'Gentlemen at home, hoodlums elsewhere': The Extraterritorial Application of the European Convention on Human Rights

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Abstract—This article explores the extraterritorial application of the European Convention on Human Rights, focussing on the implications of the seminal case of *Al-Skeini and Others v United Kingdom*, which explicitly recognised the personal model of jurisdiction, accepted that Convention rights can be divided and tailored and abandoned the concept of *espace juridique*. It concludes that some uncertainties have remained following this case, in particular regarding the position of the territorial principle, the relationship between the spatial and personal models of jurisdiction, the use of lethal force and the dividing and tailoring of Convention rights. This article therefore proposes that the existing models be replaced with a cause-and-effect model of jurisdiction triggered on the basis of (i) cause in fact; and (ii) an assessment of the scope of responsibility based on the principles of foreseeability and remoteness. This article further proposes

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that the Convention rights be divided and tailored such that the extent of States' obligations be proportionate to the capacity of States to fulfill these obligations, based on an assessment of the *de facto* situation.

Introduction

The scope of the application of the European Convention on Human Rights (ECHR or Convention) is governed by Article 1, which requires the High Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention'.[1] While neither Article 1 nor any other part of the ECHR provide a definition of the term 'jurisdiction', the reference to the concept of 'within their jurisdiction', rather than 'within their territory', indicates that States may be obliged to secure rights and freedoms to those outside their territory, such that the ECHR has extraterritorial application. The importance of establishing the jurisdiction of a particular State lies in the fact that jurisdiction 'is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it'.[2] Thus, if a potential claimant is not within the jurisdiction of a State, then the State cannot be held responsible, and the application is inadmissible *ratione personae*[3] before the European Court of Human Rights (the Court). The seminal case of *Al-Skeini and others v United Kingdom*[4] (*Al-Skeini*) is a restatement of the principles governing the scope of the extraterritorial application of the ECHR. As such, this article will first assess the implications of *Al-Skeini,* which explicitly

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art 1.
[2] *Al-Skeini and Others v UK* [GC] (2011) 53 EHRR 18 [130].
[3] Directorate of the Jurisconsult, 'Practical Guide on Admissibility Criteria' (Council of Europe/European Court of Human Rights, 30 April 2020) <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 10 May 2021.
[4] *Al-Skeini* (n 2).

recognised the personal model of jurisdiction, accepted that Convention rights can be divided and tailored and abandoned the concept of *espace juridique* (Part 1). Then, this article will assess the uncertainties that have remained following *Al-Skeini* (Part 2). Finally, this article will argue that the cause-and-effect model of jurisdiction should be adopted to determine the scope of the extraterritorial application of the ECHR (Part 3), such that an individual who is causally affected by an act or omission of a State is within its jurisdiction. The adoption of the cause-and-effect model serves to ensure that States are not 'gentlemen at home, hoodlums elsewhere',[5] that is, that States do not escape responsibility for violations committed on the territory of another State, which they could not perpetrate on their own territory.

1. Analysing Al-Skeini

Al-Skeini concerned the deaths of six Iraqi civilians who had been killed or fatally wounded by British soldiers in Basra (southern Iraq) in 2003, when the United Kingdom was an occupying power. Four of them were shot by British soldiers, another victim had been beaten by British soldiers and then forced to jump into a river where he drowned, and 93 wounds had been found on the body of the last victim who had died while detained at a British military base.

Their relatives contended that the victims were within the jurisdiction of the United Kingdom under Article 1 and that the United Kingdom had breached its procedural obligation under Article 2 in failing to carry out an adequate and effective

[5] ibid [18] (Judge Bonello).

investigation into the deaths. The Court held that the victims fell within the jurisdiction of the United Kingdom under Article 1 and that there had been a breach of the procedural obligation under Article 2. The next part of this article will assess: (A) the treatment of the spatial model and personal model of jurisdiction; (B) Convention rights being able to be divided and tailored; and (C) the concept of *espace juridique,* in *Al-Skeini*.

A. Spatial Model & Personal Model of Jurisdiction

Prior to *Al-Skeini,* the extraterritorial application of the ECHR was premised on two strands of jurisprudence on jurisdiction: the spatial model and the personal model.[6] The spatial model, developed in *Loizidou v Turkey*,[7] dictates that jurisdiction arises when a State 'exercises effective control of an area outside its national territory'[8] in which the affected individual is situated. Meanwhile, the personal model lays down that jurisdiction arises whenever a State exercises authority and control over an individual.[9]

The Court in *Al-Skeini* explicitly recognised the personal model of jurisdiction, stating that 'in certain circumstances, the use of force by a State's agents operating outside its territory may

[6] Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23 (1) EJIL 121.
[7] *Loizidou v Turkey* (1996) 21 EHRR 188.
[8] ibid [62].
[9] The Commission declared that 'authorised agents of a State, including diplomatic or consular agents bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. Insofar as, by the acts or omissions, they affect such persons or property, the responsibility of the State is engaged': *Cyprus v Turkey* [1975] ECHR 3.

bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction'.[10] The Court emphasised that 'what is decisive in such cases is the exercise of physical power and control over the person in question'.[11]

The Court retained the requirement of an exercise of public powers by the State in order to trigger jurisdiction, stating that the extraterritorial jurisdiction of a State is established where 'through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government'.[12] The Court thereby held that there was a jurisdictional link between the United Kingdom and the victims, as 'the United Kingdom … assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government', in particular assuming 'authority and responsibility of the maintenance of security in south-east Iraq'.[13] As Milanovic has noted, '*a contrario*, had the UK *not* exercised such public powers, the personal model of jurisdiction would not apply'.[14] Thus, the Court applied an intermediate model somewhere between the spatial model and the personal model by emphasising that the State had exercised public powers as well as authority and control over the victims.

