of the events of the previous decades in Europe. Whilst the term ‘jurisdiction’ must clearly be interpreted using the dynamic and evolutive approach, which the Convention organs have always applied, it is however important to look at the context in which the Convention was adopted. During the 1930’s and 40’s appalling human rights abuses were carried out across Europe by military forces within occupied territories. It is inconceivable in this context that the drafters of the Convention, amongst whom were such notables as Pierre-Henri Teitgen who had been captured and tortured by the forces of the belligerent occupier of France, should have considered that the prospective responsibilities of states under the Convention should be confined to the violations of human rights perpetrated only within their own territories. Such an approach would have meant that states could be held accountable for Buchenwald, but not for Auschwitz, and not for the extraterritorial reprisals and atrocities carried out by the occupying forces that took place in e.g. Poland, Ukraine, Czechoslovakia, Greece, the Netherlands or France. This historical background to the *raison d’être* of the Convention must be the starting point for the present examination of the accountability of State parties to this Convention for the extraterritorial actions of their military forces.

4. The Interveners’ comments aim to provide the Court with information on the following matters: (i) the legal standards relating to extraterritorial application of human rights law, including the general principles of interpretation of ‘jurisdiction’ under Article 1 of the Convention, the jurisdiction provisions of other human rights instruments, the test of control, authority or power over the person, the applicability of the Convention in situations of military occupation and its applicability beyond the European regional space; and (ii) overview of instances of extraterritorial application of human rights law in the circumstances of control, authority or power over the person in the practice of international courts and bodies. These comments examine the jurisprudence of this Court in light of other international and comparative standards, including those enshrined in other regional instruments such as the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples’ Rights, and the International Covenant on Civil and Political Rights (hereafter ‘ICCPR’), as well as applicable rules of public international law.

¹ Letter dated 17 March 2009 from T.L.Early, Section Registrar, Fourth Section, to INTERIGHTS on behalf of the Interveners.

II. LEGAL STANDARDS RELATING TO THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS LAW

A. General Principles of Interpretation of ‘Jurisdiction’ Under Article 1 of the Convention

5. Public international law requires that the concept of ‘jurisdiction’ be interpreted in light of the object and purpose of the particular treaty under which the jurisdiction is invoked.² In that regard, the Court has affirmed repeatedly that it must be mindful of the Convention’s special character as a human rights treaty.³ The object and purpose of the Convention as an instrument for human rights protection require that its provisions be interpreted and applied so as to be practical and effective.⁴ In addition, any interpretation has to be consistent with the general spirit of the Convention, as an instrument designed to maintain and promote the ideals and values of a democratic society.⁵ In its interpretation of the Convention provisions, the Court must also take into account the relevant rules of international law, and should so far as possible interpret the Convention in harmony with other rules of international law of which it forms part.⁶ When faced with a continuous evolution in the relevant norms and principles applied in international law, the Court has to search for common ground among the international law norms, that reflects common ground in contemporary societies.⁷

6. When considering the conduct of States outside their territory, one of the guiding principles under international human rights law, is the need to avoid unconscionable double standards. In the words of the UN Human Rights Committee (hereafter the ‘HRC’) with respect to the applicability of the ICCPR, ‘it would be unconscionable to permit a state to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory.’⁸ The International Court of Justice (hereafter ‘ICJ’), in affirming the approach of the HRC, observed that

‘while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. ...[The *travaux préparatoires* of the ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.’⁹

In line with this approach, this Court’s established practice emphasises that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another state which it could not perpetrate on its own territory.¹⁰ The Court has applied this principle too in cases where the impugned act of the State took place outside the regional space of the Council of Europe.¹¹

² Article 31 (1) of the Vienna Convention on the Law of Treaties of 1969.

³ See, e.g. *Loizidou v Turkey [GC]*, no. 15318/89, 18 December 1996, § 43; *Al-Adsani v the United Kingdom [GC]*, no. 35763/97, 21 November 2001, § 55.

⁴ *Mamatkulov and Askarov v Turkey [GC]*, nos. 46827/99 and 46951/99, 4 February 2005, § 101.

⁵ *Mamatkulov, supra*, § 101, *Soering v the United Kingdom [Plenary]*, no. 14038/88, 7 July 1989, § 87.

⁶ *Al-Adsani, supra*, § 55.

