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A STUDY ON EXTRATERRITORIAL JURISDICTION OF THE ECHR AND ITS INTERACTION WITH INTERNATIONAL HUMANITARIAN LAW

TYRIMAS APIE EŽTT EKSTERITORINĘ JURISDIKCIJĄ IR JOS SĄVEIKĄ SU TARPTAUTINE HUMANITARINE TEISE

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ABSTRACT AND KEY WORDS

This thesis aims to identify the inconsistencies in Strasbourg case law regarding the extraterritorial application of the European Convention on Human Rights and examine its relationship with armed conflicts. Article 1 of the Convention establishes the boundaries of the jurisdiction of member states, although there is no particular provision for extraterritorial aspect. The Strasbourg court's decisions on the issue of responsibility of states for extraterritorial armed conflicts include various contradictory elements. Therefore, this study evaluates ECtHR's decisions and various jurisdictional models relating to the extraterritorial military activity of states within the context of the ECHR and International Humanitarian Law.

Key words: ECHR, Strasbourg court, jurisdiction, extraterritorial application, armed conflict, ECtHR, International Humanitarian Law.

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LIST OF ABBREVIATIONS

CA – Court of Appeal

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EComHR – European Commission of Human Rights

HC – High Court

HL – House of Lords

GC – Grand Chamber

IAC – International Armed Conflict

ICJ – International Court of Justice

IHL – International Humanitarian Law

IHRL – International Human Rights Law

ILC – International Law Commission

KFOR – Kosovo Security Force

NATO – North Atlantic Treaty Organization

NIAC – Non-International Armed Conflict

NKR – The Republic of Nagorno-Karabakh

UK – United Kingdom

UN –United Nations

UNMIK – United Nations Mission in Kosovo

UNSC – United Nations Security Council

US – United States

INTRODUCTION

The relevance. Recently, appeals to the European Court of Human Rights (hereinafter - ECtHR) related to armed conflict or other cases of violence are increasing. This creates conditions for the emergence of a new actual topic. The application of the European Convention on Human Rights (hereinafter – ECHR or the Convention) to armed conflicts requires the determination of the nature of the extraterritorial jurisdiction of the Convention and, on the other hand, the examination of relevant aspects of interaction with International Humanitarian Law (hereinafter - IHL). Since its adoption, the ECHR has been one of the most important and consulted sources of International Human Rights Law (hereinafter - IHRL). This Convention differs from other existing sources in the field of human rights protection in international law. The primary factor is that Article 1 of the Convention is not limited to defining obligations for states but also tries to define the boundaries of the sphere in which states perform these obligations.

This is proven by the statement in Article 1 of the Convention that "The High Contracting Party shall secure the rights and freedoms contained in Section I of this Convention within their jurisdiction" (European Convention on Human Rights, 1950, Art.1). However, the concept of "within their jurisdiction" mentioned in this provision is controversial and needs clarification. In particular, the interpretation of jurisdiction was rendered even more complicated by the ECtHR's determination in Bankovic v. Belgium (Bankovic and others v. Belgium and others, [GC] No. 52207/99, [12.12.2001]).[1]

Over time, the extraterritorial military exercises of states expanded. The Strasbourg court was already confronted with a unique practice. The question was simple. How and by what methods will the extraterritorial jurisdiction of the ECHR be determine? The precise clarification of the application of the ECHR's provisions to extraterritorial activities and the determination of the degree of the state's responsibility are two of the most problematic issues facing the Strasbourg Court. Because the exercise of jurisdiction is a necessary condition for the contracting state to be liable for an act or omission (Al-Skeini and Others v. UK, [GC] No. 55721/07, [07.07.2011], para 130).[2] When analyzing the nature and extent of extraterritorial jurisdiction, the Court also raises two important issues: the "effective overall control" of the signatory state in

[1] Hereinafter referred to as (Bankovic, 2001)
[2] Hereinafter referred to as (Al-Skeini, 2011)

another territory and whether the act of the state's agent or authorized representative is included in its jurisdiction (State agent authority). In fact, the duty of the court does not end with just determining the applying conditions and boundaries of the jurisdiction. While trying to resolve this issue, the Court should examine the relationship between International Human Rights Law and International Humanitarian Law. Because the extraterritorial activity of states in armed conflicts reveals another problematic aspect of this study, which is the second side of the topic's relevance. In other words, the Strasbourg Court recently started following a new path in the cases it analyzed and tried to clarify the relationship between the ECHR and the Geneva Conventions (hereinafter – Geneva Convention). In particular, the interpretation of the application of Articles 2 and 5 of the Convention to armed conflicts, the consideration of IHL norms, and the arguments about whether the ECHR is effective during armed conflicts reveal once again how important the topic is. Although these instances are seen as precautions against limiting the possibilities of another legal field of the Convention, the Strasbourg Court should not undermine the Convention's credibility and legal protection. Because of all this, it is necessary to investigate the topic and analyze the conflicting points that arise through specific cases.

The aim of the research. The primary purpose of the thesis is to determine the nature of the extraterritorial jurisdiction based on Article 1 of the European Convention on Human Rights and the boundaries of its application area. Furthermore, this study aims to establish an academic legal background by analyzing the problems related to the application of the Convention to armed conflicts in the context of interaction with the norms of International Humanitarian Law.

The objectives. The objectives of the research are following: 1) to explaine the extraterritorial aspect of the concept of jurisdiction provided for in Article 1 of the Convention; 2) to review existing models of the Spatial and the Personal jurisdiction; 3) to analyze Strasbourg Court and domestic courts decisions; 4) to clarify new models that determine the scope of extraterritorial jurisdiction; 5) to explore the conditions of application of the ECHR norms to armed conflicts and examine the problems.

In light of all of these issues, in order to determine the ***tasks*** of the research, the thesis answers following questions: a) According to the interpretation of Article 1 of the Convention, what is meant by extraterritorial jurisdiction? b) How is the responsibility of the signatory state determined during their extraterritorial activity in the territory of another state? c) How do rights and freedoms of the ECHR interplay with IHL norms in armed conflicts after jurisdiction is

defined? d) To what extent is the Convention applicable in cases of armed conflicts and other acts of violence, and what methods does the Strasbourg Court employ for interpreting it?

Limitation of the topic. This thesis examines the extraterritorial activity of states under the ECHR only in international armed conflicts. Because during non-international armed conflicts, states do not undertake direct intervention and participation on the territory of another state. This case reduces the concept of extraterritorial military operation outside the territory to zero. From this point of view, extraterritorial military action, which is the subject of this research, should be understood only as International Armed Conflicts and other acts of violence involving two or more states. On the other hand, this thesis analyzes not all provisions of the Convention but only possible rights and freedoms that may be violated in armed conflicts (For instance, Articles 2, 3, 5, 8, and 15 of the Convention and Article 1 of the I Additional Protocol).

Research methods. Numerous methods of research apply to the current study: 1) comparative method - which uses to contrast, analyze and synthesize similarities, differences and consequences in both regional and domestic court's cases related to the extraterritorial military exercise of states; 2) the doctrinal method – this method clarifies the essence of the concept of jurisdiction mentioned in the ECHR, describes and analyzes the precedent law constitute by the Strasbourg court in recent years. In addition, it determines basic theoretical background for the interaction between the ECHR and IHL; 3) the analytical method – this method helps describe the difficulties in applying the Convention to armed conflicts. By analyzing court cases and legal acts, the author can make suggestions on the topic at hand.

Structure of the research. In general, this thesis is composed of three parts. The first chapter provides the theoretical and legal background to the extraterritorial jurisdiction of the ECHR. In this part, the related cases of the Strasbourg court are analyzed under the headings of spatial and personal models. The second chapter addresses the relationship between the Convention and IHL and explores the ECHR's applicability in international armed conflicts. Finally, the third chapter describes alternative models for the extraterritorial implementation of the Convention. This section presents a critical perspective on the Convention's applicability to armed conflicts. The conclusion part of this study briefly provides the results obtained from the previous chapters and comments on the issues surrounding the main research question. This section concludes with the author's views and additional suggestion on the problem. In the Annex of the thesis, the author presents a table with all analyzed the court cases for readers to

understand the topic more easily.

Originality of the research. One of the most vivid and specific problems confronting the Starbourg Court is the extraterritorial application of the ECHR. Several scholars even claim that the problems under investigation threaten the legality of the Convention and the legitimacy of the Strasbourg court. This thesis is among the most notable exsmples in its field, although there are other articles on the topic by various authors. In this regards, it explores related cases comprehensively and provides readers with their significant outcomes. The author not only attempts to identify impediments but also offers suggestions for their removal. Additionally, the interaction analysis of two fields of law and their respective regulatory acts distinguishes this study from others. Considering these perspective, *the originality of the research* is incontestable.

The most important sources. To achieve the intended goals, the author uses sources of precedent law, diverse regional and domestic court cases, and normative legal acts of international and regional character. These include the following documents: the European Convention on Human Rights, decisions of the Strasbourg Court and domestic courts, the Geneva Conventions and their Additional Protocols. Moreover, in order to deeply explore the topic and reach certain conclusions, the author reviews the materials of the following main authors: Marko Milanovic, Samantha Besson, Sarah Miller, Richard Lawson, Alexander Orakhelashvili, and Severin Meier.

PART I. THE THEORETICAL AND LEGAL BACKGROUND FOR EXTRATERRITORIAL JURISDICTION OF THE ECHR UNDER ARTICLE 1

The notion of jurisdiction is one of the concepts that has different aspects and is always open to different interpretations. Jurisdiction is usually used to mean the authority of the state and the regulatory body to prepare and adopt certain laws (perspective-legislative jurisdiction), as well as the power to implement (enforcement - prerogative jurisdiction) these decisions (Brownlie, 2003, p.297). The primary meaning of jurisdiction under International Law is called 'state jurisdiction,' which is defined by the boundaries of the principle of the state sovereignty. In this sense, the jurisdiction consists of three parts: legislative, executive and judicial (Shaw, 2003, p.404). Legislative jurisdiction refers to the ability of a state to apply its laws to persons and other things within its territory. This type of jurisdiction can be applied extraterritorially in exceptional cases (Ibid., p.576). Executive jurisdiction related the ability of a state to enforce its own laws (Kamchibekova, 2007, p.90). Judicial jurisdiction is used in 2 forms or level: international law and domestic law. Judicial jurisdiction, in domestic law, refers to the power of a state to subject persons or things to the authority of courts and tribunals existing within its territory (Shaw, 2003, p.578). However, in International Law, it is used to describe the nature, conditions and boundaries of the right of international and regional courts to consider cases between the parties (Lowe, 2003, p.330). More precisely, conventions and other normative legal acts adopted by the signatory states play an important role in determining the jurisdiction of international and regional courts. In this regard, the scope of the cases that the Strasbourg Court can consider is determined by the ECHR.

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

> *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*
>
> (ECHR, Art.1)

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

boundaries of the jurisdiction, the distinction between positive and negative obligations, also how and to what extent it will be applied to the extraterritorial activities of the states remained unanswered. Afterward, the jurisdictional understanding, which caused serious misunderstandings in the relevant decisions of the Strasbourg Court, went through various legal procedures until it reached its current state.

Clarification of procedure is therefore important in determining the scope of jurisdiction. In the first draft text prepared by the Consultative Assembly of the Council of Europe, the persons who will benefit from the protection mechanism of the Convention are defined as "*to all persons residing within the territory of the states*" (Council of Europe, Vol II, 1975, p.276). Subsequently, when the Subcommittee's proposal to use the phrase "living in" instead of "residing within" was not accepted, the scope of the Agreement was defined as "within their jurisdiction", not "within their territory" (Council of Europe, Vol III, 1976, p.200). It is clear that during the preparatory discussions, the Committee could not reach a complete and precise conclusion about the application limits of extraterritorial jurisdiction of states. Simply put, the attempts and changes made in all the discussions on the Project were aimed at expanding the scope of the convention and reaching more people. Therefore, as noted by Rick Lawson, the Committee of Experts at the end of the discussions did not attempt to limit the scope of the jurisdiction to be only "territorial" (Lawson, 2004, p.88). As a result of this discussion, instead of defining the scope of the contract as "all persons in the territory", they defined it as "within the jurisdiction", which is a more flexible definition (Ibid., p.89).