In explicitly recognising the personal model, *Al-Skeini* departed from the position of the Court in *Banković and Others v Belgium and Others*[15] (*Banković*). *Banković* concerned the deaths and injuries resulting from a missile strike by NATO aircraft on the

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[10] *Al-Skeini* (n 2) [136].
[11] ibid [136].
[12] ibid [135].
[13] ibid [149].
[14] Milanovic (n 6).
[15] *Banković and Others v Belgium and Others* (dec.) [GC] [2001] ECHR 890.

Serbian radio and television station in Belgrade in the then Federal Republic of Yugoslavia in 1999. Although the decision of the 17-member Grand Chamber of the Court was unanimous, it has attracted much academic criticism. The Court in *Banković* rejected the applicants' interpretation of its earlier jurisprudence as constituting recognition of a separate basis for extraterritorial jurisdiction amounting to the personal model[16] and reaffirmed the spatial model as an exception to the primarily territorial application of the ECHR, stating that extraterritorial jurisdiction arises where a State 'through the effective control of the relevant territory and its inhabitants abroad … exercises all or some of the public powers normally to be exercised by that Government'.[17] Thus, in confirming that jurisdiction can arise where a State agent exercises authority and control over an individual, *Al-Skeini* departed from the spatial model adopted in *Banković*.

While *Al-Skeini* has been described as representing a 'potentially massive expansion of the scope of the application of the Convention'[18] in light of its departure from the position in *Banković*, its explicit recognition of the personal model does not depart from the post-*Banković* line of authority in support of the personal model. Four cases which demonstrate the substantive shift to the personal model will now be outlined. In *Issa and Others v Turkey*[19] (*Issa*), the Court rejected the Turkish government's submissions based on *Banković* and stated that 'a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating—whether lawfully or

[16] ibid [81].
[17] ibid [71].
[18] *Al-Saadoon & Others v Secretary of State for Defence* [2016] EWCA Civ 811 [33].
[19] *Issa and Others v Turkey* (2004) 41 EHRR 567.

unlawfully—in the latter State'.[20] Thus, had it been established (which on the facts it was not) that Turkish armed forces conducted operations in the area in question[21] and had detained and killed the victims, the victims would have been within Turkey's jurisdiction by virtue of the personal model. In *Öcalan v Turkey*[22] (*Öcalan*), the Court accepted that the applicant came within Turkey's jurisdiction on account of being under the authority and control of Turkish security forces following his arrest inside an aircraft in Nairobi Airport, noting that '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'.[23] In *Pad and Others v Turkey*[24] (*Pad*), the Court reiterated the personal model as espoused in *Issa*[25] and stated that, had the Turkish government not already admitted that the fire discharged from its helicopters caused the killing of the victims and had it been disputed by the parties that the victims came within the jurisdiction of Turkey, it would have applied the personal model as espoused in *Issa* to assess jurisdiction.[26] Finally, in *Isaak and Others v Turkey*[27] (*Isaak*) the Court declared admissible a complaint regarding the death of an individual at the hands of Turkish Cypriot police in the United Nations buffer zone in Cyprus. Despite taking place in an area over which Turkey did not have effective overall control, the Court found that the victim had been 'under the authority and/or effective control of the

[20] ibid [71].
[21] ibid [81].
[22] *Öcalan v Turkey* [GC] (2005) 41 EHRR 985.
[23] ibid [91].
[24] *Pad and Others v Turkey* App no 60167/00 (ECtHR, 28 June 2007).
[25] ibid [53].
[26] ibid [54].
[27] *Isaak and Others v Turkey* (dec.) App no 44587/98 (ECtHR, 24 September 2008).

respondent state through its agents'.[28] In *Al-Skeini* itself, the Court stated that its previous cases were not solely about control over particular geographical areas, rather concerned the exercise of physical power and control over the person in question.[29] Thus, it is evident that rather than presenting a significant expansion of the scope of the application of the ECHR in explicitly recognising the personal model, the Court in *Al-Skeini* sought to restore order following the development of two competing strands of jurisprudence on jurisdiction. Therefore, the *Banković* oversight—where the Court had failed to properly consider the personal model—was corrected.

Notwithstanding the body of preceding jurisprudence and *Al-Skeini*'s explicit recognition of the personal model, vestiges of the *Banković* approach remain in *Al-Skeini* in three respects. Firstly, the Court retained the requirement of an exercise of public powers by the State in order to trigger jurisdiction. 'Thus, where … authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred'.[30] Jurisdiction does not arise merely on account of the exercise of force or any violation of an ECHR right, rather the exercise of public powers is required. Secondly, while the Court did recognise the personal model, it did not at any point explicitly overrule the spatial model espoused by *Banković*, such that it continues to be applicable. Thirdly, the Court reaffirmed the territorial principle, stating that 'a State's

[28] ibid.
[29] *Al-Skeini* (n 2) [136] 'The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question'.
[30] *Al-Skeini* (n 2) [135].

jurisdictional competence under Article 1 is primarily territorial' and that 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases',[31] requiring special justification in the particular circumstances of each case. Thus, as Milanovic has noted, the Court retained 'the basic *Banković* posture that recognition of extraterritorial jurisdiction must remain exceptional'.[32]