⁷ *Demir and Baykara v Turkey [GC]*, no. 34503/97, 12 November §§ 78 and 86.

⁸ HRC, *Lopez Burgos v Uruguay*, Communication No. R 12/52, 6 June 1979, § 10.3.

⁹ See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, § 109 (the ICJ advisory opinions and judgments are available at www.icj-cij.org).

¹⁰ See e.g. *Solomou v Turkey*, no. 36832/97, 24 June 2008, § 45; *Issa v Turkey*, no. 31821/96, 16 November 2005, § 71; *Andreou v Turkey (dec.)*, no. 45653/99, 3 June 2008; *Isaak v Turkey (dec.)*, no. 44587/98, 28 September 2006.

¹¹ For example *Öcalan v Turkey [GC]*, no. 46221/99, 12 May 2005, and *Issa, supra*, concerned events in countries outside the Council of Europe - apprehension in Kenya, and use of deadly force in Iraq.

B. The ‘Jurisdiction’ Provisions of Other Human Rights Instruments

7. Article 2 of the ICCPR requires each State party to guarantee protection of Covenant rights to all persons ‘*within its territory and subject to its jurisdiction.*’ This formulation has been interpreted by the HRC to mean that State parties are required to respect and ensure the Covenant rights to all persons in their territory and to ‘*anyone within the power or effective control of that State Party even if not situated within the territory of the State Party.*’¹² In addition, the HRC has clarified that:

‘[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.’¹³

This interpretation of Article 2 of the ICCPR was followed by the ICJ in the case of *Armed Activities on the Territory of the Congo*, and in its *Wall Advisory Opinion*.¹⁴ The ICJ further concluded that international human rights instruments as well as international humanitarian law are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, in occupied territories.¹⁵

8. Within the Inter-American system, there are two separate instruments, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. The American Convention on Human Rights contains a provision which is similar to that set out in the European Convention, covering all persons ‘*subject to [the] jurisdiction*’ of the State parties.¹⁶ The jurisprudence of the Inter-American Commission on Human Rights (hereafter the ‘Inter-American Commission’), like that of the HRC, adopts a broad approach under which a State party to the American Convention ‘*may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.*’¹⁷ In a line of cases the Inter-American Commission has had regard to relevant European jurisprudence and held that ‘*jurisdiction [is] a notion linked to authority and effective control, and not merely to territorial boundaries*’, and that the focus should rather be on whether the State has ‘*authority and control*’ over the person.¹⁸ The American Declaration does not contain an explicit jurisdictional provision, however the Inter-American Commission has applied the same principles of ‘*authority and control*’.¹⁹

9. The African Charter on Human and Peoples’ Rights contains no explicit restriction on territorial applicability, and in its practice the African Commission on Human and Peoples’ Rights (hereafter the ‘African Commission’) has held that, for example, the Charter is applicable in situations of military occupation of foreign territory.²⁰

¹² See HRC, General Comment 31, CCPR/C/21/Rev.1/Add.13, § 10. See also § 11 regarding the applicability of ICCPR in time of war.

¹³ *Ibid.*

¹⁴ See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, §§ 178-180 and 216-217; ICJ, *Wall Advisory Opinion*, *supra*, § 109.

¹⁵ *Ibid.*

¹⁶ American Convention on Human Rights, Article 1(1). (The documents referred to herein related to the Inter-American human rights system are available at <http://www.cidh.oas.org>).

¹⁷ Inter-American Commission, *Victor Saldaño v Argentina*, Report No. 38/99, 11 March 1999, § 17.

¹⁸ E.g. *Saldaño*, *supra*, § 19.

¹⁹ E.g. *Coard et al v United States*, Case no. 10.951, Report no. 109/99, 29 September 1999, § 37; *Armando Alejandro Jr. and Others v Cuba* (known as the ‘*Brothers to the Rescue*’ case), no. 11.589, Report no. 86/99, 29 September 1999, § 23.

²⁰ See African Commission, *DRC v Burundi, Rwanda, Uganda*, Communication 227/1999, reported in 20th Activity Report of the African Commission on Human and Peoples’ Rights, Annex IV, examined below in section III (<http://www.achpr.org>).

