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Vassilis P. Tzevelekos  
*University of Hull Law School*

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# RECONSTRUCTING THE EFFECTIVE CONTROL CRITERION IN EXTRATERRITORIAL HUMAN RIGHTS BREACHES: DIRECT ATTRIBUTION OF WRONGFULNESS, DUE DILIGENCE, AND CONCURRENT RESPONSIBILITY

*Dr. Vassilis P. Tzevelekos\**

## INTRODUCTION

As one of the core elements of statehood, territory is inextricably linked to sovereignty. For this reason, jurisdiction is primarily territorial.<sup>1</sup> In principle, the sphere of power of the sovereign state—including its competence to exercise legislative, judicial, and executive authority—applies within the confines of its own territory. Otherwise, the state risks interfering with the sovereignty of other states and thereby breaking one of the fundamental principles of Public International Law (PIL), that of sovereign equality. The principle of sovereign equality dictates that all assertions of jurisdiction have to be balanced with the sovereign rights of other states. This is why “a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ terri-

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\* Lecturer in Public International Law, University of Hull Law School; Attorney, Athens’ Bar.; PhD, M.Res, European University Institute; M.A., European Political and Administrative Studies, College of Europe; DEA Droit international public et organisations internationales, Paris 1 Panthéon-Sorbonne; LL.B., National and Kapodistrian University of Athens. The author is grateful to Judge C. Rozakis, Professor E. Benvenisti, Professor P. Mavroidis, Dr. C.S. Ahlborn, Dr. V. Koutroulis, Dr. L. Lixinski, and Mr. C. Massarella for their critical comments on earlier drafts, as well as to Ms. K. Pitsoli, Ms. F.E. Oikonomopoulou, and Ms. K. Tassi for sending him their unpublished papers on extraterritoriality in the case law of the ECtHR. The paper benefited from questions and comments from participants at workshops and conferences at the University of Amsterdam, the Hellenic branch of the ILA, the Lincoln Law School, and the University of Hull. The usual disclaimer applies. Comments are welcome at [v.tzevelekos@hull.ac.uk].

1. *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. ¶ 59 (“[F]rom 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 (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.”). See the references that the ECtHR makes to scholars supporting this point of view, including some of the most famous textbooks on international law by Oppenheim, Dupuy (P.M.) and Brownlie. For information more generally on territorial jurisdiction, see the “all time classic” work of F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 1 COLLECTED COURSES OF THE HAGUE ACAD. INT’L LAW 111 (1964); F.A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, 186 COLLECTED COURSES OF THE HAGUE ACAD. INT’L LAW 9 (1985). See also M. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT’L L. 145 (1972).

torial competence.”<sup>2</sup> By placing the emphasis on sovereignty, classic PIL treats the question of jurisdiction in a fairly straightforward manner.

However, obligations *erga omnes (partes)*, and primarily the special regime of human rights,<sup>3</sup> came to displace that emphasis. By accentuating the “legitimate collective interest[s]”<sup>4</sup> they seek to protect, human rights challenge traditional PIL and its reciprocal,<sup>5</sup> synallagmatic foundations. By the same token, the *effet utile* of their humanistic purpose leads to the so-called erosion of sovereignty, if not to the humanization of the discipline in its entirety.<sup>6</sup> It is within this context that the question of extraterritoriality for human rights breaches arose. The problem of extraterritoriality led, not only to an animated debate about its legality, the preconditions and actual limits of jurisdiction and the “primacy” of the territorial basis, but also to an unprecedented confusion in Europe and beyond around state responsibility for human rights breaches occurring outside the territory of the state, the jurisdiction of national organs

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2. *Bankovic*, 2001-XII Eur. Ct. H.R. ¶ 60.

3. On the interrelationship between special regimes (*lex specialis*) and general international law (*lex generalis*) see *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 61st Sess., Supp No. 10, ¶¶ 123, 161–164, U.N. Doc. A/CN.4/L.682 (2006), *reprinted in* 2 Y.B. INT’L L. COMM’N 58 (2006), U.N. Doc. A/CN.4/SER.A./2006/Add.1.

4. Hum. Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

5. On reciprocity as the basis of PIL and its function and importance, see Application of Interim Accord of 13 September 1995 (the former Yugoslav Rep. of v. Greece), 2011 I.C.J. 695, ¶ 10 (Nov. 17) (separate opinion of Judge Simma) (“[D]espite the latter’s undeniable movement from bilateralism towards community interest.”).

6. On the humanization of PIL, see THEODOR MERON, *THE HUMANIZATION OF HUMANITARIAN LAW* (Brill 2006); Judge B. Simma devoted his general course at the Hague Academy of International Law in 2009 to *The Impact of Human Rights on International Law*, whereas, Judge A.A. Cançado Trindade, discussed this very same question as part of his own general course at the Hague Academy called *International Law for Humankind: Towards a New Jus Gentium (I): General Course on Public International Law*, 316 RCADI (2005). See also Menno T. Kamminga, *Humanisation of International Law*, in *CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS* 29, 29–40 (Ineke Boerefijn & Jenny Goldschmidt eds., 2008). For a collection of essays on the topic, see generally, *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* (Menno T. Kamminga & Martin Scheinin eds., 2009). Recently, Judge L.A. Sicilianos of the ECtHR treated the same topic in Greek. See NOMIKI BIBLIOTHIKI, *THE HUMAN DIMENSION OF INTERNATIONAL LAW: INTERACTIONS BETWEEN GENERAL INTERNATIONAL LAW AND HUMAN RIGHTS* (2010). Cf. A. Pellet, “*Human Rightism*” and *International Law*, 10 ITAL. Y.B. INT’L L. 3, 5 (2000), (rejecting the idea of the “specialty” of human rights and accusing “human rightists” of “tak[ing] their desires . . . as legal truths.”). For a critical account of the theory of the humanization of international law, see Vassilis P. Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation*, 6 ERASMUS L. REV. 62, 62–76 (2013). See also E. Benvenuti, *Sovereigns as Trustees of Humanity: on the Accountability of States to Foreign Stakeholders*, 107 AMM. J. INT’L L. 295, 295–333 (2013) (regarding sovereignty as a trusteeship not only towards one state’s citizens, but also towards humanity in its entirety).

(mainly of the judiciary), and the jurisdiction of the competent international courts and monitoring institutions.

The author's previous work has discussed extraterritoriality in the context of the obligation the home state has to actively protect human rights by regulating and punishing the illegal conduct of its nationals who invest in third countries.<sup>7</sup> That work on investment and human rights sets out two main arguments regarding extraterritoriality and the criterion of *effectiveness in the exercised control* that the European Court of Human Rights (ECtHR) introduced as a condition for extraterritorial jurisdiction in human rights.

First, in terms of general international law, the effectiveness criterion is problematic. It is an arbitrary judicial construction resulting from the policy choice that a European court has made with a view to artificially delimit its sphere of jurisdiction so that it safeguards its regional nature and sphere of action—the so called *espace juridique* (legal space) of the European Convention on Human Rights (the ECHR).<sup>8</sup> Hence, the first argument was that, contrary to the opinion that prevails in case law and in scholarship, effectiveness in the exercised control *should not* be a precondition for the exercise of jurisdiction when a state has caused wrongfulness outside its own territory. In that scenario, the criterion of effective control ought to be entirely disconnected from the question of jurisdiction.

The second argument also dealt with effectiveness in the exercised control. This argument focused on the distinction between wrongfulness caused by the state or by persons whose conduct is directly attributable to the state, and wrongfulness caused by third persons (such as investors) and thus not attributable to the state, although the situation at issue requires state authorities to develop a proactive behavior in the context of due diligence. Indeed, as it will be shown, effective control plays a pivotal role in that second hypothesis for extraterritorial jurisdiction, and consequently for state responsibility for human rights violations. However, in the context of due diligence obligations, the role of effectiveness in the exercised control differs from the role it *allegedly* plays as a precondition for extraterritoriality. Indeed, in the context of due diligence, effectiveness operates at an entirely different level. Rather than coming into play when illegal conduct outside of a state's territory is directly attributable to it, it plays a role in the rather old and abandoned idea of state fault through failure by the state to demonstrate diligence in preventing and punishing the wrongdoing.

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7. Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors' Human Rights Abuses That Are Not Attributable to It?*, 35 *BROOK. J. INT'L L.* 155, 218–29 (2010).

8. *Bankovic*, 2001-XII Eur. Ct. H.R. ¶ 80 (“[T]he Convention’s ordre public objective . . . underlines the essentially regional vocation of the Convention system . . . In short, 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 Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.”).

This Article will leverage these arguments and demonstrate that the distinct points and classifications between directly attributable wrongfulness and state fault, are in fact *complementary*. They operate circuitously, opening the door for *concurrent* responsibility for states involved in the same situation. The basis of the argument is the aforementioned division between *direct* attribution, as opposed to what one could call by the unconventional term of *indirect*<sup>9</sup> attribution of extraterritorial human rights violations that result from the breach of the principle of due diligence. In the first case, the state has produced the illicit result itself.<sup>10</sup> In the second case, responsibility stems from the state's negligence, that is, from its failure to be vigilant in the case of extraterritorial human rights breaches that are (in the context of the paper) either due to general situations (such as natural or social phenomena and situations like unemployment or poverty) or committed by third parties whose conduct is not attributable to it—a concept that is known to constitutional lawyers as *drittwirking* and to human rights lawyers as horizontal, and more generally positive effect of human rights.<sup>11</sup> This is a crucial classification to make. The conditions that apply in each of these two cases (direct attribution and responsibility for lack of diligence) are different.

As this Article will discuss, the same applies to the nature of the responsibility. The first case leads to objective responsibility<sup>12</sup> reflecting cau-

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9. Linked to the idea of “indirect responsibility” See *DICIONNAIRE DE DROIT INTERNATIONAL PUBLIC* 996 (J. Salmon ed., 2001) (“[I]ncurred by a subject of law because of the conduct of another subject of law.”). See also the critical comments by Jan Arno Hessbuegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 *NYU J. INT’L L. POL.* 265, 268–69 (2004).

10. Either through the conduct of its own organs or through the conduct of other organs/entities/agents, whose comportment is in terms of the law of state responsibility considered to be committed by the state itself. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 56th Sess., Supp. No. 10, arts. 5–11, U.N. Doc. A/56/10 (2001), reprinted in 2 *Y.B. INT’L L. COMM’N* 37 (2001), U.N. Doc. A/CN.4/SER.A/2001/Add.1[hereinafter 2001 ILC Articles on State Responsibility].

11. The literature on the positive effect of human rights is massive. Among other authors, see ALASTAIR MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (HUMAN RIGHTS LAW IN PERSPECTIVE)* (2004); Rolv Ryssdal et al., *Les ‘obligations positives’ dans la jurisprudence européenne des droits de l’homme*, in *PROTECTION DES DROITS DE L’HOMME: LA PERSPECTIVE EUROPÉENNE, MÉLANGES À LA MÉMOIRE DE ROLV RYSSDAL* 1359, 1359–76 (Carl Heymanns Verlag ed., 2000); D. Spielmann, *Obligations positives et effet horizontal des dispositions de la Convention*, in *L’INTERPRÉTATION DE LA CONVENTION EUROPÉENNE DES DROITS DE L’HOMME* 133, 133–74 (F. Sudre ed., 1998). See also D. Alland, *Observations sur le devoir international de protection de l’individu*, in 1 *LIBERTÉS, JUSTICE, TOLÉRANCE: MÉLANGES EN HOMMAGE AU DOYEN GÉRARD COHEN-JONATHAN* 13, 13–30 (Bruylant 2004). The positive effect (especially of the first generation civil and political human rights) is well-established in the international case law. See *Velásquez-Rodríguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (Jul. 21, 1989) (linking positive obligations directly to due diligence). See also *Hum. Rts. Comm.*, *supra* note 4, ¶¶ 6–8 (naming explicitly the principle of due diligence).

12. *DICIONNAIRE DE DROIT INTERNATIONAL PUBLIC*, *supra* note 9, at 997–98.

sality<sup>13</sup> between the wrongful result and the responsible state. The second scenario leads to the so-called state fault, or subjective responsibility,<sup>14</sup> in which the state can escape liability if it can prove that preventing or punishing the violation of the rule was impossible given the means available to it, and the particular to a case circumstances. This is explained by the fact that, as it will be discussed in more detail below, the principle of due diligence generates *obligations of means*—not of result.

The literature on extraterritoriality is vast. However, it mainly focuses on the consequences of the application of the ECtHR standard of effective control as a condition for extraterritorial jurisdiction, such as regionalism and double standards. By following a useful, but somehow descriptive path of analysis, the majority of scholars concentrate on the function of the standard and criticize its absurd outcomes and immoral consequences. They do so by classifying the relevant case law on the basis of factual criteria, such as the nexus (effective control) between the state on the one hand, and the “*locus delicti*” (territory) or the victims (persons), on the other. This is a valuable intellectual exercise, but does not suffice to fully explore the question of extraterritoriality in human rights protection.

What distinguishes this Article from most works on extraterritoriality is that, rather than taking the standard of effectiveness in the exercised control as given and evaluating its outputs, this Article also questions its foundations and strives to identify the profound, systemic sources of effective control, and more generally effectiveness in (extra)territoriality. The cornerstone of the analysis that follows is the classification—that was first applied in the context of extraterritoriality by the author of this paper in 2010<sup>15</sup>—based on the negative and positive scope of human rights norms and the consequent responsibility states bear. Furthermore, the Article places positive human rights obligations within the matrix of due diligence, and explains how that principle of PIL affects them in the context of extraterritoriality in terms of both primary and secondary (i.e. law of international responsibility) obligations.

First, the Article *deconstructs* the standard of effective control by questioning its foundations in PIL; it then *reconstructs* it by offering a map of the role, function, and legal effects of effectiveness (in particular of the effectiveness in the exercised control, understood as a term falling within the broader concept of effectiveness) in the case of extraterritorial human rights violations, as well as by suggesting that, where extraterritoriality is present, more than one state may be held liable.

Hence, according to the *primary hypothesis* of this Article, when a state causes a wrongful result, effective control has no other role in extraterritoriality than that of a criterion for (direct) attribution of the wrongful conduct. Yet, effectiveness does indeed have a role to play in the case of

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13. *Id.* at 996.

14. *See infra* part II.A. *See also* PATRICK DAILLIER, MATHIAS FORTEAU, NGUYEN QUOC DINH & ALAIN PELLET, *DRÖIT INTERNATIONAL PUBLIC* 912–15 (8th ed. 2009).

15. *See* Tzevelekos, *supra* note 7 (commenting on the obligations of the home state for human rights breaches caused by its national abroad).

extraterritorial human rights breaches owed to a lack of diligence, where it comes into play as one of the criteria used to assess the fault of the states having an obligation to demonstrate diligence with regard to the extent that each is responsible for preventing or remedying the wrongful conduct. One aim of this Article is thus to provide a primer for further academic research on extraterritoriality by revisiting the classic question of effective control as a precondition for extraterritoriality in human rights protection, discussing its role in the context of state responsibility owing to lack of vigilance, and more generally testing the named (double in reality) hypothesis.

However, this Article also has a more original and ambitious aim. A *second hypothesis* is that the two named types of responsibility (i.e. objective because of directly attributable wrongfulness, and subjective because of indirectly attributable wrongfulness owing to state negligence) for extraterritorial human rights violations are complementary and create a model of shared responsibility.<sup>16</sup> In that case, state responsibility is *inter-connected*, because it stems from one single situation, which is common to all responsible states. Yet, it is *distinctive* as it originates from two separate sources. That is, two different breaches of primary obligations by two (or more) states, namely, the state that commits the wrongful act outside its own territory and the states that, because they are legally or *effectively* connected to the situation at issue, have an obligation to demonstrate diligence in fighting wrongfulness. One can envisage a number of variations of that model regarding accumulated states being concurrently responsible because of their involvement in the same wrongful situation. For instance, one state may cause the breach, whereas more than one state might be responsible because of a lack of due diligence. Alternatively, if a non-state actor perpetrates the wrongful conduct, there might be no state directly responsible, but multiple states that are expected to react pursuant to their due diligence obligations.