In numerous conventions and other documents adopted in the field of IHRL, the concept of jurisdiction, which determines the nature and scope of the obligations of the member states, could not be fully and accurately explained. Therefore, the explanation of jurisdiction has been interpreted in different ways, both in theory and practice. More precisely, the notion has an autonomous form and character.

The ECtHR's understanding of Jurisdiction.

The tendency of interpretations of "jurisdiction" was manifested at primary stage in the practice of European Commission of Human Rights (hereinafter – EComHR) and subsequently the European Court of Human Rights. Especially, the Strasbourg Court's narrow interpretation of the jurisdictional understanding in the inadmissibility decision in the case of Banković v. Belgium led to further deepening of the discussions surrounding the issue and the proposal of

alternative solutions. When the Court explained the concept of jurisdiction for the first time in this case, it equated the concept of jurisdiction possessed by states in international law with the jurisdiction provided in the Article 1 of the Convention:

> *"As to the "ordinary meaning" of the relevant term in Article 1 of Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial."*
>
> (Banković., 2001, para 59)

This interpretation meant that the scope of jurisdiction was confined by the principle of territoriality possessed by states. Moreover, this meant that the rights and freedoms of this Convention could be applied in a very narrow field. Indeed, these circumstances could reduce the legal impact of the Convention, which has done very serious work in the field of human rights protection. In fact, this interpretation was also contrary the nature and requirement of the Law of International Responsibility that arise when states violate their human rights obligations. Because in attributing the violation of international law to the state, the real personality of the perpetrator is forgotten, and the fiction of whether he/she acts as an instrument of the state is taken as the basis (Crawford *et al*, 2010, p.222). In assessing whether a breach is imputable to the state, it is immaterial who does the act or omission that results in the infringement. In other words, the most significant point for attributing the violation to the state is whether there is a connection.

Nevertheless, the notion of *"jurisdiction"* provided in the ECHR should be distinguished from *"attribution of conduct"* and *"state jurisdiction"*.

Firstly, while jurisdiction concerns the application of the ECHR, attribution of conduct examines whether a state is liable for a violation of the law. In fact, the confusion and inconsistency between these two terms is comprehensible. Because both terms are founded using the effective control test and the Strasbourg Court uses these concepts interchangeably (Milanovic, 2018, p.103). Taking into account the analyzed topic, the term attribution of conduct would try to find an answer to whether the state is responsible for a violation of the law committed in its territory. Nevertheless, the question of jurisdiction is whether the violating state exerts control over the victim and, thus, whether the state owes a deprivation rights under the ECHR.

Secondly, the concept of jurisdiction under the ECHR has a harmonious relationship with state jurisdiction. The jurisdiction of the Strasbourg Court is a result of state jurisdiction (Admissibility Guide, 2011). When analyzing Article 1 of the Convention, it becomes clear that the jurisdiction specified here is a threshold criterion (Al-Skeini, 2011, para 130). This criterion is an abstract concept and defines the boundaries for the protection of human rights and freedoms within a certain legal framework. In this respect, the framework characterized by the ECHR for jurisdiction is none other than state jurisdiction. In other words, the meaning of the jurisdiction provided in Article 1 does not mean the authority of the court to hear a case, but state jurisdiction, and it has two meanings: whether individuals have certain rights and freedoms in interaction with the state; whether the state has certain obligations to individuals in this mutual relationship. It's kind of like the relationship between the right holder and the obliged.

It can be seen, if there is no obligation for the state to protect human rights, naturally, the protection claims of individuals also lose their validity. If there is no right, there is no obligation, or vice versa. Therefore, a suitable space is necessary for the fulfillment of mutual rights and obligations. But this does not imply that the ECHR and Strasbourg court no longer has jurisdiction if it is proven that a violation of the law did not occur on the territory of a state. Accordingly, a non-geographical clause is the only appropriate hypothesis for what the geographical scope of the ECHR means and how jurisdiction will be determined when it goes beyond the territorial boundaries of any contracting state (Besson, 2012, p. 862). Accordant with Besson, the interesting fact is that the application criterion of the Convention is by no means regional. In her opinion, the point to be emphasized is the functional feature of jurisdiction. Furthermore, Besson argue that the term “territorial” is not essential when discussing territorial jurisdiction. The criterion concerns whether the jurisdiction over any given territory is functional. The same approach applies to the personal model (Ibid., p. 863). Namely, it is related to the applicability of jurisdiction. Thus, from the analysis of the decisions of the ECtHR on specific cases, it is clear that the Court applies state jurisdiction and its extraterritorial jurisdiction in parallel. This means that the jurisdiction provided for in Article 1 of the Convention is valid not only for a specific geographical area but also for extraterritorial application.

As can be seen, there is still a gap in the precise and complete interpretation of the concept of jurisdiction stipulated by the ECHR. In my opinion, the following definition would be appropriate to explain the concept of extraterritorial jurisdiction under Article 1 of the

Convention: *"The extraterritorial jurisdiction of the ECHR should be understood as a concept that: a) establishes the relationship between the state and violations committed outside its territory in terms of place and person; b) develops regardless of a specific geographical location; c) cannot be limited by the concept of state jurisdiction."*

I consider, while the state jurisdiction determines the limits of jurisdiction specific to a certain area, the Court is not satisfied with these limits only. As noted above, in the case of Bankovic v. Belgium, the Strasbourg Court interpreted the concept of jurisdiction of the ECHR in a narrow sense, but always refrained from making such a decision in subsequent cases. Because, over time, states committing human rights violations outside their territories made it possible to look at the issue from a new perspective. All this created the basis for discussing and clarifying the meaning of terms such as *effective overall control* and *state agent authority* in Strasbourg practice.

The Strasbourg Court envisages the extraterritorial application of the Convention in three different situations:

- the establishment of effective control by a contracting state to the Convention over another territory outside its borders;
- to exercise direct control over individual persons by a contracting state or its organs;
- to exercise sovereignty power by diplomatic or consular bodies (Arsava, 2019, p.591).

The common aspect of all three situations points to the exercise of sovereign power over individuals in respect of Article 1 of the ECHR. The difference is that the power of sovereignty is used directly in one situation *(by keeping individuals under control by direct orders and instructions),* and indirectly *(by providing effective control over a territory)* in another (Thallinger, 2008, p.179).

1.1. The Spatial Model: Effective Overall Control

As mentioned earlier, it is normal for a state to establish effective control within its sovereign borders. Court practice to date has indicated that the requirement of principles of sovereignty is excluded in cases where states create effective control with extraterritorial activities in legal or non-legal forms. This criterion was developed in connection with the case of Northern Cyprus and later confirmed in other relevant decisions of the Court (Loizidou v. Turkey, [preliminary objection], No. 15318/89, [23.03.1995], para 62).[3] It is immaterial whether the effective control established by a signatory state in another territory is exercised by its army or by another local armed group affiliated with it. The ECtHR's conclusion regarding local armed groups in particular is that if these armed groups continue their existence with the financial and military support of a state, this is enough for that state to bear responsibility (Ilascu v. Moldava and Russia, [Judgment], No. [08.07.2004]. para 316).[4] Determining the degree of effective control depends on the nature of the case before the court. However, in general, the primary criteria that ensure the existence of effective control are: 1) the presence of another state's army or army groups on the territory; 2) the amount of financial and military assistance given to local armed groups; 3) opportunities to influence the activities of domestic administration (Arsava, 2019, p.592).

On the other hand, it does not matter whether the effective control created by the state in another territory is legal or illegal. The establishment of control by one state in another territory is carried out two circumstances: a) origination of control by another state within the boundaries given with the consent of the territorial state. The Consent is the main criterion and severely limits the activity of the state; b) control is created over the territory in other cases where there is no consent or agreement (Milanovic, 2011, p.135). This situation can be legal or illegal. Since it reflects the application of a certain force, this type of control is carried out in accordance with the principle of *jus ad bellum* in international law and the principles of *jus in bello,* which indicate the criteria for the law of war (Ibid., p.135). In a result, whether the activity of the state establishing authority over the territory is legal or not is not a matter of dispute.

Taking this into consideration, it is useful to analyze the Strasbourg court's case law in

[3] Hereinafter referred to as (Loizidou, 1995). Regarding "Loizidou v. Turkey" case, the Court held two sessions at different times. The first of these is the decision on preliminary objections dated March 23, 1995. The other decision is: (Loizidou v. Turkey, [GC], No. 15318/89, [18.12.1996]).

[4] Hereinafter referred to as (Ilascu, 2004)

order to create a more understandable background of the essence, degree, and application of effective overall control under the Spatial Model applying to armed conflicts.

1. Case of Loizidou v. Turkey.

The decision of the ECtHR in this case is the special consequences established the fact that the concept of jurisdiction can be applied extraterritorially, and thereby indicating in which circumstances the signatory state may be responsible for its acts (Wilde, 2007, p.523). In this case, the claimant, a citizen of the Cyprus, Titina Loizidou, participated in a rally organized on March 19, 1989, for the return of Greek refugees living in the region. Later, she was arrested by Turkish policemen in the region bordering the territory occupied by Turkey, brought to Nicosia and released after being detained for more than 10 hours (Loizidou., preliminary objections, para 12-13). Loizidou appealed to the European Court of Human Rights and claimed that his rights under Articles 3, 5 8, and Article 1 of Additional Protocol No. I of the Convention were violated.

The ECtHR rejected Turkey's preliminary claims regarding the non-recognition of the respondent state and the legal status of the Turkish Republic of Northern Cyprus and proceeded with the case. (Ibid., para 42-52). The initial objections of the Turkish Government regarding the lack of territorial jurisdiction *(ratione loci)* in this case deserve attention. The Turkish government noted that the defendant was the state of Northern Cyprus; therefore, it claimed that the Strasbourg Court did not have ratione loci jurisdiction over this case from the beginning. On the other hand, the Turkish government noted that the events did not take place in the territory of the Republic of Turkey, but in another state (Ibid., para 55). In response to Turkey's initial objections, the Court emphasized that a signatory state to the Convention can be held responsible if it establishes effective control as a result of a legal or illegal military operation outside its territory (Ibid., para 62). The claimant also noted that the Turkish Republic of Northern Cyprus is not recognized by any state or international organization other than the Government of Turkey, and since Turkey occupied this territory, the controlling state should be held responsible for the violation of the law (Ibid., para 48-49).

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

"[...] It is obvious from the large number of troops engaged in active duties in northern

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

(Loizidou, [merits], 1996, para 56)

Concluding remarks.

To sum up, the court found that if the effective control exercised by a state over another territory is merely "overall", this is sufficient for that state to be responsible for the violation occur (Milanovic, 2011, p.137). The court continued the approach adopted in this case later in the Cyprus v. Turkey case, stating that since Turkey has effective overall control over the territory of Nothern Cyprus, the Turkish government is also responsible for: 1) the activities of the army and other authorized representatives of Turkey; 2) the activities of the local administration that maintain their existence with the financial and military support of the Turkish government (Cyprus v. Turkey, [GC], No. 25781/94, [10.05.2001], para 17).[5]

Another remarkable point in *Loizidou* was that the court did not consider Turkey's activity in the territory of Northern Cyprus as an *"occupation."* It can be assumed that the court followed the route to avoid referring to IHL. Apparently, even toward the end of the 1990s, the court did not indicate the relationship of the Convention to Humanitarian Law. Underscoring the importance of considering IHL in this case, Judge Pettiti added that if the claimant was indeed expelled from occupied territory, then the court must analyze the relevant norms and application criteria of the 1949 Geneva Conventions (Dissenting Opinion of Judge Pettiti, pp. 39–40).