10. The above-mentioned international bodies, including this Court, in practice frequently assert the extraterritorial applicability of human rights obligations, albeit without expressly addressing the question of jurisdiction.²¹ Indeed, the jurisprudence of other international human rights bodies does not suggest that applicability of human rights obligations outside the State's territory is in some way exceptional or extraordinary. To the contrary, it has been suggested that where the State exercises its control, authority or power abroad, there should be a presumption of extraterritorial reach of the State's human rights obligations, in view of the purposes and objects of human rights treaties.²²

11. In addition, public international law principles provide guidance on this matter.²³ The International Law Commission observed that '[i]nternational life provides abundant examples of activities carried out on the territory of a State by agents of another State acting on the latter's behalf', and that '[t]here is nothing abnormal in this.' While discussing the Draft Articles on State Responsibility, it expressly noted that 'draft articles 5 et seq. [which provide rules on attribution of conduct to a state] set no territorial limitation on the attribution to the State of the acts of its organs.'²⁴ Therefore, under public international law the State is responsible for the conduct of its organs, which constitutes a breach of an international obligation of that State,²⁵ regardless of whether this conduct was performed within or outside the territory of that State.

C. The Relevant Test in International Human Rights Law

12. The starting point of the Court's analysis of the existence of extraterritorial jurisdiction is the principle that '*in exceptional circumstances the acts of Contracting States which are performed outside their territory or which produce effects there ("extraterritorial act") may amount to the exercise by them of jurisdiction within the meaning of Article 1.*'²⁶ The Inter-American Commission has similarly stated that '*a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory.*'²⁷

²¹ See e.g. ICJ, *DRC v Uganda*, *supra*, §§178-180; African Commission, *DRC v Burundi, Rwanda, Uganda*, *supra*, § 216. For examples in this Court's practice, see *Xhavara and Others v Italy and Albania* (dec.), no. 39473/98, 11 January 2001, concerning the sinking in international waters of a ship carrying irregular Albanian immigrants by an Italian naval ship. See also *Women on Waves and Others v Portugal*, no. 31276/05, 3 February 2009, concerning the ban on a ship chartered by the Women on Waves Foundation from approaching Portuguese territorial waters and entering Portugal.

²² Judge Theodor Meron, former President of the ICTY, stated: 'In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise;' and 'Fundamental principles as the prohibition of the arbitrary taking of life, the duty of humane treatment of persons in detention, the prohibition of inhuman or degrading treatment or punishment, and essential due process must always be respected.' In 'Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties,' 89 *American Journal of International Law*, vol.89 (1995), p.78, at pp.80– 81(fns omitted).

²³ For the Court's reference to the work of the International Law Commission, see e.g. *Ilaşcu and Others v Moldova and Russia*, no. 48787/99, 8 July 2004, § 320.

²⁴ Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, '*Areas Where the European Convention on Human Rights Cannot Be Implemented*', Doc.9730, 11 March 2003, § 15. The Assembly's Legal Affairs Committee noted in the same report that the ILC devoted a special provision, Article 12, to this issue; however, it was later decided to delete it, as it was considered unnecessary to devote a separate provision to such an obvious principle. *Ibid.*, fn.11, referring to UN doc.A/53/10, Report of the ILC on the Work of its Fiftieth Session (1998), § 426.

²⁵ See ILC, Draft Articles on State Responsibility, Article 2.

²⁶ E.g. *Ilaşcu*, *supra*, § 314, and *Issa*, *supra*, § 68.

²⁷ Inter-American Commission, *Saldaño*, *supra*, § 17.