In order for the Article to examine the two named hypotheses and illustrate the links between direct and indirect attribution, it provides an overview of these two legal frameworks within the paradigm of extraterri-

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16. One cannot use the term “shared responsibility” without referring to the seminal homonymous project run by the University of Amsterdam. See SHARES: RESEARCH PROJECT ON SHARED RESPONSIBILITY IN INTERNATIONAL LAW, <http://www.sharesproject.nl> (last visited Oct. 18, 2014). Admittedly, the model of concurrent responsibility presented in this paper falls only partially within the concept of shared responsibility by André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT’L L. 360, 367–68 (2013) (defining shared responsibility *stricto sensu* to exclude causality, which is present in the cases used as examples in the present paper for one of the two involved states). Thus, according to Nollkaemper and Jacobs, “[i]f individual causal contributions could be determined, the allocation of responsibility could fully be based on principles of individual responsibility, rather than shared responsibility. In this sense, shared responsibility is an antidote for situations where causation does not provide an adequate basis for responsibility.” *Id.* at 367–68. Despite that, common case law examples appear in both papers. See *id.* at 379–80. What explains this partial overlap is that the cases at issue are understood in the present paper as the aggregation of two or more individual responsibilities, rather than *stricto sensu* shared responsibility.

torial human rights violations. The cases the Article discusses are mainly taken from the ECtHR, since the ECHR is the main regime where the question of extraterritoriality arose. Yet, to the extent that the aforementioned analytical basis (i.e. the distinction between positive obligations for indirectly attributable wrongfulness, and negative obligations not to produce a wrongful result through conduct directly attributable to the state) applies outside the ECHR system, the findings of the Article have a broader theoretical value and pertinence for different human rights protection systems, other classes or families of human rights, or even areas of PIL beyond human rights.

After asserting the two aforementioned main hypotheses, and after building along the lines that were briefly described earlier the arguments that correspond to each one of them, this Article proceeds with broadening the circle with the bases that activate due diligence. For that purpose, it juxtaposes the various legal bases of jurisdiction that exist to the generic concept of effectiveness—encompassing effective control—arguing that, when a state is *effectively* linked to a situation necessitating diligence, it shall have a legal obligation to be proactive and protective, that is, to demonstrate due diligence. Thus, this Article argues that effectiveness may generate obligations of due diligence.

As far as the structure of the Article is concerned, the first step corresponds to what has already been described here as an attempt to deconstruct the theory of effective control as a condition for extraterritorial jurisdiction. The Article will proceed with its *deconstruction* task *en deux temps*, starting first, in Part I, with the role of effectiveness in the case of direct attribution, which will then be distinguished—in Part II—from the case of state responsibility for indirectly attributable wrongfulness, or because of responsibility for lack of due diligence, the two terms being used here interchangeably. A process of *reconstruction* will follow deconstruction, for the purposes of which the paper will examine in Part III the role of effectiveness in the exercised control in the case of concurrent responsibility. In more detail, the reconstructive part of the analysis aims at: (i) explaining how extraterritoriality in human rights violations opens the way to the concurrent responsibility of more than one state; (ii) identifying the role effective control plays in the case of extraterritoriality. Part IV explains why, outside the traditional legal bases—such as nationality and territory—linking a state with a situation that requires it to demonstrate diligence, effectiveness too shall have that same effect. In other words, this Part shows why, as already mentioned, effectiveness shall generate obligations of diligence.

I. DECONSTRUCTION: EFFECTIVE CONTROL IS NOT A CRITERION FOR JURISDICTION IN THE CASE OF DIRECT ATTRIBUTION OF EXTRATERRITORIAL HUMAN RIGHTS BREACHES.

A. *How Did it all Start? A Convenient Confusion.*

Before assessing effective control as a precondition for the exercise of extraterritorial jurisdiction, it is important to understand how this standard



emerged in international law, and especially within the regime of the ECHR, where it originated. The concept emerged from the confusion caused by the ECtHR's poor reasoning in *Loizidou*.<sup>17</sup> The confusion, however, proved invaluable in the court's subsequent maladroit efforts to artificially delimit its sphere of jurisdiction with a view to maintain the regional nature and scope of its jurisdiction and to avoid addressing a number of highly political issues of human rights violations.<sup>18</sup>

In the *Loizidou* case, the court was faced with, *inter alia*, two independent preliminary questions:

- i. Whether the wrongful conduct at issue—denial of access to and of peaceful enjoyment of property—was attributable to its actual perpetrator, the Turkish Republic of Northern Cyprus (TRNC) or the state that exercises effective control over the TRNC, Turkey;
- ii. If, because Turkey was a signatory party to the ECHR and the TRNC, being a non-state entity, was not, the court was competent to examine the case on its merits.

In the context of *Loizidou*, these two separate questions were interconnected. The court's jurisdiction depended on its assessment of the attribution of the illicit conduct of the TRNC. If the court deemed the wrongful conduct at stake attributable to TRNC, because that entity was not a party to the ECHR, the court would lack jurisdiction to examine the merits of the case. In the opposite scenario, the attribution of the conduct at issue to Turkey would authorize the court to exercise jurisdiction over a state party to the ECHR. In other words, in the context of the *Loizidou* case, the court had to answer two entirely different legal questions, with the first question (attribution) being a condition or preliminary requirement for the answer the court would give to the second question (its own jurisdiction).

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17. *Loizidou v. Turkey*, App No. 15318/89, 20 Eur. H.R. Rep. (1995).

18. Outside the *Bankovic* case, that will be discussed in detail below, see, for instance, *Ben El Mahi v. Denmark*, 2006-XV Eur. Ct. H.R. The applicants in that case were representatives of the Moroccan civil society complaining against the famous cartoons in the Danish press that depicted the Prophet Muhammad. The court made use of its effective control standard in order to declare that the applicants were not falling under the jurisdiction of the respondent state. Interestingly enough, the national courts of that state had confirmed their competence, but refused to exercise it, as they found no grounds to prosecute those responsible for the publications at issue. The case is interesting for a number of reasons. First, it proved that all cases involving freedom of expression may have an extraterritorial effect, as the message may be found offensive by any person, domiciled anywhere in the world. The second reason has to do with the existing legal links between the publications at issue and the respondent state. The cartoons were published by Danish nationals in the territory of Denmark. Despite these obvious legal links (territory and active personality), the ECtHR chose to focus on the "extraterritorial" effect of these publications, as well as on the nationality and the place of domicile of the applicants. This allowed it to apply its questionable standard of effective control as a criterion for extraterritoriality and, thereby, as a means for declaring the case inadmissible.

But how did effective control come into play in the context of *Loizidou*? The question of attribution required the court to resort to the theory of *de facto* organ,<sup>19</sup> under which conduct is not attributed to its actual wrongdoer, but rather to the state that exercises effective<sup>20</sup> control over the wrongdoer. Although the reasoning of the ECtHR lacks the clarity one would expect or wish it to have, *Loizidou* links effective control to attribution, which is a preliminary question for establishing its jurisdiction. Thus:

the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>21</sup>

Therefore, the alleged violations of the ECHR “are capable of falling within Turkish “jurisdiction” within the meaning of Article 1 . . . of the Convention.”<sup>22</sup>

Here, the ECtHR is making three points: (i) that the conduct of the TRNC is attributable to Turkey, (ii) that this automatically extends Turkey’s jurisdiction extraterritorially (whatever this may mean in the case of wrongfulness caused by a state outside its borders, that is, in the case of a negative human rights breach extraterritorially), and (iii) that, consequently, the court has jurisdiction to examine the merits of a case on extraterritorial wrongfulness. Importantly, it is also clear that the criterion of effectiveness in the exercised control is the key element for attribution, which in turn allows the court to establish its own jurisdiction *ratione personae*. Thus far, outside criticizing the court for the poor quality of its reasoning, no other complaints can be made.

In terms of PIL, the conclusion the court reaches in *Loizidou* is absolutely fine. Because Turkey exercises effective control over TRNC, the

19. See 2001 ILC Articles on State Responsibility, *supra* note 10 (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

20. Courts are still fighting about the appropriate standards of control for an entity’s conduct to be attributable to the state exercising control. With *Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) departed from the test of effective control used by the ICJ in its *Nicaragua* case. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 115 (June 27). *Cf. Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 120 (Intl. Crim. Trib. for the Former Yugoslavia Jul. 15, 1999) (introducing a less strict level of control, which was later rejected by the ICJ). See *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43, ¶¶ 406–407 (Feb. 26) (with the ICJ insisting on its old *Nicaragua* dictum).

21. *Loizidou*, 20 Eur. H.R. Rep. ¶ 62.

22. *Id.* ¶ 64. See also *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. ¶¶ 56, 77.

conduct at issue is attributable to it; and because Turkey is a party to the ECHR, the ECtHR can exercise jurisdiction over the internationally wrongful acts that Turkey commits outside its territory. As long as wrongful conduct is attributable to a state, this state will be internationally responsible for it no matter where the conduct took place. And insofar as conduct that falls within the scope of the ECHR is attributable to a signatory party, the ECtHR will have jurisdiction over any cases brought against that party regardless of the territorial or extraterritorial nature of wrongdoing. This leads to an extension of the ECtHR's jurisdiction beyond Europe; however, there are well-defined conditions to this exercise of jurisdiction that comply with general international law, but also with Strasbourg's earlier practice.<sup>23</sup> To accomplish this, the rather abstract and lacunary text of Article 1 of the ECHR,<sup>24</sup> providing that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights

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23. See e.g., *Stocké v. Federal Republic of Germany*, App. No. 28/1989/188/248, 199 Eur. Comm'n H.R. Dec. & Rep. (ser. A) ¶ 166 (1989) (explaining that jurisdiction "is not limited to the national territory of the High Contracting Party concerned, but extends to all persons under its actual authority and responsibility, whether this authority is exercised on its own territory or abroad. Furthermore, nationals of a State are always partly within its jurisdiction and authorized agents of a State not only remain under its jurisdiction when abroad, but bring any other person 'within the jurisdiction' of that State to the extent that they exercise authority over such persons. Insofar as the State's acts or omissions affect such persons, the responsibility of that State is engaged."). The state is also responsible "for the acts of the private individual who de facto acts on its behalf." *Id.* ¶ 168. In similar terms, several years earlier, the European Commission suggested that "the nationals of a Contracting State are within its 'jurisdiction' even when domiciled or [a] resident abroad; whereas, in particular, the diplomatic and consular representatives of their country of origin perform certain duties with regard to them which may, in certain circumstances, make that Country liable in respect of the Convention." *X. v. Federal Republic of Germany*, App. No. 1191/61, 1965 Y.B. Eur. Conv. on H.R. 168 (Eur. Comm'n on H.R.) A few years later on, the European Commission on Human Rights assessed the admissibility of a complaint involving extraterritoriality brought by a non-national of the respondent state. In *Hess*, the victim complained about the detention of her husband in Germany, in execution of a sentence by the Nuremberg International Military Tribunal. The Commission held that "there is in principle, from a legal point of view, no reason why the acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention." *Hess v. United Kingdom*, App. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 73 (1975). The application was finally declared inadmissible, because the conduct at issue was exercised on the basis of the Four Powers arrangement regarding Germany in the aftermath of World War II. The Commission held that because of the absence of direct causality, in what appeared to be a scenario of joint responsibility, the United Kingdom was not solely responsible. *Id.* at 73-74. The ECtHR confirms in its pre-*Loizidou* case law that effective control is irrelevant to extraterritoriality and that the sole condition that applies for a state to be responsible for extraterritorial wrongful conduct is that this conduct is attributable to it. Hence, "[t]he term 'jurisdiction' is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory" . . . "The question to be decided here is whether the acts complained of . . . can be attributed to [the respondent states], even though they were not performed on the territory of those States." *Drozd v. France*, 240 Eur. Ct. H.R. (ser. A) ¶ 91 (1992).

24. Which, according to the ECtHR "must be considered to reflect th[e] ordinary and essentially territorial notion of jurisdiction." *Bankovic*, 2001-XII Eur. Ct. H.R. ¶ 61. "In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside

and freedoms defined in Section I of this Convention” is interpreted in the light of general PIL, and especially of the norms of the International Law Commission (ILC) on state responsibility, which complement the regime of the Convention by filling its gaps.<sup>25</sup>

While *Loizidou* presented the questions of attribution and jurisdiction as two parts of the same inquiry—the former as a condition for the latter—another case that came before the ECtHR, *Bankovic*, required a rather different analysis. In *Bankovic*,<sup>26</sup> the victims complained of alleged human rights breaches they suffered because of the use of force via aerial bombing by NATO member states (that are also parties to the ECHR) against Serbia.

What *Loizidou* and *Bankovic* have in common is that in both cases the alleged wrongful conduct took place outside the territory of the states to which the wrongdoing was attributable. However, the wrongful conduct in *Loizidou* was committed by a different entity (the TRNC) than the one to which it was finally attributable (Turkey), whereas in *Bankovic*, the allegedly illicit conduct was (directly) attributed to the actual perpetrator,<sup>27</sup>

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their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention.” *Id.* ¶ 67.

25. Vassilis P. Tzevelekos, *The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights-Between Evolution and Systemic Integration*, 31 MICH. J. INT'L L. 621, 670–80 (2010).

26. *Bankovic*, 2001-XII Eur. Ct. H.R.

27. The author of the allegedly illicit conduct was an international organization (a subject of international law with an autonomous legal personality, and, not party to the ECHR). The ECtHR did not envisage “piercing the institutional veil” of the organization thus holding responsible its member states (that are also parties to the ECHR) for the illicit conduct of the international organization. This alternative analysis would amount to derived responsibility of states participating in international organizations for the breach of what in essence is a “quasi-primary” obligation not to “use” an international organization for wrongful purposes. The ILC recently finalized its codification of the law on the responsibility of international organizations. See *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 66th Sess., Supp. No. 10, art. 61, U.N. Doc. A/66/10 (2011), reprinted in [2011] 2 Y.B. INT'L L. COMM'N 17, U.N. Doc. A/CN.4/L.778 [hereinafter ARIO] (enumerating the necessary conditions to hold member states accountable for the wrongful conduct of the international organization: “1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State’s international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation. 2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.”). Article 61 (as well its previous versions, such as former article 28 which was much wider) has been inspired by the practice of the ECtHR. Among other cases, see *Bosphorus Hava Yollary Turizm ve Ticaret Anonimirketi v. Ireland*, 2005-VI Eur. Ct. H.R. ¶ 154 (holding that “[i]n . . . establishing the extent to which a State’s action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards . . . The State is considered to

NATO,<sup>28</sup> which is not a party to the ECHR. In the first case, the answer to the question of attribution was the theory of *de facto* organ and its criterion of effective control. On the contrary, in the second case, because the court chose<sup>29</sup> not to examine whether NATO's conduct could also be attributed to its member states (in which case effective control would have a role to play),<sup>30</sup> the theory of *de facto* organ was irrelevant. In short, because of the court's decision not to pierce NATO's institutional veil with a view to hold its member states accountable under the ECHR, nothing in *Bankovic* justified the use of the criterion of effective control.

Despite this, the court chose to rely on that criterion. For political reasons that do not need to be addressed here, the ECtHR profited from the confusion of its obscure reasoning in *Loizidou*, and merged the two *Loizidou* questions, attribution and jurisdiction, into a single, equally obscure and artificial standard:

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retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.”). However, in *Bankovic*, because the ECtHR concluded, by the game of extraterritoriality, that it had no competence to discuss the merits of the case, it also considered that “it is not necessary to examine the remaining submissions of the parties on the admissibility of the application. These questions included the alleged several liability of the respondent States for an act carried out by an international organisation of which they are members.” *Bankovic*, 2001-XII Eur. Ct. H.R. ¶ 83.

28. The claims of the applicants concerning the positive effect of human rights are left outside the scope of the analysis here. *Bankovic*, 2001-XII Eur. Ct. H.R.

29. According to G. Cohen-Jonathan, *Bankovic* is “[u]ne ‘non décision’ sur la responsabilité des États du fait de l’Organisation internationale.” G. Cohen-Jonathan, *Observations: La territorialisation de la juridiction de la Cour européenne des droits de l’homme*, in 52 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 1069, 1070 (2002).