2. Banković and Others v. Belgium and others.

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

In 1999, 16 people died as a result of the bombing of the building of the Serbian Radio and Television during the attacks carried out by NATO air forces against Yugoslavia. The relatives of the deceased who applied to the ECtHR claimed that Articles 2 and 10 of the

[5] Hereinafter referred to as (Cyprus, 2001)

Convention were violated (Bankovic., 2001, para 9-11). In respect of the claimant's argument, the respondent states are included in the territorial (ratione loci) jurisdiction (Ibid., para 30). In justifying this claim, the claimant referred to the "effective control" hypothesis adopted in *Loizidou* case (Ibid., para 46). In this context, the respondent's primary objection was that the claimants generally lacked jurisdiction in *"raitone personae"*.

One of the important issues was related to the interpretation of Article 1 of the Convention. While interpreting Article 1 of the Convention, the Strasbourg Court stated that the scope of application of the concept of jurisdiction in the Convention is limited to state jurisdiction based on the principle of sovereignty (Orakhelashvili, 2003, p.539). However, the question arises when the extraterritorial jurisdiction of a state is established? In keeping with the discretion of the court, it happens under the exception. This exception is that as a result of the occupation of that territory by another state with the consent or invitation of one state, the occupied state is deprived of public services that can be used in normal situation and this opportunity is transferred to the occupying state (Bankovic, 2001, para 71). However, none of the previous similar cases mentioned such an approach (Orakhelashvili, 2003, p.544-545).

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

> *" [...] In short, the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an* ***essentially*** *regional context and* ***notably*** *in the legal space (espace juridique) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention."*
>
> (Bankovic., 2001, para 80)

It can be concluded that, the violation of law can enter the legal space in two cases: A) when the violation is committed by the contracting state in a certain territory; B) when the violation occurs in the territory of the contracting state (Greenwood, 2002, p.101). Such a narrow approach was never used in subsequent court cases. Furthermore, the court has not argued in any of its judgments that the decision in *Bankovic* case was erroneous.

In this case, as in *Loizidou* judgment, there is no indication of the ECHR's interaction to IHL. However, several questions were raised by Judge Jean Paul Costa. The most considerable of the questions was whether it was necessary to refer to the 1907 Hague Rules and the 1949 fourth Geneva Convention when investigating the extraterritorial military activities of states. Additionally, could the court analyze crimes as a result of air attacks conducted during peace operations? (Abrisketa, 2015, p.209). However, the court refrained from examining these issues and explained jurisdiction as a term to a specific field. The court's view on Article 15 (Derogations) of the Convention will be discussed in more detail in second chapter of this study.

Concluding remarks.

To summarize, the negative and criticized conclusions reached by the Strasbourg Court in *Bankovic* case were as follows: 1) the court equated the concept of jurisdiction in the Convention with that of the state jurisdiction; 2) by limiting the scope of the Convention, the court has reduced its purpose and legal effect. However, the *"living instrument"*[6] qualification, purpose and subject of the Convention played an important role in the interpretation of *Loizidou* decision (Loizidou, 1995, para 71-85); 3) the court failed to clarify the difference between effective control created as a result of extraterritorial military operations and air attacks (Lawson, 2004, p.111-112). Indeed, according to some authors, if the court had explained the difference between the two acts, especially the nature of the airstrike, there would have been no reason to deny that the violations committed fell within the jurisdiction of the states (Altıparmak, 2004, p.227).

3. Ilascu and Others v. Moldova and Russia.

This case draws attention with a completely new interpretation of the concept of "effective overall control" and thus brings innovation to Strasbourg practice (Ilascu v. Moldava

[6] The Strasbourg court stated for the first time in the case of Tyrer v. United Kingdom that the Convention is a living instrument. Moreover, the court noted the requirements of the current times should be taken into account in the interpretation of provisions of the ECHR. (See: Tyrer v. UK, [GC], No. 5856/72, [25.04.1978], para 31)

and Russia, [GC], No. 48787/99, [08.07.2004]).[7] The most necessary feature of the decision was that it established the idea that jurisdiction could be divided between two states (De Schutter, 2006, p.226). As it is known, after the Republic of Moldova declared its independence in 1991, the 14th USSR army units in Transnistria agreed with the local separatist groups and reported they did not recognize Moldova. Afterwards, a protracted armed conflict broke out between the Russian-backed local separatists and the Moldovan army. Therefore, when ratifying the ECHR on September 12, 1997, Moldova added a condition stating that it would not fulfills its obligations under the Convention in Transnistria until the problem was resolved (Ilascu, para 325-327).

The 4 Moldovan citizens, who were the claimants in the case, were subjected to inhuman treatment and torture by the soldiers after they were arrested in the territory of Transnistria (Ibid., para 188 and 240-272). One of the arrested claimants, Ilascu, was sentenced to death. The claimants, who applied to the ECtHR, stated that their rights and freedoms had been violated pursuant to Articles 2, 3, 5, 6, 8 of the Convention and Article 1 of Protocol No. 1. They claimed that the Moldovan government was responsible for the violations. In addition, the claimants argued that Russia should also be recognized as a defendant by Court. They attributed this to the fact that the territory of Transnistria is under de facto Russian rule and that military and financial assistance is provided to local administration (Ibid, para 3).

The part of the court's decision regarding the violations to enter the jurisdiction of Russia was considered the correct approach. However, the possibility that Moldova is responsible for this issue has sparked a discussion. The court stated that this responsibility was related to the nature of the positive obligations under the ECHR (Ibid, para 335). In the context of this case, positive obligations mean whether the government used all reasonable instruments necessary to protect the rights of claimants and release them from prison (Ibid., para 339). Although the court acknowledged that Moldova was unable to maintain effective control over Transnistria, it noted that it was the responsibility of Moldova to provide adequate diplomatic, economic, and legal support for the protection of the people's rights there (Ibid, para 330-331). This is the meaning of the court's statement on the matter:

" […] If a local authority is established through effective control of another state over

[7] Hereinafter referred to as (Ilascu,)

only a certain part of a state's territory, this does not eliminated the state's jurisdiction under Article 1 of the ECHR. In addition, if such a situation arises, the contracting state has a positive obligation to those who have suffered violations in that territory. In order to fulfill these obligations, the jurisdiction may be narrowed."

(Ibid., para 333).

Based on this interpretation, the court analyzed whether Moldova had made any attempt to establish effective control over the territory of Transnistria. The ECtHR concluded that since the date of ratification of the Convention, Moldova had reduced its efforts to maintain effective control over the region (Ibid, para 340-347). Especially, it was noted that the negotiations were completely stopped after Ilascu was released from prison in 2001. The court did not find sufficient Moldovan efforts to establish effective control and consequently accepted the Moldovan government as the responsible party in this case (Ibid, para 348-352).

Although the court came to such a conclusion, some judges expressed their disagreement with this decision. One of these, Judge Bratza argued that according that to judicial practice, if a state can establish effective control in any area, its jurisdiction is clearly founded. However, in the case, Moldova cannot be held responsible for the violations, as it has no effective control over the disputed territory. For all this, Judge Bratza stressed that the court's decision was contrary to the Strasbourg case law (Partly Dissenting Opinion of Judge Bratza, *et. al.* pp.128-129).

Another Judge Loucaides stated that it is wrong to hold Moldova responsible for not taking diplomatic and other preventive measures to protect people's rights in the region. This can make the concept of jurisdiction *absurd* and *unrealistic* (Partly Dissenting Opinion of Judge Loucaides pp.141).

Concluding remarks.

The decision in this case added a new paradox to the concept of authority. These are: 1) the concept of authority for the protection of positive obligations can be interpreted narrowly; 2) the jurisdiction established under effective overall control can be divided between two states.

4. Chiragov and Others. v. Armenia.

The main subject of this case concerns six Azerbaijani refugees from the Lachin district of Nagorno-Karabakh, occupied by Armenia (Chiragov and Others. v. Armenia, [GC], No.

13216/05, [16.06.2015]).[8] The brief history of the incident is that during the collapse of the USSR, the Nagorno-Karabakh Autonomous Oblast (NKAO) became a self-governing region of the Azerbaijan Soviet Socialist Republic. From a geographical point of view, there was no common border between Nagorno-Karabakh and the Armenia Soviet Socialist Republic, and the Lachin district, which is the focus of the claim, is located on the border between Armenia and NKAO (Chiragov, para 12).

On September 2, 1991, the local representatives announced the establishment of "The Republic of Nagorno-Karabakh"[9] consisting of Karabakh and Shaumyan district and declared that it would not be under the jurisdiction of Azerbaijan. As a consequence, these calls and movements made by local Armenians turned into an armed conflict. Lachin district, where the claimants lived during the attacks, was occupied by the Armenian army on May 17, 1992 (Ibid., para 15-20).

The six claimants in this case, appealed to the Strasbourg court regarding violating their rights stipulated by Articles 8, 13, and 14 of the ECHR and Article 1 of Protocol No.1 (Ibid., para 3). The extraterritorial aspect of this case is striking. The claimants allege that the army and local government operating in the territory of the "The Republic of Nagorno-Karabakh" (hereinafter – "NKR") are directly subordinate to the Armenia. In this regard, both the claimants and the third party, Azerbaijan, submitted several documents to the court as evidences (Ibid, para 58). Among these evidences, numerous bilateral agreements, normative legal acts, state financial packages and budget aid reports indicated cooperation between Armenia and the "NKR" in the political, economic, and military spheres (Ibid., para 59-86). The most essential of them were undoubtedly Resolutions No. 822, 853, 874, and 884, adopted by the UN.[10] Because on the one hand, all four resolutions confirmed that Nagorno-Karabakh and its surrounding regions belong to the Republic of Azerbaijan *de jure* at the international level. On the other hand, these indicated that the Armenian army occupied Nagorno-Karabakh.

The court noted that the state's jurisdiction are defined in two forms within the ECHR: 1) the Spatial model – a state's control over the territory outside its borders 2) the Personal model – the state's control over people in another territory through its agents (Ibid., para 167). The court added that this includes the use of public power normally exercised by a state, in whole or part,

[8] Hereinafter referred to as (Chiragov,)
[9] Declaration Proclaiming "The NKR" (02.09.1991), See: https://ombudsman.az/en/view/pages/133
[10] See: https://digitallibrary.un.org/?ln=en

by another state with its consent or invitation (Ibid, para 168). It is clear that the court referred to both approach in *Al-Skeini* and *Ilascu* decisions.

However, the exciting aspect is that the court noted analyzing the hypothesis of establishing control over individuals is not essential in this case. In keeping with the court's opinion, what is necessary is whether Armenia has applied effective control over Nagorno-Karabakh and whether it continues to do so (Ibid, para 169). The Court is not satisfied with the occupation of the Lachin district where the claimants live. According to the claim, Armenia effectively controls the whole Karabakh region. Therefore, *the first* examine is related to Armenia's ability to control Karabakh as a whole effectively (Ibid., para 170). *Secondly,* although Azerbaijan ratified the ECHR in 2002, the violations occurred long before this date. Therefore, another critical point is whether the effective control created by Armenia continues (Ibid., para 171).

From the analysis of the court, it became clear that there are several important mutual relations between Armenia and the "NKR", such as the signing of the military cooperation agreement in June 1994. The court evaluated this fact as the first official document establishing Armenia's presence in the region (Ibid., para 175). In addition, the court also stated local governments were given loans in different years and continuous financial assistance (Ibid., para 181-185). In particular, the court considered the facts of the case of Zalyan, Sargsyan and Serobyan v. Armenia[11] to indicate that the Armenian army was not satisfied with being located in Nagorno-Karabakh. In addition, the activities of Armenian law enforcement officers and the jurisdiction of Armenian courts are dominant in this area (Ibid., para 182). Taking into account all, the Strasbourg court reached the following conclusion:

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

[11] Zalyan and Others v. Armenia, [GC], App. No. 36894/04 and 3521/07, [17.03.2016].

of Article 1 of the Convention [...].”