13. In the Court's jurisprudence, the analysis of extraterritorial applicability of the Convention has focused on whether the impugned State's actions involve 'authority and/or effective control' *over persons* outside its territory, or 'effective control' *over foreign territory*.²⁸ In the practice of other international human rights bodies, the analysis of extraterritorial applicability of human rights instruments has focused on whether the State has 'authority and control'²⁹ or 'power or effective control'³⁰ over a person, who is located outside its borders. When examining the existence of control,³¹ authority or power over the person, the Court and other international bodies have focused on whether the State had the direct capability to affect the individual's right allegedly violated. In several cases concerning deprivation of life, the Court has examined whether the individual came under the 'authority and/or effective control', and therefore within the jurisdiction, of the respondent State by considering whether the acts of that State's agents, in causing the death of the individual, resulted in such authority or control.³² In *Andreou*, the Court found jurisdiction to exist on the basis that '*even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range [...] was the direct and immediate cause of those injuries.*'³³ In *Solomou*, the Court found that the individual's death fell within the jurisdiction of Turkey referring to the fact that '*the bullets which had hit [him] had been fired by the members of the Turkish-Cypriot forces.*'³⁴ In *Pad v Turkey*, the Court reached the same conclusion on the basis that '*the fire discharged from the [Turkish] helicopters had caused the killing of the [applicants]*', and moreover concluded that it was not required to examine whether the killing had occurred outside Turkish territory, due to the fact that the Turkish Government had already admitted causing the deaths.³⁵ Similarly, the Inter-American Commission in *Armando Alejandro Jr. and Others v Cuba* (known as the 'Brothers to the Rescue' case) referred to the test of 'control' and concluded that '*the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. Consequently, the Commission is competent ratione loci to apply the American Convention extraterritorially to the Cuban State in connection with the events that took place in international airspace.*'³⁶ Therefore, while not suggesting that everyone affected, however remotely, by State conduct comes within that State's jurisdiction, jurisprudence and scholarly writing³⁷ support the argument that, at least where there is a direct and immediate link between the extraterritorial conduct and the alleged violation of individual rights, the individual is to be treated as falling within the State's control, authority or power, and therefore, jurisdiction.

²⁸ There is also an additional test which focuses on whether the acts of private individuals abroad which breach the Convention have been committed with the acquiescence or connivance of authorities of the State. See *Solomou, supra*, §§ 44-46, and *Isaak, supra*.

²⁹ See Inter-American Commission, *Coard, supra*, § 37.

³⁰ HRC, General Comment 31, *supra*, § 10.

³¹ Or 'effective control'.

³² See e.g., *Solomou, supra*, § 49; *Issa, supra*, § 72; *Isaak, supra*.

³³ *Andreou, supra*.

³⁴ *Solomou, supra*, §§ 50-51.

³⁵ *Pad v Turkey (dec.)*, no. 60167/00, 28 June 2007, § 54.

³⁶ Inter-American Commission, *Brothers to the Rescue, supra*, § 25.

³⁷ See Rick Lawson, 'Life after *Bankovic*: On the Extraterritorial Application of the European Convention on Human Rights', in F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Centre for Human Rights, Intersentia, 2004), p. 83: "It would go too far to assume that anybody who is 'affected' by the conduct of a contracting state is 'within the jurisdiction' of that state. A decision to cut development aid or to reduce quota for imports would then suffice to bring indeterminate numbers of people 'within the jurisdiction'. On the other hand, it would be too restrictive to require a formal relationship, or some kind of structured relationship over a period of time, between the state organ acting abroad and the individuals concerned. This would unjustifiably exclude state accountability in situations of *de facto* control or ad hoc operations on foreign soil. Instead, it is suggested that if there is a direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's right, then the individual must be assumed to be 'within the jurisdiction' [...] of the state concerned."

14. In accordance with the practice of the Court,³⁸ other international bodies consider that the question of whether the State exercises control, authority, or power, is in all cases one of fact, to be assessed depending on the circumstances of the particular situation.³⁹ In the jurisprudence of the international bodies, there are no acts or omissions, which *a priori* exclude jurisdiction. To the contrary, some acts create a presumption of applicability of certain human rights obligations. For example, in the practice of the Convention organs, the HRC, and the Inter-American Commission, the circumstances of arrest or detention on foreign territory – when the individual is in the physical control of State agents – have always been found to give rise to jurisdiction.⁴⁰ Situations of military occupation also have also been found to create a presumption of applicability of human rights obligations.⁴¹

15. The extent to which a State must secure the rights of an individual outside its territory depends on the extent of its control, authority or power over the individual, and is determined based on the particular circumstances of each case.⁴² The Court has held that, for example, where the State has effective overall control of an area situated outside its borders, that State may be required, in some cases, to secure the entire range of Convention rights.⁴³ Conversely, in other circumstances involving specific acts or omissions, for example deprivation of liberty or use of deadly force, even in the absence of an overall control over a foreign area, the Court may nevertheless find the responsibility of the State to be engaged in so far as it relates to securing the specific rights affected.⁴⁴ Therefore, when extraterritorial jurisdiction is found to exist, it is not always necessary to secure the entire range of the Convention rights and freedoms; the State may be required to secure one or more of the Convention rights and freedoms, depending on the particular circumstances of control, authority or power which that State has over the individual outside its territory.