30. See e.g., *Behrami v. France*, App. Nos. 71412/01, 78166/01, 45 Eur. H.R. Rep. SE10 85, ¶¶ 138–140 (2007) (finding that NATO had exercised sufficient effective control over the conduct of the respondent states’ (military) organs); ARIO, *supra* note 27, art. 7 (“The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.”). See also *id.*, art. 6, (“Conduct of organs or agents of an international organization: 1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents.”). In its Report of 2004, the ILC explained that Article 8 of the ILC norms on state responsibility corresponds, *mutatis mutandis*, to former Article 4, which in the final draft is Article 6. Thus, as far as Article 8 of the norms on state responsibility is concerned “[t]his provision concerns persons or groups of persons acting in fact on the instructions, or under the direction or control, of a State. Should instead persons or groups of persons act under the instructions, or the direction or control, of an international organization, they would have to be regarded as agents according to the definition given in paragraph 2 of draft article 4” (now Article 6). *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 59th Sess., Supp. No. 10, at 106, U.N. Doc. A/59/10 (2004). See also ARIO, *supra* note 27, art. 61 (holding a state responsible for the conduct of the organization the member of which it is, if that state has caused the organization to proceed to the conduct at issue).

In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.<sup>31</sup>

This is how the court of Strasbourg departed from its early case law<sup>32</sup> on extraterritoriality and constructed its “illustrious” and highly criticized<sup>33</sup> theory of extraterritorial jurisdiction. Under that rather arbitrary standard, what matters in the case of extraterritorial wrongdoing is not whether conduct is directly attributable to a state party to the ECHR, but whether the respondent state exercises extraterritorial jurisdiction stemming from the effective (or its variations)<sup>34</sup> control it exercises over the situation, whether *ratione loci*<sup>35</sup> or *ratione personae*,<sup>36</sup> either because of the conduct of its own agents/state organs abroad or because of the con-

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31. *Bankovic*, 2001-XII Eur. Ct. H.R. ¶ 71.

32. *See supra* note 23.

33. *See* Michal Gondek, *Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?*, 52 NETH. INT'L L. REV. 349, 360–67 (2005). Other authors, although they are skeptical about the vacuum in human rights protection the *Bankovic* standard creates, appear to accept it. *See, e.g.*, Tarik Abdel-Monem, *How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights*, 14 J. TRANSNAT'L L. & POL'Y 159, 194–96 (2005).

34. *See* *Issa v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. ¶ 74 (2004) (“It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.”). *See also* *Medvedyev v. France*, App. No. 3394/03, 51 Eur. H.R. Rep. ¶ 67 (2010) (employing the term of “full and exclusive control”). For a brief but comprehensive note on *Medvedyev* and the question of jurisdiction from the perspective of the law of the seas, see Efthymios Papastavridis, *Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas*, 25 INT'L J. MARINE & COASTAL L. 569, 576–82 (2010).

35. *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. ¶ 62 (1995), as well judgment on the merits in the same case, *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. H.R. Rep. ¶ 52 (1996). *See also* *Hussein v. Albania*, App. No. 23276/04, Eur. H.R. Rep. 4 (2006) (declaring the case inadmissible because the applicant “has not demonstrated that [the respondent states] had jurisdiction on the basis of their control of the territory where the alleged violations took place.”).

36. *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. ¶ 93. The applicant was arrested by Turkish officials in the territory of a third country but was under Turkey’s authority and control (effective control over persons).

duct of a third party that is directly attributable to it.<sup>37</sup> Until recently,<sup>38</sup> effective control was—and, as will be explained, still remains—a real *conditio sine qua non* for the ECtHR to exercise jurisdiction with regard to extraterritorial wrongfulness directly attributable to the respondent state.

B. *The Consequences of the Effective Control Doctrine:  
Universalization of Regionalism, Anti-Humanization of  
International Law, and Double Standards.*

The following passage very eloquently summarizes the effective control doctrine's effect:

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 which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.<sup>39</sup>

In case of extraterritoriality, effectiveness in the exercised control is a precondition for jurisdiction. Thus, if a state causes human rights violations outside its territory, unless it exercises effective control, it bears no responsibility. This Article suggests two ways to read this dictum.

The first way consists of seeing effective control as a criterion that allows an assessment of whether a *primary* human rights obligation exists for the state. In principle, states only have an obligation to respect human rights within their territory. According to the ECtHR, states are obliged to respect human rights extraterritorially only in exceptional circumstances, specifically, when they exercise effective control. Therefore, when a state does not exercise effective control, it has no human rights obligations extraterritorially. Effective control widens the scope of the primary obligation under the ECHR, expanding it beyond a state's own borders. This implies that, in the absence of effective control, there is no obligation for the state not to break human rights outside its own territory, hence no breach of the law, and consequently no state responsibility. The reading goes against the very teleology of human rights protection and the related interpretative approaches aiming to render their protection effective. Furthermore, it goes against the ECtHR's aforementioned early case law.<sup>40</sup> And, perhaps most importantly, it leads to a double standard, allowing

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37. See *id.*; *Medvedyev*, 51 Eur. H.R. Rep. ¶ 67 (finding the applicants within the jurisdiction of the respondent state pursuant to the exercise by state agents of “full and exclusive control”, “at least de facto”, “in a continuous and uninterrupted manner” over a ship and its crew from the time of its interception in international waters”).

38. See *infra* part I.C. discussing *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. (2011).

39. *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. ¶ 311. See also Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 *ISR. L. REV.* 503, 508 (2007) (“Extraterritorial jurisdiction understood spatially conceives obligations as flowing from the mere fact of territorial control—if the state controls territory, the state is responsible for what happens in it.”).

40. See *supra* note 23.

states to cause results that would otherwise violate international law so long as they are committed outside of the state's territory.

According to a second possible reading of the above passage, although states have under the ECHR a primary obligation to respect human rights both territorially and extraterritorially, unless they are exercising effective control, they cannot be responsible under the ECHR for their extraterritorial wrongful conduct. In turn, by conflating jurisdiction with effective control, the ECtHR introduces an additional element for *secondary* state obligations that shall only apply within the ECHR regime.<sup>41</sup> However, this is entirely absent from both the relevant ILC norms on state responsibility,<sup>42</sup> as well as the text of the ECHR itself. The objections against this contradiction are equally abundant. In terms of general international law, effective control is a legal standard that applies in attribution,<sup>43</sup> and, as such, it is absolutely foreign to jurisdiction.<sup>44</sup>

Furthermore, attribution in international law is regulated by the secondary rules of international responsibility. In contrast, the concept of jurisdiction stems from the framework of primary law and concerns the various bases for the exercise of competence. In the case of states, jurisdiction constitutes the expression of one of the most fundamental rules of international law, that is, sovereignty. The various types and bases of jurisdiction that exist within PIL correspond to fundamental state rights, that is to say to the state's legal powers, which are, of course, primary rules of international law. From their side, because they are not sovereign, international institutions of PIL such as international courts and tribunals, do not have *kompetenz-kompetenz* and only exercise those functions and powers that are given to them (either explicitly or even implicitly) by their member states by the means, in principle, of international agreements or unilateral acts, that is, once again, primary international law. Consequently, the two questions of attribution and jurisdiction are regulated by different bodies of law and ought to be treated separately.<sup>45</sup>

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41. Cf. Michael O'Boyle, *The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life After Bankovic,'* in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 131 (F. Coomans & M. Makkinga eds., 2004) (arguing that "[i]n the Convention system the concepts of jurisdiction and state responsibility are not interchangeable. They are separate concepts though the former is necessarily the pathway to establishing the latter.").

42. 2001 ILC Articles on State Responsibility, *supra* note 10, art. 2 ("Elements of an internationally wrongful act of a State. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State.").

43. *Id.* art. 8.

44. Cf. Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 *HUM. RTS. L. REV.* 411, 417 (2008) (distinguishing between the various expressions of jurisdiction in PIL, on the one hand, and the concept of jurisdiction in human rights treaties, Milanovic treats them as separate concepts, with the latter aiming to delimit the scope of the treaty and only denoting "a sort of factual power that a state exercises over persons or territory.").

45. Aslan Gündüz, *Creeping Jurisdiction of the European Court of Human Rights: The Bankovic Case vs The Loizidou Case*, 7 *PERSPECTIVES* 1, 6 (2002).



The criterion of effectiveness in the exercised control is therefore irrelevant to the question of jurisdiction in case of directly attributable wrongdoing. That its artificial inclusion to jurisdiction by the court in *Bankovic* (by taking advantage of the confusion created in *Loizidou*) served the policy goals of the ECtHR at the time does not make it more valid in terms of general international law. Simply put, state jurisdiction is not one of the conditions the ILC norms require for holding responsible a state that breaks international law outside its borders. It is neither territory nor nationality that counts, but rather causality (see quote below).<sup>46</sup>

However, the fact that the *Bankovic* standard is not in line with PIL rules on state responsibility does not necessarily render it unlawful. The relevant ILC norms are *jus dispositivum*: they allow for derogations by states. There is nothing wrong with a group of states “departing” from the *lex generalis* in their aspiration to establish a special<sup>47</sup> regime for the protection of human rights in a regional context.

Yet as stated above, there are strong counterarguments to this idea. No matter whether the matter discussed here is described as a *lex specialis* to the general rules of state responsibility, or whether ECHR’s ambit of primary law was designed to be territorial, the *lex* itself is missing—the legal basis supporting either of the two aforementioned scenarios. As such, the criterion of effective control is absent from the text of the ECHR. While it is true that Article 1 specifies that states shall secure the Convention’s rights “to everyone within their jurisdiction,” it says nothing about the criteria that shall apply for jurisdiction. Supposing that the intention of the signatory parties was to delimit in such a way the spatial application of their agreement,<sup>48</sup> the purposive, historical interpretation of the law is just one among several other methods of interpretation.<sup>49</sup>

Last but not least, although courts enjoy discretion in interpreting the law and they are even excused, if need be, to resort to judicial activism, this does not give them a *carte blanche*, nor does it exempt them from their responsibility to deliver legitimate *dicta*. As it will be explained shortly, defending the regional nature of the ECHR might be, to a certain extent, a legitimate goal; however, the means to that goal, i.e. the *Bankovic* standard, is unfortunate. And the court of Strasbourg ought to have better justified the reasons why it departed from its previous case law or chose to diverge from general international law. After all, “[h]ow does the notion

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46. Françoise J. Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 *REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE* 119, 122 (1992) (“It is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place.”).

47. Special both as *lex specialis* and because of its humanistic object and purpose.

48. Christopher Lush, *The Territorial Application of the European Convention on Human Rights: Recent Case Law*, 42 *INT’L & COMP. L. Q.* 897, 901, 905 (1993).

49. The “object and purpose” interpretation method, for example, could lead to diametrically opposite outcomes.

of legal space relate to that of effective control”?<sup>50</sup> In short, if not *contra*, the *Bankovic* standard is definitely *praeter legem*—it simply lacks foundations in positive international law.

On the other hand, to return to the question of the rationale behind the standard, one can understand the anxiety of a regional, quasi-constitutional court such as the ECtHR to maintain its regional focus and avoid becoming a “world” court. “The public order of freedoms does not apply outside Europe.”<sup>51</sup> This is, after all, what “justifies” the flagrant denial of justice in *Bankovic*. By the means of the standard of effective control, the ECtHR is raising a technical, artificial barrier destined to exclude cases falling outside the borders of an instrument designed to protect human rights in Europe. This contrivance allows the ECtHR to delimit primarily the theoretical territory (spatial confines) of its own jurisdiction and perhaps to avoid also imposing its own European standards on the rest of the world. One may agree or disagree with that policy choice by the Strasbourg Court but cannot deny that there is a rationale behind it. The standard of effective control in extraterritoriality serves a legitimate purpose<sup>52</sup> even though the standard is fundamentally incompatible with the philosophy and the special object and purpose of a human rights instrument.<sup>53</sup> For, without resorting to judicial activism and “law-making” of that sort, the ECtHR could not self-restrain its competences and defend its regional scope,<sup>54</sup> thus favoring the intentions of many of the parties drafting the ECHR.<sup>55</sup> In a nutshell, Strasbourg sought to delimit its own jurisdiction. However, the jurisdiction to which the treaty refers is the jurisdiction of states, and not the court itself.<sup>56</sup> Furthermore, this very policy choice comes at a price. To serve its purpose, the court had to partially sacrifice the obligations states have under the ECHR to respect human rights.

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50. Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 41, 71 (F. Coomans & M. Kamminga eds., 2004).

51. G. Cohen-Jonathan, *supra* note 29, at 1082.

52. Sarah Miller, *Revising Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention*, 20 *EUR. J. INT'L L.* 1223, 1236 (2010).

53. Virginia Mantouvalou, *Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality*, 9 *INT'L J. HUM. RTS.* 147, 160 (2005). *Cf.* Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 *AMER. J. INT'L L.* 78, 82 (1995) (“Narrow territorial interpretation of human rights treaties is anathema to the basic idea of human rights, which is to ensure that a state should respect human rights of persons over whom it exercises jurisdiction.”). However, examining the question of the extraterritoriality of human rights treaties in the context of the conduct of the United States in the territory of Haiti, Meron appears to link effective control with extraterritorial jurisdiction.

54. Christos Rozakis, *The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights*, in *THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS* 63 (2005).

55. Lush, *supra* note 48, at 901–05.

56. Milanovic, *supra* note 44, at 415.

Thus, for the ECtHR to restrict its own jurisdiction,<sup>57</sup> it needed to constrain equally the spatial scope of application of its Convention. And the court did so by the means of the test of effective control. Therefore, “a nexus to the State-termed jurisdiction [must be] established before the state act or omission can give rise to responsibility.”<sup>58</sup>

However, although the Strasbourg court is a regional court, it is a court of PIL, and PIL’s primary task is to regulate the conduct of states at the international level. The ECtHR has been created by the means of international law, it operates within the latter’s legal order, it forms part and parcel of it. It is only natural that, in terms of general international law, the rule is as simple as it is.

States are responsible when they break international law, both within their territory but also (and especially) outside their borders.<sup>59</sup> This is in essence the *raison d’être* of international law, which, historically, first dealt with the international relations aspect of states’ conduct. With its standard of effective control, Strasbourg ignored that order. Of course, there are good reasons explaining why, for a human rights court, the starting point is the activity of the state within its national territory and not its acts or omissions outside it. International human rights originate from constitutional law and its vertical premises concerning the relationship between a “Leviathan” and its subjects. But the fact remains that Strasbourg is an international court. As such, its role is to deal with the “international relations” aspect *as well* as its member states with respect to human rights. However, because of the rather opportunistic *Bankovic* standard, the simple rule “breach + attribution = wrongfulness or responsibility,” filtered through the distorting lenses of jurisdiction (in essence of the court itself), ends up being entirely deformed. As a consequence, within the special regime of human rights, states are considered not to have jurisdiction (and responsibility) for extraterritorial wrongs directly attributable to them unless they are proven to exercise effective control. Thereby, Strasbourg defends regionalism, and states eventually evade accountability for the extraterrito-

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57. O’Boyle, *supra* note 41, at 135 (“the real question in *Bankovic* concerned the forum to whom they should be accountable.”).

58. Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739 (2005).

59. U.N. Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, ¶ 12.3, U.N. Doc. R.12/52 (July 29, 1981) (“Article 2(1) of the [International] Covenant [on Civil and Political Rights] . . . does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory.”). See also Miller, *supra* note 52, at 1236 (suggesting that the criterion for extraterritorial wrongfulness covered by the ECHR should be the nexus of wrongfulness to state territory: “States and their agents do not carry the obligation to uphold and extend Convention rights wherever they go, nor does control, without more, necessarily translate into jurisdiction.”).

rial human rights abuses that they directly commit. This is a rather irrational, and certainly undesirable outcome.