B. Dividing and Tailoring of Convention Rights

The Court in *Al-Skeini* overturned the Court's ruling in *Banković* in holding that Convention rights can be divided and tailored. In *Banković,* the applicants argued that 'the determination of 'jurisdiction' can be carried out by adapting the 'effective control' criteria … so that the extent of the positive obligation under Article 1 of the Convention to secure Convention rights would be proportionate to the level of control in fact exercised'.[33] In response to this, the Court stated that 'the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 … can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question',[34] such that either all or none of the Convention rights applied . The Court in *Al-Skeini* stated that where a State exercises effective control of an area, 'the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified.'[35] Conversely, where a State through its

[31] ibid [131].
[32] Milanovic (n 6).
[33] *Banković* (n 15) [46].
[34] ibid [75].
[35] *Al-Skeini* (n 2) [138].

agents exercises authority and control over an individual, 'the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual'.[36] Holding that Convention rights can be divided and tailored allowed the Court to recognise the personal model, which had been rejected in *Banković*. As Lord Hope has noted, 'the concept of dividing and tailoring goes hand in hand with the principle that extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. The court need not now concern itself with the question of whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached'.[37]

C. Espace Juridique

The Court also departed from *Banković* in abandoning the concept of *espace juridique*. As articulated in *Banković, espace juridique* dictates that the operation of the ECHR is limited to the territorial borders of its Contracting States and does not apply beyond this legal space. In *Banković*, the Court resisted the extraterritorial application of the ECHR by emphasising the fact that 'the Convention is a multi-lateral treaty operating … in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space'.[38] Thus, the Court stressed that the ECHR was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. However, in subsequent cases the Court did not apply the concept of *espace juridique*, with the ECHR being

[36] ibid [137].
[37] *Smith v Ministry of Defence* [2014] AC 52 [49].
[38] *Banković* (n 15) [80].

applicable to the alleged acts of Turkish agents in the non-Contracting States' territories of northern Iraq,[39] Kenya,[40] Iran,[41] and the United Nations buffer zone in Cyprus.[42] The ECHR has also been applied in relation to the acts of the Portuguese authorities in international waters.[43] In *Al-Skeini*, the Court overruled *Banković* holding that 'the importance of establishing the occupying State's jurisdiction' does not imply 'that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States'.[44] Thus, *espace juridique* has finally been laid to rest, such that ECHR obligations can theoretically arise in any part of the world.

Thus, while the Court did not explicitly overrule *Banković* and retained the public powers requirement, there was an expansion in the scope of the extraterritorial application of the ECHR through explicitly recognising the personal model, accepting that Convention rights can be divided and tailored and abandoning the concept of *espace juridique.*

2. Uncertainties Following Al-Skeini

Despite the clarifications offered by *Al-Skeini*, some uncertainties have remained regarding (A) the position of the territorial principle; (B) the relationship between the spatial and personal

[39] *Issa* (n 19).
[40] *Öcalan* (n 22).
[41] *Pad* (n 24).
[42] *Isaak* (n 27).
[43] *Women on Waves and Others v Portugal* App no 31276/05 (ECtHR, 3 February 2009).
[44] *Al-Skeini* (n 2) [142].

models; (C) the use of lethal force; and (D) the dividing and tailoring of Convention rights.

A. Position of the Territorial Principle

The position of the territorial principle[45] is uncertain after the Court broadened the scope of the extraterritorial application of the ECHR. The Court's references to the territorial principle appear to be indicative of a strong presumption in favour of jurisdiction being territorial. However, according to Duttwiler, the territorial principle is 'to be taken with a grain of salt', as 'the reality is that the Convention organs have applied the ECHR to numerous extraterritorial situations which occurred on the high seas and on four different continents'.[46] Similarly, Lord Hope has argued that the word 'exceptional' is included 'not to set an especially high threshold for circumstances to cross before they can justify a finding that the state was exercising jurisdiction extraterritorially', but only 'to make it clear that, for this purpose, the normal presumption that applies throughout the state's territory does not apply'.[47] Lord Dyson has gone so far as to extrajudicially state that the 'fundamental principle is that of the exercise of control and authority', such that 'the territorial principle loses its special significance'.[48] According to His Lordship, 'it is clearer simply to say that, whenever the state

[45] *Banković* (n 15) [61].
[46] Michael Duttwiler, *'Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights'* (2012) 30 (2) Netherlands Quarterly of Human Rights 137.
[47] *Smith* (n 37) [30].
[48] Lord John Dyson, 'The Extraterritorial Application of the European Convention on Human Rights: Now on a Firmer Footing, but is it a Sound One?' (Judiciary of England and Wales, 30 January 2014) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> accessed 18 May 2021.

exercises control and authority over an individual, it is under an obligation under Article 1 to secure the rights and freedoms of the Convention to that individual wherever he or she happens to be'.[49]

B. Relationship Between the Spatial and Personal Models

Al-Skeini chronicles the fact that there are two principal bases for establishing extraterritorial jurisdiction—effective control over an area and State agent authority and control—without elucidating the relationship between the two. If a State exercises effective control over an area, it can be assumed that its agents also have authority and control over the people living in that area. The opposite is not true, as authority and control over particular individuals does not necessarily correlate with effective control over the whole area. This lack of clarity is exacerbated by the fact that, in *Al-Skeini*, the Court retained the public powers requirement from *Banković* as an element of the personal model, referring to paragraph 71 of *Banković* as support.[50] It is strange that the Court referenced this paragraph, which concerned the spatial rather than the personal model, stating that jurisdiction arises 'when the respondent State, through the effective control of the relevant territory and its inhabitants abroad … exercises all

49 ibid. This notion is corroborated by Barbara Miltner, who has argued that 'in the extraterritorial context, it is the state's nexus to persons that becomes the pivotal element of Article 1 jurisdiction' and that 'jurisdictional connections *ratione personae* have become the necessary and sufficient means for establishing Article 1 jurisdiction': Barbara Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons' (2012) 33 (4) Michigan Journal of International Law 693.