(Chiragov, para 186)

It can be seen the court discussed the existence of both hypothesis in the case, but in the end, by applying the spatial model, it accepted that Armenia created effective control over the Nagorno-Karabakh (Gadirov, 2021, p.39).

One of the Judges Sir Motoc noted that the court’s use of characteristic terms such as *high integration, occupation, local army groups* and reference to General International Law was a progressive event. According to Judge Motoc, the mentioned terms are reminiscent of the decisions of the UN Security Council. This approach is almost a turning point and innovation in Strasbourg’s practice (Concurring Opinion of Judge Motoc, p.85).

Concluding remarks.

The essential points in this case are following: 1) this case is one of the rare cases in which a third state (Azerbaijan) joins and becomes a party to support the claimant’s arguments; 2) the court interpreted the relationship between a state and the territory under its control under "high integration."

1.2. The Personal Model: State Agent Authority

Another hypothesis regarding the extraterritorial application of jurisdiction is called the personal model. This model was first implemented during the EComHR. The Strasbourg court referred to this model for the first time in the years following the case of *Bankovic*. In this respect, it is possible to divide the application history of the personal model into 2 parts: a) the previous Strasbourg case practice; b) the post-Bankovic case practice (Milanovic, 2011, p.181-183). The essence of the personal model is that if a state control individual representatives, they also come under the jurisdiction of the state. Namely, any act or omission performed by those individuals creates responsibility for the state.

According to the court, the personal model falls into three categories in general. In other words, those indicate in which cases the extraterritorial activities of states are included in the

scope of the personal model: A) activities of diplomatic and consular staff; B) activity carried out by one state by exerting force (for example, occupation) on the territory of another state; C) the using by another state of the public powers it possesses with the permission or consent of one state (Al-Skeini, 2011, para 134-136). Taking into consideration, it is useful to examine the related Strasburg case law to better understand the personal model and determine the degree of control exerted over individuals.

1. Cyprus v. Turkey (EComHR).

The main subject of this case concerns the military operation carried out by Turkey on the territory of Cyprus on 20 July 1974. As a result of this operation, on 30 July 1974, the north of Cyprus was occupied by Turkey. Acting as the claimants, the Cyprus complained about Turkey to the EComHR for the following reasons: a) the restriction of freedom of movement of the local population; b) the death of a numerous civilians during military operations; c) the evacuation of large numbers of people from their place of residence and confiscation of their property (Cyprus v. Turkey, No. 6780/74 & 6959/75, [26.05.1975], p.127).[12] The mentioned facts also formed the basis of the second application by the Cyprus on 21 March 1975 (Ibid., p.128).

Thus, the Commission established the personal model hypothesis for the first time with this decision. In this context, the signatory state may recognize the guaranteed rights and freedoms to everyone under its authority and responsibility regardless of its borders. More specifically, authorized agents of a state (including diplomatic craw and members of the army) are not limited to being within the jurisdiction of the state while operating in another region. If these agents obtain additional control over people and property in another region, such individuals and goods are regarded to be subject to the state's jurisdiction. (Ibid., p.136).

There was a difference of opinion among the authors on the theory regarding this case. Sarah Miller stated that the Commission's decision was erroneous. According to her idea, this decision of the Commission is just to indicate the difference between the formal jurisdiction established by the annexation of a state and the real control or functional jurisdiction effectuated by Turkey over Cyprus. More concretely, in Miller view, the control over Cyprus is not jurisdiction exercised through state's agents. This effective control is a territorial jurisdiction (the spatial model) established over the zone of Cyprus. She connected this explanation with the

[12] Hereinafter referred to as (Cyprus, 1975)

domination that Turkey has created over the Cyprus for many years (Miller, 2010, p.1237). However, Milanovic disagreed with Miller's view, emphasizing that the court applied this assumption to focus on cases that emerged in the following years. According to Milanovic, the model of effective control over the territory mentioned by Miller does not apply in this case. The control meant by Miller was implemented for the first time in the case of *Loizidou v. Turkey* (Milanovic, 2011, p.182).

Concluding remkars.

The consequences of this case are following: 1) obviously, the EComHR has a broad understanding of the concept of extraterritorial jurisdiction in this case 2) with this decision, the Commission implemented the concept of the Personal model, a new hypothesis, to the Strasbourg practice for the first time.

2. Issa and Others v. Turkey*.*

The basis of the case concerns the extraterritorial military operation carried out by Turkey in northern Iraq in 1995 (Issa and others v. Turkey, [GC], No. 31821/96, [16.11.2004], para 4, 10).[13] Accordant with the claimants' arguments, 7 Iraqi citizens were arrested by Turkish soldiers and then were founded dead (Ibid., para 12-19). Wives of dead citizens applied to the ECtHR for the violation of Articles 2, 3, 5, 8 and other provisions of the Convention. Although the Turkish government acknowledged that it had carried out local military operations on the territory of northern Iraq at the time, it stated that Turkish soldiers were 10 km from the village of Azadi, where the incident took place (Ibid., para 25).

Thus, the court argued that the claimants failed to prove two main facts: 1) whether the Turkish army could maintain effective control over the territory of northern Iraq; 2) whether Iraqi nationals were detained in the alleged territory (Ibid., para 75-77). The court declared an inadmissible decision because the facts in question could not be proven "without any reasonable doubt" by the claimants (Ibid., para 76). The Strasbourg court, while adopting *Issa*, interpreted the concept of the jurisdiction (legal space - espace juridique) created in *Bankovic* in a different way and applied it to this case. In this context, the court emphasized that in order to establish extraterritorial jurisdiction, a state must find effective control in another territory. On the other hand, if a state establishes control in another region through its agents, it is obliged to protect the people's rights there (Ibid., para 70,71). In fact, the personal model of the jurisdiction established

[13] Hereinafter referred to as (Issa, 2004)

during the EU Commission period started to revive after *Bankovic* and became a reference source by the court.

This decision was the first test applied by the Strasbourg court to broaden the scope of the Convention. Namely, the court has not considered the applicability of the ECHR's norms to a nation that is not subject to its jurisdiction in any prior decisions (Milanovic, 2011, p.92). On the other hand, *Issa* state that if a contracting state can establish temporary effective control in the territories not covered by the Convention, the court's jurisdiction may extend to non-European zones (Tarik Abdel-Monem, 2005, p.11). Due to this, the court reversed its *Bankovic* decision and re-proposed the personal model hypothesis created during the Commission period. However, the Strasbourg court seems to have ignored *Issa* decision so as not to violate the foundations of the legal space hypothesis adopted in *Bankovic* (Milanovic, 2011, p.92).

Concluding remarks.

These are the most important consequences of the case: 1) Turkey's operation in the northern Iraq region was completely short, due to this, it did not give grounds for effective control; 2) although the Turkish army has carried out a military operation in the northern Iraq region with enough soldiers, this does not mean that Turkey has established effective overall control over the area. Based on this idea, the court state that *Issa* was different compared to the case of Cyprus v. Turkey; 3) unlike *Bankovic*, the court does not interpret the concept of jurisdiction narrowly in this case; 4) as mentioned above, the court discusses not only effective control over the territory but also extraterritorial jurisdiction, which comes about through the state's agent or other authorities.

3. Öcalan v. Turkey.

One of the most important cases regarding the personal model hypothesis is Öcalan v. Turkey (Öcalan v. Turkey, [GC], No. 46221/99, [12.05.2005]).[14] After *Bankovic*, the court first mentioned the application of this model in Issa v. Turkey, but it was finally declared inadmissible for lacking proof.

This case concerns the arrest of Abdullah Öcalan, leader of the Kurdistan Workers Party (PKK), by the Turkish government in Nairobi, the capital of Kenya. In more detail, after being deported from Syria on October 9, 1998, Öcalan requested asylum from countries such as Greece, Russia and Italy at different times, but received a negative response. He was taken to the

[14] Hereinafter referred to as (Öcalan, 2005)

Greek consulate building in Nairobi on February 2, 1999 (Ibid., para 13-15). After long-term diplomatic talks, the Greek representatives announced that the Netherland would accept Öcalan. At the end of the meetings, Kenyan agents brought Ocalan to Nairobi airport to leave the country. However, unexpectedly, they handed over Ocalan to Turkish soldiers who were waiting on another plane (Ibid., para 16-17). The claimant applied to the court alleging that his rights in Articles 2, 3, 5, 14 and other relevant provisions of the Convention were violated (Ibid., para 8). When the aspect of extraterritorial jurisdiction of the case is examined, curious nuances emerge. The necessary question is whether a violation that occurs far beyond the legal space of the ECHR falls within Turkey's jurisdiction.

In the preliminary ruling of the case, Turkey argued that the approach in *Bankovic* decision should be applied. The main cause for this was that Turkey compared this case with *Bankovic* and requested a similar approach from the Strasbourg court. In other words, the court could apply the same hypothesis for Turkey in this case, just as it adopted a decision of rejection based on the legal space factor in *Bankovic* decision. Yet the court rejected such an approach (Öcalan v. Turkey, [Judgment], No. 46221/99, [12.03.2003], para 93).[15] When this case was heard in the Grand Chamber, the court tried to clarify the difference between *Öcala*n and *Bankovic* and came to the following conclusion:

> *"It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey."*
>
> (Öcalan, 2005, para 91).

The issue that raises the question is whether the effective control implemented by Turkey is about the person arrested or the place where the incident took place. When the analysis of related opinions of the court, it is clear that the main issue is about the physical control that

[15] Hereinafter referred to as (Öcalan, 2003)

Turkey has directly generated over the person (Wilde, 2005, p.803, 804). It is possible to conclude that Turkey's direct physical control over the person was the most essential point that distinguished this case from *Bankovic*. Because the physical force used in *Bankovic* was from a long distance and was carried out by an aerial attack (Altıparmak, 2006, p.72).

Several authors point out that *Issa* and *Öcalan* distinguish by the primary implementation of the personal model. According to Hannum, both decisions marked a turning point in the Strasbourg practice by introducing the Personal model after *Bankovic* (Hannum., *et. al.* [remarks], 2002, p.99). Nevertheless, according to some authors, this is not right approach. For instance, O'Boyle argues that none of *Issa* and *Öcalan* defined the exact boundaries of the state's jurisdiction. He consider that the court avoided discussing this fact. Therefore, none of decisions can be considered a turning point in the application of the Personal model (O'Boyle, 2004, p.133-134). The Strasbourg court applied the Personal model reached in *Öcalan* in similar cases, namely Pad v. Turkey (Pad and others. v. Turkey, [GC], No. 60167/00, [28.06.2007])[16] and Issak v. Turkey (Issak and others v. Turkey, [GC], No. 44587/98, [24.09.2008]).[17]

Concluding remarks.

The essential results regarding this case are following: 1) with this case, the court has shown that the human rights violation committed by the contracting state can create a jurisdictional status even if it takes place outside the legal limits of the Convention; 2) as opposed to *Issa*, *Öcalan* is a case in which a state is ultimately held liable by applying the Personal model to its extraterritorial exercise.

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

This case concerned the amendment of some criteria adopted in *Bankovic* and the implementation of the personal model. The main theme of the study is the occupation of Iraqi lands by the US army and various coalition states. According to Resolution No. 1441[18], adopted by the UN Security Council on 8 October 2002, the British army occupied the Basra region of Iraq and gained control on 5 April 2003 (Al-Skeini, 2011, para 9,10).