16. Also consonant with the approach of the Court,⁴⁵ the international bodies referred to herein have held that the lawfulness under domestic or international law of the action by which any of the forms of control, authority, or power, were obtained, is not relevant for the purpose of determining whether the State in fact exercises control, authority or power over the individual and, therefore, whether that individual is subject to that State's jurisdiction.⁴⁶ Therefore, either *legal* or *factual* control, authority or power, may give rise to 'jurisdiction' for the purposes of the Convention. In addition, even temporary control, authority or power may give rise to a finding of 'jurisdiction' for the purposes of the Convention.⁴⁷

17. In accordance with international practice, the Court's jurisprudence clearly distinguishes between 'jurisdiction', which is a prerequisite for triggering the Convention obligations,⁴⁸ and responsibility for violation of those obligations. Although both are questions involving assessment of facts, they require different analyses, and there may be instances where the Convention is applicable extraterritorially, without there being a breach of its provisions. In the context of the right to life, this in

³⁸ See *Issa, supra*, § 55: 'the issue [of jurisdiction] is inextricably linked to the facts underlying the allegations.'

³⁹ See e.g. HRC, *Lopez Burgos, supra*; *Lilian Celiberti de Casariego v Uruguay*, Communication No. 56/1979, 29 July 1981. The Inter-American Commission in *Coard, supra*, discussed the existence of control "under given circumstances".

⁴⁰ See e.g. this Court's judgment in the *Öcalan* case, *supra*, § 91; the European Commission's decisions in *Illich Sanchez Ramirez v France (dec.)*, no. 28789/95, 24 June 1996, and *Freda v Italy*, no. 8916/80, 7 October 1980; the HRC's decisions in the *Burgos* and *Casariego* cases, *supra*; and the Inter-American decision in *Coard, supra*.

⁴¹ See section II.D., below, on military occupation.

⁴² See e.g. *Cyprus v Turkey [GC]*, no. 25781/94, 10 May 2001, where the Court referred to 'the particular situation concerning Cyprus', § 77. See e.g. the comments made by the Legal Affairs Committee of PACE, *supra*, § 45.

⁴³ E.g. *Cyprus, supra*. See also the ICJ judgment in the *DRC v Uganda*, and the decision of the African Commission in the *DRC* case, *supra*, which refer to the applicability of the ICCPR in situations of occupation (§§ 216-217).

⁴⁴ See e.g., *Öcalan, Solomou, supra*.

⁴⁵ See, e.g. *Loizidou, supra*, § 52;

⁴⁶ See HRC, General Comment 31, § 10; see also ICJ, *Wall Advisory Opinion, supra*.

⁴⁷ See *Issa, supra*, §§ 74-76.

⁴⁸ *Ibid.*, § 66.

practice would mean that if ‘jurisdiction’ is established for the purposes of Article 1, the Court would further assess the legality of the acts complained of on the basis of the applicable rules of the Convention⁴⁹ and, in situations of occupation, in light of the applicable rules of international humanitarian law.⁵⁰

D. Military Occupation Implies the Existence of Authority and Control

18. Under the Hague Regulations of 1907, a territory is considered occupied when it is actually placed under the authority of the hostile army.⁵¹ The Regulations further state in Article 43 that the occupying power ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’⁵² In *DRC v Uganda*, the ICJ referred to Article 43 and held that ‘this obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.’⁵³ According to its Article 2, the Fourth Geneva Convention, concerned with the ‘Protection of Civilian Persons in Time of War’ applies to all cases of declared war or of any other armed conflict, which may arise between two or more of the High Contracting Parties (Article 2). The Convention protects those ‘who at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.’⁵⁴

19. On the basis of the above rules of international humanitarian law, the international bodies in a number of cases concerning situations of military occupation have assumed the existence of ‘authority and control’ and, therefore, have concluded that the human rights obligations of the occupying power in question were applicable.⁵⁵ The bodies considered that occupation creates a relationship of control and authority between the occupying power and the inhabitants of the occupied area. For example, the Court has concluded that as a consequence of military occupation the State exercises effective control over the occupied territory and therefore jurisdiction for the purposes of the Convention, whether such control is exercised directly, through the respondent State’s armed forces, or through a subordinate local administration.⁵⁶ In the *Advisory Opinion on the Wall* the ICJ concluded that, in situations of occupation, the human rights obligations in question are applicable, without entering into discussion as to the basis of applicability.⁵⁷ Also, in the *DRC* case, the ICJ concluded that ‘international human rights instruments are applicable “in respect of acts done by a State in exercise of its jurisdiction outside its territory,” particularly in occupied territories.’⁵⁸ The African Commission in *Democratic*

⁴⁹ See *Solomou*, *supra*, for an example of this approach, and section III below for examples from other tribunals.