Furthermore, the standard raises another concern. Even if this Article would admit that effective control as a condition for jurisdiction in the case of direct attribution of extraterritorial wrongfulness has a place in the Strasbourg system, there is absolutely no excuse for its use in systems that are designed to be universal. Regionalism is a characteristic exclusive to regional courts such as the ECtHR. In the absence of regionalism, its “*ratio legis*” (supposing that it ever existed) ceases to exist.<sup>60</sup> However, this Article observes that this problematic construction by the human rights court of Europe has led to an unprecedented confusion regarding the spatial ambit and scope of human rights protection, and the responsibility of states for human rights violations extraterritorially. This in turn threatens to negatively affect the broader regime of human rights protection at the global level. Ironically, *Loizidou* has been fiercely accused of fragmenting the unity of international law<sup>61</sup> (regarding the effect of reservations that are incompatible with the object and purpose of a treaty), yet it contributed to the unity and the “anti-humanization” of international law through its use of the effective control doctrine.

Despite the heavy criticism that followed the *Bankovic* case and its subsequent applications, the ECtHR test of effectiveness for the establishment of extraterritorial jurisdiction proved to be exceptionally influential. Regretfully, the doctrine extended well beyond its regional context,<sup>62</sup> be-

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60. O’Boyle, *supra* note 41, at 130–31 (“The Court in *Bankovic* was only concerned with the issue of ‘jurisdiction’ in Article 1 which is a threshold requirement in the treaty. The approach advocated [in favor of the disconnection of effective control from jurisdiction and responsibility] only makes sense as regards a treaty which has no limiting ‘jurisdiction’ clause.”). Thus, the same conduct that is not covered by the ECHR because of its territorial restraints may activate state responsibility on the basis of other human rights treaties that were not designed to apply regionally, or other human rights rules of general international law.

61. See Judge Gilbert Guillaume, ICJ President, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, Speech Before the United Nations General Assembly (Oct. 27, 2000).

62. In the case of the Inter-American system, see *Coard et al. v. United States*, Case 10.951, Inter-Am. Ct. H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 ¶ 37(1999) (“[E]ach American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state’s territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the *control* of another state – usually through the acts of the latter’s agents abroad. In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and *control*.” (emphasis added)). The case concerned extraterritorial wrongfulness directly attributable to the respondent state. For a brief and insightful overview of the practice of the Inter-American Commission on Human Rights on extraterritoriality, among others, see Mantouvalou, *supra* note 53, pp. 153–154. For a more detailed study on the Inter-American system, see C.M. Cerna, *Extraterritorial Application of the Human Rights Instruments of the Inter-American System*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 141–174 (F. Coomans & M. Kamminga eds., 2004)..

ing erroneously and uncritically adopted by a number of other *fora*, both national and international. Alas, this has been the case of the International Court of Justice (ICJ),<sup>63</sup> as well as of the HRC.<sup>64</sup> Esteemed scholars equally appear to endorse the standard in the case, for instance, of the question of the wrongful conduct of private armies undertaking on the territory of states other than the home state or the contracting one.<sup>65</sup> In fact, the British House of Lords referred to *Bankovic* in *Al-Skeini* to conclude that the U.K. had no jurisdiction over (and consequently, no respon-

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63. See Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 109 (July 9) (holding that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.”). However, rather than shedding light on the criteria that apply for extraterritorial jurisdiction or responsibility, the ICJ merely referred to the practice of the HRC holding that Israel’s jurisdiction extends to the occupied territories as well because it is exercising effective control. *Id.* ¶ 110 (regarding civil and political rights) and ¶ 112 (regarding social and economic rights). Both the ICJ and the HRC should have avoided referring to the criterion of effective control. A state that is causing a breach of international law, including human rights, outside its territory is internationally responsible for that conduct, no matter whether it exercises effective control over that territory or not. Effective control should only come into play if the question of attribution arises. A few months later the ICJ missed another good opportunity to clarify things as to when the jurisdiction of the state extends beyond its territorial borders for human rights violations. See Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 179 (Dec. 19) (“The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.”). The ICJ did not err in its conclusions. However, there is an apparent tendency in its case law to link responsibility for conduct that is directly attributable to the respondent state with the exercise of control by its organs that are acting as an occupying power (*see, e.g., id.* ¶¶ 167, 169).

64. General Comment No. 31, *supra* note 4, ¶ 10 (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”). See also, for instance, how the Australian Human Rights Commission relied on effective control to defend the idea of a narrow extraterritorial effect for the International Covenant on Civil and Political Rights, and the Convention for the Rights of the Child, in a case concerning Australian’s involvement in a project (Cambodia Railway Rehabilitation Project) leading to local population in Cambodia having to resettle from sites along the railway tracks under construction or repair. AUSTRALIAN HUMAN RIGHTS COMMISSION, Complaint by Equitable Cambodia and Inclusive Development International on behalf of families resettled under the Cambodia Railway Rehabilitation Project against the Commonwealth of Australia (AusAIID), ref. 2012-09267 (May 12, 2013).

65. Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT’L L. 989, 994, 1012–13 (2008).

sibility for) the victims' deaths, because the U.K. troops were not exercising effective control over an area in Iraq where civilians were killed during security operations carried by the British army.<sup>66</sup>

It seems then that, other than regionalism, the arbitrary criterion of effectiveness in the exercised control also justifies double standards. The flip side of the ECHR's *espace juridique* is something more than a simple legal *vacuum*, or even more than what is optimistically called an *espace juridique paneuropéen*;<sup>67</sup> it is an *espace extra-juridique*.<sup>68</sup> That is, it is an emptiness wherein everything is allowed as long as Europeans can avoid exercising control. Hence, effective control as a condition for extraterritoriality in the case of direct attribution results in the following paradox. While the ECtHR is entitled to fully review the acts and omissions that its member-states commit in the domain of human rights within their national territory, in principle, no similar judicial control applies over the human rights violations that these very same states commit outside it. In other words, while the inhabitants of Europe are enjoying high standards of human rights protection (for instance, they are entitled to compensation for the length of domestic judicial procedures), people living outside Europe are completely denied access to justice for much more heinous acts or omissions that are directly attributable to the European states. Thanks to the ECtHR's standard, the European governments seem to be (or they think they are) given the green light to commit human rights violations outside Europe. Neo-colonialism<sup>69</sup> *über alles*.

### C. *Late Developments: The Standard is Dead; Long Live the Standard?*

The misuse and the appropriation of the "tools" it has developed for different purposes, was of course something that could not be tolerated by

66. Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. ¶ 84 (2011). See Ralph Wilde, *Compliance with Human Rights Norms Extraterritorially: Human Rights Imperialism*, in INTERNATIONAL LAW AND THE QUEST FOR ITS IMPLEMENTATION 319, 319–48 (Laurence Boisson de Chazournes & Marcelo Kohen eds., 2010).

67. F. Benoît-Rohmer, *Pour la construction d'un espace juridique européen de protection des droits de l'homme. Réflexions sur l'arrêt de la Cour européenne des droits de l'homme Ilaşcu et autres contre Russie et Moldova du 8 juillet 2004*, 15 L'EUROPE DES LIBERTÉS (2004), available at [http://leuropedeslibertes.u-strasbg.fr/article.php?id\\_article=120&id\\_rubrique=9](http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=120&id_rubrique=9) (last visited Oct. 18, 2014).

68. See generally Wilde, *supra* note 58, at 772.

69. As opposed to classic colonialism, which is still present in the Convention's text. See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 56, Nov. 4, 1950, Europe T.S. No. 5, 213 U.N.T.S. 221 (allowing state-parties to the ECHR to extend its application to "all or any" of the territories for whose international relations they are responsible). This was meant to establish a limitation to Article 1. *Id.* See also L. Moor & A.W.B. Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 76 BRIT. Y.B. INT'L L. 121 (2005); Barbara L. Miltner, *Revisiting Extraterritoriality: the ECHR and Its Lessons*, available at [http://works.bepress.com/barbara\\_miltner/1/](http://works.bepress.com/barbara_miltner/1/) (last visited Oct. 18, 2014). See also S. Karagiannis, *Le territoire d'application de la Convention européenne des droits de l'homme vaetera et nova*, 61 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 33, 63 (2005).

the ECtHR. It was the case of *Al-Skeini*<sup>70</sup> that gave the court the opportunity to condemn the U.K. for the pharisaic case law of its House of Lords. It is not within the scope of this Article to discuss *in extenso* the reasoning of the ECtHR in *Al-Skeini*. Suffice it to say that, although the court finally held that the extraterritorial human right breaches at issue fell within its jurisdiction in substance, it refrained from entirely abandoning its *Bankovic* standard. The key concept in its reasoning is the exercise of *public power* by the British authorities on the territory of Iraq, because the U.K. has assumed some of the powers which are normally exercised by a sovereign government. Thus:

[i]n these *exceptional* circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>71</sup>

Until *Al-Skeini*, the Strasbourg standard was clear, albeit arbitrary: the attribution of wrongful conduct to a state where that conduct took place outside its territory does not automatically authorize the court to exercise jurisdiction—a showing of effective control was also necessary. With its judgment in *Al-Skeini*, the court seemed to slightly depart from the criterion of effective control. Yet it did not abandon it, nor did it overturn it. It simply widened, or even lowered the standards. Although this shift in the standard represented a significant step, *Al-Skeini* is far from sufficient in eliminating the legacy of *Bankovic*.

The key element in *Al-Skeini* is the exercise of public authority by the U.K. The standard is definitely looser, but the logic remains the same. Instead of its classic test of effectiveness, the ECtHR sets a presumption.<sup>72</sup> States exercising public authority (especially if they do so willingly, as a consequence of a military invasion) are automatically presumed to exercise a control leading to the expansion of their jurisdiction beyond their own territory, that is, over the territory under their authority. Although the factual element of effectiveness recedes, the question of control remains intact. The sole difference is that it now depends on a presumption that does not need to be tested—as the ECtHR seems to imply. Presumably, the burden of proof is reversed and an *exception* to the criterion of effectiveness in the exercised control (which is an *exception*, according to the court, to the principle of territoriality) is born. However, this criterion, together with the flawed confusion it inherently contains between the two

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70. *Al-Skeini*, 53 Eur. H.R. Rep.

71. *Id.* ¶ 149 (emphasis added).

72. Which, like all other presumptions, is rebuttable. After all, “[i]t is a question of fact whether a Contracting State exercises effective control over an area outside its own territory.” *Id.* ¶ 139.

separate questions of attribution and jurisdiction, continues to be the principle.

It seems that PIL is taking its revenge in little segments by forcing Strasbourg, case after case, to gradually deconstruct its *Bankovic* case law and its absurd results. Until the moment that the ECtHR admits that *Bankovic* was (something more than) a legal mistake, it will have to stick to the logic of exceptionalism,<sup>73</sup> forcing it to resort each time to imaginative interpretations and excuses,<sup>74</sup> as well as to droll logical schemes of the kind of the “exception to the exception.” Yet, for the moment, exceptionalism seems to be the only available escape for the court to bypass the legal monster its own practice has erected.

## II. DECONSTRUCTION: DISTINGUISHING BETWEEN DIRECT AND INDIRECT ATTRIBUTION IN EXTRATERRITORIALITY. THE CASE OF EXTRATERRITORIAL STATE FAULT

Having concluded with the first step of deconstruction, which only concerned the case of direct attribution, that is, of wrongful results *caused* by the state, this Part now turns to the second category of extraterritorial human rights violations owed to the lack of *diligence* by the state. An important structural distinction of systemic nature needs to be made at this point between wrongfulness directly attributable to the state, on the one hand, and wrongfulness owing to lack of diligence (indirect attribution), on the other. This distinction is used here as an analytical tool to classify case law and as foundation for the arguments the Article puts forth regarding effective control and concurrent responsibility. If this fundamental distinction is not made, the comparative analysis of the cases discussed so far (relating to direct attribution), and those that will be discussed below, is limited to the simple, factual observation that both involve the exercise of effective control either over a person or a territory (and consequently the persons on it).<sup>75</sup> Hence, for the reasons that are explained in the next few pages and, despite these *prima facie* similarities and the consequent

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73. *Id.* ¶ 132 (“To date, the Court in its case-law has recognised a number of exceptional circumstances” allowing it to depart from its test of effective control”).

74. *Issa v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. ¶ 74 (2004) (introducing the idea of temporary effective control).

75. Wilde, *supra* note 58, at 797–806 (arguing states committing human rights violations outside their territory are bound by European and international human rights law “insofar as [their activity] involves the exercise of either effective control over territory, or power, control, or authority over an individual or individuals.”). See also MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* 127, 173 (Oxford University Press 2011). However, it should be noted that Milanovic does indeed acknowledge the difference between negative and positive human rights obligations. See, e.g., *id.* at 209–22; Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT’L L. 121, 132 (2012) (discussing the implications of the Al-Skeini judgment for positive human rights obligations). But see Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS. 47, 61–62 (2013) (critiquing Milanovic’s narrow approach to positive obligations).



trend in the literature<sup>76</sup> to compare what in the eyes of this study appears to be two different types of case law, the Article opts for juxtaposing these two different sets, rather than bringing them under the common umbrella of effective control. Indeed, as will be demonstrated, effectiveness operates in these two different categories in an entirely different manner, depending on whether the wrong is directly attributable to a state, or indirectly because of its negligence.

The analytical premises of the argument defended here are the following:

- i. In the case of direct attribution of wrongfulness, the state is responsible under general international law for the illicit acts or omissions that are attributable to it, no matter whether these took place within or outside its national territory. Consequently, at least in terms of general international law, the question of jurisdiction ought to be disconnected from the criterion of effective control, which might come into play in the context of attribution. Competent courts are simply expected to exercise jurisdiction every time a wrongful conduct is committed by a state. This is something that should apply irrespectively of the *locus* where wrongfulness took place;
- ii. That former type of cases is to be distinguished from what is called in the paper indirect attribution, where the state is not responsible because it has caused a wrongful result, but for its failure to pre-empt and/or remedy illicit conduct that is not attributable to it, to the extent that this is possible. This obligation stems from the principle of due diligence, which needs first to be briefly discussed, so that the main argument defended here can be better explained.

Thus, before delving in the analysis of the case law falling in that category, it is necessary to briefly refer to the basics of due diligence.

#### A. *Due Diligence, Obligations of Means and Subjective Responsibility Because of State Fault*

The nature of that second legal basis, the so-called due diligence principle or standard, is well known.<sup>77</sup> Therefore, this Article refrains from discussing its features in extreme detail. In the past, due diligence has been

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76. See, e.g., Gondek, *supra* note 33, 367–70. See also Elspeth Berry, *The Extra Territorial Reach of the ECHR*, 12 EUR. PUB. L. 629, 629–55 (2006).

77. On due diligence, see the famous monograph by Riccardo Pisillo Mazzeschi, “DUE DILIGENCE” E RESPONSABILITÀ INTERNAZIONALE DEGLI STATI (Giuffrè ed., 1989), as well as, by the same author, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERM. Y.B. INT’L L. 9, 9–51 (1992). See also Robert P. Barnidge, Jr., *The Due Diligence Principle under International Law*, 8 INT’L COMM. L. REV. 81, 81–121 (2006).

recognized by numerous courts, including the ICJ itself.<sup>78</sup> Quite recently, the ICJ in *Pulp Mills* explicitly used the principle, confirming its foundations in general international law. Thus, the “principle of prevention, as a customary rule, has its origins in . . . due diligence . . . A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”<sup>79</sup> The regional courts of human rights, including both the Inter-American (since its seminal *Velasquez* case<sup>80</sup>) and the European court, give effect to diligence every time human rights rules acquire an horizontal (positive) effect that calls the respondent state to prove that it made good use of the means available to it, as well as pertinent and necessary, in order for it to prevent or to remedy human rights breaches by individuals.

Due diligence is a principle, that is, a primary generic obligation of international law that acquires a concrete content only after being situated in the context of or applied with regard to a specific international norm or rule. Each time due diligence is embodied within a specific rule of international law, it expands its effect and scope of application to the extent that the state is expected to do more than merely abstain from breaking the rule by way of direct attribution, that is by causing a wrongful result through conduct directly attributable to it. In light of due diligence, state obligations develop a new dimension that requires them to prevent or punish a breach of the law that (in the context of the paper) might be caused either by the conduct of another person (to whom wrongfulness is directly attributable) or by a general situation that cannot be personified, such as social or natural phenomena. This is why this Article juxtaposes due diligence to the breaches of international law that are *directly* attributable to the state, by describing the type of responsibility for the breach of the former by the latter (as already explained in the introduction of the

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78. See *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9) (recognizing that every state has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”). See also *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8) (confirming, in the context of environmental protection, “a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”). Two other examples from the ICJ relate to the positive effect of human rights. See *Legal Consequences of Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. (July 9) ¶ 141 (explaining that, given the “numerous indiscriminate and deadly acts of violence” against the civilian population of Israel, that state has “the right, and indeed the duty, to respond in order to protect the life of its citizens.”). See also *Armed Activities on Territory of Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 179 (Dec. 19) (finding the respondent state’s “responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account”).