Relatives of six Iraqi citizens who applied to the ECtHR claimed that the UK was responsible. According to the claimant's arguments, victims died in the following circumstances: 1) when the first victim is on the street; 2) the second person, as a result of the raid on his house

[16] Hereinafter referred to as (Pad, 2007)
[17] Hereinafter referred to as (Issak, 2008)
[18] See: https://digitallibrary.un.org/record/478123?ln=en

by British soldiers; 3) with a bullet fired from outside when the third person was in his house; 4) when the fourth victim drives his car on the way; 5) the fifth victim was arrested by British soldiers, beaten, and thrown into the Shat-al-Arab river. A few days later, that person's body was found by the British police on the riverbank; 6) the sixth victim, Baha Mousa, was beaten to death while in custody after being arrested by British soldiers (Ibid., para 34-63). Therefore, his relative also made an allegation under Article 2 (inappropriate investigation into the death fact) of the ECHR (Ibid., para 95).

The review of the case by the British courts.

Al-Skeini was first heard in British courts. This case was considered in the UK in 3 stages: 1) High Court[19] 2) Court of Appeal[20] 3) House of Lords.[21] It is useful to note that each of the British courts has held that the arguments raised against the 5 claimants are not covered by Article 1 of the Convention. The court concluded that only violations concerning the sixth claimant should be taken into account.

Firstly, while the case was heard in the Court of Appeal, Judge Lord Brooke took a new view, contrary to the decision taken by High Court. Judge Brooke noted that in the analysis of this case, as in *Bankovic,* it is essential to examine the personal model and the hypothesis of effective territorial control. As an example of this view, he cited the case of a person being abducted by state agents on another state's territory (Al-Skeini., CA, para 80). In fact, this argument had the potential to change the course of the case. Because if the court had made a decision based on this argument, each of the six claimants would have been subject to the jurisdiction of the UK (Milanovic, 2011, p.189). However, Lord Brooke later stated that he did not criticize the approach in *Bankovic* and noted that the court did not have a chance to make a different decision in this case. (Al-Skeini, CA, para 80). Moreover, Lord Brooke argued the court should examine whether there has been a violation of Articles 2 and 3 of the Convention, which is the basis of the claim. On the other hand, the Strasbourg court must analyze whether the respondent state has fulfilled its positive obligations related to the violations. In this context, Baha Mousa is directly under the UK's jurisdiction. Sir Brooke based this argument on three facts: a) Mousa was arrested by British soldiers; b) the victim was subjected to direct physical

[19] Al Skeini and Others v. Secretary of State for Defence, [2004] EWHC 2911, App. No. CO/2242/2004. (Hereinafter - Al-Skeini, HC)
[20] Al Skeini and Others v. Secretary of State for Defence, [2005] EWCA 2911, Dava No. C1/2005/0465, C1/ 2005/0465 B. (Hereinafter - Al-Skeini, CA)
[21] Al Skeini and Others v. Secretary of State for Defence, [2007] UKHL 26, (Hereinafter - Al-Skeini, HL).

force; c) he was detained by British soldiers for some time in the UK controlled prison (Ibid., para 108). Judge declared that the allegation of the other five claimants were inadmissible as they were not under the UK control. The British soldiers could not intentionally and effectively create an obstacle to the rights and freedoms of the other five claimants (Ibid., para 110).

As can be seen, Brooke has shown that the fact of direct control of victims (for instance, the detention of person in a prison) is a distinctive nuance. Nevertheless, Milanovic argued that, this approach adopted by Lord Brooke and two other Judges is inaccurate. Because applying the personal model, there is no need to have direct control over individuals. For instance, in the case of *Pad* and *Issak,* the personal model was still applied even though the victims were not under the direct control of Turkey (Milanovic, 2011, p.191).

Secondly, while analyzing the case, the House of Lords made the following two important arguments referring to *Bankovic*: 1) the territory of Iraq is outside the legal space of the ECHR; 2) the jurisdiction of the contracting state should be understood as state jurisdiction. In addition, the House of Lords assessed that although the UK was operating militarily in Iraq, its troops were fewer and did not have effective overall control. In such a situation, the UK could not fulfill its positive obligations under the ECHR. Due to this, the House of Lords concluded that the UK did not have territorial jurisdiction over the five claimants. Regarding the sixth claimant, the House emphasized that jurisdiction established only based on the personal model (Milanovic, 2012, p.125-127).

The ECtHR's understanding of Al-Skeini.

In this case, the Strasbourg court moved away from the narrow interpretation of jurisdiction in decision of *Bankovic* and readjusted the concept of legal space. In this context, the court concluded that if agents of a state exercise control over people in the territory of another state, the state will be held responsible for the violation. As an inference of this control, the state accepts the positive obligations stipulated by the Convention towards those people. In fact, this approach revealed two facts: a) rights and freedoms in the ECHR can be divided; b) these rights and freedoms can be adapted again (Al-Skeini, 2011, para 137).

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

protecting the rights and freedoms in that area (Ibid., para 142).

Although the court overturned some criteria in *Bankovic* through this case, *Al-Skeini* cannot be considered a turning point in Strasbourg's history. This argument is based on a necessary fact. Every time the court invoked the personal model presumption, it cited such a fact: *"Normally, the British army used the public power the Iraq could use."* (Ibid., para 149). From this argument of the court, it can be considered that if the British army did not use public power and committed a violation at a long distance, the UK's responsibility would not arise.

Concluding remarks.

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

PART II. DEROGATION AND THE INTERACTION BETWEEN THE ECHR AND INTERNATIONAL HUMANITARAIN LAW

After looking at the theoretical and legal framework regarding the extraterritorial application of the ECHR, the interaction with International Humanitarian Law should be examined. Therefore, this chapter provides an overview of the application of the Convention to international armed conflicts. First it starts with some background information about the theory and comparisons to help understand the problem better. Next, the following two sections present a review of each related case.

Two diverse areas of international law, IHRL and IHL, are based on common humanist ideas, despite having various sources and legal regulatory mechanisms. The human factor plays a vital role in the protection mechanism of both legal fields. The function of human rights protection in armed conflict and peacetime brings both fields of law closer together (Szpak, 2014, p.303). However, serving the actual purpose does not allow them to ignore their differences. This fact leads to the emergence of the following differences: A) the concept of protection in IHL applies to people to varying degrees (for instance, the protection of civilians is different from the protection of members of the army). Nevertheless, IHRL applies the same protection mechanism to all people; B) both individuals and states can be held responsible for violations in IHL. However, for IHRL, the responsible subject is only the state; C) IHL norms implement only to the situation of armed conflicts. However, IHRL norms are applied in peacetime. The curious aspect is that, although IHRL norms are not binding on states during armed conflicts, they still cannot ignore these norms (Andonovska, 2021, p.29, 30). The point that raises the question is the position of the ECHR, one of the primary sources of IHRL, concerning this interplay.

Recently, the Strasbourg court has examined numerous cases related to the activities of states in extraterritorial military operations. This category includes the cases analyzed above, in which states used their militray on the territory of another state. In these cases, whether the court applies IHL, which governs military operations, is essential (Abrisketa, 2015, p.201). In keeping with to some authors, the ECtHR uses “an approach of its own” when referring to IHL (Forowicz 2010, p.313–351). The essence of this approach is that even if the court refers to IHL, it happens indirectly. In other words, the court implicitly avoids making a direct reference and seems to

convey a subliminal message (Abrisketa, 2015, p.202). All this raises two necessary questions: *1) to what extent can the ECHR be applied during extraterritorial military operations?; 2) What is the role of Article 15 of the Convention in this connection?*

Even before the adoption of the ECHR, the world countries adopted a defense mechanism to regulate armed conflicts that may arise between them. This mechanism was IHL, which incorporated the Geneva Conventions and their Additional Protocols. Therefore, the ECHR was intended to be implemented only in peacetimes. An example of this is Article 2 of the Convention. As is known, this article prohibits the deprivation of life. However, this interdiction applies only to the peacetime situation. It is clear that Article 2 made an exception in the case of deaths during armed conflicts. As a result, Article 2 implicitly stated that IHL managed deaths from armed conflict based on the "lex specialist" (Abrisketa, 2015, p.204). However, the main problem is that the difference between lawful acts of war and unlawful war is not explained. The Strasbourg court did not provide any guidance in this regard, either in the cases it applied directly to IHL or in others (Schabas, 2015, p.601).

Article 15 of the ECHR is the most substantial point that clearly elucidate the interaction between the two areas of law. From theory, Draper argued that Article 15 established "an innovative philosophy" in this relationship. According to him, this approach was the beginning of showing that both fields of law overlap and complement each other (Draper, 1972, p.326–338). Paragraph 1 of the relevant article is as follows:

> *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."*
>
> (ECHR, Art. 15.1)

The continuation of the regulation enumerates the rights (Articles 2, 3, 4.1, and 7) that cannot be violated even under the above conditions. Two facts constitute a legal discussion about this article.

Firstly, it can be seen, Article 15 reflects some essential nuances: a) the phrase *"to other obligations under International Law"* actually indicates a reference to IHL; b) this provision

envisages the parallel application of the norms of both IHL and IHRL in exceptional situations (Abrisketa, 2015, p.204). There are also several argumentations that confirm this in the theory. In keeping with Gonzalez, Article 15 represents the point where IHL and IHRL cooperation overlap (Gonzalez, 2006, p.13–35). In addition, for some authors, both fields of law can be applied, albeit partially, in any armed conflict, and one can replace the other in interpretation (Orakhelashvili, 2008, p.161–182).

Secondly, another critical point of this article is the essence and limits of applying the concept of *"time of war and other public emergency...*" situations. The most serious discussions on this issue arose after *Bankovic.* In respect of the claimants in this case, during times of war and any threats to the nation's existence, a signatory state may apply to the Article 15 by notifying the General Secretary of the EC in advance. This situation also applies to the case of a signatory state participating in an extraterritorial military operations. If the state does not notify that it is applying for an exemption from its obligations related to the application of Article 15, it is responsible for violating the law (Bankovic, 2011, para 49).

The Strasbourg court presented two arguments in its response: 1) there is no accepted concrete approach as to what types of war and emergencies Article 15 may enforce to; 2) if a state participating in extraterritorial armed conflict does not invoke Article 15, this is evidence that jurisdiction under Article 1 of the Convention does not arise (Ibid., para 62).

According to the court's first answer, there is no exact approach regarding whether the "time of war" concept in Article 15 refers to an international or a non-international armed conflict (IAC or NIAC). For instance, Altıparmak argued that there were very few norms regarding NIAC when the ECHR was drawn up. Therefore, the time of war mentioned in this provision applies primarily to IAC. (Altıparmak, 2004, p.235). On the other hand, the decisions of post-Bankovic proved that the approach regarding jurisdiction was also wrong. More precisely, a state does not need to invoke Article 15 during the war. For example, in Issa v. Turkey, the court accepted the jurisdiction of the respondent state even if the claimants did not refer Article 15 (Issa, 2004, para 82). In respect of some authors, even if the state makes an exception to its positive obligations under Article 15, it should not violate its negative commitments, such as respect for human rights and freedoms (Altıparmak, 2004, p.235, 236).

To sum up, contributions from the ICJ and other courts, as well as doctrinal sources, regarding the interaction of the two areas of law are scarce in Strasbourg's practice. As

mentioned in the methodological part of the study, the ECtHR avoids directly referring to IHL in cases related to extraterritorial armed conflicts. The main reason for this is the court pays attention to the legal and procedural various between the two fields of law. Additionally, the court considers that a direct reference to IHL can be interpreted as an attempt with another legal system (Abrisketa, 2015, p.205). However, recently it is possible to observe that the court has taken audacious measures. Because the cases of *Al-Jedda* and *Hassan* proved that the court had taken a new approach and referred to the IHL system. Hence, I consider it necessary to examine these cases in detail.