⁵⁰ ICJ *DRC v Uganda* judgment, *supra*, §216; HRC, General Comment 31, § 11; the Inter-American Commission, *Juan Carlos Abella v Argentina*, no. 11.137, Report no. 55/97, 18 November 1997, § 161, and *Coard*, *supra*, § 42.

⁵¹ Hague Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907, Article 42.

⁵² *Ibid.*, Article 43. In the case of *Naletilic and Martinovic* the ICTY listed five guidelines for helping to determine if the authority of the occupying power had been established, including whether the occupying power was substituting its own authority; whether it had sufficient troops having sufficient force to make its authority felt and whether it was issuing and enforcing directions to the civilian population. It went onto say that for individuals a state of occupation existed from the moment they fell ‘into the hands of the occupying power’ to avoid any interim period where civilians had reduced protection. (*Prosecutor v Naletilic and Martinovic*, Case No. IT-98-34 (Trial Chamber), ICTY, §§ 217-22.)

⁵³ ICJ, *DRC v Uganda*, *supra* § 178.

⁵⁴ Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War, Article 4.

⁵⁵ See the ICJ, *DRC v Uganda*, and *The Wall Advisory Opinion*, *supra*; African Commission, *DRC v Burundi, Rwanda, Uganda*, *supra*.

⁵⁶ *Banković and Others v Belgium and Others* (dec.) [GC], no. 52207/99, 12 December 2001, §§ 70-71 referring to *Cyprus v Turkey*, and *Loizidou*, *supra*.

⁵⁷ See the ICJ, *Wall Advisory Opinion*, *supra*, § 78, referring to Article 42 of the Hague Regulations of 1907.

⁵⁸ ICJ, *DRC v Uganda*, *supra*, § 216.

Republic of Congo v Burundi, Rwanda, Uganda also found human rights obligations to be applicable without a discussion as to the basis of such applicability, beyond referring to the situation of occupation of parts of Congo.⁵⁹ Therefore, it can be concluded that once a situation is qualified as occupation within the meaning of international humanitarian law, there is a strong presumption of ‘jurisdiction’ for the purposes of the application of human rights law.

E. The ‘Espace Juridique’ Concept Does Not Restrict the Application of the Convention to the Regional Space of the Contracting Parties

20. The Court has established the principle that in certain circumstances, the scope of the Convention may extend beyond the regional space of the contracting parties.⁶⁰ The Convention has been considered applicable in territories outside the Council of Europe – for example in northern Iraq,⁶¹ Kenya,⁶² Iran,⁶³ Sudan,⁶⁴ Costa Rica,⁶⁵ in a UN neutral buffer zone,⁶⁶ and in international waters.⁶⁷ The suggestion *obiter dicta* in *Banković* of ‘*espace juridique*’⁶⁸ as a limitation on jurisdiction for the purpose of Article 1 of the Convention has been a single exception, which is not binding and indeed has not been followed in the Court’s more recent cases such as *Issa*, *Öcalan*, *Isaak*, and *Pad*. Applying such a rigid limitation would conflict with the universality of human rights emphasised in the Preamble of the Convention, which refers to the Universal Declaration of Human Rights.⁶⁹ Accordingly, the existence of ‘jurisdiction’ for the purposes of Article 1 must be determined with regard to the existence of control, authority, or power of the State over an individual regardless of whether this individual is located within or outside the European regional space.

21. In this respect, the jurisprudence of the Court is in step with the practice of other regional and international bodies, none of which appear to refer to a ‘legal space’ or ‘*espace juridique*’ limitation of the kind referred to *obiter dicta* by the Court in *Banković*. For example, the *Lopez Burgos* case before the HRC concerned an applicant who was abducted and detained by Uruguayan agents in Argentina, which had not ratified the ICCPR at the time; however, on the facts of the case the HRC found that ICCPR applied.⁷⁰ The HRC reached the same conclusion in *Lilian Celiberti de Casariego*, concerning an applicant who was abducted by Uruguayan agents in Brazil, which was not, at the time, a party to the ICCPR.⁷¹ The *Haitian Interdictions*, and the *Brothers to the Rescue* cases before the Inter-American Commission both concerned action in *international* (air and water) space; on the facts of

⁵⁹ African Commission, *DRC v Burundi, Rwanda, Uganda, supra*, §§ 79-80.