79. *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20).

80. *Velasquez-Rodriguez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, (July 21, 1989).

Article) unconventional term of *indirect* attribution. In both cases, namely when the state is clearly breaking the law as well as when it fails in its obligation to develop a diligent conduct, the state is responsible because of the breach of a primary rule of international law.

What, however, differentiates these two cases is that, according to the scenario of direct attribution, there is a direct *causality* between the state's conduct and the wrongful result. That is, the state has produced the illicit result by conduct directly attributable to it. To the contrary, in the second case, the result is only indirectly attributable to the state in the sense that it derives from its own failure to effectively fight wrongs caused by or resulting, *not* (in principle, and in any case not in the scenarios examined in this Article) from its own conduct, but because of conduct that is attributable to another person or caused by a general situation.

Admittedly, the analytical distinction between direct and indirect attribution that this Article employs is not reflected in the model of responsibility adopted by the ILC. As is well known, Article 2 of the norms on state responsibility requires a breach of an international obligation that is attributable to the state to be shown for wrongfulness to be established. As such, subjective elements, like intention (*dolus*) or negligence are not relevant for the purposes of the secondary rules on responsibility. These amount to fault, and are seen by the ILC as part of the primary obligation. They may be pertinent if the primary rule specifically requires them, as a precondition for its breach. Thus, in terms of Article 12 of the ILC norms, “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”<sup>81</sup> If the primary rule requires fault (as diligence does), this is necessary to be assessed with a view to determine whether a breach has occurred.

The subjective nature of fault is in essence absorbed by the objective element of the breach of the obligation, conditioning the existence of the breach. If fault allows diagnosing a breach, and this is attributable to a state, then that state is internationally responsible (unless wrongfulness is exonerated) and the ILC norms on state responsibility apply. This explains why, as such, the generic obligation to demonstrate diligence is quasi-absent from the named ILC norms,<sup>82</sup> but also why—as already argued—the

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81. ILC Articles on State Responsibility, *supra* note 10, art. 12.

82. *Id.* (referring implicitly to due diligence in art. 14(3), regarding regarding the temporal dimension of the obligation to prevent, in terms of which the failure to prevent is a continuous breach of international law). See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 82, and 114–20 (2002) (explaining that the ILC norms do not refer to any general standard of behavior, and whether state behavior shall involve “some degree of fault, culpability, negligence or want of due diligence”, and analyzing, respectively, Articles 9 and 10). It goes without saying that the fact that due diligence is not regulated by the ILC norms does not mean that it is excluded *per se*. The ILC norms do not deal with fault, but this is inherent to primary rules when they develop effects under due diligence. Regarding this question, see the very comprehensive overview by Timo Koivurova, *Due Diligence*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (2013).

distinction between direct and indirect attribution of wrongfulness is unconventional, hence not making part of the ILC norms on responsibility. By excluding the subjective elements from the field of secondary rules on state responsibility, and placing them in primary obligations, the ILC left this preliminary question outside the scope of its codification of the rules on responsibility. What only matters in terms of these rules is that there is wrongfulness. Wrongfulness requires a breach of obligation and attribution. This scheme is wide enough to also cover primary rules, which, to be breached, require fault. This is the case of due diligence. For the rule of due diligence to be breached, negligence (i.e. fault) is necessary. If this is established, then the breach of due diligence is—by default—attributable to the state that owed to demonstrate diligence, leading to state responsibility in the same way as it happens with obligations that do not require fault to be breached.

One may wonder if, although the scheme chosen by the ILC works fine with obligations requiring the assessment of fault, the very exclusion of fault from the norms on responsibility adds something to the way international responsibility works. What is the practical value of that choice? Be it excluded from the relevant norms, fault is still a crucial element for establishing a breach, which, on its own turn, is one of the two preconditions for responsibility to be established, and the relevant ILC rules to apply. Even if, formally, fault does not account for an element of state responsibility, it may precondition one of its two elements, namely the breach of an obligation. Moreover, even if fault consisting in lack of owed diligence is ultimately, by the nature of things, automatically attributable to a state, the idea behind it is that the state aims at preventing, in case of risk, or remedying, if this has already occurred, a wrongful result owing to a different cause or person. This is why this Article endorses the distinction between direct and indirect attribution.

Direct attribution, amounting to objective responsibility, implies causality. This is where attribution establishes the responsible person. On the other hand, indirect attribution reflects the idea that, irrespective of the author of the wrongful result, the state has an obligation to demonstrate diligence. The state is responsible not for the result towards which it ought to demonstrate diligence, but for its own negligence. That means that negligence is by default attributable to a state, simply because this has an obligation to demonstrate diligence. In a sense, in the context of diligence, attribution is of no significance as it is inherent to the existence of the obligation to be diligent. Beyond attribution (which is the easy part in case of lack of vigilance), because due diligence is an obligation of means, and is inextricably linked to negligence, for a breach to occur, it is needed to assess this last element (i.e. negligence). Even if the ILC sees this as part of the primary obligation, this is still a precondition for wrongfulness, that is, a precondition for responsibility.

Indirect attribution of wrongfulness stemming from state fault because of the lack of diligence distinguishes itself from objective state responsibility stemming from direct attribution in that the latter requires states to

guarantee certain results. In fact, the exigencies of due diligence can be satisfied if the state does everything in its power to prevent, deter, punish, or remedy wrongdoing that is not (in principle) attributable to it, but to third subjects or that owes to general situations. In sum, direct attribution corresponds to objective responsibility, which requires certain results, that is to say, simply enough, *not* to break the law. In indirect attribution under due diligence, the responsibility of the state is triggered because of lack of vigilance, that is to say, because of the state's failure to suitably use the means at its disposal (regardless of how limited these may be) in order to fight (in the context of the cases discussed in the Article) the illicit conduct of a third subject or situation.<sup>83</sup> This is why responsibility for the failure to demonstrate diligence is not objective, but *subjective*.

This idea corresponds to the good, old, and, as it has been abandoned by the ILC, nowadays almost forgotten concept of state fault<sup>84</sup> State fault requires, in the case of obligations of means, a subjective appreciation of the available means, their suitability and the necessity to make good use of them in order to reach the dual pre-emptive goals of due diligence and prevention. As already explained, in principle, the author of the initial wrongful conduct is not the state itself, but another, third subject or situation. Therefore, the state does not become liable unless it is established that it failed to transform itself into a good “doctor” in fighting wrongfulness. Yet, to use that metaphor, we all know that there are incurable “illnesses” or unexpected ones, as well as that even a curable illness can have detrimental effects if, in the context of a particular case, it is impossible for the “doctor” to effectively intervene to achieve a result which, under different circumstances, would have been guaranteed. In a nutshell, due diligence is *par excellence* an obligation concerned with means or conduct,<sup>85</sup>

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83. Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371, 378–82 (1999).

84. Pierre-Marie Dupuy, *Le Fait Générateur de la Responsabilité Internationale des États*, 188 RCADI 102–03 (1984); Pisillo Mazzeschi, *supra* note 77, at 18–21, 49–50. See also James Crawford & Simon Olsson, *The Character and Forms of International Responsibility*, in INTERNATIONAL LAW 462–63 (Malcom Evans ed., 2014).

85. Tehran Hostages (U.S. v. Iran), 1979 I.C.J. 7, Judgment, ¶ 68. González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 252 (Nov. 16, 2009). See also J. Combacau, *Obligations de résultat et obligations de comportement: Quelques questions et pas de réponse*, in MÉLANGES OFFERTS À PAUL REUTER: LE DROIT INTERNATIONAL, UNITÉ ET DIVERSITÉ 181, 181–204 (Bardonnat D., et al. eds., 1981); A. Tunk, *La Distinction des Obligations de Résultat et des Obligations de Diligence*, 449 LA SEMAINE JURIDIQUE (JURIS-CLASSEUR PÉRIODIQUE) (1945). The ICJ has explained this in the *Application of Convention on Prevention and Punishment of Crime of Genocide* [(Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. ¶ 430] in very explicit terms: “. . . it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to

not results. It always requires a subjective appreciation of the means for prevention that are necessary in the light of the particular circumstances of a case, on the one hand, and the availability of those means, on the other, as well as another number of subjective elements such as the question of the knowledge or the foreseeability of a breach or even a risk assessment regarding the breach. This is what makes responsibility for lack of diligence subjective in nature; and subjectiveness is the very essence of state fault.

Having concluded with this brief aside on the basics of due diligence, this Article now proceeds with the discussion of the extraterritorial case law on the basis of that principle and the *positive* dimension human rights rules acquire in its light. The relevant case law can be classified into two broad categories.

### B. Two Types of Cases of Extraterritorial Due Diligence

#### 1. The First-Generation Cases: Pseudo-Extraterritorial Due Diligence

The first type of due diligence case involves a well-established standard of the ECtHR that a state should not extradite, expulse, or deport a person to a third country where she risks suffering serious<sup>86</sup> human rights

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preventing the genocide. In this area the notion of “due diligence,” which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce.” Cf. Pisillo Mazzeschi, *supra* note 77, at 41–45 (arguing that, be they flexible, due diligence standards are objective).

86. *Dougoz v. Greece*, 2001-II Eur. Ct. H.R. 6–7 (signaling this includes violations of Article 3 of the ECHR, such as torture, inhuman, and degrading treatment, and even rights protected in Article 2, such as the right to life). See also *Othman (Abu Qatada) v. United Kingdom*, Eur. Ct. H.R. (2012) (expanding the “circle” of serious violations falling under its *Soering*-type case law by including also the right to a fair trial, under Article 6 of the ECHR). However, the court did so after an extreme case of flagrant denial of justice, which, in light of the circumstances of the case, was indirectly linked to the peremptory norm of Article 3 of the ECHR, as it concerned admission of evidence obtained by torture. Thus, the court held, “[i]t is noteworthy that, in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact . . . serves to underline the Court’s view that ‘flagrant denial of justice’ is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial

violations—either by the state authorities of the state of destination or even by individuals<sup>87</sup> in that state (horizontal/positive effect). These non-refoulement cases fall in line with *Soering*<sup>88</sup> for purposes of this Article.<sup>89</sup>

Admittedly, that particular line of case law presents a number of significant similarities with the extraterritoriality cases discussed in Part 1 of this Article. First, with the exception of the *Hirsi Jamaa* case<sup>90</sup> in which extraterritoriality is uncontroversial, the *Soering*-type cases also contain a debatable<sup>91</sup> or pseudo element of extraterritoriality on the basis of the

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procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.” *Id.* ¶ 260. Given “that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial, [i]t would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial. The Court does not exclude that similar considerations may apply in respect of evidence obtained by other forms of ill-treatment which fall short of torture.” *Id.* ¶ 267. Finally, another important enlargement of the semantic field of non-refoulement concerns Article 13 of the ECHR and the right to effective remedies. National authorities duly decide on the merits of a case of refoulement, when the person risks suffering serious human rights violations, such as the ones falling under Article 3 of the ECHR. *See M.S.S. v. Belgium*, Eur. Ct. H.R. ¶¶ 286, 293 (2011).

87. *H.L.R. v. France*, 1997-III Eur. Ct. H.R. ¶ 40 (“Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention . . . may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”).

88. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) (concerning the extradition of the victim to a third country, where he remained on death row for a protracted time). Although the ECtHR cannot create an obligation for states to impose the Convention standards on third states, “[t]hese considerations cannot however absolve the Contracting Parties from responsibility under Article 3 . . . for all and any foreseeable consequences of extradition suffered outside their jurisdiction.” *Id.* ¶ 86.

89. *See Saadi v. Italy*, Eur. Ct. H.R. ¶ 124 (2008) (providing a comprehensive overview of the principles that the court applies in that stream of cases).

90. *Hirsi Jamaa and Others v. Italy*, App. No 27765/09, Eur. Ct. H.R. (2012). The case concerned the interception by the respondent state of migrants on the high seas and their return to the country of departure. Because “the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities,” *id.* ¶ 81 and, in more detail, of their military personnel that intercepted the migrants, embarking them onto Italian military ships and returning them to the country they departed from, the respondent state was found to exercise jurisdiction. Italy was, therefore, held responsible for exposing the applicants to risk of ill-treatment, as well as for violating Article 4 of the 4th Protocol of the ECHR, which was for the very first time in the history of the ECtHR given an extraterritorial effect. *Id.* ¶¶ 178, 180.

91. In the case of refoulement, the human rights violations the victim may suffer will occur outside the deporting state’s territory. However, at the moment of the refoulement the victim is on the deporting state’s territory. As such, extraterritoriality is absent at the moment of the deportation. It comes into play though regarding the preventive aim of non-refoulement seeking to guarantee that the victim will not suffer any human rights violations outside the deporting state’s territory. Thus, “the Court notes that liability is incurred in such cases by an action of the respondent State concerning a person while he or she is on its

place where the human rights violation is highly possible to take place. This is the territory of a state other than the respondent one. The second similarity is more decisive in terms of the ECtHR test of effectiveness as a condition for the establishment of jurisdiction. Indeed, the respondent state is exercising effective control over the person that risks suffering a human rights violation. Seemingly, the sole difference between *Soering* and the first type of cases examined in the study is that the wrongful conduct did not yet take place. There is only a risk of violation, not an actual violation.<sup>92</sup> However, given the aforementioned evident similarities, this “minor” difference does not seem important enough, from the ECtHR’s perspective, to exclude that type of case law from the standard of effective control as a condition for extraterritorial jurisdiction. Thus, according to the court, the named standard finds in these cases yet another application, proving its uncontested validity.<sup>93</sup>

Indeed, for the state to safeguard in the *Soering*-type cases the rights of an individual, it must exercise effective control over that person, that is, the (potential) victim, in that, because of effective control, it has the power to effectively decide whether or not to transfer it to the third country, as well as in that it does so. Yet, a rigorous analysis of that argument, demonstrates that the similarities between the *Soering*-type cases and the direct attribution extraterritorial cases stop here.

Once the rationale of non-refoulement is recognized, it is essential to return to the fundamental concept of due diligence. The state that decides to transfer a person to a place where that person *might* suffer human right violations is not causing these violations itself—it is breaking its obligation not to expulse or extradite that person. In different terms, what is really at stake is not the negative dimension of the state’s obligation to refuse extradition, nor is it the state’s equally negative obligation to refrain from causing the wrongful treatment to which that person may be subjected in the future due to the conduct of a third person. What is at stake is that

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territory, clearly within its jurisdiction, and that such cases do not concern the actual exercise of a State’s competence or jurisdiction abroad.” *Bankovic*, 2011-XII Eur. Ct. H.R. ¶ 68. However, it is the ECtHR that is constantly referring to *Soering* when discussing extraterritoriality. See, e.g., *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (2011); *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99 (1995). See also *Milanovic*, *supra* note 44, at 9 (squarely rejecting that non-refoulement cases “involve extraterritorial application, since the individual concerned is located within the territory of the extraditing state.”).

92. Which means that the court, as well as the extraditing state, shall each time proceed with a risk assessment. See, e.g., *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. (proceeding with a fact-based test and, taking into account the diplomatic guarantees the respondent state had obtained that the applicants would not be submitted to human rights violations in their home state, the court found that no substantial grounds existed for believing that the applicants faced a real risk of treatment proscribed by the ECHR). Interestingly, in that case the court condemned (*inter alia*) the respondent state because of its failure to comply with the interim measures ordered by the court and, thereby, deprived it from the possibility to proceed with a proper risk assessment before the applicants were extradited to their home state.