2.1. Al-Jedda v. the United Kingdom: Innovation in Strasbourg's practice?

Al-Jedda has one of the most essential places in the history of Strasbourg court (Al-Jedda v. the United Kingdom, [GC], No. 27021/08, [07.07.2011]).[22] With this case, the ECtHR eliminated the principle of "refrain from resorting to IHL" found in previous cases. From a historical aspect, this case is related to the occasions that took place after the invasion of Iraq in 2003 by the US and coalition states. On October 16, 2003, the UNSC adopted Resolution No. 1511 and established a Multinational Coalition Force to maintain security and stability in Iraq (UNSC Resolution No. 1511).[23] In respect of this document, the Multinational Force was supposed to protect the region from all threats, and the UN would only support the redevelopment of Iraq. Although on June 28, 2004, several authorities were transferred to the newly formed interim government, the UNSC extended the mandate of the Multinational Force until December 31, 2007 (Al-Jedda, para 37-41).

The key theme of case concerns the claimant, who holds both Iraqi and British citizenships, who was arrested on October 10, 2004, by American soldiers with the assistance of British Security Services. Accordant with the victim, He was detained in a British concentration camp until the end of 2007 after their arrest (Ibid, para 10). The main reason was that he created conditions for terrorists to enter the state to commit terrorist attacks in Fallujah and Baghdad. Therefore, the claimant applied to the ECtHR for violation of his rights under Article 5(1) of the Convention (Milanovic, 2012, p.134).

[22] Hereinafter referred to as (Al-Jedda,)
[23] See: https://digitallibrary.un.org/record/504316#record-files-collapse-header

As with *Al-Skeini*, this case was first heard in the UK's courts. In the end, the High Court referred to the cases of *Behrami* and *Saramati* while making its decision (Behrami and Behrami v. France, and Saramati v. France, Germany, Norway, [GC], No. 71412/01 and 78166/01, [02.05.2007]).[24]

There are two necessary points in the decision of the HC:

1) The HC noted that the arrest and detention of the Claimants occurred under the control of the UN in the region. Accordant with UNSC Resolutions No. 1511 and 1546[25], the UN is responsible as the main power and authority in the region is a Multinational Force (Al-Jedda, para 18);

2) The HC considered that the obligation to arrest and detain the claimant was imposed by UNSC Resolution No. 1546. The HC referred to the Article 103 of the UN Charter. Article 103 states that UN norms are applied if there is a conflict between the obligations arising from the UN Charter and the commitments of states in other international agreements. Therefore, the obligation established by UNSC Resolution is superior compared to the ECHR. As an outcome, the HC decided that the claimant was not within the ECHR jurisdiction (Ibid., para 60).

The British courts based their decisions on the cases of *Behrami* and *Saramati*. Due to this it is useful to analyze these cases very briefly before the ECtHR's final decision.

The Cases of Behrami and Saramati.

The main subject of these cases are related to the post-war events between Kosovo and Serbia. As it is known, after the war, the UN decided to establish the Kosovo Security Force (KFOR) with assistance of NATO member states to ensure stability and security in that territory based on Resolution No. 1244[26]. In addition, this Resolution envisages the establishment of another organization, the United Nations Mission in Kosovo (UNMIK), which will carry out legislative, executive, and judicial authority in the region (Behrami; Saramati, para 4).

The victims in the *Behrami* are relatives of two children who died and went blind due to the explosion of an unexploded bomb in the area after the war. Since the task of clearing the area of mines was the responsibility of KFOR, primarily French soldiers, the claimants applied to the ECtHR against France under Article 2 of the Convention (Ibid., para 5-7., 61). In the *Saramati*,

[24] Hereinafter referred to as (Behrami) and (Saramati) or (Behrami; Saramati)
[25] See: https://digitallibrary.un.org/record/523025
[26] See: https://peacemaker.un.org/kosovo-resolution1244

the victim was arrested by UNMIK police and remained in a KFOR-controlled prison from 2001 to 2012. Therefore, the claimant enforced to the ECtHR about violating his rights under Articles 5 and 13 of the Convention (Ibid., para 8, 62). France and Norway were recognized as the main respondents in this case (Ibid., para 66).

Firstly, the Strasbourg court noted that it was not crucial whether states had generated effective control in another territory in this case. The court emphasized that effective control is under the jurisdiction of KFOR and UNMIK, which use public power instead of local government. Due to this, the essential nuance is whether the activities of the organizations that originate effective control in the territory are related to the UN (Ibid., para 70-71). Examining the Resolution 1244, the court noted that KFOR affiliated with UNMIK based on delegation (Ibid., para 125). Afterwards, the court analyzed whether the UN is responsible for the activities of both agencies. Referring to Article 10 of the Resolution No. 1244, the court pointed out that the task of establishing UNMIK was assigned to the UN Secretary-General. Taking into account other evidences, the court decided that UNMIK is a body under the direct authority of the UN (Ibid., para 129). As can be noticed, there was a firsthand assignment relationship between the UN and its bodies. Thus, the ECtHR concluded that it does not have *ratione personae* authority to consider the case (Ibid., para 144).

The Strasbourg court's viewpoint to the Al-Jedda.

The claimant's allegation in the ECtHR grounded on the following arguments: 1) the UK generated effective control over the prison where the victim was held by soldiers and the region generally; 2) if more than one state simultaneously conducts military activities on the territory of another state, one or more of the states may be liable for violations; 3) effective control was achieved not by a military operation under the auspices of UN body but by a direct invasion of US and British forces. The claimants used the letter dated 8 May 2003[27], sent to the UNCS by the US and British representatives, as proof for this argument; 4) The UNSC, with Resolution No. 1511, stated that the region's leading power is under the Provisional Coalition States' control (Al-Jedda, para 69-71).

In response to the claimant's allegations, the court stated that the interpretation of Resolution No. 1511 does not mean that the UN will be responsible for the actions of states that

[27] See: https://digitallibrary.un.org/record/498571

are part of a Multinational Power. On the other hand, there is no fixed indication that member states of a Multinational Power are not responsible for their actions (Ibid., para 80). The court noted that this case differed from *Behrami* and *Saramati* under Article 5 of the International Law Commission (ILC) (Ibid., para 84).

It is clear from the common interpretation of this article that the UN can only be liable for violations if it establishes an effective control. As considered by the court, since the UN could not originate such an effective control, the coalition states will be responsible. The court noted that the victim was held in a British-controlled facility. (Ibid., para 84-86). Consequently, the UK has jurisdiction under Article of the ECHR accordant with personal model.

Can Al-Jedda be considered an innovation?

As can be obvious, the decision on *Al-Jedda* was the first in the history of Strasbourg case law. In a result of the court's bold steps, this decision paved the way for future human rights test controls by UN bodies (Milanovic, 2012, p.137). It was considerable that the court referred to the UN Secretary-General's letter and several UNSC documents. In particular, comparing Article 103 of the UN Charter and the legal status of the ECHR were preliminary and progressive circumstances for references to IHL (Ibid., para 138).

However, the disadvantage of this decision was that the court, as usual, avoid making direct application to the IHL. For instance, the ECtHR underlined the importance, albeit indirectly, of the UNSC taking more concrete decisions on arrest and detention during armed conflict (Pejic 2011, p.837–851). However, this issue could be interpreted very quickly in the light of IHL norms by the principle of *lex specialis.* As can be seen, the court chose to ignore such a reference. Therefore, *Al-Jedda* is a better source for comparison between the ECHR and UNSC decisions than in terms of reference to IHL (Abrisketa, 2015, p.211).

In my opinion, both *Al-Skeini* and *Al-Jedda* are decisions that have left their mark on the history of Strasbourg. The court has yet to make such a landmark decision since *Bankovic*. However the court indicate the first signals that the ECHR will sooner or later be interpreted in parallel with IHL norms against the backdrop of international armed conflicts. As a consequence, these judgments later removed the court's disregard for IHL norms, and finally, in 2014, the case of *Hassan* introduced a new point of view.

2.2. Hassan v. the United Kingdom: Direct application to IHL

This case is significant in terms of numerous nuances in the ECtHR's practice (Hassan v. the United Kingdom, [GC], No. 29750/09, [16.09.2014]).[28] First, the court brought a new approach to regulating legal relations between IHRL and IHL. Second, it explained in more detail the limits and methods of application of the ECHR during armed conflicts. Finally, it established for the first time the direct application of the Convention to IHL. The issues underlying the *Hassan* are as follows: 1) an analysis of whether or not obligations continue for states entering into armed conflict without resorting to Article 15 of the ECHR; 2) determining whether violations committed by states are to be interpreted based on the ECHR or on IHL norms per the principle of *lex specialis* (Sommer, 2020, p.51).

The key theme of this case is related to the events that happened after the occupation of Iraq by the British and coalition armies. The claimant is an officer serving in the Ba'ath party and the military. The claimant was trying to hide from the British army for political causes. The British soldiers who raided the house on April 23, 2003, to arrest the claimant could not find him. Therefore, they captured and questioned his brother Tarek Hassan. He was released by soldiers on May after being detained for a while for questioning, Afterward, Hassan went missing, and his body was founded about four months later in the town of Samara, 700 km from prison (Hassan, para 10-29). The claimant applied to the ECtHR for violating his brother's rights under Article 2, 3, and 5 of the Convention (Ibid., para 59-65).

All three British courts, in this case, stated that the prison where the soldiers held the victim was not only under the UK's control but generally operated by coalition states, and therefore rejected the claims (Ibid., para 31, 32).

The Strasbourg court first discussed whether the victim was under British jurisdiction. The court turned to the Personal model developed in *Al-Skeini*. Accordant with this approach, a signatory state is responsible for violations if it can generate control over people and things through its representatives in another territory. However, what is important is the application of any physical force and pressure on the victim (Al-Skeini, 2011, para 136). The court did not accept the UK's jurisdiction under Article 2 and 3. The court noted insufficient evidence that Hassan was subjected to torture and inhumane treatment during his detention. On the other hand,

[28] Hereinafter referred to as (Hassan,)

the victim was alive when he was released from prison. The fact that he was found dead 4 months later in a remote area not under British control is inadmissible under Article 2 of the ECHR (Hassan, para 62-64).

Additionally, the court considered the allegations under Article 5 of the Convention. Responding to the claims, the UK Government stated that the Strasbourg court should consider the norms of IHL, and especially the relevant articles of the III and IV Geneva Convention. Because of Article 21 of the third GC, the state may limit the freedom of movement of prisoners of war (The Third Geneva Convention, 1949, Art. 21).[29] The UK army also did not have jurisdiction under Article 5, as it exercised these rights (Hassan, para 99).

The Strasbourg court pointed out that the article should be interpreted since there are significant differences of opinion between the parties on the solution to the problem under Article 5. The court stated that so far, the reference to Article 15 to allow an exception from Article 5 has been applied mainly in two circumstances: a) first, the state's attempt to suppress internal armed conflicts; b) second, measures to prevent local acts of terrorism (Gioia, 2011, p.204, 205). As can be observable, the states have mainly applied Article 15 in solving local military problems. According to these facts, the court interprets Article 5 under the relevant articles of the 1969 Vienna Convention (Hassan, para 100).

In this context, ECtHR noted the importance of interpreting IHL and relative international legal norms under Article 31.1, paragraph c of the Vienna Convention (Ibid., para 103). In other words, there should be a common denominator between Article 5 paragraphs (a) and (f) of the ECHR and the requirement of "deprivation of liberty for security" of the third and fourth Geneva Conventions. The court noted an essential nuance at this point: *"if a state deprives a person of liberty based on the norms of IHL, it should not do so far unreasonable or arbitrary causes, according to the Article 5 of the ECHR"* (Ibid., para 105). In addition, under Article 43 of the fourth GC, inspections must be carried out periodically by a *"competent body"* to verify the legality of a person's arrest and deprivation of liberty (Ibid., para 106). In a consequence, the ECtHR, which directly refers to IHL norms for the interpretation of Article 5, eventually accepted that the UK had deprived the victim of liberty based on the requests of the Geneva Convention.