⁶⁰ *Pad*, cited above, § 53: “A State may be held accountable for violations of the right to life of persons who are in the territory of another State which does not necessarily fall within the legal space of the Contracting States;” For recent case law, see cases referred to in fn.11 above. See also the case law of the European Commission, e.g. *Illich Sanchez Ramirez v France (dec.)*, no. 28789/95, 24 June 1996, DR 86-B, p.155, concerning apprehension of the applicant by French authorities in Sudan; and *Freda v Italy (dec.)*, no.8916/80, 7 October 1980, DR 21, p.250 concerning apprehension by Italian police in Costa Rica.

⁶¹ *Issa* (in principle), *supra*.

⁶² *Öcalan, supra*.

⁶³ *Pad* (in principle), *supra*. The Court did not rule on the question of extraterritorial jurisdiction, but allowed the possibility of applying the Convention in Iran.

⁶⁴ *Illich Sanchez Ramirez, supra*, p.161-162.

⁶⁵ *Freda, supra*, p. 253.

⁶⁶ *Isaak, supra*.

⁶⁷ *Khavara* and *Women on Waves* cases, *supra*.

⁶⁸ *Banković, supra*, § 80.

⁶⁹ See eg. Philip Leach, ‘The British Military in Iraq – the Applicability of the *Espace Juridique* Doctrine under the European Convention on Human Rights’, Public Law 2005 AUT, 448-458. For a critique of the *espace juridique* limitation see also Ralph Wilde, ‘The “Legal Space” or “*Espace Juridique*” of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?’, EHRLR 2(2005), 115-124.

⁷⁰ HRC, *Lopez Burgos, supra*.

⁷¹ HRC, *Lilian Celiberti de Casariego, supra*.

these cases, the Commission found that the respondent States had exercised jurisdiction for the purposes of applicability of their human rights obligations.⁷²

III. INSTANCES OF EXTRATERRITORIAL USE OF LETHAL FORCE IN THE JURISPRUDENCE OF REGIONAL AND INTERNATIONAL BODIES

22. The international bodies referred to herein have considered the deliberate extraterritorial use of lethal force as a classic form of direct exercise of State power affecting the right to life.⁷³ For example, the use of lethal force was considered sufficient *per se* to render the individual targeted under the control, authority or power of the State in the *Salas and Others v US* and *Brothers to the Rescue* cases before the Inter-American Commission.⁷⁴ Further, the cases brought by the Democratic Republic of Congo before the ICJ and before the African Commission of Human and Peoples' Rights, both concerned, *inter alia*, killings, and both bodies found human rights obligations, in particular the right to life, to be applicable. The same approach is upheld in the recent jurisprudence of the Court in *Issa, Isaak, Solomou, Andreou, and Xhavara*.⁷⁵ After establishing the existence of jurisdiction, the Court, like the other tribunals, has proceeded to examine the merits of the complaints in order to ascertain if there has been a failure by the State to ensure the real and effective protection of life and to carry out an investigation into the circumstances of the deaths.

23. The ICJ judgment in the case of *Democratic Republic of the Congo v Uganda* concerned State responsibility for the actions of forces of the Ugandan army within the territory of the Democratic Republic of the Congo. The Ugandan army was seeking to combat anti-Ugandan counterinsurgents. The ICJ concluded that the Ugandan armed forces had engaged in unlawful killings and other acts that violated various provisions of international humanitarian laws and international human rights laws including the ICCPR, the Convention on the Rights of the Child (CRC), the Optional Protocol to the CRC, and the African Charter.⁷⁶

24. The African Commission in the case of *Democratic Republic of Congo v Burundi, Rwanda, and Uganda*, found violations of provisions of the African Charter, the ICCPR, and international humanitarian law as a result of killings and other grave abuses that occurred during military activities and the 'effective occupation' of DRC territory by the armed forces of Burundi, Rwanda, and Uganda.⁷⁷ The African Commission stated that such acts constitute flagrant violations of, *inter alia*, the right to life and integrity of the person.⁷⁸

25. The Inter-American Commission has examined several cases concerning the right to life in an extraterritorial context. In a case before the Inter-American Commission involving military activity, *Salas and others v United States*, the applicants alleged violations of various rights protected by the American Declaration relating to *deaths* and other serious harm to persons and property as a result of the 1989 U.S. military intervention in Panama. In ruling that the case was admissible,⁷⁹ the Commission stated that where it is asserted that a use of military force has resulted in individuals' death, personal injury, and property loss, the human rights of the affected individuals are implicated.