50 *Al-Skeini* (n 2) [135].

or some of the public powers normally to be exercised by that Government'.[51]

Moreover, as Raible has argued, 'the geographical model collapses into the personal one when it is applied to smaller and smaller areas',[52] such as mere places or vessels. For instance, *Medvedyev and others v France*[53] concerned France having full and exclusive control over a Cambodian merchant ship and its crew.[54] Meanwhile, *Al-Saadoon and Mufdhi v United Kingdom*[55] concerned United Kingdom authorities exercising control over the premises of a British-run prison in Iraq.[56] The lack of distinction between the two tests beyond merely a difference in scale has continued in later case law, with the Court in *Jaloud v the Netherlands*[57] (*Jaloud*) explicitly mentioning both models but making no distinction between them in application. Thus, the relationship and delineation between the spatial and personal model has remained unclear, creating uncertainty as to the prevailing test of extraterritorial jurisdiction.

C. Use of Lethal Force

The explicit recognition of the personal model of jurisdiction in *Al-Skeini* has raised the question of the extent to which this model captures the use of lethal force. Logically, killing alone constitutes an exercise of authority and control over an individual by totally

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[51] *Banković* (n 15) [71].
[52] Lea Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should Be Read as Game Changers' [2016] 2 European Human Rights Law Review 161.
[53] *Medvedyev and Others v France* [GC] (2010) ECHR 384.
[54] ibid [66]-[67].
[55] *Al-Saadoon and Mufdhi v United Kingdom* (2010) 51 EHRR 9.
[56] ibid [88].
[57] *Jaloud v The Netherlands* [GC] App no 47708/08 (ECtHR, 20 November 2014).

removing his autonomy. This notion has been corroborated by Judge Albuquerque, who stated that 'the shooting of an individual by State agents constitutes the ultimate form of the exercise of State control'.[58]

As Milanovic has reasoned, *Banković* and *Al-Skeini* indicate that 'while the ability to kill is "authority and control" over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft'.[59] Meanwhile, *Issa, Pad* and *Isaak* indicate that killing, including by bombing from a helicopter, constitutes an exercise of authority and control over an individual triggering jurisdiction even in the absence of an exercise of public powers. In particular, as Milanovic has noted, the application of the personal model to a fact pattern similar to *Banković*—a killing taking place by missile fire from an aircraft—renders *Pad* directly contradictory to *Banković*.[60]

The question of the extent to which the personal model captures the use of lethal force is further complicated by the case of *Georgia v Russia* (II),[61] where the Court held that Russia did not have jurisdiction under either the spatial[62] or the personal model

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[58] *Georgia v Russia* (II) App no 38263/08 (ECtHR, 21 January 2021) [9] (Judge Albuquerque).
This has been further corroborated by Leggatt J who stated that killing would give rise to jurisdiction under the personal model as 'it is the ultimate exercise of physical control': *Al-Saadoon (n 18)* [95].
[59] Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (n 6).
[60] ibid.
[61] *Georgia v Russia* (n 58).
[62] The Court held that Russia did not have jurisdiction under the spatial model, as armed confrontation and fighting between enemy military forces creates a situation of chaos where there is no control over an area. According to the Court, 'in the event of military operations—including, for example, armed attacks, bombing or

for the purpose of assessing alleged substantive violations of Article 2 during the active phase of hostilities in an international armed conflict (IAC),[63] such that serious allegations of unlawful killings of civilians during the first five days of conflict were inadmissible.[64] In assessing the applicability of the personal model, the Court sought to distinguish this case from prior cases where lethal force was sufficient to create a jurisdictional link, such as *Issa*, stating that:

> [T]hose cases concerned isolated and specific acts involving an element of proximity. By contrast, the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling by Russian armed forces.[65]

While the Court appears to be excluding heavier weaponry or methods causing larger scale damage from jurisdiction, it is difficult to enumerate the uses of force that are considered 'isolated and specific acts involving an element of

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shelling—carried out during an international armed conflict one cannot generally speak of 'effective control' over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area': *Georgia v Russia* (n 58) [126].

[63] *Georgia v Russia* (n 58) [137]-[138].

[64] In spite of this conclusion, the Court adopted a less restrictive approach than the one in *Banković* by holding that: (i) Russia had jurisdiction over individuals who were detained and subjected to ill-treatment even during the active phase of hostilities: ibid [239], [269]; (ii) Russia had jurisdiction for the purpose of investigating potential substantive violations of Article 2 even if the deaths occurred during the active phase of hostilities: ibid [331].

[65] ibid [131]-[132].

proximity'. As Milanovic has commented, it is unclear whether 'hand to hand, gun to gun, tank to tank, drone to target'[66] forms of force fulfill this requirement. Moreover, as the Court confined its holding to IACs only, it is unclear how lethal force in an extraterritorial non-international armed conflict or in circumstances below the armed conflict threshold would be treated. In light of these issues, the extent to which the use of lethal force is captured by the personal model remains unclear.