93. *Hirsi Jamaa and Others*, Eur. Ct. H.R. ¶¶ 70–82 (2012).



state's *positive* obligation to prevent violations caused by third legal persons found outside its own territory to the best of its ability. Be it expressed in negative terms, the obligation *not* to extradite is in essence a *means* for the state to comply with its positive obligations under due diligence, that is, to prevent a human rights violation. Due diligence and the positive dimension of the rights endangered are the ultimate aim of non-refoulement, which as such is nothing more than a means to a preventive end. The existence of a risk of a human rights violation abroad means that what matters is not the respondent state's obligation to refrain from producing the illicit result.<sup>94</sup> Rather, the state is obligated to *prevent a foreseeable* breach of human rights norms. This requires a *risk* assessment, that conditions non-refoulement. The obligation *not* to extradite is merely one of the available to the state means that allows it to effectively fulfil its due diligence obligations. Dissimilarities between the two sets of cases go even further. The author of the human rights violations that the victim may suffer if sent to another country is not directly the respondent state itself, but either the authorities of the state of destination or any other subject within it -and this falls within the definition of due diligence. A state is liable, not because it violated the victim's human rights, but because it failed to assert its due diligence in preventing a third party from violating the victim's human rights.

By exposing someone to a risk of human rights violations, the state breaches its own primary obligation of vigilance.<sup>95</sup> In those types of cases, behind and beyond non-refoulement, the respondent state is not held responsible because of a wrongful result that is directly attributable to it, but because it has breached its very own (primary) due diligence obligation,<sup>96</sup> in that it failed to prevent a human rights violation by a third subject, whereas this was possible (exactly because the human rights victim was under its effective control). These are typical due diligence cases; not another confirmation of the groundless standard of effective control for extraterritorial jurisdiction. Consequently, this is not the same type of cases as the ones discussed in the previous chapter on direct attribution. Despite parallels, these two sets of case law are not entirely comparable units.<sup>97</sup>

## 2. The Second-Generation Cases: Abandoning the Criterion of Effectiveness When Effectiveness has Indeed a Role to Play.

In addition to the *Soering*-type cases, the case law of the ECtHR contains a second type of cases concerning extraterritorial and indirect wrongfulness. In this group of cases, both extraterritoriality and due diligence

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94. Either itself or via the entities whose conduct is directly attributable to it.

95. Or, in that particular context, obligation of non-refoulement.

96. Miller, *supra* note 52, at 1243 ("Though the signatory state is not actually engaging in the prohibited conduct itself, it incurs responsibility under Article 1 because it is the termination of its territorial ties with the individual which provokes the subsequent, foreseeable violation.").

97. G. Ress, *Problems of Extraterritorial Human Rights Application: The Jurisdiction of the European Court of Human Rights*, 12 *ITAL. Y.B. INT'L L.* 51, 63 (2002).

are uncontroversial. Interestingly enough, the court of Strasbourg chose at last to abandon (for that type of cases only) its erroneous standard of effectiveness in the exercised control as a condition for extraterritoriality. However, it is equally interesting, and possibly ironic, that the court abandoned its doctrine in a case in which effective control actually played a substantial role. It may be that this role is *entirely* different than the one the ECtHR suggests with its theory on extraterritorial jurisdiction in the context of direct attribution, but still the function of effective control in the case of due diligence is significant. Admittedly, one should celebrate the ECtHR's case law as a decisive, but limited, step toward the abandonment of the effective control test. However, it should be observed that, unlike what the court of Strasbourg appears to submit, effectiveness is a vital element of systemic nature and considerable gravity in the case of subjective responsibility owed to a state's fault in fulfilling its due diligence-stemming obligations of comportment.

*Ilaşcu*<sup>98</sup> is a case presenting many similarities with *Loizidou*. Exactly as TRNC is under the effective control of Turkey, the Moldavian Republic of Transdnistria (MRT) is a non-state entity under the effective authority of Russia. MRT's conduct is directly attributable to Russia under the same terms and legal basis (*de facto* organ) that make Turkey responsible for the conduct of TRNC; Moldova is not exercising control over the territory of the MRT, as the government of Cyprus is not exercising any control over the territory of the TRNC. What differentiates the two cases, however, is that the victims in *Ilaşcu*, who were illegally detained in MRT, not only complained against Russia (in its capacity as the state exercising effective control on them and, primarily, on the *locus delicti*), but also against Moldova, which lacked control.

The ECtHR's position is surprising:

[E]ven *in the absence of effective control* over the Transdnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.<sup>99</sup>

Thus, despite the absence of effective control over the territory at issue, the perpetrators and the victims, the Moldavian authorities continue to exercise jurisdiction over their nationals.<sup>100</sup> Therefore, Moldova's international "responsibility for the acts complained of, committed in the territory of the 'MRT,' over which it exercises no effective authority, is to be assessed in the light of its positive obligations under the Convention."<sup>101</sup> In other words, despite the absence of effective control, the court was right

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98. *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179.

99. *Id.* ¶ 331 (emphasis added).

100. *Id.* ¶ 335.

101. *Id.*

to find that Moldova exercised jurisdiction for acts committed by a third party that was not under its effective control outside the territory Moldova controlled. Despite all that, the court expects them to fulfil their obligations under due diligence (positive effect of human rights),<sup>102</sup> and fight to their best, the wrongfulness at issue. “The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.”<sup>103</sup>

However, in the absence of effective control, the means available to Moldova are limited. Consequently, the expectations for diligent conduct cannot be but equally limited. No matter, however, how limited these may be, they still constitute an obligation that Moldova has to fulfil. Its failure to do so, that is to say, its fault to comply with its positive obligations in the light of due diligence, engages its responsibility and leads to its condemnation by the ECtHR.<sup>104</sup> As the former Vice President of the ECtHR, Judge Rozakis persuasively noted, “the Court in the case of *Ilaşcu* took a different approach by incorporating the issue of positive obligations within the very notion of jurisdiction and by disregarding the test of effective control as a precondition for the establishment of jurisdiction. . . . It clearly transpires from the *Ilaşcu* judgment that the Court has developed a rather subjective test in determining whether Moldova faced up to its positive obligations, by calling into question its political tactics in effectively protecting the human rights of the individual applicants.”<sup>105</sup>

Thus far, this Article has argued that effective control is irrelevant to the question of jurisdiction (in the case of directly attributable wrongfulness) and, as such, should not apply as a condition for the establishment of extraterritorial jurisdiction. This is something that the ECtHR appears to accept only in the *Ilaşcu*-type cases. However, contrary to what the court seems to suggest in that case, effectiveness is *not* foreign to the concepts of due diligence and state fault. Indeed, it plays an important role in the context of both territorial and extraterritorial due diligence-based wrongfulness, serving as an indicator for assessing the standards of diligence the state is expected to demonstrate—always on the basis of the *effective* means available to it. Consequently, effectiveness is an element that one ought to take into account when deciding about a state’s fault due to its failure to demonstrate the appropriate standards of diligence. The more effective they are the links and control a state exercises over a situation that calls for diligent conduct, the bigger the standards of diligence that this state may and, therefore, shall demonstrate are. Because due diligence is an obligation of means, the condition for its fulfillment is that the state has the pertinent and necessary means at its disposal to fight the relevant wrongfulness. It logically flows, then, that the wider the extent of control

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102. *Id.* ¶¶ 332–335.

103. *Id.* ¶ 333.

104. *Id.* ¶¶ 351–352.

105. Rozakis, *supra* note 54, 57, 70–72.

the state exercises over a given situation—territory, people—the more the state is able to guarantee the effectiveness of the means it will apply in order to serve the purpose of fulfilling its due diligence obligations. The expectations of effectively demonstrated diligence cannot be but *proportionate*<sup>106</sup> to the effectiveness of the control a state exercises over a situation. Indeed, within that particular context, human rights “can be ‘divided and tailored.’”<sup>107</sup> Effectiveness, therefore, is crucial to due diligence; it inherently operates as an element that allows the assessment of state fault and the expected standards of diligence. And this applies equally in the case of territorial and extraterritorial due diligence. Yet it is important to highlight that the function and logic of effectiveness of exercised control in the context of due diligence are absolutely irrelevant to the homonymous standard that the ECtHR established in *Bankovic* as a condition for the establishment of the responsibility of a state to which certain extraterritorial illicit conduct is directly attributable.

### III. RECONSTRUCTION: BRIDGING DIRECT AND INDIRECT ATTRIBUTION

#### A. *A First Set of Conclusions*

What is then the function of effective control? There are two different answers to that questions that constitute two separate narratives.

First, according to the ECtHR, effective control in principle is a precondition for a state’s primary obligations under the ECHR—and consequently its international responsibility—to extend extraterritorially in the case of direct attribution of wrongfulness. If the effective control criterion is not met, the state is considered not to exercise jurisdiction and the court of Strasbourg cannot exercise jurisdiction over the state. However, if responsibility is not engaged because the state itself produced the wrongful result, but rather because it failed to exercise due diligence, then effective control is of no pertinence. This, of course, does not apply in the case of non-refoulement, where the ECtHR continues to rely on its standard of effective control. The oxymoron is manifest. As long as states do not exercise effective control, they are given the “green light” by the ECtHR to

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106. See R. Lawson, *Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 105–07 (F. Coomans & M. Kamminga eds., 2004). The author defends the idea of a proportional relationship between effectiveness of control and obligation of states to “secure” human rights, “including positive obligations.” *Id.* at 105. It is not of course a coincidence that this strong proposition also appears in *Bankovic* among the applicants’ arguments. *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. ¶¶ 39, 46. Yet, it is equally not surprising that the court squarely rejected this argument *Id.* ¶ 75. As it is argued in this Article, the idea of proportionality in the relationship between obligations and exercised control only applies in the case of a state’s positive obligations—as a tool for assessing state fault, and establishing the contours of due diligence a state must demonstrate. As far as negative obligations are concerned, no proportionality of that genre applies, as states should simply abstain from directly causing the wrongful result. See generally Marek Szydło, *Extra-Territorial Application of the European Convention on Human Rights after Al-Skeini and Al-Jedda*, 12 *INT’L CRIM. L. REV.* 289, 289–90 (2012).

107. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. ¶ 137 (2011).

abuse human rights outside their territory. At the same time, the court requires these states to act as good Samaritans, fighting human rights violations extraterritorially, against a myriad of parties. This is true as long as, of course the conduct at issue is not directly attributable to them, in which case responsibility under the ECHR would in a sense be exonerated.

The narrative this paper is offering is different. First, a distinction needs to be made between directly and indirectly (because of lack of vigilance) attributable wrongfulness. In the first case, effective control has a role to play only when, in accordance with the ILC rules on state responsibility, a court is required by the facts of the case to examine whether wrongfulness not committed by the organs of a state should be directly attributable to it. Outside that, no other role should be recognized to the criterion of effective control in that framework. When the state causes the wrong, effective control is simply irrelevant to extraterritoriality. In terms of general international law, the rule is rather simple. When a wrongful conduct is attributable to a state, that state is internationally responsible. That rule applies both for territorial, as well as for extraterritorial wrongful conduct.

Moving then to the second case, that of responsibility because of failure to meet the required standards of diligent comportment, the state will only be responsible if, indeed, it fails to meet these standards. However, due diligence standards are not as objective, because they depend upon a number of circumstances, such as knowledge, foreseeability, the particular facts of the case, and the means that are available within a given state at a given moment. Effectiveness in the exercised control is linked to the facts of a case and, as such, it is of significance as an element that is indispensable for assessing the applicable standards of diligence and, consequently, the (subjective) responsibility of the state because of its fault.

### B. *Concurrent Responsibility: Enlarging the Circle of the Responsible States*

#### 1. Concurrent Responsibility in *Loizidou/Ilaşcu*-type Cases

There is a second set of conclusions that can be drawn from the *Ilaşcu* judgment. What makes that case extremely important for this Article's purposes is that the ECtHR condemns both respondent states. Russia and Moldova were both held responsible for a single factual situation (the illegal detention of the applicants) in which they were mutually involved. Furthermore, interestingly enough, the two governments are found responsible for an extraterritorial breach of human rights. Yet this is where similarities stop. The rationale behind and, consequently, the legal basis justifying each government's responsibility are different. MRT's illegal conduct is directly attributable to Russia, engaging its international responsibility. Similarly, in *Loizidou*, the Court applied the same appropriate criterion of effectiveness in the exercised control, in conformity with what now is Article 8 of the ILC norms on state responsibility (*de facto* organ). However, following again the path it has traced with *Bankovic* and *Loizidou*, the ECtHR applies its arbitrary test of effective-

ness as a means for the justification—outside attribution—of the exercise of extraterritorial jurisdiction.<sup>108</sup> On the other hand, the case of Moldova is rather different. As it has already been explained, the latter's responsibility is owed to the lack of diligence it has demonstrated in fighting Russia's wrongfulness on a territory that is not under Moldavian effective control and, more generally, in aiming to reestablish control over that territory. The ECtHR is correct to hold here that the criterion of effectiveness is irrelevant to extraterritoriality. Nevertheless, that very same criterion is of importance for the subjective assessment of the means that were available to Moldova to diligently fight the human rights violations at issue and, consequently, for the evaluation of its fault.

If one disregards the fact that, apparently, the ECtHR tends again in *Ilaşcu* to conflate attribution with jurisdiction, the scheme is indeed interesting. The existence of a single wrongful result leads to the responsibility of two different states. Yet, this is not a form of joint responsibility, as *causality* is clearly distinguishable. The state to which the breach of human rights is directly attributable is accountable for breaking the law by causing the wrongful result (*via* the third subject, whose conduct it controlled). The second state, Moldova, is responsible because it had an obligation of diligence to fight, by the means that were available to it, a wrongful result that is directly attributable to Russia. In the former case, it is the wrongful result that counts and, therefore, the responsibility is objective. In the latter case, the responsibility is subjective in nature, as it stems from the breach of a primary obligation of means, i.e. the principle of due diligence and the consequent positive effect human right rules acquire in its light. Finally, each state is responsible for its own illicit conduct, consisting in a direct violation in the first case, and in an indirect one of the same rule in the second—acquiring a different scope in the light of due diligence. However, if they are separate, both illicit conducts coincide in that they stem from the same particular factual situation, namely the illicit deprivation of the liberty of the applicants.

Similar cases to *Ilaşcu*, such as *Ivantoc and Others*,<sup>109</sup> and *Catan and Others*,<sup>110</sup> involve both Moldova and Russia. The victims were suffering human rights violations by MRT, whose conduct is attributable to Russia, pursuant to the *de facto* organ rule, because of the effective control Russia exercises over that entity. This triggered Russia's international responsibility for extraterritorial wrongfulness—in the first case, through the applicants' detention (in what in reality is a follow up case to the *Ilaşcu* judgment), and in the second case in the language policy followed by the MRT authorities forbidding the use of the Latin alphabet at school and forcing children to use the Cyrillic alphabet by various means including school closures. What distinguishes these two cases from *Ilaşcu*, however, is that the court was satisfied to see that Moldova made substantial effort,

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108. *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. ¶¶ 314, 392.

109. *Ivantoc v. Moldova*, Eur. Ct. H.R. (2011).

110. *Catan v. Moldova*, Eur. Ct. H.R. (2012).

despite its limited means, to assist the people suffering from the wrongful conduct.<sup>111</sup> Although Moldova's positive obligations for wrongfulness occurring in an area over which it exercises no control remained intact, because the standards of diligence are subjective and depend on the actual capacities of the state, Moldova sufficiently fulfilled its positive human rights obligations.

This line of reasoning has been adopted by the national courts of Cyprus as well, in the context of the broader Cyprus issue, part of which is the *Loizidou* case too. With its seminal judgment in *Vassos Vassileiou and others*,<sup>112</sup> the Nicosia District Court departed from earlier Cypriot case law and recognized that,<sup>113</sup> in light of the ECHR, as well as PIL more generally, Cyprus also had an obligation to effectively investigate the death of its nationals killed by Turkey. The two states, Turkey and Cyprus, share concurrent responsibility for what is in essence the same factual situation.<sup>114</sup> While Turkey was responsible both for directly violating the right to life by killing the Cypriot nationals outside its territorial borders, as well as for failing to effectively investigate the circumstances surrounding their death, Cyprus was only responsible for its failure to investigate the fate of its missing nationals. The logic is identical: one factual situation common to both states; two (or more) separate breaches of international law; leading to the separate, yet interconnected and concurrent responsibility of each one of these states.