[29] See: https://ihl-databases.icrc.org/ihl/full/GCiii-commentary

The relationship between the ECHR and IHL.

The Strasbourg court, until this case, has never established a guideline on the parallel interpretation and application of the ECHR with IHL norms. It is true that, although the court in *Bankovic* used statements such as "it is necessary not to lose sight of the norms of international law when determining state jurisdiction," the case of *Hassan* has an entirely different place in the history of Strasbourg (Byron, 2007, p.851). On the other hand, it is also a fact that the court utilizes certain expression in this direction in the cases of *Varnava* and *Al-Skeini*. Even according to some authors, *Al-Skeini* is the first case that laid the foundations of the decision of *Hassan* (Dimitrios, 2019, p.168).

However, when interpreting this case, the court referred not only to *Al-Skeini* and other decisions but also to the experience of the ICJ. In particular, two cases have been more essential references in ICJ: 1) *"Decision about Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory"*[30] and 2) *"Decision on Armed Activities in Congo Territory"*[31] Per these decisions, the court mentioned provisions regarding the parallel application of IHL and IHRL norms during armed conflicts (Sommer, 2020, p.57).

To sum up, the court stated that the commitments under the ECHR do not lose force even in armed conflicts in which the member states are involved (Hassan, para 104).

Concluding remarks.

The key factors in this case are following: 1) the norms of ECHR were applied directly to International Armed Conflicts for the first time; 2) The court noted that the norms of ECHR cannot be construed in a way that limits state's powers arising from IHL; 3) the court rejected the thesis of avoiding IHL norms; 4) the court determined that application to the IHL system depends on the specifics of each case.

[30] See: https://www.icj-cij.org/en/case/131
[31] See: https://www.icj-cij.org/en/case/116

PART III. A NEW APPROACH ON EXTRATERRITORIAL APPLICATION OF THE CONVENTION AND CRITICISM ASPESCT

It is already obvious that the ECtHR mainly applied two diverse models in extraterritorial armed conflicts: the spatial model and personal model. As mentioned above, the most essential factors in applying the spatial model were: 1) a state's total or partial occupation of another state's territory; 2) the establishment of effective control by another state in the captured territory; 3) a state's political, economic, and military support of a local administration carrying out occupation in another state.

On the other hand, the personal model, which was first applied in the case of *Issa*, was based on: a) the foundation of effective control over people and things in the territory of another state by the agents of one state; b) the transfer of public power normally exercised by one state to another state with the consent, authorization, or connivance of that state; c) the using direct physical force, detention, and control by signatory state's agents in any territory, regardless of the legal space of the ECHR.

Moreover, there are alternative jurisdictional models for the extraterritorial military activity of states. These are the "Functional Model" proposed by Judge Bonello in the case of *Al-Skeini* and the "Third Model" established by the famous author Marko Milanovic. This part of the study provides an analysis of these models in detail. Afterward, it sets out the consequences of applying the ECHR to armed conflicts and the general approach regarding the future of relations between the ECHR and IHL system.

3.1. The role of the Functional Model

Sir Bonello, of the judges in the case of *Al-Skeini*, first presented the functional model hypothesis in his concurring opinion (Concurring Opinion of Judge Bonello, p.78-86). In fact, this model is more of an improved hypothesis than a new approach to the extraterritorial application of the ECHR (Ibid., para 8). Although Judge Bonello agreed with the court's final

decision, he believed that the model on which the court based was wrong. The court needs to use the convenient reasoning when applying the personal model hypothesis and interpreting the state's responsibility (Ibid., para 3, p.78). In other words, he consider that the court interpreted the models it applied in numerous cases analyzed until Al-Skeini, either in a broader sense or, as in the case of *Bankovic*, in a very narrow framework. Therefore, Judge Bonello put forward the idea of five commitments that member states to the Convention must fulfill unconditionally:

> *"a) by not violating any human rights (under the control of state agents); b) by establishing a regime to prevent human rights violations; c) by investigating allegations of human rights violations; d) by punishing state's agents who violate human rights; e) by compensating the damage caused to the person whose rights have been infringed."*
>
> (Ibid., para 10, p.79).

Judge Bonello argued that if any of these obligations under the control of a state were infringed, that state was responsible. He consider that the jurisdiction of the state coincides with the concept of authority and control that it creates in another territory. In this context, it is immaterial whether the jurisdiction is internal or extraterritorial in accordance with the obligations under the ECHR. The jurisdiction should be understood as a functional concept. If a state has control over a certain area, any type of violation that occurs will be subject to the state's jurisdiction. On the other hand, Bonello assume that the boundaries of the state's jurisdiction are limited by the liabilities arising from the Convention. Thus, if the violators of the Convention are under the control and authority of the signatory state, these actions are considered to have occurred as a logical result of the state's power (Ibid., para 11-14, p.79, 80).

Afterward, an essential question arises naturally. *How to determine whether the state establishes authority and control over individuals?* According his argument, the existence of such authority and control depends on whether the state fulfills its obligations under the Convention. In this context, the functional jurisdiction of the state will set up a natural inference. It means that if a signatory state lacks the power to enforce its obligations in another territory, it has no authority and cannot exercise any influence (Ibid., para 19, p.81).

From authors Mr. Stewart agrees Judge Bonello's argument about the functional model. Stewart notes that if a state has the necessary power to uphold its obligations on its zones or

elsewhere, it has natural jurisdiction over the people under its control (Stewart, 2011, p.118).

In conclusion, Sir Bonello, who agreed with the common opinion of other Judges in *Al-Skeini,* pointed out that the functional model for determining extraterritorial jurisdiction is more convenient than other models (Concurring Opinion of Judge Bonello, para 21, 22).

The basis of Judge Bonello's idea was not to seek new ways and methods to solve the jurisdictional problem but to analyze the principles of human rights and the fundamentals underlying the concept of jurisdiction. I agree with this idea. However, I consider that the factual circumstances of each case must be considered in order to apply the most appropriate jurisdiction model. In addition, when making a decision on a case, the court should compare the hypothesis implemented in previous cases.

3.2. The Third Model as an object of extraterritorial jurisdiction

As is known, the most important nuance underlying the personal model is the obligation of state agents to protect human rights and freedoms where they control. This obligation also applies to violations outside the state's territory. These are positive commitments that the state must fulfill. However, some questions arise that: are the boundaries of the obligation to respect human rights limited by the jurisdiction of the state? Why is the condition of protecting the negative obligation not applied to the state in every place where it can establish control? All these questions create the hypothesis of the Third Model proposed by Marko Milanovic (Milanovic, 2011, p.209). He generated this hypothesis based on the discussion on the sovereignty character of the jurisdiction and the positive and negative differences in the ECHR commitments.

The distinction between a state's liability to respect human rights and its liability to protect human rights is conditional. In fact, if the state has ensured the protection of these rights, it means that the state has taken all necessary preventive measures to ensure that the rights are not violated (Ibid., p.209). An example of this is the case of Velásquez-Rodríguez v. Honduras. In this case. The Inter-American Court of HR noted that the state must thoroughly and fully investigate violations of the rights protected by the Convention. On the other, if the state does not ensure the free and full use of its rights by the persons under its control, it will be considered to

have infringed its positive commitments (Rodríguez v. Honduras, [Judgments], Series C. No.4, [29.07.1988], Inter-Amer.Ct.HR, para 172-176).[32] This decision indicated that the state should protect the rights under the Convention, and if an infraction occurs, it must fulfill its obligation to investigate and punish (Barnett, 1997, p.598). As a result, the state has international responsibility not for violating human rights, but for failing to preserve the rights that need to be protected (Rodríguez., 1988, para 172).

In order not to violate the obligation to respect human rights, it is enough for the state to form control over the activities of its agents. Nevertheless, as mentioned above, the obligation to preserve human rights involves taking several measures, such as defense, detention, and punishment. As can be seen, the capacity for negative and positive obligations is not the same. Due to this, Milanovic considers that if the jurisdiction limitation can be applied for the performance of positive commitments, the similar situations is not valid for negative obligations. Simply put, Milanovic point out that the obligation to respect human rights is flexible and that these liabilities are viable worldwide (Milanovic, 2011, p.210).

Within this framework, Milanovic analyzes Article 1 of the ECHR. He states that this article only mentions the function of the states to defend human rights, that is, the positive obligation. The question is that *does this article of the Convention provide for the commitment to respect human rights (negative obligation)?* Yes, of course. The fact that Article 1 of the ECHR does not mention the obligation to respect human rights does not mean that negative obligations can be ignored. In respect of Milanovic, the negative liabilities stipulated in the ECHR and other human rights conventions are clear from the interpretation of the relevant articles. In simply words, the commitment to "protect human rights" mentioned in Article 1 also includes the obligation to "respect human rights". The only separation is that while positive obligation can be limited, negative obligation always exists for states everywhere (Ibid., p.212-215).

Milanovic implemented this hypothesis to the case of *Al-Skeini*. He argued that if UK soldiers had not established effective control in the Basra region of Iraq, the UK would not be held responsible for the infringements. Yet accordant with Milanovic, UK jurisdiction would be deemed to have arisen even for such a case. Because even if the UK did not set up effective control in the region, it had a negative obligation to prevent human deaths (Ibid., p.216, 217).

Milanovic's core concept was that the third model would replace the previous versions

[32] Hereinafter referred to as (Rodríguez, 1988)

(Ibid., p. 219). However, in my view, there is no need to replace the existing models with the third model. First, the distinguishing between positive and negative commitments is inappropriate for the Court case law and, as Milanovic indicated, would even lead to radical discrimination (Ibid., p.221). Second, suppose that this model is applied to international armed conflicts. In this case, the state should always respect individuals' right to life, right to liberty and security. However, expecting governments to uphold obligations equally in times of peace and conflict would be absurd. Therefore, the Strasbourg court does not allow the state to ignore negative obligations under the pretext of war. For instance, the court concluded in *Hassan* that a state cannot deprive individuals of liberty for arbitrary reasons (Hassan, para 105). In other words, as Milanovic also emphasized, the Strasbourg court thinks it essential to consider IHL standards in extraterritorial armed conflicts.

Milanovic lists several features that distinguish the third model: flexibility, clarity, impact, and others. He argue that the most important of them is flexibility (Milanovic, 2011, p. 219). He notes that utopian interpretations should not be allowed when determining the responsibility of states for extraterritorial military activities. The court should consider the situation of states. In contrast, the court should not turn a blind eye to states' evasion of negative obligations (Ibid., p. 220).

I can complete Milanovic's ideas with one word. In my opinion, it is about implementing a balance. However, *what would achieving balance provide us?* Even if it gives nothing, it will still provide something. Contracting states will henceforth refrain from committing human rights violations unless necessary during extraterritorial armed conflicts.

Is it still on the agenda to replace the third model with others? The reality is that the court has already done a lot solve the problems suggested by Milanovic. For instance: 1) In *Al-Skeini*, the court noted that the rights of the ECHR is "divisible" and "tailored." (Al-Skeini, para 137); 2) According to the ECtHR's opinion in *Al-Skeini*, the state has liabilities only in certain situations (Ibid., para 136). In other sense, the state's positive obligations to protect the individuals' rights are not valid in each situation. Nonetheless, the state should fulfill its obligation not to violate human rights whenever possible. It is obvious that the court drew attention to the distinction between positive and negative obligations; 3) In *Hassan*, the Strasbourg court indicated that exceptions to certain conventional norms could be allowed in armed conflicts. However, signatory state cannot completely ignore human rights. Because the

safeguards of the ECHR continue to apply in all situations (Hassan, para 104). This approach was an excellent tool for balancing positive and negative obligations.