D. Dividing and Tailoring of Convention Rights

The implications of the conclusion in *Al-Skeini* that Convention rights can be divided and tailored remain to be worked out, as it is unclear *in what manner* and *at what time* they can be so divided and tailored. While the Court in *Al-Skeini* did indicate that Article 2 should be interpreted flexibly without imposing unrealistic burdens, on account of the conditions in Iraq being far more difficult than those in the United Kingdom in peacetime,[67] *Al-Skeini* and the following cases have offered little specific guidance as to how rights are to be divided and tailored. For instance, Leggatt J in *Al-Saadoon and Others v Secretary of State for Defence* described the fact that rights could be divided and tailored as the 'critical point of departure',[68] but failed to offer any particular guidance. This matter is particularly important as, while it may appear obvious that an individual's right to life should be protected, the stringency of the Court's review of State action to secure rights, as well as the potential inclusion of particular

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[66] Marko Milanovic, '*Georgia v. Russia No. 2*: The European Court's Resurrection of *Banković* in the Contexts of Chaos' (*EJIL: Talk!*, 25 January 2021) <https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-chaos/> accessed 18 May 2021.
[67] *Al-Skeini* (n 2) [168]-[177].
[68] *Al-Saadoon* (n 18) [57].

Articles, such as the Article 13 right to marry, that appear out of place in the context of extraterritorial jurisdiction, require nuanced and principled reasoning. The contentious nature of this matter was evident in *Jaloud*, where the Court was unanimous in finding jurisdiction and a violation of the procedural obligation under Article 2 but there was a 10-7 split amongst the judges regarding the flexibility that States should be accorded in extraordinary situations such as occupation and armed conflict and the stringency of the Court's review of State action in this context.

3. The Cause-and-Effect Model of Jurisdiction

The uncertainties following *Al-Skeini* indicate that the jurisprudence on extraterritorial jurisdiction remains 'bedevilled by an inability or an unwillingness to establish a coherent and axiomatic regime, grounded in essential basics and even-handedly applicable across the widest spectrum of jurisdictional controversies'.[69] In light of this, it is necessary to determine the proper scope of the extraterritorial application of the ECHR, having regard to the purpose of Article 1 and the ECHR as a whole.

This article proposes that the spatial and personal models be replaced with a cause-and-effect model of jurisdiction, such that an individual causally affected by an act or omission of a State will be within its jurisdiction. Jurisdiction would be triggered on

[69] *Al-Skeini* (n 2) [4] (Judge Bonello).

the basis of a two-tier test: (i) cause in fact, and (ii) an assessment of the scope of responsibility.[70] Cause in fact seeks to establish the causal relationship between the act or omission of the defendant State and the harmful outcome through the 'but for' test. The 'but for' test entails the question of whether the harmful outcome would have occurred but for the preceding act or omission of the defendant State. This test indicates the outer limits of liability, as it yields a potentially infinite number of causes for any given harm. An assessment of the scope of responsibility is required to restrict liability, as it would be unreasonable to hold a defendant State liable for harmful results beyond their control. As such, the second limb of the cause-and-effect model seeks to determine which consequences of their wrongful acts the defendant State should be responsible for.[71]

An assessment of the scope of responsibility involves the principles of foreseeability and remoteness. The principle of foreseeability requires that the wrongful harm could have been foreseen as a consequence of the act or omission by a reasonable person at the time it was carried out, while the principle of remoteness operates to exculpate States where there is insufficient proximity between the State's act or omission and the harm. The cause-and-effect model does not amount to 'anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt'[72] being brought within the jurisdiction of that State, as it includes the principles of foreseeability and remoteness that will

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[70] Markus Kellner and Isabelle Durant, 'Causation' in Atilla Fenyves et al. (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (De Grutyer 2012) 449.

[71] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26(2) The European Journal of International Law 471.

[72] *Banković* (n 15) [75].

exculpate a State in spite of the 'but for' test establishing a factual causal link.

In advocating in favour of a cause-and-effect model of jurisdiction, the next part of this article will (A) discuss the case law of the Court as it relates to the cause-and-effect model, (B) explore the manner in which the cause-and-effect model accords with the principle of the universality of human rights and the living instrument interpretive approach, (C) address arguments against the adoption of the cause-and-effect model, and (D) briefly outline the appropriate application of the notion that Convention rights can be divided and tailored.

A. Case Law

Despite the rejection of a cause-and-effect notion of jurisdiction by the Court in *Banković*,[73] there is precedent for its application. *Andreou v Turkey*[74] concerned the cross-border shooting of a demonstrator situated on Greek-Cypriot territory by Turkish armed forces situated on Turkish-Cypriot territory. The Turkish government argued that the affected individual did not fall under its jurisdiction, as it lacked control over the United Nations buffer zone or the Greek-Cypriot National Guard ceasefire line. The Court disagreed, stating that:

> [E]ven though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the *direct and immediate cause* of those injuries, was such that

[73] ibid [75].
[74] *Andreou v Turkey* App no 45653/99 (ECtHR, 27 October 2009).

> the applicant must be regarded as 'within [the] jurisdiction' of Turkey within the meaning of Article 1.[75]
>
> Thus, the Court focussed on the causal link between the actions of State agents and the harmful outcome.

In addition to this particular case, the cause-and-effect model is not inconsistent with the current trend of the case law adopted by the Court. As has been explored above, there is a line of authority—including *Issa, Öcalan*, *Pad* and *Isaak*—that supports the personal model without a public powers requirement. In *Hassan v United Kingdom*, the Court recognised that this case concerned a period 'before the United Kingdom and its coalition partners had declared that the active hostilities phase of the conflict had ended and that they were in occupation, and before the United Kingdom had assumed responsibility for the maintenance of security in the South East of the country'.[76] Thus, regardless of the fact that United Kingdom had not yet exercised the very public powers referred to in *Al-Skeini*, the Court concluded that the United Kingdom had jurisdiction over the victim as he had been 'within the physical power and control of the United Kingdom soldiers'[77] when he had been detained.