## 2. Concurrent Responsibility in *Soering*-type Cases

The Moldovan cases are not the only ones where the ECtHR held more than one state responsible for the same wrongful extraterritorial situation or result. Recently, in *M.S.S. v. Belgium and Greece*, a case similar to *Soering*, the ECtHR,<sup>115</sup> condemned *à la fois* the two respondent states for the sufferings of the victim. The applicant in that case was an asylum seeker, who, among other complaints, raised an issue against the Belgian government, which, acting in compliance<sup>116</sup> with its obligations under the law of the European Union (EU law), transferred him to Greece and, thereby, exposed him to degrading treatment (prohibited by Article 3 ECHR). His complaint against Greece concerned, *inter alia*, the conditions

111. *Id.* ¶¶ 147–148; *Ivantoc*, Eur. Ct. H.R. ¶ 108.

112. Nicosia District Court 13863/2002, ¶ 174 (Cyprus).

113. N. Kyriakou, *Missing Persons and Cypriot Justice: Case Note in the Judgment of Vassos Vassileiou and Others against the Republic of Cyprus*, EFARMOGES DIMOSIΟΥ ΔΙΚΑΙΟΥ 953 (2010) (in Greek).

114. *Id.* at 951.

115. *M.S.S. v. Belgium*, Eur. Ct. H.R. (2011).

116. *Cf.* Court of Justice of the European Union (CJEU) (joined cases) Case C-411/10, *N.S. v. Sec'y of State for Home Dep't* 2011 E.C.R. I-0000; Case C-493/10, *M.E. v. Refugee Appls. Comm'r & Minister for Justice, Equal. & Law Reform* 2011 E.C.R. I-0000 (holding that states have an obligation not to transfer asylum seekers to another EU state where a risk for that person exists to suffer inhuman or degrading treatment. The presumption that all states within the EU offer satisfactory reception conditions is rebuttable).

of the applicant's temporary detention by the Greek authorities, as well as his living conditions in Greece after his release and the consequent failure, on various grounds, of the Greek authorities to prevent him from living homeless in conditions of extreme poverty.

Interestingly, in that case, Greece was found to be in violation of Article 3 because of conduct directly attributable to it (conditions of detention),<sup>117</sup> as well as for lack of diligence<sup>118</sup> in alleviating the sufferings of the applicant who has been exposed to extreme poverty.<sup>119</sup> Yet, what is mostly important for this Article's subject is that Greece's responsibility is directly linked to Belgium's failure to prevent the applicant's exposure to these violations, and especially to the dreadful living conditions he experienced in Greece.<sup>120</sup> This is yet another application of the *Soering* standard,<sup>121</sup> which, in *M.S.S.*, resulted in the concurrent responsibility of two states for the same wrongful result. The one state has caused this result, whereas the second failed to prevent it from occurring. Furthermore, outside the self-evident case of direct attribution (detention in Greece by the Greek authorities), both Greece and Belgium failed to demonstrate due diligence. The overall situation and the primary legal basis at issue (Article 3 ECHR, developing a positive effect in the light of due diligence) were common to both states. What differentiates the case of the two states is that Greece, exercised territorial jurisdiction, whereas Belgium exercised a pseudo-extraterritorial one.

As this Article argues, effective control is irrelevant to the establishment of jurisdiction in the case of direct attribution. Yet, effectiveness becomes highly relevant when discussion comes to the assessment of the nature, means, and standards of diligent conduct that each state has to demonstrate. For Belgium to escape responsibility, suffice it to deny expelling the applicant in Greece while he is still under its effective control. For Greece, on the other hand, to avoid seeing its responsibility engaged for lack of diligence, it should have made available to the applicant the means that would have allowed him to live in dignity while in Greece.<sup>122</sup> Hence, once again, the same wrongful result created concurrent responsibility for the two states. One state directly breached Article 3 by detaining the applicant, and the second indirectly breached it by failing to prevent this from happening. Just as in *Ilaşcu*, here concurrent responsibility operates in a mutually dependent way between direct and indirect attribution.

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117. *M.S.S.*, Eur. Ct. H.R. ¶¶ 223–234 (2011).

118. Interestingly, in the present case, the minimum standards of diligence were not established solely on the basis of the means available to the state, but, *inter alia*, on the basis of the obligations of that state under EU and international law regarding the special protection of refugees. This led to an automatic “quasi-objectivization” of “state fault.” *Id.* ¶¶ 250–251.

119. *Id.* ¶¶ 249–264.

120. *Id.* ¶¶ 344–368.

121. *Id.* ¶ 365.

122. See *supra* note 118. In the context of that particular case, the standards are mainly set by EU law.



### 3. Enlarging the Circle of Responsible States and Triggers of Concurrent Responsibility

*M.S.S.* contains another interesting element, subsequently implicitly recognized by the court in its relatively recent *Hirsi Jamaa* judgment.<sup>123</sup> In conjunction with Article 3 of the Convention, the court found both Belgium and Greece in violation of Article 13 of the ECHR, which requires states to offer effective remedies at the national level. In the case of Belgium, the absence of effective remedies resulted in the deportation of the applicant to Greece, where his rights under Article 3 were finally infringed.<sup>124</sup> In Greece, the absence of effective remedies resulted in the applicant risking to be sent back to his country of origin, where it was highly possible that he would suffer treatment prohibited by Article 3 ECHR, with no prior decision being taken by the competent Greek authorities on the merits of his case.<sup>125</sup>

By linking the right to effective remedy to the prohibition of torture and degrading treatment, the court condemned, next to Belgium, Greece as well for the same state obligation, namely to prohibit arbitrary refoulement, so that the risk of exposure to ill-treatment in a third country is minimized. In reality, within the particular context, Article 13 is nothing more than one of the means available to a state in order for it to comply with its pseudo-extraterritorial obligation of due diligence. If this scenario were to come true, the indirectly attributable breach of Article 3 to Greece would be complemented by the violation of that same article through conduct directly attributable to the state of origin.<sup>126</sup> Thus, the circle of the responsible states would automatically be widened so that, next to Belgium and Greece, the state of origin is held internationally responsible as well.

Thus, a chain of interconnected, parallel, and complementary, yet separate, distinguishable and therefore concurrent obligations, leading to concurrent responsibility, appears to be created. This chain links all states involved in the wrongful result, either by directly breaking a person's rights, or indirectly, by failing to demonstrate diligence and, in the particu-

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123. *Hirsi Jamaa and Others v. Italy*, App. No 27765/09, Eur. Ct. H.R. ¶ 146 (2012) (examining the risk of violating Article 3 because of the return of the applicants to their country of departure as well as the risk of arbitrary repatriation the applicants may suffer from the country of departure to their respective countries of origin).

124. *M.S.S. v. Belgium*, Eur. Ct. H.R. ¶¶ 385–397 (2011).

125. *Id.* ¶¶ 294–321. *See also supra* note 118. As the court explains, “[i]n order to determine whether Article 13 applies to the present case, the Court must ascertain whether the applicant can arguably assert that his removal to Afghanistan would infringe Article 2 or Article 3 of the Convention.” *Id.* ¶ 294.

126. Similarities can be found in the *El-Masri* case, which concerned ill-treatment suffered by the applicant during and following his extraordinary rendition to CIA. Like Greece, the respondent state was condemned both because it caused (admittedly, to a different degree) ill-treatment and because, *inter alia*, it did not follow a lawful procedure for the applicant's transfer into the custody of CIA. Moreover, the state did not take into account the foreseeable risk that existed regarding the applicants' rights because of that transfer. *See El-Masri v. The Former Yugoslav Republic of Macedonia*, Eur. Ct. H.R. ¶¶ 215–223 (2012).

lar context, by exposing that person to the risk of having her/his rights breached. The chain contains as many rings as the states involved into a common to them factual situation that requires them either to refrain from causing the illicit result, or to exercise jurisdiction in order to prevent it or remedy it. Thus, every time a given situation calls upon more than one state to exercise concurrent jurisdiction, all the involved states may end up sharing concurrent responsibility. In principle,<sup>127</sup> only one of them will be responsible for the direct infringement of the law, whereas the rest of them will be responsible because of their negligence to *effectively* fight to the best of their ability the breach at question.

The model may take various shapes. For instance, one can envisage a scenario with no author of the wrongful conduct. Instead the wrongful conduct might be attributable to a natural phenomenon or a generally experienced situation, such as in *M.S.S.* where the poverty experienced by the applicant amounted to inhuman treatment. Another scenario would be an author of the breach whose conduct is not attributable to any state. This could be for instance the case of a terrorist group, or more generally of non-state actors. In that case, a situation of accumulation of states owing to demonstrate diligence may occur.<sup>128</sup> To give an example, this was the case in *Rantsev v. Cyprus and Russia*,<sup>129</sup> which concerned human trafficking commencing in Russia and ending in Cyprus. The victim was found dead under rather strange circumstances allowing to suspect the victim's employer. *Inter alia*, the court diagnosed both states' responsibility owing to their failure to combat by various means trafficking and, more generally, exercise their jurisdiction in the light of the principle of due diligence.

But, when then does a state have an obligation to demonstrate diligence? Or in different terms, what activates due diligence?

#### IV. EFFECTIVENESS GENERATING DUE DILIGENCE OBLIGATIONS

States must refrain from breaking the law both territorially and extra-territorially. But when does a state have the obligation to demonstrate diligence? When does a state have an obligation to exercise its jurisdiction and use the means at its disposal in order to fight the wrongfulness of the other subjects of international law or alleviate the pain caused by natural phenomena, social situations, and so forth? Can an African state be expected to demonstrate diligence in the case of human rights violations on the high seas by a European state against the nationals of an Asian country? When does international law require states to be good Samaritans?

Relatively recently, The Hague Court of Appeals delivered case law<sup>130</sup> which could be seen as an answer to the House of Lords *Al-Skeini*

127. Unless if there is a form of coperpetration, such as aid or assistance.

128. *E.g.*, the author could be an individual or a non-state actor.

129. *Rantsev v. Cyprus*, App. No. 25965/04, 51 Eur. H.R. Rep. 1 (2010).

130. Hof's-Gravenhage 5 juli 2011, NJ 2011 m.nt (Hasan Nuhanovic/Netherlands) (Neth.), available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSGR:2011:BR5388> (last visited Oct. 18, 2014); Hof's-Gravenhage 5 juli 2011, NJ 2011 m.nt (Mehida Mustafic-Mujic/Netherlands) (Neth.), available at <http://zoeken.rechtspraak.nl/de>

and to the ECtHR *Behrami and Saramati*<sup>131</sup> judgment. The *Dutchbat* case, as it is custom to call it, concerned the murder of Bosniaks in Srebrenica by Serbian troops. The Netherlands' involvement consisted in that they failed to protect the victims, who had taken refuge in a Dutch battalion operating in the framework of a UN peacekeeping force command in Srebrenica. The Dutch army rejected the victims' request to include them and some members of their close family in the list with the personnel of the UN or the Dutchbat itself that was to be safely evacuated with the Dutchbat. Consequently, they had to leave the compound, which led to them all being killed.

The Dutch court started with a profound analysis of the question of who exercised effective control.<sup>132</sup> It did so, *not* in order to establish the Netherlands' obligation to demonstrate extraterritorial due diligence, but as a means for it to answer the question of the attribution of the wrongfulness resulting from the failure to meet the owed standards of diligence.<sup>133</sup> In-depth analysis of this case is beyond the purposes of this Article, but the Dutch court relied on the ILC ARIO<sup>134</sup> and held that, although Dutch troops operated in the framework of a UN peacekeeping mission, Dutch authorities were in fact exercising effective control.<sup>135</sup> Consequently, the

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tailpage.aspx?ljn=BR5386 (last visited Oct. 18, 2014). *See also* the decision of the Dutch Supreme Court in the *Nuhanovic* case: HR 6 september 2013, NJ 2013 m.nt (Ministry of Defence and Ministry of Foreign Affairs/Nuhanovic) (Neth.), available at <http://www.asser.nl/upload/documents/20130909T125927-Supreme%20Court%20Nuhanovic%20ENG.pdf> (last visited Oct. 18, 2014).

131. *See supra* note 30. *See also* Stichting Mothers of Srebrenica v. Netherlands, Eur. Ct. H.R. (2013). The applicants in that case had brought civil proceedings against the Dutch state and the UN before Dutch courts, which held that, *inter alia*, they had no jurisdiction to hear the claims against the UN. The ECtHR declared the case inadmissible and refrained from exercising its jurisdiction on the merits, holding that the granting of immunity to the UN had served a legitimate purpose and did not infringe the right of the applicants to have access to justice in a disproportionate manner.

132. *See Nuhanovic*, Hof's-Gravenhage, NJ 2011 m.nt ¶ 5 (Neth.).

133. On that particular question, see T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113, 113–92 (2010).

134. Hof's-Gravenhage 5 juli 2011, NJ 2011 ¶ 5.8 m.nt (Hasan Nuhanovic/Netherlands) (Neth.) (referring explicitly to ARIO's former Article 6 which now is Article 7).

135. *Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rep. ¶¶ 74–86 (2011) (relying on ARIO and the test of effective control to attribute the conduct at question to the respondent state instead of the UN). Interestingly, as in *Loizidou*, effective control is applied as a criterion for attribution, which is a condition for responsibility. Yet, once again, the court fails in a case of direct attribution of wrongfulness to distinguish between effective control as a criterion for attribution, on the one hand, and the (entirely different) question of extraterritorial jurisdiction, on the other. *See especially* ¶ 85 of the judgment; *see also* the factually contiguous case of *Al-Saadoon v. United Kingdom*, App. No. 61498/08, 49 Eur. H.R. Rep. ¶ 88 (2009).

wrongful conduct in question was attributable (also) to the Netherlands.<sup>136</sup>

Yet, outside the issue of the doubtful usefulness of the application of the criterion of effective control as a criterion for attribution, the issue that is left unresolved is where the obligation of the Dutch army to exercise extraterritorial jurisdiction stems from. Outside the question of the possible responsibility of any other actor involved in the situation at issue (including that of the subject that directly produced the wrongful result, i.e. killed the persons at issue), the Dutch government was found by its national courts to be responsible for the breach of its own obligation to demonstrate diligence in the prevention of serious human rights violations. Interestingly, the Dutch government found itself involved in a situation to which it was *effectively* linked despite the absence of either a territorial, or a nationality legal nexus. Neither the victims nor the perpetrators were its own nationals; the *locus delicti* was outside the Dutch national territory, whereas the Dutch army was equally operating outside The Netherlands. In short, the traditional legal bonds that generate the obligation to exercise jurisdiction through positive conduct (i.e. to demonstrate diligence), that is *territory* and *active* or *passive personality*, were entirely absent in that case. Under these circumstances, did the Dutch army have an obligation to try to save the victims' lives? And, if yes, what would the source of that obligation be in the *Dutchbat* case? Rather than the question of attribution, that case raises the question of the existence of a primary, positive obligation for The Netherlands to act in a preventive/protective manner.

One plausible answer could be that what engenders due diligence in that particular case is the mandate given by the UN Security Council to the peacekeeping operation the Dutch army was serving at, as well as the agreement between the UN and Bosnia and Herzegovina on the status of the peacekeeping mission, part of which was the Dutch army as well.<sup>137</sup> However, the Court of Appeals held that, with the fall of Srebrenica, the peacekeeping operation was brought to an end and that from that date (July 11, 1995) onwards the mission of the Dutchbat was to safely evacuate the refugees.<sup>138</sup> Another possible source of the due diligence obligation could be found in the instructions the Dutch army was given by one of the high-ranking commanders of the peacekeeping operation, requesting them "to take all reasonable measures to protect refugees and civilians" in their care.<sup>139</sup> One could also argue that a special legal relationship has been established with some of the victims who were employed by the Dutch army and the UN. Nevertheless, this scenario does not cover the brother

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136. Hof's-Gravenhage 5 juli 2011, NJ 2011 ¶ 5.20 m.nt (Hasan Nuhanovic/Netherlands) (Neth.).

137. Supreme Court of the Netherlands, Dutch Supreme Court in the HR 6 september 2013, NJ 2013 ¶ 3.17.3 m.nt (Ministry of Defense and Ministry of Foreign Affairs/Nuhanovic) (Neth.).