In both cases, the court applied the personal model. In principle, personal model provides the same consequence as the third model. Even Milanovic admits this fact (Milanovic, 2011, p. 221). Moreover, Milanovic note that there is a risk to implementing the third model. He adds that although this model is difficult for the ECtHR's Judges to enforce, it is impossible to know how it will work in practice. (Ibid., p. 221).

Simultaneously, there is no need to replace the third model with the spatial and personal models.

3.3. Absurd or Logical Result? - About the ECHR's application to IHL

This paragraph provides a critical approach to the interplay between the ECHR and IHL, and a concluding examination of how the court has chosen a path in this context. It is a reality that the cases of *Al-Skeini*, *Al-Jedda, Hassan* and *Jaloud*, in particular, played a significant role in applying the Convention to extraterritorial armed conflicts and shedding light on the problems between the ECHR and IHL. Until these cases, the traditional approach of the Strasbourg court was to apply the Convention to armed conflicts, ignoring or paying less attention to IHL norms (Borelli, 2015, p.41)[33]. The most obvious example of this was the comments in *Bankovic* that the norms of ECHR were 'indivisible' and 'non-tailored' (Bankovic, 2001, para 75).

However, the court held the opposite opinions in numerous cases before that case. For example, the court stated in the *McCann* that the Convention would not impose an 'unrealistic burden' on member states (McCann v. UK, [GC], No. 18984/91, [27.09.1995], para 200). In addition, in the case of *Osman*, the court noted that any obligation in the Convention could not impose an "impossible and disproportionate burden" on the contracting party (Osman v. UK, [GC], No. 23452/94, [28.10.1998], para 116).

Subsequently, the court abandoned the strict interpretation of the provisions of the ECHR and concluded that it is essential to consider the norms of IHL during armed conflicts. The ECtHR's first mention in *Al-Skeini* that the rules of the Convention were "divided and

[33] The court used this approach in the cases of Chechnya conflicts. (For example, Isayeva v. Russia, [Judgement] No. 57950/00, [24.02.2005]).

harmonized" were initial steps in this direction (Al-Skeini, 2011, para 137). All these innovations created such a question in itself.

If the norms of Convention can be divided and adapted for extraterritorial application, why ignore the reference to IHL norms? Although the reference approach introduced by the court was a new method called the reconciliation of the ECHR and IHL, it was not revolutionary (Dimitrios, 2019, p.168). On the other hand, it is incorrect to say that each of the preliminary measures toward this harmonization started with *Al-Skeini*. Because in the case of Varnava v.Turkey, the court considered it appropriate to interpret Article 2 "as far as possible in the light of the common standards of International Law, including IHL norms" (Varnava v. Turkey, [GC], App. No. 16064/90, 18.09.2009, para 185).

Can the ECtHR's direct application to IHL norms be considered an intervention in another legal system? In theory, several have criticized the broad interpretation of the jurisdiction in the ECHR and its implementation to extraterritorial armed conflicts. The most necessary factor underlying the critical argument was the scope of application of Article 1 of the Convention. They believe that the direct application of the ECHR to armed conflicts may damage the norms of IHL, and pit two areas of law against each other (Morgan, *et. al.,* 2017, para 2).

However, the fact that the court takes into account IHL norms and makes an exception in the articles of the Convention cannot be considered interference. In other words, the court's reliance on differences between IHL and the ECHR when determining a state's extraterritorial jurisdiction cannot be considered an arbitrary limitation (Meier, 2019, p.413).

The theorists criticizing the interaction of the ECHR with IHL system during its extraterritorial application raise another question that will lead to discussion. *Can absurd consequences appear when applying the provisions of the Convention to International Armed Conflicts?* According to them, such a reference can have absurd and harmful inferences. As an instance, Article 2 of the ECHR can be interpreted as prohibiting the killing of enemy forces in armed conflicts unless there is a severe need to protect life. On the other side, Article 5 can be interpreted as a rule limiting the capture of prisoners of war. As a cause, the lack of norm regarding prisoners of war in the list of exceptions in Article 5 can be cited. Therefore, this case does not allow the application of detention for prisoners of war (Morgan, *et. al.*, 2017, para 5). Nonetheless, in terms of IHL norms, it is normal to kill combatants in a legal war and restrict the

freedom of prisoners of war.

In appearance, the provisions of the Convention cannot be applied to armed conflicts without considering the norms of IHL. In respect of Meirer, while such a critical approach is to be taken seriously, it should not be overstated (Meirer, 2019, p.414).

In general, two essential factors should be analyzed in order not to get an absurd result during the relationship of the ECHR with IHL: 1) the time and nature of the control (over the territory or people) established by a member state in another territory must be clearly defined 2) the second is to focus on Articles 2 and 5 of the ECHR and the existence of exceptions under Article 15. For example, an exception in Article 2 for "deaths resulting from lawful acts of war" would not produce the absurd inferences that critics claim. As can be seen, the ECtHR should not interpret the rules of the Convention (especially Articles 2, and 5) in a strict and radical way (Ibid., p.415).

In this regard, on the interpretation of Article 2, the ICJ Advisory Opinion on Nuclear Weapons stated that IHL norms on the use of lethal force in international armed conflicts constituted a "lex specialis", and that IHL should be referred to for the precise meaning of these acts (Legality of the Threat or Use of NW, 1996, para 25).[34]

Despite these efforts, the Strasbourg court indicated that the application of Articles 2 and 5 to International Armed Conflicts is not an essential element for states to invoke the derogation. In particular, the court's approach in the case of *Hassan* was to interpret IHL norms with due regard, even if states invoked no derogations (Hassan, para 103).

Moreover, determining the reconciliation between IHL and the ECHR under Article 5 was one of the commendable steps taken by the Strasbourg court. For example, the court noted in Hassan that the circumstances of derogation in Article 5 should be harmonized with IHL norms on detention "as far as possible" (Ibid., para 104).

In conclusion, the ECtHR must consider the norms of IHL in each case and avoid a strict interpretation of the rules of the Convention.

[34] See: https://www.icj-cij.org/en/case/95

CONCLUSION

1. For several years, states have carried out military activities on the territory of different countries, either alone or within coalition unions. During armed exercises, the rights and freedoms of the citizens of one state were violated by other states. As an inference of these violations, a new practice was formed at the Strasbourg court. This approach is called extraterritorial jurisdiction or application of the ECHR. A problematic aspect of the new subject was Article 1 of the Convention, which defined jurisdictional boundaries. Article 1 of the ECHR stipulates that member states must preserve the rights and freedoms specified in Section I of this Convention *"within their jurisdiction."* The most significant question that arose in this direction was how and by what methods the extraterritorial application of the Convention would be carried out. The numerous case practice of the Strasbourg court revealed various approaches.

2. This thesis analyzed the most important cases implemented by the ECtHR. Based on these cases, the Strasbourg court developed two essential hypotheses. First is the spatial model, which accordant with the court, if the signatory state can establish full or partial effective control over the territory of another state, it should also be responsible for violations of law that may occur in that territory. This study examined that this control also must be an 'effective' accordant with the case law. Secondly, this study point out the cases based on the personal model and indicate its results. The use of physical force against or detention of people in another state by authorized state's agents would create an opportunity for the application of this model.

3. The extraterritorial application of the ECHR was primary related to the military operations of states abroad. Therefore, per the purpose of the study, this thesis examined the relationship between the Convention and IHL norms. The fundamental point of discussion was how the court would refer to IHL norms and whether a parallel interpretation was possible. While analyzing the application of the ECHR to extraterritorial armed conflicts in *Al-Jedda*, the court referred to the UN Resolutions and emphasized the importance of taking into account the principles of international law. However, the court chose *Hassan v. UK* to refer to the IHL system directly. In this decision, the ECtHR established a new approach in the history of Strasbourg case law by directly referring to IHL norms and the related articles of the Geneva Conventions.

4. Another consequence of this thesis is the examination of alternative models regarding the interpretation of Article 1 of the ECHR. The Functional model put forward by Sir Bonello,

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

5. The last result obtained in accordance with the aims of the thesis concerns the interaction between the ECHR and IHL norms. In this context, I have argued that the key word in determining the exact compromise is balance. *Is the basic goal of the ECHR to protect human rights at all times and in all circumstances?* It should be noted that the ECHR was adopted only to protect against human rights violations in peacetime. Because a few years before this event, the international community had already accepted the rules defining the responsibility of states in armed conflicts. In fact, the Strasbourg court normally had two options. According to the first option, the court would completely neglect the reference to IHL norms. This situation could deprive victims of extraterritorial armed conflicts from the assistance of the Strasbourg court. Additionally, it would undermine the universal effect and legal status of the Convention. Pursuant to the second possibility, the court would directly apply the norms of the ECHR to armed conflicts, ignoring the Geneva Conventions that regulate the law of war. Allowing such a radical interpretation would constitute a conflict between the IHRL and IHL. It can be seen that, the ECtHR's only recourse is to strike a balance. Therefore, to referring to IHL norms, the Strasbourg court should also refrain from serious interference. The balancing method will serve as a bridge between the Convention's regional defense identiy and its universalist impact.

6. After analyzing critical approaches, this thesis reached the following conclusions: 1) the connection between the ECHR and IHL norms is a natural and logical consequence; 2) it is essential that the court directly refers to IHL norms in subsequent cases; 3) the parallel interpretation of both legal instruments is the most convenient approach.

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SUMMARY

A Study on Extraterritorial Jurisdiction of the ECHR and its interaction with International Humanitarian Law

Kamran Khalilov

The issue of extraterritorial jurisdiction of the ECHR is no longer confidential, it is openly discussed and often regulated by law. This study aims to clarify the conflicting aspects of the ECHR regarding extraterritorial jurisdiction arising during the activities of a signatory state in the territory of another state, and to determine how the Strasbourg Court applied the Convention to international armed conflicts in this context. During the research, several methods were implemented to the topic: comparative method, the doctirinal method, the analytical method.

According to Article 1 of the ECHR, the member states are obliged the recognized the rights and freedoms defined in the Convention to everyone "within their jurisdiction". Nevertheless, the Strasbourg Court did not precisely explain when and how the jurisdiction of the ECHR regarding the extraterritorial actions of signatory states emerged. Therefore, this study analyzes two essential models presented by the ECtHR for solving the problem. While the spatial model is based on the state's control over a particular territory, the personal model consists of the power of authority that the state exerts on individuals through its agents. The topic of this thesis establishes an obvious background by examining numerous the court cases on both models. In addition, this study explorer the functional and third models under alternative approaches.

This thesis provides the author's arguments after analyzing the ECtHR's reference to IHL norms through the case law. The author focuses on applying the balance method to solve the problem. To sum up, this research proposes that extraterritorial jurisdiction under the ECHR is and should be limited to such situations to maintain a workable balance between the Convention's regional identity and its universalist aspirations.

Annex 1

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

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

		prohibition of torture, right to liberty and security, *and etc.*	agents over people and things in the territory of another state	
Öcalan v. Turkey	Personal	Prohibition of torture, right to liberty and security, prohibition of discrimination	Detaining the victim in the territory of another state and using physical force against him	Yes
Al-Skeini v. the UK	Personal	Right to life, (inappropriate investigation into the death fact)	The killing of people in the territory effectively controlled by a state	Yes
Al-Jedda v. the UK	Personal	Right to liberty and security	Detention of the victim in a state-controlled facility	Yes
Behrami v. France	Personal	Right to life	Establishment of control over territory and people by agents of coalitions of partner states	No
Saramati v. France, Germany, Norway	Personal	Right to liberty and security, right to an effective remedy	Establishment of control over territory and people by agents of coalitions of partner states	No
Hassan v. the UK	Personal	Right to life, prohibition of torture, right to liberty and security	Detaining the victim in the territory of another state and using physical force against him	Yes

Source: Compiled by the author.