The case of *Jaloud* provides further support for the notion that the Court is moving toward adopting the cause-and-effect model. As Raible has commented, in *Jaloud,* the Court oscillated between the application of the personal and spatial model[78] and did not specify which model it ultimately applied. The Court sought to determine the relationship between Dutch troops and

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[75] ibid [25] (emphasis added).
[76] *Hassan v UK* [GC] App no 29750/09 (ECtHR, 16 September 2014) [75].
[77] ibid [76].
[78] Raible (n 52).

the UK armed forces,[79] which would seem to indicate that the Court was trying to establish that the Netherlands had control over the area despite not being the occupying power at the time, and thereby establish jurisdiction. However, the Court held that the death of Jaloud occurred within the jurisdiction of the Netherlands, as it had asserted 'authority and control over persons passing through the checkpoint',[80] which is reminiscent of the personal model. As Haijer and Ryngaert have noted, in clarifying that individuals killed by shots from a checkpoint fall within the jurisdiction of the State controlling the checkpoint, the Court has opened the door for patrol jurisdiction: 'jurisdiction over individuals injured by patrol brigades (after all, both checkpoints and patrols are not permanent establishments)',[81] given that a foot patrol can be considered a moving checkpoint. Such a broad interpretation of State agent authority and control comes close to the cause-and-effect model, indicating that the Court is moving toward adopting this model without explicitly stating that it is doing so.

B. The Principle of the Universality of Human Rights & the Living Instrument Interpretive Approach

The cause-and-effect model of jurisdiction accords with the principle of the universality of human rights: the notion that individuals are endowed with equal human rights simply by virtue of being human, regardless of where they live and who they are. The agenda heralded in the Preamble of the EHCR is the

[79] *Jaloud* (n 57) [141]-[149].
[80] ibid [152].
[81] Friederycke Haijer and Cedric Ryngaert, 'Reflections on *Jaloud v. the Netherlands*' [2015] 19 Journal of International Peacekeeping 174.

'universal and effective recognition and observance'[82] of fundamental human rights. Preventing States from escaping responsibility for human rights violations abroad would be in line with this aim of securing universal recognition of human rights. As Judge Bonello argued in *Al-Skeini,* '"universal" hardly suggests an observance parcelled off by territory on the checkerboard of geography'.[83] This notion is further echoed in *Issa* where the Court stated that 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[84] If human rights are regarded as inherently 'human', it would be doctrinally inappropriate to treat individuals as deserving of a lesser standard of human rights depending on their location and, thereby, allow States to escape responsibility for their actions. The lower jurisdictional standard of the cause-and-effect model satisfies this objective.

The cause-and-effect model also accords with the living instrument interpretive approach to the ECHR. This approach characterises the ECHR as a 'living instrument which … must be interpreted in light of present-day conditions'.[85] In response to this demand, the ECHR must be interpreted in light of the development in the use of technology by States, particularly the proliferation of surveillance, air strikes by unmanned aerial vehicles (drone strikes), and cyberattacks. States have increasingly engaged in mass surveillance regimes, with the United Kingdom's surveillance regime involving the collection of data belonging to those situated outside its territory, thereby impacting their Article

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[82] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Preamble.
[83] *Al-Skeini* (n 2) [9] (Judge Bonello).
[84] *Issa* (n 19) [71].
[85] *Tyrer v United Kingdom* (1978) Series A no 26 [31].

8 right to privacy. Drone strikes, which seriously endanger civilian lives contrary to Article 2, have been increasingly utilised as a method of warfare. British statistics indicate that in the four years of war against ISIS in Iraq and Syria from 2014-2018, Reaper drones were deployed on more than 2,400 missions: almost two a day on average.[86] States are increasingly incorporating active cyber operations into their military arsenals, with cyberattacks having the capacity to cause widespread ramifications akin to a traditional armed attack. Surveillance, drone strikes, and cyberattacks are instances of conduct engaged in by States that are controlled centrally within a State's territory but produce effects outside its territory. Such situations where a State agent has insufficient proximity of relationship to an individual to directly exert their authority and control but is nonetheless able to significantly impact upon their rights are excluded by the spatial and personal models. If the use of lethal force does not suffice to create a jurisdictional link extraterritorially on account of being an exercise of authority and control, then exfiltrating data, reading emails or hacking phones is unlikely to suffice either. In fact, the United Kingdom Investigatory Powers Tribunal has relied upon this *Banković* analogy to rule that individuals located outside the United Kingdom but subject to its surveillance are not within the jurisdiction of United Kingdom.[87] Thus, the means by which a Contracting State can harm the rights of the citizens of another state without having to physically enter the territory of the latter state have changed since the ECHR first conceived of jurisdiction. This is exactly the kind of development that the living

[86] Dan Sabbagh, 'Killer drones: how many are there and who do they target?' *The Guardian* (London, 18 November 2019) <https://www.theguardian.com/news/2019/nov/18/killer-drones-how-many-uav-predator-reaper> accessed 18 May 2021.
[87] *Human Rights Watch Inc & Others v The Secretary of State for the Foreign & Commonwealth Office & Others* [2016] 5 WLUK 352.

instrument interpretive approach ought to capture. A shift to the cause-and-effect model would ensure that Contracting States are unable to escape responsibility in such scenarios.