138. *Nuhanovic*, Hof's-Gravenhage 5 juli 2011, NJ 2011 ¶ 5.11 m.nt (2011).

139. *Id.* ¶ 6.8.

of one of the applicants, who lost his life after being illegally refused permission to remain with the battalion.

Although interesting, none of these bases addresses what seems to constitute the weightiest element in the *Dutchbat* case. A broader, all-purpose and pragmatic basis would be to admit that what generated the obligation of the Dutch authorities to apply positive measures for the protection of these people's lives, as well as of any other person found in a similar situation, was the real risk they suffered being killed, on the one hand, as well as the mere *fact* that, in that particular moment, these persons were *de facto*,<sup>140</sup> that is *effectively*, under the jurisdiction of the Dutch authorities. Thus, especially after the moment the Dutch army learned about the atrocities taking place in the area and, in turn, knew that men leaving the battalion were risking being killed, they had an obligation to deploy all the means available to them to prevent this from happening. The existence of an *effective nexus* generates due diligence. This is, besides, the reason why they received the aforementioned instruction by the peacekeeping commander, requesting that they protect the lives of the people in their care. That is to say, the people found *de facto* under their effective jurisdiction. Accordingly:

it would not be contrary to the instruction of the UN or the Dutch Government if Dutchbat had decided [. . .] to no longer cooperate in the evacuation because of the above mentioned risks. This meant that Dutchbat, according to the standards of the law of Bosnia and Herzegovina and under the legal principles (with binding effect on the State) that are laid down in art. 6 and 7 [International Covenant on Civil and Political Rights], did not have the right to send [the victims] away from the compound. According to those standards it is not allowed to surrender civilians to the armed forces if there is a real and predictable risk that the latter will kill or submit these civilians to inhuman treatment.<sup>141</sup>

In the *Dutchbat* case, concurrent responsibility is the output of complementarity between direct and indirect attribution. A factual situation common to all the involved subjects results in the distinctive, yet interconnected responsibility of more than one subjects. The objective responsibility of the perpetrator—should the facts at issue be attributable to a state—is inextricably linked to the subjective fault by The Netherlands, which, in the light of the particular circumstances of that case, was called to prevent the death of men found, if not *de jure*, definitely *de facto*<sup>142</sup> under Netherlands jurisdiction. The victims were under the effective control of the Dutch army operating abroad, and, in that context, effective control is of importance as the generative basis of due diligence.

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140. *Nuhanovic*, HR, NJ 2013 ¶ 3.17.3 m.nt (2013) (Neth.).

141. *Nuhanovic*, Hof's-Gravenhage July 5, 2011, NJ 2011 ¶¶ 2.16, 6.8 m.nt (Neth.).

142. Like, partially, in *Hirsi Jamaa and Others v. Italy*, App. No 27765/09, Eur. Ct. H.R. (2012).

Thus, effectiveness reveals amply its full capacity. Other than the role it is called to play in the scenarios examined in the previous chapters of the study, and the classification of the case law on the basis of negative (causality between wrongful state conduct and result) and positive (based on the principle of due diligence) obligations, effectiveness acquires a third, particularly important for the purposes of concurrent jurisdiction or responsibility, dimension. *Ex facto oritur jus*.<sup>143</sup> As long as a state is effectively linked to a situation, it has a legal obligation to demonstrate due diligence.<sup>144</sup> Put simply, if, for instance, a state finds people drowning in the high seas, it has a legal obligation to try rescuing them, irrespective of their nationality or whether the state in some way caused their drowning.

Indeed, to return to the ECtHR, the court is partially right to associate effectiveness with jurisdiction, but only in the case of indirectly attributable wrongfulness, which requires states to exercise jurisdiction in the light of due diligence. In that case, for a state to be expected to exercise jurisdiction, no threshold or level of control is necessary. The state should, simply enough, be pragmatically connected to a situation requiring it to put its means at the services of whoever is in need of them. Alongside the legal links that activate due diligence, effectiveness has the same effect. Nationality, passive and active,<sup>145</sup> territory, the protective principle, and, under certain conditions, universal jurisdiction, require, or, in the case of universal jurisdiction, may permit a state to exercise jurisdiction. Outside these general legal links, due diligence may also stem from special legal bases as well, such as occupation or UN Security Council mandate. Effectiveness occupies a place next to these legal bases, or in Distefano's terms,

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143. This explains why within de facto entities that are not recognized as states by the international community, certain "domestic" legal acts that are necessary for the protection of the interests (and also rights) of the inhabitants are seen as valid. *See*, in this context, Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 56, ¶ 125 (June 21).

144. *See also* a similar idea, based however on a different classification, by H. King, *The Extraterritorial Human Rights Obligations of States*, 9 HUM. RTS. L. REV. 521, 551–55 (2009).

145. In that respect, see the very interesting recent judgment of the ECtHR in *Gray v. Germany* (application no. 49278/09), Judgment (May 22, 2014), which concerned a complaint by the sons of a person who lost his life as a result of medical malpractice by a German physician practicing in the UK. That state prosecuted the doctor on the bases, apparently, of territory and passive personality. Proceedings were also initiated in Germany, which refused to extradite the doctor to the UK. Apparently, Germany acted on the basis of active personality, for a wrong committed by its national operating overseas. The court found that, in the light of the circumstances of that case, Germany has provided effective remedies with a view to investigating the victims' father death and the responsibility of the doctor for medical negligence. Hence, Germany was not found to be responsible for human rights violations. However, it is interesting that Germany had a positive obligation to investigate a wrongful result produced outside its borders, by a person whose conduct was not attributable to it, against a person who was not a German national. Complementarity, and (possible) concurrent responsibility arise in the present context from the fact that, next to Germany, the UK too had a similar positive obligation.

between the extremes of law and reality.<sup>146</sup> Effectiveness also produces a similar, parallel effect, especially when at stake is the safeguarding of essential social values, such as the most fundamental human rights, important aspects of environmental protection or the protection of valuable elements of the cultural heritage of the mankind, that are all protected *erga omnes*.

In short, the existence of any type of nexus, either legal or pragmatic, that is, effective, between a state and a given factual wrongful situation expands that state's sphere of jurisdiction and requires it to actively fight wrongfulness.<sup>147</sup> "[W]ell-situated"<sup>148</sup> states that are legally or factually linked to wrongfulness are expected to demonstrate diligence. Outside an obligation to abstain from causing a prohibited by international law result, states have an obligation to fight wrongfulness too—to the extent, of course, that this is possible to them, and as long as the means they choose in that end are lawful.

#### CONCLUSION

Ultimately, this Article has included two arguments aiming to deconstruct what actually constitutes the state of the art in the case law and legal scholarship on the question of extraterritoriality, as well as one argument of a reconstructive nature.

Thus, with respect to *deconstruction*, it has suggested that an important distinction of systemic class must be made between extraterritorial wrongfulness directly attributable to a state for negative human rights violations, on the one hand, and extraterritorial wrongfulness resulting from the lack of diligence, on the other. In this Article, that second type of responsibility has been juxtaposed to the first by the use of the rather un-

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146. "Le principe de l'effectivité est le trait d'union entre le droit et le fait". G. DISTEFANO, *L'ORDRE INTERNATIONALE ENTRE LÉGALITÉ ET EFFECTIVITÉ: LE TITRE JURIDIQUE DANS LE CONTENTIEUX TERRITORIAL*, 257 (Pedone, 2002).

147. Cf. MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW PRINCIPLES, AND POLICY*, *supra* note 75, at 209–22. According to the author (who, it should be reminded, sees jurisdiction in human rights treaties as a different concept from jurisdiction in general international law), as far as positive obligations are concerned, "the notion of jurisdiction in human rights treaties would be conceived of only territorially, as de facto effective control of areas and places . . . This threshold would, however, apply only to the state's obligation to secure or ensure human rights, but not to its obligation to respect human rights, which would be territorially unbound." *Id.* at 210. "When, however, states are expected to do more than just refrain from adversely affecting the lives of others, when they need to take positive steps . . . they cannot fulfil such obligations effectively without having the tools to do so. Such obligations should, therefore, be territorially limited to areas and places under the state's jurisdiction." *Id.* at 219. Although Milanovic appears to accept that positive human rights obligations are obligations of means, he prefers to establish a threshold standard of effective control. If the state does not exercise effective control, then it should be free of the obligation to demonstrate diligence, even *vis-à-vis* its own nationals and with no regard to the means that may be available to it. See also L. Hammer, *Re-Examining the Extraterritorial Application of the ECHR to Northern Cyprus: The Need for a Measured Approach*, 15 INT'L J. HUM. RTS 858, 858–72 (2011).

148. Shany, *supra* note 75, at 70.

conventional term of indirect attribution. Starting *first* with the case of direct attribution, effective control is *not* a criterion for extraterritoriality. In fact, there appears to be confusion between the concepts of extraterritorial judicial jurisdiction and responsibility for the illicit conduct of a state (that is, conduct directly attributable to the state) outside its borders. In terms of PIL, the rule is clear. A state is responsible every time a wrongful conduct is attributable to it, with no regard to whether wrongfulness is taking place within or outside its national territory. The only task effective control may be called to carry out in the case of directly attributable extraterritorial wrongfulness is to serve as a criterion for attribution, in conformity with the ILC norms on state responsibility and the (still lacking unity and coherence) relevant international case law. If a state causes a wrongful result it should be responsible for that with no regard whether wrongfulness is territorial or not.

*Second*, regarding indirectly attributable extraterritorial wrongfulness owing to the fact that the state failed to fulfill its positive human right obligations, effective control plays a role in assessing the owed standards of due diligence. Among several other factors, effectiveness is an element taken into consideration for assessing the standards of diligent comportment a state can and, therefore, is legally obliged to demonstrate. The subjective due diligence standard permits a flexible and individualized assessment for each case. The more direct, solid and, thus, effective the control a state has over a situation, the higher are the standards of diligence this state may, and therefore is expected to demonstrate. In short, because due diligence amounts to obligations of means, and its standards are proportionate to the effective control a state exercises over a wrongful situation, the very element of effective control is one of the criteria that apply for the test of state fault.

As far as *reconstruction* is concerned, this Article has argued that direct and indirect attribution interact in a complementary way that leads to the concurrent responsibility of more than one state for the same wrongful situation. In a nutshell, the concept of concurrent responsibility amounts to one wrongful result, and severability of the breaches of the primary obligations by several states. In principle, one or more states will be objectively responsible because of directly breaking the law, whereas other states may be subjectively responsible because of their failure to fight the wrongful result that has directly been caused by the former state, or even to demonstrate diligence aiming to remedy the failure of every other state involved in the situation to demonstrate diligence. A variety of relevant scenarios exist, the key being that, for concurrent responsibility to occur, there must be either a wrongful result or risk that the result will occur, as well as concurrent, overlapping jurisdiction, which, on its own turn presupposes that a “third” state will be expected to demonstrate due diligence.

Indeed, the model of concurrent responsibility on the basis of the complementarity between positive (due diligence) and negative (causality between wrongful conduct and result) obligations that this Article has identified in the context of extraterritorial human right breaches may find



an application in a variety of other scenarios<sup>149</sup>—which, however, extend well beyond the scope of the present Article.

This model may apply whenever a non-state actor operates overseas or engages in activities having a transboundary reach, inviting thus two states or more (for instance, the home state or state of nationality, on the one hand, and the host state on the territory of which the activities of the non-state actor take place, on the other) to be proactive with a view to protect potential victims from the harmful conduct of that actor. In similar terms, this Article's model may be applicable in scenarios of transboundary environmental pollution, where all concerned states will be expected to demonstrate diligence, whereas, should the source of the pollution be attributable to a particular state, that state will be concurrently responsible for causing the damage. Apparently, the list with the scenarios is significantly richer, the common denominator in all these cases—and the necessary conditions for the model of concurrent responsibility at issue to apply—being the existence of due diligence obligations in a transnational context that would involve more than one nations.

Finally, as this Article has demonstrated, effectiveness has three different functions in the context of extraterritorial human rights obligations:

- i. It is a criterion for attribution (*de facto* organ) in the frame of the law of secondary obligations (state responsibility);
- ii. It is a criterion for the assessment of the standards of (both territorial and extraterritorial) due diligence a state may and, therefore, shall demonstrate (in the framework of positive primary obligations). In that case effectiveness—including effective control—is a factor taken into account for establishing state fault; and
- iii. Next to the classical legal nexuses, such as nationality and territory, effectiveness is a “source” that generates the obligation for states to make use of their powers, i.e. exercise sovereignty/jurisdiction with a view to fight international wrongfulness by the means of positive conduct (due diligence).

Thus, in the context of due diligence, the criterion of effectiveness acquires a double dimension. *First*, it is indeed a criterion, that is, a sufficient, yet not necessary, condition for extraterritorial jurisdiction. If a state is factually connected to a situation requiring it to make use of its means with a view to protect, it shall have a legal obligation to do so. Thus, effec-

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149. This owes primarily to the fact that due diligence finds application in a big number of areas of international law. For a brief but comprehensive overview of its effects in areas like investment law, environmental law, transnational criminal law or humanitarian law see the First Report of the ILA Study Group on Due Diligence in International Law (07-03-14), chaired by Professor Duncan French, with Professor Tim Stephens acting as Rapporteur. INTERNATIONAL LAW ASSOCIATION, *Due Diligence in International Law* (2014), available at [http://www.ila-hq.org/en/committees/study\\_groups.cfm/cid/1045](http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1045).

tiveness activates due diligence, calling the state to exercise jurisdiction for protective purposes. The existence of a factual nexus between a state and a situation shall suffice to activate that state's obligation to demonstrate diligence. *Second*, the more effectively the state is linked to a situation the higher the standards of diligence become for it. This refers to the idea of effectiveness, and in particular effective control, being an element for assessing state fault.

Hence, in addition to the state that has caused a wrong, *all*<sup>150</sup> other subjects that are, either legally, or in pragmatic terms linked to a situation related to that wrong, and who failed to demonstrate the level of diligence that each one's effective link and involvement—that is, its functional proximity to the case, requires—are also responsible. No matter where a human rights breach is taking place, each subject linked to the breach in legal or pragmatic terms has the obligation to demonstrate, from its own perspective, its own share of diligence. This requires the exercise of parallel and subsidiary<sup>151</sup> jurisdiction, which, for at least one of the involved subjects, will unavoidably be somehow extraterritorial. The failure to demonstrate diligence equates to distinctive responsibility for each one of the involved to the situation states. This is how concurrent responsibility is formed and, as the diagram that follows portrays, this is the map of the role of effectiveness in the case of human rights (extra)territoriality.

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150. In the example of the *Dutchbat* case, outside the perpetrator (direct attribution) and next to the Netherlands (indirect attribution due to lack of diligence) a number of other subjects, including the UN itself, which was allegedly on the top of the chain of command, may be held responsible. All these non-diligent subjects were legally and/or effectively linked to a situation of human rights violations, which they failed to prevent. What, however, differentiates the other non-diligent subjects with the Netherlands—together with whom they “share” responsibility for the lack of diligence in the killings at issue—is that, with its courageous decision, the Dutch judiciary remedied the wrongfulness of its own government.

151. Sovereignty requires priority to be given to the state exercising territorial authority. See *H.L.R. v. France*, 1997-III Eur. Ct. H.R. ¶ 40. However, other states being directly linked to the same situation (through nationality, for instance) are equally expected to contribute to the prevention and the sanctioning, as well as to any other form of diligence against wrongfulness. As to how parallel jurisdictions will be balanced, equilibrium shall be maintained between state sovereignty and effectiveness in protection, on the basis of criteria such as the ability and the willingness of the territorial, first, state to exercise effective diligence. Finally, although the question of the establishment of priorities in case of parallel and conflicting jurisdictions does not fall within the scope of the present paper, one cannot but recall the role effectiveness plays also in the case of the opposability and the international effect of the legal links between a state and a person and the ICJ *Nottebohm* case (*Liechtenstein v. Guat.*) 1955 I.C.J. 1 (Apr. 6) (refusing to allow Liechtenstein to exercise diplomatic protection in favor of a formerly German citizen, who had only acquired its nationality during the war. The Court based its decision on the criterion of the effectiveness in the bonds between the state and its nationals).