⁷² Inter-American Commission, *Haitian Interdictions*, and *Brothers to the Rescue*, *supra*.

⁷³ See Douglas Cassel, 'Extraterritorial Application of Inter-American Human Rights Instruments', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Maastricht Centre for Human Rights, Intersettia, 2004), p. 177.

⁷⁴ *Salas and Others v United States (U.S. Military Action in Panama)*, no. 10.573, Report No. 31/93, 14 October 1993, *Brothers to the Rescue*, *supra*.

⁷⁵ *Supra*.

⁷⁶ ICJ, *DRC v Uganda*, *supra*.

⁷⁷ African Commission, *DRC v Burundi, Rwanda, Uganda*, *supra*.

⁷⁸ *Ibid.*, §§ 79-80.

⁷⁹ Not yet been decided on the merits by the Inter-American Commission.

Therefore, the Commission applied the American Declaration even though the U.S. activity occurred within Panamanian territory.⁸⁰

26. The *Haitian Interdictions* case concerned action by US military vessels in international waters designed to prevent Haitian refugees from sailing to the US or other countries. The Inter-American Commission considered the US extraterritorial action sufficient to render the human rights provisions of the American Declaration applicable. There was no discussion of the degree of US control of the international waters where the interdiction actions were taking place or of the leased Cuban territory where some Haitians were detained prior to repatriation to Haiti as a necessary prerequisite to the triggering of the obligations of the Declaration. The Commission found a violation of the right to life pursuant to Article I of the American Declaration on the basis that the US exposed the refugees to the risk of death on return to Haiti.⁸¹

27. Another case, *Brothers to the Rescue*, concerned the shooting down by the Cuban air force of two private planes flying in international airspace, which were owned by an anti-Castro organization based in the US. The incident resulted in the deaths of all four persons on board. The Inter-American Commission found Cuba responsible for violating the right to life and the right to fair trial of the victims. The Commission held that the victims had been placed under the 'authority' of agents of the Cuban state, acting outside of Cuban territory.⁸² The Commission reasoned as follows:

'In certain cases, the exercise of [the Commission's] jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. [...] Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.'⁸³

The Commission further found it is competent *ratione loci* to apply the American Declaration since the civilian pilots died as a consequence of direct actions taken by agents of the Cuban State in international airspace, who thus placed the victims under their authority.

IV. CONCLUSION

28. It is submitted that it is a common ground between the international and regional courts and human rights bodies that when determining whether the acts or omissions of a State's agents abroad fall within its 'jurisdiction', regard must be had to the existence of control, authority or power of that State over the concerned individual. When the agents of the State exercise such control, authority or power over an individual outside its territory, that State's obligation to respect human rights continues. This is a factual test and it is determined depending on the circumstances of the particular action or omission of the State agents. Certain situations, such as military occupations create the strong presumption that individuals are under the control, authority or power of the occupying State, and therefore that Convention rights are applicable. In the context of the right to life guaranteed by the Convention, if the State has control, authority or power over the right to life of a person located outside its territory, then it exercises 'jurisdiction' over that person for the purposes of the applicability of the

⁸⁰ *Salas and Others v the US*, § 6 under section 'Analysis'.

⁸¹ *Haitian Interdictions*, *supra*.

⁸² *Brothers to the Rescue*, *supra*.

⁸³ *Ibid.*, § 23 (emphasis added).

Convention. In such cases, the Court should examine the allegations of substantive or procedural violations of the right to life and/or the obligation to ensure an effective remedy.

29. In accordance with the ordinary meaning of jurisdiction in public international law, and with the object and purpose of the Convention, an unduly narrow interpretation of jurisdiction would lead to the creation of unconscionable double standards governing the conduct of States, depending on whether their agents act within or outside that State's territory, and would be out of step with international practice and in conflict with core values such as the universality of human rights, the rule of law, and the fundamental nature of the right to life.