Similarly, the cause-and-effect model would ensure that States are held responsible for their complicity in human rights abuses abroad, particularly torture. As Jackson has noted, States have been involved in foreign human rights abuses by sharing intelligence, selling equipment used in interrogations, or providing technical support. In such cases, 'the foreign state is wholly in control of its own territory; there is no question of the complicit state exercising effective control of an area outside of its own territory'.[88] Moreover, the authority and control rest with the foreign state, which is responsible, for instance, for an arrest and torture, such that the complicit State's agents facilitate but do not themselves exercise authority and control over the victim. Thus, under the existing interpretation of jurisdiction, the victim of the foreign state's acts does not fall within the complicit state's jurisdiction, such that States may facilitate acts of torture or other human rights violations committed abroad by foreign agents without incurring responsibility. This development in state practice should be captured by the living instrument interpretive approach, with the adoption of the cause-and-effect model ensuring that there is no distinction between torture or other human rights violations committed on one's own territory and those facilitated on the territory of another state.

[88] Miles Jackson, 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' [2016] 27(3) The European Journal of International Law 817.

C. Addressing Arguments Against the Cause-and-Effect Model of Jurisdiction

The Court has interpreted extraterritorial jurisdiction under the ECHR by reference to the narrow, primarily territorial understanding of jurisdiction in international law, with the corollary that extraterritorial jurisdiction has been considered exceptional and requiring special justification, rather than being the natural consequence of States' actions abroad. The Court in *Banković* declared itself satisfied that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction … are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States'.[89] Thus, the Court held that Article 1 'must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification'.[90] This approach has continued in the later case law.[91] However, it has been questioned in legal commentary whether this reliance on the understanding of jurisdiction in international law is appropriate.[92] The international law notion of jurisdiction refers to the 'competence of a State to make, adjudicate and enforce the law with regard to a certain

[89] *Banković* (n 15) [59].
[90] ibid [61].
[91] See for example *Issa* (n 19) [67]; *Al-Skeini* (n 2) [131].
[92] Alexander Orakhelashvili 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 EJIL 529; Marko Milanovic 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 HRLR 411; Alexandra Rüth and Mirja Trisch '*Banković v Belgium*' (2003) 97 AJIL 168.

situation—in short: to regulate conduct'[93] without infringing upon other States' jurisdiction. As such, jurisdiction under international law allocates competences among States thereby seeking to reconcile their competing sovereignties. Jurisdiction under Article 1 of the ECHR serves a different function: it is a threshold criterion that delimits the group of individuals whose Convention rights have to be secured and thus, the scope of a State's duties to secure those rights. As such, extraterritorial jurisdiction 'is derived from factual control and does not depend on any legal authority to act'.[94] As Scheinin has argued, conflating both concepts of jurisdiction confuses the issue of the legal consequences of an exercise of authority and control abroad with the permissibility of a state exercising jurisdiction beyond its own territory.[95] The legitimacy of a State's actions under international law cannot be a condition for establishing jurisdiction under the ECHR. If legitimacy were a condition, then the ECHR would apply where States act within the confines of their competence under international law. As De Schutter has reasoned, such an interpretation would lead to 'the paradoxical result that a State acting beyond its … powers as recognized under international law, could not be held responsible for the consequences resulting

[93] Duttwiler (n 46).
[94] Stuart Wallace, *The Application of the European Convention on Human Rights to Military Operations* (CUP 2019). This has been corroborated by Judge Loucaides who has stated that jurisdiction for the purpose of Article 1 means 'actual authority, that is to say, the possibility of imposing the will of the State on any person': *Ilaşcu and Others v Moldova and Russia* [GC] (2005) 40 EHRR 1030 (Judge Loucaides).
[95] Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

from these acts under the treaties it has agreed to'.[96] The application of human rights law 'cannot depend on whether a State abuses its power within or outside the jurisdictional confines imposed by international law. To be effective [in protecting the individual against the abuse of State power], human rights have to apply wherever a State wields its power'.[97] Given that extraterritorial jurisdiction should not be interpreted by reference to the understanding of jurisdiction in international law, the territorial principle should be disregarded and a conception of extraterritorial jurisdiction that regards it as the natural consequence of States' actions abroad adopted.

It could be argued that the living instrument interpretive approach is not to be applied to Article 1, such that the aforementioned present-day conditions are irrelevant. In *Banković,* the Court appeared to imply that Article 1—unlike the ECHR's substantive provisions—was not to be interpreted as a living instrument in accordance with present-day conditions,[98] as 'the scope of Article 1 … is determinative of the very scope of the Contracting Parties' positive obligations and, as such, of the scope and reach of the entire Convention system of human rights protection'.[99] In this way, the Court sought to limit the scope for developing a more expansive interpretation of jurisdiction in the future. However, in endorsing a more expansive interpretation of jurisdiction than that found by the Court in *Banković*, the Court has effectively been treating Article 1 as subject to the living instrument interpretive approach. As Lord Hope has noted, the words 'to date' in Paragraph 131 of *Al-Skeini* indicate that 'the list

[96] Olivier De Schutter 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 Baltic Yearbook of International Law 185.
[97] Duttwiler (n 46).
[98] *Banković* (n 15) [64]-[65].
[99] ibid [65].

of circumstances which may require and justify a finding that the state was exercising jurisdiction extraterritorially is not closed'.[100] Thus, the aforementioned present-day conditions that inform the living instrument interpretive approach are relevant.

It could also be argued that expanding the scope of the application of the ECHR through the cause-and-effect model may be inappropriate in light of the practical limitations of the Court. As the Court already suffers from considerable procedural delays, a low jurisdictional standard could lead to the Court being overburdened. Judge Nußberger has argued that 'justice delayed is justice denied. If all are included, if the limits of the system are stretched in time, space, and substance, the system might be overloaded and stop functioning properly'.[101] As Milanovic has noted, the decision in *Banković* was driven partly by the desire not to 'open the floodgates of litigation by considering every individual against whom force was used as falling under the protection of the Convention'.[102] Likewise, the Court in *Georgia v Russia* (II)[103] concluded that, having regard to 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances', 'it is not in a position to in a position to develop its case-law beyond the understanding of the notion of 'jurisdiction' as established to date'.[104] In light of these concerns,

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[100] *Smith* (n 37) [30]. This notion has been corroborated by Miles Jackson, who argues that the living instrument interpretive approach points 'towards a more expansive understanding of jurisdiction in Article 1': Jackson (n 88).

[101] Angelika Nußberger, 'The Concept of 'Jurisdiction' in the Jurisprudence of the European Court of Human Rights' (2012) 65 CLP 241.

[102] Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (n 6).

[103] *Georgia v Russia* (II) (n 58).

[104] ibid [141].

Judge Nußberger suggests that a restrictive interpretation of jurisdiction may be necessary to ensure the effectiveness of the Court. However, it is submitted that such practical concerns are insufficient to outweigh the significance of providing redress for human rights violations. Moreover, the application of a threshold that discounts rights violations abroad undermines the integrity of international human rights law. As Judge Nußberger has commented, accepting 'that grave human rights violations remain unanswered'[105] might undermine the credibility of the Court. While selectivity is necessary to mitigate the increasing caseload of the Court and ensure its continuing effectiveness, this must be done on a reasoned basis through judgment on exemplary cases in pilot procedures, prioritisation of especially important cases, and a robust admissibility stage of proceedings.

Adjudicating on wartime measures adopted by States or on States' military strategies might be regarded as being outside the Court's institutional competence, such that jurisdiction should not arise in such circumstances. However, in the context of a conflict, the European Court of Human Rights may be the only available international institution to analyse human rights violations with binding effects for the parties. This is primarily on account of the fact that there is no permanent international court considering individual complaints regarding violations of international humanitarian law (IHL).[106] Even if there were a forum adjudicating on IHL, the protection granted under the ECHR extends to some rights and freedoms which are not

[105] Nußberger (n 101).

[106] Anastasiia Moiseieva, 'The ECtHR in Georgia v. Russia—a farewell to arms? The effects of the Court's judgment on the conflict in eastern Ukraine' (*EJIL: Talk!*, 24 February 2021) <https://www.ejiltalk.org/the-ecthr-in-georgia-v-russia-a-farewell-to-arms-the-effects-of-the-courts-judgment-on-the-conflict-in-eastern-ukraine/> accessed 10 May 2021.

guaranteed or are not so widely covered under IHL, such as the freedom of the press, the right to assembly, strike or vote, as well as the right to private and family life.[107] Thus, the scenarios of invasions, occupations or other conflict are the exact sphere where the Court can demonstrate its unique competence.

D. Dividing and Tailoring of Convention Rights

The low jurisdictional standard of the cause-and-effect model of jurisdiction relies on Convention rights being able to be divided and tailored in order to assuage concerns of whether a State is actually in a position to guarantee all of the Convention rights to an individual. As such, the extent of States' obligations should be proportionate to the capacity of States to fulfill these obligations, based on an assessment of the *de facto* situation. Thus, jurisdiction should arise in regard to a certain Article when the performance of its obligations is within a State's control. This notion is echoed in the functional test of jurisdiction proposed by Judge Bonello in *Al-Skeini*. Judge Bonello argued that 'a Contracting State is obliged to ensure the observance of all those human rights which it is in a position to ensure'.[108] Similarly, according to Judges Yudkivska, Wojtyczek, and Chanturia, Article 1 should be read as stating 'a High Contracting Party shall secure the rights and freedoms defined in Section I of this Convention to everyone under its State power and the scope of the rights and freedoms to be secured should be adequate to the extent of the scope of effective State power'.[109]

Necessitating that all territorial rights and obligations be available in the case of extraterritorial jurisdiction may be an

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[107] ibid.
[108] *Al-Skeini* (n 2) [32] (Judge Bonello).
[109] *Georgia v Russia* (II) (n 58) [3] (Judges Yudkivska, Wojtyczek, and Chanturia).

impossible bar, especially given that particular Convention rights, such as the right to a fair trial, are predicated on the State having established the necessary institutions, which is difficult for an attacking or occupying force. However, it is necessary to prevent States from escaping all responsibility purely on account of being just an attacking or occupying force. For instance, there may be particular cases where an occupying force is so established in a particular country that it is reasonably able to provide greater protection than merely not engaging in killing or torture. As Judge Bonello has noted, 'it is quite possible to envisage situations in which a Contracting State, in its role as an Occupying Power, has well within its authority the power not to commit torture or extrajudicial killings, to punish those who commit them and to compensate the victims—but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections'.[110] Thus, the rights that a State is able to uphold would fall within its jurisdiction, while those it cannot uphold would not, based on a detailed assessment of the *de facto* situation.

Conclusion

While the Court did not explicitly overrule *Banković* and retained the public powers requirement, *Al-Skeini* has expanded the scope of extraterritorial application of the ECHR by explicitly recognising the personal model of jurisdiction, accepting that Convention rights can be divided and tailored, and abandoning the concept of *espace juridique*. Despite the clarification of the jurisprudence offered by this case, some uncertainties have

[110] *Al Skeini* (n 2) [32] (Judge Bonello).

remained, indicating the need for further clarification of the scope of the extraterritorial application of the ECHR. This article has advocated that such clarification could be achieved through the adoption of a cause-and-effect model of jurisdiction delimited by the principles of foreseeability and remoteness. In doing so, States are prevented from being 'gentlemen at home, hoodlums elsewhere' by being held responsible for their human rights violations abroad.